

Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties

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Too often, popular political power—whether it is in the form of direct democracy or other more innovative forays in participatory or deliberative democracy—presents itself principally as a counterweight to the political power parties wield. Yet setting up “popular democracy” and “party democracy” in opposition to one another in the American political landscape is not only unnecessary but also pathological: this oppositional posture risks the ossification of party democracy and keeps popular democrats insulated from the substantial improvements the power of parties could bring to the polity. This Article, accordingly, seeks to enrich both party democracy and popular democracy by showing how each might draw strengths from the other, and how each needs the other to function more effectively. A new literature in political theory explores the central role of partisanship in democratic functioning, and we will deploy that theory in service of some practical applications in institutional design here. We have been involved—on the ground level—in two recent policy conversations that really would have been improved with a complementary vision of the parties and the people. We could have better exercises of party democracy and popular democracy, if only we started to see how they might be brought into pragmatic symbiosis.

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INTRODUCTION

According to the standard story, popular democracy is fundamentally at odds with party-based representative democracy. Supporters of popular political power support initiatives, referenda, and more innovative forays in participatory democracy as counterweights to the power of political parties. California’s Proposition 13 and various term limits initiatives, to take just a few examples, have been justified as efforts by the people to retake power from the unresponsive two-party system. In response, popular democracy’s detractors point to the debates over marriage equality and the ravages of ballot-box budgeting as reasons to shield civil rights from popular decision making and to provide political representatives with the latitude they need to govern effectively. Both camps—and most observers—think of the two systems as sworn enemies battling for advantage in a zero-sum game.

Yet setting up “popular democracy” and “party democracy” in opposition to one another in the American political landscape is not only unnecessary but also pathological: it thwarts an understanding of their potential for mutual enrichment. We argue here, instead, that popular democracy and party democracy can and should be viewed as complementary helpmates, each with the potential to aid the other in overcoming its greatest weaknesses.

Popular democracy and party democracy in the United States each have characteristic, reasonably well-understood limitations. Ballot initiatives and

referenda present a daunting informational challenge for ordinary voters. Even in its more selective, deliberative forms, popular democracy gives rise to unanswered questions about agenda setting and legitimacy: only small numbers of citizens participate, and what they discuss and which options they consider are generally decided by elites.¹ To be sure, the popular vote to adopt a ballot measure can legitimate it as a formal matter, but it is equally clear that a democratic mandate requires more than such formal legitimacy if most citizens are to accept it over time.²

Defenders of party democracy—and especially the two-party system—have long presented it as a solution to democracy’s information and legitimation problems.³ This assertion presupposes, however, that the two major parties will campaign and govern on the basis of fairly centrist platforms with roughly equal appeal to the median voter, that the parties will take turns in power, and that the mass electorate will discern which party is responsible for what and mete out electoral rewards and punishment accordingly.⁴ Party democracy as practiced in the United States, however, does not consistently satisfy these conditions.⁵ Indeed, state constitutional provisions for supermajority voting rules, plural executives, and separated powers can be said to manifest a deep suspicion of the claims of party purists.

Our claim in this Article is that parties and partisanship can help to ameliorate the informational, agenda-setting, and legitimation problems of popular democracy, and that popular democracy has unexplored potential for righting a poorly functioning system of party democracy. Notwithstanding the conventional narrative of opposition, there is an important potential for complementarity between popular and party democracy.⁶

1. Here we have in mind exercises like the British Columbia Citizens Assembly on Electoral Reform in which a deliberative body of lay citizens, often chosen at random, is convened to decide or advise on some pressing matter of public concern. CITIZENS’ ASSEMBLY ON ELECTORAL REFORM, <http://www.citizensassembly.bc.ca/public> (last visited Nov. 29, 2011).

2. The citizens on the losing side of any election are at risk of becoming disaffected from the political order. *See generally* CHRISTOPHER J. ANDERSON ET AL., *LOSERS’ CONSENT: ELECTIONS AND DEMOCRATIC LEGITIMACY* (2005).

3. *See, e.g.*, NANCY L. ROSENBLUM, *ON THE SIDE OF ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (2008); Russell Muirhead, *A Defense of Party Spirit*, 4 *PERSP. ON POL.* 713 (2006); Jonathan White & Lea Ypi, *Rethinking the Modern Prince: Partisanship and the Democratic Ethos*, 58 *POL. STUD.* 809 (2010).

4. The standard literature on retrospective voting includes V.O. KEY, JR., *THE RESPONSIBLE ELECTORATE* (1966) and MORRIS P. FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS* (1981). For canonical work on parties’ need to appeal to the median voter, see ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); Duncan Black, *On the Rationale of Group Decision-Making*, 56 *J. POL. ECON.* 23 (1948); Susan C. Stokes, *Political Parties and Democracy*, 2 *ANN. REV. POL. SCI.* 243 (1999); and Bernard Grofman, *Downs and Two-Party Convergence*, 7 *ANN. REV. POL. SCI.* 25 (2004).

5. This argument is developed at length in Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance and Election Law* (Oct. 4, 2011) (working paper) (on file with author).

6. Heather Gerken gestures at this thought in Heather Gerken, *Making Democracy Work*, 37

Part I establishes the necessary definitions and then explores the conventional narrative of the emergence of popular democracy against the parties, followed by the parties' defensive response thereto. The old story is one of trying to use popular democracy to destroy the party system; popular democrats today routinely reveal these Progressive roots. Party leaders then respond defensively, undermining popular initiatives at the implementation stage or even using the initiative process to shape partisan competition and candidate campaigns. The somewhat newer story is one of "productive tension," where the conflict is acknowledged but refocused to highlight the good that may serendipitously result from the adversarial posture of popular and party democracy.⁷ But the productive-tension story offers only a defense of "hybrid democracy" in its familiar guises, rather than an account of whether the conventional hybrid forms can be reworked and improved upon—with the popular element used to strengthen party-based representation and accountability and the partisan element given a formal role in popular lawmaking with an eye to meliorating popular democracy's characteristic difficulties. That is our project here.

Part II reviews canonical political science literature that teaches what parties can do to keep a political system responsible, stable, and vital.⁸ It also explores new work in political theory that celebrates the importance of parties and partisanship to political functioning, both on a system-wide basis as well as for the ordinary citizen.

We then turn to the potential for complementarity between popular and party democracy.⁹ Part III homes in on some recurring design problems that politics face concerning party democracy on the one hand and popular democracy on the other. We posit that popular democracy can help treat the illnesses endemic to party democracy and vice versa.

POL. THEORY 838 (2009) (reviewing ANDREW REHFELD, *THE CONCEPT OF CONSTITUENCY: POLITICAL REPRESENTATION, DEMOCRATIC LEGITIMACY, AND INSTITUTIONAL DESIGN* (2005) and KEVIN O'LEARY, *SAVING DEMOCRACY: A PLAN FOR REAL REPRESENTATION IN AMERICA* (2006)), though Gerken is principally focused on "representative democracy" broadly rather than party democracy specifically, our focus here.

7. See *infra* notes 55–56 and accompanying text.

8. Because there has been much more appreciation, analysis, and criticism of popular democracy in the legal academy—see, for example, Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 *BUFF. L. REV.* 903 (2006)—we think it is more important to dwell carefully here on parties' contribution to our democracy. It is a common perspective among political scientists but not well understood by legal theorists.

9. We are not the first to suggest that it might be good for the polity to have *both* strong popular democracy and strong parties. See, e.g., Anthony J. Eksterowicz & Paul C. Cline, *Is Citizen Participation Consistent with Effective Political Parties?*, 79 *NAT'L CIVIC REV.* 529 (1990). But the theorists who see room for both have not done enough to highlight the ramifications of this reconciled complementary view for institutional design. Rosenblum herself has few institutional design ideas in her book and concludes by inviting others to incorporate her theoretical insights into design projects. See ROSENBLUM, *supra* note 3, at 458 ("[T]here is a lot to say about how institutional arrangements . . . could shape the work parties do, and I have said little about prescriptions."). We accept her invitation here.

The central, related problems of party democracy are (1) sustained breakdowns in competition, with the major parties failing to compete robustly for the affections of the polity's median voter on the basis of political considerations specific to the government in question, and (2) accountability occlusion, with the mass electorate unable to discern which party is responsible for what and to respond accordingly at the polls. The first problem often occurs at subnational levels in federal democracies.¹⁰ The second problem may also result from federal arrangements, owing to voter confusion about the distribution of governmental powers across levels or the causes of the social and economic conditions the voter observes. More important for present purposes, accountability occlusion can be exacerbated or ameliorated by structural arrangements internal to a particular government. Separated powers and supermajoritarian decision rules—both characteristic of state government in the United States—are causes of accountability occlusion.

Popular democracy, however, offers two promising avenues for experimentation in an attempt to fix these problems. First, states that currently require supermajority votes of the legislature on certain matters should consider letting the majority party opt for a referendum instead of meeting supermajoritarian constraints. Like legislative supermajority requirements, a public referendum could limit the majority party's ability to adopt ideologically extreme policies and to give away the store to special interest groups—both of which are substantial risks when, owing to competitive breakdown, the prospect of the majority party losing its majority status is too remote to temper policymaking. But unlike legislative supermajority requirements, a referendum call by the majority party would clarify which party bears responsibility for the policy ultimately adopted.

Second, and closely related to the first, states might empower each major-party legislative caucus, acting in its own name, to put its top legislative priority to a direct popular vote (say, one bill per legislative session). This would focus voters on what each party stands for with respect to the government in question, which is a prerequisite to effective partisan competition. It would also give the minority party a meaningful role in governance,¹¹ helping to legitimate the system but without the hobbling effects of supermajoritarianism.¹²

Popular democracy, for its part, is often challenged on grounds of citizen competence. Parties can be part of the solution. Direct-democracy states could

10. See Elmendorf & Schleicher, *supra* note 5, at 35–50.

11. Allowing minorities or minority parties to have agenda-setting power to force accountability is a theme of David Fontana, *Government in Opposition*, 119 *YALE L.J.* 548 (2009); Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 *J. POL. PHIL.* 74 (2005); and Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2312 (2006).

12. For a discussion of supermajority rules and their underlying political theory, see generally Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 *HASTINGS CONST. L.Q.* 141 (2006).

authorize political party organizations or party caucuses in the legislature to make ballot-printed “endorsements” in initiative and referendum elections, enabling voters who would otherwise be in the dark to rely on that most familiar, useful, and time-tested of voting cues: the political party label.

Political parties can also strengthen popular democracy in its more novel and deliberative forms, such as citizens’ assemblies and policy juries. Parties could be used to develop policy proposals for the assembly’s considerations, to winnow the field of options for lay citizen bodies to consider, and to resolve otherwise unanswerable questions about which outside groups are entitled to the deliberative body’s time and attention. In a two-party system, the major parties possess a striking combination of qualities found nowhere else: technical policymaking expertise, sensitivity to interest groups, political acumen, and the allegiance of large swaths of the citizenry. These qualities are precisely what are needed to organize and ground the policy-oriented deliberations of a body of lay citizens and to legitimate the inevitable exclusion of a proposal or interest group.

To drive home the practical importance of our thesis about the potential complementarity of popular and party democracy, Part III winds up by applying the thesis to two important contemporary policy debates: state budget stalemates and state constitutional reform. Both are issues in which we were personally involved. With regard to budget stalemates, we argued in the *New York Times*¹³ and the *San Francisco Chronicle*¹⁴ that California and other states that require legislative supermajorities for the adoption of budgets and/or tax increases should institute an alternative mechanism whereby each major-party legislative caucus can propose its own preferred budget directly to the people, or to a randomly selected subset thereof.¹⁵

The other example in Part III draws from our work as legal and policy advisors to *Repair California*, a coalition that sought a limited constitutional convention to reform California’s constitution.¹⁶ At one time, *Repair California* wanted a convention whose delegates would be chosen at random from the

13. Chris Elmendorf & Ethan J. Leib, *Budgets by the People, for the People*, N.Y. TIMES, July 28, 2009, at A25, available at <http://www.nytimes.com/2009/07/28/opinion/28leib.html>.

14. Chris Elmendorf & Ethan J. Leib, *Let Californians Vote on Two Budgets—1 Red, 1 Blue*, S.F. CHRON., Feb. 11, 2011, at A12, available at <http://www.sfgate.com/cgi-bin/article/article?f=/c/a/2011/02/10/EDRR1HKUNU.DTL>.

15. For an exposition and analysis of participatory budgeting in Brazil—a design that inspires but is ultimately distinguishable from our proposal—see MARION GRET & YVES SINTOMER, *THE PORTE ALEGRE EXPERIMENT: LEARNING LESSONS FOR BETTER DEMOCRACY* (Stephen Wright trans., 2005).

16. For a brief history of *Repair California* and its undoing, see Kylie Mendonca, *Where’s the Revolution? A Short History of Repair California’s Short Promise*, BOHEMIAN, May 26, 2010, <http://www.bohemian.com/bohemian/05.26.10/feature-1021.html>. For a description of the venture while it was still in its design phase, see Hendrik Hertzberg, *The States We’re In*, NEW YORKER, Aug. 24, 2009, http://www.newyorker.com/talk/comment/2009/08/24/090824taco_talk_hertzberg. With *Repair California*’s website now removed from the Internet, this Article reports some details that are no longer widely available.

citizenry at large, rather than selected through an appointment or election process that would likely favor the currently dominant political party and interest groups. Because constitutions should not entrench momentarily dominant parties or interest groups, we shared *Repair California*'s preference for a convention of laypersons. But we also wanted lay citizen delegates to be advised by members of the party establishment to root their thinking in reality and with expertise and information that parties are reasonably competent at providing. We suggested that this could be achieved by establishing an advisory body composed of political elites, which would set the initial agenda for the convention and provide ongoing feedback during the delegates' deliberations. This model is a good example of complementarity in action.

We think starting to see party democracy and popular democracy as potential sources of mutual improvement rather than as warring opposites is a big step forward and promises better institutional design. Populists and party advocates have for generations seen one another as having adverse interests. It is high time for both to understand what the other offers to the political system generally and to optimize their own performance by harnessing the virtues of the other.

I.

THE CONVENTIONAL NARRATIVE: CONFLICT RATHER THAN COMPLEMENTARITY

In this Part, we explore the tensions between party democrats and popular democrats as a matter of intellectual history and theory—as political scientists have come to see the relevant dynamics between party and popular democracy. A lengthy intellectual history and complete review of the political science literature is beyond the scope of this Article,¹⁷ but the basic story is one of conflict. Even the more nuanced accounts of co-optation and, more recently, productive tension, rely on a fundamentally adversarial picture of the two democratic modalities.

Our working definition of party democracy is drawn from the canonical account in Giovanni Sartori's *Parties and Party Systems: A Framework for Analysis*. Party democracy channels the contest for power principally through parties, "any political group identified by an official label that presents at elections, and is capable of placing through elections . . . candidates for public office."¹⁸ The definition of a party can be refined, as follows:

[A]n organization . . . [that] is expected to endure beyond the lifespan of those who bring it into existence, . . . if it competes in elections with the intention of capturing the major institutions of government,

17. For such an exhaustive treatment, see Nancy Rosenblum's book—ROSENBLUM, *supra* note 3—about how democracies and democratic theorists have viewed parties through the ages.

18. GIOVANNI SARTORI, *PARTIES AND PARTY SYSTEMS: A FRAMEWORK FOR ANALYSIS* 63 (1976).

through which . . . it intends to exercise power in its own name.¹⁹

Party democrats turn these definitions into something normative; they hold that democratic polities *should be* organized by parties that compete for power and form governments.²⁰ This Article primarily addresses two-party systems, the form that party democracy assumes in the United States and in most other nations that elect legislative assemblies from single-member districts using plurality-winner voting rules.²¹

Our working definition of popular democracy is essentially institutional. It includes instances of citizens playing a direct role in the lawmaking process, as they do in initiative and referendum elections and when convened in citizen juries to advise others or to make political decisions. Popular democrats, seeing these institutions in a normative light, hold the people to be the source of sovereignty and think democracy should involve the people directly in law-making and implementation through institutions other than candidate elections.

A. The Antinomy of the Parties and the People

There is a tradition—most easily traced through the American Progressives—that pits the parties against the people. Whatever continuing political resonance Progressives have in the modern U.S. political system, citizens continue to live with this inheritance.²² And even if the historiography of the Progressive movement paints a complicated account of Progressives' motivations,²³ there are good reasons that their anti-party attitude remains with us today. Party systems still easily conjure thoughts of bosses, spoils, patronage, votes-for-sale, and corruption. The Progressives were not the first to make these associations—politics itself conjures these images for many—but venality gets systematized as part of the party apparatus in the Progressive narrative.²⁴ Progressives' sales pitch against big parties sticks with us.²⁵

Progressives are most often associated with the institution of direct democracy, routinely discussed as an antidote to the corruptive tendencies of

19. ROSENBLUM, *supra* note 3, at 466 n.59 (quoting Joseph LaPalombara, *Reflections on Political Parties and Political Development, Four Decades Later*, 13 PARTY POL. 141, 143–44 (2007)). We have edited the quotation to avoid LaPalombara's focus on national parties.

20. Bernard Manin takes credit for the term "party democracy." See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 196 n.6, 206–18 (1997). Our use is somewhat different but not in ways that would be particularly useful to elaborate in this context.

21. See generally MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara North & Robert North trans., 1954).

22. For a history that links the Progressive agenda with our contemporary political commitments, see ELDON J. EISENACH, *THE LOST PROMISE OF PROGRESSIVISM* (1994).

23. See, e.g., RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY* (1986); Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982).

24. ROSENBLUM, *supra* note 3, at 172.

25. For more work telling the Progressive tale, see PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 2* (1998); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); V.O. KEY, JR. & WINSTON W. CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* (1939).

party democracy and as a higher law that can take power away from parties and hand it back to the people, where it belongs. More than two-thirds of Americans now live in a city or state with the popular initiative.²⁶ Academic criticism notwithstanding, the vast majority of citizens are pleased to have this Progressive institution, which can be used as a counterweight (or as a credible threat of a counterweight) to a political system tied up with duopolistic parties.²⁷ The ascendancy of direct democracy is undeniable,²⁸ and parties inspire very little confidence within the electorate.²⁹ Although in Europe and other countries parties often sponsor ballot questions,³⁰ the American political system's bifurcation of party democracy and popular democracy is notable and potentially traceable to the ethos of direct democracy's Progressive ancestry.

It is not without reason that party democrats see direct democracy as a threat. Referendums and initiatives are often said to “contribut[e] . . . greatly to the relative weakness of political parties,”³¹ at least in part because parties are less able to engage their “programmatic” and agenda-setting functions when others get to set the agenda from outside the party system.³² Initiative

26. JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 1, 8 (2004).

27. See generally *id.* Americans' continued enthusiasm for direct democracy is reported and analyzed in SHAUN BOWLER & TODD DONOVAN, DEMANDING CHOICES: OPINION, VOTING, AND DIRECT DEMOCRACY (1998); Joshua J. Dyck & Mark Baldassare, *Process Preferences and Voting in Direct Democratic Elections*, 73 PUB. OP. Q. 551 (2009); Alana S. Jeydel & Brent S. Steel, *Public Attitudes Toward the Initiative Process in Oregon*, 34 STATE & LOCAL GOV'T REV. 173 (2002); Todd Donovan & Jeffrey A. Karp, *Popular Support for Direct Democracy*, 12 PARTY POL. 671 (2006).

28. See John G. Matsusaka, *The Eclipse of Legislatures: Direct Democracy in the 21st Century*, 124 PUB. CHOICE 157 (2005).

29. See VIRGINIA A. HODGKINSON & MURRAY WEITZMAN, GIVING AND VOLUNTEERING IN THE UNITED STATES (1996), available at <http://www.cpanda.org/cpanda/analysis/a00243> (in the “Browse” box, select “Confidence in political organizations [Q4B_4]” and click “Get results!”) (finding that 40.5 percent of Americans have “very little” confidence in political organizations and only 4.3 percent have a “a great deal”).

30. See generally Ian Budge, *Political Parties in Direct Democracy*, in REFERENDUM DEMOCRACY: CITIZENS, ELITES, AND DELIBERATION IN REFERENDUM CAMPAIGNS 67, 69 (Matthew Mendelsohn & Andrew Parkin eds., 2001). The most obvious contrast case to the United States is Switzerland, which is both a party democracy and a direct democracy; the systems co-exist without the same sense of tension that is endemic to U.S. conceptions. And in Italy, parties have seemingly been strengthened by direct democracy. See *id.* at 69–70.

31. Kris Kobach, *Switzerland*, in REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY 132 (David Butler & Austin Ranney eds., 1994). Indeed, weakening parties is often remarked upon as a major deficit of direct democracy. See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 70, 230 (1989); DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 27, 189–99 (1984); CAL. COMM'N ON CAMPAIGN FIN., DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT 68–69 (1992); David B. Magleby, *Direct Legislation in the United States*, in REFERENDUMS AROUND THE WORLD, *supra*, at 254–57.

32. See LEON EPSTEIN, POLITICAL PARTIES IN WESTERN DEMOCRACIES 261–88 (1967). Regarding the effects of direct democracy on issue agendas in legislative elections, see generally STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS (2005).

campaigns threaten to disrupt intraparty alliances, bring up “wedge issues,” and tear at the fabric of party unity.³³

Perhaps most important, the initiative process threatens what has long been seen as the greatest strength of two-party democracy: the enabling of meaningful, socially productive political participation by even minimally informed voters, who may vote retrospectively (for or against the party in charge) based on their local observations of social and economic conditions. The more law that gets made directly, outside of the legislative arena, the less it makes sense to blame the then-dominant party for conditions one dislikes. Who is to say whether the bad results were caused by the party in charge or by the people themselves exercising the initiative power? Extensive use of the ballot initiative could end up gutting representative government by depriving elected lawmakers of both the capacity (by tying their hands) and the incentives (by clouding responsibility) to solve the problems that voters care about.

Modern day experiments with and theories of “deliberative democracy”—a democratic modality in which the talk of ordinary citizens must contribute to policy outcomes to legitimize them—routinely invoke Progressivism in their design discussions, reinforcing the tendency to see party democracy and popular democracy as oppositional. Deliberative democrats often see their advocacy for deliberation as necessary in part because of party politics that can too easily corrupt public discourse.³⁴ Deliberative forums are routinely

33. For this range of arguments—and for a defense of both direct democracy and party democracy—see generally IAN BUDGE, *THE NEW CHALLENGE OF DIRECT DEMOCRACY* (1996). Parties also can lose their intermediary status on account of direct democracy. See ARTHUR LIPOW, *POLITICAL PARTIES AND DEMOCRACY: EXPLORATIONS IN HISTORY AND THEORY* (1996); Lloyd N. Cutler, *Political Parties and a Workable Government*, in *A WORKABLE GOVERNMENT?: THE CONSTITUTION AFTER 200 YEARS* 49–58 (Burke Marshall ed., 1987); Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

34. For our efforts to engage in deliberative democratic design with features of popular and party democracy in view, see Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005); ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004). For the roots of the latter’s design proposal in the work of Progressives, see LEIB, *supra*, at 51–57; that section draws heavily from KEVIN MATTSON, *CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA* (1998) and focuses attention on Charles Zueblin, Frederic Howe, and Tom Johnson. Rosenblum’s charges against deliberative democrats notwithstanding—see ROSENBLUM, *supra* note 3, at 206, 273–311—*Deliberative Democracy in America* took parties seriously and made room for them explicitly. See LEIB, *supra*, at 50–51 & 73–76. She is right, however, that some deliberative democrats can see parties as obstructing deliberation rather than framing or mobilizing it. See, e.g., James S. Fishkin, *A Nation in a Room*, BOS. REV., Mar./Apr. 2006, at 10. What she is not right about is that the “constant in all [deliberative democratic literature] is unyielding antipartyism.” ROSENBLUM, *supra* note 3, at 298. We think Muirhead has this wrong too. See Muirhead, *supra* note 3, at 715 (“[D]eliberative ideals implicitly view party loyalties as impediments to the sort of reflection that deliberation requires.”); see generally Russell Muirhead, *Can Deliberative Democracy Be Partisan?*, 22 CRITICAL REV. 129, 136 (2010) (arguing “not really”). In a recent paper, White & Ypi are starting to envision a way to break through Muirhead’s claim that “[p]artisan democracy is a fundamental rival to deliberative democracy.” See *id.* at 130; Jonathan White & Lea Ypi, *On Partisan Political Justification*, 105 AM.

idealized as post-partisan affairs: parties do not get seats at the table in the institutions of popular governance inspired by Progressives.³⁵

Progressives are also conventionally credited with opening up party primaries to popular voting.³⁶ The direct primary sought to eradicate but could only dilute the worry that nominations for major offices only give lay citizens the opportunity for very limited input. Progressives reasonably complained that elite party “machines”³⁷ were presenting nominations to the people as *faits accomplis*. Giving citizens a say on whom the party would be proposing for the general election was, of course, an effort to have the parties and the people usefully interact (as we will ultimately suggest is a perfectly healthy posture for popular democracy). Yet more was going on in this reasonable reform than either simple access to important party decisions or a recognition of something that cannot be denied: in one-party jurisdictions with no party competition, the nomination game is the whole ball of wax.³⁸

Two *nomoi*—that of the party and that of the people—were seen as fighting for sovereignty, and the Progressives knew whose side they were on. The direct primary was calculated to weaken the law of parties.³⁹ In addition to more access for the people to a party convention, many Progressives imagined the dissolution of parties—or at least bolting from them as a way to punish and chasten them.⁴⁰ Some fantasized about a post-party world, where we are all

POL. SCI. REV. 381 (2011).

We should also be clear that there is a divide within the deliberative democracy literature—which we paper over here (as Rosenblum also does). Some deliberative democrats really are most interested in deliberation at the legislative, executive, or judicial level as the touchstone of legitimacy. Those democrats may also underestimate parties but most deliberative democrats these days fall into what one of us called the populist strain. See LEIB, *supra*, at 31–33 (differentiating between the “elitist/liberal” and the “populist/democratic” strains); David L. Ponet & Ethan J. Leib, *Fiduciary Law’s Lesson for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1254 (2011) (same).

35. *But see* BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* (2004) (convening citizens to deliberate about partisan elections). Although Rosenblum tries to dismiss the book’s respect for party democracy in a variety of ways, we think Ackerman and Fishkin do an admirable job finding a way to meld party democracy and popular democracy in their Progressive-inspired design.

36. To be fair, not all accept this account of the emergence of the direct primary. For a challenge to the orthodoxy, see ALAN WARE, *THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH* (2002) (arguing that party elites instituted the direct primary to replace caucus convention systems for their own reasons and not to accommodate antiparty reformers).

37. Even talking about parties as machines is a Progressive inheritance. For a classic from the period, see JESSE MACY, *PARTY ORGANIZATION AND MACHINERY* (1904).

38. See Adam Winkler, *Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1886–1915*, 100 COLUM. L. REV. 873, 881–82 (2000).

39. See, e.g., George W. Norris, *Why I Believe in the Direct Primary*, 16 ANNALS AM. ACAD. POL. & SOC. SCI. 22–24 (1923) (explaining that the direct primary “takes away the power of the party leader or boss and places responsibility for control upon the individual”); see also AUSTIN RANNEY, *CURING THE MISCHIEFS OF FACTION* 129 (1975) (arguing that direct primaries weakened parties’ control over their nominating processes).

40. ROSENBLUM, *supra* note 3, at 191 (citing MICHAEL MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865–1928* 57 (1986) (suggesting that the Progressives called for “a new Revolutionary War against the party system”)).

“Independents” and no one does their political business with any fealty to party.⁴¹ Parties must be divisive and partial by their very nature. For Progressives (and many people’s Progressive inheritance), independence from parties is good for the individual citizen and the political system; it can extricate us “from the narrow and deadly groove of parties,”⁴² which disable us from seeing the people as a whole,⁴³ and are seen as the engines of corruption.⁴⁴

The Progressives were committed to what Hannah Arendt articulated so well: that popular government must “challenge . . . the party system as such, in all its forms.”⁴⁵ She highlighted that “it is indeed in the very nature of the party system to replace . . . government of the people by the people” with “government of people *by an elite sprung from the people*.”⁴⁶ (Party democrats in the Schumpeterian tradition would not disagree.⁴⁷) Like Progressives, she saw parties as “very efficient instruments through which the power of the people is curtailed and controlled.”⁴⁸

This is, to be sure, a narrative that reaches back even further in the history of political thought. Antipartyism connects to a desire for political “holism,” a deep anxiety about “fatal divisiveness” that will bring down democracy⁴⁹ and the American founders’ proclaimed desire to be rid of factions.⁵⁰ But its modern incarnation seems easily pinned to the Progressives and their sway over our understanding of politics. Even if there is plenty in the historiography of Progressivism to make us question their commitment to the average citizen,⁵¹ their institutions that are still with us are the cornerstones of popular

41. Except perhaps to the party that is the party of the whole, without partiality. See MOISEI OSTROGORSKI, *DEMOCRACY AND THE PARTY SYSTEM IN THE UNITED STATES* 420 (1910).

42. 2 MOISEI OSTROGORSKI, *DEMOCRACY AND THE ORGANIZATION OF POLITICAL PARTIES* 600 (Frederick Clarke trans., 1964).

43. See OSTROGORSKI, *supra* note 41, at 161 (“Up to this point not much has been seen of the people, although it has been talked of a good deal; everybody quoted its authority, acted in its name, took pledges on its behalf, but this everybody was made up almost exclusively of the class of professional politicians [in parties].”).

44. See, e.g., LINCOLN STEFFENS, *THE STRUGGLE FOR SELF-GOVERNMENT: BEING AN ATTEMPT TO TRACE AMERICAN POLITICAL CORRUPTION TO ITS SOURCES IN SIX STATES OF THE UNITED STATES WITH A DEDICATION TO THE CZAR* 42 (1906).

45. HANNAH ARENDT, *ON REVOLUTION* 269 (1965).

46. *Id.* at 281 (citing DUVERGER, *supra* note 21, at 425).

47. See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* (1942).

48. ARENDT, *supra* note 45, at 273.

49. ROSENBLUM, *supra* note 3, chs. 1 & 2.

50. See generally Richard H. Pildes, *Political Parties and Constitutionalism*, in *RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW* (Rosalind Dixon & Tom Ginsburg eds., forthcoming 2011), available at <http://ssrn.com/abstract=1550905> (acknowledging that more modern constitutions take a less antiparty view than the American one did). For the standard account of how the party system was legitimized in the United States, the founders’ antipathy notwithstanding, see RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840* (1969).

51. It can be argued that, veiled in all the Progressive rhetoric was just another form of elitism, whose church was the university and whose commitment to “merit” and “civil service” was antiparty without being pro-populist in the slightest. *Id.* at 179–83 & 195–99.

democracy. And those institutions were intended to engrave the tombstones of party democracy.

Yet big parties are still with us and show no realistic signs of implosion, notwithstanding Americans' continuing deep suspicion of them.⁵² Popular democracy failed in its grandest ambitions.⁵³ How and why that happened is its own story, but, for our purposes here, it is important to see that it has led to a slightly different way to think about the antinomy of the parties and the people.

B. Co-option, Hybrid Democracy, and the Potential for "Productive Tension"

Some Progressives were skeptical that direct democracy and direct primaries would be enough to counter the party system, thinking that parties would be able to co-opt and exploit both systems.⁵⁴ Now that the vast majority of Americans live in "hybrid democracies" where both parties and popular self-government rule,⁵⁵ parties do appear to have adjusted, just as the more wary Progressives feared that they would.⁵⁶

Parties have run their own initiative campaigns in the shadows, endeavoring to shift the ground rules of political competition in the party's

52. See HODGKINSON & WEITZMAN, *supra* note 29. And this is not just an American phenomenon.

53. Parties continue to dominate democracy, and popular democracy has not really changed that. See Budge, *supra* note 30, at 80–83.

54. See MARY PARKER FOLLETT, *THE NEW STATE: GROUP ORGANIZATION THE SOLUTION OF POPULAR GOVERNMENT* (1920). For a contemporary political science evaluation that the direct primary "succeeded in multiplying the party oligarchies rather than in democratizing them," see PAUL ALLEN BECK & FRANK J. SORAUF, *PARTY POLITICS IN AMERICA* 251 (7th ed. 1992).

Rosenblum usefully spells out how Follett's insight into the group spawned a "civil society" literature—and explores how and why parties routinely get left off of the list of civil society groups. We think Rosenblum tends to overplay the antipartyism in the civil society literature; once parties are seen as arms of the state, it is harder to see them as organic civil society groups (even though there are, obviously, lots of interactions between those groups and parties proper). See ROSENBLUM, *supra* note 3, at 261–73. Parties are not "mere voluntary associations[s] but" can be rightly conceived as "political organ[s] and as such [perhaps] should be recognized and controlled by law." Alonzo H. Tuttle, *Limitations upon the Power of the Legislature to Control Political Parties and Their Primaries*, 1 MICH. L. REV. 466, 469 (1903).

55. See generally Elizabeth Garrett, *The Promise and Perils of Hybrid Democracy*, 59 OK. L. REV. 277 (2006); Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1130 (2005); Elizabeth Garrett, *Crypto-Initiatives in Hybrid Democracy*, 78 S. CAL. L. REV. 985 (2005).

56. This counter-narrative might be credited to the Garrett sources above and the following key works: Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731 (2000); Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party: Partisanship and Ballot Initiatives in California*, 7 PARTY POL. 739 (2001); ELIZABETH R. GERBER ET AL., *STEALING THE INITIATIVE: HOW STATE GOVERNMENT RESPONDS TO DIRECT DEMOCRACY* (2001). Of course, to say that the parties "have adapted" is not to deny that direct democracy may weaken political parties. Indeed, the weakening of parties is often seen as a major deficit of direct democracy. See CRONIN, *supra* note 31, at 70, 230; MAGLEBY, *supra* note 31 at 22, 27, 189–99; Magleby, *Direct Legislation in the United States*, *supra* note 31, at 254–57; CAL. COMM'N ON CAMPAIGN FIN., *supra* note 31. *But see* Linda Maduz, *Direct Democracy*, 2 LIVING REVS. DEM. 1, 7–8 (2010), available at <http://www.livingreviews.org/lrd-2010-1> (reviewing European studies indicating that parties, especially minor parties, are sometimes strengthened by direct democracy).

favor,⁵⁷ to raise the salience of issues that favor the party in candidate campaigns,⁵⁸ or to encourage turnout by segments of the electorate that benefit the party.⁵⁹ Major parties that invest in broadcasting their support for or opposition to a ballot initiative can affect the outcome of the election.⁶⁰ And the party in government—public officials elected on the party label—may thwart initiatives at the back end by withholding funding or other resources necessary for the full implementation of the initiative.⁶¹

Exploitation and subversion by the parties would seem to frustrate a great deal of what popular democrats were hoping to accomplish with their institutional innovations, but a recent modification of the “parties will adapt” trope puts a more positive spin on the conflict. In a thesis that John Matsusaka has been promoting, the mere availability of direct democracy within a jurisdiction can serve to motivate legislators to pursue policies preferred by the median voter.⁶² The parties in government, seeing that the median voter can

57. We can name names, if you like. One example that easily comes to mind is the (failed) drive to change how California allocates its presidential electors in the Electoral College from a winner-take-all system (which forty-eight states use) to a district-based allocation method (which two states use). Although this initiative proposal was made to look like it was about “fair” representation of the voters of California and their presidential preferences (and an effort to encourage candidates for president to come to California to campaign)—hence, the name of the supporting committees “Californians for Equal Representation” and then “California Counts!”—it was also supported and pressed by the California Republican Party (the top donor) and was a fairly transparent attempt to win electoral votes for the Republican Party in the 2008 presidential race. For some analysis of this initiative, see Ethan J. Leib & Eli J. Mark, Commentary, *Democratic Principle and Electoral College Reform*, 106 MICH. L. REV. FIRST IMPRESSIONS 105 (2008), available at <http://www.michiganlawreview.org/firstimpressions/vol106/leibmark.pdf>.

58. See, e.g., NICHOLSON, *supra* note 32, at 91–131 (investigating the California Republican Party’s use of immigration and affirmative action ballot initiatives to set agenda in candidate campaigns).

59. Putting this strategy into effect is obviously tricky, since an initiative likely to mobilize core supporters of one party may also induce a countermobilization by supporters of the other party. Recent studies show that mobilization by ballot initiative campaigns is concentrated among conventional partisan voters. See, e.g., Joshua J. Dyck & Nicholas R. Seabrook, Who is Mobilized by Direct Democracy? Context, Partisanship, and Turnout in Ballot Initiative Elections (2008) (working paper) available at <http://www.law.buffalo.edu/baldycenter/pdfs/DyckPaper08.pdf>; Todd Donovan & Daniel A. Smith, Turning On and Turning Out: Assessing the Individual-Level Effects of Ballot Measures, Delivered Before the 4th Annual State Politics and Policy Conference (Apr. 30, 2004), available at http://bisc.3cdn.net/534979c065caa53507_b7m6b5a7t.pdf. Regarding the effect of high-profile “social issue” ballot measures on turnout, see Daniel R. Biggers, Social Issue Ballot Measures and Their Impact on Turnout (2011) (working paper) available at http://www.bsos.umd.edu/gvpt/jcurry/saps/documents/3_5/biggers.pdf.

60. See generally HANSPETER KRIESI, DIRECT DEMOCRATIC CHOICE: THE SWISS EXPERIENCE 139 (2005) (highlighting that party cues are the “quintessential shortcut” in initiative voting); Sara Binzer Hobolt, *Taking Cues on Europe? Voter Competence and Party Endorsements in Referendums on European Integration*, 46 EUR. J. POL. RES. 151 (2007) (analyzing effect of party cues in referendum elections).

61. GERBER ET AL., *supra* note 56.

62. See generally MATSUSAKA, *supra* note 26; see also Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996) (same); Simon Hug & George Tsebelis, *Veto Players and Referendums Around the World*, 14 J. THEOR. POLIT. 465 (2002) (extending analysis to multi-dimensional issue space).

easily overrule them, respond accordingly and anticipatorily, adopting policies that appeal to that voter. In this retelling of the on-the-ground dynamics of the tension between party and popular democracy, the conflict results in a productive dialectic with policy ultimately better tracking the median voter—or so one might reasonably hope. Further tests of Matsusaka’s thesis have yielded decidedly mixed results.⁶³

These accounts do complicate the conventional narrative in some ways, but they are consistent with it in another, for the story is still one of fighting democratic modalities.⁶⁴ Even the more optimistic productive tension thesis remains insufficiently attentive to the potential for complementarity or mutual reinforcement between party and popular democracy. Matsusaka’s argument is a way to make peace with popular democracy and notice something useful about the way it might work even when it appears not to be working. But it is not the basis of a reform agenda to improve popular or party democracy, which we think is a reasonable aspiration.

To find the best attunement of popular democracy with parties, we need to understand what both popular democracy and party democracy are good for. For our purposes here, we assume legal theorists have at their disposal a pro and con list for popular democracy,⁶⁵ party democracy, by contrast, is a bit more unfamiliar. Moreover, Americans by and large like their popular democracy and are much more skeptical of parties.⁶⁶ It is, then, to the benefits of party democracy—too often unsung—that we now turn.

II.

WHY PARTIES, REDUX

The functional role of parties in the political system can be divided into three areas: governance, elections, and citizenship.⁶⁷ In governance, political parties solve social choice problems in legislatures, frame the terms of debate, legitimize opposition, and stabilize the political order. For voters in elections,

63. Compare MATSUSAKA, *supra* note 26, and Simon Hug, *Policy Consequences of Direct Legislation Theory, Empirical Models and Evidence*, 45 *QUALITY & QUANTITY* 559 (2011) (confirming Matsusaka thesis using new modeling techniques and dataset that others had used to challenge the thesis), with Melissa J. Marschall & Anirudh V.S. Ruhil, *Of Models and Methods: A Response to Matsusaka*, 5 *STATE POL. & POL’Y Q.* 364 (2005) (challenging Matsusaka’s method and findings), and Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States* (2010) (working paper), available at <http://www.columbia.edu/~jrl2124/democratic%20deficit.pdf> (using state-of-the-art methods to measure median voter preferences and finding no effect of direct democracy on policy congruence across a host of issue areas).

64. Another complication comes from recent research on the Continent suggesting that direct democracy sometimes strengthens political parties, especially minor parties. See Maduz, *supra* note 56, at 7–8.

65. One of us has a quick and dirty sketch for the uninitiated at Leib, *supra* note 8. A pro list (with relevant citations) is available *id.* at 904–06. A con list (with citations) is available *id.* at 906–11.

66. See *supra* notes 27 & 29.

67. Many thanks to Patrick Sellers for taking a first pass at drafting sections of Part II.

political parties furnish simple, reliable cues to candidates' positions (helping low-information voters to cast ballots that accord with their policy preferences); make the dominant governing coalitions legible (enabling retrospective voting); and mobilize turnout (helping to solve the collective action problem that results from the miniscule probability that any one citizen's vote will shift an election's outcome). Finally, parties enhance the practice of citizenship because they give citizens a broad non-ascriptive basis for social solidarity, they make political participation efficacious, and, arguably, because they furnish starting points for public debate. Of course, these three environments—governance, elections, and citizenship—are not mutually exclusive. Nevertheless, the benefits political parties offer in each context are distinct enough to warrant separate analyses. Together, these benefits help counter some of the more aggressive attacks on party democracy from within popular democracy and elsewhere.

A. Parties in Governance

Although the natural instability of democratic states is not always openly appreciated, democratic systems are inherently precarious.⁶⁸ The proper method of constituting and administering the state is always a core issue in elections. Successful democracies, then, are those states capable of repeatedly creating opportunities for conflict and repeatedly ensuring that any potential conflict is peaceful,⁶⁹ a phenomena Rosenblum calls “regulated rivalry.”⁷⁰ Elections alone are not enough to ensure stable democracies. To successfully manage conflict, democracies must also create some method of legitimizing and institutionalizing a role for citizens opposed to the victorious governing regime.⁷¹ When a democratic system offers minorities neither a legitimate role in governance nor a realistic hope for becoming or joining the ruling coalition in the next cycle, it risks collapse.⁷² Enter the political party.

Political parties create a desire for stability in both the majority and minority.⁷³ Through their organizational advantages, political parties make it possible for one election's losing side to more easily organize for a victory in the next contest.⁷⁴ The ability to lose one election but still win another election in the future creates the incentive to transfer power peaceably.⁷⁵ Such stability

68. See generally DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS* (2009); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 23–55 (Ian Shapiro & Casiano Hacker-Cordón, eds., 1999).

69. *Id.* at 49.

70. ROSENBLUM, *supra* note 3, at 119–26.

71. Przeworski, *supra* note 68, at 50.

72. *Id.*

73. ROSENBLUM, *supra* note 3, at 121. The Supreme Court of the United States signed onto the stability story in *Timmons v. Twin Cities New Party*, 520 U.S. 351 (1997).

74. JOHN W. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 25 (1995).

75. ROSENBLUM, *supra* note 3, at 123. White & Ypi also emphasize continuity and ongoing political agency, *supra* note 3, at 811–12.

not only creates broader political moderation and legitimacy, but it also keeps the party in power on its toes, forcing it to engage the issues of the day. As Daniel Defoe put it, “The Party who are Out, are always a Curb, and a Bridle to those which are In.”⁷⁶ This is the “social function of antagonism”—helping to refine, moderate, justify, and facilitate the discovery of equilibria through dialectical “trial by discussion.”⁷⁷ As Clinton Rossiter famously put it, “No America without democracy, no democracy without politics, no politics without parties, no parties without compromise and moderation.”⁷⁸

Parties also stabilize government in another, more logistical respect. Without parties in a legislature, the coalition behind most any bill is at risk of unraveling. Lawmakers who favor a bill as a matter of principle may be bought off by opposing legislators who promise either to support other legislation providing district-specific benefits for the defector or to provide key endorsements or funding for the defector’s reelection campaign. As John Aldrich argues, the realization of a politics of principle requires a solution to this collective action problem, and political parties can provide it.⁷⁹ Parties bind lawmakers together into “long coalitions” centered on recurring, ideologically-linked issues that lawmakers and voters care about. In return for the use of the party’s organizational advantage and assistance in winning office, politicians promise some degree of allegiance to the party’s policy agenda.⁸⁰ Parties in turn can reward or discipline affiliated lawmakers through committee assignments and the distribution of campaign funds, thereby holding the coalition together.

B. Parties in Elections

Parties not only function to organize governance; they also improve elections. The essential difficulties that elections present for ordinary voters are problems of information and coordination. Voters need information about the policy positions and priorities of the candidates, about the coalition of legislators in control of the government, and about the relationship of the candidates to the dominant governing coalition. Yet even this information is not enough.

Imagine a legislative race in which the incumbent faces off against three opponents. A majority of the voters are unhappy with the dominant governing coalition and wish to effect a change. The three challengers each present a politically distinct alternative to the incumbent. A majority of the voters prefer all three to the incumbent but are divided as to which is the *most* preferred alternative. Absent some coordination mechanism, voters who prefer all three

76. 3 DANIEL DEFOE: HIS LIFE, AND RECENTLY DISCOVERED WRITINGS: EXTENDING FROM 1716 TO 1729, at 134 (William Lee ed., 1869).

77. ROSENBLUM, *supra* note 3, at 136–56 (drawing from Hume and Mill).

78. CLINTON ROSSITER, PARTIES AND POLITICS IN AMERICA 1 (1960).

79. ALDRICH, *supra* note 74, at 37–41.

80. *Id.* at 25.

challengers are likely to split their votes, inadvertently returning the incumbent to office.

Now expand the picture and consider multiple legislative districts. If voters in district A manage to coordinate on an alternative to the incumbent, and voters in district B succeed as well, but the challengers elected in districts A and B do not have an agreed upon or overlapping agenda, the change effected at the district level will not yield a predictable change in the outputs of government. A new governing coalition may form, but whether the legislator from district A or B will be part of it is anyone's guess.

Parties go a long way toward solving these problems. The organization of legislatures along party lines helps make the then-dominant governing coalition (if there is one) legible to voters. The labeling of candidates according to party suggests the candidates' likely policy positions and tells voters whether any given candidate will join or work against the dominant coalition. Parties also solve the coordination problem faced by voters dissatisfied with the governing coalition's performance. Once voters can see the principal coalition ("party") in the legislature, voters who are unhappy with the status quo can coordinate and focus on the candidates unified in opposition to that party. If enough voters agree that the opposition is better than the incumbents, a new coalition will come into power and have a chance to implement the agenda on which its candidates ran.⁸¹ In other words, parties can make voting effective.

Of course, parties are not the only players in the electoral arena. Interest groups are also involved, and knowledge of interest-group endorsements and expenditures can help voters cast ballots in accordance with the voters' preferences.⁸² Interest group "cues," however, are no substitute for party cues. Party cues are relevant to larger swaths of the electorate; party cues are informed by observations about governmental policymaking and performance over time; and party cues can enable retrospective accountability.⁸³ Parties

81. See Austin Ramney, *Party Responsibility*, in 16 INT'L ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCE 11, 103–06 (Neil Smelser & Paul Bates eds., 2001); FIORINA, *supra* note 4; Morris Fiorina, *The Decline of Collective Responsibility in American Politics*, DÆDALUS, Summer 1980, at 25. To be sure, the political science discipline is not of one mind about the possibilities for retrospective accountability. See generally Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAVIOR 117 (2002); David R. Jones & Monika L. McDermott, *The Responsible Party Government Model in House and Senate Elections*, 48 AM. J. POL. SCI. 1 (2004). There are also obvious complications with retrospective voting in jurisdictions where there is no partisan competition—see, e.g., V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949)—and when voters face regimes of divided government, when it is not easy to know whom to blame for outcomes. See generally DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–1990* (1991); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). More on the problems with retrospective accountability anon.

82. ARTHUR LUPA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 69–77 (1998).

83. See Elmendorf & Schleicher, *supra* note 5, at 56 (comparing party cues and interest-group cues); Cheryl Boudreau, *Conflicting Cues, Consistent Opinions? How Party Cues and Endorsements Affect Public Opinion* (2011) (working paper) (on file with authors) (using laboratory experiments to

integrate interest-group concerns into a larger policy agenda.⁸⁴ In a political world without parties, special interest groups, incumbents, celebrities, and consultants would be more powerful, not less so.⁸⁵

California politics during the 1910–52 period illustrates the essential importance of parties and party-labeled ballots. During this time, cross-filing was permitted and party labels did not appear on primary ballots.⁸⁶ Eradicating party labels was a Progressive reform, as popular democrats sought to undo party democracy.⁸⁷ But the effect of this reform was not quite what the Progressives had anticipated. Incumbents ran in both major-party primaries and regularly won both nominations; name recognition trumped all in the low-information world of state legislative primary elections. The resulting legislature was centrist—but slothful and corrupt. The most powerful legislative coalitions were not organized on party lines and as such were invisible to voters. Legislators did not create party-based “long” coalitions to pursue ideological objectives, as Aldrich would have predicted.⁸⁸ Rather, out-of-government interest-group coalitions (mostly unions) eventually pushed a ballot initiative to end cross-filing because they wanted a partisan legislature that would actually do something. The legislature responded with a compromise measure to add party labels to candidates on primary ballots, which ultimately passed.

Adding party labels to ballots was the beginning of the end for cross-filing. Once party labels were introduced on the ballot, incumbent Democrats were rarely nominated in Republican primaries and vice versa. Party labels enabled elections to function in line with our reasonable expectations and reduced the likelihood of corruption and sloth in the legislature.

In addition to informing voters of candidate ideology and enabling retrospective accountability, the organization of politics through political parties serves to mobilize political participation. Parties get voters to the polls. As California’s experience in the 1910–52 period reveals, the absence of meaningful partisan competition means that incumbents will almost always be reelected.⁸⁹ Absence of competition not only makes elections stale, but it also

show that party cues have much more powerful opinion-shaping effects than cues from party-affiliated interest groups). The inadequacy of interest-group cues may also be inferred from the poor performance of nonpartisan elections. See Elmendorf & Schleicher, *supra* note 5, 26–29 (reviewing studies of nonpartisan elections).

84. Zachary Elkins et al., *The Citizen as Founder: Public Participation in Constitutional Approval*, 81 TEMP. L. REV. 361, 368–69 (2008).

85. See LARRY J. SABATO, *THE PARTY’S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA’S FUTURE 205–06*, 210 (1988).

86. This narrative is engagingly told in SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* (2009).

87. See *supra* Section I.A.

88. See *supra* Section II.A (discussing Aldrich’s theory of parties as solution to collective action problem faced by legislators).

89. See MASKET, *supra* note 86.

can make politicians less responsive to ordinary citizens. Party-mobilized mass turnout is necessary lest elections end up creating perverse incentives for lawmakers to serve only narrow, self-organized factions within the political community.⁹⁰

C. Parties for Citizenship

There is a powerful story about citizenship, where the virtuous citizens are the “independents”—those who affiliate with no party.⁹¹ Because partisans are often thought of as slaves to ideologies and parties, they are routinely considered to fail the test of the good citizen, someone who deliberates afresh about social policy and gives every argument a fair hearing. Independence-as-virtue is inherited from the Progressives,⁹² and the romance of independence continues to this day, perhaps made even more alluring in this age of seeming “hyperpolarization.”⁹³ As Muirhead states the problem, “partisanship appears to reflect bias, thoughtlessness, cowardice of mind, asocial contentiousness, and faltering devotion to the common good.”⁹⁴

We do not deny that this criticism of parties has some force. Citizens’ “party identification”⁹⁵ is sometimes too strong to be normatively attractive. For many citizens, party identification is essentially an inherited characteristic, adopted as a matter of familial loyalty or genetic code.⁹⁶ Such partisans seem to “reason” only emotionally and mostly unconsciously;⁹⁷ party identification determines more than it derives from beliefs.⁹⁸ Studies have shown that party identification biases perceptions of social and economic facts⁹⁹ as well as

90. See Elkins et al., *supra* note 84, at 379–80; Stephen M. Griffin, *California Constitutionalism: Trust in Government and Direct Democracy*, 11 U. PA. J. CONST. L. 551, 571 (2009).

91. Though “independence” may also be seen as a failure of the parties. See ZOLTAN L. HAJNAL & TAEKU LEE, WHY AMERICANS DON’T JOIN THE PARTY: RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE (2011).

92. OSTROGORSKI, *supra* note 41, at 216–17.

93. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

94. Muirhead, *supra* note 3, at 714.

95. The basic work laying out the concept—which is now central to political science—is ANGUS CAMPBELL ET AL., THE AMERICAN VOTER (1960).

96. See generally DONALD GREEN ET AL., PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS (2002); Richard G. Niemi & M. Kent Jennings, *Issues and Inheritance in the Formation of Party Identification*, 35 AM. J. POL. SCI. 970 (1991).

97. ROSENBLUM, *supra* note 3, at 323 (citing Joshua Freedman, *This Is Your Brain on Politics*, N.Y. TIMES, Jan. 18, 2005, at A25; Benedict Carey, *A Shocker: Partisan Thought Is Unconscious*, N.Y. TIMES, Jan. 24, 2006, at D1).

98. Christopher H. Achen & Larry M. Bartels, *It Feels Like We’re Thinking: The Ration-alizing Voter and Electoral Democracy* (Aug. 28, 2006) (working paper), available at <http://www.princeton.edu/~bartels/papers>.

99. See, e.g., Adam R. Brown, *Are Governors Responsible for the State Economy? Partisanship, Blame, and Divided Federalism*, 72 J. POL. 605, 606 (2010) (finding that voters’ perceptions of economic conditions are colored by partisan identification with or against party in control of executive branch of government).

attributions of political responsibility across levels of government.¹⁰⁰ New research has also shown that independents vote quite reliably for the most ideologically proximate candidate in congressional and presidential elections, whereas strong party identifiers tend to favor their team's nominee even if the opposing candidate is ideologically closer to the voter.¹⁰¹

Yet partisanship *does* contribute to the practice of citizenship, even allowing for the fact that it biases some people's attitudes and beliefs. "Independents" tend not to identify with one another across a broad range of issues. The same is not true of partisans, who—despite differences in race, class, gender, ethnicity, and religion—feel some degree of social solidarity and therefore facilitate social integration.¹⁰² Solidarity and integration are central to an engaged citizenship, where citizens appreciate their stake and role in the broader political community. An independent's vote can always be bought, is always for sale, and is always individual. Parties, by contrast, allow Southerners and Northerners, rich and poor, whites and minorities, and Christians and Muslims to feel that they are connected in a shared or overlapping political narrative. The partisan makes a "good faith effort to stand with a group striving for democratic legitimacy."¹⁰³ The independent is in a tent of her own, a tent that cannot, by definition, include a broad swath of other citizens. And the large tent, ironically enough, has tended to make party identification salient and penetrating.¹⁰⁴

Second, independents' political disengagement sits in tension with the presumptive aspirations of participatory democracy. Consider these findings

100. *See id.* (showing that voters apportion blame for poor economic performance between governor and president on basis of voter's partisan preference for one or the other); Neil Malhotra & Alexander G. Kuo, *Attributing Blame: The Public's Response to Hurricane Katrina*, 70 J. POL. 120 (2008) (showing that party cues cause individuals to blame opposite-party more than own-party officials for poor government response to natural disaster).

101. Stephen A. Jesse, *Testing the Spatial Voting Theory in the 2008 Presidential Election 2* (2011) (working paper), available at <https://webspace.utexas.edu/sjessee/www/research-files/spatial08.pdf> ("While the behavior of independents is strongly consistent with the predictions of unbiased spatial voting, partisans show strong bias toward their party's nominee above and beyond what would be predicted by their ideological position . . ."); Boris Shor & Jon C. Rogowski, *Congressional Voting by Spatial Reasoning* (Aug. 25, 2010) (working paper), available at <http://ssrn.com/abstract=1676841> (finding similar results in study of House and Senate elections). Note that the partisans' tendency to favor their own party's candidate over the opposition candidate does not necessarily mean that they are voting irrationally or against their interests/ideology. Voting for the candidate of a given party is a way of strengthening that party in the legislature, and so long as the voter is ideologically closer to the *median* legislator of her party than the *median* legislator of the opposing party, it can still be rational to vote for a less ideologically proximate own-party candidate over a more proximate opposite-party candidate—assuming there is some degree of party cohesion or control within the legislative chamber.

102. The point developed here is specific to political systems (such as ours) that induce the development of large, bridging political parties, as opposed to systems that provide more-or-less proportional representations for numerous small, narrowly focused parties.

103. Muirhead, *supra* note 3, at 719.

104. *See generally* Sidney Verba et al., *Reply to Reviews*, 91 AM. POL. SCI. REV. 427, 429 (1997).

about independents: they vote in low numbers and know less about the issues.¹⁰⁵ Even if most independents in the United States are, as political scientists tell us, “closet Democrats or Republicans,”¹⁰⁶ as a group they fail to impress from the standpoint of participatory democracy. Surely, we cannot make a political virtue out of lack of participation in the very processes that define a democracy.

Finally, a deliberative ideal of citizenship according to which citizens decide policy consistent with the force of the better argument cannot envision citizens starting with “a view from nowhere.” Good deliberation should involve a point of view, values, and recognition that any policy decision requires pressing hard on one’s beliefs and ideas. Parties set the stage for rooted and meaningful deliberation. As Rosenblum puts it, “Deliberation is likely to be interesting and urgent only when it is about choosing sides. By their regular participation and exhibition of emotional commitment, partisans demonstrate that making decisions and choosing sides is a value.”¹⁰⁷

* * *

Of course, just because we can list three spheres of influence where parties may potentially serve to improve democracy does not mean that parties always function properly—nor does it mean democratic society should continue without refinement from popular democracy. Indeed, the reconciled view we embrace requires an appreciation both for how exercises of popular democracy can improve party democracy and for how party democracy can improve popular democracy, a view we explore in more detail in the next Part. Nothing can guarantee that these two democratic forces will combine for mutual optimization, but blending of party democracy with popular democracy is possible and desirable when it comes to practical institutional design. Part III attempts to construct a framework for complementarity by identifying some recurring inadequacies of party democracy and popular democracy; it then applies that framework to two conversations about democratic design.

105. See CAMPBELL ET AL., *supra* note 95, at 143; JACK C. DOPPELT & ELLEN SHEARER, NONVOTERS: AMERICA’S NO-SHOWS 22 (1999); BRUCE E. KEITH ET AL., THE MYTH OF THE INDEPENDENT VOTER 24, 41–55, 166–67 (1992); André Blais, *What Affects Voter Turnout?*, 9 ANN. REV. POL. SCI. 111 (2006). This is not altogether uncontroversial. Because about 40 percent of Americans now say they are independents (since 2000), it is harder to generalize about them than it once was. See, e.g., Russell J. Dalton, *Review Symposium: Parties, Partisanship, and Democratic Politics*, 7 PERSP. ON POL. 628, 629 (2009) (“[A] larger share of these new independents are politically aware and engaged—the antipartisanship label is less applicable to this group than a postpartisanship label.”). And, as noted earlier, those independents who bother to vote seem to vote in an ideologically coherent fashion. See *supra* note 101.

106. KEITH ET AL., *supra* note 105, at 4.

107. ROSENBLUM, *supra* note 3, at 310. Obviously, for this to work, there must be not only parties but a system of parties. This point is elaborated upon in John Aldrich, *Review Symposium: Parties, Partisanship, and Democratic Politics*, 7 PERSP. ON POL. 621, 625 (2009).

III. COMPLEMENTARITIES

Thus far, we have exposed the conventional story about the contest between party and popular democracy and explained why parties tend to be good for the republic in a manner sufficient to encourage popular democrats to be more circumspect about their too-quick dismissal of party democrats. But we have not yet argued directly for our complementarity vision or given it any more specific contours. That argument unfolds below, as we highlight some recurring design problems within party democracy and popular democracy. Once those internal inadequacies are revealed, the sibling democratic system proves to be a viable design solution to help the other function better. We then apply those design guideposts in two recent contexts that show the usefulness of our complementarity view as well as the pathologies of the conflictual view.

A. Some Diagnoses and Suggestions for Combining the Parties and the People

The discussion in Part II reveals that parties are supposed to be working as a check against one another. Whether it is to moderate policy through “regulated rivalry,” to frame elections in a way that collate salient issues for the electorate into policy packages that are clearly distinguishable, or to furnish deliberating partisans with arguments about the opposition’s shortcomings, the benefits of the American party system depend upon its ability to generate two broad but differentiated coalitions that appeal to the median voter and take turns in power. When the party system fails these tasks—when parties appeal only to narrow factions in their respective bases or when one party enjoys a de facto lock on political power—the stabilizing, legitimating, and informational benefits of party democracy are lost.¹⁰⁸

1. Two Problems with Party Democracy

While federal democracies like the United States with single-member districts and first-past-the-post elections generally yield two-party systems,¹⁰⁹ healthy two-party competition is not assured. Two problems recur. First, the parties may fail to develop competitive, well-tailored brands for purposes of elections in subnational jurisdictions (e.g., states and cities) whose median voter is well to the left or right of the national median or whose issue space (the dimensions of political conflict) differs in some significant respect from the issue space of national politics.¹¹⁰ Many forces can work against the

108. For an analysis of how breakdowns in partisan competition undercut the informational value of the party cue, see Elmendorf & Schleicher, *supra* note 5, at 35–50.

109. See DUVERGER, *supra* note 21, at 217.

110. Elmendorf & Schleicher, *supra* note 5, at 35–50. For the first treatment of the problem, see David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419 (2007).

development of party sub-brands that are tailored to the issue space and electorate of subnational governments. These forces include voter inattention to subnational politics; an uneven geographic distribution of highly affective partisans (by national party ID); election laws, such as voter registration rules, that tend to unify parties across levels of government; and the strategic calculations of party-affiliated actors who aim to move up to a higher level of government through a vertically integrated party organization.¹¹¹ The result may be long runs of one-party dominance in a state or city, with little pressure on that party to govern responsibly. We will call this *competitive breakdown*.

The other recurring problem with American party democracy is *accountability occlusion*, which occurs when constitutional structures obscure who was responsible for a particular act, making it difficult for voters to trace responsibility for the conditions they observe to the party in control of government. For example, separated powers and supermajority decision rules often prevent the legislative majority party from governing without winning the support of at least some minority-party representatives.¹¹² Figuring out which party is more to blame for policies adopted via backroom, cross-party deals is no easy task.

Another source of accountability occlusion is the ballot initiative. The more often law gets made through ballot initiatives, whose sponsors are various and obscure, the less it makes sense for ordinary voters to blame the party in government for policy outcomes the voters do not like.¹¹³ Notably, the ballot initiative has been used in some states essentially to pre-allocate significant portions of the annual budget, diminishing the majority party's authority to make the hard fiscal tradeoffs at the core of governance.¹¹⁴

111. *Id.*

112. Each of the fifty states has one or more separately elected executive officials. (Regarding separately elected "plural executives" at the state level, see *infra* note 115.) And at last count, sixteen required supermajority votes for the passage of certain revenue measures. Bert Waisanen, *State Tax and Expenditure Limits—2008*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/Default.aspx?TabId=12633#othertax> (last visited Nov. 29, 2011). On the federal side, the increasing use of the filibuster in the Senate also transforms the body into a supermajoritarian institution. But the separation of powers, bicameralism, and presentment can also be characterized as a form of supermajoritarian hurdle for all legislation. See John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 712–15 (2002).

113. There is some evidence that cognitive burden of voting on multiple ballot measures undermines citizens' ability to vote correctly in partisan elections for representatives, even in high-profile races for president. See Richard R. Lau et al., *An Exploration of Correct Voting in U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 405 (2008) ("[A] large number of propositions on the ballot evidently distract[s] voters from the presidential election, and at its maximum is associated with an 11 percent decrease in the probability of a correct vote . . .").

114. The extent to which this is a problem is subject to debate. See, e.g., John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 STATE POL. & POL'Y Q. 248 (2005) (challenging the conventional wisdom); BRUCE E. CAIN & GEORGE A. (SANDY) MACKENZIE, PUB. POLICY INST. OF CAL., *ARE CALIFORNIA'S FISCAL CONSTRAINTS INSTITUTIONAL OR POLITICAL?* 26 (2008), available at http://www.ppic.org/content/pubs/report/R_1208BCR.pdf (arguing that "[t]here is a danger of overestimating the effects of

On the executive side, many state constitutions parcel out the power to implement the law among separately elected governors, attorney generals, comptrollers, insurance commissioners, education commissioners, and other officials.¹¹⁵ Christopher Berry and Jacob Gersen have argued that such “plural executive” arrangements can enhance accountability, as they empower voters who are dissatisfied with outcomes in particular policy domains to allocate blame more precisely.¹¹⁶ Voters should not vote out the insurance commissioner if their concerns are with the schools. But plural executives multiply the informational demands on voters—requiring voters to monitor a much larger number of officials—and they interfere with priority setting, coordination, and party-based accountability for policy implementation.¹¹⁷

The competitive-breakdown and accountability-occlusion problems are deep and multifaceted. They are also related: When one party has a lock on government, it faces little pressure to honor the concerns of the median voter. The only elections that will matter are the dominant party’s primaries, and primary elections are low-information, low-participation affairs that do little for democratic responsiveness.¹¹⁸ If the majority party faces little pressure to govern well or responsibly, ordinary citizens will naturally favor structural checks on its ability to govern¹¹⁹—hence the ballot initiative, plural executives, term limits, budgetary set asides, and supermajority-decision rules for revenue bills.¹²⁰

procedural reform and of underestimating the degree to which the underlying problems are political,” and that “[i]n the end, rules do not determine budgets; voter preferences do”).

115. On the plural executive see Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 49–50 (forthcoming); Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696 (2009).

116. Berry & Gersen, *supra* note 115, at 1405.

117. See Calabresi & Terrell, *supra* note 115, at 1727–28; Rodriguez, *supra* note 115. See also Vikram David Amar, *Lessons from California’s Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469 (2009) (chronicling conflicts between, inter alia, a Republican Governor and a Democratic Controller during California’s fiscal crisis).

118. On the limits of primary elections as a source of democratic responsiveness, see Elmendorf & Schleicher, *supra* note 5, at 29–31, and sources cited therein.

119. They may also support reforms that diminish the party’s control over the nomination of candidates, such as the “top 2” nonpartisan primaries recently adopted in Washington and California (on which see *Top 2 Primary Frequently Asked Questions*, WASH. SECRETARY STATE, <http://wei.secstate.wa.gov/osos/en/Pages/Top2PrimaryFAQ.aspx> (last visited Nov. 29, 2011); *California Proposition 14 Top Two Primaries Act*, BALLOTPEIDA, [http://ballotpedia.org/wiki/index.php/California_Proposition_14,_Top_Two_Primaries_Act_\(June_2010\)](http://ballotpedia.org/wiki/index.php/California_Proposition_14,_Top_Two_Primaries_Act_(June_2010)) (last visited Nov. 29, 2011)).

120. New research by Robert McGrath shows that the frequency of ballot initiative use is strongly and positively correlated with uncompetitive elections for representatives, conditional on ideological divergence between citizens and their representatives, suggesting that voters turn to the initiative when the normal forces of electoral competition are not working properly. See Robert McGrath, *Electoral Competition and the Frequency of Initiative Use in the U.S. States*, 39 AM. POL. RES. 611 (2011).

2. *How a Targeted Injection of Popular Democracy Could Help Cure the Ills of Party Democracy*

The competitive-breakdown and accountability-occlusion problems are not going to be solved by simply adding “more popular democracy” to the mix. Indeed, as noted above, frequent use of the ballot initiative can aggravate accountability occlusion by making it less certain whether the majority party is responsible for policies the voter dislikes. But, against the conventional narrative of opposition between party and popular democracy, a careful integration of popular democracy into party governance could go some distance toward ameliorating the accountability occlusion and competitive breakdown problems. The key is to recognize, first, that referendum calls *by parties* can be used as substitutes for more conventional checks on overreaching by the legislative majority and, second, that party-initiated votes on direct legislation would help to clarify what the parties stand for.

Consider how a dose of popular democracy could benefit those states that require legislative supermajorities to pass certain types of legislation. Imagine that the state instead permitted the majority party to adopt such measures unilaterally, provided that the bill also passed a referendum vote. The popular-approval condition would press the majority party to heed the concerns of voters in the middle of the political spectrum—even if, owing to competitive breakdown, that party does not fear losing its majority status in the next election.¹²¹ The referendum performs a checking function similar to the one more familiarly associated with supermajority or presentment requirements.¹²² And, of central importance for present purposes, substituting the referendum for a supermajority-decision rule would clarify which party was responsible for the policy adopted. If voters do not like the policy in retrospect, they can vote for the other team in the next election. A state that replaces its supermajority-vote requirement with a party-initiated referendum substitutes an accountability-enhancing check for an accountability-occluding one.

121. This assumes that, in the run of cases, (1) the voters who turn out in the referendum election are representative of the electorate as a whole (more likely if the referendum is held in connection with a general election than a primary); and (2) voters in the aggregate understand the proposal well enough to express meaningful opinions at the ballot box. These conditions do not have to be satisfied perfectly or in every case, however. Even if they hold only probabilistically, the majority party is still likely to “check itself” in anticipation of the referendum hurdle.

122. The checking functions are similar in that they make it harder for a well-organized faction in the legislature to give effect to the interests of the few or the ideologies of the extremes. But of course there are differences too: to the extent that the opposition party represents minority interests, its “check” is likely to better protect those interests than the check of the median voter in a referendum election. “Checking” performed by an executive or an opposition party in government is also more likely to reflect strategic electoral calculations, whereas checking performed by the electorate is more likely to reflect the popular passions of the moment. More considered popular checks may be achieved through dual-referendum requirements (spaced out over a period of time) of the sort that Bruce Ackerman recommends for constitutional amendment. See Bruce A. Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 666–68 (2000).

Going a step further, state constitutional reformers should also consider allowing *each* major-party legislative caucus to put its top priority to a referendum vote (say, one bill per legislative session).¹²³ The ballot title and summary for each measure should describe it as the party's top legislative priority. Voters would decide whether one, both, or neither measure becomes law. This procedure would help to clarify what each party stands for with respect to the government in question, while also pushing the party coalitions to frame and modulate their agendas in ways that appeal to the median voter. For a long-out-of-power minority party, the opportunity to put its priorities directly to a popular vote could be a critical first step toward developing a competitive, state-specific brand.¹²⁴

It might seem odd or even undemocratic to give a minority party the opportunity to effectuate its objectives without first winning a majority of seats in the legislature, but that objection rests on an improperly static and formalistic understanding of "democracy." *Healthy* democracy requires more than the election of lawmakers followed by the cobbling together of fifty-one-percent coalitions to pass bills. Healthy democracy involves representatives who coalesce into ideologically coherent governing coalitions that voters can see and understand; healthy democracy gives voters a sense of where their representative stands vis-à-vis the governing and principal opposition coalitions; and healthy democracy requires an opposition coalition that has a realistic shot of winning power if the majority-party proves corrupt, incompetent, or insensitive to the concerns of the median voter. If the major opposition party is a rump, so long out of power that voters have no experiential sense of what it stands for or would do if returned to power, democracy will suffer. Reforms that help that party to credibly communicate what it stands for, and that encourage the party to adopt positions that are marketable to the median voter, are democracy enhancing.

The "it's not democratic" objection to giving the minority party direct access to a referendum ballot looks even weaker when one considers how the states limit ballot access for purposes of voting on initiatives. Formally, initiative proponents are required to gather the signatures of a certain number of registered voters, often defined as a percentage of the citizens who voted in the last gubernatorial election.¹²⁵ In practice, gathering signatures requires

123. This suggestion is also advanced in Elmendorf & Schleicher, *supra* note 5, at 59–60.

124. As Elmendorf & Schleicher observe, *id.* at 48, a long-out-of-power party faces a credible commitment problem in trying to build a competitive brand at the state or local level, especially if the party's national brand is disfavored in the locality. The party must convince local voters that it will in fact do what it says it will do if returned to power. Giving the party a limited opportunity to "speak when it counts"—for example, authority to put a measure on the ballot in its name—is one way to enable the party to build a local reputation based on deed as well as word.

125. *Initiative Petition Signature Requirements*, NAT'L CONF. STATE LEGISLATURES (Apr. 7, 2010), <http://www.ncsl.org/default.aspx?tabid=16585>.

money—and only money.¹²⁶ Professional firms gather the signatures for ballot-initiative proponents, and they charge for their services. If anyone willing to put up several million dollars can have a law of his drafting put to a popular vote on enactment, it is hard to see the “democratic” objection to allowing the principal opposition caucus in the legislature—which after all consists of lawmakers who have actually won elections—to put a measure before the people as well.

One might also object to the legislative-caucus referendum on the ground that it is simply unnecessary. If leaders of the majority or minority party have been unable to enact their top priority reforms through the ordinary legislative process, they still can, in their capacity as citizens, circulate petitions and qualify the measure for the ballot as initiated legislation. But there is a big difference between putting a measure on the ballot by citizen initiative and doing so under a formal procedure whereby each party declares its top priority and puts the corresponding reform on the ballot—a ballot that *labels* the measure as the party’s top priority. Ordinary, low-information voters in initiative and referendum elections frequently know little about the measures on which they are voting apart from what they learn from the ballot itself.¹²⁷ The fact that actors affiliated with the California Republican Party’s legislative leadership, for example, put Proposition *X* on the ballot may be lost on many voters unless the ballot says as much. Furthermore, a ballot label which notes such an affiliation between the measure and a party is obviously less informative than one which declares that the measure is the party caucus’s top legislative priority. Finally, the establishment of a *de jure* procedure for the party caucuses in the legislature to put their top priority to a popular vote on enactment would probably result in new political conventions, internal to each party, for deciding and declaring priorities. The corresponding debate and give-and-take would itself help educate voters about the parties-in-government.

3. *Improving Popular Democracy Through an Injection of Party Democracy*

Party democracy is not the only thing that can be improved by its sibling democratic modality. Popular democracy routinely suffers difficulties that party democracy is well suited to ameliorate. As we have noted, initiative and referendum elections are low-information environments. Popular democracy relies on the common sense of the electorate, but that common sense must be

126. Elizabeth M. Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 TEX. L. REV. 1845, 1849–54 (1999).

127. On ballot wording effects, see, for example, BOWLER & DONOVAN, *supra* note 27, at 55–59 (finding disparate effect of self-interest on respondents’ position on a school voucher ballot initiative, depending on whether respondents were provided with the proposition’s ballot description and name, or the name alone); Craig M. Burnett & Vladimir Kogan, *The Case of the Stolen Initiative: Were the Voters Framed?* (Sept. 10, 2010) (working paper), available at <http://ssrn.com/abstract=1643448> (using survey experiments to demonstrate effect of question wording on public support).

applied against a background of meaningful information and policy knowledge. Interest groups are routinely trying to fill the knowledge gap, and there is a great deal of hope that heuristics and proxies can give citizens the information they need to make sound decisions in direct democracy.¹²⁸ But parties furnish the best, most broadly relevant cues¹²⁹—the use of which is rarely facilitated by current direct-democracy systems.

Yet these direct elections could and probably should make greater use of party signals. Specifically, the party organizations, or the party-caucuses in the legislature, could be authorized to make ballot-printed endorsements of initiatives that citizens have qualified for the ballot.¹³⁰ Just as the “D” or “R” next to a candidate’s name helps low-information voters decide how to vote, so too could the indications “State Democratic Party recommends YES” and “State Republican Party recommends NO” next to the title and summary of a ballot initiative.¹³¹ The party labels would certainly convey more reliable information than the ballot summary itself, which is often crafted by a partial government official and written in a manner that defies comprehension by the less-well-educated members of the electorate.¹³²

128. For a recent and fairly optimistic literature review arguing that the weight of the evidence supports the view that citizens perform pretty well in direct democracy, see Maduz, *supra* note 56, at 3–4. For a more skeptical take, see Elmendorf & Schleicher, *supra* note 5, at 31–34. Competence can be measured in many ways, and cues certainly can be misused by the electorate. See, e.g., Arthur Lupia & Richard Johnston, *Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums*, in REFERENDUM DEMOCRACY, *supra* note 30, at 193–95; Cheryl Boudreau, *The Market for Political Information: How the Consumption of Information Affects Citizens’ Decisions* 13, 22–25 (Jan. 17, 2011) (working paper), available at <http://ssrn.com/abstract=1742556> (showing that subjects in laboratory experiments rely on superficial opinion polls, even when given more probative cues).

129. See *supra* text accompanying notes 95–99.

130. This suggestion is also advanced in Elmendorf & Schleicher, *supra* note 5, at 58. It is probably better for states to delegate responsibility for assigning the party label to the parties’ legislative caucuses, rather than to the party organization as such. The “party brand” as the public sees and understands surely has much more to do with the behavior and choices of party-affiliated legislators than party-organization insiders. Cf. Jonathan Woon & Jeremy C. Pope, *Made in Congress? Testing the Electoral Implications of Party Ideological Brand Names*, 70 J. POL. 823, 825 (2008) (showing that roll-call votes taken by members of Congress affect voter perceptions of party brands); Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1766–70 (1993) (commenting on obscurity of major parties’ organizational leadership, in contrast to their legislative leadership). However, the party organization might have a viable First Amendment claim against a state law that delegated to the party caucus in the legislature authority to speak in the party’s name. Cf. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989) (deeming state interference with “internal organization” of political parties presumptively unconstitutional). A First Amendment challenge would probably fail, however, if the ballot clearly stated that the endorsement was made by the party’s legislative caucus. Cf. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 458–59 (2008) (rejecting First Amendment challenge to primary elections with candidate self-labeling of party affiliation, on ground that plaintiffs had not shown that reasonable voters would be confused about who assigned the label).

131. It will also help voters who know something about the initiative measure in question to develop a better understanding of their state parties, and the clearer the voter’s picture of the state parties, the less risk of competitive breakdown.

132. For a state-by-state rundown of who drafts the ballot title and summary, see *Preparation of a Ballot Title and Summary*, NAT’L CONF. STATE LEGISLATURES (Jan. 2002),

The parties also have important but as-yet-unexplored roles to play in the deliberative forums at the vanguard of popular democracy. Consider jury decision making: there, citizens make decisions by adjudicating disputes between zealous advocates, not in a vacuum or through mere shortcuts.¹³³ The zealous advocates are the ones who set the agenda, frame the debate, and gather relevant and persuasive evidence upon which decision makers express their ultimate judgments. It is hard to see how a “citizens assembly” or “policy jury” comprised of lay citizens selected at random could possibly arrive at a democratic decision or recommendation without some outside agent setting the agenda or framing the debate. Rather, it is more likely that the body would collapse in disarray or that a handful of charismatic or clever members who organize from within the body will capture it.

The agenda-setting problem in an assembly of lay citizens is not unlike the agenda-setting problem faced by legislatures. Legislatures solve the problem principally through parties, and the organization of elections on party lines legitimizes this solution. The political parties could play a somewhat analogous role with respect to deliberative bodies comprised of randomly selected citizens. The deliberating citizens need not be organized into “party caucuses” from within, but the parties, or actors affiliated with the parties, could be used to winnow the field of options for the citizens to consider and to present the initial set of arguments and witnesses for and against the alternatives.

In many of the experiments to date with deliberative citizen bodies, these agenda-setting and information-provision functions have been performed by putatively neutral experts, usually academics.¹³⁴ But if citizen bodies are to be delegated important, real-world responsibilities—as under California’s recently adopted model for redistricting by citizens commission¹³⁵ and as under various proposals for the use of citizen bodies to draft political or constitutional reforms that would then go to a referendum vote—then academics will not and should not continue to perform this role. “Neutral expertise” too often cloaks unspoken agendas and interest groups who feel—or pretend to feel—that their perspective was given short shrift are sure to attack the process as illegitimate on grounds of bias or exclusion.

<http://www.ncsl.org/default.aspx?tabid=16586>. On language complexity in ballot summaries, see Shauna Reilly & Sean Richey, *Ballot Question Readability and Roll-Off: The Impact of Language Complexity*, 64 POL. RES. Q. 59 (2009).

133. See ROSENBLUM, *supra* note 3, at 148.

134. See, for example, the influential “deliberative polling” exercises conducted by Jim Fishkin and his collaborators. CENTER FOR DELIBERATIVE DEMOCRACY, <http://cdd.stanford.edu> (last visited Nov. 29, 2011).

135. See *California Proposition 11, Creation of the California Citizens Redistricting Commission*, BALLOTEDIA, [http://ballotpedia.org/wiki/index.php/California_Proposition_11,_Creation_of_the_California_Citizens_Redistricting_Commission_\(2008\)](http://ballotpedia.org/wiki/index.php/California_Proposition_11,_Creation_of_the_California_Citizens_Redistricting_Commission_(2008)) (last visited, Nov. 29, 2011).

The simplest, most even-handed, and most legitimate way of both limiting the universe of policy options for a citizen body¹³⁶ and of divvying up interest-group access is to give the major parties the central role and to allow them “equal time”¹³⁷ to perform agenda-setting. In the initial presentation of the party’s “case” to the citizen body, each party, as a coalition of interests, can decide for itself who should be able to speak, about what, and for how long. Some interests are sure to be unhappy with the outcome, but there will be no one to blame but the party with which they are affiliated. Further, given the powerful place of parties in most citizens’ political self-understanding, a deliberative process that gives equal weight and respect to the citizen’s party is one that the citizen is likely to regard as legitimate. Parties, not academic grandees, are therefore best positioned to legitimize the deliberative process. Once the parties accept the mantle of co-equal orchestrator of the deliberative process, their ability to discredit the outcome after the fact will be much reduced. Party leaders can reject the outcome, of course, but this will be less powerful than a rejection coupled with an indictment of the process itself.

In summary, popular democracy could be used to strengthen party democracy by clarifying what the parties stand for and who is responsible for a particular legislative action. This may be achieved by substituting referendums for supermajority-vote requirements and by authorizing the major-party caucuses in the legislature to put their top legislative priorities to a referendum vote. Parties could be used to strengthen mass popular democracy by educating voters who would otherwise be in the dark about the likely merits of pending ballot initiatives (i.e., with ballot-printed party endorsements).¹³⁸ And parties could strengthen the deliberative, microcosmic version of popular democracy by assuming primary responsibility for the initial option-winning, agenda-setting, and information-provision needs of the citizen body.

Obviously these are only suggestions. They do not exhaust the potential complementarities between party and popular democracy, and they do not prove that the complementarities outweigh the disadvantages of familiar “mixed” systems (e.g., the accountability occlusion that may result from extensive use of the ballot initiative). But hybrid democracy is here to stay in many of the American states,¹³⁹ and we might as well learn to make the best of

136. For purposes of this discussion, we assume that the enactment convening the citizen body to some extent limits the policy options open to the body, but leaves open a sufficiently large number of options for further winnowing to be necessary. Obviously the more the enactment focuses and limits the body, the simpler will be the body’s agenda-setting problem. But for any number of reasons, both sincere and strategic, good-government reformers may not wish to strictly enumerate and limit *ex ante* the options that the body may consider. *Cf. infra* text accompanying notes 171–173 (discussing proposal for a “limited” constitutional convention for California).

137. Or time in proportion to their respective vote shares in recent jurisdiction-wide elections.

138. These endorsements would also help to better define the parties in the eyes of those voters who know something about the substance of the initiatives.

139. *See supra* note 55.

it with a set of principles for sound institutional design. This paper is one small step in that direction.

Our understanding of the conventional narrative of opposition between party and popular democracy and our thinking about potential complementarities that are too often overlooked because of the conflict between party democrats and popular democrats took root during two policy conversations in which we were fortunate to be involved. The remaining sections of this Article explore applications of complementarity in real life reform proposals and show that the problems with which this Article has been concerned are not just of academic interest, but rather have a large and immediate bearing on governance and constitutional reform in California and elsewhere. Our complementarity perspective offers a way of moving beyond the stale debate over whether popular or party democracy is “good” or “bad,” or “better” or “worse” than its sibling democratic modality.

B. Using Popular Democracy to Break Budget Stalemates

The start of fiscal year 2010 was a particularly challenging time in state legislatures. Revenues were declining precipitously because of the economic recession, and nine states began their fiscal years without spending plans in place. Failing to agree on a budget (again a problem in California, Minnesota, New York, and Pennsylvania for the start of fiscal year 2011),¹⁴⁰ however, is not just traceable to tough economic times. Since 2002, Arizona, California, Connecticut, Illinois, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Wisconsin have failed, at least once, to close the deal on a budget on time. Government shutdowns resulted on six occasions, and California, a routine and repeat offender, has been reduced to issuing IOUs to its creditors in place of hard currency.¹⁴¹

The costs of late budgets are enormous: lost wages for state employees, increased operational costs for extended legislative sessions, legal costs dealing with frustrated creditors, credit rating ramifications, increased debt costs, lost revenues due to office closures and furloughs, and tremendous loss of public confidence, a commodity that is hard to price but impacts every aspect of state government.¹⁴²

140. The National Conference of State Legislatures tracks state budget timeliness and its website has a committed section for budget and tax issues that is tremendously informative about every state's policies and practices. See *Issues and Research*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/Default.aspx?TabID=756> (last visited Nov. 29, 2011).

141. Elmendorf & Leib, *supra* note 14. We drew our data from *Late State Budgets*, NAT'L CONF. STATE LEGISLATURES (Aug. 27, 2010), <http://www.ncsl.org/default.aspx?tabid=17823>.

142. See *id.*; MARC J. HETHERINGTON, WHY TRUST MATTERS: DECLINING POLITICAL TRUST AND THE DEMISE OF AMERICAN LIBERALISM (2006).

Divided government can frustrate budget negotiations, especially in states with highly polarized parties. Negotiations can be trickier yet in states with direct democracy, as citizens over the years have deployed the ballot initiative to protect then-favored programs, curtailing legislators' freedom to make fiscal tradeoffs.¹⁴³ Add to that the constitutional rules in many states requiring supermajoritarian agreement for budgets and/or revenue measures: two states virtually always require annual supermajority votes on budgets,¹⁴⁴ six others require supermajoritarian agreement under certain conditions,¹⁴⁵ and sixteen subject tax measures to supermajority requirements.¹⁴⁶ The potent mix of polarization, ballot-box budgeting, constitutionally driven supermajority vote requirements, and the veto power of the governor under conditions of divided government, results in treacherous budget negotiations with real costs on the polity.

A traditional party man would say that the obvious solution is to do away with the ballot initiative, eliminate supermajority requirements for budgets and revenue measures, remove the fiscal set-asides from state constitutions, and let the majority party *govern*. But that option is infeasible. Voters like the ballot initiative and distrust their elected lawmakers. Measures that empower the party in government at the expense of "the people" are hard sells, and there is no guarantee that party-empowering reforms would, by themselves, restore robust two-party competition.¹⁴⁷ A quick look at California reveals the depth of these very difficult problems.¹⁴⁸

In 2010, California reformers did manage to terminate by ballot initiative the state's supermajority requirement for passing budgets—but only by packaging that reform with a populist measure to dock legislators' pay for every day that the budget is late. And, pointedly, the initiative did not eliminate the supermajority requirement for revenue measures. Indeed, at the very same election, Californians passed two other initiatives that further tightened the noose on the revenue side.¹⁴⁹

143. Although much is made of this obstacle to budget agreement by partisans and the mass media (and some scholars), some political scientists have challenged the conventional wisdom. See Matsusaka, *supra* note 114.

144. The two states are Arkansas and Rhode Island. See *Supermajority Vote Requirements to Pass the Budget: A Legisbrief*, NAT'L CONF. STATE LEGISLATURES (Oct. 2008), <http://www.ncsl.org/Default.aspx?TabId=12654>. California was on this list until November 2010, when voters did away with the supermajority requirement for budget agreement in Proposition 25. For fiscal year 2011, California's budget was one hundred days late; it passed on October 8, 2010. The tardy budget ended up helping those who wanted to undo the supermajority requirement.

145. The states are Connecticut, Hawaii, Illinois, Maine, Mississippi, and Nebraska. *Id.*

146. Waisanen, *supra* note 112.

147. See Elmendorf & Schleicher, *supra* note 5, at 35–51 (examining barriers to effective partisan competition at subnational levels of federal systems).

148. Both houses of the California legislature have been controlled by Democrats since 1996. *Table 411—Composition of State Legislatures, by Party Affiliation*, U.S. CENSUS BUREAU, <http://www.census.gov/compendia/statab/2011/tables/11s0411.xls> (last visited Nov. 29, 2011).

149. These were Proposition 26, which expanded the reach of the supermajority requirement

The distrust of government which underwrote these measures is perhaps not surprising, given how difficult California's voters have made it for their elected officials to govern, given the rhetorical battering that "political insiders" take in ballot initiative campaigns, and given the partisan polarization of California's legislature.¹⁵⁰

The problem of polarization merits further remark, as it relates in interesting ways to the institutional questions at the heart of this Article. California has the most polarized state legislature in the nation.¹⁵¹ The median Democratic representative is far to the left of the state's median voter—who is quite liberal relative to the national median voter¹⁵²—and the median Republican legislator even farther to the right. The extreme polarization of California's legislature is a predictable outgrowth of California's supermajority requirement for the passage of revenue bills and the bipartisan gerrymander of its legislative districts.¹⁵³ Because of the gerrymander, a huge swing in public opinion would be necessary for the minority party (the Republicans) to gain a significant number of seats.¹⁵⁴ And the supermajority requirement for revenue

for revenue measures, and Proposition 22, which prevented the legislature from allocating certain revenue streams designated for the use of local governments. See *California Statewide General Election Voter Guide, Proposition 26*, CAL. SECRETARY STATE, <http://www.voterguide.sos.ca.gov/propositions/26> (last visited Nov. 29, 2011); *California Statewide General Election Voter Guide, Proposition 22*, CAL. SECRETARY STATE <http://www.voterguide.sos.ca.gov/propositions/22> (last visited Nov. 29, 2011). One of us has argued that the enactment of Proposition 26 may have been due to voter confusion, but the confusion concerned a subtle modification to the existing supermajority requirement for taxes, not the primary purpose of Proposition 26, which was to extend the supermajority requirement to most "fees" as well as taxes. See Chris Elmendorf, *Voter Confusion and the Single-Subject Rule: Prop. 26 as a Test-Case-in-Waiting, Part One in a Two-Part Series*, FINDLAW (Dec. 16, 2010), http://writ.news.findlaw.com/commentary/20101216_elmendorf.html.

150. For a brief review of the literature on the effects of initiative use on trust in government and citizens' sense of political efficacy, see Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 117, 134–35 (Guy-Uriel E. Charles et al. eds., 2011).

151. Boris Shor, All Together Now: Putting Congress, State Legislatures and Individuals in a Common Ideological Space to Assess Representation at the Macro and Micro Levels 26 fig.11 (Jan. 20, 2011) (working paper), available at <http://ssrn.com/abstract=1697352>.

152. *Id.*

153. On the gerrymandering of California's legislature, see DOUGLAS JOHNSON, ROSE INST. STATE & LOCAL GOV'T, COMPETITIVE DISTRICTS IN CALIFORNIA: A CASE STUDY OF CALIFORNIA'S REDISTRICTING IN THE 1990S (2005), available at http://www.claremontmckenna.edu/rose/publications/pdf/rose_ca_case_study.pdf (comparing the competitiveness of California's districts in the past with the 2004 election, where no districts changed hands). In 2008, California, by ballot initiative, delegated responsibility for drawing electoral districts to an independent commission of lay citizens. If the commission's initial maps following the 2010 census are any indication, this reform will result in more competitive districts even though "competition" was not among the *de jure* criteria that the commission is charged with pursuing. Eric McGhee, *Redistricting Commission Map Looks More Competitive*, S.F. CHRON., June 19, 2011, available at <http://www.ppic.org/main/commentary.asp?i=1126>. For some recent and diverse reflections and evaluations of the redistricting commission, see *How Will Redistricting Affect Constituents?*, ZÓCALO PUB. SQUARE, <http://zocalopublicsquare.org/thepublicsquare/2011/06/14/how-will-redistricting-affect-constituents/read/chats> (last visited Nov. 29, 2011).

154. Most (but not all) recent empirical work on gerrymandering and polarization finds that

bills greatly diminishes the Republicans' incentive to develop a moderate state-party brand, one with appeal to the state's median voter. So long as the Republicans hold more than one-third of the seats in the legislature,¹⁵⁵ they can block the tax increases their core constituencies so detest. The bottom line is that the California Republican Party has had little to gain from pivoting to the middle, which in turn means that Democratic lawmakers can career off to the left without jeopardizing their legislative majority. And so it is that California ends up with the most polarized legislative caucuses in the nation.

Yet, as usefully illustrative as California is in its extremity, the problems in California are by no means unique.¹⁵⁶ When each party takes an extreme and opposite position, far from that of the median voter, how can the median voter keep policy from shifting too far in one direction? Her tools of control include separated powers,¹⁵⁷ supermajority-decision rules,¹⁵⁸ and the ballot initiative.¹⁵⁹ Conventional advocates for party democracy surely like none of this, for these practices and requirements occlude accountability.

Observe the paradox: Failures of the party system—namely extreme polarization and an uncompetitive opposition party—create pressure for external checks on party-based governance. But these checks make it hard for the party system to right itself, because they occlude accountability even as they slow the majority party's efforts to fully implement an agenda that disregards the median voter. These problems of governance (in California and elsewhere) circa 2010 call out for the type of party-enhancing alternative check suggested above—that is, substitution of a popular-approval mechanism for conventional supermajority-vote requirements.

Writing in the *New York Times* and the *San Francisco Chronicle*, we urged California and other states facing budget stalemates to use ordinary citizens to break deadlocks. We sketched two models, one relying on a small deliberative body of lay citizens chosen at random and the other on the mass referendum.

gerrymandering is not to blame. However, this work does not consider effects of gerrymandering on party-level strategy and, by extension, on how a "typical" Democrat or Republican legislator would represent a district with a given distribution of voters. For citations and further discussion, see Christopher S. Elmendorf & David Schleicher, *Districting for a Low Information Electorate*, 121 *YALE L.J.* (forthcoming 2012).

155. Which they have been able to do in the current gerrymandered environment.

156. See generally Pildes, *supra* note 93.

157. Cf. Joseph Bafumi et al., *Balancing, Generic Polls and Midterm Congressional Elections*, 72 *J. POL.* 705 (2010) (showing that strategic voting by ideological moderates explained mid-term "swing" away from the President's party in congressional elections). At the state level, the relatively rich informational environment of gubernatorial elections means that minority-party candidates can sometimes win the race for governor—overcoming the negative associations of their party brand—even if their party has no realistic chance of winning a majority of the seats in the legislature. See Elmendorf & Schleicher, *supra* note 5, at 56.

158. When the supermajority vote requirement exceeds the majority party's share of legislative seats, the majority party will have to compromise with the minority party to pass bills.

159. Which, in principle, enables the median voter to end-run an unresponsive legislature.

The first model would keep the basic supermajority requirement for revenue measures in place, but augment it with a fallback procedure in the event the legislature fails to adopt a balanced budget on time (most likely due to a partisan impasse).¹⁶⁰ A group of randomly selected citizens—at least one from each legislative district—would be convened to resolve the stalemate. Prior to the meeting of this body, two proposed budget/tax packages would be produced, one by the Democratic caucus in the legislative branch and one by the Republican caucus.¹⁶¹ The proposed budgets would be finalized prior to the random citizen selection process, to ensure their tailoring to the projected preferences of the median voter rather than to those of any specific person randomly chosen for the citizen budget assembly.

Over a two-week period, the budget assembly of lay citizens would hear from and question government leaders, policy experts, interest groups, and other supporters and critics of the proposed budgets, but the agenda, order of presentations, and witnesses would be in the hands of those proposing the budgets, mimicking an adversarial proceeding with zealous advocacy on both sides. The citizens would then deliberate among themselves and vote by secret ballot on which of the budgets to adopt. The vote would take place on the budgets as originally submitted; neither the citizens nor lawmakers would be

160. This short sketch draws liberally from our first op-ed on the subject. See Elmendorf & Leib, *supra* note 14.

161. In our earlier version of this proposal, we included the governor as one of the relevant entities that would draw up a proposed budget for the citizen budget assembly to consider. In the refined proposal here, we simplify the citizens' choices even more, giving them only two budget packages to consider. In part, we think the sheer peculiarity (from a partisan standpoint) of the governor in office in California during the last two failed budget negotiations made us think that third choice was necessary. Schwarzenegger came to power without having to go through a primary process in the Republican Party, so his ties to the Republican base are thinner than we would expect for any future governor that comes to power the traditional way. See generally Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004). Whether changes in California's primary system will affect the types of people who fill that office—and whether it will have any long-term effect on party unity, sufficient to make it necessary to add the governor's proposed budget for the assembly's consideration—is anyone's guess.

We also concede that there is additional—and not obviously necessary—complexity when citizens have to choose among three budgets that we avoid if we keep it to two: With three options, there is a difficulty in aggregating assembly members' votes so as to make sure the most preferred budget prevails and the most disfavored budget fails. Since it is, of course, possible that none of the three budgets would win a clear majority if each citizen voter were given only a single vote to cast, voting design must be considered carefully. This is not the place to work through the details but it suffices to note that these kinds of decisions with more than two options do get made routinely (with "instant runoff voting"). We suspect that a version of the Coombs Rule, under which the option with the most "last place" votes is eliminated first, would work pretty well for adjudicating between three budgets. Cf. Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (a.k.a. the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUD. 641 (2004) (demonstrating advantages of Coombs Rule for selecting Condorcet winner). Thanks to Mike Gilbert for forcing us to think this through. For a new book exploring all the complications within democratic voting systems, see GEORGE G. SZPIRO, NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT (2010).

able to make amendments.¹⁶² The winning budget—including its revenue measures, if any—would become law.

Lay citizen decision making is generally reliable when citizens, serving like jurors, adjudicate among a small number of discrete choices.¹⁶³ Americans are reasonably comfortable with lay citizens making such choices—as evidenced by the popularity of both the jury and direct democracy, where ordinary citizens answer “yes” or “no” to exogenously formulated questions. Accordingly, using citizen assemblies in this way ought to be inoffensive to our political culture as long as the citizens are not building the budget from the bottom up.¹⁶⁴

There is also a second option.¹⁶⁵ The state constitution could be amended so that, during budget negotiations, either major-party legislative caucus could declare an impasse that would trigger a referendum vote, in which all citizens in an act of mass democracy get to vote for a budget. The referendum ballot would contain two budgets—one from each major party—and the budget receiving the greater number of votes would become law.

We do not have strong preferences as between the mass and deliberative mechanisms for breaking budget stalemates. The deliberative approach might do more to encourage the parties to wrestle with long-term and technically complex issues and to propose actuarially honest budgets as opposed to budgets that

162. This, again, is to prevent the budget from being “tailored” to the idiosyncratic and personal concerns of the particular citizens chosen by lot to serve on the budget assembly. It would also allow the process to be concluded quickly.

163. NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES* 340 (2007) (“[I]n systematic studies spanning five decades, we find that judges agree with jury verdicts in most cases. . . . In both civil and criminal trials, the disagreement is not related to the complexity of the trial evidence, as would be expected if juries misunderstood law and evidence that in contrast legal experts correctly comprehended.”). For an excellent collection of articles about citizen competence in the more general context of designing participatory democratic institutions, see *CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS* 147 (Stephen L. Elkin & Karol Edward eds., 1999).

164. The mechanics of the bottom-up participatory budgeting in Porto Alegre are described in detail in GRET & SINTOMER, *supra* note 15, at 26–61. It is worth mentioning that although Porto Alegre’s experiment with participatory budgeting seems more “popularly” driven than our more party-respectful version, that is not the only way to look at it. Notably, participatory budgeting in Porto Alegre is not actually legalized and citizens cannot themselves enact law. *Id.* at 59. The first exercise of participatory budgeting had no effect on spending either. *Id.* at 53. Our citizen budget assembly would not suffer from these flaws, as it would find its source in the law and have the power to enact policy. Moreover, the drive to “legalize” the participatory budgeting in Porto Alegre—which has been in effect since 1989—was inspired in large measure to protect it if the city mayor’s office changed hands to a political party that was less enthusiastic about participatory budgeting. It was after all the Worker’s Party (PT) that put the experiment into effect when it came to power in 1988 and that supports it through the executive powers that the party has at its disposal. *Id.* at 59. The resistance to legalization came from a fear that the law “might subordinate the participatory structure to the legisla[tur]e.” *Id.* Finally, although a superficial look at the mechanics of budgeting in Porto Alegre shows a strong form of popular democracy, the city council in Porto Alegre actually performs governmental feasibility studies to check citizen decision making. *See id.* at 51. Porto Alegre is a good example of complementarity rather than conflict—and therefore remains an inspiration and a nice model to learn from.

165. This is the *San Francisco Chronicle* proposal. Elmendorf & Leib, *supra* note 14.

make for good sound bites but are filled with gimmicks.¹⁶⁶ Yet the deliberative process is at some risk of being skewed by nonrandom self-selection of invited participants,¹⁶⁷ by the idiosyncratic views of particular charismatic members, or even by quid pro quo corruption. It is easier to buy off a handful of citizens than the hundreds of thousands likely needed to swing a statewide election. Which process would yield more fiscally responsible and ideologically congruent outcomes is unclear. For present purposes, however, the commonalities between the two schemes are more important than the differences.

Each proposal substitutes a popular-approval mechanism for a legislative supermajority requirement (or, potentially, bicameralism and presentment requirements).¹⁶⁸ This should help to restore party-based accountability for critical budgetary decisions. The adopted budget will be *either* the Democratic budget *or* the Republican budget, not some mishmash of compromises which even the most attentive of voters is unable to untangle for purposes of assigning party-based responsibility. Down the line, dissatisfied voters would know exactly whom to reward or to fault when they go to the polls at the next election. The referendum campaign would also educate voters about the state parties. This kind of voter education is essential if the parties are to develop distinct, competitive state-level brands that are responsive to median voter preferences. Furthermore, the popular approval mechanism should provide budget proposers with an incentive to take seriously the concerns of the median voter rather than catering exclusively to their parties' respective bases.

Note also that in the deliberative version of our proposal, the parties play the critical function of winnowing options, setting the agenda, and providing information. Parties, of course, cannot be the only ones weighing in: the nonpartisan Legislative Analyst's office should be allotted some time before the assembly. This would be a natural extension of the mass-democracy convention in which the state prepares and distributes a "voter guide" that includes the Legislative Analyst's characterization of ballot measures and their likely fiscal impact. But the parties' strengths as agenda setters, integrators of

166. Moreover, the citizens' budget assembly has the ability not only to break a deadlock but also to furnish useful advice to parties and citizens in the future. Participants in these fora are likely to be interviewed and questioned about what their elected representatives brought forward as options—and their collective deliberative judgment and reports should enjoy a wide audience, allowing thoughtful popular opinion to improve budget choices going forward.

167. See Amy Lang, *Agenda-Setting in Deliberative Forums: Expert Influence and Citizen Autonomy in the British Columbia Citizens' Assembly*, in DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY 85 (Mark E. Warren & Hilary Pearce eds., 2008); Fred Cutler et al., *Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda-Setter*, in DESIGNING DELIBERATIVE DEMOCRACY: THE BRITISH COLUMBIA CITIZENS' ASSEMBLY, *supra* at 166.

168. We were primarily concerned with California governance when we wrote our proposals, but the same mechanisms could be used to break budget stalemates that result from divided government, where each party controls one house of the legislature, or where one party controls the legislative branch and the other party has the governor's office.

interest groups, and policy experts can usefully infuse popular democracy with relevant background for its exercise of common sense. Thus popular democrats can still have a new exciting institution that allows citizen votes to affect law in an unmediated fashion after real deliberation, while party democrats can shape those votes with their better knowledge and expertise.

Our proposals leave many details unexplored. How can a “germaneness to the budget” requirement be enforced, since so much substantive law gets passed in budget bills? Should the assembly be allowed to consider structural reform for the budget process itself? What about measures to alleviate budget crunches in future years? Who shall adjudicate legal challenges to the proposals? When and how quickly? Even with these questions unanswered, however, there is sufficient meat on the bones here to serve as an exemplar of the way we hope to see popular and party democracy designed in the future: with an eye toward complementarity.

C. Using Parties to Advise, Rather than Control, Statewide Constitutional Conventions

We argue above that a better integration of popular and party democracy could help states resolve everyday policy conflicts, such as how to pass budgets, but what happens when states undertake broader and more sweeping efforts to restructure their government? Here, too, there are significant benefits to viewing popular democracy and party democracy as complementary helpmates and significant peril to viewing them as adversaries.

Shortly after we ran a version of our proposal to improve state budgeting processes in the *New York Times*,¹⁶⁹ we received a phone call to join policy and legal teams that were organized by *Repair California*, a coalition of groups that intended to run an initiative campaign to trigger a constitutional convention in California.¹⁷⁰ We signed on to help them think about how to design the

169. Elmendorf & Leib, *supra* note 13.

170. What follows draws from speeches we gave in the fall of 2009. Leib gave a talk at Yale Law School on the subject as part of *The Constitution in 2020* project. See Ethan J. Leib, Localism and Democracy: The Constitution in 2020 (Oct. 3, 2009), *recording available at* <http://www.constitution2020.org/node/107>. Elmendorf spoke with Pam Karlan in Sacramento on a panel sponsored by the Institute for Governmental Studies at the University of California, Berkeley; the Bill Lane Center for the American West at Stanford; and the Center for California Studies at California State University, Sacramento. See Christopher S. Elmendorf, Comparing Avenues to Reform: Initiatives, Revision Commission, or Convention? (Oct. 14, 2009), *recording available at* <http://www.calchannel.com/channel/viewvideo/772>.

The following sources contain all the facts that follow: STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY (G. Alan Tarr et al. eds., 2006); Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125 (2005); G. Alan Tarr & Robert F. Williams, *Getting from Here to There: Twenty-first Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075 (2005); Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, 87 OR. L. REV. 867 (2008); and a very useful set of background papers on Alan Tarr’s website, *Constitutional Conventions Q&A*, CENTER FOR STATE CONST. STUD., <http://www-camlaw.rutgers.edu/statecon/>

proposed convention. Our dialogues with the policy advisory committee helped us to see just how badly interactions between supporters of each system can be when those systems are posed as conflictual rather than complementary.

Repair California was committed to the idea of a *limited* constitutional convention.¹⁷¹ It feared, quite reasonably, that contentious social issues like gay marriage or the death penalty would bog down or fracture the convention¹⁷² and that the California electorate would be reluctant to authorize a constitutional revision process that could result in the undoing of California's legendary property tax limitations. On the other hand, *Repair California* did not want to prejudice which potential structural reforms to California's government should be on or off the table. Thus, *Repair California* proposed to limit the convention to four general topic areas: elections, governance, budget-related constitutional provisions, and fiscal management between the state and localities (with Proposition 13 specifically excluded).¹⁷³

The question of how to circumscribe, if at all, the work of a convention cannot be answered well without knowing more about how convention delegates will be selected. The more sophisticated the delegates and the more legislative experience they have, the better their odds of coping with an open-ended task. From the outset, *Repair California* hoped to engineer a novel "lay citizens" model for delegate selection.¹⁷⁴ All previous state constitutional conventions had been populated by election or appointment, but *Repair California* wanted to select delegates at random from the full pool of eligible California voters.

Popular democrats on the policy advisory committee embraced this model with vigor. True to form, they wanted to exclude any and all participation by political parties. In their view, parties and party insiders were to blame for the

conconvqa.html (last visited Nov. 29, 2011). Much of what we are sharing here is also the product of many phone calls in which we participated in connection with our work on the advisory boards to *Repair California* and the voluminous email correspondence with that group as well.

171. The legality of limited conventions is explored in Robert F. Williams & G. Alan Tarr, *The Law of Limited State Constitutional Conventions*, Ctr. for State Constitutional Studies (N.J. Const. Reform Background Paper #7) (undated), available at <http://camlaw.rutgers.edu/statecon/njtaxconvpapers/report7.pdf>. Alaska's constitution does not allow limited conventions; and Montana's requires popularly-initiated conventions to be unlimited. ALASKA CONST. art. XIII § 4; MONT. CONST. art. XIV § 2(1).

172. Concerns about "runaway" conventions drive much of the thinking about triggering them. See Gerald Benjamin & Tom Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53 (1996). Even the *New York Times* cannot repress its fear. See Editorial, *The New York Convention Con*, N.Y. TIMES, Aug. 8, 2010, at A18. To be fair, New York's proposed convention would be a product only of parties with very little popular participation, a design that has proven itself not to work well, for reasons we discuss in what follows.

173. This was similar to a strategy New York used in preparation for a failed call for a convention in 1997: New York proposed four "Action Panels" within their convention delegation to address the four policy areas that were of especial interest: fiscal integrity, state/local relations, education, and public safety. See Williams, *supra* note 170, at 894.

174. See Steven Hill, *The Big Constitutional Convention Question: Who's Going To Fix California*, L.A. TIMES, June 22, 2009, <http://articles.latimes.com/2009/jun/22/opinion/oe-hill22>.

current dysfunction of California politics, and only the common sense of the man in the streets could fix this mess.¹⁷⁵ However, some preliminary internal polling suggested that the convention call would likely fail if the initiative specified “random” selection.

At least two other models (and hybrids thereof) for choosing delegates were under serious consideration. One was selection by election, a fairly common mechanism in the history of state constitutional conventions with certain legal advantages.¹⁷⁶ Though “scientific” selection polled better, *Repair California* took the idea of electing delegates quite seriously. Members of the policy committee that we would tend to identify as party democrats also favored elections, and, true to form, they were deeply skeptical of citizens acting directly in the political sphere, citing standard deficiencies with citizen competence. The sense that party democracy and popular democracy were oppositional was on full display in these debates, and that oppositional posture was obstructing the possibility for nuanced design.

The elected-delegates model was ultimately rejected, however, for reasons of cost, timing, and anxiety that the same interests that dominate elections to the California Senate and Assembly would end up controlling the convention. This led to a discussion of selection by appointment. Florida has used an appointed constitutional revision commission since the adoption of its 1968 constitution,¹⁷⁷ and some viewed the appointment model as a way of ensuring expertise and diversity.¹⁷⁸ Party democrats also tended to favor appointed delegations for the convention (when they saw that an elected delegation was a non-starter) because it seemed clear that most appointments would be political

175. Practical problems quickly emerged during the months that the popular democrats were prevailing upon *Repair California* to embrace a fully random model. How large a delegation is needed to get a representative sample? Is five hundred people (the benchmark number we were using) simply too large to allow for good deliberation? Should noncitizens participate and vote? If DMV lists are used to draw randomly from the population, might the convention not systematically lose people and diversity? Using voter rolls surely would undercount minorities.

176. Along with designing a new substantive model for constitutional conventions, *Repair California* also wanted to change the trigger for calling a constitutional convention in California—specifically, to enable a convention to be called by ballot initiative in lieu of the two-thirds vote of the legislature that the California Constitution currently requires. CAL. CONST. art. 18 § 1. There is a chance that an initiated constitutional amendment that enables a convention to be called by ballot initiative would be characterized by the courts as a constitutional “revision” rather than an “amendment,” owing to the qualitative significance of the change it effects. Under well-established California law, constitutional revisions cannot be enacted by ballot initiative. See *Strauss v. Horton*, 46 Cal. 4th 364 (2009). Several members of the legal team thought that a revision-based challenge to a ballot measure allowing a convention to be called by ballot would be marginally weaker if the “change in the call” initiative did not also authorize new methods of delegate selection.

177. For a discussion of Florida’s experience with constitutional revision, see Rebecca Mae Salokar, *Constitutional Revision in Florida: Planning, Politics, Policy, and Publicity*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 170, at 19–57; and Williams, *supra* note 170, at 891–93.

178. These views were expressed in the conversations cited *supra* note 170.

in some form or other, as they are in Florida.¹⁷⁹ But popular democrats were disappointed by the appointments model: How could the new constitution really be the voice of the people if the people never got to participate directly in deliberating about its design? Popular democrats were not mollified by the fact that any proposals on which the delegation agreed needed the voters' approval to take effect as California's new constitution. The ratification stage is very different from the design stage.

With the clash between party democrats and popular democrats came efforts to bridge the gap, a need we recognized in our design project about the budget as well. Although random selection was the method preferred by most committee members, there was a lot of discussion about how to temper some of the feared pathologies of this approach (such as technical or political naïveté and lack of proper representation due to self-selection effects). We considered hybrid delegations—with some members elected, some appointed, and some randomly selected—but hybrids can carry the drawback that delegates will not be deliberating equally. Even if each delegate has one vote, natural deliberation dynamics will tend to have the “lay” delegation deferring to the others.¹⁸⁰ Accordingly, we favored a design that would allow both sides to win victories without having to undermine the other.

Our effort at conciliation between the popular and party democrats led to a proposal to choose the delegates at random from the populace but to structure the convention proceedings using an Advisory Commission whose membership would be split between neutral experts (selected by the nonpartisan and highly respected Legislative Analyst) and partisan appointees. The latter would be chosen, in equal numbers, by a Democratic Appointments Committee and a Republican Appointments Committee. These committees would in turn be drawn from the ranks of the respective parties' top elected officials, both current and former.¹⁸¹

The Advisory Commission would be charged with winnowing the universe of potential constitutional reforms down to a handful of leading contenders for the convention delegates to consider; assembling a briefing packet of background materials on these options for the delegates; preparing a list of witnesses who would testify, pro and con, on each of the proposed reforms; and, finally, with explaining to the delegates how the leading contenders were selected. The delegates would remain free to consider other reforms, to invite other witnesses, and, of course, to ignore the Advisory Commission's recommendations.

179. Representatives from minority communities that were on *Repair California's* policy committee also favored appointment. They suggested that an appointment method was more likely to produce a diverse delegation.

180. See Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997).

181. Cf. Elmendorf, *supra* note 34, at 1409–10 (presenting similar model for appointments to election reform bodies).

The reasons for involving the Commission at the outset should be apparent: to keep the scope of the lay delegates' task manageable; to ground the delegates' work in political reality as it is understood by the people who have actually tried to govern subject to the constraints of the California Constitution; to forewarn the delegates about the politics of actually trying to enact the kinds of reforms that the delegates might favor; to reduce the likelihood of the convention ending up under the de facto control of some random internal faction comprised of delegates who just happen to be a bit more knowledgeable and charismatic than the others; and to resolve conflicts among interest groups and other outside parties over who is "owed" time—and how much—to make the case for their preferred reforms before the convention. The Advisory Commission would have no votes at the convention but would have some discursive influence and provide real guidance for lay citizens, who are not necessarily accustomed to debating constitutional design.

The role of the Advisory Commission under our state constitutional reform proposal is not unlike the role for the major parties' legislative leadership under our proposal for breaking budget stalemates. Yet, the reader will observe that we did *not* recommend delegating agenda-setting for constitutional reform to the major parties' current legislative leadership, in hopes of inducing the development of competing Democratic and Republican proposals from which the delegates would choose. Rather, the Advisory Commission was to consist of equal numbers of partisan and nonpartisan members, and the partisan members were to be chosen by current *and former* top elected officials.

Why these differences between constitutional convention design and budget process design? They owe to the different goals to be realized in constitution making and budget making. Constitutions, at their best, serve to legitimate and to limit the political order over the long run. Their design ought to embody a correspondingly long-term perspective. The practical wisdom of top government officials who have tried to govern under the constitution that is to be reformed is indisputably germane to this project, but the long-term perspective is more likely to be realized if the parties' contributions come not just from current leadership, but from former officials as well.¹⁸²

The Advisory Commission was also designed to filter the parties' contributions through a process that requires engagement and compromise with the opposing party as well as nonpartisan experts. It would be little short of disastrous for a constitutional convention to devolve into a choice between two starkly different reform packages, one pushed by and designed to entrench the current Democratic Party leadership or agenda, the other crafted by the Republican leadership to similar effect. The resulting constitution almost

182. Former officials, particularly those no longer serving in government, are also less likely to benefit personally from any constitutional reforms the convention might propose.

certainly would not be regarded as legitimate by minority-party identifiers (and it might hamper the minority's efforts to regain power for years to come). The fact that the constitution would take effect only after being approved by the median convention delegate and then the median voter would be beside the point. If citizens who affiliate with the minority party generally regard the constitution as a bald power play, the constitution cannot perform its legitimating function.

By contrast, there is nothing objectionable about a stark clash between a pair of budgets crafted by the Democratic and Republican parties' current legislative leaders. If the Republican budget loses—a likely result in California today—that is merely a signal that California Republicans need to stake out different positions to become competitive as a state party. And, critically, their budget loss is just a one-year loss. There will be another budget to adopt next year—another chance for the minority party to show that it now deserves the median voter's support. Our budget-tiebreaker procedure will have performed its role if it yields an on-time budget and in the process clarifies for ordinary citizens what each of the major state parties stands for at that time.

The point of a constitutional convention, however, is not to “get the job done quickly” or to educate voters about the parties. The point is to craft a technically sound and politically saleable package of constitutional reforms that, if adopted, supports legitimate and responsive governance for many years to come. The parties' participation can help to ground and legitimate the convention's work, but no party should expect to “have its way” on constitutional reform, even if it can persuade a majority of the convention delegates to side with it.

Ultimately, neither our Advisory Commission proposal nor the *Repair California* constitutional convention took flight. The principals at *Repair California* opted for a hybrid model in which some delegates would be chosen at random from the citizenry and others would be appointed by formally nonpartisan local government officials, whom the voters think better of than “politicians in Sacramento.”¹⁸³ Agenda setting was not addressed. The entire undertaking then went south because *Repair California* was unable to raise the money to qualify its plan for the ballot.

As one would expect given the standard party *versus* popular democracy narrative, popular democrats on the policy advisory committee hated the Advisory Commission model. In our view, the popular democrats were insensitive to the reality that parties would have resources at the ratification stage that could upset all the hard work of the exercise of popular democracy at the design stage.¹⁸⁴ Popular democrats also unfairly denied the good faith and practical

183. For the details of their hybrid, see Repair Cal., Delegate Selection (inoperative web page last visited Oct. 20, 2010) (archive copy on file with the author).

184. Consider British Columbia's deliberative Citizens' Assembly, which spent a year deciding that the province's election system should move to “single transferable vote” to better reflect the

wisdom of elected party leaders who had actually tried to govern California, as if anyone who had tried to work within the major-party system was forever tainted for their efforts. Party democrats, for their part, may have been too quick to discount the potential credibility and party-disciplining benefits of drawing convention delegates directly from the people at large. This selection technique would seem particularly appropriate for bodies that constitute the rules under which the parties must operate and especially when the parties-in-government have become unmoored from the median voter's concerns.

Had the convention occurred, it is anyone's guess what it would have produced. Maybe it would have collapsed, for want of an organized mechanism for focusing debate and decision. Maybe it would have organized from within, with the more savvy and politically connected members (probably the local government appointees) taking charge. What is clear, however, is that the convention's work would not have been grounded except adventitiously in the experiences of the state's most high-profile and electorally accountable current and former leaders or in the practical political smarts of the state parties whose job it is to organize and make some sense out of the cacophony of citizen opinion. Once one grasps the role that parties play in orchestrating legislative action, enabling citizens to fathom their electoral choices, integrating interest groups into majority or potential-majority coalitions, and in shaping citizens' sense of what is politically acceptable, it is hard to see why the parties should be excluded from a forum for constitutional reform, even if they should not be simply handed the reins.

CONCLUSION

Our experiences with institutional design in both the budget and the constitutional convention contexts have convinced us that something is very wrong with posing party democracy and popular democracy as oppositional. We have taken for granted what popular democracy contributes to the aspiration for popular sovereignty, a first principle of democracy; but we have tried to be a bit more specific about why party democracy is so crucial to democratic functioning in the real world. Ultimately, both modalities of democracy are part of the same family, and they can help support one another much better when institutional designers start to see their potential complementarity. Each has its imperfections, but neither is going anywhere anytime soon. Those with their eyes on the prize of trying to legitimate and improve each form of democracy ought to take seriously our complementarity view as the basis for a reform agenda going forward.

diversity of citizens in the province. The people, in a province-wide referendum, failed to adopt the Citizens' Assembly proposal. It needed a supermajority of 60 percent and came shy of it with a 57 percent approval vote. It went to a second vote and failed again, garnering only 38 percent approval. For detail about and analysis of the British Columbian Citizens' Assembly, see *DESIGNING DELIBERATIVE DEMOCRACY*, *supra* note 167.

