Washington College of Law
American University

ARTICLES

"Expertness for What?": The Gould Years at the NLRB
and the Irrepressible Myth of the "Independent" Agency
Distinguishing Legislative Rules from Interpretative Rules
Joan Flynn
Richard J. Pierce, Jr.

SYMPOSIUM:
REGULATION OF POLITICS

FEDERAL ELECTION COMMISSION

Obstacles to Effective Enforcement of the
Federal Election Campaign Act
Commissioner Scott E. Thomas & Jeffrey H. Bowman

"A Complicated and Indirect Encroachment":
Is the Federal Election Commission
Unconstitutionally Composed?
Jamin B. Raskin

The Enforcement Blues: Formal and Informal
Sanctions for Campaign Finance Violations
Todd Lochner & Bruce E. Cain

CAMPAIGN FINANCE

Money Talks: In Defense of a Common-Sense
Approach to Judicial Review of Campaign
Contribution Limits
Attorney General Jeremiah W. (Jay) Nixon & Paul R. Magoffee

Campaign Contribution Limits: Pandering to Public
Fears About "Big Money" and Protecting Incumbents
D. Bruce La Pierre

TWO-PARTY SYSTEM

Pull the Plug
America's Two-Party System: Friend or Foe?
Joel Rogers
David A. Dulio & James A. Thurber

COMMENT

Open Access or Forced Access: Should the FCC Impose
Open Access on Cable-Based Internet Service Providers?
Daniel Shih

American Bar Association
Defending Liberty
Pursuing Justice
TWO-PARTY SYSTEM

PULL THE PLUG

JOEL ROGERS

An effective party system requires, first, that the parties are able to bring forth programs to which they commit themselves and, second, that the parties possess sufficient internal cohesion to carry out these programs.

Committee on Political Parties, American Political Science Association

It is an essential part of democracy that minorities should be adequately represented. No real democracy, nothing but a false show of democracy, is possible without it.

John Stuart Mill

TABLE OF CONTENTS

Introduction .................................................................................................................. 744
I. Third-Party Struggle ............................................................................................. 746
   A. Plurality Voting and Two-Party Duopoly ....................................................... 746
   B. Fusion and Minor Parties .............................................................................. 748
II. Third-Party Participation .................................................................................... 749
   A. Current Use (or Non-Use) of Fusion .............................................................. 749
   B. Supporting Fusion in the Courts .................................................................... 750
   C. Representative Government ....................................................................... 753

* John D. MacArthur Professor of Law, Political Science, and Sociology, University of Wisconsin-Madison. Thanks to Joshua Cohen and Ted Lowi for countless discussions on this subject, and to Ted Lowi in particular for his writings on it. In what follows, his influence is evident throughout.


INTRODUCTION

On the standards suggested by the above — the first from the American Political Science Association’s (APSA) classic statement on “responsible” party government,3 the second from Mill’s Representative Government — the present American party system fails.

It is not the case that the Democratic and Republican parties, as distinct collectivities, stand for clearly defined “programs to which they commit themselves.”4 It is even less true that, as organizations, they “possess sufficient internal cohesion” to carry out such programs.5 Instead, as is well known, the two major parties’ bases in the general public — in the sense of stable blocs of voters, divided by partisan loyalties — are weak and attenuated. Our politics are increasingly candidate centered. Our President is mostly “personal” — out of synch with, and not particularly accountable to, Congress. And there is, as always, but with worse recent effect than in the past, as much variation within the major parties as between them.6 As policy choices have become “hard,” one proximate consequence of all this is the “divided government” that has prevailed in the United States, more or less without interruption, for the past twenty years.7 Another is the famous “gridlock” and “incrementalism” of government policy — as aided by its sheer obscurity from the public, with “virtually all policy decisions, even including non-incremental decisions . . . subsumed and masked within the budget and reconciliation process.”8 This is not the APSA committee’s fa-

---

3. APSA Report, supra note 1, at 1.
5. APSA Report, supra note 1, at 1.
6. See Mill, supra note 2, at 372.
vored “responsible” party system — marked by partisan clarity, accountability, and effective legislating — but something approximately its opposite. Nor, certainly, to turn to Mill’s concern, is ours a system in which electoral “minorities” are “adequately represented.”

In terms of “descriptive representation,” the case is easily made. The Blacks and Hispanics who comprise about a quarter of our population have nowhere near that share of our 500,000 elective offices, particularly at upper reaches: zero percent, for example, in the United States Senate; about twelve percent in the House of Representatives. And even the latter number is inflated — outside the consequence of dense urban racial segregation (itself not good news) — by reliance on “benignly gerrymandered” racial districts that now appear to be heading toward history’s dustbin. The numbers for women — a majority of our population, but a traditional “minority” so far as power — are no better. Indeed, given their share of the population, their numbers are somewhat worse. Women comprise twenty-two percent of state legislators, and about twelve percent of Congress. In this respect, the United States ranks about last in the developed world.

But for purposes of this exchange, it is the partisan minorities that most centrally concern us — those who, for whatever reason, are not content with the offerings of the major parties, and want some greater range of choice on their party vote. And they fare exceptionally badly.

---

10. See APSA Report, supra note 1, at 1-2 (highlighting prerequisites of responsible parties).
12. How “benign” this was is subject to dispute, and in my case, real doubt. Racial gerrymandering was offered as way to improve minority representation, and did of course increase the number of minority elected officials. But it arguably benefited white conservatives even more, and certainly seems to have done little to improve the quality and strength of representation of minority interests.
14. See STATISTICS 1999, supra note 8, at 293, table 473 (displaying selected characteristics of members of Congress from 1981-1995); id. at 297, table 482 (showing number of women in state legislatures in 1998).
I. THIRD-PARTY STRUGGLE

A. Plurality Voting and Two-Party Duopoly

Virtually all United States elections are decided by plurality voting (PV) in single-member election districts (SMDs). In such elections, the "winner takes all." Those voting for the loser get what is left — which, as Euclid and others have proven, is approximately nothing.

Consequently, any PV-SMD system is deeply inimical to new party entrants. Almost by definition, efforts to establish new parties will at first command the support of only a minority of voters. But in such a system, even that minority will be reluctant to express itself at the polls, for fear that its vote will be "wasted" on candidates with no serious chance of winning, or (perhaps worse) function to "spoil" the election by taking needed votes away from the second most favored candidate, and throwing it to the least.16 The result, announced by Duverger as approaching "most nearly perhaps to a true sociological law,"17 is a natural equilibrium of two-party duopoly.18

Finally, and also familiar, are the results of the enactment of this "law" in the American case. Of the approximately one thousand minor parties formed in the United States since the 1840s, only ten have ever polled more than six percent of the presidential vote.19 In the last century, outside that tiny number of states that have permitted plural nomination (a.k.a. "fusion") candidacies, none have been able to participate as an important player in determining electoral outcomes, much less electing any significant number of candidates on its own ballot line, for more than a few election cycles — and then, typically, only during periods of massive economic depression or war.20

---

17. Id. at 217.
18. There are famous exceptions to this "law," at least as applied at the national level. Consider Canada, and the success of the New Democratic Party there. Such exceptions can fairly easily be accommodated, as Duverger later did, by simply acknowledging that the specific two parties competing in one region may differ from those competing in another. See id. at 223 (noting that the precise composition of the two-party equilibrium may vary by region — with parties A & B dominating in one region, B & C in another, and A & C in a third).
20. See id.
The chief function of minor parties in United States history has been to articulate concerns unaddressed by the major parties — concerns that, if they showed significant appeal, were then incorporated into at least the rhetoric, and sometimes the program, of one or another of the majors. This has often been a very important function, but it has seldom been an enduring one. As the great American historian Richard Hofstadter summarized the United States’ case: “Third parties are like bees: once they have stung, they die.”

The result today? Even including independents (quite different, as we will explore below, from representatives of minor parties), the ranks of “alternative” elected officials are trivially small. At last count, for example, a mere .24% (18 of 7,375) partisan state legislative seats were not occupied by Democrats or Republicans. In Congress, it looks somewhat worse. A clear two-party duopoly rules.

But of course in human affairs, as Pascal observed, “nature” is just another name for “first custom.” In the case of the American political party system, its ontological status is even more fragile — a second, or third, or fourth, or fifth or . . . ad (almost) infinitum custom. The present two-party duopoly has been patiently constructed by those two parties themselves, and survives today only through an almost endless series of restrictions on alternatives enacted through their monopoly on legislative power. To engage the two-party versus multi-party debate squarely, it is important to recognize this fact.

Despite common confusion on the subject, for example, the Constitution does not require single-member districts (outside, of course, the Presidency). Until the 1840s, indeed, virtually all congressional districts were

---


22. Id.


24. In the 104th Congress there were two independent Representatives and zero independent Senators. In the 105th Congress there was only one independent Representative and still no independent Senators. See id. at 366 (discussing rationality of associating with either Democrat or republican party). The only independent members of the 106th Congress are Representatives Virgil Goode (Virginia) and Bernard Sanders (Vermont). See Office of the Clerk, U.S. House of Representatives, Current Congressional Profile (visited March 24, 2000) <http://clerkweb.house.gov/mbrcmte/statsanswers.htm> (noting only current independents in Congress).

multi-member, and most remained so into the 1860s, with many surviving thereafter. Below the Congressional level, as late as the late 1950s, most state legislators came from multi-member districts.

Moreover, the Constitution does not require plurality-voting rules. Until the 1940s, dozens of major cities still featured proportional representation for local office. Cumulative voting — in which voters are given as many votes as the number of multiple representatives from their district, and can bunch or split them any way they would like — survived in state legislatures (e.g., Illinois) until as late as 1980. Nor, certainly, does the Constitution encourage Congress, acting under the guise of “campaign finance reform” in the early 1970s, to massively subsidize major party candidates while discriminating against minor ones. Still, less does the Constitution mandate the welter of major-party favoring ballot access requirements and nominating procedures now extant in all the states.

American politics, when its history is examined, provides ample evidence of alternative party and balloting systems, and possibilities for greater variety in party competition, notions now destroyed by the major parties.

B. Fusion and Minor Parties

An important fact of American history is that the Constitution does not limit alliances between parties, of a sort that could, even in a PV-SMD system, provide some equivalent to that which in others is typically provided by proportional representation — to wit, some serious weighting of minority electoral sentiment. Until the end of the nineteenth century, “fusion” candidacies were universally permitted and very widely practiced. Under their terms, a minor party could nominate the same candidate or slate of candidates as a major one, with votes cast on its line counting toward those candidate(s)’ total vis-à-vis rivals. This permitted minor party supporters to vote their values without wasting their votes. By voting along their own line, they could declare their real political identity. By combining their votes with those cast on major party lines, they could stay in the main game. And, along the way, their leadership could bargain up their power with more towering rivals — “We’ll back your Sam on our ticket if you back our Joe on yours.”

In the nineteenth century, fusion was the procedural sine qua non of the post-bellum heyday of minor party activity. Grangers, Greenbackers, and other minor parties all built themselves on it.26 But with the People’s Party

upsurge in the 1890s, and the widespread success of Populist “combination” tickets with the Democrats, its exercise eventually proved too threatening to elites.\textsuperscript{27} After the massive Populist-Democratic defeat in the election of 1896, Republican-dominated state legislatures in the Midwest moved to bar the practice.\textsuperscript{28}

At the time, the partisan intent of this move was obvious and admitted. As a Republican legislator opined on introduction of that state’s proposed bar to the practice: “We don’t propose to allow the Democrats to make allies of the Populists, Prohibitionists, or any other party, and get up combination tickets against us. We can whip them single-handed, but don’t intend to fight all creation.”\textsuperscript{29}

Eventually, states in the rest of the country — at the time, typically dominated fully by one party — enacted similar bans.\textsuperscript{30} Thus, antifusion laws are rightly added to the panoply of turn-of-the-century electoral reforms along with abolition of alien voting, literacy tests applied to cities only, poll taxes and white primaries in the South, the requirement of personal periodic registration, and the introduction of the direct primary. All of these reforms had the effect of weakening parties, suppressing blacks in the South, and driving much of the Northern immigrant and working class out of the electorate, never fully to return.\textsuperscript{31}

\section*{II. \hspace{1em} Third-Party Participation}

\subsection*{A. Current Use (or Non-Use) of Fusion}

Today, in any case, fusion survives as a legal possibility in only a tiny handful of states (in some of which it is barred by internal rules in the relevant, dominant party). And fusion is practiced, regularly only in New York.\textsuperscript{32} There it has had precisely the dreaded effect of underwriting a longstanding minor party tradition. While this has seldom made much difference in the partisan composition of state offices,\textsuperscript{33} it bears emphasis that its exercise has materially affected election outcomes — with the result that minor party members achieve at least some bargaining power with their

\begin{thebibliography}{99}
\bibitem{27} See \textit{id.} at 292-97 (recounting rise and fall of combination tickets).
\bibitem{28} See \textit{id.} at 298-301 (describing Republican Party response to fusion ballots).
\bibitem{29} Id. at 296.
\bibitem{30} See \textit{id.} at 302 (listing states enacting antifusion laws after 1896 election).
\bibitem{31} The best summary of these reforms remains that of Walter Burnham. \textit{See WALTER DEAN BURNHAM, THE CURRENT CRISIS IN AMERICAN POLITICS} 126-52 (1982) (summarizing various electoral reforms).
\bibitem{33} Today, for example, all members of the New York legislature are either Democratic or Republican.
\end{thebibliography}
major party colleagues — and not just contributed to maintenance of distinct, non-fringe, alternative political communities. Neither New York’s present Governor, nor New York City’s present Mayor, would have come to office without the support of minor parties. That is, votes on the Republican lines were exceeded by votes on the Democratic lines of their rivals. Only the additional support provided by votes cast on fusing minor parties tipped the election in their favor. The same has been true in many important presidential contests. For example, neither John F. Kennedy in 1960, nor Ronald Reagan in 1980, would have carried the state but for votes cast on allied minor party lines.

B. Supporting Fusion in the Courts

In the early 1990s — familiar with the history of fusion, interested in breathing a little life into our party system, and figuring a direct constitutional challenge to the PV-SMD system too improbable a quest — I instigated a legal challenge to the forty-odd state antifusion laws. The argument against the laws, proceeding on First and Fourteenth Amendment grounds, relied principally on the Supreme Court’s decisions in Anderson v. Celebrezze, Tashjian v. Republican Party of Connecticut, Eu v. San Francisco County Democratic Central Committee, and (later) Norman v. Reed. My colleagues and I took these cases clearly to establish, as fundamental associational freedoms, the right of political parties and their members to choose their standard-bearers and their optimal political strategy, and the right of minor parties to operate in a political system free of invidious discrimination against them. Antifusion laws burden the first right on their face by telling consenting qualified parties they cannot nominate a consenting qualified candidate, or build themselves through cross-endorsement. They burden the second almost as clearly, having been enacted with the successful partisan intent of driving minor parties into ob-

34. See NY State Board of Elections (visited Apr. 20, 2000) <http://www.elections.state.ny.us/>.
35. See generally id.
38. 479 U.S. 208 (1986).
41. What began literally as a “mom and pop” operation (early on, I dragged my wife, Sarah Siskind, a distinguished employment rights lawyer, into the effort), eventually benefited from the assistance of many others. Too many to be named; but particular thanks to Joshua Cohen, Larry Gold, Colin Gordon, Con Hitchcock, Lance Lindblom, David Vladeck, and Larry Tribe — and throughout, Dan Cantor, then executive director of the New Party.
scurity. Never, in fact, through all the ensuing years of litigation, was this second claim seriously contested by any of our opponents.

The challenge proved a long road, but after successive defeats in the Seventh Circuit we eventually won a decision in the Eighth Circuit. This split between the Circuits prompted Supreme Court review. The underlying Eighth Circuit case involved a consensual alliance between a major and minor party, in support of a common (and also consenting) candidate, which was barred by that state’s antifusion law.

In justification of the law’s above-stated burdens on the minor party’s rights, Minnesota’s chief asserted interest was in avoiding voter “confusion”—the apparent thought being that the people of 1990s Minnesota were decidedly less intelligent than their Nineteenth Century forebears, or contemporaries in New York, and thus unable to negotiate a ballot with more than two credible parties on it.

Balancing these arguments, the Eighth Circuit found no real contest. But the Supreme Court, in *Timmons v. Twin Cities Area New Party*, decisively reversed (six to three), on the new ground — never asserted by the defendant state — that states had a constitutionally protected right not just to “choose” a two-party system, but to protect its existing occupants from competition from without. As Richard Hasen concluded in his review of the holding:

Timmons’s significance rests not so much on the Court’s approval of antifusion laws — for reasons explained below, fusion likely would not affect the outcome of the vast majority of elections in which it is used — but instead on the Court’s holding that a state has a legitimate interest in favoring the Democratic-Republican duopoly.

Beyond the ballot access cases, Timmons will make it easier for states to entrench the two-party duopoly through campaign finance laws, policies regulating access to public television, patronage practices, partisan gerrymandering, and potentially a wide variety of other measures.

42. Before eventually succeeding in the United States Court of Appeals for the Eighth Circuit, see *Twin Cities Area New Party v. McKenna*, 73 F.3d 196 (8th Cir. 1996), our losses included: the District Court decision in *Twin Cities Area New Party v. McKenna*, 863 F. Supp. 988 (D. Minn. 1994); the decisions of both the District Court and the Court of Appeals for the Seventh Circuit in *Swamp v. Kennedy*, 950 F.2d 383 (7th Cir. 1991); petitions for rehearing and rehearing in *Swamp v. Kennedy*, 950 F.2d 383, 388 (7th Cir. 1992); as well as a petition to the Supreme Court for a *writ of certiorari* to review *Swamp v. Kennedy*, 505 U.S. 1204 (1992).

43. See *Twin Cities*, 863 F. Supp. at 990 (reviewing facts of case).

44. 520 U.S. 351 (1997).

45. See *Timmons*, 520 U.S. at 365-70 (deciding not to apply strict scrutiny to Minnesota’s fusion ban, but finding state aims more than sufficient to justify restrictions).

In *Timmons*, in effect if not in word, the Court overturned *Williams v. Rhode* as well as *Anderson*. In both of those cases, the Court had recognized the endurance of our two-party system and freely granted the possibility that it was a welcome form of government. But the Court treated with near contempt efforts by members of the present duopoly simply to reproduce themselves endlessly as its occupants — by erecting artificial barriers to new party entry and effective competition. No more, however. After *Timmons*, just such behavior is deemed worthy of protection.

To underscore just how extreme and confused a departure from precedent *Timmons* created, it bears emphasis that, as a constitutional matter, antifusion laws are quite distinct from the PV and SMD rules that elsewhere militate against a multi-party system. The point should be of special relevance to those who feared that their invalidation might have put the Court on a slippery slope, at the bottom of which would lie wholesale judicial judgments about redesign of these elements of our election system.

47. 393 U.S. 23, 28-29 (1968).
48. *Compare Timmons*, 520 U.S. at 354 (stating that Minnesota’s fusion law does not violate the First and Fourteenth Amendments), with *Anderson v. Celebrezze*, 460 U.S. 780, 802 (1983) (following *Williams*), and *Williams*, 393 U.S. at 28-29 (stating that state election laws must comply with the Fourteenth Amendment).
49. *See Anderson*, 460 U.S. at 802 (citing *Williams*, 393 U.S. at 31-32). Although the Court acknowledged that a two-party system might encourage political stability, the Ohio two-party system failed because it favored two specific parties, namely the Republicans and Democrats. *See id.*
50. *See id.* at 793-95 (ruling that states could not impose unfair statutory deadlines on candidates seeking ballot qualification); *Williams*, 393 U.S. at 25 (determining that certain petition requirements for seeking ballot qualification was burdensome to new parties).
51. *See Timmons*, 520 U.S. at 370 (permitting state to invoke antifusion law because such laws do not impose constitutional burden).
52. This was clearly a concern of Justice Breyer in oral argument in *Timmons*. Consider this question from the bench:

> There are a lot of rules deliberately disadvantaging third and fourth and fifth parties — first past the post, single member districts. There are good arguments for and against such things.

> Proportional representation in many parties allows parties to grow more quickly and is a better representation of people’s views.

> On the other hand, two parties, which is a much worse representation, and interferes with people’s ability to choose what they want, has the advantage that we know whom to hold responsible for good or bad government. . . .

> How can I say that the State has no right in these kinds of things to decide either of those two models that it believe is the more — better democracy?

C. Representative Government

In fact, I think, the slope is not particularly slippery at all, since it fundamentally involves, against a background of "fundamental" individual and organizational speech and associational rights, a nearly classic judicial "balancing" of different core values—e.g., government accountability and responsiveness, stability, and representativeness—sought in any democratic party system. Whole libraries have been devoted to what these core values actually mean, of course, but in most cases they are clear enough. An "accountable" and "responsive" government is one that in fact acts on the people's will, as expressed primarily through the election of representatives. A "representative" government is one that takes into account the views of all citizens. A "stable" government is a bit trickier to define and the Court has not been particularly helpful in clarifying matters. Minimally, however, I think it means a government that, irrespective of ebbs and flows in partisan composition, enjoys sufficient basic institutional supports to govern continuously and effectively within the frame of its originating constitutional mandate, and a government whose basic operation in that frame enjoys a ballast of ongoing voter confidence and support.

Any reasonable person will recognize that the respective achievement of these different basic values will vary across different sorts of electoral systems and will recognize too that there are, to some degree, tradeoffs between and among accountability, responsiveness, stability and representativeness. For example, perfect representation of all interests may make government unmanageable and thus less accountable. In choosing different electoral systems, the relevant policy question is how, respecting such tradeoffs, we can best maximize the achievement of them all. This is not, however, a question for the courts to answer. The principal job for the judges, rather, is—respecting these various goals and the contribution of different electoral rules to them—to ensure that the choices made do not violate the Constitution or other superior law. As regards to fundamental rights, the balancing of interests is a fairly straightforward job, as least in broad description. If some election rule burdens fundamental rights but contributes to one of these core values, it should be carefully scrutinized, with its contribution weighed against that burden. If the election rule burdens fundamental freedoms without advancing any of these values, it should be ruled unconstitutional. Thus, the process of evaluating election

53. See Timmons, 520 U.S. at 358, 364, 366-67 (permitting state to enact election regulations based on the need to maintain political stability).

54. See Hasen, supra note 23, at 332 (arguing that stability is unproven and perhaps unprovable in context of two-party system).
laws may turn out to be a perfectly sticky slope with a series of obvious stops for rumination and departure along the way.

D. Antifusion Laws Versus PV-SMD Rules

But so much for guides to judicial balancing. What are the essential in-kind differences between antifusion laws and PV-SMD rules? There are two.

First, while SMDs and winner-take-all PV election rules might be questioned (as I will do below) as a matter of policy, they are at least arguably supportive of some of the important democratic values just noted. By requiring that candidates capture the support of a plurality of the voting population, PV rules might be argued (and of course routinely are) to promote responsiveness and accountability in elected officials. By forcing geographically defined communities together in the choice of a single representative, SMDs might be argued (and of course also routinely are) to promote political unity and stability. But antifusion laws do not even arguably advance such basic values. They simply exist to preserve the existing two parties. Furthermore, it should be noted that antifusion laws do not increase the functionality of the PVD-SMD system, since they actually interfere with its free and efficient operation by frustrating the emergence of cross-party pluralities within it.

Second, whatever their effects on the range of available choice in the electoral system, PV, and SMD rules do not restrict the content of that choice. Antifusion laws, by contrast, do. They tell party members that they cannot nominate certain (consenting, and otherwise qualified) candidates. And they tell consenting parties that they may not embrace a common standard-bearer. This electoral injunction is equivalent to a legislative one that no one can ever cross the aisle to vote with the other side, that “bipartisan consensus” is to be prevented, etc. — a truly weighty content restriction indeed.55

Personally, I find it dismaying that the Supreme Court of the United States cannot recognize these distinctions, or, in recognizing them, chose to suppress its public recognition on the grounds offered by its Chief Justice from the bench at oral argument: “so we’re talking about a major effect here [from a] ruling in your favor.”56 But the point of this excursus on the history of fusion and Timmons is not to complain of the adverse holding, or even to re-litigate the holding in this article. It is simply to underscore the

55. Perhaps it was for this reason — a pretty weighty invasion of party autonomy — that one major party (Republican) joined various minor ones (Reform, New York Conservative, and New York Liberal) and joined us as an amicus.

extravagance of the present Court’s commitment to the two-party status quo, or at least its deference to the states in maintaining it.

III. POST-TIMMONS

I take the political implication of Timmons to be that those looking to break the duopoly should probably not look to the present judiciary. The Court is not, of course, perfectly unified on all issues of electoral law, and individual Justices will always have their own, and sometimes straying, opinions. All are welcome to take heart, for example, from the fact that Justice Clarence Thomas, of all people, seems to agree with Lani Guinier that proportional representation is preferable both to racial gerrymandering and the abandonment of minority racial voice. But if something as relatively trivial and unthreatening as fusion is considered off the Breyer, Kennedy, O’Connor, Rehnquist, Scalia, and Thomas plantation, and would be off Souter’s if it could in any way be shown to threaten two-party-induced stability, I simply find it hard to believe that proponents of multi-partyism will find sufficient allies on the bench.

Of course, that leaves the electoral process itself. But here I think present discussion of possibilities could benefit from some greater clarity on strategy.

Many proponents of a multi-party system, for example, are excited by the recent electoral success of such independents as Minnesota Governor Jesse Ventura, the brief appearance of Audie Bock in the California State Assembly as a Green Party representative, or the prospect of Ralph Nader or John Anderson again running for President on third-party lines. For them — especially when viewed against the backdrop of large and stable shares of the public telling pollsters they would happily consider a third-party alternative; the steady rise in independent registrations and even

57. See E. Joshua Rosenkranz, Solving a Legal Puzzle, in Reflecting All of Us: The Case for Proportional Representation 49 (Joshua Cohen & Joel Rogers eds.) (1999) (noting agreement between Clarence Thomas, the “archconservative,” and Lani Guinier, the “nominee who was dumped as too radical,” that proportional representation is preferable to racial gerrymandering).

58. In Timmons, the first six justices listed comprised the majority. Souter joined only part of the exceptional acerbic Stevens dissent, in which Ginsburg fully joined. Said Souter in distancing himself, “[i]f it could be shown that the disappearance of the two-party system would undermine [an] interest [in political stability], and that permitting fusion candidates poses a substantial threat to the two-party scheme, there might well be a sufficient predicate for recognizing the constitutionality...” of the antifusion law. Timmons, 520 U.S. at 384.

59. Reflecting some of the pressures on such minor party representatives reported below, Bock switched her affiliation to “Independent” after a few months in office. Tellingly, she described her motive for doing so to be a newfound desire to stay in office. See Rene Sanchez, Greens Turning Red Over Defection, WASH. POST, Oct. 30, 1999, at A4.
sharper rise in independent voter self-identification and regular ballot splitting; and bipartisan presidential candidate calls for such fundamental "process" reforms as campaign finance — this suggests that the moment may finally be right for breaking the duopoly directly through the election of individuals who favor a more open system. The thought seems to be that this nearly glacial block of ice, its structural integrity long since weakened by public disaffection, may finally be ready to crack and admit some open water for alternatives — if only some obliging wrecking ball or well-aimed pick (Perot, Ventura, Nader, etc.) could be found.

I find these thoughts fanciful. Like equality and a number of other good but (at least in their accomplishment) complicated ideas, one must aim squarely to achieve a multi-party system. To realize such a system, what one needs now is not more rogue independent candidates uncommitted to new party building, nor even fringe candidates committed to it but with no serious chance of winning office, but changes in the basic PV-SMD rules themselves. That is the avenue for system reform.

But at the moment, that project — while much more serious in purpose and potential effect, and beginning to show some new signs of life — is still in its infancy. The potential for meaningful changes in the PV-SMD rules is uncertain. For obvious reasons, I project that the chance of leadership from the two major parties themselves is vanishingly remote. Whatever their frustrations with the present system, the Republicans and Democrats clearly do not welcome new rivals.

At the state and local level, however, the widespread availability of initiative and referendum rights (in nearly half the states and a greater share of municipalities) opens the prospect of direct "citizen lawmaking" on the subject. There it seems perfectly conceivable to me, at least in principle, to construct a holy alliance between politically potent forces disadvantaged by the recent racial gerrymandering cases and those interested more generally in a more representative and responsive system. This may especially be so in our major cities, where shifting ethnic and racial compositions, in the context of historically racialized politics, may give a large number of anxious citizens a stake in systems better "reflecting all of us." However,
unless better resourced than it is at present, and more fully integrated into other popular projects of democratic reconstruction (at present, barely admitted as possibilities, much less articulated by an organized mass base), the chance remains doubtful, particularly as a national project.

To be ponderously clear here: It is not that I do not think fundamental reform along these lines is clearly in the interests of the vast majority of voters — and not just ideological or racial minorities. As I will argue in a moment, I think it clearly is. But this hardly makes it unique among a long string of similar reform possibilities on which American politics has shown, for a long time now, almost no sign of movement. All I can do is wish the project luck and aid, and then wait and see.

IV. JUSTIFICATION OF THIRD-PARTY POLITICAL INVOLVEMENT

A. History of Two-Party Versus Multi-Party Debate

So much, however, for considerations of political feasibility. What of the substantial merits of the case? Is the two-party system we have still preferable to a multi-party one? I think clearly not — so clearly not, in fact, that I am actually flummoxed that others could argue otherwise, were that argument governed by common standards of reason and evidence.

But of course — and this is a central difficulty in this discussion — common standards of reason and evidence do not support a preference for a two-party system. Emotions here run deep, it seems, and standards of ordinary judgment are ordinarily suspended. Among the vast majority of those who defend the existing duopoly, even the most distinguished scholars routinely make utterly confused and unsophisticated arguments on its behalf — rife with missed distinctions, undefended assertions, and disregard of competing evidence. It seems that when we enter discussions of the duopoly, we are in an essentially religious debate rather than a scientific one. The existing arrangement has so long been in place that for some, it seems, life is literally incomprehensible outside it, which leads to much stuttering, muttering, and posturing without evidence in defense of its "natural" persistence and allegedly deep roots within American political culture and public life.

Duverger did not help in launching the modern discussion. After stating his "law" that PV-SMD systems will generate a natural duopoly, he pronounced that result good, even part of "the nature of things," since "political choice takes the form of a choice between two alternatives."63 Since

63. See DUVERGER, supra note 16, at 215 (theorizing that two-party systems correspond to nature).
this undefeated declaration, an antic search has begun, seeking to define what those "two alternatives" — necessarily as enduring as the duopoly and corresponding neatly to its respective members throughout our history — might possibly be. Characteristic in his certainty on the answer, and the goodness of the result, is Joseph Romance:

[T]his is historical. The two parties . . . reflect the fundamental debate in American politics over the issues of freedom and equality. With a few exceptions, it is usually the Republican Party that fears centralized state action and champions individual freedom. At the same time, the Democrats believe in the government's ability to encourage equality. These principles are central to American politics and the addition of a third party could generate profound philosophical confusion among voters.64

But such summaries of American political history and possibility should leave any even passably informed person gasping with questions. How could we possibly think that all the complexities of American political culture and political conflict, over more than two hundred years, could be reduced to a single values choice? Why would we think that choice is one best posed as between individual freedom and equality — when the most important social movements of the past forty years (not to mention many before) have been about achieving greater equality by the extension of civil rights and liberties? Whence the confidence that the parties have been consistent in their respective positions in the choice when the "few exceptions" have occupied such long and critical periods of our history? Think of the Republican-led Civil War and Reconstruction, which had something to do with equality; or the post-1896 "building" of the national state, which had something to do with just that; or Southern Democratic suppression of blacks for most of the twentieth century, which was not at all about promoting equality, or their related defense of "states' rights" against the alleged encroachment of a Federal government. Whence the confidence that American parties now or in the past have had enough internal discipline and policy cohesion to stand for anything much at all in a consistent way, when Duverger himself, and all since, have found them instead to have had, for most of their history, an almost pre-modern and in any case "very archaic general structure" — characterized by weak vertical linkages between elites and masses, relatively low capacities for mobilization, and a decidedly coalitional rather than programmatic thrust? And why should American voters, who have among the highest income and educational attainments in the developed world, be uniquely incapable of choosing between more than two partisan options?

Regarding the typical quality of debate in this area, to ask such questions is I think to answer them: that it is poor, maybe uniquely poor. I am quite sure that if Professor Romance were asked to explain something else about American politics — e.g., the closely related “exceptional” lack, throughout our history, of a durable labor party — we would get a nuanced, historically informed explanation, attentive to structural features of United States politics and shifting organizational forms and conflict. But when it comes to the two-party system, even accomplished scholars are misguided and misinformed.

Not helpful either was APSA’s early 1950’s framing of the issue of a “responsible party system,” which simply assumed that question to reduce, as the title of its report has it, to that of building a “more responsible two-party system.” Despite the efforts of Theodore Lowi65 and others, much the same undefended orthodoxy holds today. Consider the distinguished political scientist John Aldrich. From the true observation that political parties are indispensable to organizing debate and governance in mass democracies — most foundationally, as Mill said elsewhere, public judgment cannot be exercised without the articulation of clear alternatives for its subject — notice how he immediately and unexplainably draws the unimplied conclusion that, in America at least, only two can ever do so: “In America democracy is unthinkable save in terms of a two-party system, because no collection of ambitious politicians has long been able to think of a way to achieve their goals in this democracy save in terms of political parties.”66

B. Characteristics of the Two-Party System

More serious arguments — or better, arguments, as against mere assertions — for our two-party system, and in particular for the PV-SMD rules at its core, usually point to that system’s contribution to some of the core values considered above — in particular stability, and accountability and responsiveness.

Beginning with structure, as already noted in our discussion of Timmons, the idea is that SMDs — by forcing members of “contiguous and compact


territory" together over a single choice of representative — limit the appeal of faction while ratifying "natural" geographic homogeneities of interest. And PV — by forcing election of a single representative to office from any given district — removes any doubt about who is to be held responsible for actions once in government.

On behalf of the two-party system that results from this PV-SMD structure, analogous arguments are made. That there are only two of them is first considered good because it forces moderation and compromise both within their ranks, and between them. On intra-party factionalism, the idea is simple enough. If exit is limited, voice and loyalty effectively rule, and differences get talked about and struggled through. More precisely, with only two channels of power open to them even in theory, and usually just one in practice, and with both such channels necessarily "big tent" operations marked by great inner diversity, factions learn to behave themselves as the price of staying in the tent.

On inter-party factionalism, the thought is no more complicated. With only two parties, the swing voters usually standing squarely near the median of public opinion will decide most elections. Although it disturbs their "voting cue" function by inevitably confusing their respective messages, the two parties' common search for this elusive being will drive them both toward the moderate "vital center" of American life. And that, again, contributes to political "stability."

At the same time, having just two parties makes it relatively easy to know whom to blame for what happens in government, and to effectuate change in policy through a change in electoral behavior. Instead of government being run by a fragmented coalition of parties — with many participating more or less continuously, despite changes in electoral mood (think here of postwar Christian Democrats in Italy) — you can "throw the bums out" and get new ones in. To serve this legitimating accountability function, of course, this last claim presumably relies on some reasonably high level of citizen involvement, and clear differences among the "bums."

C. Two-Party System Shortcomings

Now what I think any reasonable person must recognize is that, at least at present, none of these arguments has much force. Part of this has to do with the historic function and structure of American political parties, and the new sorts of policy choices now before the country. Part of this also has to do with the evolution of American electoral behavior, changes in our basic social structure, and expectations on representativeness.
On the parties themselves, the beginning of wisdom is to recognize that, contrary to the suggestion from Romance, they have never been "responsible," in the sense of combining their familiar "constitutive" function — understood to entail both representation of constituencies and the elaboration of electoral and other rules that go into any political regime — with a "program" or policy function. As Lowi observes, "Indeed, the genius of the American party system, if genius is the right word, is that it has split the regime from policy, keeping the legitimacy of the government separate from the consequences of governing." 68

The split gives rise to:

[S]everal important regularities of [our] two-party system. First, the formation of new parties (or the dissolution or the reorganization of existing ones) produces changes in the nature of the regime, while the functioning of established parties does not. . . . Second, new ideas and issues develop or redevelop parties, but parties, particularly established ones, rarely develop ideas or present new issues on their own. . . . Third, the key feature of the functioning of constituent parties has been the existence of competition and not so much what the competition was about. The more dynamic and intense the level of competition, the more democratic parties become, often in spite of themselves. But the more regularized and diffuse the competition, the more conservative the parties become. 69

For long stretches of American history, all this was functional enough. That parties had little to say about policy and were not programmatic in their mobilizing strategies mattered less when, as before the New Deal, government itself mattered less. And even during the postwar generation, widely shared prosperity masked the parties' deficiencies as instruments of governance. Throughout this period, despite searing inequality and all manner of social problems, the "American dream" was increasingly widely shared; and on balance, things got decisively better for most people over the postwar period.

Over the past thirty years or so, however, those governance deficiencies have become increasingly evident. Most basically, perhaps, starting in the early 1970's, the economy stopped working the way it had for all of our modern history — with steady generational increases in income and living standards. Since then, as we all know, prosperity — the basic democratic test of economic performance in a democracy — has not been widely shared. In contrast not only to our previous history, but also the continuing contemporary experience of OECD Europe and Japan, wage growth in the

67. See generally Romance, supra note 64, at 31-72 (outlining the benefits of the two-party system).
68. Lowi, Prospects & Obstacles, supra note 65, at 5.
69. Id. at 5-6.
United States basically stopped, or even went into reverse. Large portions of the population did worse, not better, over time.

With the overall wage reversal manifesting, government still did almost nothing constructive about it. Likewise, in countless policy areas, there was no movement on obvious, and generally recognized, social problems — health insurance, the crisis of our cities, rising economic inequality, etc. Instead, to return to where we began, "gridlock" and "incrementalism," characterized by a notably opaque legislative process, became the norm. Over a generation-long era of "hard choices," very few got made in ways that served the best interests of "the people."

Where the elusive "median voter" winds up in this is confused and angry. Perhaps the best real approximation to this mythic creature are the non-college-educated white workers who still comprise the bulk of the American electorate, whose loyalties are about evenly split on partisan lines, and who stand dead center in American public opinion. They have received next to nothing from national policy over the past generation; their confidence in government’s willingness or ability to "represent me" or "get the job done" is at or near all-time lows; and they are, in consequence, increasing volatile and unstable in their electoral choices.\(^70\) If the "stability" promised by the two-party system is to mean anything more than "yes indeed, we can protect ourselves in perpetuity as a two-party system, however empty of content," this does not suffice. It is not "stability" in the substantive sense of a government able to govern effectively, within a stable constitutional frame, and enjoy, irrespective of ebbs and flows in partisan composition, broad citizen confidence and support in doing so. Instead, ours is a deathly stasis of government inaction, characterized by avoidance of real problems, citizen cynicism, and widespread withdrawal.\(^71\)

Part of the reason that the parties — again never particularly programmatic — have not done better is that there are only two of them. To win, they typically need fifty percent or more of the vote, which means that they need to appeal to an even wider share of voters in attempting to net that. But that this is true of both parties of course implies, at least under the competitive conditions we presumably favor, an inevitable blurring of distinctions between them, or the reduction of electoral choice ever more squarely to candidate choice. And within party ranks it implies an inability to move decisively in almost any area of policy without alienating some of their intended base. In such circumstance, as we now know from a generation of experience with it, electoral politics reduces largely to candidate

\(^{70}\) See Ruy Teixeira & Joel Rogers, America’s Forgotten Majority: Why the White Working Class Still Matters (forthcoming 2000).

\(^{71}\) See Hasen, supra note 23, at 332 (asserting that "stability" rationale in support of two-party system is "unproven and perhaps unprovable").
construction of highly personalized policy profiles ("tough on deficits," "soft on abortion," "middling on welfare," etc.), without much regard for party line, and the lobbing of negative advertising around hot-button "wedge" issues (gun control, abortion, condoms in schools, etc.) back and forth over the partisan divide. The net again, for the larger, tougher issues involving real cash and conflict, is confusion or simply inaction.

Nor does it help that, even as the respective partisan bases of the major parties erode, the system as a whole is broadly non-competitive.\textsuperscript{72} This assertion may seem counter-intuitive. As mentioned above, however, for long stretches of American history we have had towering one-party dominance on a regional basis (e.g., the Democratic South, which Republicans didn't seriously begin to crack until the 1970's, and the Republican Midwest in the early part of the twentieth century). By contrast, it is now common to talk of a truly national "competitive party system." But what was once true regionally remains true within particular election districts. In the 1998 House elections, for example, the average victory margin was a compelling forty-three percent, and fewer than one in ten victors had margins of less than ten percent. One in five House races, in fact, were effectively uncontested, with only one major party candidate in the field. At the state and local levels, things only get worse. In state legislative races, better than forty percent have only one major party candidate in the field, while victory margins in the remaining "contested" races are at least as those reported for the Congressional races.\textsuperscript{73}

Not unrelated to one-party dominance in particular regions and districts, the present system is approaching all-time lows in voter participation. Less than half the eligible electorate participated in the last presidential election, and less than a third in the 1998 congressional races. Moreover, in the primaries that effectively decide results in generally noncompetitive districts, turnouts of five or ten percent are utterly routine. The simple (new or old) undemocratic math of this is just short of staggering. Consider a

\textsuperscript{72} In safe districts, that is, candidates can take risks. And surely they sometimes do. To govern, however, majorities or super-majorities of elected officials are needed, and enough of them are affected by the dynamic noted above that it tends to infect the whole of the legislative process. In our non-parliamentary system, when not about straightforward trading of favors and logrolling, much of the art of partisan legislative leadership in our non-parliamentary system is about watering down (or obscuring) potentially controversial legislation to secure the support of more vulnerable colleagues, or crossing the aisle to find enough maverick support in the other party to permit them to pass on it entirely. See Letter from Frances Fox Piven, to Joel Rogers, Professor of Law Political Science, and Sociology at the University of Wisconsin-Madison (on file with the author).

Congressional example: the 104th Congress that brought us the Contract with America and Republican dominance of the House for the first time in forty years, was produced in the 1994 election by the approximately twenty-five percent of the electorate that voted for winning candidates. Thus, that Congress was accountable to a little more than half of that, or thirteen percent.\textsuperscript{74} This is, in short — to return to the distinction above — no longer a system that even offers much by way of regime legitimacy, much less legitimacy in actual governance.

Consideration of the increased role of money in politics, where organized money has largely replaced organized people and some ninety-five percent of our growing election costs are provided by an utterly unrepresentative one to two percent of the population, along with special (overwhelmingly corporate) interests of different kinds, indicates worsening electoral representativeness. The median investor is a quite different animal than the median voter, with quite different interests.\textsuperscript{75} Such surpassing control of our politics by a tiny fraction of the population is certainly a species of “factionalism”\textsuperscript{76} that the present party system shows absolutely no sign of moderating. Indeed, by dividing elections into an endless series of one-on-one contests, the system surrenders many economies that would come of the joint support of candidates, and encourages a rat race of competition among candidates of the same party in different districts, for the same group of investors. Thus, the investors are given even more power than they otherwise would have had in extracting favors and trading candidates in the same party off against one another.

Finally, to go to the system’s underlying structural fundamentals, SMDs are simply not working in passably representative and functional ways. Perhaps, in some very distant Jeffersonian past, the notion that geographically defined communities were sufficiently cohesive to admit only a single representative had some grip on reality (though as mentioned earlier, when this argument had most to recommend it, SMDs were in fact not generally used), but surely not today. Infinitely greater population density, greater interdependence in the economy across regions, greater expectations of

\textsuperscript{74} See Robert Richie & Steven Hill, The Case for Proportional Representation, in REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 10 (Joshua Cohen & Joel Rogers eds., 1999) (“House passage of any particular bill in 1995 required the votes of representatives elected by only 13 percent of eligible voters.”).


\textsuperscript{76} See Hasen, supra note 23, at 358-60 (using tobacco lobby as example of small group in population with proportionately more clout in Congress).
representation of minorities, greater diversity in the range of social interests and concerns, greater diversity in the population itself, the need for more regional solutions to all manners of policy problems, and increasing candidate reliance on out-of-district contributions, all suggest that the "community" described by district lines is typically mythic, and that the real community of interest could be better represented, and more functionally so, if otherwise described and represented.

D. Implications from Third-Party Involvement

I strongly believe that the introduction of a viable third or fourth party into this mix, and changing the underlying PV-SMD structure to permit that — through some species of proportional representation (PR) in larger, multi-member districts — would improve our system of representative politics. We know from comparative experience that PR systems increase turnout, while doing almost infinitely better on descriptive representation. They increase party competition by keeping minority parties involved (be they "minor" parties in the usual sense, or Republican or Democratic ones in districts dominated by the other). And they can certainly be designed in ways that prevent factional proliferation.\footnote{See, e.g., Electoral Laws and Their Political Consequences (Bernard Grofman & Arend Lijphart eds., 1986).} This last point bears emphasis because the claim that PR systems inevitably lead to extreme factionalism, and thus instability, is another of the dogmas of the American two-party religion, and one that its priests often support with entirely fictitious "evidence." As Rogowski summarizes:

Empirically ... the supposed connection between plurality election and stability rests on overgeneralization or faulty recall to a surprising degree. Despite a widespread belief to the contrary, for example, the French Third Republic never used PR; indeed, according to some eminent historians, the regime's shifting parliamentary majorities were artifacts of its two-ballot majority system, reflecting only minuscule changes in popular sentiment. The ill-fated Spanish Republic ... also elected its parliaments by plurality. Interwar Germany and Italy employed PR; but so, in those same years, did the extremely stable Swiss, Swedes, Norwegians, Danes, Belgians, and Dutch (who frequently attributed their "low-voltage politics" to the proportional system). Overall, Rae concludes that it is "clearly silly" to hold that PR encourages insurgent parties or destabilizes regimes.\footnote{Ronald Rogowski, Trade and Then Variety of Democratic Institutions, 41 INT'L ORG. 203, 209-10 (1987).}

A better concern, as noted earlier, is that a PR system might be too stable (i.e., unresponsive), with the party coalitions responsible for governance not changing enough in response to shifts in electoral sentiment. But this problem is more or less directly proportionate in size to the number of vi-
able parties in the system, and that is bound to be small. In the case of United States politics, however, I cannot imagine, and history shows no evidence of there ever being more than three or four. One important reason for this, which would endure even after the sorts of reform I propose, is that we remain a Presidential system, and one with popular direct election of chief executives at virtually all other levels of office (Governors, County Executives, Mayors, etc.). This phenomenon exerts natural pressure against minor party proliferation, since in these remaining PV-SMD races, the same sorts of pressures that now almost universally militate against third-party candidates would remain. If they want to be a meaningful part of the political field, minor party supporters need to mount, or support, a truly major candidate, and arithmetic dictates that few can do so.

More substantively, the entry of a third or fourth party would force parties to define their bases more clearly, and thus be more accountable to them. Instead of having to compete for more than fifty percent of the voting population, they could compete for a third or a fourth. This is bound to alleviate the problems noted above regarding program coherence. And with greater partisan clarity in position, and more consistently maintained, both voters and the general governance system will benefit. In addition, voters would know more clearly what they were voting for, and legislative bargaining could start from visible positions. Both would be a tremendous boost, fostering responsiveness and accountability of the system.

The precise version of PR, more fitting for the United States, need not overly concern us. Perhaps the simplest move is also the best — toward cumulative voting, in at-large elections, of the sort used very widely in the past. What the precise boundaries of the new districts should be will also not be attended here.79

Note, too, that such a system, by creating pressures toward “list” voting by party, would have the happy correlative effect of helping to equalize ballot access — since what was done for one “list” (even under Timmons) could not be offered to another. It would also tend to dampen the rat race of competition among candidates for cash, while strengthening parties as organizations. Running as a group, candidates of any party would have every incentive to pool resources, rather than divide them, and the natural way to do this, again, would be through the sponsoring party itself, giving it greater power over those candidates themselves.80

79. Personally, with the possible exception of extremely large states like California, I would favor statewide elections for all House members — something that would do wonders for the coherence of their Congressional delegations. Below that, for state legislative offices, some carving of sub-state regions seems appropriate. But in any case and throughout, districts would be much larger than they currently are, and multi-member.

80. Both points are made by Lowi, supra note 9.
Finally, there are those who worry that adoption of such a system would wreak havoc within the Electoral College, since a third or fourth party holding enough votes for an alternative could frustrate the process of Presidential selection. Should such an unlikely situation occur, of course, the Constitution provides for a suitable remedy. But for reasons noted above, I think it extremely, even vanishingly, unlikely.\textsuperscript{81}

What these changes would do, however, is to force the President to deal more squarely with Congress, including the three or four parties represented in it, as his or her prime constituency for bargaining and coalition building. The President would be less "personal" and free to ignore the legislature. Presidential "mandates" would be more clearly integrated with congressional ones, and bargained out more cleanly between the President and different congressionally represented parties. This quasiparlamentarization of American politics would not necessarily make the President less powerful. By facilitating the construction of more clearly defined legislative majorities, it could well have the opposite effect. But it would make the relationship between the executive and legislative branches more transparent, and closer, which would almost certainly make that relationship more functional than it is at present.

CONCLUSION

Whether we will ever get to such a system is anyone's guess. Again, I hesitate even to speculate on its political feasibility. But I do think American politics today contains severe shortcomings, disgracing this nation's democratic promise. And I do think the weight of evidence and recent experience does shift the burden of argument from those who would advocate a multi-party system, and the correlative supporting changes in our PV-SMD system, to those who would continue to defend that system and the two-party duopoly.

The great democratic achievement of the last generation was the civil rights revolution for minorities, women, and others — and we survived it, and have been immensely strengthened by it as a nation. I hope that the great achievement of the next generation will be fixing our broken party system — to make real choice and representation available to all, and to restore our collective ability to act on common public problems.

\textsuperscript{81} See U.S. CONST. art. II, § 1, cl. 3 ("[I]f there be more than one who have such Majority, . . . then the House of Representatives shall immediately chuse . . . ."). This procedure, while clearly inferior to direct popular election, is probably about as fair as the current practice of assigning all the electoral votes in a state to the candidate winning there, however narrow the margin.
But let me give the last word to Lowi, making the same point a bit more sharply:

One of the best kept secrets in American politics is that the two-party system has long been brain-dead—kept alive by support systems like state electoral laws that protect the established parties from rivals and by public subsidies and so-called campaign reform. The two party system would collapse in an instant if the tubes were pulled and the IVs were cut. The current parties will not, and cannot, reform a system that drastically needs overhauling. 82

It's time to pull the plug.

82. Lowi, Prospects and Obstacles, supra note 65, at 3.