

March 2012

## Law and the Polarization of American Politics

Stephen E. Gottlieb

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>



Part of the [Law Commons](#)

---

### Recommended Citation

Stephen E. Gottlieb, *Law and the Polarization of American Politics*, 25 GA. ST. U. L. REV. (2012).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol25/iss2/4>

This Article is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact [mbutler@gsu.edu](mailto:mbutler@gsu.edu).

# LAW AND THE POLARIZATION OF AMERICAN POLITICS

**Stephen E. Gottlieb\***

I.	COMPLAINTS ABOUT POLARIZATION.....	341
II.	HOW THE LAW CHANGED THE POLITICS .....	343
	A. <i>Legal Changes to the Media</i> .....	344
	1. <i>The Shape of the Media</i> .....	344
	2. <i>The Law of Irresponsibility</i> .....	347
	3. <i>The Principles of Journalists</i> .....	354
	B. <i>Legal Changes to the Political System</i> .....	355
	1. <i>The Nomination System</i> .....	355
	2. <i>Safe Seats</i> .....	357
	3. <i>Campaign Money</i> .....	359
III.	CONSEQUENCES .....	366
	A. <i>A Perfect Storm</i> .....	366
	B. <i>The Risks to Democratic Government</i> .....	367
IV.	PROPOSALS .....	371
	A. <i>Reconstructing Media</i> .....	371
	B. <i>Reconstructing Campaigns</i> .....	374
	CONCLUSION.....	376

There has been considerable concern over the polarization of American politics in recent decades.<sup>1</sup> Bipartisanship seems to many to have hit a low. And the partisanship stands in the way of many

---

\* Professor, Albany Law School; LL.B. Yale Law School; B.A. Princeton Univ. The author would like to thank his research assistants, Martin Bonventre, Chris Kimball, and Sarah Merritt for excellent help in preparing this article.

1. See, e.g., *America's Angry Election*, ECONOMIST, Jan. 3, 2004, at 7; Gary Dorrien, Book Review, CHRISTIAN CENTURY, May 24, 2000, at 618 (reviewing KYLE A. PASEWARK AND GARRETT E. PAUL, THE EMPHATIC CHRISTIAN CENTER: REFORMING AMERICAN POLITICAL PRACTICE (1999)); Martin Gottlieb, *Hyper-Partisanship No Illusion; Many Forces Selfishly Push Americans Apart*, DAYTON DAILY NEWS (Ohio), Jan. 14, 2004, at A6; Arnold Hamilton, *Americans Remain Politically Divided in 2004*, DALLAS MORNING NEWS, Jan. 13, 2004; Bill Lambrecht, *America's Political Fault Lines Grow Deeper*, ST. LOUIS POST-DISPATCH, Jan. 11, 2004, at B1; John Leo, *Splitting Society, Not Hairs*, U.S. NEWS & WORLD REP., Dec. 15, 2003, at 66; Richard Tomkins, *Analysis: Climate of Hate in 2004 Contest*, UNITED PRESS INT'L, Jan. 14, 2004, available at <http://westlaw.com> (search "Climate of Hate in 2004 Contest" in Westlaw's "All News Plus Wires" database).

worthy projects. More, political scientists have described the role of sharp political cleavages in the destruction of numerous democracies.<sup>2</sup> Excessive partisanship can be very corrosive.

What is less realized is the role that law has played in creating the partisan environment that many denounce. These changes have involved parallel trends in the law of political campaigns and elections and the law of mass communications. This article brings together many of the changes taking place in the law regulating American politics and identifies the collective impact of those changes.

Two caveats are essential. First, there are many good reasons for the individual changes. There is no mythic golden age to which to return. Politics has been nasty and dirty both before and after these changes.<sup>3</sup> The rules have played favorites, protecting some politicians and certain political ideas, both before and after these changes. At one level they are only a different set of favorites. But since law governs the type of politics we have, it is important to see what it is doing and how.

Second, I do not wish to be understood as claiming that other factors have had no impact on the polarization in American politics. It is too early to know how much the recent presidential campaign, for example, may change American politics. Nor do I attempt in these pages to assess the shares that might be assigned to different causes. But this article does assert that any attempt to understand what has taken place without identifying the relevant legal changes is drastically incomplete.

---

2. See NANCY BERMEO, *ORDINARY PEOPLE IN EXTRAORDINARY TIMES: THE CITIZENRY AND THE BREAKDOWN OF DEMOCRACY* (2003); *THE BREAKDOWN OF DEMOCRATIC REGIMES* (Juan J. Linz & Alfred Stepan, eds., 1984).

3. Compare the wild allegations of Senator Joseph McCarthy and others in the 1950s, see 3 ERIC BARNOUW, *THE IMAGE EMPIRE: A HISTORY OF BROADCASTING IN THE UNITED STATES* 8–21, 37–40, 46–56 (1970); WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932–1972*, 489–99, 520–30 (1975), with the impeachment efforts against presidents of both parties later in the century. There has been a recent outpouring of scholarship on the McCarthy era. See generally DAVID CAUTE, *THE GREAT FEAR* (1978); MARTIN H. REDISH, *THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA* 140 (2005); ELLEN SCHRECKER, *MANY ARE THE CRIMES* (1998). The overbreadth of the blacklists is evident in the text. See AM. BUS. CONSULTANTS, *RED CHANNELS* 9 (1950); 2 ERIC BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES* 266–67 (1968).

Part II will describe changes in the law. Part IIA will examine changes to media law, including changes in federal licensing and liability rules and will conclude with discussion of parallel changes in journalists' practices. Part IIB will describe changes in the law of political campaigns, including nominations, districting, and financial rules.<sup>4</sup>

Part III brings these together and describes relevant warnings from other disciplines about the impact on American democracy.<sup>5</sup> Part IV makes suggestions for the law of mass communications and the law of election campaigns.<sup>6</sup>

### I. COMPLAINTS ABOUT POLARIZATION

The report of the Pew Research Center For The People & The Press found “[t]he extraordinary spirit of national unity that followed the calamitous events of Sept. 11, 2001 has dissolved amid rising polarization and anger.”<sup>7</sup> And the report found the country “further apart than ever in its political values.”<sup>8</sup>

Andrew Kohut, director of Pew, told John Leo that “the anger level is so high that if the demonstrators of 1968 had felt like this, ‘there would have been gunfire in the streets.’”<sup>9</sup> Compromise has been demeaned linguistically:

The middle ground, treasured as the key to every election, has dubious associations. Words such as *opportunistic*, *lukewarm*, *compromising* and *vacuous* cling to it. Populist political

---

4. See *infra* Part II.A–B.

5. *Id.*

6. See *infra* Part IV.

7. Andrew Kohut, *Foreword* to PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, THE 2004 POLITICAL LANDSCAPE: EVENLY DIVIDED AND INCREASINGLY POLARIZED (2003), available at <http://people-press.org/reports/pdf/196.pdf>.

8. *Id.* at 7.

9. Leo, *supra* note 1, at 66.

commentator Jim Hightower observes that the middle of the road is home to yellow stripes and dead armadillos.<sup>10</sup>

Gary Dorrien describes the loss of an appealing and principled Christian middle ground, leaving the religious in the hands of a variety of radical faiths. “Maverick” congressmen in this polarized political world are Republicans whose support for Bush reached only 96%, and ticket splitting at the polls has declined.<sup>11</sup> Richard Tomkins reported the view of the experts he spoke with that “[t]he biggest impact of a polarized United States . . . would be on Capitol Hill where changing party demographics and geographics have contributed to hardening partisanship on and off the floor.”<sup>12</sup>

The Houston Chronicle reported that a Zogby poll “portray[ed] not only separate nations—the blue states of the upper, outer rim that Al Gore won in 2000 and the red states of the South and heartland won by President Bush—but also distinct moral world views.”<sup>13</sup> And John White wrote in a much discussed essay, “Not since the Civil War and post-Reconstruction period has the country been so divided. As we enter what promises to be a very contentious 2004 presidential contest, George W. Bush and his Democratic challenger will be campaigning in two different, yet parallel, universes.”<sup>14</sup>

The picture painted by these and other writers display an American politics very much changed from the tweedledum-tweedledee politics of the 1950s and early 1960s that Goldwater and many in his generation decried. So it seems that we have finally gotten what we wished for though many now dislike the results. The question is how. Some blame the Bush Administration<sup>15</sup> or the Democrats<sup>16</sup> for

---

10. Dorrien, *supra* note 1, at 618.

11. Gottlieb, *supra* note 1, at A6.

12. Tomkins, *supra* note 1.

13. Mark O’Keefe, *A Divide Forms When Politics Battles Religion*, THE HOUSTON CHRON., Feb. 14, 2004, Religion, at 1.

14. John Kenneth White, *E Pluribus Duo: Red State vs. Blue State America: An Analysis of the O’Leary Report/Zogby International Values Poll 2* (2003) (unpublished manuscript on file with author) (quoted in O’Keefe, *supra* note 13).

15. See Barbara C. Neff, *Bush and God-Talk: Presidential Language Puts Off Some in Religious Community*, NAT’L CATH. REP., Feb. 21, 2003, Nation, at 4.

16. Leo, *supra* note 1.

polarizing America. Many writers have focused on the changes in religious leanings,<sup>17</sup> the culture wars,<sup>18</sup> the decisions of political leaders,<sup>19</sup> other actors in the national political debate, and the availability of computers.<sup>20</sup>

If that polarization is the direct result of a variety of national and international events and campaigns, one could treat variations as simply a normal part of politics. That explanation is much too simple. The thesis of this article is that legal changes were an important contributing factor, however unintentionally, and that those changes piled on one another sufficiently to have a powerful effect on the political culture. Whether or not a particular presidential campaign turns out to be much milder, these factors have a long-term effect in polarizing politics that will not disappear with a more collaborative leader. It is important to understand how law is shaping the levels of bitterness in American politics.

## II. HOW THE LAW CHANGED THE POLITICS

We have rewritten the law of speech and politics to substitute insanity for milquetoast. For much of the twentieth century, national media and the political nomination process favored broad appeals to the public. Following the 1968 Democratic Convention, that changed for the nomination process.<sup>21</sup> Following the 1976 amendments to the copyright laws, that changed for the national media.<sup>22</sup>

17. O'Keefe, *supra* note 13.

18. Debra Gersh, *Promulgating Polarization*, EDITOR & PUBLISHER, Oct. 10, 1992, at 30.

19. Leo, *supra* note 1 (blaming polarization on the left's decision to turn to the courts and the changes in the Democratic Party since the McGovern nomination in 1972); Gottlieb, *supra* note 1, at A6 ("Under Ronald Reagan and Newt Gingrich, mainly, the Republican Party decided that the old, bipartisan ways weren't working for it, that it needed to be more different from the Democrats and more confrontational.").

20. Gottlieb, *supra* note 1 (blaming cable television and talk radio for maximizing their audiences with "partisan gladiators," computers for highly partisan legislative districting, and interest groups for "riling up their own supporters" with "[o]verstatement.").

21. See JAMES W. CEASER, *PRESIDENTIAL SELECTION* 236–59 (1979).

22. Under the impetus of the change in the copyright rules, see 17 U.S.C. §111(c)-(d) (2006) (providing for compulsory licensing), the FCC removed its restrictions on broadcast signals that could be rebroadcast on cable television. See *Cable Television Syndicated Program Exclusivity Rules*, Report and Order, 79 F.C.C.2d 663 (1980). The sequence is well described in DOUGLAS H. GINSBURG & MARK

## A. Legal Changes to the Media

### 1. The Shape of the Media

A relatively nondiverse broadcasting oligopoly was the result of a set of official policies dating from shortly after the birth of radio. In the 1920s, the Department of Commerce under Secretary Herbert Hoover and the new Federal Radio Commission systematically stripped universities of their radio stations in favor of commercial broadcasters.<sup>23</sup> The Federal Communications Commission (FCC) took over from the Federal Radio Commission in 1934,<sup>24</sup> and looked for middle of the road ownership, though sometimes with political ties, supporting newspapers, for example, which had supported Eisenhower's election.<sup>25</sup> The Commission prevented unions from acquiring stations and when a political party that had acquired a station in the early days of radio applied for renewal, the FCC announced that stations were henceforth to be apolitical.<sup>26</sup> And it restricted broadcasting to a maximum of three national networks through a policy known as "localism" in the allocation of station licenses under which only the largest cities had more than three licensed broadcasters.<sup>27</sup> The result was a large set of locally centrist stations with near monopoly status in their broadcasting markets contracting with the big three networks for prime time and other programming.<sup>28</sup>

---

D. DIRECTOR, 1983 SUPPLEMENT TO REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS 72-102 (1983).

23. See 1 ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES* 96-98, 121-22, 172-74, 218-19, 258-61, 271-72 (1966).

24. The changeover was mandated by the Federal Communications Act of 1934.

25. See LAWRENCE D. GASMAN, *TELECOMPETITION: THE FREE MARKET ROAD TO THE INFORMATION HIGHWAY* 74-75 (1994); 3 BARNOUW, *supra* note 3, at 68-79, 126.

26. On refusal to license labor related stations, see STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 34, 61-62 (1978). On the F.C.C.'s requirement of station neutrality, see 2 BARNOUW, *supra* note 3, at 137.

27. See STAFF OF S. COMM. ON COMMUNICATIONS, *OPTIONS PAPERS*, H.R. Doc. No. 95-13, at 45-65 (1977) [hereinafter *Shooshan*] (memorandum from Chip Shooshan to the Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce). The policy is well described in Neil K. Alexander, Jr., Note, *The Local Service Objective and FCC Broadcast Allocations*, in DOUGLAS H. GINSBURG, *REGULATION OF BROADCASTING: LAW AND POLICY TOWARDS RADIO, TELEVISION AND CABLE COMMUNICATIONS* 163-68 (1979).

28. See *Shooshan*, *supra* note 27, at 55-60; Alexander, *supra* note 27.

Vying for a broad audience, networks excluded programming offensive to any part of their audience. They largely avoided politics except for the required sale of time to candidates during campaigns<sup>29</sup> and some Sunday news interview programs. Politics as presented was distinctly middle of the road. Protest songs made the rounds as a counterculture attack on the war in Vietnam but rarely on the tube.<sup>30</sup>

The FCC unintentionally reinforced bland TV with the fairness doctrine.<sup>31</sup> Literally it required broadcasting to provide conflicting points of view on controversial issues of public importance. Actually it encouraged broadcasters either to stress conflict or avoid anything that looked or sounded like a point of view. Points of view required time for a response to make the opposite point. If the disagreement bored or antagonized the audience, ratings would plummet, advertising would leave, and the networks would foot the bill. So typically they did their best to avoid controversy. This was particularly true before the media were splintered by cable and the Internet because the networks shared a large, wide, and diverse audience and their principle strategic objective, contrary to

---

29. 47 U.S.C. § 315 (2000).

30. See generally 2 BARNOUW, *supra* note 3, at 271–303 (describing broadcasting coverage of Vietnam, including, at 287–303, the struggle between broadcasting and the rising counterculture which developed over the war in Vietnam). For a legal challenge arising from coverage of the war, see *Comm. for the Fair Broad. of Controversial Issues*, 25 F.C.C.2d 283 (1970) (presidential addresses regarding the war in Vietnam were subject to the fairness doctrine and the stations had not met their obligation of fairness in response); *Complaint by Bus. Executives Move for Vietnam Peace Concerning Fairness Doctrine Re Station WTOP, Washington, D.C.*, 25 F.C.C.2d 242 (1970) (denying petition to require station to sell time for anti-war ad). See also *Yale Broad. v. FCC*, 478 F.2d 594 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 914 (1973) (regarding the ambiguity of regulations regarding the playing of songs on the radio that refer to drugs without regard to whether they supported or opposed their use; this has become known as regulation by “raised eyebrow”).

31. See *The Handling of Public Issues Under the Fairness Doctrine and the Pub. Interest Standards of the Communications Act*, 89 F.C.C.2d 916, 919–20 (1982). The fairness doctrine had statutory support in 47 U.S.C. § 315(a), which reads “[n]othing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.” Nevertheless, the F.C.C. withdrew the doctrine. See *Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C.R. 5043 (1987).



broadcasters' objectives in the current era of niche media, was to appeal to as wide an audience as possible.<sup>32</sup>

The signature moments for national political coverage were in the 1960s. Virtually every American mourned the Kennedy assassination together on national television. Network news covered civil rights demonstrations in the South, showing demonstrators kneeling in prayer in front of courthouses where they were barred from registering to vote or being attacked with fire hoses when they marched to protest segregation. That was drama. The national network audience for these events played a large role in the bipartisan passage of the Civil Rights Acts of 1964 and 1965. Later in the decade the whole country saw dramatic images of riots in America and carnage in Vietnam. The networks set a national norm by focusing everyone on the same images, the same ideas, and the same people.<sup>33</sup> The media and its public were hardly amoral for being centrist, and it had a huge impact on American values and politics.

Beginning in 1976, changes in the applicable law boosted cable companies. The FCC had sharply restricted cable carriage of broadcast signals.<sup>34</sup> The Copyright Act of 1976 provided for a compulsory license of broadcast signals on behalf of cable companies.<sup>35</sup> That statute was inconsistent with the Commission's protection of local broadcasters against the importation of distant signals. In the wake of that Act, the FCC dismantled its regulations.<sup>36</sup> As cable reached an increasing proportion of American homes, television viewers soon had many more options than the three provided by the national broadcast networks. The FCC then finally

---

32. *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976); *see also* EDWARD JAY EPSTEIN, *NEWS FROM NOWHERE: TELEVISION AND THE NEWS* 65–72 (1973).

33. *See* Michael Robinson, *Television & American Politics: 1956–76*, 48 *PUB. INTEREST* 3, 9–39 (1977).

34. *See* *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972) (setting out the signal carriage rules imposed on cable and discussing the relationship to the copyright rules; for example, *see* ¶ 18).

35. *See* H.R. Rep. No. 94-1476, at 88–91 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5679, 5702 (on § 111 of the Copyright Act of 1976 creating a compulsory license).

36. *Malrite T. V. of N.Y. v. FCC*, 652 F.2d 1140, 1143–47 (2d Cir. 1981), *cert. denied sub nom. NFL v. FCC*, 454 U.S. 1143 (1982) (describing FCC regulation of cable before the Copyright Act of 1976 and de-regulation afterward, both very much driven by the impact of the status of the copyright rules).

authorized new broadcast networks.<sup>37</sup> In the 1990s the Internet added yet more options. The viewing audience splintered. Now there was room for networks with a strong political point of view. The differences between networks grew. Fox News is not CBS. The market for the center began to dwindle. Indeed the center may have become uninvolved, uninterested, uniformed, and smaller. American politics splintered along with the broadcast audience. Many refer to civil rights as the "wedge issue" that split the Democrats.<sup>38</sup> The splintering of the media may have been just as important.

A plethora of media outlets could generate a spectrum of views. The splintering of the media changed the incentive structure within the newsroom. In the era of three channel oligopoly, broadcasting avoided angering any part of their audience. In the era of splintered media, excitement, not inoffensiveness, assumed greater importance.

## 2. *The Law of Irresponsibility*

To understand how completely the media have changed, it is important to understand several other changes in the law of media liability which have removed both incentive and enforcement for responsible journalism. There were good reasons to be unhappy about the law as it stood, but the remedies have substituted a new set of problems.

The first significant legal change dates from 1964 when several southern juries were poised to bankrupt the *New York Times* in a series of libel cases. In the first to reach the Supreme Court, a southern jury found the *New York Times* guilty of libel because of several minor misstatements in an ad taken out by a group of leaders of the Civil Rights Movement, misstatements which probably improved the sheriff's standing in the segregationist community he was fighting to preserve.<sup>39</sup> The jury reported \$500,000 in damages, a huge sum in the 1960s. That judgment was possible because the law

---

37. See VINCENT MOSCO, *BROADCASTING IN THE UNITED STATES: INNOVATIVE CHALLENGE AND ORGANIZATION CONTROL* (1979) (discussing the FCC's protection of the three-network broadcasting oligopoly over the course of nearly half a century).

38. See, e.g., Editorial, *The Nuclear Wedge Issue*, N.Y. TIMES, Feb. 28, 1995, at A22.

39. *N.Y. Times v. Sullivan*, 376 U.S. 254, 258-69 (1964).

then existing allowed the jury to estimate the damage to the defendant's reputation, regardless of whether the defendant actually suffered any financial injury. And a series of cases were poised to repeat that judgment in a variety of southern towns. The impact on the *New York Times* would have been substantial.

The Supreme Court held that misstatements about public officials, later expanded to public figures, would not result in legal liability unless they were made with knowledge of their falsity or reckless disregard of the truth. Although the decision was intended to protect freedom of the press, plaintiffs initially took advantage of the decision to put the behavior of the media defendants under the microscope, carrying out public investigations of the practices and paper trails of the journalists, often casting defendants in a bad light even when they got the story right.<sup>40</sup>

The rule, however, immunizes many misstatements. Some justices later came to the conclusion that it would have been better to hold the defendants responsible for their misstatements but limit damages to provable economic damages.<sup>41</sup> Plaintiffs then could sue to clear their names, but in most cases would have little ability to impose large financial costs on media defendants. In fact, most libel plaintiffs sue to vindicate their names rather than for the money.<sup>42</sup> As it stands, however, the rules protect defendants from liability though not from the expense of litigation defense.

The second major change took place about a decade later and involved the fairness doctrine, which had required all broadcasters to provide a balanced presentation of controversial issues of public importance.<sup>43</sup> Failure to satisfy the fairness requirement could result

40. See Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227–30 (1985). But see *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) (requiring libel plaintiff to prove the falsity of the offending statement, which modified somewhat the practices Bezanson and his colleagues had observed).

41. *Rosenbloom v. Metromedia*, 403 U.S. 29, 86 (1971) (Marshall, J., dissenting).

42. John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel*, 71 IOWA L. REV. 217, 219–20 (1985).

43. *Editorializing by Broad. Licensees*, 13 F.C.C. 1246, 1247 (1948); *Mayflower Broad. Corp.*, 8 F.C.C. 333, 340 (1940) (stating that licensee operating in public domain "has assumed the obligation of presenting all sides of important public questions"). I have discussed the fairness doctrine, and the

in demerits in broadcasters' files which would be considered when their licenses came up for renewal. Although nonrenewal was rare,<sup>44</sup> broadcasters took that threat very seriously.

In *NBC v. FCC*, NBC broadcast a documentary called "Pensions: The Broken Promise." The program highlighted a series of cases in which pension plans had been abused so that workers were denied pensions after spending their careers working for a company. The documentary won awards and was part of the run-up to the passage of pension legislation in Washington. The specific examples were not controversial or disputed. But Accuracy in Media, a conservative watchdog organization, challenged NBC, saying that it had not broadcast a balanced presentation of whether pension plans in general were good or bad. NBC responded that nothing in the documentary addressed that issue, and to the extent that any of the people in the documentary said anything about that question, their comments were in fact balanced. NBC argued that the explicit point of the documentary was that abuses took place and were possible under existing law.<sup>45</sup>

The FCC sided with Accuracy in Media and found against NBC. The network took the case to the D.C. Circuit Court of Appeals which reversed. For the D.C. Circuit, one could imply a large number of issues from any given set of facts, but it was not reasonable to require the broadcaster to address every inference that people might draw. The documentary as it existed addressed a significant set of problems and performed a public service. To require the network to address the inferences people might draw about issues on which the network did not express an opinion would discourage the network from addressing significant problems because it would force the network to either water down an otherwise accurate and hard-hitting

---

problems with it, at greater length in *In the Name of Patriotism: The Constitutionality of "Bending" History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 553-77 (1987).

44. The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 58 F.C.C.2d 691, 708-11 (1976) [hereinafter 1976 Report and Order] (Robinson, Comm'r, dissenting) (pointing to rarity of adverse findings under fairness doctrine), *rev'd in part*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).

45. *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated as moot*, 516 F.2d 1101 at 1180 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976).

documentary or run another program to face the other issue. Either alternative would result in a loss of the already limited audience for documentaries because of the weaker nature of the documentary. But the D.C. Circuit approach had the effect of narrowing the doctrine substantially. Henceforth, only explicit issues would be covered.

Following the circuit court decision and subsequent questions about the constitutionality of the doctrine, the FCC decided to eliminate the fairness doctrine entirely. Now there is no requirement that broadcasters address any issues in a fair and balanced way, and hasn't been for a quarter century.<sup>46</sup>

Several years later, the FCC also withdrew from the comparative licensing process in which it had chosen who would get a license to broadcast and who would not, based on a set of criteria that were supposed to identify public spirited broadcasters who would reflect the interests and needs of the communities in which they were licensed to broadcast.<sup>47</sup> There had been many abuses of those licensing procedures; the most blatant involved partisanship. But beyond partisanship, the FCC for most of fifty years had favored middle of the road broadcasters all over the country and excluded minorities of every sort, racial and political.<sup>48</sup>

Terminating a poorly operating system was certainly overdue. But it left no responsibility for the quality of broadcasting except whatever the market would enforce.

---

46. The constitutionality of the fairness doctrine was questioned in *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11, 378 n.12 (1984) (indicating that Court is prepared to reconsider the doctrine) and *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987) (remanding for consideration of constitutional argument against fairness doctrine). The FCC has discontinued the doctrine in *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987).

47. Materials on FCC licensing from the 1930s through the 1970s are collected in the first edition of DOUGLAS GINSBURG, *REGULATION OF BROADCASTING* 75–334 (1979). For penetrating histories of licensing and attendant regulation in this period, see 3 BARNOUW, *supra* note 3; Mosco, *supra* note 37. In 1997, Congress authorized random selection for noncommercial educational stations under some circumstances, 47 U.S.C. § 309(i), and required auctions under most circumstances for commercial broadcasters, 47 U.S.C. § 309 (j). Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002, 111 Stat. 258, 260. The FCC subsequently adopted a point system for comparative licensing proceedings for noncommercial stations in *Reexamination of the Comparative Standards for Noncommercial Educ. Applicants*, 15 F.C.C.R. 7386 (2000).

48. See *Metropolitan Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (on racial exclusion).

With the development of the Internet, Congress added, and the Court expanded, several additional dodges. One says that an Internet provider is not responsible for information posted on an Internet service by someone else.<sup>49</sup> The courts have interpreted that provision as excusing Internet services from responsibility for content that they edit, pay for, or that they refuse to take down even though they are aware of its errors. The most famous example among those of us who have followed Internet law involved an Internet posting that directed people to call a particular person for t-shirts and other memorabilia, which suggested that he supported and condoned the bombing of the federal office building in Oklahoma City. As this Internet hoax spread, he began to receive so many calls that he could no longer carry on his business, and some of the calls involved threats to his safety. So he asked AOL to take that hoax down. It did nothing while the story spread around the country. Eventually he sued but the courts held that AOL was not responsible. When media investigated and reported that he had never offered such items, the angry calls declined to some eighteen per day.<sup>50</sup>

Litigation over inaccuracies in the *Drudge Report* and other Internet sources have been similarly fruitless, the courts almost routinely finding that the information was delivered by someone else so no one was responsible who could be identified, held liable in damages, or both.<sup>51</sup>

As a result of the removal of all of these rules and decisions, the media marketplace has been shifted from a highly regulated market toward a marketplace that is legally wide-open.

Nevertheless, the current marketplace inherits a configuration of media businesses that was shaped by the federal government since the birth of radio and had long favored commercial over public or educational broadcasting. The Federal Communications Commission spent half a century protecting the media oligopoly that Hoover had created. The FCC was finally forced to provide the spectrum that

---

49. 47 U.S.C. § 230(c) (2000).

50. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). The decision has been very controversial but nevertheless has been followed by most courts.

51. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998).

became the basis of the public broadcasting system in the late 1960s. The bulk of broadcasting is and has always been private, for profit, and dependent on advertising.

Thus, stations had reasons to avoid politics for their sponsors' sakes, with some prominent exceptions. News was brief and editorializing minimal. The networks enlarged news broadcasts in 1960 to counter revelations of rigged quiz shows and respond to the more aggressive approach of the new FCC chair, Newton Minow.<sup>52</sup> It has often been suggested that dependence on advertising made stations particularly supportive of American business in less blatant ways. In fact, broadcasters' biases tended to be from unexamined stereotypes rather than deliberate manipulation of news.<sup>53</sup> When the era of niche media arrived and the wraps came off both licensing and content, commercial broadcasting was ready for entrepreneurs whose objective was to advocate a point of view.

That opportunity meshed with the direction of corporate thinking over the past several decades. Before he was appointed to the U.S. Supreme Court, Justice Lewis Powell had prepared a report for the U.S. Chamber of Commerce in which he argued that business was not getting its point of view across.<sup>54</sup> He urged that corporations organize to present their point of view to the public. Following his advice, corporate America developed a web of conservative think tanks advocating economic laissez faire and other conservative causes. And corporate moguls and religious institutions with a political purpose established new stations and networks. The

---

52. 3 BARNOUW, *supra* note 3, at 128 (describing the increase in news documentaries); *id.* at 181 (describing the very limited time that had been allotted to news). Network news expanded from 15 minutes to a half hour in 1963, see CBS Evening News, [http://en.wikipedia.org/wiki/CBS\\_Evening\\_News](http://en.wikipedia.org/wiki/CBS_Evening_News) (last visited Jan. 21, 2008).

53. See HERBERT T. GANS, *DECIDING WHAT'S NEWS* (1979).

54. Memorandum from Lewis Powell to Eugene B. Sydnor, Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), available at <http://www2.bc.edu/%7Eplater/Newpublicsite05/02.5.pdf>; see also David Harvey, *Section One: Political and Economic Dimensions of Free Trade: Neoliberalism as Creative Destruction*, 610 ANNALS 22, 30 (2007) (describing the memo); Zygmunt J. B. Plater, *Law, Media, & Environmental Policy: a Fundamental Linkage in Sustainable Democratic Governance*, 33 B.C. ENVTL. AFF. L. REV. 511, 529–31 (2006) (quoting from the memo).

enormous media interests of several conservative organizations have been repeatedly documented.<sup>55</sup>

In other words, extremism can flourish in a concentrated media even though there are strong centrist incentives in that environment. Voices of hate were a strong presence in the concentrated media of the 1930s,<sup>56</sup> before federal regulation gradually tightened. Incentives are not automatic; people can and sometimes do choose other paths. But changed incentives matter, even if not conclusively.

Some argue that economic theory teaches that business would not capture media for political purposes. As Ed Baker demonstrates, that theoretical economic claim does not necessarily describe actual behavior.<sup>57</sup> One reason is that the rewards available through the political system can be greater than the loss of revenue from media broadcasts directly. Particularly, for media embedded in corporate conglomerates or in diversified financial assets, there can be great economic benefits from redirecting the course of legislation, by convincing people to support business claims for deregulation or tax exemptions, or to support legislators who will direct funds to business in other ways as well.<sup>58</sup>

Free market economists also claim that the market is a sufficient guarantor that misuse of the facts will be punished. The proponents of this theory ignore the large cost in time, effort, and sometimes money involved in checking on information. They also ignore the passage of time. These devotees of the market assert in effect that whatever the market might eventually bring about, it will bring about immediately, which is comparable to asserting that there can't be any water above sea level because, after all, water flows down to the ocean—eventually. But in a fractured marketplace, there is plenty of room for

---

55. See, e.g., ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* (2003) (documenting the extensive media holdings of The Wall Street Journal/Dow Jones Corporation and Rupert Murdoch's News Corporation, among others).

56. See, e.g., 2 BARNOUW, *supra* note 3, at 44–51, 221–24; *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 51 (D.C. Cir. 1972).

57. ALTERMAN, *supra* note 55, at 225; C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* 88–96 (2007); see also C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (1994); Frank Rich, *All the News That's Fit to Bully*, N.Y. TIMES, July 9, 2006, § 4, at 12.

58. See KEVIN PHILLIPS, *WEALTH AND DEMOCRACY* 326 (2002).



angry, partisan broadcasters, little way for those who are annoyed by the broadcasts to object especially where they are not part of the loyal audience the broadcasters are appealing to, and little way for people to discover the competing views unless the viewers take the time and trouble to find out. And by the time any abuse may be discovered, other issues will have come to the fore.

Bias is not necessarily, or primarily, deliberate. Bias partly flows from the economics of newsgathering.<sup>59</sup> The media gets a great deal of its news from government press releases, and particularly from whoever happens to be president.<sup>60</sup> That form of bias follows the election returns. A second form of bias is the result of unexamined prejudices and stereotypes.<sup>61</sup> A third form of bias is the result of current events. A study that appeared in the neoconservative journal, *The Public Interest*, concluded that the news had turned conservative because of the riots in the middle and late 1960s while the entertainment media had been liberal because of their concentration on stories about current social issues. The legal changes outlined above, however, permit a more organized and deliberate ideological use of the media.

The result of all these factors is a media that plays less to the political center and more to the extremes.

### 3. *The Principles of Journalists*

Journalism also changed. At the start of the twentieth century, the penny press sought a mass audience. Advertisers wanted to appeal to customers without regard to their politics. Opinion was confined to the editorial page and news took on a hard facts approach, a record of who said what and what happened where. Joe McCarthy upset that model by using it too well. By reporting his unsupported allegations of disloyalty without comment, news media gave McCarthy enormous influence. In the wake of what we have come to call McCarthyism, the press looked for ways to report the news without

---

59. See GANS, *supra* note 53, at 116–45.

60. *Id.* at 145.

61. *Id.* at 201–02.

being so vulnerable to unscrupulous allegations. The newsman's obligation was to get at the truth, to provide a more carefully digested record.

There was not supposed to be a liberal or a conservative truth. Truth was independent of party and partisanship. But inevitably the news media itself came under attack. Nixon's first vice-president, Spiro Agnew, attacked the national media as "effete" snobs before being forced out of office for corruption. Soon the Watergate investigation triggered by the "investigative reporting" of Bob Woodward and Carl Bernstein brought Nixon down. The impeachment was bipartisan. But the reaction to the impeachment had highly partisan fallout. Many on the right wing of the Republican Party blamed the press instead of Nixon for his fall.

Journalists increasingly settled on a new paradigm for reporting. Conflict provided drama, and drama became the engine to sell papers and win viewers. Get an allegation. Then ask someone on the other side. Now you have "unbiased" responsible reporting from which no interested reader can make head or tail. The sides are easier to tell apart. But the ubiquitous combat storyline contributes to polarization.<sup>62</sup>

As a result, a splintered press, partly freed of responsibility, found its theme in the maximization of antagonism on paper, screen, and speaker. That reorienting of press content would be matched by a reorientation of politics.

## *B. Legal Changes to the Political System*

### *1. The Nomination System*

A century ago, Progressives replaced conventions with the primary election system for making many nominations.<sup>63</sup> The shift to primaries continued over several decades. That switch has large political significance. Generally, conventions look for coalitions to

---

62. See Gersh, *supra* note 18, at 30.

63. The history of the nomination process is detailed in Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 HOFSTRA L. REV. 191 (1983).

put people over the top. The political pros that ran conventions had their eyes on winning the general election. They wanted competitive candidates. Primaries are relatively divisive, particularly where the rules award the nomination to the winner of a plurality. The electoral logic goes further where primaries are not open to independent voters or to the general electorate but only to party voters. Competing candidates elected by each party's "base" will be far apart. The late V.O. Key documented the pressure of primaries toward the extremes and his work has been repeatedly corroborated since.<sup>64</sup> The mathematics is quite simple. Assume the parties each have close to 50% of the voting public. Victory takes just above half of either party, and often less, to nominate a candidate who might go on to win the general election—roughly just over half of a half, or 25% in a well fought election, and often a much smaller percentage, of the voting population can control the political system.

The impact of the primary system was largely on state offices until the changes in the Democratic Party presidential selection rules in the 1970s.<sup>65</sup> The Democratic Party reacted strongly to the battles over black participation in southern state delegations and Mayor Daley's use of the police to abuse marchers and demonstrators during the 1968 Convention in Chicago, and it determined to end boss control by substituting more democratic selection systems throughout the country. In practice this meant a national move to primaries for selection of state delegations to the national party conventions. In the wake of those changes, the Republican nominating process changed as well.

The result of those events was a shift toward more primaries for both national, state, and local offices. Subsequently, party conventions rarely decided on the candidates. This second major

---

64. V.O. KEY, *AMERICAN STATE POLITICS: AN INTRODUCTION* 145–65 (1956).

65. On the changes in the Democratic Party candidate selection rules, see *DELEGATE SELECTION RULES FOR THE 1980 DEMOCRATIC NATIONAL CONVENTION* (1978); *MANDATE FOR REFORM: A REPORT OF THE COMMISSION ON PARTY STRUCTURE AND DELEGATE SELECTION TO THE DEMOCRATIC NATIONAL COMMITTEE*, reprinted in 117 CONG. REC. 32, 908-917 (1971). CEASER, *supra* note 211, at 260–303 (describing the changes). On the conflict between state statutes and party rules, see *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975).

round of substituting primaries for other nominating systems had the effect of pushing both parties away from the center, driven by the mathematical logic of the primary nominating process. The percentage controlling presidential selection has to be adjusted further downward for the impact of specific proportional or winner-take-all allocation of the votes in state primaries. The controlling proportion has to be adjusted slightly upward to the extent that parties allow independents to vote in party primaries.<sup>66</sup>

The mathematics of course is equally applicable to Republican primaries. The dominance of the right-wing Republicans over their party might have been achieved in other ways. They got their workers out and into every available party position. But primaries have been the battle ground between “liberal” and “conservative” Republicans. The latter dominated several elections even though they never reflected more than about a quarter of the public.

So the extension of the primary process has tended to deepen the political divide.

## 2. *Safe Seats*

Law drives the political divide in yet another way. The use of gerrymandering grew substantially after the Supreme Court held malapportionment unconstitutional in a series of cases in the early 1960s.<sup>67</sup> Malapportioned legislatures defined “geographically protected oligarchies of rural and small-town legislators.”<sup>68</sup> But traditionally defined campaign districts often permitted considerable

---

66. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

67. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring apportionment of state legislative seats in proportion to population); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring apportionment of congressional seats in proportion to population); *Baker v. Carr*, 369 U.S. 186 (1962) (holding reapportionment justiciable). Some have ascribed the recent growth in gerrymandering to newer technology. See *Vieth v. Jubelirer*, 541 U.S. 267, 364 (2004) (Breyer, J., dissenting) (“The combination of increasingly precise map-drawing technology and increasingly frequent map drawing means that a party may be able to bring about a gerrymander that is not only precise, but virtually impossible to dislodge.”).

68. Gordon E. Baker, *The Unfinished Reapportionment Revolution, in* POLITICAL GERRYMANDERING AND THE COURTS 11, 24–25 (Bernard Grofman ed., 1990).

local competition. Gerrymandering, by contrast, is all about political safety from voter judgment.<sup>69</sup>

Safe seats are not accidents of politics. Politicians draw safe seats to protect their jobs and to minimize the seats held by the other party. Safety is fostered by creating one party districts.<sup>70</sup> In one party districts, politicians are encouraged to move toward the extremes since there is nothing pulling them toward the center. Nevertheless, the U.S. Supreme Court has been unwilling to review the gerrymandering of legislative districts.<sup>71</sup>

Gerrymandering creates safe legislative seats, the lack of competition drives the legislators further apart, and that supports a very bitter politics.<sup>72</sup> “As a result, members speak more to their parties’ ‘bases,’ which provide most electoral and financial support.”<sup>73</sup> As Samuelson puts it, “stridency is a strategy.”<sup>74</sup>

That combination of the constitutional revolution against malapportionment, the subsequent legislative development of the tools of gerrymandering to write incumbent protection into the laws

69. See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 471, (2006) (Stevens, J., dissenting) (referring to “the large percentage of safe seats in recent congressional and state legislative elections” (citing Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?*, 153 U. PA. L. REV. 541, 574 (2004–2005))).

70. *Davis v. Bandemer*, 478 U.S. 109, 130–31 (1986) (White, J., plurality) (“To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit.”). I have addressed the techniques of gerrymandering in several articles, including Stephen E. Gottlieb, *Fashioning a Test for Gerrymandering*, 15 J. LEGIS. 1 (1988) (urging the symmetry test); *id.* at 7 (providing a visual description of gerrymandering); Stephen E. Gottlieb, *Identifying Gerrymanders*, 15 ST. LOUIS U. L.J. 540, 546–53 (1971) [hereinafter *Identifying Gerrymanders*] (describing gerrymandering for partisan advantage as the “selective use of opposing policies” and homogeneous districting as the tool for creating safe districts). Gerrymandering as commonly described involves both “stacking” into homogeneous districts and “cracking” opposing votes into mildly diverse districts where they will be overwhelmed. As the result, both the districts of the dominant and minority parties will generally be safe ones.

71. *Perry*, 548 U.S. at 419–20 may signal a change. In response to a brief submitted on behalf of Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, including some of the country’s leading political scientists, five justices wrote about the concept of symmetry that is the now standard mathematical measure of the partisan distortion of districting used by political scientists, and the justices each expressed interest in the potential of the measure.

72. Robert J. Samuelson, *Polarization Myths*, WASH. POST, Dec. 3, 2003, at A29; see also *Identifying Gerrymanders*, *supra* note 70, at 547.

73. Samuelson, *supra* note 72.

74. *Id.*

shaping their districts, and the Court's refusal to deal with it have helped stamp stridency on modern American politics.

### 3. *Campaign Money*

The Federal Election Campaign Act of 1971 and the Bipartisan Campaign Reform Act of 2002, together with other intervening amendments, were supposed to level the playing field. They may have done the reverse. And more pertinent here, they may have intensified the forces driving politics away from the center in two ways: by decreasing competition and by changing the politics that flows from fundraising.

The expense of political campaigns has been growing, partly because of the cost of media, partly because of the increased importance of primaries, and partly because campaigns are run much more by and for individual candidates than the party driven campaigns of yore, and the growing need for money has made campaign donors a primary constituency of every elected official.<sup>75</sup>

Political scientists have argued for decades about the importance of money to successful political campaigns. From their perspective, campaigns need more funds, not less. They have argued that restrictions on contributions disadvantage the candidates of ordinary Americans by contrast to candidates of those with wealth and it disadvantages challengers by contrast to incumbents.<sup>76</sup> In their view, that includes the restrictions imposed by the federal campaign finance restrictions.<sup>77</sup>

Incumbents start with a multi-million dollar advantage. They already have put together their fund-raising machinery, and have

75. See, e.g., LARRY J. SABATO, *PAYING FOR ELECTIONS: THE CAMPAIGN FINANCE THICKET* 5 (1989).

76. Bruce E. Cain, *Moralism and Realism in Campaign Finance Reform*, 1995 U. CHI. LEGAL F. 111, 138 (1995) (putting the concept of "floors without ceilings" into philosophical perspective); Frank J. Sorauf, *Politics, Experience, and the First Amendment: The Case of American Campaign Finance*, 94 COLUM. L. REV. 1348, 1358 (1994) (emphasis in the original) (comparing the school of thought among political scientists "arguing for public funding of campaigns *without* spending limits on them—for spending 'floors without ceilings,' as the position has come to be known"—with those of reformers who are not political scientists).

77. See 2 U.S.C. § 441a (2006).

publicly financed political staffs briefing them and communicating with constituents. The press covers incumbents. It does not know what to do with people who do not hold public office. Congress provides incumbents with staff, postage, a media center for interviews, and the ability to provide services for constituents. Challengers are off stage, hamstrung. Contributors find it wise to support incumbents because they have the power that contributors are trying to access. The mantra of the political scientists has been “floors, not ceilings.” That is, they have argued for creating a financial floor in political campaigns, injecting enough money into the system so that both sides could get their messages across. But they have argued against financial ceilings. Ceilings hinder those on the bottom. The need is to inject sufficient money into the campaign without pinching what a challenger can come up with.<sup>78</sup> So contribution limits have probably increased incumbent protection from effective challenges.<sup>79</sup>

In turn, incumbent protection insulates the incumbents from the discipline of the polls and allows them to move closer to their most important vocal and financial supporters and away from the center of their districts. To the extent that the federal rules restrain competition, they contribute to the extremism of American politics.

The federal restrictions may have changed the politics in another way. As approved in *Buckley v. Valeo*,<sup>80</sup> the federal statutes imposed restrictions on campaign contributions as well as expenditures coordinated with candidates under the rubric of avoiding corruption.<sup>81</sup> The statute made funding campaigns much more

---

78. See GARY C. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 194 (1980).

79. See *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (Opinion of Breyer, J., joined by Roberts, C.J. and Alito, J.) (objecting to Vermont’s “substantial restrictions on the ability of candidates to raise the funds necessary to run a competitive election”); *id.* at 264 (Kennedy, J., concurring) (describing Vermont’s contribution limits as “stifling”); *id.* at 268 (Thomas, J., concurring in the judgment, joined by Scalia, J.) (stating that Vermont’s restrictions on contributions “will generally suppress more speech by challengers than by incumbents, without serving the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof”).

80. *Buckley v. Valeo*, 424 U.S. 1 (1976).

81. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 U.S.C. § 431–55 (2006)). The limitations are imposed by 2 U.S.C. § 441a(1)–(6) (2006). The treatment of coordinated expenditures is governed by 2 U.S.C. § 441a(7) (2006) and *FEC v. Colorado Republican*

difficult. Campaigns now had to turn to a larger number of people who could make relatively limited contributions. The increased difficulty of fundraising guaranteed that those who could accomplish it, the “aggregators,” and large donors as a group, would take on increased importance.<sup>82</sup>

Aggregators come in two flavors. One is the fundraiser typical of various not-for-profit causes, sending solicitation letters to supportive groups of people. That kind of solicitation does not bring in very large individual donations unless it is used to identify people who might be reached in another way, but successful fundraisers can raise very large sums from large groups of people, particularly people who are ideologically driven. These include the voters on both sides of the “moral issues,” and a variety of other citizen causes, both liberal and conservative. Typically, this kind of fundraising from individual voters does not raise large sums from those who consider themselves independent and whose views are “middle of the road.” Thus, this form of fundraising mimics and reinforces the polarization of the primary process itself.<sup>83</sup>

The second type of aggregator is an individual who moves among people of wealth. Those people can consistently give significant donations and will know others who can do the same. The limitations of the FECA impose limits on what each individual can contribute to an individual campaign. But they can be counted on to support many different campaigns and PACs.<sup>84</sup> These people are worth face-to-face

---

*Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (applying coordinated expenditure rules to political parties).

82. See Stephen E. Gottlieb, *The Dilemma of Election Campaign Finance Reform*, 18 HOFSTRA L. REV. 213, 255 (1989); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 838 (1998) (try to circumvent this problem by requiring anonymous donations). Subsequently, BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002) made a “patriot dollars” proposal as a version of the anonymous donation idea and an alternative to public financing of campaigns. For commentary on their proposal, see Bruce E. Cain, *Cheap Talk Citizenship: The Democratic Implications of Voting with Dollars*, 37 U. RICH. L. REV. 959, 961 (2003).

83. LARRY SABATO, *THE RISE OF POLITICAL CONSULTANTS: NEW WAYS OF WINNING ELECTIONS* 220–258 (1981), describes the direct mail process and its results. The author also relies on his own experience doing and working with fundraisers in political, not-for-profit, and educational institutions.

84. See 2 U.S.C. § 441a(a)(3) (2006) (specifying the aggregate limits for individuals for political contributions per campaign cycle).



development and solicitation. Some of them can also make expenditures and provide varieties of “soft money,” which are not fully regulated by the FECA, even after the amendments of the Bipartisan Campaign Reform Act of 2002.<sup>85</sup> By necessity, a large portion of campaign funds have to be raised among a large number of reasonably wealthy people.<sup>86</sup>

What has become clear is that the very size of this group of essential contributors drives policy proposals in a different way from the influence of a smaller group of very wealthy donors.<sup>87</sup> As the tables below illustrate, the fundraising enterprise continually pushes for larger donations from an increasingly large base of large donors.

As Table I makes clear, donations have grown at every level, but larger donations have grown more rapidly than smaller ones; small donations have shrunk as a percent of donations; and large donations have increased as a percentage of donations. Table II makes the same point by looking at the numbers of people who have made donations over \$200 (the threshold for reporting).<sup>88</sup>

---

85. Federal Election Campaign Act of 1971, Pub. L. No. 107-155, § 202, 116 Stat. 91 (2002).

86. See SABATO, *supra* note 83.

87. Philip Pollock argues that the total group of contributors has remained quite stable over several decades though the distribution of contributions has shifted. See William Clagett & Philip Pollock, *Changing Modes and Shifting Targets: Monetary Recruitment in the 1960s and the 1980s* 3 (Jan. 6, 2005) (paper presented at the annual meeting of the Southern Political Science Association) available at [http://www.allacademic.com/meta/p66989\\_index.html](http://www.allacademic.com/meta/p66989_index.html).

88. 2 U.S.C. § 434(b)(3)(G) (2006).

Table 1. Donations by size, year, %

	Total* donations \$200- 999	Total* donations \$1000- 9999	Total* donations ≥\$10,000	% donations \$200- 999 of all ≥ \$200	% donations over \$10,000 of all ≥ \$200
1992	106m	294m	138m	20%	26%
1996	165	413	192	21%	25%
2000	174	616	447	14%	36%
2004	265	1004	645	14%	34%
Increase	250%	518%	467%	-30%	31%

\* Dollar totals are in millions and include both "hard" and "soft" money. During this period, 1992–2004, the Consumer Price Index increased 35%.

Source: Figures calculated from figures provided by the Center for Responsive Politics on its website. See OpenSecrets.org, Donor Demographics, <http://www.opensecrets.org/bigpicture/donordemographics.asp?cycle=2006> (last visited Feb. 27, 2009), for the relevant years. Note that their figures for most of the years are in the form \$+ and therefore calculating the figures within the relevant ranges required subtracting relevant higher figures. Numbers are rounded.

Table 2. Donors by size, year, %

	Total* donors \$200- 999	Total* donors \$1000- 9999	Total* donors ≥\$10,000	% donors \$200- 999 of all ≥ \$200	% donors over \$10,000 of all ≥ \$200
1992	273,116	153,198	6,341	63%	1.5%
1996	435,216	235,426	7,215	64%	1%
2000	438,914	324,054	14,919	56%	2%
2004	673,602	441,517	25,833	59%	2%
Change	246%	288%	407%	-6%	33%

\* Source: Figures calculated from figures provided by the Center for Responsive Politics on its website. See OpenSecrets.org, Donor Demographics, <http://www.opensecrets.org/bigpicture/donordemographics.asp?cycle=2006> (last visited Feb. 27, 2009), for the relevant years. Note that their figures for most of the years are in the form \$+ and therefore calculating the figures within the relevant ranges required subtracting relevant higher figures. Numbers are approximate and rounded. Totals are in millions and include both "hard" and "soft" money.

Unfortunately, it is not possible to make precise comparisons between the source and types of contributions before and after the

FECA became effective because of changes in reporting requirements. The information we have does confirm that a large share of political fundraising has long come from relatively substantial gifts.<sup>89</sup>

To the extent that the federal restrictions have been successful, it has been by making campaign finance more dependent on continually enlarging the group of substantial givers and refocusing efforts on that level of donor rather than the much smaller group, which might have made megagifts of the kind that cap the efforts of many nonpolitical not-for-profit institutions. But that has its own political price.

A few very large donors have very specific requests, and we are accustomed to thinking of that as inappropriate access and influence, even when not legally barred. Specific favors that have precise benefits are insufficient to satisfy the much broader class of people among whom funds must be raised under the statutory restrictions. A large group of people whose dollars are crucial to the campaign requires favors and legislation that affect the economy in a broader way. Part of the political dynamic behind recent tax cuts, which reduced the progressivity of the tax code, has been the effort to solidify the support of this group—still a very small portion of the electorate but much too large for individual favors.<sup>90</sup>

Satisfying more people may sound more democratic than the corruption of specific favors for a small group. But in this form, money changes the policies, not merely the exceptions. In these ways the system of financing politics has the effect of driving politics away from the center and further toward the extremes.

---

89. See HERBERT E. ALEXANDER, FINANCING THE 1976 ELECTION 512–14 (1979); HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 73–85 (1976); see also ALEXANDER HEARD, THE COSTS OF DEMOCRACY 48–52 (1960) (the seminal work in the field that noted that the significance of larger donors depends on the significance of the election).

90. KEVIN PHILLIPS, WEALTH AND DEMOCRACY 321–27 (2002), suggests the relationship between the cost of campaigning and the rising tax breaks for the wealthy. DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE (2003) and CHARLES LEWIS & THE CENTER FOR PUBLIC INTEGRITY, THE BUYING OF THE PRESIDENT 2004 (2004) tell a somewhat more traditional story about the benefit to the super rich, but their data show a curve of benefits of tax breaks so that members of the upper middle class also feel a noticeable benefit in their taxes though far less than those much more wealthy.

That can be seen in another way. The individual campaign contribution limit is now \$2,000 indexed for inflation or \$2,300 in 2008.<sup>91</sup> Few have \$2,300 to give to a political campaign. Some, however, will contribute the maximum allowed to candidates who support legislation, which will bring large returns to them or their companies. Those who move in wealthy circles know many people who can give in those amounts. And each of those donors can give much more than \$2,300 because they can give to many different organizations so long as they are independent.<sup>92</sup>

The more numerous ordinary Americans have much lower incomes. For most salaried and hourly employees \$2,300 is a lot of money. Typical contributions are closer to \$25 or \$50. So, while most candidates will depend on aggregators and large donors, populist candidates raising money under the federal campaign rules will often be cash poor.<sup>93</sup>

As one political scientist wrote, politicians can shirk their duty in different ways, and there are competing methods for controlling their behavior.<sup>94</sup> Large campaign contributions threaten to make elected leaders shirk their duties to the public after the election. But the absence of competition frees candidates before the election. The two are related. The more difficult the fundraising process, the more it

---

91. 2 U.S.C. § 441a(a)(1)(A), 441a(c) (2006). There are a variety of limits for contributions to different kinds of political committees, and the aggregate statutory limit for all covered contributions is now \$94,000 over the course of two years, see 2 U.S.C. § 441a(3) (2006), indexed for inflation. For the current inflation indexed amounts, see Federal Election Commission Notice 2007-2, Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294 (Feb. 5, 2007).

92. 2 U.S.C. § 441a(1) (2006) (spells out maximum contributions by donee); 2 U.S.C. § 441a(3) (2006) (spells out maximum aggregative contributions by donor); 2 U.S.C. § 441a(7) (2006) (spells out the treatment of coordinated expenditures).

93. Some very wealthy individuals like George Soros tried to even the balance by contributing to so-called section 527 organizations, like MoveOn.org which are exempt under the statute. 2 U.S.C. § 441b(c)(2) (2000); see *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2686 (2007) (Scalia, J., concurring in part and in the judgment) (noting the treatment of section 527 organizations). In response, the Administration tried to subject 527 organizations to the same election campaign rules. The Federal Election Commission considered rules to prevent section 527 organizations from commenting on the behavior of candidates. Glen Justice, *Finance Battle Shifts to Election Panel*, N.Y. TIMES, Jan. 16, 2004, at A16. *But see* *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (holding the Bipartisan Campaign Reform Act of 2002 (BCRA) unconstitutionally prohibited at least some issue ads, which raised doubts about the constitutionality of any limitation of issue ads by section 527 organizations).

94. Gary C. Jacobson, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 369–71 (1989).

threatens to defeat competition, the more large donors and large fundraisers matter, and therefore gain access and political advantage. So it turns out that contribution limits matter both before and after the election.

Political contributions certainly corrupt. And they skew political discussion further from the center to satisfy the financial base of each party, emphasizing the particular concerns of major givers, regardless of the position of the mass of the American public. Contributions loosen the tie between politics and public opinion. Ours is not a politics of working people largely because working people cannot provide the funds that campaigns require. It is a politics that responds heavily to the “base” of each party, as defined in part by money and legal restrictions on who can contribute what. Limits on contributions and expenses at best substitute one inequity for another. They do not solve the problem.

### III. CONSEQUENCES

#### *A. A Perfect Storm*

Journalistic conventions which emphasize conflict, media that now slice the public narrowly in the hands of ideologically driven owners, gerrymandering that segregates the voting population into safe districts, primary elections, and campaign finance rules that pass control to politically active portions of their parties come together in a bare knuckles brawl of extremists. That is what the papers like, what people find on their screens, and the way primary election math adds up. The winners reinforce the point by demonizing everyone who disagrees. The two parties have become fighting faiths.

We have had fighting faiths before. We had fighting faiths before the Civil War, our bloodiest, and perhaps holiest, conflict. We had fighting faiths again during the Populist Movement, when lots of people died over the union movement, and the beginning of Jim

Crow. Indeed, segregation was designed largely to divide the Populists and keep power in wealthy hands.<sup>95</sup>

Whether fighting faiths advance the cause of fairness and justice or simply bloody the countryside depends. But democracy is in peril when the objectives of partisanship override respect for those opposed. To some, times seem perilous when the executive is denied power that it believes is important to protect the country. To others, times seem perilous when an executive claims the power to put people beyond the reach of courts, lawyers, press, public, and family and hold them there without process or limit; when government claims the power to invade our privacy and use the information without accountability; or when government claims we all must be treated as suspects. Such times seem perilous because power corrupts, particularly when the techniques of twentieth century totalitarianism are wielded by those who claim to protect us from totalitarianism. These arguments reach to the very core of patriotism and subversion. They pit us against each other as our country's worst enemies. When totalitarianism comes to this country, it will surely come dressed in red, white, and blue.<sup>96</sup>

### *B. The Risks to Democratic Government*

Half a century ago, American political scientists would have welcomed greater polarization of the parties to give Americans a much clearer choice.<sup>97</sup> Half a century later, the entire political environment has undergone large changes and the effects on the polarization of the parties seems to have gone too far. For students of democracy and its history, polarization and intolerance threaten commitment to democracy.<sup>98</sup> And the polarization of the leadership is

95. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 74–83 (1955).

96. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY*, 61 (George Allen & Unwin 1976) (1942) (suggests socialism will come from the “very success” of capitalism).

97. COMM. ON POL. PARTIES, AM. POL. SCI. ASS'N, *TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM* (1951) (urging disciplined parties on a British model).

98. See James L. Gibson, *The Political Consequences of Intolerance: Cultural Conformity and Political Freedom*, 86 AMER. POL. SCI. REV. 338 (1992) (describing the risks of intolerance); see also James L. Gibson, *Enigmas of Intolerance: Fifty Years After Stouffer's Communism, Conformity, and Civil Liberties* (Centre for Comparative and International Politics Working Paper, Version 1.6, 2004),

even more threatening than the polarization of the masses.<sup>99</sup> Democracy has been brought down repeatedly when competing partisans came to believe each other disloyal.<sup>100</sup> Both the reality and the perception are dangerous. Yet members of both parties have been charging each other with disloyalty or helping our enemies.<sup>101</sup>

---

available at <http://jameslgibson.wustl.edu/enigmas/enigmas.pdf>; ROBERT WEISSBERG, *POLITICAL TOLERANCE: BALANCING COMMUNITY AND DIVERSITY* 185–224 (1998); MICHAEL WALZER, *ON TOLERANCE* (1997).

99. BERMEO, *supra* note 2, at 5–6; see also SAMUEL A. STOFFER, *COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES: A CROSS-SECTION OF THE NATION SPEAKS ITS MIND* (1955), who first speculated about the importance of elite attitudes toward liberty.

100. BERMEO, *supra* note 2, at 168; see also *THE BREAKDOWN OF DEMOCRATIC REGIMES*, *supra* note 2.

101. Attorney General John Ashcroft told a Senate panel: “To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies.” Quoted by Tim Russert, *The Vice President Appears on Meet the Press* (NBC television broadcast Dec. 9, 2001), available at <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/print/vp20011209.html>). A small sample of reports culled from the *New York Times* include: Editorial, *Will the Real Traitors Please Stand Up?*, N.Y. TIMES, May 14, 2006, § 4, at 12 (President Bush described the leak of the NSA surveillance program “a shameful act” that is “helping the enemy”); Editorial, *Talking Sense, at Last, on Iraq*, N.Y. TIMES, Sept. 21, 2004, at A26 (“Mr. Bush still declines to even acknowledge the disastrous condition the war has fallen into, preferring simply to assert over and over that the course there is now firmly set for a Democratic and stable future. Democrats who question these Pollyannaish projections are almost instantly slapped down as unpatriotic underminers of military morale.”); Editorial, *An Un-American Way to Campaign*, N.Y. TIMES, Sept. 25, 2004, at A14 (“We did not, however, anticipate that those on the Bush team would dare to argue that a vote for John Kerry would be a vote for Al Qaeda. Yet that is the message they are delivering—with a repetition that makes it clear this is an organized effort to paint the Democratic candidate as a friend to terrorists. . . . Mr. Bush has not disassociated himself from any of this, and in his own campaign speeches he makes an argument that is equally divisive and undemocratic. The president has claimed, over and over, that criticism of the way his administration has conducted the war in Iraq and news stories that suggest the war is not going well endanger American troops and give aid and comfort to the enemy. This week, in his Rose Garden press conference with the interim Prime Minister Ayad Allawi, Mr. Bush was asked about Mr. Kerry’s increasingly pointed remarks on Iraq. ‘You can embolden an enemy by sending mixed messages,’ he said, going on to suggest that Mr. Kerry’s criticisms dispirit the Iraqi people and American soldiers.”); Robin Toner, *Kerry Presents Himself as a Patriot With a Different View*, N.Y. TIMES, June 4, 2004, at A23 (“Mo., Gen. Johnnie Wilson, one of only four black four-star generals, got a standing ovation when he introduced Mr. Kerry this way: ‘It seems to me unpatriotic that those who were absent would question Kerry’s commitment, dedication and patriotism to our great nation.’ The Democrats’ aggressiveness in this debate is, in large part, a reaction to 2002, strategists close to the campaign say. The Democrats’ vulnerability on national security that year, one year after the terrorist attacks, was embodied by the Senate race in Georgia. Max Cleland, a triple amputee who earned a silver star in Vietnam, lost that seat to Saxby Chambliss after a lacerating Republican advertising campaign that used footage of Saddam Hussein and Osama bin Laden to accuse Mr. Cleland of being soft on defense. ‘There’s a strong feeling among Democrats that in going after Max Cleland, who left three limbs on the ground, Republicans really crossed a line,’ said a Democratic strategist close to Mr. Kerry. ‘That upset John Kerry and a lot of other Democrats.’”); Adam Nagourney & Robin Toner, *Strong Charges Set New Tone Before Debate*, N.Y. TIMES, Sept. 27, 2004, at A1 (“‘It’s a fairly common occurrence in wartime

We think of charges and countercharges of disloyalty as hyperbole, but they have been corrosive, leading members of competing parties in numerous countries to believe that winning was more important than respecting the wishes of the public, and goading each other in a kind of death spiral until one party seized the reins. Sometimes that dance of death was initiated by economic policies, sometimes by violence, and sometimes both. In other words, polarization at the top endangers democracy.<sup>102</sup>

Americans have gone through periods in which they could not in fact trust each other. The election laws in all of the states reflect periods when political success was governed by dirty tricks, fraud, and intimidation. Americans are used to attributing those flaws to party machines of a bygone era. But the contested 2000 presidential election brought these issues back to the fore. Invalid absentee ballots were counted in some Florida counties but not others.<sup>103</sup> The procedure of voting and the form of the ballots differed by county, and in those counties that used punch cards, “hanging chads” (incompletely pushed through the card stock) were scored differently, a difference the Florida Supreme Court tried to stop until the U.S. Supreme Court barred it from continuing.<sup>104</sup> A private computer data

---

that people who dissent are accused of being unpatriotic,’ said Alan Brinkley, a historian who is the provost of Columbia University. ‘But to have it come from high levels of this kind is somewhat unusual.’”).

102. See BERMEO, *supra* note 2; THE BREAKDOWN OF DEMOCRATIC REGIMES, *supra* note 2.

103. The New York Times conducted an extensive examination of the ballots, with differing conclusions depending on whether the chads or the absentee ballots were examined, whose ballots, and in which counties. Their coverage included: Josh Barbanell, *Examining the Vote: How the Ballots Were Examined*, N.Y. TIMES, July 15, 2001, § 1, at 16; David Barstow & Don Van Natta Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, § 1, at 1; Richard L. Berke, *Examining the Vote: News Analysis; Who Won Florida? The Answer Emerges, but Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16; Richard L. Berke, *Democrats Seek Inquiry on Florida Vote Count*, N.Y. TIMES, July 16, 2001 at A11; Richard L. Berke, *Lieberman Put Democrats in Retreat on Military Vote*, N.Y. TIMES, July 15, 2001, § 1, at 16; C. J. Chivers, *House Republicans Pressed Pentagon for E-Mail Addresses of Sailors*, N.Y. TIMES, July 15, 2001, § 1, at 19; Michael Cooper, *Timely but Tossed Votes Were Slow to Get to the Ballot Box*, N.Y. TIMES, July 15, 2001, § 1, at 19; Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at 1; Archie Tse, *The Confusing Ballots*, N.Y. TIMES, Nov. 12, 2001, at A16; Ford Fessenden, *Ballots Cast by Blacks and Older Voters Were Tossed in Far Greater Numbers*, N.Y. TIMES, Nov. 12, 2001, at A17; Ford Fessenden, *Examining the Vote: The Method; How the Consortium of News Organizations Conducted the Ballot Review*, N.Y. TIMES, Nov. 12, 2001, at A17.

104. *Bush v. Gore*, 531 U.S. 98 (2000).



company with strong ties to the Republican party was hired without competitive bidding to purge the Florida rolls of people who should not vote, but their sloppy process purged tens of thousands who were qualified, most of them Democrats.<sup>105</sup> The counting of ballots itself was interrupted by a mob of screaming party workers reminiscent of the goon squads that steered many an election at the turn of the twentieth century.

Politics in Congress began to show serious cracks. Once they gained control, Republicans excluded Democrats from many traditional opportunities to examine legislation, participate in hearings, or gain access to information. Bipartisanship was gone and many in Congress reacted to the change in behavior with dismay.<sup>106</sup>

Government is all about conflict, sometimes creating it, sometimes resolving it, managing and mismanaging it, adding fuel to the fire. Conflict by itself says very little about whether governments will fall or democracy will be overthrown. How conflict is managed is crucial.<sup>107</sup> Polarization, paranoia, and demagoguery add fuel to the conflicts among us.

America is not immune from polarization, paranoia, or demagoguery.<sup>108</sup> Despite an honored tradition of people protesting in public, mayors, sheriffs, and presidents have filmed,<sup>109</sup> hosed, shot,<sup>110</sup>

105. GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY: AN INVESTIGATIVE REPORTER EXPOSES THE TRUTH ABOUT GLOBALIZATION, CORPORATE CONS, AND HIGH FINANCE FRAUDSTERS* 7–12 (2002).

106. See Carl Hulse, *With Promises of a Better-Run Congress, Democrats Take On Political Risks*, N.Y. TIMES, Dec. 27, 2006, at A23.

107. See generally AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003) (describes how contemporary international policies are exacerbating conflicts); SUSAN L. WOODWARD, *BALKAN TRAGEDY: CHAOS AND DISSOLUTION AFTER THE COLD WAR* (1995) (describing the inadequacy of the federal arrangements in the former Yugoslavia to manage the emerging conflicts).

108. RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* (Univ. of Chicago Press 1964).

109. See, e.g., *Laird v. Tatum*, 408 U.S. 1 (1972) (finding Army data gathering of domestic demonstrations did not present a justifiable controversy); see DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 180 (2004) (discussing of the Army's domestic "intelligence").

110. Some of the most famous images from the Civil Rights Movement were the use of fire hoses on the demonstrators. Many were murdered in the context of many different demonstrations and issues. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (finding no Eleventh Amendment immunity of state officials coming out of the shootings at Kent State). For extensive studies of violence in America, see

arrested, and penned peaceful demonstrators<sup>111</sup> claiming fear of what the demonstrators might do. The U.S. has been sufficiently moved by fear of the masses elsewhere to intervene repeatedly against popular democratic leaders in such places as Guatemala, Chile, and Iran.<sup>112</sup>

In short, paranoia and polarization are dangerous.

#### IV. PROPOSALS

The legal regime that centered politics in the mid-twentieth century required the federal government to take extensive control over the shape of the media and what it could broadcast. And it required a political system that privileged closed doors and secret deals. Neither is defensible any longer.<sup>113</sup> Given that limitation, proposals for reform can go only part way toward shaving the worst edges off our polarized politics.

##### *A. Reconstructing Media*

The bland media and political oligopoly that existed for much of the twentieth century had major flaws. We should not return to that era. But it does make sense to take some steps to bring responsibility, balance, and fairness back to the media and return politics to a broader slice of the public.

---

VIOLENCE IN AMERICA: AN ENCYCLOPEDIA 261 (Ronald Gottesman & Richard Maxwell Brown eds., 1999); VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES (Hugh Davis Graham & Ted Robert Gurr, eds., 1969).

111. See *Schiller v. City of N.Y.*, 2008 U.S. Dist. LEXIS 4253 (S.D.N.Y. Jan. 23, 2008) (arising out of police arrest and detention of persons demonstrating outside the 2004 Republican National Convention).

112. The George Washington University National Security Archive, which is available at <http://www.gwu.edu/~nsarchiv/NSAEBB/index.html>, includes many relevant documents: for Chile, see Peter Kornbluh, *Chile and the United States: Declassified Documents Relating to the Military Coup, Sept. 11, 1973*, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB8/nsaebb8i.htm>; for Guatemala, see Kate Doyle & Peter Kornbluh, *CIA and Assassinations: The Guatemala 1954 Documents*, available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB4/index.html>. For Iran, see STEPHEN KINZER, *ALL THE SHAH'S MEN* (2003).

113. FCC restriction of networks and licensing of media ownership may not have been constitutionally defensible. See Stephen E. Gottlieb, *Government Allocation of First Amendment Resources*, 41 U. PITT. L. REV. 205, 205–07, 226–30 (1980).

Libel laws can be recalibrated so that plaintiffs defamed by media misstatements can seek vindication without imposing outlandish damages for innocent mistakes.<sup>114</sup> Responsibility for Internet shenanigans can also be imposed.<sup>115</sup> Courts could impose liability for those speakers who are paid by their media hosts. A more far-reaching solution might require congressional development of a fair notice and take down procedure much as it did for copyright.<sup>116</sup> And a modicum of fairness can be restored.<sup>117</sup> There were well understood problems with the fairness doctrine as it once stood.<sup>118</sup> The D.C. Circuit put an end to the FCC's inference of multiple issues from documentaries which did not explicitly deal with them.<sup>119</sup> But that did not require that the FCC abolish the doctrine in its entirety as it did.<sup>120</sup> A reasonable version is not out of the question. Fairness matters.

Public broadcasting can be put on a reliable footing outside the foundation in advertising that threatens to make each new form of media duplicate the strengths and weaknesses of existing media.<sup>121</sup>

---

114. See *Rosenbloom v. Metromedia*, 403 U.S. 29, 86 (1971) (Marshall, J., dissenting) (urging a limitation to measurable financial damages in place of the narrowing of the liability decision).

115. Courts have disagreed about the proper interpretation of 47 U.S.C. § 230(c) (2000) (limiting liability for defamatory content provided by another). Compare *Barrett v. Rosenthal*, 114 Cal. App. 4th 1379, 1392, 1395 (Cal. Ct. App. 2004) (finding immunity does not apply to those who republish with knowledge of defamatory character), with *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding complete barrier to liability despite repeated requests to remove a damaging hoax).

116. 17 U.S.C. § 512(c) (2006) (providing protection for copyright holders).

117. See *NBC v. FCC*, 516 F.2d 1101 (D.C. Cir. 1974), *vacated as moot*, 516 F.2d 1101 at 1180 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976) (narrowing the fairness doctrine to explicit issues).

118. Its problems are outlined in Stephen E. Gottlieb, *In the Name of Patriotism: The Constitutionality of 'Bending' History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497, 553-71 (1987).

119. The Circuit Court decision in *NBC v. FCC*, 516 F.2d 1101, 1106-07, 1128-29, 1134-46 (D.C. Cir. 1974), *cert. denied*, 424 U.S. 910 (1976), minimized First Amendment problems by narrowing the doctrine considerably.

120. *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 87-266, 52 Fed. Reg. 31,768 (adopted Aug. 4, 1987).

121. Existing rules leave public broadcasting stations dependent on advertisers differentiated only by sanitizing the text. See 47 U.S.C. § 399b (2000) (defining advertising prohibited on public broadcasting stations); Comm'n Policy Concerning the Noncommercial Nature of Educ. Broad. Stations, 7 F.C.C.R. 827 (1992) (differentiating between prohibited advertising and permitted underwriting); *KERM, Inc. v. FCC*, 353 F.3d 57, 58 (D.C. Cir. 2004) (describing the relationship of the statutory ban on advertising to the use of underwriting on noncommercial public broadcasting stations). Prior to the authorization of underwriting, public broadcasting was supported exclusively from public sources although the search for a system that would put the stations out of the reach of politics was never satisfactorily resolved.

Public support is appropriate because news is properly described as a public good.<sup>122</sup> That is, advertisers are paying for access to purchasers and are therefore likely to undersupply the news that is valuable in carrying out the business of democracy. In fact, many news organizations have been shrinking.<sup>123</sup> Foreign bureaus have been closed. And even within the U.S. there are fewer reporters covering more communities. By failing to support the news, the present set of rules pushes all news givers into the arms of government press secretaries who supply cheap “picture opportunities” and canned information, and pushes them into the arms of economic powerhouses whose patronage or ownership governs the funding, quantity, presentation and direction of news.

The expansion of Internet, cable, and other media presents a different set of problems. Social movements often work like pendulums, shifting backward just as we identify the problems of its position in the arc. There is some evidence that large media enterprises are treating the plethora of media outlets like a vacuum to be filled by a new set of monopolists.<sup>124</sup> So even in this period of burgeoning choice, it is important to stake out a position on the antitrust rules. Allowable media concentration should be much less than the one-sixth of local media outlets or stations with access to nearly 40% of the national audience that the FCC now allows.<sup>125</sup> Diversity of ownership and viewpoint matters.

---

122. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

123. Jennifer Dorroh, *Armies of One—Are ABC's New One-Person Foreign Bureaus a Model for Covering the World in the Digital Age?*, AM. JOURNALISM REV., Dec./Jan. 2008, available at <http://www.ajr.org/Article.asp?id=4443> (cites “a time of ever-dwindling resources for foreign news”); Jack Shafer, *The Incredible Shrinking Newspaper—Newspapers are Dying, but the News is Thriving*, SLATE, June 24, 2006, <http://www.slate.com/id/2144201/> (newspapers are shrinking but staff is moving online); Todd S. Purdum, *TV Political News in California Is Shrinking, Study Confirms*, N.Y. TIMES, Jan. 13, 1999, at A11 (television coverage of California gubernatorial race shrank); Editorial, *The Last Anchor*, N.Y. TIMES, Aug. 9, 2005, at A18 (“network news operations are less well financed, less powerful and less likely to send an expensive team of cameras and producers to cover an overseas story”).

124. The fight over net neutrality is an example of this. See H.R. 5417, 109th Cong. (2d Sess. 2006) (proposal entitled “To amend the Clayton Act with respect to competitive and nondiscriminatory access to the Internet”).

125. 47 C.F.R. § 73.3555 (2008).

Such steps may improve media and limit some of the more outrageous behavior without returning it to the oligopoly that exerted a strong pull on politics prior to the revamping of the media over the past three decades.

### *B. Reconstructing Campaigns*

The path to real campaign reform, reform that would bring politics closer to the people from the ideologues and the financial oligarchs is well known. Public financing is the only solution for which there is evidence. Political scientists have pointed out for years that it was the one solution that would work.<sup>126</sup> It works by reducing the dependence of candidates on large contributions and even larger fund-raising efforts, and by enabling a relatively even-handed and competitive campaign. The American Civil Liberties Union (ACLU), a major critic of restrictions on fundraising, supports public financing for just that reason. The U.S. Supreme Court gave public finance of political campaigns its blessing in *Buckley v. Valeo* in 1976.<sup>127</sup> And the court gave its blessing on expense restrictions as a condition of accepting public money. Contributions can be excluded entirely for publicly funded campaigns.

There are two problems with public financing of election campaigns. First, it would actually work. And therefore it is unpopular with legislators. True campaign finance reform would make politics much more competitive. There is no incentive for incumbents to want that. Incumbents want to protect their positions. So legislators satisfy our demand for political blood and protect their own entrenched reelection machine by offering us prohibitions that can always be circumvented.

Second, it is not free. The federal presidential campaign checkoff has been purely voluntary and fewer people check it off every year. We seem to prefer the myth that restrictions on campaign

---

126. Cain, *supra* note 76, at 138; Sorauf, *supra* note 76, at 1358. Cain and Sorauf, in turn, cited the seminal work of HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 190 (3d ed. 1984); ALEXANDER HEARD, *supra* note 89; and GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 31-45 (1983), among others.

127. *Buckley v. Valeo*, 424 U.S. 1 (1976).

contributions will force "bad" politicians to play nice. Our national distaste of politics prevents us from giving our money to candidates or doing the hard work required to clean the system up. We are moralists, not reformers. Underfunding of existing public funding programs is a serious problem. In the presidential campaign system as it stands, candidates have the option to decline public money in favor of private financing if they deem the public funds made available are insufficient, as has been the case in recent presidential elections—behavior that ought to trigger an increase in funding but has not.

Americans are reluctant to pay for public goods like elections. They want their communications media to deliver news and information as if it were an important public service, and claim they want a large quantity of well-organized information about truly important issues, not just the police blotter and the weather. But they want it paid for privately by corporations which are very sensitive to who buys what, among which payments for news are trivial.

Some states have been trying aggressive public funding systems.<sup>128</sup> Public financing would not return politics to the center, but it would increase the competitiveness of many races and reduce the dependence on ideologically committed political financiers. To that extent it could help politics to stand down from present polarities.

---

128. FLA. STAT. ANN. §§ 106.30–36 (LexisNexis, LEXIS current through 2008 regular sess.); Kentucky Public Financing Campaign Act, 1992 Ky. Acts ch. 288, § 13, *repealed by* Act 2005, ch. 105, § 17; ME. REV. STAT. ANN. tit. 21, §§ 1121–1128 (West, LEXIS current with CHS. 470–560 of the second regular sess. of the 123d Legislature) (Maine Clean Election Act); Public Financing Act, MD. CODE ANN., ELEC. LAW § 15-101 (Michie, LEXIS current through all legislation enacted in the 2008 regular Sess.); MASS. ANN. LAWS ch. 10, §§ 42–42C (LexisNexis, LEXIS current through Act 377 of the 2008 regular sess.) (Massachusetts State Election Campaign Fund); *id.* ch. 55C, § 1–12 (Massachusetts Limited Public Financing of Campaigns for Statewide Elective Office); *id.* ch. 62, § 6C (Massachusetts Voluntary Contribution for State Election Campaign Fund); Michigan Campaign Finance Act, MICH. COMP. LAWS Serv. §§ 169.261–265 (LexisNexis, LEXIS current through 2008 Sess.); NEB. REV. STAT. §§ 32–1602, 1610 (LexisNexis, LEXIS current through 2008 special sess.) (Nebraska Campaign Finance Limitation Cash Fund); R.I. GEN. LAWS §§ 17-25-18 to 17-25-30 (LexisNexis, LEXIS current through Jan. 2008 Sess.) (Rhode Island Public Financing of Election Campaigns); VT. STAT. ANN. tit. 17, §§ 2810, 2851–56 (LexisNexis, LEXIS current through 2007 adjourned Sess.) (Vermont Campaign Finance Option); WIS. STAT. ANN. § 11.31 (West, LEXIS current through 2007 Wis. Act 41) (Wisconsin Election Campaign Fund); *see also* 26 U.S.C. §§ 9001–13 (2006) (Presidential Election Campaign Fund); 26 U.S.C. §§ 931–42 (2006) (Presidential Primary Matching Payment Account).

## CONCLUSION

The centrism of the mid-twentieth century was partly the product of a variety of legal restrictions. As the legal landscape changed, media and politics changed radically. The law and regulations governing media organizations gradually relaxed, allowing many more outlets, with greater ideological diversity, but also a splintered, ideological, and often irresponsible media.<sup>129</sup> Eventually the FCC began to allow reconcentration of ownership, but the splintered outlet niches leave plenty of ideological space.

Liability rules also relaxed for defamation and fairness, minimizing incentives for diligence in a media system in which most preach to loyal audiences of like ideological stripes.<sup>130</sup>

This might have been balanced by 1950s style broadly inclusive political practices. But the expansion of primaries as the route to nomination privileged more ideological candidates.<sup>131</sup> The redesign of legislative districting encouraged that trend.<sup>132</sup> And the financial contribution rules have helped to align politics with major donors instead of reducing that relationship as its proponents sought.<sup>133</sup> The parallel track of communication law and election law could not help but drive us toward a far more extremist world.

One would not want to bring back 1950s style centrism with all its faults. But legal reforms are available that could curb some of the excesses of contemporary politics, particularly with respect to antitrust rules, defamation, and fairness rules applicable to the media and regulation of gerrymandering and campaign finance in the political process.

---

129. *See supra* Part II.A.

130. *See supra* Part II.A.

131. *See supra* Part II.B.

132. *See supra* Part II.B.

133. *See supra* Part II.B.