

# POWER TO THE VOTERS

RICHARD D. PARKER\*

I am, or try to be, a populist democrat. For decades, populism was largely invisible, barely a straw man, in the discourse of the law schools. Well-meaning ideologues of the governing class were accustomed to prescribe—for the people—policies and institutional processes based on an assumption that government of and by the people is—obviously and of course—not to be trusted. Now, that is changing. Populism, today, is a recognized position in legal academia. The ideal is now embraced, its possible implications explored, by a growing band.<sup>1</sup>

Its meaning is, to say the least, contested. At a minimum, though, my premise is that populism should involve taking popular sovereignty more seriously than has been the practice in legal discourse. More particularly, it ought to involve a renewed emphasis on the value of political equality which—in negotiation with values of political freedom and political community—constitutes the democratic idea. From this it follows that populism ought to involve renewed respect for majority rule as generally the fairest practical guarantor of political equality among persons as well as the most practical way of approximating popular sovereignty over time.

If populism is imagined, above all, in terms of popular sovereignty and political equality, it may acquire a bite that cuts across and shakes up stultified left/right lines of “debate.” By the same token, if notions of popular sovereignty and

---

\* Williams Professor of Law, Harvard Law School. This essay is a revised version of remarks delivered at the Federalist Society Nineteenth Annual Student Symposium on “Law and the Political Process” at Harvard Law School, March 3-4, 2000.

1. See, e.g., AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS (1998); RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); J. M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995).

political equality are injected with a populist sensibility—an acceptance and, more, an embrace of ordinariness: ranging from our own ordinariness (and so our deep equality) to the ordinariness of “the people”<sup>2</sup>—these ideas may recover from their torpor of several long decades and acquire, at last, new critical vigor.

What such a re-orientation yields is a back-to-basics approach to the revitalization of democracy. Let me sketch, in three steps, a few fundamental features of this approach.

### MASS POLITICAL PARTICIPATION: A GOOD IN ITSELF

The most potent rationalizations for “governance” of the masses by enlightened elites are, nowadays, packaged as paeans to democracy. Against a backdrop of perfectionist premises, they insist that participation by the mass of real people in the real world of politics has value *only* if other conditions are met—only if reality is radically transformed in one way or another. They deplore the inadequacy (even the “corruption”) of democracy as we know it. And they conclude, regretfully of course, that the world is not yet safe for democracy. This line of argument must be rejected at the outset as a barrier, rather than a roadmap, to democratic revitalization.

The most transparently naked rationalization focuses on *outcomes* of political processes. The political empowerment of ordinary people is good, so the argument goes, only insofar as its likely outcomes are good. Today, the argument continues, the masses tend to have “bad values” or, at the very least, a mistaken understanding of their own interests. Hence, bad outcomes. There are, sad to say, some who would call themselves populists who take this line. The assumption of these rationalizers of political elitism is that they know better and, so, that they and their ilk should “lead”—be the “spokesmen” or “advocates” for—ordinary people. For them, political equality is but an “idealistic” fantasy—to be used, if at all, as a cynical smoke screen.

---

2. See generally JAMES AGEE & WALKER EVANS, LET US NOW PRAISE FAMOUS MEN (1941); PARKER, *supra* note 1; cf. LIONEL TRILLING, THE LIBERAL IMAGINATION: ESSAYS ON LITERATURE AND SOCIETY 88 (1950) (“We who are liberal and progressive know that the poor are our equals in every sense except that of being equal to us.”).

A somewhat more subtle version of the argument focuses on the *quality* of political processes. The participation of the masses in politics is good, it asserts, only so long as the political process is otherwise a good one. Today, it continues, our political process is utterly spoiled—poisoned by a few who, with clever thirty second spots, play on the ignorance, shortsightedness and emotions of the many. Thus, it concludes, the political influence of the many may have to be restricted. Again, there are self-styled populists who make this argument. The assumption is that ordinary people are incompetent dupes in need of enlightened cossetting. Again, political equality is imagined as an “ideal” too fine to flourish as a practice—much less motivate and enable a challenge, even if a messy one, to the few by the many—in the real world.

The most sophisticated version of the argument focuses on *preconditions* of democracy. Mass political participation is good, it claims, only after some level of social and economic empowerment, enlightenment and equality has first been achieved for everyone. Again, there are “populists” who take this line. But at bottom, despite the apparent sophistication, it repeats the other versions of the argument. For it assumes that ordinary people who suffer deprivation and inequality need help from their betters before acting politically on their own. It sees them as victims. It presupposes that they cannot or will not—if and as they choose—help themselves.

In place of these pseudo-democratic rationalizations of elite rule, movement toward a revitalization of democracy requires a different, more positive as well as more realistic, attitude toward mass participation, on a basis of political equality, in democratic rule. It requires an appreciation of such participation in politics as a good in itself. But how so?

The answer, I think, is not to invoke the inherent value of self-government, of autonomy. For in politics there are, after all, going to be winners and losers. The losers do not govern themselves in the same way the winners do. They are governed, instead, by the winners, at least for a time, to a degree and in some respects. The argument from self-government is, as we know, too easily turned by losers in the democratic arena into yet another claim for vindication—and, in the end, a claim for the government of everyone—by an elite of paternalistic protectors.

The answer, rather, lies in an old idea of personal and public hygiene. The idea is that active engagement in political life—win or lose—is good for you and for your community.<sup>3</sup> It is good in the same way that an experience of vitality—regularly summoning and expressing and disciplining your energy (successfully or not) toward a chosen end—is good for you. In an old-fashioned sense, it is good for your “constitution.” It is an important way in which you constitute yourself. As participants in the mid-century civil rights movement understood (and as some “civil rights leaders” of the *fin de siècle* seem to have forgotten) political self-help is an indispensable (though not, of course, the exclusive) route to an achievement of respect as well as self-respect.

To be sure, politics can be boring, perverse, even depressing. But physical exercise, too, is often painful. And in a regime of competition among political—if not (yet) social and economic—equals, the gain resulting from the pain is likely all the greater.

Should it be surprising that the prescription for a revitalization of democracy is a promise of revitalization *through* democracy?

#### THE APEX OF POLITICAL EQUALITY: ONE PERSON, ONE VOTE

No one can say, nowadays, that cultural and political elites are uninterested in political equality. In fact, one huge sector of the establishment—the one that nods when it reads editorials in *The New York Times*—talks about no topic more passionately than it does about this one. The focus of its concern, however, is skewed.

The focus is, of course, on equality in the realm of political campaign speech. Indeed, campaign finance reform has surpassed even “minority” rights as *the* cause of the establishment sector I have in mind. But while I support many reform proposals—public financing of campaigns, free television time for candidates, an abolition of “soft money”—I believe we all should be skeptical of claims that such reform would go far toward a goal of political equality.

---

3. See ALBERT CAMUS, *THE PLAGUE* (1948); cf. HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958).

There is, first, the problem of political advertising "independent" of official campaign organizations.<sup>4</sup> If (as I am convinced) the Supreme Court will never allow a closing of this "loophole" —if wealthy people remain free to spend as much as they want "independently" of the candidate they promote— then it is fatuous to suppose that other reforms will produce anything like political equality in campaign speech. If, on the other hand, "independent" expenditures are somehow shut down—so that the political marketplace is left exclusively to limited spending by campaign organizations—the result would be political *inequality* of another kind. For, then, electoral discourse would be controlled by an even *more* concentrated group: the *coterie* of official campaign managers. Establishment advocates of campaign finance reform tend not to see this as a problem. For their goal is orderly equality among officials of campaign organizations—not among citizens.<sup>5</sup> Nevertheless, as a practical matter, the issue is whether campaign advertising will be dominated by a larger, more fluid and chaotic elite—or a smaller, more tightly organized one, as many reform advocates prefer.

Second, there is the matter of the "free press" exception for media corporations.<sup>6</sup> Plainly, the Court would not permit a limitation (much less a suppression) of speech about candidates by the owners and managers of print and electronic media. They are imagined as "independent" by definition. Indeed, many establishment advocates of campaign finance reform seem surprised that rich people who own newspapers might be regarded as rich people. Their horror at a mixing of "money and politics" tends to disappear abruptly when the money

---

4. See *Buckley v. Valeo*, 424 U.S. 1, 39-59 (1976).

5. See Richard D. Parker, *Taking Politics Personally*, 12 *CARDOZO STUD. L. & LITERATURE* 103, 112 (2000).

6. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 668 (1990). The Court opined:

The media exception ensures that [a campaign finance law] does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations.

*Id.* (citations omitted).

belongs to the owners of *The New York Times*. Nonetheless, so long as the wealthy are free to buy—and then, bluntly or subtly, to support candidates through—such media, participation in campaign debate before a mass audience will be anything but equal.

The problem with focusing our concern about political equality on campaign finance reform is not just the barrier posed by the Supreme Court. Nor is it just that reformers find themselves aspiring to little more than a rearrangement of the elite domination of campaign discourse. There are two deeper problems: On one hand, anything like real equality of *effective* participation in political debate is a chimera. Given the protean nature of “speech,” the most that can be imagined (if not hoped for) is a very, very rough equality of opportunity. On the other hand, the assumption underlying the focus on the financing of political advertising is typically an assumption of political inequality—that the mass of ordinary people are passive and rather incompetent consumers (rather than actors), easily duped or swayed (rather than appropriately persuaded) by competing waves of thirty-second spots. If we want to vindicate political equality—as we should if we want to revitalize democracy—we ought to focus, instead, on something that does not, from the very outset, tend to compromise or contradict our goal.

We should focus on the vote. Taking the vote, rather than speech, as the key resource for participation in democratic politics—seeking to promote its use and the effect of using it—is the best way to take political equality seriously. For a focus on voting enables us to begin with a standard of equality that is both strong and established in law: one person, one vote. What’s more, equal participation in voting is a practical goal. Not everyone can speak at once or as effectively as everyone else. But everyone can vote at once. And every vote counts as much as every other. Most important, the aspiration to enhance the value of the vote is grounded in a respect for ordinary people—as political actors, indeed as rulers—that is unambiguous.

Strangely, the vote seems now to be out of favor. Across the conventional political spectrum, many denigrate the value of voting and the one person, one vote standard. Some claim voting is irrational. Others purvey a narcissistic notion of

“deliberative” democracy to eclipse what they imagine as the tawdry marking of a ballot. Still others claim that “communities” — rather than shifting collections or coalitions of individuals — should somehow express themselves in politics. On the surface, what unites them all is a tendency to idealize democracy and, so, to find its reality disappointing. But what accounts for this idealizing tendency? It is, I think, fear — fear of losing and of trying to win, fear of ordinary people and of their own ordinariness. To them, I would say: Get over it. Get into voting. It will be good for you. And for others as well.

### ROCK THE VOTE

How, then, might democracy be revitalized by promoting the use and effect of the vote? The central scandal of American democracy, from my populist point of view, is that most people do not cast a ballot in most elections. To promote use of the vote, the obvious strategy is to promote its effect. If something really significant seems to be at stake, people are more likely to take part. Even if no one believes her own vote will make the difference, she will see value — as have so many, from soldiers to protestors — in doing her part. For the moment, all I can do is gesture toward a few ways of enhancing the effect — and so the value, and so the use — of the vote. With respect to each, I want to encourage not only law reform, but also political action.

First of all, in candidate elections the voters must be presented with a real contest. In 2000, only about 35 seats in the U.S. House of Representatives are said to be in play. In a great many districts, the incumbent faces no (or only nominal) opposition. In other districts — and in many other elections up to and including presidential elections — there frequently seems not much more than a dime’s (or perhaps a dollar’s) worth of difference between the candidates. Hardly a motivation to cast a ballot.

For this condition, the legal remedy need not go so far as instituting systems of proportional representation. (Such systems tend to funnel power to party elites and, so, should be rejected by populists.) But barriers to entry — from ballot qualification requirements to exclusions from debates<sup>7</sup> — facing

---

7. *See, e.g.,* *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding state statute requiring a minor party candidate to get at least 1% of the total votes

"minor" party candidates surely must be lowered. Once a number of "minor" parties gain a foothold, run-off elections should be held. In the run-offs, the two highest vote-getters would be moved to address issues of concern to the others while, at the same time, the principle of popular majority rule would be vindicated. At the same time, the system for drawing legislative districts needs to be transformed. Districting should be taken from the hands of incumbent-friendly politicians and transferred to incumbent-unfriendly commissions. The commissions should be given one overriding instruction: draw and re-draw district lines so as to promote hotly contested elections in as many as possible.

In support of such legal remedies, a political one may now be underway. For the bulk of "alienated" non-voters may now be so huge as to have reached a critical mass. Politicians are more and more likely to take the opportunity to offer the "something different" these non-voters seem to want. In the last decade, candidates ranging from Ross Perot to Jesse Ventura to John McCain to Ralph Nader have done just that and, so, have begun to shake up political business-as-usual. The lesson for democratic populists is: When in doubt, support a maverick.

Second, the suffocating smugness of officialdom must be dispelled. In the last few decades, this pathological condition has become acute. Whether they be elected officials pompously touting "Burkean" notions of representation or civil servants claiming indispensable experience and expertise or judges relying on imagined wisdom and independence, these self-important middlemen—ensconced between voters and lawmaking—now are an incubus, cabining and repressing the political energy essential to popular sovereignty at the ballot box.

The primary legal remedy should be term limits. With respect to elected officials, term limits are an important supplement to the promotion of contested elections. But with respect to unelected officials, they are even more vital. If civil servants and judges (judges!) were limited to no more than fifteen years in office, government in all its nooks and crannies

---

cast in the primary to be placed on the general election ballot); *Forbes v. Arkansas Educ. Television Communication Network Found.*, 22 F.3d 1423, 1426 (1994) (upholding the right of a public television station to exclude an independent candidate for Congress from participation in a debate even though "[h]e had obtained enough signatures to qualify for the ballot under state law").

would, to a significant degree, be cracked open to the influence of the voters in periodic elections.

The political remedy, in this case, is largely attitudinal. We must stop acting as the enablers of the inflated arrogance of officialdom. For too long, we have treated officials with exaggerated respect. Now, it is time to start treating them—as they were treated in the early decades of our history—with a somewhat exaggerated disrespect. As reformers of bygone days knew well, regularly exposing the misdeeds, the incompetence, the hypocrisy of officials is not cynicism or nihilism; it is realism, the tonic of democratic lawmaking. (And that goes for lazy Justices and lying Presidents.)

The third and most important way of enhancing the effect, and so the use, of the vote is to eliminate the middlemen entirely. I am referring, of course, to direct democracy, lawmaking by initiative and referendum. What is at stake at the ballot box is, there, about as clear and immediate as can be. Popular support for direct democratic lawmaking, in states that allow it, is strong and consistent. So, however, is elite opposition to it.<sup>8</sup> Today, direct democracy is at a turning point.

The pressing legal challenge, right now, is to resist growing efforts to hem in and hobble the initiative and referendum. That will involve challenges to new infringements on the right to petition, new ballot qualification requirements, and new “interpretations” of arcane rules like the “single subject” standard. Eventually, it is likely also to involve defense against federal constitutional arguments, particularly the claim that direct democracy violates the “republican form of government” clause.<sup>9</sup> (In the 1950’s and 1960’s, it was exclusively conservatives who insisted that “America is a republic, not a democracy.” Now, it is mostly progressives.) While turning back these anti-democratic thrusts, the time is ripe to go on the offensive as well—mending (rather than ending) processes by which proposals for popular lawmaking are drafted and summarized, then extending the initiative and referendum to

---

8. See, e.g., DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

9. See, e.g., Hans A. Linde, *On Reconstituting “Republican Government,”* 19 OKLA. CITY U. L. REV. 193, 199-201 (1994); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993).

all fifty states and even experimenting (at first) with “advisory” or “instructive” initiatives and referenda at the federal level.

Politically, beyond exposing elitist assumptions behind the wave of assault on direct democracy, I have one main suggestion: If there is an initiative or referendum proposal that you don’t like, oppose it actively. And if it is passed, don’t throw up your hands and go to the courts or the newspapers to pontificate about “republican” government. Instead, launch your own initiative campaign to repeal the popularly made law you don’t like or to enact one you do like.

My bottom line is this: Democracy will be revitalized when more and more and then more of us give it a try.