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Hollowed-Out Democracy

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HOLLOWED-OUT DEMOCRACY

KATE ANDRIAS*

Professors Joseph Fishkin’s and Heather Gerken’s essay for this symposium, *The Two Trends That Matter for Party Politics*, along with the larger project of which it is a part, marks a notable turn (or return) in the law-of-democracy field.¹ Unlike much recent scholarship, Fishkin’s and Gerken’s work does not offer a comprehensive theory of corruption or equality, but instead analyzes the relationship between campaign finance law and the actual functioning of political parties in our democracy.

In brief, Fishkin and Gerken tell us that our contemporary political parties are at once highly polarized and oddly weak. They claim this is so because of a shift in the center of gravity of the parties, away from the formal party structure and toward “shadow parties.” These shadow parties, controlled by big donors, undermine the influence of “the party faithful,” i.e., everyday voters who provide the energy and backbone of the political parties through volunteering, attending caucuses and conventions, and making small donations. On this view, the potential of *McCutcheon v. FEC* to reinvigorate parties may be overstated.² The decision, Fishkin and Gerken warn, is more likely to exacerbate the trend toward shadow parties, rather than to encourage formal parties populated by party activists.³

Fishkin’s and Gerken’s focus on the evolution of political parties promises to open up a productive and challenging new conversation. But I have two concerns about their arguments. First, it is not clear that the formal parties, at least on the national level, are actually comprised of the party faithful. The Democratic and Republican Senatorial and Congressional Campaign Committees have, for many years, been national fundraising organizations, organized and

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¹ Joseph Fishkin & Heather K. Gerken, *The Two Trends That Matter for Party Politics*, N.Y.U. L. REV. ONLINE 32 (2014).

² 134 S. Ct. 1434 (2014). Cf. Marc E. Elias & Jonathan S. Berkon, Commentary, *After McCutcheon*, 127 HARV. L. REV. F. 373, 374 (June 20, 2014), available at http://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127_Elias_Berkon.pdf (arguing that the “big winner” of *McCutcheon* “is likely to be the group that suffers most under today’s regime: political parties”).

³ Fishkin & Gerken, *supra* note 1, at 39–40.

controlled by senior federal elected officials, with no grassroots base. Meanwhile, both the Democratic National Committee and the Republican National Committee have functioned primarily as campaign service vendors.⁴ In short, Fishkin and Gerken's important critique could have been launched at the formal parties themselves as they existed even before casting shadows.

Second, while Fishkin and Gerken are correct to worry about the dominance of the elite in our democratic organizations, for that conversation to have real impact on the vitality of our democracy, it must be expanded beyond political parties. That is, Fishkin's and Gerken's conception of the problem (the "hollowed-out" party⁵) and their implied solution (a robust role for party activists), while apt, are too narrow. In fact, the hollowed-out party and the legal edifice that has enabled it are but one small part of a broader hollowing out of our democracy and our doctrine: We lack participatory institutions that enable the vast majority of citizens, particularly low- and middle-income Americans, to engage in politics and governance—and we want for a conception of the First Amendment broad enough to encourage and protect such collective efforts.⁶

Far more than a short response piece is necessary to support these claims. But consider this sketch: Broad-based membership organizations in the United States have withered over the course of the last half-century. The problem lies not only with the political parties. Labor unions have shrunk while representatively governed civic organizations, once flourishing, have been replaced by professionally managed advocacy groups.⁷ The organizations that now

⁴ See Daniel J. Galvin, *The Transformation of Political Institutions: Investments in Institutional Resources and Gradual Change in the National Party Committees*, 26 *STUD. AM. POL. DEV.* 50, 52, 57–59 (2012) (explaining that “the national committees now play a supportive role, offering resources and services to candidates who seek their help” and dating fundamental changes in the national party committees to the 1930s for the Republicans and the 1980s for the Democrats).

⁵ Fishkin & Gerken, *supra* note 1, at 47.

⁶ On the paucity of our current First Amendment conception in the realm of politics, see Robert F. Bauer, *The Right to “Do Politics” and Not Just to Speak: Thinking About the Constitutional Protections for Political Action*, 9 *DUKE J. CONST. L. & PUB. POL’Y* 67, 69 (2013) (critiquing the purely speech-focused First Amendment analysis as it has been applied to coordination rules and arguing for a broader right to “do politics”); JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012) (tracing the disappearance of the right of assembly from constitutional law and arguing for its return); RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE* (2012) (arguing for a revival of the constitutional right to petition the government for redress of grievances).

⁷ See THEDA SKOCPOL, *DIMINISHED DEMOCRACY* 128, 127–74 (2003) (describing “civic America’s . . . transition from membership activities to professionally managed institutions” in the twentieth century); see also ROBERT D. PUTNAM, *BOWLING ALONE*

participate in national politics represent an array of interests, but few are composed of, and governed by, cross-sections of ordinary Americans.⁸ Like the shadow parties described by Professors Fishkin and Gerken, even organizations representing the “public” interest are heavily reliant on big donors; elites drive their decisions and shape their messages.

In short, our democracy is lacking the active participation of most Americans. Not only do middle class and poor Americans vote at lower rates,⁹ but they have far less input and power at every step of national governance. Organizations advocating on behalf of the wealthy far outnumber and outspend representatives for the middle class and the poor. “Of the billions of dollars devoted annually on lobbying in Washington, 72 percent is spent by organizations representing business interests; in contrast, . . . 1 percent is spent by unions, and less than 1 percent is spent by organizations advocating on behalf of social welfare programs or the poor.”¹⁰

The political reform movement, at least since the seminal case of *Buckley v. Valeo*,¹¹ has attempted to address this imbalance. But it has done so not by building organizations of workers and citizens to draw Americans into the democratic process and to contend equally with business interests, but rather by trying to *insulate* elected officials from the corrupting influence of money.¹² Meanwhile, the doctrine has followed a similarly narrow path: Campaign finance cases since *Buckley* have focused on the right to speak, not on a broader right to participate in the democratic process.¹³

Ironically, the majority opinion in *McCutcheon* might offer a glimmer of an alternative, recognizing that efforts to influence the

(2000) (examining the deterioration of American civil society); RICHARD B. FREEMAN, *AMERICA WORKS: THE EXCEPTIONAL U.S. LABOR MARKET* 75–92 (2007) (describing and analyzing the decline of the American labor movement).

⁸ SKOCPOL, *supra* note 7, at 127–74; see also KAY LEHMAN SCHLOZMAN, SIDNEY VERBA, & HENRY E. BRADY, *THE UNHEAVENLY CHORUS* 440, 431–42 (2012) (explaining that business interests are well represented in organized politics while “the less privileged” are significantly less represented).

⁹ See SCHLOZMAN, VERBA, & BRADY, *supra* note 8, at 153, 174 (noting that political participation in America varies widely based on social class).

¹⁰ Kay Lehman Schlozman, *The Role of Interest Groups*, BOS. REV., July–Aug. 2012, http://new.bostonreview.net/BR37.4/ndf_kay_lehman_schlozman_money_politics_democracy.php. Of the remaining money spent, the vast majority is from institutions, some by states and local government, and “2 percent is spent by public interest groups (a category that includes both liberal and conservative advocates).” *Id.*; SCHLOZMAN, VERBA, & BRADY, *supra* note 8, at 431, 441–42.

¹¹ 424 U.S. 1 (1976).

¹² See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (imposing, *inter alia*, limits on individual contributions to federal candidates).

¹³ Bauer, *supra* note 6, at 68–69.

electoral process include a variety of activities beyond pure speech. The Court opens: “There is no right more basic in our democracy than the right to participate in electing our political leaders.”¹⁴ And it repeatedly emphasizes the importance of political association.¹⁵ The Court’s analysis in *McCutcheon* is, I believe, deeply flawed: its understanding of political participation too individualistic and monetized; its view of corruption too narrow; and its concern for the tribulations of the super-rich puzzling. Nonetheless, the *McCutcheon* opinion, in its emphasis on association and participation, may hint at a possible path for a new reform agenda.

Those who worry about the corrupting influence of money and about the problem of political inequality ought to think seriously about the Court’s gesture toward political association. There may well be more to gain from a reform movement that seeks to facilitate enduring, broad-based membership organizations composed of cross-sections of ordinary Americans, rather than one that seeks only to insulate politicians from the flow of money, or, as Fishkin and Gerken do, to rechannel its flow. In short, efforts to enshrine a broader conception of political equality and anticorruption in the doctrine remain important. Yet, we must also look beyond campaign finance regulation to the laws that govern collective organizations of workers,¹⁶ the political activity of nonprofits,¹⁷ and the broader rights to associate, assemble, and petition.¹⁸ Given that many familiar models of membership—traditional labor unions, fraternal civic organizations, civil rights groups, as well as participatory political party organizations—have atrophied, such a reform effort no doubt will require creativity, along with herculean effort. But our democracy might well depend on it.

¹⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440–41 (2014).

¹⁵ *See, e.g., id.* at 1448 (“[T]he First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association.”).

¹⁶ For one account of how labor law might be reformed to encourage more political power for workers, see Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *YALE L.J.* 148 (2013).

¹⁷ *See SKOCPOL, supra* note 7, at 286–88 (noting tax laws that push associations toward expert-driven strategies and arguing for the repeal of rules designed to create firewalls between partisan and nonpartisan activities).

¹⁸ *See INAZU, supra* note 6 (arguing in favor of the right of assembly); KROTOSZYNSKI, *supra* note 6 (arguing in favor of the right of petition).