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The Partisan Connection

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INTRODUCTION

We are sympathetic to the institutional innovations Leib and Elmendorf propose, and to the concept of democracy at the heart of their recommendations. They resist the opposition of “popular democracy” and “party democracy,” and their models of reform ingeniously blend the two. Popular democracy attempts to realize the imperative that “the people should rule” by engaging “the people” directly in the legislative activity of government. This activity includes initiatives, referenda, recalls, and party primaries—familiar Progressive institutions that aim to popularize democracy. Party democracy, by contrast, relies on the opposition of rival parties to render government accountable to a citizenry that in turn steps into its authority only at election time. Legitimate opposition, campaigns, elections, and the peaceful transfer of power are the familiar practices of party government. In conventional terms, party democracy and popular democracy are rivals. As Leib and Elmendorf tell it, the institutions of popular democracy were intended to curtail and ultimately eclipse party democracy. 1 Popular primaries were intended to curb the entrenched power of party bosses, for instance.2 Similarly, other popular reforms like the Australian ballot were meant to cleanse politics
of partisan corruption and return power to the people.\textsuperscript{3} Popular democracy in the familiar Progressive image is a cure for the pathologies of partisan democracy.

Against this standard narrative of opposition, Leib and Elmendorf argue that popular and partisan democracy are complementary.\textsuperscript{4} The advantages of each can be blended, and each can correct for the disadvantages of the other. Their innovations, such as breaking legislative budgeting logjams by having each party propose its budget to the people (who would then adopt one or another by popular vote)\textsuperscript{5} let parties propose and the people decide. Party-“endorsed” referenda on budgets and policy can substitute for less effective conventional checks on legislative majorities and can press parties to heed the concerns of voters in the middle. And party-initiated votes on direct legislation help clarify parties’ priorities and what they stand for, thereby improving accountability.\textsuperscript{6}

We agree with the spirit of these proposals. They illustrate what it might mean to say that party democracy and popular democracy should be seen as friendly siblings. And from our perspective as defenders of parties and partisanship, Leib and Elmendorf’s recommendations give institutional force to both. We might even agree with them more than they do. That is, in our view, party democracy and popular democracy belong together and need no reconciliation: fundamentally, they are aligned.

\section*{II. CONSTITUTIONAL DEMOCRACY}

The reason that party democracy and popular democracy can be cast as “siblings” is that they share a basic purpose: they are both efforts to overcome the constraints of \textit{constitutional democracy}.\textsuperscript{7} The purpose of eighteenth-century constitutionalism was twofold, and each purpose was in tension with the other; on one hand, to facilitate popular power and empower “the common, recognizable interests of ordinary people, and nothing more.”\textsuperscript{8} On the other, to constrain popular power to ensure that majorities could not overwhelm the “permanent and aggregate interests of the community.”\textsuperscript{9} Constraining popular

\begin{itemize}
\item \textsuperscript{3} ALAN WARE, \textit{THE AMERICAN DIRECT PRIMARY: PARTY INSTITUTIONALIZATION AND TRANSFORMATION IN THE NORTH} 39–45 (2002) (showing that ballot reform, embraced by those hostile to parties, did not prevent the parties from shaping the reform to their own advantage).
\item \textsuperscript{4} Leib & Elmendorf, \textit{supra} \textsuperscript{1}, at 91–100.
\item \textsuperscript{5} \textit{Id.} at 74.
\item \textsuperscript{6} \textit{Id.} at 73.
\item \textsuperscript{7} The constitutional constraints on direct popular action should be familiar. They include: bicameralism; separation of powers; indirect democracy via representation; large electoral districts; an independent judiciary; entrenched rights; a constitution insulated from popular frustration by difficult amendment; and revision procedures.
\item \textsuperscript{8} Philip Pettit, \textit{Democracy, Electoral and Contestatory}, in \textit{42 NOMOS: DESIGNING DEMOCRATIC INSTITUTIONS} 134 (Ian Shapiro & Steven Macedo eds., 2000).
\item \textsuperscript{9} THE FEDERALIST No. 10 (James Madison) (Project Gutenberg Etext ed. 1992), available at http://thomas.loc.gov/home/histdox/fedpaper.txt.
\end{itemize}
participation, in James Madison’s view, facilitated popular power. As he said in *The Federalist No. 10*, “the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.” 10 Among the most important institutions facilitating popular power is the separation of powers and—as this quote from *The Federalist No. 10* suggests—representation itself, which in Madison’s mind was the chief point of distinction between modern and ancient democracy. As Madison explains in *The Federalist No. 63*, “[t]he true distinction between these [ancient democracies] and the American governments lies in the total exclusion of the people, in their collective capacity, from any share” in government. 11

Constitutional democracy’s great advantage in this view is that it disempowers transient and presumably thoughtless or “captured” majorities. But this comes at a cost: it makes it difficult for majorities in general to have their way. The deliberative space that representation, staggered elections, bicameral legislatures, and separation of powers create also separate the government from the people. This disadvantage was at the heart of the antifederalists’ opposition to Madison’s 1787 constitution: the new national government would not solicit the affections of the people, and without such affection and trust, the government would only be able to enforce its laws through force and fear. 12 “When a government is to receive its support from the aid of the citizens, it must be so constructed as to have the confidence, respect, and affection of the people,” said Robert Yates in 1787. 13 “But the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States.” 14 Madison and Hamilton, in rejoinder, conceded that the proposed national government would be distant from popular passions and prejudices—and would not necessarily generate affection. Constitutional democracy would, however, warrant popular appreciation of its “better administration.” 15

But from the start, “better administration” was not sufficient to connect the national government with the broader population. 16 The antifederalists diagnosed an enduring weakness not only of the United States Constitution, but also of large-scale representative democracy more generally. Without the

10. *Id.*
13. *Id.*
14. *Id.*
15. *The Federalist No. 27*, supra note 9 (Alexander Hamilton) (“Unless we presume at the same time that the powers of the general government will be worse administered than those of the State government, there seems to be no room for the presumption of ill-will, disaffection, or opposition in the people. I believe it may be laid down as a general rule that their confidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.”), No. 46, supra note 9 (James Madison).
16. *Id.*
intrinsic ability to connect the national government to the broader population, large-scale representative democracy needed some other method to bridge this gap.

III.
PARTIES AND POPULAR AFFECTION

Parties proved to be the creative remedy for this weakness. As John Aldrich shows (and as Leib and Elmendorf appreciate), parties arose almost immediately in the United States at the legislative level.\textsuperscript{17} It proved impossible for scattered and independent legislators to stand together on important principles with respect to a variety of legislation over time, to protect what they regarded as achievements, and to oppose their opponents effectively across a range of issues—without developing parties.\textsuperscript{18} Without parties, happenstance coalitions that managed to achieve something on one day would either quickly disband or be easily obstructed from coming together the day after. Parties bring consistency, coherence, memory, and purpose to representative legislatures.

And so, from the start, legislators tried to develop party spirit—what we now call “party ID”—among the citizenry, so they could be more confident of building a sustainable legislative majority. The team spirit of the legislative caucus spilled out into political campaigns, organization, education, and mobilization, and ultimately to the political self-understanding of ordinary citizens. In order to do its job, the “party-in-government” needs to be connected to the “party-in-the-electorate.”\textsuperscript{19}

Party government was meant to be popular democracy—pitted against the more distant and elitist norm of constitutional democracy embodied in the 1787 constitution. Leib and Elmendorf’s effort to bring party democracy and popular democracy together is true to the heart of party democracy. Our own effort to resuscitate party in democratic theory is motivated by the appreciation that party and partisanship are essential to democracy, which is why we regard their fundamental posture sympathetically: the opposition of popular democracy and party democracy is false.

IV.
THE NON-PARTISAN WISH

The current predicament in American politics (and perhaps European too) is a consequence of the failure of parties to do their fundamental job: they are

\textsuperscript{17} Leib & Elmendorf, supra note 1, at 85; John Aldrich, Why Parties: The Origin and Transformation of Political Parties in America 68–77 (1995).
\textsuperscript{18} Leib & Elmendorf, supra note 1, at 85 n.79; Aldrich, supra note 17, at 37–41.
not connecting representative legislatures to the people. It is no surprise that we hear strident professions from representatives claiming to have the support of a popular majority, even if it is a fictional or silent majority.\textsuperscript{20} Representatives regularly conjure their faithfulness to the mandate of “the people.” This compensatory rhetoric is not successful, at least not today. Citizens regard legislators’ machinations, posturing, compromises, and refusals to compromise with dismay and disgust.\textsuperscript{21} Rather than elicit the loyalties of ordinary citizens, the most partisan of partisans—those who run for office and those who serve in legislatures—cannot even enlist the broad population in their own contests. As we write, Americans give the United States Congress an 11 percent approval rating—British Petroleum met with more approval immediately after the oil spill in the Gulf of Mexico.\textsuperscript{22}

The wish to overcome partisan politics, we have argued elsewhere, is misplaced.\textsuperscript{23} There is no non-partisan way to identify problems and solutions. Politics is not like engineering or car repair: “it was a dead battery—problem solved!” Both the national debt and unemployment are current problems, and there is no scientific, common sense, or non-partisan way to decide whether to privilege debt reduction or job creation; one is likely to exacerbate the other, and reasonable people will have different notions about which problem and which solution should take precedence. If, as at present, these differences are posed as matters of principle attached to a comprehensive view of the purposes of democratic government, there can be no compromise. With one side controlling the presidency and the Senate, and the other controlling the House, neither side can rule. Nor does either party seem likely to persuade such a large swath of the citizenry of its merits that it will rule anytime soon—and extraconstitutional devices that are aligned with the constraining spirit of constitutional democracy, like the filibuster, mean that each party would have to persuade a very large swath indeed. Constitutional democracy has overwhelmed party democracy.

The more parties fight and the more uncompromising representatives are, the less important and consequential politics seem. Each party castigates the other for “playing politics,” that is, for seeking short-term political advantage rather than common solutions. In doing so, politicians themselves amplify the


anti-partisan prejudices of the citizenry.

V.
HOW TO ENGAGE PARTISANS AND INDEPENDENTS

We think that repairing American politics depends on more and better partisanship, not less. Leib and Elmendorf’s suggestion that legislative logjams over budgets should be brought to the people in the form of competing party proposals does what party aimed to do from the start: connect representative legislatures to the electorate.24 A measure of the success of these proposals, in our view, would be that they make more citizens better partisans. Lieb and Elmendorf’s innovations seem to point in the right direction.

Whether a more partisan citizenry squares with the authors’ purpose is a further question. Clearly, Leib and Elmendorf appreciate the importance of parties for democratic decision making.25 But what about partisanship—in particular, the partisanship of ordinary citizens? The authors do not idealize “Independents” or denigrate partisans.26 Leib and Elmendorf distinguish their proposals from deliberative experiments that are adamantly post-partisan: unlike those experiments—here, parties set agendas and propose policies.27 Still, their recourse to random selection and open mass participation guard against decision making by a “citizens assembly” or “policy jury” dominated by partisans.28 Given their objectives—resolving partisan stalemates, leavening ideological extremism, and empowering centrist citizens—dilution of strong partisanship and solicitude for the voices of nonpartisans (i.e., Independents, centrists, or the elusive “median” voter) is not surprising. Given their diagnosis, their recommendations underscore the notion that the decisive voice in popular democracy should belong to nonpartisans. This may simply reflect their realism. Leib and Elmendorf want to offer suggestions people find compelling, and few people would argue that the problem with American politics today is that partisanship is too weak. Leib and Elmendorf have their sights not just on breaking stalemates, but also on democratic decisions that do not thwart an engaged majority. Independents, centrists, and cautious undecideds see themselves as the judicious umpires inclining victory to a policy or side as they think the interests of the country demand. The authors underscore this when they draw the analogy to juries where “citizens make decisions by adjudicating disputes between zealous advocates.”29 Whether they fully intend to or not, Leib and Elmendorf cast those citizens without strong precommitments as the core of a new democratic majority.

24. Leib & Elmendorf, supra note 1, at 100–107.
25. Id. at 83–91.
26. Id. at 90 (“[A] deliberative ideal of citizenship . . . cannot envision citizens starting with a ‘view from nowhere.’”).
27. Id. at 78 n.34.
28. Id. at 97–98.
29. Leib & Elmendorf, supra note 1, at 98.
We doubt whether their models for popular participation would draw out that “other majority”—non-voters. And we doubt that they will temper Independents’ or centrists’ mistrust. Consider the varieties of political independence that prevail today. Fundamentalist Independents see party divisions as inherently too rigid to allow the exercise of personal judgment over time. Circumstantial Independents see current parties as creating the wrong kind of divisions, based on politically unimportant issues. And, importantly, there is no agreement among self-styled Independents or designated “centrists” on the real configurations of conflict and what the lines of party division should be. A third type, Pragmatic Independents, want to bypass partisanship because it thwarts practical solutions to problems. The adjectives they attach to partisanship are nasty diminutives: “pettiness,” “bickering,” and “smallness” (hence the 2008 electoral fantasy that Barack Obama would “transcend the grubby machinations and tawdry favor-swapping of party politics”).30 Perhaps for Pragmatic Independents, a popular decision, even if it is a choice between partisan policies, is enough; anything besides a stalemate is an advance. But the other Independent types are likely to be put off by Leib and Elmendorf’s proposals. Leib and Elmendorf propose deciding between a Democratic or Republican budget, “not some mishmash of compromises.”31 Participation in the proposed arrangements demands that even relentless Independents be open to partisanship. Either nonpartisans will be drawn into the partisan contest, or they will be as alienated from the choice they are asked to make as they are from elections.

We want to press this point. For partisans—i.e., citizens with stable party identifications—the specifics of the rival proposals will not matter; they will side with their party. But for Independents, putative centrists, and the undecideds, the details of budgeting would be too overwhelming even in their summary versions. Inevitably, the decision will need to be framed by partisan advocates in terms of the principles and broad purposes that make sense of the specifics. These principles and purposes, which give definition to the parties, will also be the basis for slogans and ads. And there will be ads: party organizations and all the smaller groups that gather around them will spend madly in support and in opposition to rival proposals.

For Independents, partisan agenda-setting, partisan options, and the absence of genuinely nonpartisan “citizen initiatives” is likely to make this process, too, an anathema. Non-partisans will likely resist the ideas of party leaders, and prefer that neutral experts provide information, arguments, and witnesses to moderate deliberative bodies. Why should anti-partisans think the outcomes would be better if the lines of division and temper of rivalry remain essentially the same? As our typology of Circumstantial and Fundamentalist

31. Leib & Elmendorf, supra note 1, at 106.
Independents suggests, antipartisanship may be a matter of taste and principle, a political identity. Little in Leib and Elmendorf’s “blending” of popular and party democracy and “equal time” for parties has obvious charm for antipartisans or offers consolation for the deeper wish that parties and partisans would be overcome by other forces.

We do not think this vitiates their ideas. But it does highlight how the success of their ideas depends on making citizens more sympathetic to partisanship. For defenders of the partisan spirit, the value of institutional innovation is its capacity to create, sustain, and improve partisans. As a matter of speculation, we think the institutional innovations Leib and Elmendorf designed are promising in this regard; for example, their proposal that instead of requiring extraordinary legislative majorities for some types of legislation, i.e., a state budget, the authors recommend popular approval of either the Democratic or Republic budget—and not some “mishmash.” True, this reform and others they propose may exacerbate antipartisanship, for the reasons we set out above. Even if they fail to convert Independents, however, they could make some nonpartisans more appreciative of the uses of parties for setting the contours of democratic decisions even for popular democracy. Leib and Elmendorf’s proposals, we speculate, would encourage parties to make their policies accessible, to try to win popular support, and to incorporate citizens as inclusively as possible. Ideally, they would be encouraged to create partisans, not just votes in favor of this or that budget or program. Parties neglect partisan-creation during elections; leaders’ considerations are short-term, tactical, and geared to a single cycle. There is reason to imagine that voting on key programmatic matters would encourage attention to creating partisans over the long term.

The key point is that to succeed, their recommendations would need to nourish ordinary or retail partisanship. On a standard view, it makes sense to think of partisans almost exclusively as elites. As John Aldrich says, the real partisans are those who hold office and run for office, and perhaps too the apparatchiks who gather around them. Ordinary civilian partisanship is attenuated compared to the partisanship of officials and party leaders. Partisanship among citizens is a comparatively passive stance: an identification one might express to pollsters or a sort of brand loyalty. This does not deny partisanship’s roots in membership in social groups. Nor does it not deprive party identity of its moral value or deny its significance as an element of

33. Leib & Elmendorf, supra note 1, at 106.
34. ALDRICH, supra note 17.
political identity, as we have argued elsewhere and as too few democratic theorists have fully appreciated. Still, on this view, partisan activity is typically restricted to voting, and partisanship amounts to a “standing decision,” as Key said, to vote for candidates of one party over others. The attenuated partisanship of ordinary citizens is in a sense appropriate, since citizens do not rule, they judge. The distance between citizen-judges and representative-rulers is consistent with the Madisonian ideal of representation. It is a further respect in which constitutional democracy puts party and partisanship on the defensive.

Leib and Elmendorf’s proposals compress this distance by inviting citizens to take a stand on the policies that define the parties. In ordinary elections, citizens are asked not to judge parties directly, but persons. In the schemes the authors propose, they judge policies directly, along with the reasons offered for them, the consequences projected, and the philosophies underlying them. To succeed, these novel institutions will need to draw citizens more closely to one party vision or the other over time. They will need to invite non-partisans not merely to judge competing partisan proposals, but to generally sympathize with one or the other. Lacking this sympathy, voters will likely find each proposal unattractive, and respond with disdain, if they respond at all. Without some sympathy for one party’s approach, voters will inevitably find something to disagree with in each proposal—they will see partisan proposals as either too similar or too different or simply too deficient. Every major public policy (such as a budget) possesses something deficient, at least from the perspective of an individual citizen. The breadth of the country, with its attendant multiplicity of interests, means that no broad or comprehensive policy will be able to fully reflect what each and every citizen wants. Public policy is not a compromise, it is a bundle of countless compromises cobbled together: there is no other path to the common good. This means that any passable conception of the common good will be, in some of its details, disagreeable. So long as citizens plant themselves in a merely “judicial” role, evaluating partisan proposals from afar, they will find much to dislike. Only if they possess (or develop) partisan sympathies will they come to see one bundle of compromises as superior to another, and bear the concessions that politics cannot avoid.

37. Leib & Elmendorf, supra note 1, at 106.
VI.
TWO CAVEATS TO LEIB AND ELMENDORF’S RATIONALE FOR COMBINING
POPULAR AND PARTY DEMOCRACY

So we appreciate Leib and Elmendorf’s aspiration to combine popular and party democracy—with two caveats. Our first caveat focuses on the authors’ centrism. They promise that their institutional designs will require the major parties to do what party democracy alone does not seem to require at the present moment: to “campaign and govern on the basis of fairly centrist platforms with roughly equal appeal to the median voter.”38 Parties will be induced to “frame and modulate their agendas in ways that appeal to the median voter.”39 They will “honor the concerns of the median voter.”40 The authors’ proposals aim at making the parties more centrist. It is not hard to understand the appeal of “centrism” today, at least as a vague antithesis to “extremism” both in terms of left and right points on an ideological spectrum and political types—adamant, “principled,” and uncompromising partisans. Centrism looks ahead to the majority invoked on the 2008 Primary Night in New Hampshire when Barack Obama promised voters:

[YOu can be the new majority who can lead this nation out of a long political darkness. . . . Democrats, Independents and Republicans who are tired of the division and distraction that has clouded Washington, who know that we can disagree without being disagreeable, who understand that, if we mobilize our voices to challenge the money and influence that stood in our way and challenge ourselves to reach for something better, there is no problem we cannot solve, there is no destiny that we cannot fulfill.41

While understandable, these appeals to centrism raise concerns. One, of course, is the substantive question: what changes in programs or principle are required if parties follow the advice to tailor their policies “to the projected preferences of the median voter”?42 Another is whether this reflective or reflexive understanding of the relation between party proposals and citizens is a core democratic value, as the authors imply.43 For any given election or on any polled issue political scientists may locate an ideological center or the elusive median voter (though they always contest one another’s empirical evidence and the methods used to assess it). But as a larger matter, apart from statistics, does “the center” have meaning or value except as a way of indicating a desire for distance from contingent, unmodulated, “extreme” positions? There is an

38. Id. at 71.
39. Id. at 95.
40. Id. at 93.
42. Leib & Elmendorf, supra note 1, at 104.
43. Id. at 106, 148.
unacknowledged tension between valuing reflexive or responsive parties (especially parties responsive to the center) and parties’ necessarily creative, constructive political role. Leib and Elmendorf focus on reflection, but it is partisans who must configure the conflict and draw the lines of division, and that is politically creative work. The center, electoral or substantive, is not necessarily a justifiable orientation. Our most important concern, however, is that the emphasis on “centrism” is a distraction. It diverts us from the important (and again, creative) work that parties do, and a core characteristic of an ethic of partisanship: compromise. We do not have time to explore this here; suffice to say that political compromise, not some empty, abstract, and elusive centrism, is what disaffected citizens most often want. It is what majoritarianism requires—both among the major parties and between the parties, especially under divided government. There is no reason to think that the compromises that break stalemates and move policy forward to solving problems—especially long-term ones—is a matter of splitting the difference or coming together in some ideological or electoral center.44

Our second caveat follows and concerns the appropriate reach of Leib and Elmendorf’s proposals. At some historical moments the chief complaint has been that American parties are undifferentiated, too centrist, mongrels, or hodge-podges (think of George Wallace’s characterization that there wasn’t a “dime’s worth of difference” between the parties).45 Today, the animus against parties is reversed, and is captured by the equation: partisan = ideological = extremist. The thing of note is how swiftly a political analysis with the title Off Center supplanted Dead Center: the Perils of Moderation.46 Is partisan stalemate a core democratic pathology? Given that only a generation ago the antipartisan charge was that parties agreed too readily and collaborated to keep controversial questions off the political agenda, there is reason to doubt that the current antipartisan complaint—extremist partisans have abandoned the center—is a permanent feature of American politics. If contemporary discontents are not embedded in the structure of American politics, is it wise to remedy them with constitutional design? One virtue of Leib and Elmendorf’s piece—the focus on state government—prompts the question whether the authors’ diagnoses and solutions apply generally. Do California’s politics of apparently entrenched extreme polarization apply to Massachusetts, effectively a one-party state? Leib and Elmendorf do not argue for uniformity across states. And they might respond to the charge of contingency by saying that the

“informational, agenda-setting, . . . legitimation” checking, overreaching legislative majorities, and sharpening party identity (and hence enabling accountability) of legislative parties is always valuable. They would commend their institutional innovations whether or not conditions of extremism and stalemate prevailed. Their proposals rest on a vision of a mix of party and popular democracy that they view as defensible in terms of foundational values but impossible under current arrangements.

CONCLUSION: CONSIDERING UTOPIAN INSTITUTIONAL DESIGN

The attraction of novel institutional design to address political problems and frustrations points to the larger “utopian turn” in recent political and legal theory. This turn is unmistakable: hardly a book or article in legal and political theory fails to propose a new or redesigned institution, one that goes beyond any reform currently advocated by politically-engaged groups. We will not try to explain this utopian turn here. But Leib and Elmendorf’s article prompts us to ask about the function of institutional designs that are not only ambitious, but in all likelihood unfeasible given current political institutions and incentives, and impractical to implement on a scale beyond experiment; they are, in this respect, utopian. They aim not merely at a piecemeal reform but instead are intended to have broader significance: they reconceive a democratic order in a manner that promises to be more true to its foundational values.

In the history of political thought, utopian design often took the form of philosophical models of a perfect community: the purpose of these classical utopias was not to institute the ideal, but to hold a mirror up to ourselves, to offer a vivid way of leveling profound moral criticism. Other utopias are designed with a view to motivating action, often revolutionary action aimed at radical change; they are idealist in the true sense.

Today, and in this Article, we have something different: novel, imaginative institutional designs that have the look of circumscribed reforms addressed to a particular problem (in this case legislative stalemate) but that rest on a larger diagnosis of political pathology and point to some set of foundational democratic values.

Leib and Elmendorf do not pretend to offer a full-blown democratic theory of the sort that philosopher Philip Pettit does with his account of democracy as nondomination and the institutions necessary to give it life. Instead, the authors join other scholars in occupying a tenuous middle ground. They do not pretend to hold a moral mirror up to reveal the most profound democratic pathologies; unlike classical utopians they do not aim at a shock of moral recognition. Nor are their proposals revolutionary utopias meant to be so attractive and so specifically targeted at present discontents that activist citizens might be expected to seize on them. That is, they have neither the moral bite

47. Leib & Elmendorf, supra note 1, at 71.
that draws blood of true idealism nor the reformism that is carried by social movements and instituted, yes, by parties. The status of institutional design in this piece and many others in contemporary legal and political theory, we argue, is to make a conceptual point vivid. It does: Leib and Elmendorf’s case for the complementarity of popular and party democracy would have less weight if they did not come attached to novel institutional designs. The authors are advocates and activists, and may take umbrage at this. However, from our standpoint as political theorists, the intellectual exercise of institutional design in the service of conceptual clarification is important, even if proposals are not part of a comprehensive political philosophy and even if they are not feasible. We just wonder, why now?

It may be that the academic trend of institutional design reflects a broader and deeper impatience among citizens with the condition of American democracy; we may be on the cusp of a reformist “public mood” that periodically renovates American politics. Insofar as thought experiments in institutional design satisfy the democratic impatience with inherited forms, and inspire citizens to reengage their government more wholeheartedly, we can sympathize with the enthusiasm for designing something new. But at the same time, we are cautious: constitutional innovation will not wholly eradicate the frustrations endemic to democracy, nor should its advocates pretend that it can.

The frustrations of democratic self-rule cannot be eliminated so long as “the people” are marked by (and divided by) real differences of region, ethnicity, race, economic condition, talent, religion, and philosophy. Coming to agree with people very different from ourselves (as democratic self-rule requires) is neither easy nor entirely satisfying. How can people be induced to cooperate for their common good, in spite of their differences and their tendency to “vex and oppress” each other?

The innovation of the twentieth century—popular democracy—invoked the image of a unified “people” that might speak authoritatively and overrule the elites that artificially divided it. Direct popular participation in primary elections, initiatives, recalls, and referenda—rather than elite deliberation—would give the people authority, and diminish the artificial divisions imposed by corrupt or ambitious elites. This “holism,” or belief that the people (and therefore the community) is naturally unified, as we have argued elsewhere, is partly responsible for the antipartisan prejudice that has always marked American politics. And it is based on a false promise, for under conditions of liberty, the people do not stand together as one harmonious whole.

For their part, Leib and Elmendorf make use of the institutions of popular

50. THE FEDERALIST NO. 10, supra note 9 (James Madison).
democracy, but do not promise to overcome the unpleasant necessity of compromising with those unlike ourselves: parties do not disappear in their image of democracy. If their reforms were to successfully engage the apolitical “center”—making it more political, and thus more sympathetic to partisanship—the formal institutions of democratic governance (especially Congress) might again be connected with the ordinary lives of citizens. But if the center were to remain apolitical, and not “show up” to take on the new responsibilities Leib and Elmendorf invest it with (as it fails to show up in primary elections), then the reforms would bring us more of the same. This—more of the same, more distrust and antipartisanship—will invite even more ambitious institutional and constitutional innovations that promise democracy without the frustrations of compromise. Such innovations, if they found traction in the population, would betray not only party, but also liberal democracy itself.