

The Shifting Power of Political Parties (Part 1)

A talk with **Professor Richard Pildes**

I. Two Party System and the Primaries

- A. First past the post vs. proportional representation
 - 1. First past the post:
 - a. A type of plurality/majority system. Winner-takes-all.
 - b. The candidate with the most votes wins the seat while the losing party wins no seats.
 - 2. Proportional representation:
 - a. More than two political parties are represented.
 - b. The percentage of votes for a particular party yields that percentage of seats for that party.

- B. Decline of political parties
 - 1. Slow decline in party bosses' control
 - a. Until the 1900s, party bosses and party leaders largely controlled who would be on the ticket in the elections on the state and congressional levels.
 - b. Wisconsin Governor Robert La Follette was one of the first proponents of a direct primary. Wisconsin's primary law applied only to state offices when first enacted in 1906 and later expanded in 1911 to include presidential elections.
 - c. By 1912, a mixed system of primaries and party selections developed across the country.

- C. Caucus vs. primary
 - 1. Caucus
 - a. Caucus: a political party organizes meetings, usually in every precinct around a state. Party members attend the meeting and cast a vote for the nominee. Typically, members vote by raising hands or breaking into groups. In some instances, the candidates themselves may attend and speak to the party members.
 - b. Caucuses were once the most common way of choosing presidential nominees. Today, primaries are more common.
 - i. States with caucuses: Alaska, Colorado, Hawaii, Kansas, Maine, Minnesota, Nevada, North Dakota, Wyoming, D.C., Utah, and Iowa.
 - ii. Territories with caucuses: American Samoa, Guam, Virgin islands, Northern Marianas,
 - iii. All other states and Puerto Rico use primary elections.

2. Primary

- a. Primary: direct statewide process of selecting candidates or delegates who will go to the convention.

D. Presidential elections

1. Conventions continued to play a major role in selecting presidential nominees until early 1970s.
2. 1968 Democratic National Convention
 - a. After President Lyndon B. Johnson announced he would not seek reelection, a clear nominee had not emerged. The viable candidates were Hubert Humphrey, Eugene McCarthy, and Robert F. Kennedy. Humphrey had not competed in any primaries and instead garnered delegates' support through caucuses.
 - b. The Vietnam War was a divisive issue, and both McCarthy and Kennedy were against the Vietnam War while Humphrey was for. After Kennedy was assassinated, support for the candidates were split between those who were for and those against the War.
 - c. The Convention took place in Chicago amid a discordant climate and civil unrest over the Vietnam War. After a contentious nomination process, Hubert Humphrey emerged as the Democratic presidential nominee even though he had not won any of the primaries.
3. Post-1968
 - a. After the contentious DNC Convention of 1968, the DNC created the McGovern-Fraser Commission, which aimed to open up the selection process. Created new complex caucus rules with enforcement tools to ensure compliance with the rules.
 - b. As a result of the Commission, more states moved away from caucuses and adopted primaries.

II. Polarization, Fragmentation, and the Right of Association

A. Increased campaign finance regulation

1. Greater regulation in campaign financing and the role of parties, and the rise of Super PACs have also impacted political parties.
2. Bipartisan Campaign Reform Act of 2002 (BCRA)
 - a. Often referred to as the McCain-Feingold Act, was designed to curb soft money.
 - b. The BCRA prohibits national parties from raising or spending nonfederal funds; requires state, district and local party committees to fund certain federal election activities with federal funds (hard money) and, in some cases, with money raised according to new limitations, prohibitions, and reporting requirements (Levin funds), or a

combination of both; limits fundraising by federal and nonfederal candidates and officeholders on behalf of party committees, other candidates, and nonprofit organizations.

- i. Levin funds are donations allowable under state law, raised directly by the specific state or local party that intends to use the, and limited to no more than \$10K in a calendar year from any person, corporation or union.
- c. Soft money
 - i. Contributions made outside the federal contributions limits to a state or local party, candidate, or outside interest group. Soft money was considered by many to be a major loophole in campaign finance law that allowed the parties to raise hundreds of millions of unregulated money.
 - ii. Prior to ban, national political parties accepted unlimited soft money to use for direct “issue ads” intended to influence outcome elections when they were actually intended for generic party building activities.

B. Polarization and fragmentation

1. Today’s hyperpolarized politics reflects historical and structural changes in American democracy.
 - a. The Voting Rights Act allowed disenfranchised black voters and some white voters to enter the voting bloc, breaking up the Southern one-party monopoly. They broke apart the old Democratic Party of the South into the highly conservative Republican party, which drew many formerly Democratic Southern voters, and a new moderate/liberal Democratic Party more ideologically in line with the rest of the Democratic Party nationwide.
 - b. In the South, as the Democratic Party became more liberal, the more conservatives fled - and as more conservatives fled, the more liberal the Democratic Party became.
2. Political fragmentation
 - a. Diffusion of power away from parties & diffusion of power away from party leadership to individual party members
 - b. Decline in the capacity and power of party leaders in Congress to bring along their caucuses to support leadership positions.
 - c. Political fragmentation is evidenced by increase in influence of Super PACs, 501(c) and 527 organizations. 527 organizations: type of tax-exempt organization, created under § 527 primarily to influence the selection, nomination, election, appointment, or defeat of candidates to offices. 26 U.S.C. § 527.

C. First Amendment right of association

1. California Democratic Party v. Jones, 530 U.S. 567 (2000):

- a. In 1996, California's Proposition 198 changed the State's partisan primary from a closed to a blanket primary. In a blanket primary, each voter can vote on any candidate regardless of party affiliation. Several political parties in California prohibited nonmembers from voting in their party's primary. They filed suit against the State alleging that the blanket primary violated their First Amendment right of association.
- b. The District Court in Sacramento found that the burden on the parties' right of association was not severe. The Court of Appeals for the Ninth Circuit affirmed.
- c. The Court held that blanket primary violated the petitioners' First Amendment right to association. Justice Antonin Scalia, writing for the majority, recognized that a political party's ability to exclude nonmembers from its candidate selection process is an integral part of its First Amendment right to join together to promote its political agenda. It found Proposition 198 not narrowly tailored to serve a compelling state interest.