Politics As Markets: Partisan Lockups of the Democratic Process

Samuel Issacharoff* and Richard H. Pildes**

This article critiques the prevailing constitutional doctrine applied in cases of state regulation of democratic politics. Instead of the conventional individual rights versus state interests approach, Professors Issacharoff and Pildes construct a less formulaic and more functional theoretical framework by borrowing from the last generation of academic thought in private law. In particular, corporate-law scholarship has increasingly shifted from a focus on specifying first-order fiduciary duties to emphasizing second-order considerations involving proper construction of the background "market for corporate control." This article seeks a similar transformation in public-law thought. It argues for a shift away from the conventional first-order focus on defining rights and equality and toward an emphasis on the proper construction of background "markets for partisan control" in the arena of democratic politics. Oftentimes, state regulations that purportedly reflect state interests in "stability" or the "avoidance of factionalism" can be seen as tools by which existing parties seek to raise the cost of defection and entrench existing partisan forces more deeply into office. When, but only when, political arrangements work in this way, this article suggests that courts or other institutions should play the role of destabilizing these arrangements and restoring a more competitive partisan political environment. The article offers comparative perspectives from German constitutional law and revisits questions involving the original constitutional conception of democracy in its efforts to move legal assessments of politics toward ensuring robustly competitive partisan political environments that avoid insider lockups of democratic politics.

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* Charles Tilford McCormick Professor of Law, the University of Texas School of Law.

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INTRODUCTION

The democratic politics we experience is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules. Democracy is as much the creation of these structures as it is an organic expression of any preexistent "popular will." To the extent democratic politics today in the United States is widely perceived as unimaginative, frozen, devoid of genuine significance, and personality-rather-than-issue driven, these qualities partly reflect the specific institutional framework of contemporary democracy, rather than any fundamental, underlying ideology of the American electorate. American politics was not always thus. In the nineteenth century, for example, American partisan and ideological competition was far more robust. Third parties were a consistent and enduring presence, including the Liberty, Free Soil, Know-Nothing, Constitutional Union, Southern Democrat, Greenback, People's, and Prohibition Parties.[1] Voter turnout dwarfed that in the present era.[2] Political parties generated more intense and pervasive personal ties. Many reasons, of course, contributed to the reorganization of democratic life into its current forms. But among them were the increasingly sophisticated ways, over the course of the twentieth century, that the two dominant parties managed to manipulate and capture the ground rules of political competition so as to freeze out serious challengers. This article explores the ways in which dominant parties manage to lock up political institutions to forestall competition, with a principal focus on the failure of the institution best positioned to destabilize these lockups, the United States Supreme Court, to develop a theoretical framework that would enable effective judicial performance of this role.

The Court has failed to develop such a framework despite its increased willingness over the last several decades to adjudicate claims involving "political rights." In this period, judicial oversight over the political process has expanded to a level unimaginable when the Supreme Court first entered the political thicket in the early 1960s. Despite this expansion, the Court has never been able to articulate a correspondingly expansive, sophisticated, or highly functional account of what features of democratic politics should be the focus of constitutional analysis. Nor has the Court been able to articulate a clear vision of either the exact nature of what it elliptically refers to as "political fairness"[3] or the proper scope for courts in exercising their more ag-

1. *See* STEVEN J. ROSENSTONE, ROY L. BEHR & EDWARD H. LAZARUS, THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 48 (2d ed. 1996).

2. *See* RUY A. TEIXEIRA, WHY AMERICANS DON'T VOTE: TURNOUT DECLINE IN THE UNITED STATES 1960-1984, at 1, 8-12 (1987).

3. The Court's initial formulation appears in *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) (identifying the goal of legislative apportionment as "achieving [the] fair and effective representa-

gressive oversight role. This failure has led, in turn, to awkward attempts to fold difficult questions of democratic politics and judicial review into the conventional regime of rights-based constitutional and statutory law. In case after case, courts avoid confronting fundamental questions about the essential political structures of governance and instead apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes. This formulaic technique has led to a jurisprudence comprised of an unsatisfying discourse about individual entitlements and the quality of counterpoised state interests.

In our writings on courts and politics, we have devoted much attention to the limitations of rights discourse in this domain. At one level, the focus on rights poorly explains the nature of vote dilution claims, in which individuals can only show harm as part of an aggregate entity. Thus, in this area we have written critically of both the limited relevance of individualistic claims and the difficulty in resting standing to sue on traditional, individualistic conceptions of harm.[4] At another level, the conventional taxonomy of state interests relevant to regulating politics is too narrow to capture the range of considerations the courts actually take into account. Thus, in these areas we have argued that constitutional doctrine is also concerned with "expressive harms" that can result from the values the state expresses when it structures democratic institutions. These are not the conventional harms of constitutional doctrine in other fields, but we have suggested that special concerns for the content of the political culture seem to emerge from Supreme Court decisions that address the proper construction of democratic politics.[5]

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tion of all citizens"). *See also* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) (stating that the very essence of districting is to produce "politically fair" results).

4. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 592 (1993) (concluding that Shaw v. Reno, 509 U.S. 630 (1993), reaffirms the "messy jurisprudence of compromise" that had guided the Court); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 872 (1995) (arguing that group voting rights claims stem from "a profound disorientation from the crucial factors" justifying reliance on racial or ethnic classifications); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47, 50 (1996) (concluding that there is "deep uncertainty at the core of the Court's ruling in *Shaw* and its progeny"); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2508 (1997) [hereinafter Pildes, *Principled Limitations*] (describing the proper method of implementing *Shaw*); Richard H. Pildes, Commentary, *Two Conceptions of Rights in Cases Involving Political "Rights,"* 34 HOUS. L. REV. 323, 325 (1997) (suggesting that legal rights are rhetorical tools used to achieve pragmatic aims). These criticisms have found a partial audience in the Supreme Court. *See, e.g.*, Bush v. Vera, 116 S. Ct. 1941, 1999-2000 n.3 (1996) (Souter, J., dissenting) (citing Issacharoff *supra*).

5. *See* Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 722-30 (1994) (arguing that courts should focus on the legitimate scope of state authority, rather than balancing state interests against individual rights); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 506-16 (1992) (arguing that public policies can violate the Constitution not only because of their material conse-

But the failures of current doctrinal frameworks are not limited to the artificial narrowness of the rights-versus-state-interest formula. For in organizing an overview of judicial approaches to evaluating the political process,[6] we have become more acutely aware that the Court's electoral jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated about actual political practices. Together with our coauthor Pam Karlan, we increasingly see the images of democratic politics that underlie the Court's decisions as simply ad hoc—different views of the point of politics emerge almost at random as the Court confronts questions that range from patronage to redistricting to restructurings of the political process through voter initiatives.[7]

In this article, we present a more process-based reexamination of some of the landmark cases in this area, both old and more recent, that generates a more systematic conception of a well-functioning political process. The key to our argument is to view appropriate democratic politics as akin in important respects to a robustly competitive market—a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens. But politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, anticompetitive entities alter the rules of engagement to protect established powers from the risk of successful challenge. This market analogy may be pushed one step further if we view elected officials and dominant parties as a managerial class, imperfectly accountable through periodic review to a diffuse body of equity holders known as the electorate.[8]

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quences, but also because the meaning the policies convey does not respect constitutional values). These arguments have also received attention in the Court's jurisprudence. *See* Abrams v. Johnson, 117 S. Ct. 1925, 1944-45 (1997) (Breyer, J., dissenting) (arguing that districting plans may reflect political pressures); Bush v. Vera, 116 S. Ct. 1941, 2001-03 (1996) (Souter, J., dissenting) (arguing that any harm alleged to result from race-conscious districting should not be actionable under the Equal Protection Clause); Shaw v. Hunt, 116 S. Ct. 1894, 1909 (1996) (Stevens, J., dissenting) (distinguishing the expressive harms recognized by the Court in Establishment Clause cases from those alleged in cases of racial gerrymandering); Miller v. Johnson, 515 U.S. 900, 935 (1995) (Ginsburg, J., dissenting) (arguing that state legislatures must sometimes consider race in districting).

6. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1997).

7. For an incisive review showing the internal inconsistency in one term's political process related cases, see Pamela Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997).

8. Other commentators have previously drawn analogies between political and economic markets. For example, Peter Schuck used such an analysis to criticize the Court's partial intervention into the political gerrymandering domain in Davis v. Bandemer, 478 U.S. 109 (1986). *See* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Poli-*

Like the managerial class well-known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they act in the name of the entity to protect themselves against outside challenges to their personal authority. Again, like their corporate counterparts, political managers use procedural devices, created in their incumbent capacity, to lock up their control.

In corporate-law scholarship, the focus of legal regulation has shifted in the last generation. Traditionally, this scholarship focused on defining first-order duties of corporate managers by providing substantive content to fiduciary obligations that would then be legally enforced.[9] More recently, corporate-law scholarship has moved to what might be characterized as a focus on second-order concerns. Rather than seeking to police directly the behavior of managers through substantive legal commands, current scholarship emphasizes the importance of the background competitive structures within which managers make decisions. This scholarship focuses on the market for corporate control; the target of regulation is the construction of appropriately competitive markets that will discipline managers to act in the interests of shareholders.[10] If these markets permit appropriately robust competitive challenges to incumbent management, as through threats of takeovers, for example, then the market itself might be a more effective check on self-dealing than the imposition of direct, first-order substantive commands in the form, for example, of fiduciary duties. This shift from a first-order to second-order focus of regulation, or a shift from centralized command-and-control models of regulation to ones which focus on creating appropriate incentives through markets, has characterized the recent market-for-corporate-control literature.

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tics, 87 COLUM. L. REV. 1325 (1987). Whereas Schuck concludes that monopolistic barriers to entry in political markets are imperfect and unlikely to succeed, *see id.* at 1345, 1349-50, our analysis leads us to conclude, to the contrary, that anticompetitive manipulations of the internal rules of political markets are both common and effective—and require some form of judicial oversight to prevent lockups in these markets.

9. This shift in the focus of corporate-law scholarship can be noticed by comparing standard survey and teaching materials from different eras. *Compare, e.g.*, ALFRED F. CONARD, CORPORATIONS IN PERSPECTIVE (1976) (focusing on specifying judicial regulation of corporate governance), *with* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (focusing on markets in corporate control). For discussion of the historical importance to corporate law of fiduciary duties of loyalty, see ROBERT CHARLES CLARK, CORPORATE LAW 34 (1986) ("*The overwhelming majority of particular rules, doctrines, and cases in corporate law are simply an explication of this duty* . . . .").

10. For an important early essay in this development, see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). For a summary of articles on the market of corporate control, see FOUNDATIONS OF CORPORATE LAW 229-67 (Roberta Romano ed., 1993).

We seek to make the same transformation in public law. In cases involving the regulation of politics, we argue that courts should shift from the conventional first-order focus on rights and equality to a second-order focus on the background markets in partisan control. Rather than seeking to control politics directly through the centralized enforcement of individual rights, we suggest courts would do better to examine the background structure of partisan competition. Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment. Corporate scholarship has inverted its focus from the foreground of managerial duties to the background rules that structure the market for corporate control; we seek to invert the focus of constitutional doctrine from the foreground of rights and equality to the background rules that structure partisan political competition.[11]

In the corporate context, courts have been relatively vigilant in policing potentially self-serving managerial behavior. We propose a theory of legal regulation of politics premised on a skeptical view of political lockups, akin to the "hard look" given to managerial self-protection in the corporate setting.[12] In corporate governance the term "lockup" refers to a variety of devices that constrain the effectiveness of the voting power of shareholders by entrenching the incumbent position of firm management. This can take the form of restrictions on voting rights for newly authorized shares, or elimination of the right to call special meetings, or manipulations of meeting dates, or penalties imposed should shareholder decisions lead to incumbent manag-

11. For general discussion recognizing the causal role of background rules in constraining outcomes and for advocacy of a shift from focusing on foreground rules to background rules in various areas of the law, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 248 (1997) ("A delegitimating critique of the kind I'm discussing in this chapter is an attempt to operate a background/foreground shift.").

12. Lockups are a familiar concern in the law of corporate governance. The principles we apply to the political sphere generally correspond to the concept of anticipatory lockups, which incumbent management uses to raise the costs of acquisition of would-be rivals. *See generally* Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539 (1996). As a general matter, courts view corporate lockups with great skepticism. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183-84 (Del. 1985) (holding that lockups are allowed under Delaware law only when they are untainted by breaches of fiduciary duty). Judicial suspicion has prompted academics to argue that anticipatory lockups should be treated differently than lockups attempted by bidders for management of a company, when the lockup provision might trigger higher competing bids. *See, e.g.*, Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L.J. 71 (1989). Others argue that lockups should be subject to the deferential business judgment standard of review. *See, e.g.*, Stephen Fraidin & Jon D. Hanson, *Toward Unlocking Lockups*, 103 YALE L.J. 1739, 1743 (1994). For present purposes, the key insights from the corporate literature are that there is an active market for managerial control, that there are well-recognized devices for frustrating challenges from outside suitors, and that raising cost barriers is a critical feature of a lockup.

ers losing their positions (as with a "poison pill" that triggers penalties should shareholders allow the firm to be taken over contrary to the desires of incumbent management). Although courts generally allow substantial managerial discretion over the business judgments of a firm,[13] they have been properly skeptical when managerial discretion is invoked to justify actions taken that further managerial self-interest—particularly if the restrictions on shareholders' voting rights threaten the legitimacy of the electoral process.[14] In analogous fashion, we propose that a self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more responsive representation. Skepticism toward self-serving managerial practices in the corporate domain, but not in the political domain, has little justification. If all else fails in the corporate sphere, the option of "exit" is always available to the dissatisfied public shareholder.[15] No such exit strategy exists in the political arena. More centrally, however, our commitment to the continued competitiveness of the political market draws from two important strands of analysis: a skeptical public choice view of political markets and a pluralist commitment to the electoral arena as a robust marketplace for airing the divergent and conflicting impulses that comprise American politics.

Beginning with the work of Anthony Downs[16] and continuing in the extensive public choice literature of the last two decades,[17] public choice theory

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13. *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (describing the business judgment rule and exploring the relevant case law); *see also* MODEL BUS. CORP. ACT § 8.30 (1984) (defining the standard of conduct for corporate directors).

14. *See, e.g.*, Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. 1990) (explaining that intermediate business judgment review includes elements of fiduciary duty analysis). This is consistent with the principle that "Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights." Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659, n.2 (Del. 1988). This exception for shareholders' voting rights does not cover every issue of voting rights, but only those that threaten the legitimacy of the electoral process. *See id.* at 659. In *Blasius*, the court reserved its scrutiny for any form of managerial action that has as its "primary purpose . . . preventing the effectiveness of a shareholder vote." *Id.* at 660. More specifically, the court said that the primary purpose of heightened review is to prevent the corporation from undermining the effectiveness of a shareholder vote "in every instance in which an incumbent board seeks to thwart a shareholder majority." *Id.* While there is concern about whether the Delaware courts are applying *Blasius* as aggressively as its language, we focus on the formal doctrine as articulated in this seminal opinion. For subsequent cases arguably cutting back on *Blasius*, see Stroud v. Grace, 606 A.2d 75, 92 n.3 (Del. 1992), and Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995). (Our thanks to Jeff Gordon, Victor Brudney, and Randall Thomas for alerting us to this line of cases.)

15. The term derives from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 21 (1970), which provides economic analyses of various strategies for expressing discontent, depending on the costs of withdrawal from unsatisfactory institutional arrangements and the degree of personal investment in institutions.

16. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

17. An excellent summary of the legal application of public choice literature is available in MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

defines the legislative process as an arena for fundamentally self-serving behavior as legislators trade off votes on specific legislation to advance their prospects for reelection. To be sure, in many contexts, the formal tools of public choice analysis rest on a crudely reductionist motivational psychology attributed to "rational" political actors. In other contexts, public choice theorists err by identifying one interest group that benefits from a policy and then inferring that the desire to benefit that group must have been the primary or exclusive reason for the policy's adoption.[18] Along with many others, we have written critically of these and other fallacies in the more extravagant claims of public choice theory.[19]

But for purposes of analyzing struggles over the architecture of democratic institutions, we believe that the legal incorporation of public choice theory has, in two critical respects, actually been too *narrow*. First, with respect to their focus on interest group rent-seeking, public choice theorists have been surprisingly inattentive to the means by which existing holders of political power seek to perpetuate their political control, not by distributing benefits to their supporters, but by capturing the basic structures and ground rules of politics itself. Second, while focusing on individual legislators' responsiveness to reelection incentives, public choice theorists, at least in the legal literature, have paid too little attention to the organizational form through which much of politics takes place: the political party. We seek to show that a public choice analysis centered on potential partisan capture of politics can illuminate a number of more discrete constitutional and policy issues—such as the *White Primary Cases*, fusion candidacies, ballot access questions, and the contemporary Voting Rights Act.[20]

We will begin by applying our political markets method to two situations where courts failed to see the relevance of a perspective that emphasizes appropriately competitive political markets. Part I reexamines the famous *White Primary Cases* to assess the Court's efforts to address the relationship between black disenfranchisement and partisan politics. Part II turns to re-

18. Perhaps the reductio ad absurdum of this fallacy comes with the suggestion that the Constitution's ban on the importation of new slaves after 1808 benefited large plantation owners and, therefore, must have been motivated by rent-seeking efforts on behalf of such planters. *See* Gary M. Anderson, Charles K. Rowley & Robert D. Tollison, *Rent Seeking and the Restriction of Human Exchange*, 17 J. LEGAL STUD. 83, 99 (1988).

19. *See* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE (1994); *see also* Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988) (critiquing public choice literature); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991) (arguing that the impact policies have on social understanding is frequently ignored); Richard H. Pildes & Elizabeth Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2143 (1990) (arguing that social choice theory fails to acknowledge the plurality of values motivating decisions).

20. We believe courts, in particular, have ignored partisan control of political institutions.

cent cases where the Court upheld laws preventing challenges to incumbent power arrangements—primarily prohibitions on write-in ballots and fusion candidacies. In each case, we shift the inquiry away from the individual-rights-state-interest model and focus instead on the effect of the challenged conduct on the structure of partisan political markets. We then move in Parts III and IV to our broader argument for judicial destabilization of attempted lockups, first through an inquiry into some of the more pressing contemporary conflicts in the legal regulation of politics and then by elaborating the methodological implications of our approach.

At the outset, we can identify two forms of political lockups. The first is a precommitment pact among existing elites that frustrates easy penetration by outsiders. We find the clearest example in the early *White Primary Cases*, such as *Nixon v. Herndon*,[21] in which Texas Democratic legislators created a statutory prohibition on black participation. This device served not simply as an expression of white racial supremacy, but as a partisan tool to deter any internal party factions from seeking to forge destabilizing coalitions with black allies. Lockups may also take a second, related form. Incumbent parties may deploy state authority to raise entry barriers against potential third-party challengers—a political version of the corporate "poison pill."[22]

The failure of American courts to respond to the danger of partisan political lockups might be traced to a design defect in the American Constitution. As we discuss in Part V below, the Framers of the Constitution, primarily Madison, viewed political parties as the embodiment of undesirable factional politics.[23] Despite this original constitutional vision, effective indi-

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21. 273 U.S. 536 (1927).

22. A poison pill is an antitakeover device that triggers "special issues of preferred shares or debt securities with rights that are designed specifically to make unwanted attempts to take over the issuing corporation difficult, impractical, or impossible." LARRY D. SODERQUIST, A.A. SOMMER, JR., PAT K. SHEW & LINDA O. SMIDDY, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES, MATERIALS, PROBLEMS 613 (4th ed. 1997); *see also* Heil v. Morrison Knudsen Corp., 863 F.2d 546, 547 (7th Cir. 1988) (discussing whether certain business practices created a poison pill); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 265 (2d Cir. 1984). In *Norlin*, the Second Circuit wrote:

> The business judgment rule governs only where the directors are not shown to have a self-interest in the transaction at issue. Once self-dealing or bad faith is demonstrated, the duty of loyalty supersedes the duty of care, and the burden shifts to the directors to "prove that the transaction was fair and reasonable to the corporation."

Id. (citations omitted).

23. The Framers conceived the Constitution as a constitution against parties. *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840, at 40, 54-73 (1969) (discussing the Framers' contempt for existing parties). When Madison wrote of the problem of "faction," as in *The Federalist No. 10*, political parties were one of the paramount forms of faction he had in mind. *See id.* at 64. Republicanism was widely understood to imply popular sovereignty where the constitutional structure would limit the divisive influence of parties. *See id.* at 53. Party politics were considered the antithesis of the (elite) politics of "the common good" that the Constitution sought to enshrine. *See* GORDON S.

vidual participation soon required some organizational form for rival viewpoints to be meaningfully heard. Politics occurs through organization, and that organization turns out to be the political party. Indeed, one of the great unappreciated ironies of the original constitutional vision is that although the Framers were exquisitely sensitive to the need to create formal checks and balances between governmental organizations, they failed to see the need to ensure sufficient competition between political organizations. In the absence of a clear constitutional conception and textual basis for ensuring such competition, American courts have been tentative and hesitant—as well as politically unsophisticated—in recognizing when partisan political markets have been captured or are appropriately "free."

I. THE WHITE PRIMARY CASES

To show how an understanding of democratic political competition can illuminate specific legal and policy problems, we begin with concrete examples of partisan manipulation that the Court has only dimly seen as such. All too often the Court has approached problems of democratic politics through mechanical legal formalisms, rather than through more functional insight into appropriate political competition. To introduce this theme, we recast the debates over the *White Primary Cases*, the Court's classic confrontations with the persistent efforts of the Texas Democratic Party to foreclose any prospect of black electoral participation.

A. *Uncertain Doctrinal Foundations*

The *White Primary Cases* have the status of untouchable icons in the legal world.[24] In the twenty-five year period immediately prior to *Brown v.*

WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, 506-18 (1969). Similarly, in his famous *Farewell Address*, George Washington warned against the "baneful effect" of parties:

> The common and continual mischiefs of the spirit of party are insufficient to make it the interest and duty of a wise people to discourage and restrain it.
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> It serves always to distract the public councils and enfeeble the public administration. It agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasionally riot and insurrection. It opens the door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion. Thus the policy and the will of one country are subjected to the policy and will of another.

George Washington, *Farewell Address* (Sept. 17, 1796), *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 213, 219 (James D. Richardson ed., 1897).

24. *See, e.g.*, Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1749 (1993) (concluding that, despite their problematic implications, these cases withstand critique because they symbolize the Court's early commitment to racial equality: "[F]ew commentators and no courts have suggested the disavowal of the *White Primary Cases*.").

Board of Education,[25] they represented a solitary, and yet determined, Supreme Court assault on at least one element of the fortress of white supremacy.[26] Virtually alone in an era in which the Supreme Court tolerated nearly all other techniques of black disenfranchisement,[27] the *White Primary Cases* suggested at least some glimmer of judicial commitment to the eventual realization of the guarantees of citizenship offered by the Reconstruction Amendments. It is not without some hesitation, therefore, that we begin our analysis of political markets with a return to these landmark cases in order to ask the simple question: Is it so clear, after all, that the entire line of the *White Primary Cases* was correctly decided?

The *White Primary Cases* may properly be viewed as a sustained effort to preserve to white voters exclusive control over the locus of decisional power in Texas. Texas was not alone, of course, in developing the white primary as one tool of disenfranchisement. But the history of the *White Primary Cases* reveals a remarkable obsession of Texan officialdom with the exclusion of black voters—an obsession the Court fails to note, but one that we suggest is key to understanding the political context of the cases. These landmark cases reflect repeated and varied state attempts to ensure that black voters could not influence the decisive political issues of the day.

The crucial question, for our purposes, is what entity generated these laws and what its motivation appears to have been. We emphasize that "the State" must not be viewed as an abstract, detached, or nonpartisan entity in most cases of political regulation. This is a central theme for this article: "The State" is always a constellation of currently existing political and partisan forces. Throughout the period of the *White Primary Cases*, the Demo-

25. 347 U.S. 483 (1954).

26. The Court proved willing to intervene in one other case, Guinn v. United States, 238 U.S. 347 (1915). In *Guinn*, federal prosecutors charged two Oklahoma election officers with unconstitutionally conspiring to deprive certain black citizens of the right to vote. *See id.* at 355. The unanimous Supreme Court found that Oklahoma's new voter-registration scheme violated the Fifteenth Amendment because its egregious grandfather clause exempted most white voters from literacy tests.

27. A rarely discussed Holmes opinion, Giles v. Harris, 189 U.S. 475 (1903), provides the most noteworthy example of Supreme Court passivity. *Giles* presented a challenge to the registration practices in the 1901 Alabama Constitution that were designed and used systematically to disenfranchise black voters and restore white supremacy. Many other states in the former Confederacy adopted similar policies. Jackson W. Giles, a courthouse janitor, was born in 1859 and lived and voted for nearly 30 years in Montgomery, Alabama before the state adopted the 1901 Alabama Constitution. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 71. His complaint alleged that he and 75,000 other qualified black voters had been denied the right to register. *See Giles*, 189 U.S. at 482. Holmes' opinion found this complaint raised "political rights" that the courts could not address. *Id.* at 497. When subsequent efforts were made to have Congress intervene by refusing to seat representatives from states that employed such tactics, Congress in turn deferred to the Court's judgment. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 74-75. As a result of the lack of national institutional commitment to the Fifteenth Amendment from the time of *Giles* until the Voting Rights Act of 1965, blacks were effectively removed from southern politics throughout most of the twentieth century.

cratic Party had a complete monopoly on politics in Texas. Thus, when "the State" acted here, this was tantamount to the Democratic Party using state law to self-regulate. One of the mysteries that must be unraveled, then, is why a political party, with a monopoly on power, would so insistently turn to state law to regulate itself.

This line of cases starts with a 1923 state law that proclaimed, "[I]n no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[28] This is the clearest example of the Democratic Party using its control of the state legislative machinery to impose a restriction on internal party affairs. The political marginalization of the small number of potential black voters could have been accomplished, it would seem, through either the normal electoral process (since white supremacist voters could swamp the black minority), or through the Party defining its own membership standards independently of state involvement. But the avenue of first recourse was state regulation. Indeed, so determined was the Party to use this route that, when the Court in *Nixon v. Herndon* struck down the statute as an infringement of the Fourteenth Amendment,[29] the State—the Democratic Party—immediately substituted new legislation. That new legislation provided that "every political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party."[30] The state executive committee of the Democratic Party duly adopted a resolution limiting the right to vote in party primaries to "all white democrats."[31] In *Nixon v. Condon*, the Court responded by finding that the statute allowing parties to define voting qualifications converted political parties into "the organs of the state itself"[32] and that, accordingly, the same prohibitions of the Fourteenth Amendment would apply.

Only after *Nixon v. Condon* and *Nixon v. Herndon* did the Democratic Party abandon the most direct forms of state regulation. But the Texas legislature, controlled by the Democratic Party, concluded that policies to disenfranchise blacks simply had to be more sharply distinguished from direct state promulgations. Within weeks of *Nixon v. Condon*, the State Convention of the Texas Democratic Party adopted a resolution restricting Party membership to whites.[33] Based on the state action issue, the Court took a step back from the struggle. In *Grovey v. Townsend*,[34] the Court found that

28. Nixon v. Herndon, 273 U.S. 536, 540 (1927) (quoting 1923 Tex. Gen. Laws 74).
29. *See id.* at 541.
30. Nixon v. Condon, 286 U.S. 73, 82 (1932) (citing 1927 Tex. Gen. Laws 193).
31. *Id.*
32. *Id.* at 88.
33. *See* Smith v. Allwright, 321 U.S. 649, 656-57 (1944).
34. 295 U.S. 45 (1935).

the absence of a direct state legislative command left this latest black franchise restriction beyond the scope of the Constitution. But in the wake of other legal developments,[35] the Court revisited this question just a few years later. In *Smith v. Allwright*,[36] the Court reversed direction and held that the Democratic Party restriction on who could vote in the Party primary did indeed amount to state action and hence violated the Fourteenth Amendment.[37] To support this result, the Court concluded that the extensive state regulation of the entire political process (including, ironically, the imposition of a poll tax) evidenced inescapable state involvement in the internal affairs of political parties:

> We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the State in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.[38]

This vastly more expansive view of state action was the critical analytic move in the doctrinal transition from *Grovey* to *Smith*. Of course, because all electoral politics is regulated—all general elections are state-administered and all candidates are listed on state-printed ballots—the *Smith* rule enabled courts to conclude that all structures of internal party political life involve state action. Perhaps more significantly, by strengthening the state action doctrine to justify constitutional oversight, the Court permitted unlimited legal intervention in partisan political activity.

The *Smith* Court's decision to find state action and overturn the Texas Democratic Party's racial membership exclusions succeeded in eradicating all white primaries conducted by the Democratic Party. However, a white primary conducted by a private citizens' group remained. This is the point at which the Court's failure to develop any functional theory of political competition and democratic politics, as opposed to relying on the most wooden formalisms, becomes problematic. In *Terry v. Adams*,[39] the Court invalidated the racially exclusive political endorsement practices of the Jaybird Democratic Association of Fort Bend County (the "Jaybird Association," the "Jaybird," or the "Association").[40] We tell this story in some detail because

35. *See* United States v. Classic, 313 U.S. 299, 318 (1941) (holding that Congress has the power to regulate primary elections under the Constitution when state law makes the primary an integral part of the electoral system).

36. 321 U.S. 649 (1944).

37. The *Smith* Court commented that party membership restrictions did not become justiciable under the Constitution until state law made a fundamental right (voting in the primary) contingent upon party membership. *See id.* at 664-65.

38. *Id.* at 663.

39. 345 U.S. 461 (1953).

40. *Id.* at 470.

it epitomizes southern politics in the one-party South and because the dynamics of intraparty competition are central to the political markets approach we suggest for constitutional oversight of politics.

Fort Bend County had been a hotbed of black political activism from the Reconstruction era.[41] From 1868 through 1888, blacks outnumbered whites in the county by four to one, and blacks held many political offices. Indeed, during Reconstruction, Fort Bend County elected more blacks to political offices than any other county in Texas. For a generation, black Republicans controlled numerous important county positions. In 1888, as movements to redeem white supremacy arose throughout the South, local whites developed plans to regain political control. They formed the Young Men's Democratic Club, which purported to be a literary and social club but was in effect a political organization. As in many other places in Texas, however, whites were sharply divided about who should govern once they succeeded in eliminating black political participation. The club split into two factions: the Jaybirds and the Woodpeckers. The Jaybird Association, which left its historical legacy in the *Terry* case, represented the wealthier white property owners. The other white faction, the long-forgotten Woodpeckers, was composed of the less affluent whites, who had often cooperated politically with blacks because they needed black support to win office. The Jaybirds and Woodpeckers fought violent, bloody battles, through which the Jaybirds gained ascendancy.[42] The Jaybirds' hostility to black interests undoubtedly influenced blacks to quickly abandon the county for more promising parts of Texas.[43] Meanwhile, Texas state law was being formally amended to facilitate black disenfranchisement statewide.[44] After many years of struggle, a referendum in 1902 produced the first statewide poll tax. The $1.50 tax was financially significant to the poor and to farmers who had to pay it at least eight months before the general election.[45] Within four years, the Texas electorate had shrunk to about one-third of its size less than ten years earlier.[46]

By 1920, when the statewide white primary statute was about to be enacted, Fort Bend County had become majority white, with 12,000 whites and

41. The facts about Fort Bend County and the Jaybird Association in the next several paragraphs are taken from the fascinating account in DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS 33-34 (1979).

42. *See id.* at 34.

43. *See id.* (noting that the dramatic political shift, coupled with a desire for a better life, induced many blacks to leave Fort Bend County).

44. *See id.* at 37-49 (discussing election laws passed to exclude black voters from primary elections).

45. The history of the Texas poll tax is thoroughly explored in CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS 21-24 (1990), and J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910, at 200-09 (1974).

46. *See* DAVIDSON, *supra* note 45, at 21-24.

10,000 blacks.[47] The Jaybirds thereafter dominated local politics. The *Terry* Court did not dispute that the Jaybird Association was a private, racially exclusive organization that endorsed candidates who then ran in the Democratic Party primary. The Association wrote its own private rules, designed its own membership criteria (including racial segregation), and bore all its own expenses.[48] As Justice Frankfurter acknowledged, "[F]ormal State action, either by way of legislative recognition or official authorization, [was] wholly wanting."[49] The Court made much of the fact that candidates bearing the Association's endorsement were overwhelmingly successful in the subsequent Democratic primary.[50] And the Court was correct that success in the Democratic primary was tantamount to election, because in the one-party state of Texas, the primary effectively was the general election.[51]

Terry caused the Court considerable consternation, as Mark Tushnet's study of the Court's internal deliberations reveals.[52] On the one hand, the Court did not want to appear to endorse white supremacy by upholding this permutation on the white primary, regardless of the technicalities of the state action doctrine.[53] On the other hand, throughout the *White Primary Cases*, judges had

> believed that a purely private political association could discriminate in its membership on the basis of race, religion, or whatever it chose, for exercising that ability was in many ways what distinguished private associations from each other. The Jaybirds were quite close to a pure form of private association, and could readily be described as a "faction" or voluntary association within the Democratic Party.[54]

The Court struggled over whether even to hear the case and initially voted 5-4 to find that the Jaybird Association's practices did not amount to state action.[55] But almost immediately, Justice Felix Frankfurter switched and voted to invalidate the Jaybird scheme. Once a new majority formed, Justice Robert Jackson drafted a dissent, but he too then switched sides and

47. *See* HINE, *supra* note 41, at 34.

48. *See* Terry v. Adams, 345 U.S. 461, 471 (1953) (Frankfurter, J., concurring).

49. *Id.*

50. *See id.* at 463, 472.

51. *See id.* at 468 (opinion of Black, J., joined by Douglas and Burton, JJ.) ("The Jaybird primary has become an integral part, indeed the only effective part, of the elective process.").

52. *See* Mark Tushnet, with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1897-1901 (1991) (discussing the Court's decisionmaking process).

53. *See id.* at 1898-99 (outlining the concerns Justices Black and Frankfurter expressed while preparing their opinions).

54. *Id.* at 1897.

55. *See id.* at 1898 (discussing the justices' misgivings).

joined a concurring opinion.[56] The final, fragmented decision emerged from three opinions that together held the Jaybird primary unconstitutional.[57]

Given the earlier decision in *Smith*, the Court had to identify impermissible action of the state that was implicated in the Jaybird Association. Here the Court's legal analysis breaks down completely. According to various *Terry* opinions, two features generated the critical state action nexus for the Jaybird "primary." First, Justice Frankfurter noted that a few state officials had been members and participants in the Jaybird Association. He did not attempt to find that these officials had used their state powers either on behalf of the Jaybirds or in the course of their participation. Rather, the bare fact that state officials participated was sufficient for Justice Frankfurter to find state action.[58]

This then leads to the second tier of the Court's reasoning: The Jaybird Association could not be sustained because its political purpose was the continued exclusion of blacks from effective participation in the political process. Thus, Justice Black's opinion began with testimony of the president of the Jaybirds, who readily conceded that the organization's specific purposes were to exclude blacks from the franchise and to provide a forum for white voters "at a time when the negroes can't vote."[59] The Court went on to endorse the view that "no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, race, or community."[60]

The Court itself (or at least members of the majority) viewed *Terry* as a political decision, not a legal one.[61] That is, some justices believed that, regardless whether conventionally sound legal grounds could be found for invalidating the Jaybird Association, the Court ought to do so lest it inadvertently lend any imprimatur to white supremacy. In the context of the times in which *Terry* was decided, that judgment might well have been astute—both

56. *See id.* at 1900 (discussing Justice Jackson's uncertainty).

57. *See* Terry v. Adams, 345 U.S. 461. The Court published four opinions in the case: Justice Black announced the judgment of the Court and wrote an opinion in which Justices Douglas and Burton concurred. *Id.* at 462. Justice Frankfurter issued his own concurring opinion. *Id.* at 470. Justice Clark, joined by Chief Justice Vinson and Justices Reed and Jackson, also concurred. *Id.* at 477. Justice Minton dissented from the Court's holding. *Id.* at 484.

58. *See id.* at 475-77 (Frankfurter, J., concurring). As Justice Frankfurter explained:

> If the Jaybird Association, although not a political party, is a device to defeat the law of Texas regulating primaries, and if the electoral officials, clothed with State power in the county, share in the subversion, they cannot divest themselves of the State authority and help as participants in the scheme . . . . This is a case in which county election officials have participated in and condoned a continued effort to exclude Negroes from voting.

Id.

59. *Id.* at 465 (Black, J., concurring).

60. *Id.* at 466.

61. *See* Tushnet, *supra* note 52, at 1901 (explaining how Justice Jackson struggled with the political-legal dichotomy).

as to the political effects of the decision and whether it was appropriate to take note of those effects.

We do not mean to question this political justification for the result in *Terry*. And had *Terry* been confined to the specific context, there might be little reason to quibble about its legal justification. But *Terry* has not been cabined in that way. Its legal analysis continues to exert gravitational pull over contemporary issues in the regulation of political parties. For that reason, it is important to explore whether judicial regulation of politics can be grounded on the doctrinal bases *Terry* constructs.

Clearly, *Terry* cannot be sustained on the basis of Justice Frankfurter's opinion. In *Terry*, Justice Frankfurter essentially relegated certain political views to the domain of the impermissible—or at least to the domain of the impermissible as long as any state officials sympathized with such views. Although the case reaches politically progressive results, Justice Frankfurter relies on the worst kind of legal formalisms to get there. Frankfurter mechanically finds state action merely by virtue of the fact that state officials participated in Jaybird affairs. The principle that state officials carry the imprimatur of the state into private arenas is not just troubling, but obviously unsustainable. Would such an expansion reach into their churches? Their fraternal organizations? Their families? To late twentieth-century ears, Frankfurter's analysis resonates of a viewpoint-based definition of political rights. Should avowed racialists now be prohibited from participating in the electoral process through political parties of their own? Could David Duke not organize an independent party in Louisiana? Could feminists not form a Woman's Party, from which men were excluded?[62] Could the Black Panther parties of days gone by be struck down as unconstitutional once they fielded a candidate in a state-sponsored election or once they succeeded in recruiting a sympathetic state official to participate in their internal affairs? In dissent, Justice Minton raised similar questions,[63] yet the majority did nothing to address them. And these formalisms precluded the Court in *Terry* and in sub-

62. These issues were directly raised by Justice Scalia during oral arguments for Morse v. Republican Party of Virginia, 1995 WL 605994, at *8-*9 (U.S. Oct. 2, 1995).

63. *See Terry*, 345 U.S. at 493-94 (Minton, J., dissenting). Justice Minton stated:

> What the Jaybird Association did here was to conduct as individuals, separate and apart from the Democratic Party or the State, a straw vote as to who should receive the Association's endorsement for county and precinct offices. It has been successful in seeing that those who receive its endorsement are nominated and elected. That is true of concerted action by any group. In numbers there is strength. In organization there is effectiveness. Often a small minority of stockholders control a corporation. Indeed, it is almost an axiom of corporate management that a small, cohesive group may control, especially in the larger corporations where the holdings are widely diffused . . . . [The endorsement of the Jaybird Association] differs little from the situation in many parts of the "Bible Belt" where a church stamp of approval or that of the Anti-Saloon League must be put on any candidate who does not want to lose the election.

Id.

sequent cases from developing any more functionally oriented legal theories about political parties, the system of political competition, and the context in which state regulation of parties ought to satisfy constitutional constraints. In the Court's most recent effort to define the boundary between political parties and the state, *Morse v. Republican Party of Virginia*,[64] a case we will explore later, the Court continued to invoke *Terry's* approach to justify expansive readings of state action.[65]

To resolve the difficult questions about the proper boundary between the state and political parties and the issue of when actions of the parties should trigger constitutional constraints, a more convincing account than Frankfurter's kind of formalism is needed. We now turn to constructing a functional theory of political competition for understanding when parties ought to be subjected to constitutional limitations. This markets-oriented framework provides a deeper understanding not only of the *White Primary Cases*, but of the general tension between preserving the autonomy of political organizations and insulating the political process from the anticompetitive designs of political parties.

B. *A Political Markets Approach to Access Restrictions*

The Court's legal analysis in the *White Primary Cases* takes place in an odd factual and political vacuum. For example, the Court never seems to consider an obvious question about the white primary regime: Given that black disenfranchisement was already a *fait accompli* in places like Texas, achieved through other techniques, like poll taxes, what generated the need for another device like the white primary? Second, the Court never penetrates the realities of state politics in Texas to explore the actual relationship between the Democratic Party, whose primaries the State was regulating, and the State itself. Yet in the answers to these questions about the context of the white primaries lies the beginning of a more effective judicial approach for defining a functional boundary between parties and the State.

After defeating the Populists at the turn of the century, the Democratic Party was the only significant political organization in Texas throughout the twentieth century (until the emergence of the Republican Party in the

64. 116 S. Ct. 1186 (1996).

65. *See id.* at 1204. The Court described the Jaybird election as follows:

> [The Jaybird election in *Terry*] did not involve the State's electoral apparatus in even the slightest way—neither to supply election officials, nor ballots, nor polling places. . . . The Jaybird nominee did not receive any form of automatic ballot access. He filed individually as a candidate in the Democratic primary, paid the filing fee, and complied with all the requirements to which other candidates were subject.

Id. (citations omitted).

1990s).[66] As we asked earlier, why was the Party seeking to use the State to regulate itself?[67] Moreover, given that the black vote in Texas had dwindled to insignificant numbers,[68] why was the Democratic Party so insistent on obtaining formal state commands to underwrite its internal white-supremacist rules?

As with much else in Texas, the answer is intricate. Social scientists from V.O. Key to Chandler Davidson have chronicled the ways in which the Democratic Party was an unruly faction-strewn organization,[69] perpetually divided along liberal and conservative axes. While the more conservative, landed interests usually held sway, the battle was repeatedly joined, particularly in critical moments such as the New Deal.[70] In Key's terms, the grand issues of Texas politics "almost invariably turn on the economic policies of government."[71] Given the relatively small size of the largely disenfranchised black population of Texas, Key observed that, "Texans, unlike white Mississippians, had little cause to be obsessed about the Negro."[72] Yet the Democratic Party—acting through the state government—returned repeatedly to the issue of black disenfranchisement.

Part of the Party's motivation undoubtedly stemmed from white supremacist ideology itself. But more interestingly, part also reflected the relationship between black votes and partisan political contestation. From Reconstruction until near the turn of the century, the relatively small group of black voters in Texas were nonetheless often in a position to be the marginally decisive voting bloc in factional struggles between much larger but sharply divided groups of white voters. Particularly in the robust third-party politics of post-Reconstruction Texas, blacks were decisive coalitional partners. The powerful People's or Populist Party challenge to Democratic domination in Texas rested on black-white coalitions that began after Recon-

66. *See* DAVIDSON, *supra* note 45, at 20-21, 198-220 (describing the suppression of the Populists and later the rise of the Texas Republican Party).

67. *See* Lowenstein, *supra* note 24, at 1756 (stating that, when the government regulates political parties, "to a very large extent the parties are regulating themselves"). This argument is all the more compelling when there is only one active party in the state.

68. *See* DAVIDSON, *supra* note 45, at 21-23. The Terrell Election Law, adopted in 1903 and 1905, further reduced the Texas electorate through the use of the poll tax. *See* text accompanying note 75 *infra*.

69. *See, e.g.*, V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 255-61 (1949) (describing the liberal-conservative split that emerged among Texas Democrats in the 1940s); DAVIDSON, *supra* note 45, at 24 (describing the chaotic, fragmented state of Texas politics between the disenfranchisement period of the early twentieth century and the New Deal).

70. *See, e.g.*, DAVIDSON, *supra* note 45, at 156 (describing how liberal Democrats provided significant opposition to conservatives in the 1940s).

71. KEY, *supra* note 69, at 255.

72. *Id.* at 254.

struction and lasted until 1900 in some places.[73] As one history of this challenge puts it, "[Negroes] possessed bargaining power that became particularly meaningful on all occasions when whites divided their votes over economic issues."[74]

As Democratic Party elites regained control of state politics, often initially through violence and intimidation, they sought to use state law to crush the potential for new party challenges. First, they leveraged their initial political edge by reducing the electorate through enactment of a poll tax, adopted first through statewide referendum in 1902 and then perfected through the famous Terrell Election Law a year later.[75] As Democratic Party domination was solidified, the state legislature in 1923 passed the white primary statute, codifying a practice that had been developing at the county level.[76] Among other elements, the statute required that any candidate who ran in the primary and lost be barred from running in the general election.[77] Those who sought to challenge the conservative, dominant faction within the Democratic Party would therefore either have to do it within the Party, but without being able to appeal to one of the potentially more significant oppositional forces with whom to form coalitions—black voters—or create an entirely new party in a sharply reduced electorate. The white primary, combined with the franchise-restricting poll tax, thus became the principal vehicle through which the Democratic Party maintained virtually unchallenged domination of Texas state politics throughout this century (the transformation of a Populist initiative, the direct primary, into a tool for solidifying one-party rule is yet another irony behind these cases[78]).

In other southern states an even more interesting story emerges concerning the relationship between partisan politics and black votes. The unruly quality of organizational life within the Democratic Party left internal factions competing for domination and sometimes appealing, as in Texas, to black votes to tip the balance. Competing factions agreed to white primaries

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73. *See* DAVIDSON, *supra* note 45, at 20 (describing the success of Texas Populists running on a platform of racial equality). For a detailed study of the interracial basis of populist politics in one Texas county, see Lawrence C. Goodwyn, *Populist Dreams and Negro Rights: East Texas as a Case Study*, 76 AM. HIST. REV. 1435, 1436 (1971) ("Populism in Grimes County is the story of a black-white coalition that had its genesis in Reconstruction and endured for more than a generation.").

74. Goodwyn, *supra* note 73, at 1449-50.

75. For the history of the poll tax in Texas, see KOUSSER, *supra* note 45, at 200-09.

76. *See* Robert Brischetto, David R. Richards, Chandler Davidson & Bernard Grofman, *Texas*, *in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990, at 237-38 (Chandler Davidson & Bernard Grofman eds., 1994).

77. *See* TEX. ELEC. CODE ANN. § 162.015 (West 1996). For a contemporary rendition of the same problem of sore-loser statutes foreclosing challenges to party exclusion, see National Comm. of the United States Taxpayer Party v. Garza, 924 F. Supp. 71 (W.D. Tex. 1996).

78. As Kousser puts it, "One of the chief reasons for the South's failure to develop a two-party system was the institution of the white primary." KOUSSER, *supra* note 45, at 72.

as what we would call a credible commitment[79] or a precommitment pact that, no matter how acute the divisions or how acrimonious the debates, neither faction would seek to prevail through making common cause with black voters. As an editor of a leading southern paper put it, "Without the legal primary . . . the fear was expressed by several that the divisions among white men might result in bringing about a return to the deplorable conditions when one faction of white men call upon the Negroes to help defeat another faction."[80]

In this context, the question is why challengers to the existing Democratic Party, either as internal factions or as potential new parties, would agree to the deal when it was the challengers who most frequently turned to black votes for support. The answer is that such interracial coalitions always put white participants on the potentially explosive defensive in the post-Reconstruction South. When Populists in the 1890s appealed to black votes, Democrats charged Populist rule with being tantamount to "Negro" rule or domination.[81] In response, Populist leaders apparently calculated in some states that their party stood to gain more in white votes than it would lose in black votes by freeing itself of this albatross through agreeing to the white primary. Thus, in Alabama and Louisiana, it was the Populists who proposed to the Democrats that they settle their differences in white primaries.[82] Far from being driven solely by racial ideology, then, the white primary was a vehicle through which existing partisan forces leveraged their current political power into a state-imposed lockup that would channel emergent partisan challenges into the least threatening form, namely, internal Democratic Party factional struggle.

In Texas, these concerns had longstanding and direct historical antecedents:

> The rise of white men's associations and county white primaries reflected the increasing fear and uncertainty that plagued white Texas during the postwar years. Whites in black belt counties tended to exaggerate the numbers and power of black politicians and degree of black political influence . . . .
>
> The fear of black domination was further buttressed by the extreme fluidity of Texas politics during the post Civil War and Reconstruction periods. Diffi-

79. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 50 (1990).

80. KOUSSER, *supra* note 45, at 76 (quoting Josephus Daniels, editor of the RALEIGH NEWS & OBSERVER, Feb. 12, 1899).

81. *See* Goodwyn, *supra* note 73, at 1438. "Democratic persistence in raising the cry of 'Negro domination' to lure Populist-leaning voters back to the 'party of the fathers' was effective enough to keep white Populists on the defensive about the race issue throughout the agrarian revolt in the South." *Id.* at 1447.

82. KOUSSER, *supra* note 45, at 75. Kousser also notes that Democrats would use their control fraudulently to count black votes for themselves, thus providing another incentive for Populists to enter this precommitment pact. *See id.*

> cult economic conditions, with depressions at ten-year intervals, nurtured the development of third parties such as the Greenback Independent Movement in the 1880s and the Populist revolt in the 1890s. In each of the postwar decades Texas Democrats had to confront serious threats to their political hegemony as each new party attempted to woo the black vote. The rise of each new party led to louder complaints of black participation. As [historian Gordon] Wood explains, white southerners in general defined black majority in a peculiar way: "The freedman did not need a numerical majority in order to enjoy a political majority. Rather, if the total number of eligible Negro voters was greater than the difference in the number cast for each party, the Negroes had a 'majority.'" Presumably, by either selling votes to one candidate or bloc voting for another, blacks could, in that case, hold the balance of power. The rise of third parties in Texas, then, increased anxiety and exacerbated the fear that when white men divided politically black power flourished.[83]

The Democratic Party therefore used state authority to ensure that political debate would remain safely confined within the *white* Democratic Party. Formal state regulation served two key functions not appreciated in the Court's opinions. First, state compulsion cemented the shaky coalitions that coexisted within the Democratic Party by dramatically raising the costs for any faction seeking to make alliances with black voters. Not only would such a group have to bear the ideological stigma of abandoning white supremacy, it would also have to bear the formidable costs of creating a new political party to challenge the Democrats. Second, state regulation also increased the costs for those black voters who might try to leverage their small influence within the Democratic Party. Even were such black voters able to find white allies willing to disregard the strictures of white supremacy, these black voters would have to offer their prospective white allies an organizational format through which to challenge the entrenched Democratic Party.

Viewed in this light, the Democrats' use of state authority to bar black participation was a classic political lockup. Governance rules raised the cost of defection for members of the governing coalition *and* raised insuperable barriers for those outside the coalition seeking entry. The use of the state to regulate internal party affairs further enshrined the political lockup since disgruntled factions could not implement internal reform to challenge the governing faction. Using insights from game theory, the Party's use of state authority can be viewed as a mechanism to stabilize internal factions within the Democratic Party by creating a closed system of repeat players.[84] By

83. *See* HINE, *supra* note 41, at 34.

84. In his often-cited work, Robert Axelrod describes two primary techniques for building the stability of cooperation in the context of a Prisoners' Dilemma: emphasizing the future impact of current choices and changing payoffs in the game. *See* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 124-34 (1984). The inability to form new alliances with black voters within the Democratic Party served both these functions. It raised the cost of defection for any group thinking of reaching outside the Party for a momentary alliance and therefore introduced a more palpable future threat. By making the future loom large for repeat players, the state rules change the payoff matrix for any momentary decision to defect. Because the long-term costs will be more palpable

raising the costs of challenge to insuperable heights, political insiders were able to lock up the market for control.

This approach certainly describes and supports the results of the early cases, *Herndon* and *Condon*. What then of *Smith* and *Terry*, where formal state involvement became increasingly remote? Would a political lockup approach support judicial intervention?

Functionally, the racial exclusion through party membership rules in *Smith* look much like the one struck down in *Condon*. Both policies raise entry costs for those seeking to challenge the incumbent party. Thus, the key to this analysis is not the fact of state regulation as such—in the fashion identified by the Court. Instead, the crucial consideration is that in both cases the racially exclusive rules ensured that the costs of defection from the Democratic Party remained prohibitive. First, Texas law provided primary victors direct access to the general election ballot. That privileged treatment was coupled with barriers to entry for other parties: To get on the general ballot, a candidate had to be nominated by qualified voters who did not participate in any other party's primary.[85] Through this means, state regulation ensured that disaffected Democrats could not form outside coalitions either before the primary (by allowing the party to determine its membership) or after the primary (by restricting such party members from mounting a challenge in the general election). When combined with the direct ballot access given the nominee of the Democratic Party in the general election, the result was a significant barrier to entry for any challengers to Democratic Party hegemony. Although the role of the state was muted compared to the earlier *White Primary Cases*, this too constitutes a political lockup.

Terry, however, does not involve any use at all of the state election machinery to lock up power for existing forces. The Jaybird system lacked any components of a political lockup. First and foremost, the Jaybird system did not impose significant political costs on defections and dissidents. Because the Jaybirds merely endorsed a candidate at the county party primary, every decision could be undone at the party level. Any Jaybird dissident could make alliances with non-Jaybird Democrats without fear of state-enforced punishment. In addition, the Jaybird nominee did not automatically receive a place on the general ballot. In short, the Jaybird system relied on the fact that few non-Jaybirds were able to vote; for that reason, no one could offer advantageous alliances to the losing faction among the Jaybirds. The fact

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should any faction decide to defect from the Party, the Party's hold on its participants is enhanced. Punishing defectors in all subsequent iterations of a repeated encounter (game) is termed a "trigger strategy" in game theory. DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 165, 169-78 (1994). It can yield far greater stability than more customary, game-by-game, tit-for-tat strategies. *See id.* at 169-72 (discussing which strategies are more likely to produce equilibrium).

85. *See* Smith v. Allwright, 321 U.S. 649, 663 (1944) (defining nomination requirements).

that the Jaybirds were quite successful at having their candidates endorsed was testimony not to a political lockup, but to the simple fact that blacks were functionally disenfranchised in Texas at the time.[86] Had black voters not been disenfranchised in other ways, the Jaybird system would have been inherently unstable. The Jaybird monopoly was an artificial one, sustained by improperly skewed background franchise rules.

Appropriate ground rules for fair political competition would have ensured a robust partisan environment to destabilize this system. Striking down the Jaybird system on the basis of a wholly fantastical conception of state action is thus best seen as a poor surrogate for direct judicial attack on the rules that disenfranchised blacks from political participation. If open rules guaranteeing fair competition had been properly enforced, the Court could have more honestly considered whether a wholly private, local political organization's membership rules really should trigger constitutional scrutiny. In a robust partisan environment with open rules of competition, that organization would be only one of many competing for allegiance from all the voters in the community.

However, in striking down the Jaybird system, the Court did nothing in fact to bring about a more competitive political environment. Given the background of other black disenfranchisement practices, the decisions might have struck symbolic fear in the heart of white supremacists, but they could not have any meaningful effect on actual political realities.[87]

This kind of functional approach to political competition would have redirected the inquiry in *Morse v. Republican Party of Virginia*, the Court's most recent engagement with the relationship between state action and political parties. The technical issue in *Morse* was statutory, not constitutional: When the Republican Party sought to charge a fee for those who wanted to participate in the Party's nominating conventions,[88] should the preclearance provisions of section 5 of the Voting Rights Act have applied?[89] Answering

86. Tremendously burdensome voter registration laws lasted long after the Democratic Party triumph over the Populists. *See* DAVIDSON, *supra* note 45, at 21-23 (discussing the impact of the poll tax). The combination of relatively small numbers, restrictive voter registration laws, and outright terror effectively eliminated black voting strength until the enactment of the federal Voting Rights Act in 1965. *See id.* at 20 (describing how the Bourbon Democrats "applied with savagery all the social and economic sanctions available" to disenfranchise black voters).

87. *See* Lowenstein, *supra* note 24, at 1749 (suggesting that the *White Primary Cases* only marginally affected southern politics).

88. *See* Morse v. Republican Party of Virginia, 116 S. Ct. 1186, 1991 (1996) (explaining that delegates had to pay $35 or $45 depending on the date of registration).

89. *See id.* at 1198, 1215-16. The Voting Rights Act imposes preclearance requirements on any state or political subdivision for which two findings have been made: first, that it used restrictive voter registration practices (such as literacy tests), and, second, that less than 50% of the voting age residents were registered on November 1, 1964. The preclearance requirement meant that no covered state or political subdivision could implement a change in voting practices without first obtaining approval from the Department of Justice or, alternatively, filing a declaratory judgment

this question required the Court to decide how far the State can go in regulating internal party affairs; thus, in our view, the functional concerns are similar to those in constitutional cases that implicate this broad theoretical question. As in *Terry*, drawing this boundary again produced a deeply divided Court.[90] The Court concluded that preclearance was required because (1) the Voting Rights Act was designed to reach all changes in state voting practices, and (2) the internal activities of the Virginia Republican Party should be considered a state voting practice because state law gave special ballot access to the convention nominee.

The interesting question *Morse* poses is whether party nominating conventions are an area into which regulatory policy, such as the Voting Rights Act, *ought* to reach. The same antilockup framework that we have argued should inform judicial application of constitutional state-action doctrine to political parties should also, we believe, be employed to determine how far statutory regulation of the political process ought to go.

To an extent, this approach is suggested in Justice Thomas's dissent in *Morse*.[91] Thomas tries to recast the *White Primary Cases*, particularly *Terry*, in functional terms: "The nub of *Terry* was that the Jaybird primary was the *de facto* general election and that Texas consciously permitted it to serve as such; thus, the exclusion of blacks from that event violated the Fifteenth Amendment."[92] According to Justice Thomas, it was the effective "stranglehold" on Texas politics of the Jaybirds and the Democratic Party that justified judicial intervention in the *White Primary Cases*.[93] He dissented in *Morse* because Oliver North, the eventual Republican nominee for Senate, lost the general election, demonstrating that no similar "stranglehold" power resided within the Virginia Republican Party.

Justice Thomas's interesting argument raises questions about defining a vibrant political market. Our argument is most clearly applicable when, as in the Texas of the early parts of this century, only one political party exists. In modern Virginia, by contrast, the state directed its preferential political treatment not at one party, but at two. The Virginia election code at issue gave automatic ballot access to both the Democratic and Republican nomi-

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action before a three-judge panel of the District Court of the District of Columbia, seeking approval of the proposed change. *See* 42 U.S.C. § 1973c (1994); South Carolina v. Katzenbach, 383 U.S. 301, 317-18 (1966) (describing the Act's preclearance procedures).

90. Justice Stevens wrote a concurring opinion, joined by Justice Ginsburg. *Morse*, 116 S. Ct. at 1191. Justice Breyer wrote a concurring opinion, joined by Justices O'Connor and Souter. *Id.* at 1213. Justice Scalia wrote a dissent, joined by Justice Thomas. *Id.* at 1216. Justice Kennedy wrote a dissent, joined by Chief Justice Rehnquist. *Id.* at 1219. Justice Thomas wrote a dissent, joined in Part II by Justices Rehnquist, Scalia, and Kennedy. *Id.* at 1222.

91. *Id.* at 1230 (Thomas, J., dissenting).

92. *Id.*

93. *See id.* at 1231.

nees and relieved only these two parties[94] of the need to demonstrate support through nominating petitions.[95] Additional statutes gave legal force to the internal nominating rules of these two parties.[96] Although these policies do not raise the same barriers to entry as in the Texas cases, they do raise the cost of defecting from the two major parties. We must now ask whether this form of preferential treatment for major parties, coupled with first-past-the-post elections, raises concerns about a two-party (as opposed to one-party) lockup.[97] In other words, should the concern about political lockups apply to oligopolistic (as opposed to monopolistic) barriers to entry that the two main parties jointly deploy through the state?

In our view, the answer should be yes. In the next part, we argue that policies entrenching the two-party system raise similar concerns to the more classic lockups struck down in *Nixon v. Herndon*. We argue that, when two-party dominance is enforced through state restrictions that have as their purpose and effect a guarantee of two-party domination, a two-party market may be insufficiently open to guarantee appropriate access to groups seeking to challenge the status quo.

II. THE POLITICS OF EXCLUSION: CREATING A BASIS FOR JUDICIAL INTERVENTION

Paradoxically, while parties provide an indispensable vehicle for political participation, they also provide the perfect vehicle for deeply anticompetitive impulses. We will now turn to two recent cases, *Burdick v. Takushi*[98] and *Timmons v. Twin Cities Area New Party*,[99] to show how the Court systematically misunderstands this paradox by focusing on the articulation of a purported "state interest" that actually licenses the worst kind of anticompetitive practices. Public choice theory could help the Court look with a more wizened eye at the ways in which democratic rhetoric can be manipulated for partisan concerns.[100] Professor Klarman has recently made a similar

94. *See id.* at 1194 n.9 (noting that Virginia defines 'political party' as an organization that received at least 10% of the general election votes cast in either of the two prior elections).

95. *See* VA. CODE ANN. § 24.2-509 (Michie 1993).

96. *See id.* § 24.2-508.

97. *See* DOWNS, *supra* note 16, at 114-16 (noting that "a two party system would cause each party to move toward its opponent ideologically"); *see also* GARY W. COX, MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS 13-33 (1997) (further discussing Duverger's Law); MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 216-28 (Barbara & Robert North trans., Methuen 1954) (1951) (proposing that a simple majority electoral system strongly favors a two-party status quo).

98. 504 U.S. 428 (1992).

99. 117 S. Ct. 1364 (1997).

100. For another context in which our lockup approach can be applied to uphold other restructurings of politics in areas of current controversy, consider the recent adoption through voter initiative in California of a system of open primaries to replace the previous closed-primary system.

point when he analyzes ballot access restrictions as evidence of "entrenchment" concerns in the political process:

> For the most part, ballot access restrictions represent a problem of legislative, rather than intertemporal, entrenchment. There is little reason to suppose that most voters wish to foreclose the option of expressing discontent with the traditional political parties by supporting an occasional third party or independent challenger. To compound the entrenchment problem, not only do incumbents have something to gain by restricting outsider competition; they may have little to lose. If incumbents of both major political parties share a self-interested commitment to imposing onerous ballot access restrictions, how are dissatisfied voters to express their frustration at the polls? The only candidates on the ballot, by hypothesis, have endorsed the restrictions. The Supreme Court on sev-

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In *California Democratic Party v. Jones*, No. CIV S-96-2038 DFL, 1997 U.S. Dist. LEXIS 184948 (D.C. Cal. Nov. 17, 1997), the federal district court upheld this initiative against constitutional challenges brought by the two dominant political parties as well as some third parties. The parties argued that their rights to autonomous self-definition, protected through the First Amendment, were violated when the State, acting through voter initiative or legislation, commanded the parties to choose their candidates through processes the parties disfavored. The parties argued that closed primaries, in which voters must affiliate themselves with a particular party and can only vote in that party's primaries, served interests in strengthening party discipline and governance structures, enhancing the morale of party activists, reducing primary election costs, and preserving the integrity of the parties over the selection of candidates. Proponents of the ballot measure argued that closed primaries favored party hardliners; contributed to gridlock in the legislature; and penalized moderates. Open primaries would, they argued, increase competition in safe districts, make elected officials more responsive, reduce the power of special interest groups, and increase voter participation because voters would have more choices.

In our view, whatever the merits of these debates—and political scientists sharply dispute the net effects of open versus closed primaries—the adoption through voter initiative of open primaries does not present the kind of anticompetitive partisan capture that ought to trigger judicial review. First, there was no allegation that the open primary would favor one party over another, or the dominant parties over minor parties. That both the dominant parties strenuously resisted the rule and actively lobbied and litigated against it provides some supporting evidence for that fact. The open primary was not favored by one dominant set of partisan interests, nor is there any reason to think that in effect it would tend to favor one such set of interests. Thus, in neither purpose nor effect is there reason to believe open primaries would be a means for partisan capture of the sort with which we are concerned.

Second, the very fact that the system was adopted by voter initiative further argues against the view that it is a disguised partisan lockup. Constitutional doctrine thus far pays virtually no attention to the distinction between popularly enacted laws and legislatively enacted ones, but in the regulation of politics, we believe the process through which a measure becomes law should be relevant to judicial review. To be sure, powerful interests, including partisan ones, can manipulate direct lawmaking processes for their own ends. But whatever its other defects, direct lawmaking has historically been invoked on numerous occasions as an effective external check on capture of political structures by currently dominant political interests. *See, e.g.*, Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI-KENT L. REV. 707, 753-55 (1992); Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347 (1985) (reviewing DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984)). Given the interests that supported and opposed the ballot measure on open primaries, this appears to have been a context in which direct lawmaking was used against the interests of dominant parties, which would not have allowed the measure to pass through ordinary legislative means. Whatever the merits of open versus closed primaries, then, nothing in the process, purposes, or likely effects of the shift to open primaries suggests that such a shift amounts to an anticompetitive partisan lockup of politics, such that aggressive judicial review would be appropriate.

eral occasions has explicitly acknowledged that ballot access restrictions warrant close judicial scrutiny because of the potential they create for incumbent self-dealing.[101]

Unfortunately, the legal standards governing such potential self-dealing are mired in an incomplete understanding of the bounds of legitimate state interest in regulating electoral participation. In the corporate setting from which we borrow many of the key concepts in this article, courts have been careful to distinguish two realms. When evaluating ordinary business judgments, the courts act with great deference; but when evaluating alterations of internal voting procedures, courts heighten the standard of review.[102] Similarly, our analysis points toward the need to revitalize the distinction between rational review for broadly directed governmental policy decisions, on the one hand, and heightened review for those decisions that structure the rules of political engagement to the benefit of incumbent lawmakers.

A. *Monopolistic Barriers to Entry*

A political process case more wrongly decided than *Burdick* is difficult to imagine. A disgruntled voter sued the State of Hawaii because state law prevented him from casting a write-in vote in the Democratic Party primary or in the general election.[103] The state's election laws, stemming from the 1890s when Hawaii was still a monarchy, ban write-in ballots.[104] To cast a ballot in Hawaii, a voter must either participate in a party primary (and vote for an official candidate within that primary) or follow a series of steps tantamount to forming an independent political party.[105] But Hawaii is for all

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101. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997) (footnotes omitted); *see also* Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1299-1301 (1994) (advocating focus on government power rather than individual rights).

102. *See, e.g.*, Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. 1990); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. 1988).

103. The plaintiff alleged that he wanted to write in Donald Duck. For reasons beyond the scope of the present paper, Donald Duck has a long and distinguished history as the exasperated voter's candidate of choice—apparently outpacing Goofy and even Mickey Mouse as the leading cartoon vote-getter. In *Dixon v. Maryland State Admin. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989), the court of appeals explained that "under appropriate circumstances" a write-in vote for Donald Duck should be constitutionally protected "as serious satirical criticism of the powers that be. . . . Correcting this problem through censorship of the vote is utterly inconsistent with the principles under which our form of government operates." *Id.* at 785 n.12.

104. For the relevant decisions reading the election laws to ban write-ins, see Jensen v. Turner, 40 Haw. 604 (1954) (upholding the ban on write-in votes), and Holstein v. Young, 10 Haw. 216 (1896) (upholding state regulations to ensure the secrecy of ballots).

105. Independent voters may either organize a separate political party (which requires the signatures of 1% of registered voters) or they may enter a candidate in the nonpartisan primary, held at the same time as the party primaries. *See* Burdick v. Takushi, 504 U.S. 428, 435 (describing Hawaii's election law). To advance to the general election, a nonpartisan candidate must receive 10% of the total primary vote or votes equal to the minimum number sufficient to nominate a partisan

practical purposes a one-party Democratic state, much as the South throughout the twentieth century was a one-party Democratic monopoly.[106] Thus, unless a significant opposition party emerges, the prohibition on write-in primary ballots channels all political dissent safely within the main currents of the Democratic Party.

Moreover, the write-in ban does not operate in isolation, nor are the stakes trivial. In addition to shutting down the write-in option, state laws make it exceptionally difficult for new parties and independent candidates to get on the ballot. For a candidate who wants to run as an independent, the difficulty does not lie in getting a place on the ballot, for only a handful of signatures are required.[107] Rather, the independent's real difficulty lies in the fact that voters who wish to vote for an independent must pay an enormous price: Hawaii law, in effect, requires primary voters to choose only a single ballot for all offices. In order to vote for an independent candidate for one office, for example, the voter loses the ability to vote in any other race. The same monopoly-enhancing restriction applies to voters who want to vote for a third-party candidate. These restrictions have even more bite in a one-party state in which the winner of the primary election, if a Democrat, is almost certainly going to win the general election.[108] Consequently, the cumulative structure of Hawaii's laws eviscerates any nascent resistance to the Democratic monopoly.[109]

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candidate to the general election. *See id.* at 436. To vote for a nonpartisan candidate, a voter must renounce participation in any of the partisan primaries. As Justice Kennedy noted in dissent, "[A] Hawaii voter who wishes to vote for any independent candidate must choose between doing so and participating in what will be the dispositive election for many offices." *Id.* at 444 (Kennedy, J., dissenting). This is particularly the case since, in a large number of elections, Democratic candidates run unopposed in the general election. *See id.* at 442.

106. *See id.* at 442 (noting that the Democratic Party dominates Hawaii politics); *see also* KEY, *supra* note 69, at 16 (noting that while the Democrats dominated Southern politics, the Party only loosely unified many internal factions).

107. *See, e.g.*, HAW. REV. STAT. ANN. § 12-5 (Michie 1997) (requiring candidates for county or state legislative offices to submit 15 registered voters' signatures and candidates for higher state or federal offices to submit 25 signatures).

108. Even getting a new party's candidate on the ballot is unusually difficult: A party must obtain signatures from 1% of the State's voters, which must be filed more than five months before the relevant *primary* election—a time when few voters are likely to care about electoral contests. *See* HAW. REV. STAT. § 11-62(a) (1995); *Burdick*, 504 U.S. at 443 (Kennedy, J., dissenting).

109. *Burdick* stands in contrast with a directly opposite development in the law of corporate governance. In 1992, the Securities and Exchange Commission ("SEC") changed the rules for corporate election to allow for partial slates. Previously, any challenge to an incumbent director had to be part of a full slate seeking to displace all directors. The SEC reform allowed challengers to pick and choose—supporting some incumbents, seeking to displace others. This is the same problem faced by disgruntled voters in Hawaii who, in order to register disagreement with the incumbent Democratic Party, essentially had to step outside the Party and challenge it wholesale. For discussion of the 1992 SEC reforms, see ARANOW & EINHORN ON PROXY CONTESTS FOR CORPORATE CONTROL § 6.02, at 6-6 (Randall S. Thomas & Catherine T. Dixon eds., 3d ed. 1998); *see also* Randall Thomas & Kenneth Martin, *The Impact of Rights Plans on Proxy Contests: Re-evaluating* Moran v. Household International, 14 INT'L REV. L. & ECON. 327, 330 (1994) (de-

Although write-in ballots are not always necessary for mobilizing political opposition, in Hawaii the write-in option is particularly significant because other avenues for opposition are so effectively closed off.[110] Around a third of general election races for the state legislature are uncontested, and in these uncontested races substantial numbers of voters who vote for other seats refuse to cast an affirmative vote. Instead, they leave their ballots blank.[111] (Until 1992 regulatory changes, corporate dissidents were faced with the strikingly analogous situation of having to vote for all or none of the incumbent directors.[112]) The ban on write-in votes prevents this disaffection from coalescing behind a specific alternative candidate to the choice of the Democratic Party.

Despite these general structural features of the case, the Court applied conventional individual-rights analysis to Burdick's claim. First, the Court defined the personal rights of Burdick it considered at stake. Then it "balanced" these against the proffered state interests, concluding that Burdick's claim was outweighed. On the rights side, the Court misunderstood Burdick's claim by applying a narrow, individualistic, nonsystemic conception of his claim. Thus, in the Court's view, Burdick claimed an insignificant right to cast a protest vote. The Court held that protecting this right would give the ballot a "generalized expressive function"—a function the Court found at odds with the smooth running of a state election.[113] Once the Court minimized the interest at stake, the state could prevail with only the slightest of justifications for its ban on write-in ballots.[114] The state proceeded to of-

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scribing greater effectiveness of proxy challengers in changing firm policy than in actually displacing incumbents).

110. There appears to be little academic literature on write-in candidacies. *See* Timothy De Young & F. Chris Garcia, *Despite the Odds: How to Wage and Project a Successful Write-In Campaign*, 2 ELECTORAL STUD. 241, 241 (1983) ("[A] perusal of professional journals has revealed not one single article on the subject.").

While write-in candidates for national office rarely win, several noteworthy successes have occurred. Strom Thurmond won his first election to the Senate as a write-in candidate in 1954, and at least three write-in candidates have won election to the House of Representatives since 1958. *See id.* at 242-51 (discussing the political context of these four successful write-in campaigns).

Write-in voting has also occasionally influenced New Hampshire's presidential primary. In 1992, write-in candidates garnered 7.5% of the vote, leaving Republican challenger Patrick Buchanan with an imposing 37.3%. *See Write-In Votes Shrink Bush Victory Margin*, SEATTLE POST-INTELLIGENCER, Feb. 20, 1992, at A8. Write-in voting also played a part in earlier New Hampshire primaries: In 1968, Lyndon Johnson won the Democratic primary without appearing on the ballot, and in 1964 Henry Cabot Lodge won the Republican primary as a write-in candidate. *See* George F. Will, *Guillotine in New Hampshire*, WASH. POST, Feb. 14, 1988, at C7.

111. *See Burdick*, 504 U.S. at 442-43 (Kennedy, J., dissenting).

112. For discussion of this problem in the corporate context, see Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 108 (1998), and Joseph A. Grundfest, *Just Say No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857 (1993)

113. 504 U.S. at 438.

114. *See id.* at 438-39.

fer two particular justifications cast at high levels of abstraction: the prevention of "party raiding"[115] and the prevention of "unrestrained factionalism."[116] To realize these interests, the state law guaranteed that candidates who failed to gain sufficient support at the nominating stage could not reassert their candidacies at the general election through the write-in route.

Yet each of these interests should appear highly suspect once we recognize that the "State" promulgating the election regulations here consists of incumbent Democrats. These regulations have the effect of raising the cost of entry into a political market that is already insufficiently competitive. Both the prohibition on party raiding and the restrictive rules for getting on the general election ballot make it prohibitively expensive for dissident groups to seek alliances outside the Democratic Party. The prevention of party raiding has the effect of prohibiting outsiders from seeking to make coalitions within the Democratic Party so as to influence the Party's selection of candidates and platform. The prohibition on write-ins then compounds this effect. State policies prevent dissidents within the Democratic Party from appealing to outsiders at the nomination stage (because of the prohibition on crossover voting in the primaries), but they prevent an appeal at the general election as well. The write-in ban ensures party primary victors will not face challengers from within the party at the general election.

In our framework, *Burdick* represents a contemporary variant of *Nixon v. Herndon*. In each case, a singularly powerful political party used its control over the state electoral machinery to devise rules of engagement that prevented internal defection. But in *Herndon* the Court was able to use the Fourteenth Amendment to strike down the partisan-motivated anticompetitive policies. Because these policies also violated the rights of a suspect class, the Court found the Fourteenth Amendment readily available. In *Burdick*, by contrast, the Court could find no constitutional basis for overturning a partisan lockup that it failed utterly to see. The critical issue for the Court should not have been Burdick's individual interest in using the ballot for mere "expressive purposes," nor should it have been the purported abstract state interests. Instead, when interpreting the various constitutional provisions that protect self-government, such as the First Amendment, the Court should construe those provisions against a background conception of democracy that recognizes the importance of competitive political markets to ensuring appropriately responsive representation. As part of that inquiry, the Court ought to focus on whether the process remains sufficiently open to challenge and reform, or whether the costs of mobilizing effective challenge have been raised so high as to leave the system insufficiently responsive. In

115. *Id.* at 439 The Court defines "party raiding" as one party's efforts to switch a bloc of voters from one party to another to manipulate the outcome of the primary election. *See id.*

116. *Id.* at 439-40 (discussing state interest in preventing write-in votes).

the one-party state of Hawaii, as in the Texas of early in the century, the state-enacted barriers to competition were ingeniously effective at stifling potential competition. The State's ability to recite abstract state interests in political stability, avoidance of factionalism, or prevention of party raiding, should hardly obstruct more penetrating judicial analysis of the actual anti-competitive effects. Indeed, given the contexts of the cases, the very interests that could be asserted in the name of the states are no more than thinly veiled formulas for disguising self-serving arguments of incumbent powers. Far from justifying these state practices, such interests should be the very reason the Court strikes those practices down.

B. *Anticompetitive Barriers and the Two-Party System*

The most difficult question for a political markets approach to legal regulation of the electoral process is what to make of the two-party system. This analysis proves more difficult as systems move further from complete one-party domination, as found in the Texas and Hawaii contexts, to a lockup involving two parties. The issue is further complicated because one of the building blocks of the political order, the single-member district, inevitably has the effect of channeling political competition into a two-party structure. Given that the electoral system is structured already toward the generation of two-party politics, our analysis must explain why certain state efforts to entrench two-party politics even further should be considered unconstitutionally anticompetitive.

The inevitable bias in favor of two parties produced by districted elections can be explained by an analogy to a town with a single main street, one-mile long, whose residents are equally dispersed. Assuming no constraints, the first economically sophisticated merchant who comes to town will open a store at the street's midpoint, because that is the most efficient location for enticing the largest number of customers. What happens with two merchants? In theory, to maximize efficiency in providing customer access to shopping, each would open a store one-third of a mile from the town's borders, a solution that should allow the firms to maximize their joint profitability. In practice, however, if one were to choose such a location, the other would set up somewhere between the first merchant and the center of town. From that location, the second merchant could compete for some of the first merchant's market, while holding a preferred position for more than half the town. Because of this strategic dilemma, markets around the world show that both merchants establish stores in the center of town, usually across the street from each other.[117] This behavior demonstrates another

117. We leave aside the argument that consumer welfare could be enhanced if geographic proximity made competition between the firms more visible. Certainly from the vantage point of access to the consumer, the result is suboptimal.

variant of the frequent conflict between actions rational to an individual but irrational if the two merchants were able to reach a cooperative and enforceable agreement.

The same dynamic drives nonproportional representation political systems. The American single-member electoral district, also referred to as a "first-past-the-post" ("FPTP") system,[118] presents the same pressures toward centrism in political markets found in geographic markets.[119] Instead of a town whose population is dispersed along a one-mile stretch, imagine an electorate comparably dispersed from left to right. Two political parties would most "efficiently" represent the population's views by placing themselves one-third of the way in from the respective poles. However, were one party to camp itself one-third of the way in from the left pole, for example, the other party would lay claim to the greatest number of potential voters by posturing itself only slightly to the right of the first party. The first party would be at a competitive disadvantage unless it were to move more toward the center. The second party would then have to edge to the right to maintain its hold on its base. And so forth. The equilibrium strategy in such a political market would be for each party to hew fairly close to the center, with one perceived as the party of the center-left and the other the party of the center-right.

Now consider a would-be third party. This could be a potential party of the right whose ideology would place it to the right of the center-right party. The new party would compete with the center-right party for those voters closest to the right pole. But such a strategy would rarely yield electoral success. The new party of the right and the center-right party would divide voters on the right part of the spectrum, leaving the center-left party in an ideal position. As long as elections were by plurality vote, the center-left party would prevail against the divided partisans of the right. Consequently, the party of the right feels great pressure to combine forces with the party of the center-right and agitate for change from within. Hence the pressure is not only toward centrist parties, but toward two and only two parties.[120] Thus, political systems that use single-member territorial districts and plurality voting rules tend toward two-party systems, typically with a center-left and center-right party.[121]

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118. *See, e.g.*, John B. Anderson & Jeffrey L. Freeman, *Taking the First Steps Towards a Multiparty System in the United States*, 21 S.P.G. FLETCHER F. WORLD AFF. 73, 74 (1997).

119. The analogy to geographic markets comes from DOWNS, *supra* note 16, at 115-17.

120. *See id.* at 122-25 (indicating that a plurality electoral system tends to result in convergence to two parties).

121. In 1951, this insight was formulated most cogently by the French political scientist Maurice Duverger, who characterized his finding as "a true sociological law" concerning the effects of different electoral systems on the structure of politics. "Duverger's law" suggests that systems in which the candidate who receives the most votes wins in a single-ballot election will produce a two-party political system, rather than a multiparty one. *See* DUVERGER, *supra* note 97, at 217-28 (de-

But for several reasons, the fact that FPTP elections strongly tend toward two-party politics does not mean that courts should license those parties to manipulate electoral systems to further insulate the dominant parties from those few possible sources of competitive pressure that do potentially remain. First, the fact that FPTP has this effect does not mean that the production of such an effect is part of the justification for this electoral structure. Any view that FPTP elections were conceived or designed in order to bring about two-party politics would be revisionist history. Today, FPTP elections

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riving this "law" from analysis of simple majority, single ballot systems in many countries including Great Britain, the United States, Sweden, Denmark, and Canada).

Duverger proposed two causal mechanisms to explain this pattern. Both implicitly derive from what today are called rational-choice models for how politicians and voters behave. One mechanism focused on voters: He assumed they did not want to "waste" their votes on candidates who stood little chance of being elected. *See id.* at 226. Rather than voting for a third-party candidate who might be the voter's first choice, that voter in a plurality, winner-take-all system, will vote for a candidate from one of the two major parties who has a "realistic" chance of winning. Voters do not vote sincerely, but strategically, in the sense that they do not vote their true first preference. They vote not primarily as a means of expressing their political values, but as a means of influencing the choice between the two candidates with the most likely chance of winning.

The second mechanism focuses on politicians and the way the plurality, winner-take-all system exaggerates the votes of large parties and diminishes the influence of small ones. *See id.* at 225-26. If candidates from two parties face each other in this system, the one who wins 51% of the vote gains office, meaning a candidate with 49% of the vote gets nothing. The system has the "balloon effect" of transforming 51% of the votes into 100% of the political power. Unless a third party can come close to capturing 33% of the votes, with the rest evenly divided between the two major parties, it stands little chance of winning office.

Duverger also proposed another generalization about electoral systems, which he termed a "hypothesis" rather than a law. This hypothesis is that systems that use proportional representation will tend to lead to the formation of many, independent parties. *See id.* at 248; *see also* Maurice Duverger, *Duverger's Law: Forty Years Later*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 69, 69-71 (Bernard Grofman & Arend Lijphart eds., 1986) (discussing Duverger's distinction between laws and hypotheses). This, too, stems from the rational-choice model of what motivates voters and politicians; because parties receive seats in proportion to their total votes, votes for smaller parties are not "wasted." While many systems that use proportional representation do have multiple parties, there are notable exceptions: Austria and Ireland were countries dominated by two principal parties despite using forms of proportional representation. For data correlating the effective number of political parties in different countries with the type of electoral system used, see DAVID M. FARRELL, COMPARING ELECTORAL SYSTEMS 146-47 (1997) (showing that countries with plurality, winner-take-all voting generally produce two effective parties, while those using forms of proportional representation tend to produce three to five parties).

Modern studies confirm Duverger's analysis. *See, e.g.*, DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (1967) (concluding that electoral laws result in disproportionately high representation of strong parties and disproportionately low representation of weak parties, with proportional representation correlating with more fragmented party systems). However, countries like Canada and India that use plurality voting and have more than two significant parties cause Rae to qualify his theories. *See id.* at 94-95. For a good survey of debates between institutionalist and more culturally oriented explanations of politics, along with a sophisticated reevaluation of Duverger's Law, see generally COX, *supra* note 96. For two interesting, recent perspectives on Duverger's Law, see William H. Riker, *Duverger's Law Revisited*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, *supra*, at 19 (defending and refining the law to account for India and Canada and discussing its incorporation into rational choice theory), and Duverger, *supra*, at 69 (attempting to correct misinterpretations of his original hypothesis).

are viewed as an alternative to various forms of proportional representation ("PR"), the electoral structure most common in Western democracies. PR systems tend to produce multiparty politics, in contrast to the two-party politics of FPTP.[122] When defenders argue FPTP elections produce stable two-party politics and effective governance structures, the contrast is with these PR systems. Yet at the time when both American elections became organized around territorial election districts and FPTP was adopted, the concept of a PR-electoral structure had not yet been conceived.[123] PR only arose in the late nineteenth century, with the extension of the suffrage and the rise of mass political parties. Belgium became the first country to adopt it in 1899.[124] In the American context, no deliberative decision was made to choose FPTP over PR, and one cannot say that, as an original matter, American electoral structures were designed to limit competition to two dominant parties.

Indeed, when the Constitution was formed and early elections held, the very idea of political parties was anathema to the reigning conception of democracy, as we will elaborate later. The idea that the FPTP system would have been justified because of its tendency to produce party politics, let alone two-party politics, could hardly have formed any part of the justification for these structures. Similarly, when Congress first mandated that states employ districted elections for representatives to Congress,[125] which did not occur until 1842 (by which time political parties were commonplace[126]), the principal aim was to increase political competition and encourage more diverse political representation—not to stifle partisan competition.[127] When states used at-large elections for all their congressional representatives, it was not uncommon for the same statewide majority to control all the seats.[128] Thus, minority interests within the state—be they partisan, economic, geographic, or other—were unable to control even one seat in the congressional delegation.

For example, immediately after the Constitution's adoption, Pennsylvania became deeply divided between Federalists, in the east, and Antifederal-

122. For a survey of electoral structures in Western democracies, see ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 713-84.

123. For a full discussion of the absence of PR from the American agenda at the time American electoral structures were being formed, see Richard Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 257-60; *see also* ISSACHAROFF, KARLAN & PILDES *supra* note 6, at 770.

124. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 720. By 1920, most European countries had followed this lead.

125. *See* The Reapportionment Act of 1842, Ch. 47, 5 Stat 491.

126. *See* JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM 47 (1983) (noting that the two-party system was established in the 1830s).

127. *See* ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES 1776-1850, at 129-31 (1987).

128. *See id.* at 154-57.

ists, in the west. Because the former controlled the state legislature, the first congressional elections were at-large; the result was that all eight elected congressmen were Federalists, most of whom lived in the east.[129] The resulting public outrage generated sufficient pressure that, from then on, congressmen from the state were elected from single-member districts.[130] The same considerations were behind Congress' adoption in 1842 of districted elections for Congress nationwide.[131] The very point of this move was to bring about more diversity in the views represented, more political competition, and more responsiveness.[132] The original justifications for territorial districting and FPTP elections thus support electoral structures that encourage more competition, not ones that limit such competition to two parties. Arguments that FPTP elections and districts are justified by the effect they have of producing two, dominant parties, therefore, must at best be seen as a thoroughly modern invention.

Moreover, the choice of FPTP over PR can be justified by arguments that have nothing to do with the creation of a two-party system. A major advantage of districted elections is that they tie constituents and representatives together far more tightly than PR systems do, enabling better constituent service, an often-touted virtue of the American system.[133] Given the absence of a historical moment at which anyone consciously chose the current American system because it would produce two-party politics, and given other strong justifications for the maintenance of this system, it is difficult to know precisely where one might locate a consensus that would justify current American electoral structures because they promote two-parties.[134]

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129. *See id.* at 113.

130. *See id.* at 113-14.

131. *See id.* at 128-31 (noting that, in passing the 1842 Reapportionment Act, Congress shared the 1791 Pennsylvania legislature's intent to stimulate competition).

132. For the full history of territorial districting in the United States, see ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 546-615.

133. For a full discussion of the comparative advantages of territorial districting and PR systems, see Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205.

134. Indeed, some argue today that districted elections poorly serve the aims of deliberative democracy. One commentator notes:

> Defenders of single-member districts representation argue that "government by majority is government by persuasion." . . . The trouble with these arguments, however, is that they ignore the strong tendency toward vagueness and ambiguity that is generated by these systems. Thus, the persuasion of ordinary citizens is of a superficial sort that leaves much of the decision-making to party leaders and leaders of interest groups who are at liberty to bargain with each other in the background. Often this bargaining on the basic points of the legislative agenda is done out of the sight of ordinary citizens and undermines their capacity to control the state. Furthermore, the system of single-member district representation puts a straitjacket on the kinds of issues that are discussed by citizens and parties. In general, the discussion in electoral campaigns tends to take place on a one-dimensional issue space. Discussion in proportional representation elections tends to involve more issues in a number of different dimensions. The single-member district system simplifies unnecessarily the process of social discussion. Some may argue that the multidimensionality of issues for discussion demonstrates that there is

Second, it is certainly true that, for institutional reasons, courts are hardly likely to declare districted elections and FPTP unconstitutional on the grounds that a more competitive politics would result from moving to PR elections. Apart from the fact that other justifications can be offered for the existing structures, the courts would surely find it well beyond their proper role to hold FPTP unconstitutional. Similarly, for historical reasons, it seems unlikely that policymakers would move away from these structures anytime soon (although alternative voting systems are becoming more common in the South as a means of settling Voting Rights Act litigation[135]). Electoral structures are highly path dependent; whether we would opt for PR or FPTP were we making the choice on a clean slate today says little about whether the costs of shifting from FPTP would justify the transition.

But even though courts would uphold these structures for institutional reasons, and policymakers would retain them for reasons of their historical endurance, courts should not infer out of these structures broad normative principles that ought to govern the entire political process. The way the Supreme Court has addressed the irrelevance of the United States Senate, the electoral college, and federalism itself to state institutions modeled on similar concepts of representation is instructive.[136] In these areas, the Court has recognized that these longstanding institutions arose out of specific historical and contingent circumstances. Although they remain a legitimate part of the constitutional order, it would be a mistake—indeed, an unconstitutional one—for states to infer any principled commitment underlying these structures for designing their own institutions. The same is true of districted elections and FPTP voting rules: That they tend to produce two-party poli-

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> greater fragmentation in the public at large than when the issues are very simple. But surely this kind of fragmentation is precisely what we should expect from discussion amongst equals who have very different experiences and roles in the society. And such fragmentation should have the beneficial effect of getting all citizens to understand the diverse interests and points of view that exist in their society and deepening their understanding of how to fairly accommodate these interests.
>
> Overall, a scheme of proportional representation is superior to other electoral schemes in promoting rational social deliberation on the overall aims of society.

THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 260-61 (1996) (footnotes omitted).

135. *See* Pildes & Donoghue, *supra* note 123, at 260-300 (discussing the Chilton County, Alabama, cumulative voting system).

136. On the irrelevance of the electoral college analogy to state electoral structures, see Gray v. Sanders, 372 U.S. 368 (1963) ("The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election."); *see also* Board of Estimate v. Morris, 489 U.S. 688 (1989) (rejecting federative models of local government that depart from one person, one vote); Reynolds v. Sims, 377 U.S. 533 (1964) ("[The United States Senate was] conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on [considerations not permissible for states to draw upon in designing their Senates].").

tics does not mean that courts should deduce a general license for those parties to further entrench the two-party system.

Third, the fact that FPTP elections already generate tremendous pressure toward a two-party structure should, if anything, argue against, not in favor of further partisan efforts to lock-up competition in the name of preserving "stability" and avoiding "factionalism." Regardless of how permissive ballot access laws are, third parties are never going to be able to do more than put competitive pressure on dominant parties. The FPTP system virtually ensures continuing two-party dominance. Any "state" interest in additional regulations designed to buttress the two-party system would therefore seem largely superfluous. But within that structure, more scope for competitive pressure will produce politics that is more responsive to the interests of voters. At times, this pressure might take the form of existing forces defecting from the party at election time; at other times, it might take the form of new parties temporarily arising to express viewpoints shut out of the two-party dialogue.

To permit existing partisan forces to insulate themselves from these pressures by appealing to the supposed preference of FPTP for two parties is to permit a form of double counting. Surely the two parties cannot employ any means to ensure their continuing control, simply by citing some purported general principle underlying FPTP that anything goes in the furtherance of two-party domination. For example, were public financing of elections adopted, but the money limited only to "the two dominant parties"—on the rationale that entrenching a two-party system is an appropriate state interest—the courts would, one hopes, find that this policy violated the First or Fourteenth Amendments.

The task then is to discern which regulations of politics are anticompetitive and lock up democratic competition in impermissible ways. We do not have a comprehensive and complete theory that offers necessary and sufficient conditions for identifying such regulations. As in so many areas of the law, it is far easier to identify dramatically anticompetitive practices than it is to specify precisely what optimal competition would look like. This is particularly characteristic of much of the constitutional law of politics. Without identifying an ideal theory of proper municipal boundary-line drawing, the Court was able to strike down grossly impermissible forms of manipulating such boundaries.[137] Without a full theory of equal voting power, the Court was able to identify impermissible vote dilution.[138] Without a worked-out vision of appropriate partisan factors in redistricting, the Court was able to

137. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down the 28-sided gerrymander of Tuskeegee).

138. *See* White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

hold partisan gerrymandering unconstitutional.[139] So too here: Without a complete theory of optimal partisan political competition, the courts can do a far better job of recognizing grossly anticompetitive practices. One possible tool for doing so is to distinguish electoral structures that incidentally reinforce the two-party bias in the political system from those that have the primary intent of shoring up two-party exclusivity.[140] An intent-based intermediate analysis provides one suggestion for how the courts might approach third-party claims, and that is the approach we develop here.

C. *Third Parties in a Two-Party World*

Third parties can employ two strategies in a system structurally driven toward two parties. The first is to displace an established party, an event not successfully accomplished in America since the emergence of the modern Democratic and Republican Parties in the 1850s.[141] The second is to serve as "checks on the major parties" by shifting the balance of power within an established party.[142] Historically, third parties have been required to use this second strategy in the United States; that has been true for groups ranging from populists at the turn of the century to the Christian Coalition today.[143]

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139. *See* Davis v. Bandemer, 478 U.S. 109 (1986) (setting the standard for claims of unconstitutional partisan gerrymandering).

140. This is a familiar distinction in constitutional doctrine. For example, the distinction between incidental effects and legislative intent is similar to the line the Court drew between neutral laws of general applicability that have incidental effects on religious activity, *see* Employment Div., Dept. of Human Resources v. Smith, 494 U.S. 872 (1990), and laws intended to restrict religious activity in particular, *see* Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520 (1993). For a general argument that much of constitutional law turns on the search for impermissible purposes, *see generally* Pildes, *supra* note 5.

141. *See* ROSENSTONE ET AL., *supra* note 1, at 219 ("Nearly a century has elapsed since a single minor party has been able to mount a sustained challenge [to the two dominant parties]."); SUNDQUIST, *supra* note 126, at 68-98 (discussing collapse of the Whig Party and the emergence of the Republican Party).

142. One of the leading studies of third parties describes the role they have played in the American system in these terms:

> Minor parties are not so much safety valves for voters who want to blow off steam as they are checks on the major parties. They are a weapon citizens can use to force the major parties to be more accountable. The threat of exit provides voters and their leaders with an important resource when bargaining with both major parties. . . . Minor parties are also policy innovators. . . . In short, third parties should not be viewed as organizations that stand outside the mainstream of the American political system. They are very much a central part of it. The stands of the major political parties, the political strategies they pursue, and the motivations underlying their choice of nominees often anticipate the response of potential third parties.

ROSENSTONE ET AL., *supra* note 1, at 222-23; *see also* DOWNS, *supra* note 16, at 127-28 (distinguishing between third parties that seek to win and those that seek to influence major parties).

143. In his classic study of the Populist and Progressive movements, Richard Hofstadter makes the following observations about third-party politics in American history:

> But third-party leaders in the United States must look for success in terms different from those that apply to the major parties, for in those terms third parties always fail. No third party has ever won possession of the government or replaced one of the major parties. (Even the Re-

Because of the high cost of organizing a viable electoral vehicle in the face of FPTP elections, ideological third-party movements aim at influencing enough members to shift opinion within one of the established parties.[144] Indeed, third parties tend to be more issue-oriented than the dominant parties, and it is specific substantive issues that tend to generate voter support for third parties.[145] Not only has this been the dominant strategy, it is also the means through which third parties have, in fact, had their greatest success.[146]

Third-party challenges in this form will inevitably be presented as confrontations with the leadership of established parties. As a leading study of third parties puts it, "They are a weapon citizens can use to force the major parties to be more accountable. The threat of exit provides voters and their leaders with an important resource when bargaining with both major parties."[147] Consequently, we should expect the two dominant parties to seek to

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> publican Party came into existence as a new major party, created out of sections of the old ones, not as a third party grown to major-party strength.) Third parties have often played an important role in our politics, but it is different in kind from the role of the governing parties. Major parties have lived more for patronage than for principles; their goal has been to bind together a sufficiently large coalition of diverse interests to get into power; and once in power, to arrange sufficiently satisfactory compromises of interests to remain there. Minor parties have been attached to some special idea or interest, and they have generally expressed their positions through firm and identifiable programs and principles. Their function has not been to win or govern, but to agitate, educate, generate new ideas, and supply the dynamic element in our political life. When a third party's demands become popular enough, they are appropriated by one or both of the major parties and the third party disappears. Third parties are like bees; once they have stung, they die.

HOFSTADTER, *supra* note 23, at 97 (footnote omitted).

144. For example, even a successful radical, state-level third party, the Minnesota Farmer-Labor Party, did not expect to endure at the time it was formed. *See* RICHARD M. VALELLY, RADICALISM IN THE STATES: THE MINNESOTA FARMER-LABOR PARTY AND THE AMERICAN POLITICAL ECONOMY 29 (1989).

145. As one of the leading empirical studies of the history of third parties in America found, "[C]oncerns about issues motivate third-party voting. . . . People intensely concerned with issues are apt to be disappointed with what the major parties have to offer. Major party candidates strive for ambiguity and resist taking controversial positions that concern only a small share of the electorate." ROSENSTONE ET AL., *supra* note 1, at 164 (footnote omitted).

146. *See* Anderson & Freeman, *supra* note 118, at 75. They write:

> [T]he only times that a third party has made a significant impact on the presidential elections have occurred when the nation has been faced with a compelling national issue that the two major parties of the time either were unwilling or unable to deal with because of extreme internal divisions.

Id. An interesting example of the difficulties of organizing an electorally viable third party may be found with the experience of the Liberal Democratic Party in Britain. Although this Party formed with well-recognized national political figures as its standard bearers, it has met great difficulties translating its political support into parliamentary seats. For example, in the 1997 parliamentary elections, the Liberal Democrats received 17.2% of the vote for parliament, but obtained only 45 seats in Parliament. In part because of these parliamentary frustrations, the Liberal Democrats have tried to establish a political base at the local level, seeking representation on local councils in elections in which one party tends to be hegemonic, and, accordingly, the two-party system is not nearly so well established. *See* Barrie Clement, *Ashdown Heralds Era of Reform*, INDEPENDENT (London), May 3, 1997, at 3.

147. ROSENSTONE ET AL., *supra* note 1, at 222. In addition,

close off avenues of third-party challenge. Most importantly, if this analysis is correct, such efforts to close off third-party challenges should be a shared objective of both of the major parties, regardless of their immediate position as the majority or opposition party. To elaborate on the market analogy, this is an area where the commanding market actors would seek to maintain barriers to entry for unrepresented groups and to channel all nascent challenges into the established party form. As the political scientist E.E. Schattschneider put it as long ago as the 1940s, the two dominant parties seek to "monopolize power."[148] The major difference between these bipartisan barriers and the barriers to entry constructed in *Burdick* and *Herndon* is that here the parties deploy the state to create the anticompetitive obstacle on behalf of a bipolar or oligopolistic party domination of the market, rather than a pure single-party monopoly.[149]

1. *Ballot Access Restrictions.*

The Court directly confronted the legacy of a bipolar effort to frustrate third-party challenges in *Timmons v. Twin Cities Area New Party*. *Timmons* addressed Minnesota's prohibition on fusion candidacies, the electoral mechanism by which candidates are endorsed by more than one party and may appear on the ballot under more than one party listing. This significant electoral strategy allows third parties to influence the positions taken by the two established parties. Cross-endorsement not only gives third parties a chance to support a candidate who might get elected, it can also give organized expression to dissenting voices within the major parties. Fusion candidacies thus influence the direction of a dominant party's platform or choice of candidates. However, most successful third parties in this century have disappeared after one election cycle (in the nineteenth century, all the sig-

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> because third parties help to hold the major parties accountable to certain minority interests, one way to enhance minority representation in the political arena is to increase the opportunities for third party activity. The less the major parties are able to monopolize control of the government, and the more uncertainty there is over which party will enjoy an Electoral College majority, the greater the incentives for the major parties to tend to the minority concerns they would otherwise ignore.

Id. at 224.

148. E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 68 (1942).

149. This argument is analogous to the concept of the "bipartisan gerrymander," which locks in the distribution of power between the two parties. They "engage in complimentary trades . . . . Democrats giving to Republicans their worst (i.e. most Republican) areas, and Republicans giving to Democrats their worst (i.e. most Democratic) areas. Displacement is equally shared." BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 159 (1984). The emergence of such bipartisan gerrymanders may seem counterintuitive. In economic markets, a stable oligopoly could emerge with Coca Cola enjoying 51% of the market and Pepsi the other 49%. In an electoral district under FPTP elections, however, the 51% share gains 100% of the representation. The key to a bipartisan gerrymander is two parties with an interest in stability across districts.

nificant third parties lasted for at least two election cycles).[150] Fusion candidacies enable third parties to mobilize continuing constituency support: Ballot access and other state-bestowed benefits typically turn on demonstrating a sufficient level of actual election-day support. With fusion candidacies, voters can support a third-party candidate who also stands a chance of being elected in the FPTP system because that candidate is also the choice of one of the two dominant parties. Fusion candidacies enable minor parties to obtain enough votes, despite the FPTP system, to sustain themselves over several election cycles.

The fledgling New Party in *Timmons* sought to nominate as their candidate an incumbent state senator who was already a candidate for one of the two dominant parties in Minnesota, the Democratic-Farmer-Labor Party.[151] Despite the lack of objection from either the state senator or the Democratic-Farmer-Labor Party, state election officials rejected this cross-listing because it violated state law prohibitions on fusion candidacies.

The fusion strategy for third parties had its heyday at the end of the nineteenth century, particularly in the Midwest where Populists, Greenbackers, and other lesser groups used coalitions with the Democrats, the weaker of the major parties, to provide a viable electoral forum for their views.[152] To a lesser extent, Republicans in the South also used fusion candidacies.[153] The movement to ban fusion candidacies emerged as a deliberate tactic to eliminate third-party competition by locking into place the two-party structure.[154] While the antifusion movement in the Midwest worked to end effective cooperation between Democrats and third-party groups, it received support from both the Republican and Democratic Parties.[155] Both parties stood to gain from erecting barriers against third-party agitation and channeling political activity within their own internal institutional frameworks. In the aftermath of the new barriers to fusion politics, the presence of third parties dramatically dwindled in contemporary politics.[156]

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150. *See* ROSENSTONE ET AL., *supra* note 1, at 81 (discussing the life span of third parties during the last two centuries).

151. The Democratic-Farmer-Labor Party is the product of a 1944 merger of the state's Farmer-Labor Party, which existed from 1918-1944, and the state's Democratic Party. As the leading history of the Minnesota Farmer-Labor Party puts it, that party was "the most successful case of a radical, state-level third party that American politics has seen." VALELLY, *supra* note 144, at xiii.

152. *See* Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288-89, 293 (1980).

153. *See id.* at 288.

154. *See id.* at 303-04.

155. *See id.* at 290 (explaining that Republicans sought to end fusion candidacies for purely political reasons, and Democrats realized that fusions resulted in less-principled political platforms).

156. *See* Brief Amici Curiae of Twelve University Professors and Center for a New Democracy in Support of Respondent 7-8, McKenna v. Twin Cities Area New Party, 117 S. Ct. 1364 (1997) (No. 95-1608).

In contrast to the way the Supreme Court approached *Timmons*, under a political markets analysis of electoral regulation, the antifusion laws should trigger exacting judicial scrutiny. The antifusion laws are not the product of what could be considered "natural monopolies" enjoyed by the two major parties as a by-product of a FPTP electoral system. Rather, they are self-conscious devices that go above and beyond the advantages directly accruing to the two parties by virtue of the single-member geographical district. Antifusion laws further entrench the two dominant parties by dramatically raising additional barriers to competition. As a result of the ban on fusion strategies, third parties seeking to participate meaningfully in government must organize a party capable of *displacing* one of the major parties, rather than *influencing* one of them.[157] Whereas American history is relatively plentiful with examples of the latter strategy, the former is a virtually insuperable barrier to entry. Justice Stevens recognized this point in dissent:[158] "[T]he right to be on the election ballot is precisely what separates a political party from any other interest group."[159]

In *Timmons*, the Supreme Court majority once again applied the traditional, but unilluminating, individual-rights-versus-state-interest framework of analysis. Following *Burdick*, the Court assumed the plaintiffs sought to vindicate the individual right of self-expression through the ballot box. As in *Burdick*, the Court then found this asserted right to be inconsequential: "Ballots serve primarily to elect candidates, not as fora for political expression."[160] Next, the Court assumed that fusion candidacies would assume constitutional importance only if they might alter electoral outcomes. The Court thereby completely disregarded the central role such candidacies actually play for third parties seeking to influence positions of the dominant parties. As a result, the Court did not see any major burden antifusion laws imposed, for the New Party was not seeking to get a different candidate elected.[161]

Given the absence of any significant interest that fusion candidacies might serve, it was easy for the Court then to conclude that exceptionally

157. *See* Brief for Respondent at 10, McKenna v. Twin Cities Area New Party, 117 S. Ct. 1364 (1997) (No. 95-1608) (contending that denying third parties the right to form fusion candidacies "imposes a Hobson's choice between political efficacy and conviction—prudence and principle—and in all but the most extraordinary times condemns them to political marginality").

158. For the argument that Justice Stevens forged a distinct view of cases involving politics during his days on the Seventh Circuit and through his experience in the cauldron of ward politics in Chicago, see Pamela S. Karlan, Cousins' *Kin: Justice Stevens and Voting Rights*, 27 RUTGERS L.J. 521 (1996) (arguing that Justice Stevens's voting rights views result from his Chicago roots, best summarized in his dissent from *Cousins v. City Council*, 466 F.2d 830, 847 (7th Cir. 1972)).

159. Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1377 (1997) (Stevens, J., dissenting).

160. *Id.* at 1372.

161. *See id.* (concluding that the antifusion law imposes only trivial burdens on associational rights).

slight state interests—such as avoiding voter confusion—were sufficient to justify the ban on fusion candidacies. Moreover, the Court went on to endorse a state interest that the State itself refused to raise, perhaps believing such an argument, far from justifying the policy, would actually constitutionally condemn it.[162] The Court held that the very anticompetitive aim and effect of the ban itself provided the constitutional justification for it: "[T]he States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . ."[163]

The real rub in the Court's analytic approach, however, comes in identifying what state interests ought to be permissible bases for regulating political competition. Just as the one-party state in Hawaii (or in Texas earlier in the century) could define its political lockup as a "state interest" to be articulated in litigation, so too can any bipartisan coalition articulate an equally plausible "state interest" in foreclosing third-party challenges.[164] Far from being troubled by this lack of limiting principles, the Court ended its inquiry as soon as the state articulated any such interest:

> States also have a strong interest in the stability of their political systems. This interest does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence nor is it a paternalistic license for States to protect political parties from the consequences of their own internal disagreements. . . . The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.[165]

"Stability-enhancing" regulation, of course, can easily be another name for allowing state legislatures (comprised exclusively of Democrats and Republicans) to create practically unchallengeable two-party oligopolies.[166] Because the individual-rights approach identifies only the expressive function of voting as being at stake, virtually any articulation of a purported state interest in political stability satisfies the Court's standard for reasonableness. Justice Stevens, in dissent, properly turns this argument on its head and reveals it for the self-interested bipartisan deal it is: "The fact that the law was both intended to disadvantage minor parties and has had that effect is a matter that should weigh against, rather than in favor of, its constitutionality."[167]

Ballot access restrictions create difficulties for third-party nonfusion candidates and independents that are not limited to the difficulties of actually

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162. *See id.* at 1374.

163. *Id.*

164. *See* text accompanying notes 113-116 *supra*.

165. *Timmons*, 117 S. Ct. at 1374 (citations omitted).

166. *See* Bradley A. Smith, Note, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. LEGIS. 167, 171 (1991) ("Of over 20,000 elections for state legislatures from 1982 through 1988, only three [were] . . . won by members of a party other than the Democrats or Republicans.").

167. *Timmons*, 117 S. Ct. at 1379 (Stevens, J., dissenting).

getting onto the ballot, though the Supreme Court consistently underestimates these effects. Third parties and candidates confronting access restrictions must expend a major portion of their scarce resources in doing so.[168] For example, parties and candidates seeking the presidency face particularly onerous ballot access restrictions from the cumulative effects of fifty-one (including D.C.) different sets of state election rules. Petition time periods and filing deadlines vary from state to state.[169] Essentially, a presidential candidate who seeks to run outside the two dominant parties must conduct fifty-one different local campaigns at different times, just to get on the ballot.[170] The costs of these efforts, even when successful, are dramatic.

Thus, when John Anderson in 1980 mounted the most credible independent campaign for the presidency in recent years (before Ross Perot), he had to spend nearly half the money he raised just to get on the ballot, including costs of litigation in a dozen states to challenge the existing restrictions. Anderson had to spend $7.3 million of his $15.0 million campaign fund to insure that he appeared on the ballot in all states[171]—a pyrrhic victory in light of the anemic resources remaining to devote to the actual campaign. Given that access to financial resources is already one of the major obstacles to serious third-party and independent challengers, the financial toll that ballot access restrictions exact is just as important as the actual formal restrictions themselves.

Major parties appreciate how ballot access restrictions burden third parties. The major parties actively fight to prevent minor parties from securing spots on the ballot. As Robert Neumann of the Democratic National Committee candidly boasted in June 1980: "We don't know how much it's going to cost [to keep Anderson off November ballots,] but we'll probably spend what it takes."[172] Consequently, Anderson spent less than 50% of the major parties' expenditures in 1980.[173] In 1976, Eugene McCarthy spent 80% of his campaign funds to cope with ballot access requirements.[174] What distinguished Ross Perot from previous third-party presidential candidates was that he had the wealth to spend $18 million on ballot access and still be able to spend $55 million more on his campaign.[175]

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168. *See* ROSENSTONE ET AL., *supra* note 1, at 20-21 (describing the difficulty of organizing a third-party election effort in multiple districts).

169. *See id.*

170. *See id.* at 21.

171. *See id.* at 24.

172. *Id.* at 45 (quoting *Democrats Ready to Fight to Keep Anderson Off Ballot*, N.Y. TIMES, June 6, 1980, at A17).

173. *See id.* at 27.

174. *See id.* at 28, 30.

175. *See id.* at 260.

2. *Campaign Finance.*

Regulation of campaign financing is perhaps the most obvious area in which a view of the desirable forms of political competition is required to assess different regulatory regimes. But the Supreme Court paid little attention to how public financing proposals would affect competitive pressure on the two dominant parties in its first encounter with modern finance regulations in *Buckley v. Valeo*.[176] In the absence of serious judicial scrutiny in this area, a two-party Congress will be free to create a bipartisan cartel with any federal public financing statute (at the state level, public financing can be and has been enacted through voter initiatives[177]).

Although Democrats and Republicans will continue to dominate politics, the concern is that further regulation will more deeply entrench these two parties vis-à-vis their potential competitors. The post-Watergate financing reforms did exactly that. As one of the leading studies of third-party politics puts it, "FECA [the Federal Election Campaign Act of 1974] is a major party protection act."[178]

The existing public financing system for presidential campaigns illustrates the potential for bipartisan entrenchment. Figures like Colin Powell, Bill Bradley, and others contemplating independent presidential campaigns during the 1996 election cycle raised the prospect of challenges to the stale and unimaginative politics of the two dominant parties. But any serious student of the campaign finance laws should realize how quixotic such campaigns would be. Any candidate with a possibility of receiving the Democratic or Republican nomination would commit political suicide by choosing to run as an independent, unless he or she could personally finance an independent campaign of the Ross Perot variety.

Statutory bias against independent candidates is clear within public financing policies for presidential campaigns. At the nomination stage, each Republican and Democratic primary candidate can qualify for up to $30 million in federal matching funds.[179] By contrast, independent candidates receive nothing.[180] Then, at the convention stage, each major party receives a

176. 424 U.S. 1 (1976) (per curiam).

177. For discussion of these recent initiatives, see CAMPAIGN FINANCE REFORM: A SOURCEBOOK 335-93 (Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz, Trevor Potter & Frank J. Sorauf eds., 1997).

178. ROSENSTONE ET AL., *supra* note 1, at 26.

179. *See* 26 U.S.C. § 9037 (1994) (authorizing payment of matching funds to eligible candidates). In 1996, major party candidates could receive up to $30.91 million in primary matching funds. *See* FEDERAL ELECTION COMMISSION, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW 9 (Aug. 1996).

180. Challengers who actually create a new party and get on the ballot may be eligible to receive matching funds. *See* 26 U.S.C. § 9033(b)(2) (1994) (stating that independent candidates are not eligible for presidential primary matching funds).

subsidy in excess of $10 million to pay for a week-long media extravaganza.[181] Independents receive no money for a convention unless they also form a new party.[182]

Immediately after the nomination, the Republican and Democratic candidates each receive $60 million of public funds to pay for their general election campaigns.[183] The major party candidates also benefit from the soft money loophole that allows virtually unlimited campaign contributions to be funneled to state and local parties for "party-building" and voter registration drives.[184] In the last election, each major party raised in the vicinity of $100 million in these soft money contributions.[185]

Independent candidates do not benefit from party expenditures or soft money contributions.[186] In addition, they do not receive any federal campaign finance funds until after the presidential election.[187] Before the election, these candidates must persuade bankers to gamble with them that they will end up with enough votes to be able to pay back campaign loans.[188] Putting all this together, a major party candidate who ran as an independent could forfeit the staggering sum of $140 million.

Of course, these financing constraints operate in conjunction with other constraints we noted earlier, such as ballot access restrictions. The cumulative effect of these anticompetitive constraints, along with the history of earlier campaign-finance legislation, suggests that, should Congress pass new financing reforms, courts ought to assess those reforms intensively to ensure they do not further entrench bipartisan political lockups.

While the American Supreme Court has been unable to develop a sound theoretical approach to cases involving the regulation of politics and has

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181. *See* 26 U.S.C. § 9008(b)(1) (1994) (defining how much public funding major parties may receive for convention expenses); *see also* FEDERAL ELECTION COMMISSION, *supra* note 179, at 10 (stating that each party received $12.36 million in public funds for convention expenses).

182. *See* 26 U.S.C. § 9008(b)(2) (1994) (providing convention funding for qualified minor parties, but not independent candidates).

183. *See* 26 U.S.C. § 9006 (1994) (creating the Presidential Election Campaign Fund). In 1996, each major party candidate received $61.82 million in public funds. *See* FEDERAL ELECTION COMMISSION, *supra* note 179, at 9.

184. *See* 2 U.S.C. § 441a(d)(1) (1994) (allowing national, state, and local party committees to "make expenditures in connection with the general election campaign of candidates for federal office").

185. The data are taken from the Federal Election Commission. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 632 (reporting data and demonstrating dramatic increase from 1991 to 1996 in the level of soft money contributions and expenditures by the major parties).

186. *See* 2 U.S.C. § 441a(d)(1) (1994) (specifically limiting such expenditures to political parties).

187. *See* 26 U.S.C. § 9004(a)(3) (1994) (establishing that once minor party candidates receive 5% of the general vote, they receive a proportionate share of the general campaign fund).

188. *See* 2 U.S.C. § 441a(a)(1) (1994) (limiting individual campaign contributions to $1000 and committee contributions to $5000).

been unwilling to play a significant role in destabilizing partisan lockups, other important courts have more aggressively stepped into these breaches. A comparative inquiry into German constitutional law reveals the capacity of, and justification for, courts to ensure an appropriately competitive political order, while not precipitating a free fall into factionalism, instability, and political fragmentation.

III. CONSTITUTIONAL REVIEW OF "OLIGARCHICAL" PARTISAN CAPTURE OF POLITICS: THE GERMAN EXAMPLE

Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) is the country's highest appellate tribunal and like the American Supreme Court, is a prominent national political actor. However, unlike its American counterpart, the German Court has consistently recognized the tendency of dominant political parties to seek to lock up democratic politics. Like the American case law we reviewed above, the German cases also confront justifications for anticompetitive practices dressed up in rhetorical appeals to stability, effective governance, and the avoidance of factionalism. But the German Court has taken a far more aggressive approach to the oversight of political competition, assuming precisely the opposite review posture to that of the American Supreme Court: "Parliament's discretion is severely limited when legislating on the right to elect representatives to legislative bodies: this [limitation] follows from the principles of formal voter equality and equal opportunity of parties."[189] At the same time that the German Court has acknowledged the legitimacy of election laws that seek to create an "effective" governing body and to avoid splintering of parties, "which would make it more difficult or even impossible to form a majority,"[190] it has also been vigilant in overturning partisan capture of the political process.

Some German Justices have gone even further and begun to articulate a politics-as-markets theory similar to the one advanced here. They warn that the Court must be especially vigilant against legislation that bolsters the "oligarchical" and "careerist" features of the established political parties, lest the representative character of the legislature be undermined.[191] This perspective on the need for courts to preserve appropriate ground rules of political competition has led the German Court to a more aggressive role in reviewing ballot access restrictions, safeguarding the rights of minor political parties, striking down campaign finance provisions that entrench the dominant par-

189. DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE REPUBLIC OF GERMANY 188-89 (2d ed. 1997) (translated from National Unity Election Case, 82 Entscheidunger des Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] 322 (1990)) (Kommers provides citations to the translated cases we use in this part).

190. *Id.* at 187 (translated from Bavarian Party Case, 6 BVerfGE 84, 92-93 (1957)).

191. *Id.* at 174 (translated from Party Finance I case, 73 BVerfGE 40, 117 (1986) (Böckenförde, J., dissenting)).

ties, and intervening in similar ways to enhance competition.[192] That the German Court has been more attuned to the dangers of partisan lockups of democracy seems difficult to attribute to more specific textual authority or greater cultural tolerance for freewheeling political competition. Yet the German Court has been more astute and aggressive in ferreting out anticompetitive manipulations of the ground rules of politics.

We discuss the theory and practices of the German Court to illustrate that, although distinguishing between appropriate stabilizing regulations and anticompetitive policies is not easy, other courts have managed to make the relevant distinctions. However, before discussing specific cases, we want to reject certain tempting, but ultimately unconvincing, explanations for the difference in the German Court's approach. The German Basic Law, like other modern constitutions, does have a more developed conception of democracy written into the text, including provisions that explicitly recognize the central role of political parties.[193] However, these provisions are drafted in the typically general terms of broad constitutional principles, and while they do not specifically legitimate a role for the Court in overseeing political competition, the textual provisions hardly provide determinate guidance.[194] Indeed, the Court has interpretively inferred from the text many of the fundamental German constitutional principles, including the principle that political parties have the "rank of constitutional institutions" and are "constitutionally integral units of a free and democratic system of government."[195]

The textual differences might explain a part of the different attitudes of German and American courts, but they cannot provide a full account. Nor can one find such an explanation in the fact that the German electoral system is a mix of PR and single-member districts. While the PR system produces multiparty competition rather than two-party dominance, the experience of the Weimar period makes German political culture even more sensitive than American to the dangers of fringe parties, paralyzing factionalism, and political fragmentation. Germany has the highest threshold requirements for representation of political parties (5%) of any Western European system of PR,[196] and its Constitution directly bans political parties that "seek to impair

192. *See id.* at 166-238 (discussing German Court decisions regarding political representation issues).

193. *See id.* at 200-01 (discussing the decision to make political parties central to Article 21 of the German Basic Law).

194. *See id.* at 511 app. (translated from Grundgesetz [Constitution] [GG] art. 21 (F.R.G.)).

195. *Id.* at 201, 209 (translated from Socialist Reich Party case, 2 BVerfGE 1 (1952); Political Parties Act of 1967 (Parteiengesetz), § 242 v.15.2.1984 Bürgerliches Gesetzbuch [BGB] [Civil Code]).

196. Thresholds of 3-5% are typical in party-list PR systems such as those in Germany and Italy, and France at some periods in time has also used a percent threshold. *See* AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945-1990, at 22, 30, 33-35 (1994) (listing legally mandated thresholds of exclusion for different coun-

or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany."[197]

A. *Representation of Minor Parties*

Since 1949, Germany's national electoral laws have mandated that a party must receive at least 5% of the vote to gain a seat in the national legislature.[198] By 1952, this same threshold had been adopted at most other levels of government.[199] Given the political instability and party proliferation of the Weimar period, the achievement of political stability was a major objective of the Basic Law, and the drafting body discussed writing the 5% threshold into the Constitution. But the framers decided to leave the setting of electoral thresholds to the regular political process.[200]

Subsequent laws on electoral thresholds have led the German Court to a series of important decisions in which it has both permitted thresholds in the service of enhancing political stability and struck down those that excessively entrench existing distributions of political power.[201] For example, one state—that is, one set of existing officeholders—sought to impose a 7% threshold. The Court found such a threshold unconstitutional, relying on the general equality clause as applied to political parties and on the general presumption that a particularly compelling reason is required to justify departing from the common practice of 5%.[202] Unlike the American Supreme Court, the German Court did not allow a generalized concern for political stability to become an all-purpose justification for regulations adopted by existing officeholders that diminished partisan competition. At the same time, the

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tries over different periods of time). Lijphart observes that most PR countries do not have any legal threshold of exclusion. *See id.* at 12. The most widely known extreme lower end among major countries is probably Israel, which had only a 1% threshold until 1992, when it was raised to 1.5%, *see* DOUGLAS AMY, REAL CHOICES, NEW VOICES 169-70 (1993), although the Netherlands for many years had a threshold of 0.67%, *see* LIJPHART, *supra*, at 22. Some recently formed democracies employ higher thresholds even than Germany; Poland has a 7% requirement, while the Czech Republic uses a complicated formula in which a party must obtain 5% of the vote to get a seat, unless it is in coalition, in which case a coalition of two parties requires only 7%, three parties 9%, four parties 11%, and so on. *See* FARRELL, *supra* note 121, at 70-71.

197. KOMMERS, *supra* note 189, at 218 (translated from Grundgesetz [Constitution] [GG] art. 21(2) (F.R.G.)). The German Court has relied on this provision in banning a Neo-Nazi Party in 1952 and the German Communist Party in 1956.

198. *See id.* at 186.

199. *See id.*

200. Some German commentators argue that the absence of any electoral threshold in the Basic Law indicates a deliberative decision not to have any thresholds at all, a position the German Court has rejected. *See* DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 109 (1994).

201. *See* KOMMERS, *supra* note 189, at 186-91.

202. *See* KOMMERS, *supra* note 189, at 186-87 (discussing the Schleswig-Holstein Voters Association Case, 1 BVerfGE 208, 247-61 (1952)).

German Court upheld the 5% threshold in the *Bavarian Party Case* against claims that it violated principles of equality, direct elections, and constitutional protections for political parties.[203] The Court accepted the 5% threshold as a reasonable means of avoiding splintering of the legislature, which would make it difficult to form an effective majority to govern.[204]

The Court's line-drawing became even more interesting in the wake of German reunification, as the Court considered it necessary and appropriate to continue to monitor the political regulation of elections. In the first post-unification elections, East German leaders expressed concern that the 5% rule would cripple political reform groups that had played a central role in reunification.[205] In response, the Bundestag enacted a "piggyback" arrangement that enabled parties in East Germany to meet the 5% threshold by forging alliances with larger parties in the West.[206] But this plan disfavored smaller parties, such as the old Communist Party, which were unlikely to find willing partners in the West. The Communists, together with other small parties in the West, petitioned the Court to invalidate the "piggyback" scheme arrangement.[207]

The Court did so. It reasoned that the constitutional principle of electoral equality required equal opportunities for parties to compete for political support and that the legislature had to consider different contextual circumstances in meeting its constitutional obligations.[208] Examining the "special, unique" circumstances of the first post-reunification election, the Court concluded that the "piggyback" provisions did not mitigate the potentially harmful effects of the 5% threshold. The Court found that the three-month timespan between unification and the elections would not give parties from the former East Germany enough time to compete effectively for votes. The Court suggested that it would be constitutional if the 5% rule were applied separately in former East and West Germany and if parties could combine their lists at the second ballot.[209] The Bundestag then amended the election law in accordance with the Court's suggestions, and in the ensuing elections some groups from the former East Germany did manage to achieve representation.[210]

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203. *See id.* (discussing the Bavarian Party Case, 6 BVerfGE 84 (1957)).

204. *See id.* at 17.

205. *See id.* at 188.

206. *See id.*

207. *See id.* (noting that the Green Party and far-right Republican Party also challenged the new election rules).

208. *See id.* at 188-89 (translation of the National Unity Election Case, 82 BVerfGE 322 (1990)).

209. *See id.* at 189-91.

210. *See id.* at 191.

The *National Unity Election Case* reveals just how closely the German Court circumscribes legislative control over the ground rules of electoral competition. Even in the politically complex setting of the first national elections in a united Germany, the Court recognized the dangers of dominant parties using election laws to stifle competition. In summing up the German Court's jurisprudence on the law of politics, Donald Kommers, the leading American commentator, has said: "[T]he protection that the Federal Constitutional Court has extended to minor parties in the Federal Republic suggests that any tampering with electoral mechanisms to the significant disadvantage of such parties would be the subject of intensive judicial scrutiny."[211] In marked contrast, the American Supreme Court has allowed advocates of one-party monopoly or two-party self-perpetuation to cloak themselves successfully behind vague appeals to political stability, electoral efficiency, and party coherence.

B. *Ballot Access Restrictions*

The German Court has struck down party ballot access regulations that the American Court routinely upholds. Thus, in the *Ballot Admission Case*, the German Court invalidated a stringent signature requirement that applied only to the candidate of a party not already represented in the national or state legislatures, while existing parties needed the approval only of the relevant state party executive committee.[212] Despite the increased risk of political instability from multiparty competition, the German Court found that the 500-signature requirement for new parties interfered with open and fair political competition.[213] In contrast, the American Court has upheld requirements that independent candidates present petitions signed by 5% of eligible voters.[214]

The German Court has also been even more concerned with ballot access restrictions in local elections. For example, it held unconstitutional one state's requirement that a candidate nominated by local voters' groups secure a minimum number of signatures to appear on the ballot, while political parties did not face a similar obligation.[215] Again adopting a more skeptical

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211. *Id.* at 192.

212. New party candidates had to collect 500 signatures from each electoral district averaging 140,000 or more voters. *See* CURRIE, *supra* note 200, at 108 n.34 (describing the Ballot Admission Case, 3 BVerfGE 19, 23-29 (1953)); KOMMERS, *supra* note 189, at 558 n.20 (same).

213. However, the Court did uphold a separate provision of the same law that required roughly 18,000 signatures for a party that sought to field an entire slate of candidates throughout the country. *See* CURRIE, *supra* note 200, at 108 & n.34.

214. *See, e.g.*, Jenness v. Fortson, 403 U.S. 431, 439 (1971) (ruling that the 5% requirement still ensured the "fluidity of American political life").

215. *See* KOMMERS, *supra* note 189, at 558 n.20 (discussing the Stoevesandt Case, 12 BVerfGE 10, 25 (1960)).

stance than the American Court toward electoral regulations, the German Constitutional Court reasoned that "[i]n the field of election law the legislature enjoys only a narrow range of options. Differentiations in the field always require a *particularly compelling* justification."[216] To reach this result, the German Court invoked the Constitution's general equality clause and a provision akin to the American Constitution's Republican Guarantee Clause.[217]

C. *Campaign Finance Regulation and Minor Parties*

No area of electoral practices in the United States is currently under greater scrutiny than campaign finance. At a doctrinal level, the regulation of campaign finance remains moored in the distinction between campaign expenditures, which receive constitutional protection, and campaign contributions, which do not.[218] In contrast, the public funding side of the Federal Election Campaign Act of 1974 remains relatively unexplored. The American Supreme Court has not yet found any aspects of the campaign-finance system to unconstitutionally disadvantage third parties. The Court upheld the Federal Election Campaign Act because Congress has a legitimate interest in not "funding hopeless candidates" and not promoting factionalism.[219] In contrast, the German Court has been extraordinarily attentive to the possible partisan manipulation of financing regulations by dominant parties. "In fact, the court's intervention in the field of party finance has few parallels in other areas of public policy; it has virtually dictated the rules and regulations governing the public funding of political parties."[220]

In one of its most striking forays into this area, the German Court in 1958 struck down provisions making donations to political parties tax deductible. The Court reasoned that because

> [t]he income tax rate increases with the size of taxable income, . . . the possibility of deducting donations to a political party from taxable income creates an

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216. *Id.*

217. *See id.* By contrast, the U.S. Supreme Court has held that the United States Constitution's guarantee of a republican form of government, *see* U.S. CONST. art. IV, § 4, is not judicially enforceable because it is a political question, *see* Luther v. Borden, 48 U.S. 1 (1849). This issue was most directly addressed in the context of challenges to referenda and initiatives as supplanting representative government. *See* Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912) (holding that challenges to initiatives based on the Republican Guarantee Clause presented nonjusticiable political questions).

218. This analytic distinction comes from *Buckley v. Valeo*, 424 U.S. 1, 19-22 (1976) (per curiam), where the Court found campaign expenditures were a form of expression protected under the First Amendment, but campaign contributions were not expressive. The Court remains highly divided on this issue. *See* Colorado Republican Fed. Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996) (evaluating whether political party expenditures receive First Amendment protection); *see also* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 616-64.

219. *Buckley*, 424 U.S. at 96.

220. KOMMERS, *supra* note 189, at 210.

> incentive primarily for corporate taxpayers and those with high incomes to make donations. . . . The challenged provisions, therefore, favor those parties whose programs and activities appeal to wealthy circles . . . .[221]

Therefore, because they favored certain parties, tax-deductible party contributions were violations of the constitutional principle of equality of opportunity for political parties. In this line of cases, the Court suggested that in order to ensure effective competition and diminish special-interest influence, the government could provide public financing to parties. The Court was careful to stress that such financing could not increase existing de facto inequalities between parties.[222]

When the German government began public financing, the laws distributed funds based on the proportion of parliamentary seats each party won. Parties that did not win seats could not receive public financing,[223] leading parties that had actively campaigned but lost to challenge these limitations.[224] Given that the Court had acknowledged the legitimate public policy of avoiding factionalism and promoting political stability, the Court might have been predicted to uphold these limitations on unsuccessful minor parties. But instead, the German Court struck them down as unconstitutional infringements on the rights of minor parties: "It is inconsistent with the principle of equal opportunity for [the legislature] to provide these funds only to parties already represented in parliament or to those which . . . win seats in parliament."[225] At the same time, the Court recognized that public reimbursement would encourage new parties and that the legislature could act against the formation of "splinter" parties by making reimbursement contingent upon a new party obtaining a certain percentage of votes.[226]

When the Bundestag responded by imposing a 2% threshold, the Court struck this down as well, on the ground that it violated general equality principles and constitutional provisions mandating universal and equal suffrage.[227] As a matter of constitutional law, the Court then specified that any party capturing 0.5% of the vote "manifests its seriousness as an election campaign competitor" and should receive a portion of public funds.[228] Later, in a separate case, the Court held that independent candidates were also eligible for public funding under certain circumstances.[229]

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221. *Id.* at 203.

222. *See id.* (discussing the Party Finance Case I, 6 BverfGE 273 (1957)).

223. *See id.* at 203-04 (describing the Party Finance Act of 1959).

224. *See id.* at 204 (translating of the Party Finance Case III, 20 BVerfGE 56 (1966)).

225. *Id.* at 208.

226. *See id.* (holding that the legislature could guard against splinter parties with a vote threshold of less than 5%).

227. *See id.* at 210-11 (commenting on the Party Finance Case IV, 24 BVerfGE 300 (1968)).

228. *Id.* at 211.

229. *See id.* at 211 (discussing the Daniels Case, 41 BVerfGE 399 (1976)).

The German Court thus has been quite active in drawing the constitutional boundary between political parties and the state—a difficult task complicated by public financing. The German Court justifies judicial involvement not through an American-oriented individual rights model, but through an approach that focuses on constructing appropriate structural relations between parties and the state.[230] For many years, the Court struggled to distinguish between public funding designed to defray legitimate campaign costs and public funding designed for the general support of parties.[231] Eventually the Court abandoned that distinction as unworkable and instead held that the total of state funding could not exceed the total amount the parties themselves raised. The Court established this rule to ensure that the parties remained tied to their voters and did not become too entrenched.[232] The Court has also attentively monitored tax deductions for party contributions and has banned tax deductions for corporate contributions to parties and for individual contributions so large that they raised concerns about equality between parties.[233]

D. *Internal Parliamentary Rights of Minor Parties and Independent Officeholders*

To ensure that dominant parties do not lockup politics in yet other ways, the German Court has also been willing to review the internal distributions of policymaking influence within the legislature itself.[234] In particular, the German Court has held that opposition parties have a participatory interest that the ruling coalition cannot suppress through parliamentary procedures.[235]

For example, the constitution of one German state allowed one-fourth of the members of parliament to request a committee to investigate problems with government.[236] In one instance, after a minority party had established an investigative committee, the majority party sought to add additional charges to the committee's mandate, including a counter-corruption charge against the leader of the minority party. The minority sued, and the Court

230. *See id.* at 208-09 (discussing the relationship between political parties and the German State).

231. *See id.* at 204-05 (upholding funding for campaign expenses but not subsidies for other party functions).

232. *See id.* at 214-15 (discussing the Party Finance Case VII, 85 BVerfGE 264 (1992)).

233. *See id.* at 214-15.

234. *See* Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 380-84, 398-414 (1984) (discussing individual rights and standards for judicial review); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 395-96 (1996) (arguing that the United States Supreme Court has avoided judicial review of the legislative process).

235. *See* KOMMERS, *supra* note 189, at 167-69 (translating the Schleswig-Holstein Investigative Committee Case, 49 BVerfGE 70 (1978)).

236. *See id.* at 167.

upheld the minority's constitutional power to define the terms of its own investigation.[237] Recognizing the need for minor parties to police the ruling coalition government, the Court intervened:

> The constitutional meaning of the rights of the minority lies in the safeguarding of this control [over defining the terms of its own investigations]. . . . The original tension between parliament and government—as it existed during the constitutional monarchy—has changed. In a parliamentary democracy the majority [party] normally dominates the government. Today, this relationship is characterized by the political tension between the government and the parliamentary fractions supporting it, on the one hand, and the opposition [party or parties], on the other hand. In a parliamentary system of government [therefore] the majority does not primarily watch over the government. This is rather the task of the opposition, and thus, as a rule, of the minority [party]. . . . If the right of the minority—and thus the parliamentary right to control—is not to be weakened unduly, then the minority must not be left at the mercy of the majority.[238]

In other litigation, a member of the Bundestag (the German Parliament) who had first been elected as a representative of the Green Party resigned from that party and became an independent representative.[239] He sued after he was stripped of all committee positions, and the Court held that a representative without a party affiliation could not be excluded from committees merely because he was not a member of any party (although he could be denied the right to vote in committee). As the Court put it, the "constitutional protection of parliamentary minorities—a right following from the principle of democracy—also applies to independent representatives."[240] In general, the Court has taken the position that "parties must be represented on committees in proportion to their strength."[241] Finally, in a case not involving interparty competition, but one in which the Court was aware of the possibilities for partisan manipulation, the Court held that when a successful candidate on a party's list withdraws or resigns after election, the party cannot simply name a substitute, nor can it shift the order of the candidates on its list. To respect the preferences of voters, the candidate who is next in line on the list elected must be given the seat.[242] This line of cases explores the structure of relationships between parties and their candidates, and between parties within the legislative process, and reveals the extent to which the German Court has taken an active role in protecting the political process from manipulation by partisan majorities.

Political markets, like economic markets, always face the prospect of anticompetitive behavior. Some external source, be it legal rules or other

237. *See id.* at 168-69.

238. *Id.* at 168-69.

239. *See id.* at 174 (presenting the Wüppesahl Case, 80 BVerfGE 188 (1989)).

240. *Id.* at 176.

241. CURRIE, *supra* note 200, at 110.

242. *See id.* at 106-07.

institutions, must be brought into play to constrain these monopolistic and anticompetitive tendencies. We do not intend this article necessarily to advocate for more active judicial oversight of politics. Our primary aim is to call attention to the prevalence of these abusive practices, to the way they eviscerate contemporary American democracy, and to highlight the need for some institutional response. But institutional mechanisms other than courts can be imagined for addressing these issues.

In some systems, independent commissions are constitutionally established to police the ground rules of fair electoral competitions. More recently adopted constitutions do tend to recognize the need for these oversight institutions. For example, the South African Constitution creates six constitutionally independent commissions, including an Electoral Commission, to "strengthen constitutional democracy."[243] But the American Constitution, with its premodern conception of democratic politics, does not provide for such institutions, and few have been subsequently created. In the absence of such alternative structures, it is inevitable that pressure will be placed on courts and constitutional law to deal with the foreseeable anticompetitive tendencies of political markets.

A comparative examination of German constitutional case law reveals that a court working with open-ended tools is institutionally capable of developing a jurisprudence that significantly protects the vitality of political markets. Despite the difficulties in defining properly functioning political markets, we see no compelling reason for the United States Supreme Court's deferential posture toward incumbent political power, or for its narrow focus on an individual rights approach to claims of diminished electoral opportunity.

IV. FURTHER CONTEMPORARY IMPLICATIONS

Ensuring robust political competition between parties has implications not only for judicial enforcement of constitutional norms, but also for demo-

243. The South African Constitution explicitly creates the Human Rights Commission, *see* CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA arts. 184-86, *reprinted in* 27 THE CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., Oceana Publications 1997), the Electoral Commission, *see id.* arts. 190-91, the Commission for Gender Equality, *see id.* art. 187, and the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities, *see id.* arts. 185-86. The Human Rights Commission, for example, must promote respect and protection of human rights and monitor compliance with human rights; it has the power to "investigate and report on the observance of human rights," as well as powers to redress human rights problems and to research and educate. *Id.* art. 184. The Electoral Commission is created to ensure, manage, and declare results of "free and fair" elections. *Id.* art. 190(1)(b). The constitution stresses that the commissions are independent—"subject only to the Constitution and the law"—and forbids anybody, including any state institution, from interfering with their operations. *See id.* art. 181. Each commission must report to the National Assembly on their activities at least once a year. *See id.*

cratic theory. We aim to sketch such a theory that can provide the kind of critical, yet practical, leverage over current political problems that more abstract contemporary democratic theory often lacks. Moreover, even if courts apply our analysis it would not always lead to more "activist" judicial involvement. While a markets approach may imply judicial activism, the formalism of conventional constitutional law can just as readily encourage courts to intervene inappropriately. In this section, we discuss one critical context in which attending to the background conditions of political competition might lead policymakers, as well as courts, to approach regulating politics differently than the current regime—with some perhaps surprising twists.

A. *Voting Rights*

A controversial application of our approach might provide new insight into issues of racial redistricting and minority vote dilution under the Voting Rights Act.[244] The Supreme Court first defined the concept of racial vote dilution in the 1970s,[245] and Congress endorsed the Court in the 1982 Amendments to the Voting Rights Act ("VRA").[246] At that time, the Court understood the problem to be that of a hostile white majority using its control over the design of political institutions to diminish the voting power of specific racial and ethnic groups, principally, blacks and Hispanics.[247] Significantly, with all the current controversy over these issues, the Court and commentators have paid virtually no attention to the background partisan context in which these policy developments occurred. In the 1970s, the South remained virtually the same one-party Democratic monopoly for all elections, other than the presidency, that it had been throughout the twentieth century.[248] The Democratic Party had a stranglehold on congressional and state legislative seats, as well as most local offices. But in the 1990s, a highly competitive two-party struggle has emerged in the South, a struggle that requires both parties to contest each and every inch of political terrain.[249]

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244. 42 U.S.C. § 1971 (1994).

245. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

246. *See* Voting Rights Act, 42 U.S.C. §§ 1971-1974 (1994). For a detailed history of the 1982 Amendments to the VRA, see generally Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

247. *See* Boyd & Markman, *supra* note 246, at 1353 (discussing Mobile v. Bolden, 446 U.S. 55 (1980)).

248. *See* Bernard Grofman & Lisa Handley, *1990s Issues in Voting Rights*, 65 MISS. L.J. 205, 267 (1995).

249. *See id.* at 268 (describing the trend for southerners to define the Republican Party as "the party of white voters" and the Democratic Party as "the party of black voters").

This competitive partisan environment might have profound implications for how public policy approaches issues of race and politics.

One theory for why public policy should make vote dilution illegal takes the form of an antidiscrimination model. Given racial hostility and given majority control, a hostile white majority could leverage its dominant power to further manipulate institutions for the purpose of diminishing black political effectiveness. To maintain fair electoral contests, constitutional law and the VRA were therefore necessary to maintain appropriately evenhanded and fair rules of democratic contestation. According to this antidiscrimination model, the justification for regulating vote dilution focuses on process rather than outcome.[250]

A second, quite different theory for addressing vote dilution takes the form of a more substantive entitlement model. Given the general position of certain racial and ethnic minorities in the American economic, cultural, and political systems, public policy should provide an affirmative commitment requiring an appropriate level of elected minority officeholders. Advocates of the substantive entitlement model focus more on outcome than process and support policies affirmatively mandating some number of elected positions, typically proportional to the voting-age population of the relevant group, for members of certain minority communities. According to proponents, the particular reason minority candidates lose elections is less important than ensuring that a sufficient number of such candidates do win.

We cannot address here which of these two models better describes the positive law of vote dilution, as either the Supreme Court conceived it originally or as Congress legislated it in 1982.[251] Nor do we take on the question of which conception ought to guide public policy. Instead, we seek to raise some provocative questions that the changed partisan context of southern politics might suggest were the first model accepted as the best positive or normative account of why vote dilution should be illegal.

Even under the process-oriented approach of this model, the concept of vote dilution remains difficult to pin down. Doing so requires judgments about exactly how "fair" rules of electoral competition would distribute political power between various minority groups—as well as between the majority and these various minorities. On this process account of vote dilution, the task is to distinguish contexts in which minorities lose elections in the same manner as any other insufficiently powerful interest groups and con-

250. For a fuller exposition of the role of the Voting Rights Act in providing this form of process protection against the exaggeration of majority power, see generally Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992).

251. For a detailed study of the relevant cases and the legislative history of the 1982 Amendments to the VRA, which addresses these questions, see ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 367-440.

texts in which minorities lose because the rules have been unfairly stacked against them. As the Supreme Court once put it, perhaps reflecting the influence of the first model at the time, vote dilution cannot become "a mere euphemism for political defeat at the polls."[252] The task for the vote dilution inquiry becomes distinguishing legitimate defeat from losses due to "unfair" manipulation of electoral structures.

The question we want to raise, then, becomes why "fair" electoral rules here should not be set in the same way "fair" prices are set in a competitive economic market. If the political marketplace is structured through ground rules that ensure appropriately robust political competition, should courts ever intervene to impose a vote dilution constraint on that competition? To put it another way, if partisan politics are sufficiently competitive, does that necessarily transform vulnerable minority groups to which vote dilution policy is addressed, particularly blacks and Hispanics, into more familiar interest groups whose political fortunes have long been left to competitive politics, rather than being protected through special regulatory regimes? In this context, courts would first examine the background competitive environment in which such claims were being made. When there is a partisan lockup, courts should intervene both to enhance competition and to remedy vote dilution claims.[253] In the absence of partisan competition, the dominant party could find latitude to engage in vote dilution without any subsequent redress through political realignments. But where there is intense partisan competition, disputes over the relative distribution of political power could be left to democratic politics itself—rival factions would presumably compete for excluded blocs of voters. The very difficulty of defining "dilution" justifies limiting the judicial role to ensuring a robust competitive environment.

The partisan context of vote dilution claims could be crucial were the antidiscrimination model the best account of statutes like the VRA. Even after black voters began to vote in significant numbers after 1965, the Democratic Party had minimal partisan incentive to attend to the interests of black voters in a one-party South. While individual contests, particularly Democratic primaries, might be influenced by black voters, the Party's partisan power was not constrained by competitive pressure. If political leaders sought to subordinate the interests of black Democrats to white Democrats, they would face no competitive sanction. No market mechanism existed to discipline efforts to diminish the effectiveness of the black vote. In practice,

252. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

253. We therefore disagree with Professor Schuck's conclusion, drawn from the partisan gerrymandering case law, that judicial regulation of political markets "would be a cure worse than the disease; constitutional change or a more enlightened legislative process would be a better remedy." Schuck, *supra* note 8, at 1330. In other parts of his article, Schuck is more guarded and considers these solutions "problematic," *id.* at 1330 n.26, in light of the fact that "[l]egislators are manifestly self-interested," *id.* at 1336.

this noncompetition model accurately describes vote dilution case law, with the notable exception of *Whitcomb v. Chavis*.[254] Throughout the 1970s and 1980s, vote dilution cases typically challenged the use of at-large or multimember election districts, particularly for local, but also for statewide, offices.[255] Such structures provided partisan monopolists the same majority control over all the seats at issue. Minority plaintiffs argued that these structures diluted their voting power and sought to replace these districts with single-member districts.[256] Single-member districts favor cohesive groups that are geographically concentrated enough to form a majority.[257] Thus, single-member districts fragment majority power, benefiting both black voters and emerging partisan challengers.

Today, two new developments have altered the context of race and politics. First, since at-large and multimember districts have been dismantled throughout the South, vote dilution cases now challenge single-member districts drawn in a redistricting plan as a whole.[258] The redistricting process can generate conflicts since legislators with control over redistricting must constantly consider how each district's lines affect the entire statewide plan. Second, in the 1990s most southern states have become intensely partisan arenas; if anything, the Democratic Party is now on the defensive throughout much of the South.[259] For purposes of vote dilution, the question is whether this partisan environment generates such powerful competitive incentives that both parties should be viewed as forced to make the pursuit of even the most marginal partisan advantage the dominant motivation driving their positions on matters like redistricting.

Paradoxically, the rise of genuine two-party competition in the South might provide the very security against exploitation that black voters within the Democratic Party once required. The rise of competitive politics might force any recalcitrant Democratic politicians to treat black voters as just one more interest group within the Party. To the extent satisfying those interests offers the prospect of partisan advantage, Party leaders will respond; if not, they will not. As long as Party elites consider the interests of black voters

254. *See Whitcomb*, 403 U.S. at 153.

255. *See* Issacharoff, *supra* note 250, at 1838-45; Pildes, *Principled Limitations*, *supra* note 4, at 2519-22. *See generally* BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992).

256. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 441-545 (analyzing multimember districts and cases striking them down).

257. *See, e.g.*, Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1424-25 (1991) (discussing whether the VRA mandate for majority-minority districts actually creates effective representation for black voters).

258. For documentation of the patterns of litigation and the concentration on at-large and multimember electoral structures in the 1970s and 1980s, see generally QUIET REVOLUTION IN THE SOUTH, *supra* note 76.

259. *See* notes 248-249 *supra* and accompanying text.

within the Party, the concerns of the antidiscrimination model might be thought satisfied. Black voters, like other minority interests within the Party, will of course not always have their demands met or interests satisfied. But when they lose, it will not be because a monopoly Party leadership has decided to extract the equivalent of monopoly profits. An alternative theory of vote dilution would therefore focus on the extent of competitive pressures on the electoral process ex ante rather than trying to reconstruct a proper distribution of voting results ex post—the latter being a particularly cumbersome and treacherous exercise in the context of decennial redistricting. Under a political markets approach, fair minority access would depend on the existence of a competitive party structure defined by internal competition within one of the parties, should minorities be concentrated there, or between the parties, if minority votes are distributed between them.

The relevance of the politics-as-markets perspective might well vary from issue to issue, but redistricting and vote dilution seem a particularly promising arena. Redistricting is probably *the* arena in which partisan motivations are more unified and dominating than any other area of policymaking.[260] The partisan stakes are high, and partisan success in redistricting can shape control over substantive policy across the board for the coming decade. With energetic two-party competition the incentives for each party to optimize partisan advantage are therefore powerful. When Democrats are in control, these incentives encourage them to subordinate all voting groups, including black voters, to the overriding objective of maximizing the number of Democratic districts across the redistricting plan as a whole: Redistricting elites will distribute blacks among districts with reference to exactly the same considerations that motivate the distributional placement of any other group of likely Democratic voters. To the extent black voters are treated like any other interest, the concerns behind the antidiscrimination analysis would be satisfied. If this analysis is correct, structural forces will propel Democratic redistricters to distribute black voters across districts in such a way as to optimize the Party's chances of controlling seats. What is critical, however, is that there no longer is the latitude that monopoly power once afforded to pursue other aims, such as diminishing black influence. When Republicans are in control, we would expect them to seek aggressively to maximize their control and minimize Democratic influence by, for example, concentrating blacks or other Democrats into districts where they hold a disproportionate majority, thereby minimizing the overall number of Democratic districts.[261] But again, competitive pressures in a well-functioning po-

260. For discussions of the strength of partisan forces in redistricting, see CAIN, *supra* note 149, at 52-53, 151-55.

261. *See, e.g.*, Kimball Brace, Bernard Grofman & Lisa Handley, *Does Redistricting Aimed to Help Blacks Necessarily Help Republicans?*, 49 J. POL. 169 (1987) (explaining why majority-minority districts disadvantage Democrats); Hugh Davis Graham, *Voting Rights and the American*

litical market would, if partisan motivations dominate, force Republicans to treat black Democratic voters no differently than the other predictable Democratic voters whose aggregate voting power Republicans were seeking to minimize.

The political science evidence suggests that this has been the case not just in the 1990s, when the two-party South flourished, but even during the 1980s, as party competition emerged. Thus, the optimal partisan strategy for distributing black voters across congressional districts appears to reflect the actual strategy that Democratic redistricters pursued.[262] Districts tended to be 30-40% black in population in the South, and 20-30% black in population in the North.[263] This distribution does not make the election of black officials likely, because racial polarization in voting typically means that black

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Regulatory State, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 177, 195-96 (Bernard Grofman & Chandler Davidson eds., 1992).

262. *See* Charles S. Bullock III, *The Impact of Changing Racial Composition of Congressional Districts on Legislators Roll Call Behavior*, 23 AM. POL. Q. 141, 142 (1995) (describing districting strategies in the 1980s and 1990s); *see also* Brace et al., *supra* note 261, at 179 (quoting a South Carolina Democratic legislator who "sought at least 30% black population in his district, but did not want more than 40% black population" in structuring a redistricting plan).

263. In the most recent and sophisticated study of this question, David Lublin concludes that the optimal strategy for electing Democrats involves creating districts that are no more than 40% black in areas with large black populations. DAVID LUBLIN, THE PARADOX OF REPRESENTATION 99 (1997) ("Mapmakers desiring solely to maximize black substantive representation should give priority to protecting Democratic seats over drawing additional districts greater than 40% black . . . . [M]aximizing the number of Democratic seats, and thus black substantive representation, would entail dismantling many black majority districts."). Another recent, major study concludes that, outside the South, the best circumstance for maximizing the political *influence* of black voters (rather than maximizing the number of black elected officials) is when black voters are distributed equally across all districts. That is because the primary objective for minorities seeking substantive representation should be the election of Democrats, black or white. *See* Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 807 (1996). Thus, "majority-minority districts make little sense in this context, unless they confer significant nonpolicy benefits, as they create greater possibilities for electing Republicans in other districts." *Id.* at 807-08. Within the South, this study confirms that the relationship between the black voting age population ("BVAP") and political influence is complex. While representative profiles become more liberal as the BVAP of their districts goes up, this responsiveness flattens out when the BVAP reaches 25-35%. Creating such districts will thus fail as a strategy for promoting black influence over legislative policy. *See id.* at 808. Between 35-50% BVAP significant improvements in responsiveness do occur, with African American influence reaching a maximum when BVAP is 47%. *See id.* Putting these effects together, the study concludes that, to maximize the influence of black voters, districters should construct as many 47% BVAP districts as possible and distribute the remaining black voters as evenly as possible. *See id.* at 795. For other important studies that explore these questions, see Bernard Grofman, Robert Griffin & Amihai Glazer, *The Effect of Black Population on Electing Democrats and Liberals to the House of Representatives*, 17 LEGIS. STUD. Q. 365, 374 (1992) ("Thus, it would appear that if we wish to maximize the election of Democrats we would not create black majority districts anywhere in the country."); *cf.* Brace et al., *supra* note 261, at 183 (explaining the circumstances under which majority-minority districts hurt or help Democrats).

voters must hold a majority for a black candidate to be elected.[264] But it does maximize the partisan prospects for the Democratic Party.

This is but the flip side of the point that has been much discussed in recent debates: whether the emphasis in the 1990s on creating "safe" minority districts has had the ancillary effect of facilitating the election of more conservative legislators overall.[265] If the optimal Democratic strategy requires distributing black voters most effectively across districts, rather than concentrating such voters, legal rules that require such concentration would enhance Republican prospects. However, the Department of Justice and the Supreme Court have required precisely this kind of concentration under the Voting Rights Act.[266] Neither Congress nor the courts have explored whether the policies of the VRA, or the constitutional doctrine on vote dilution, should be modified in light of the robust political markets that have emerged in the modern South.

These perspectives on the VRA are offered in a speculative vein. They are meant to stimulate more precise and functional thought both about what the specific purposes of the Act are best understood to be and about whether equality in this area should take account of the possible significance of the changing backdrop of partisan competition. Public policies frequently outlive the functional considerations that gave rise to and justified them, and our

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264. Thus, the creation of majority-minority districts continues to be necessary to elect significant numbers of minorities to Congress. In a study of all congressional elections between 1972 and 1994, David Lublin found that in districts without Hispanic voters the probability of the district electing a black congressperson is 8% when the district is 40% black in total population, 28% when the district is 45% black, 60% when the district is 50% black, and 86% when the district is 55% black. *See* David Lublin, *The Election of African Americans and Latinos to the U.S. House of Representatives, 1972-1994*, 25 AM. POL. Q. 269, 279 tbl.2 (1997). The addition of Hispanic voters typically changes these figures considerably; thus, when a district is 45% black and 20% Hispanic, the probability of electing a black representative goes up to 59%. *See id.* In terms of the election of Hispanic representatives, a crucial factor is what portion of the Hispanic residents have lived in the state for at least five years; length of residence affects citizenship, registration, and voter turnout. *See id.* at 280-83. When 95% of the residents have lived in the state for at least five years, a district with 45% Hispanic population has a 61% probability of electing a Hispanic representative. *See id.* at 283 tbl.4. Thus, Hispanics find it easier to get elected than blacks, although polarized voting is significant with respect to both groups. The study by Cameron et al. provides additional insight into racial polarization in voting, but fails to separate out Hispanic and Anglo voters. *See* Cameron et al., *supra* note 263, at 801-04.

While blacks and Hispanics have often been coalition partners in national politics, recent developments suggest that, in local elections, Hispanic and black voters now vote antagonistically. *See, e.g.*, Peter Beinart, *New Bedfellows*, NEW REPUBLIC, Aug. 11, 1997, at 22 (describing the recent division between Hispanic and African American communities).

265. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 598-606 (discussing the impact of race-conscious districting after the 1990 Census); Schuck, *supra* note 8, at 1342-43 (discussing the impact of race-conscious districting after the 1980 Census).

266. *See* LUBLIN, *supra* note 263, at 28 (describing the legal bases for drawing majority-minority districts).

aim is to encourage more self-conscious and contemporary thought about precisely how the VRA should be understood.

Before advocating any actual changes in vote dilution policy, many more questions would have to be confronted. Recall that our entire analysis takes place within the antidiscrimination model. If the substantive-entitlement-to-representation model better justifies why vote dilution should be illegal, the perspective developed here would be inapposite. Even within the antidiscrimination model, our politics-as-markets approach holds only if the pursuit of partisan advantage is a more powerful motivation than the desire to diminish the influence of black voters. But to accept that political markets will constrain vote dilution does not require one to endorse the position—and we do not—of Milton Friedman at the time of the 1964 Civil Rights Act, that economic markets would on their own eliminate racial discrimination in employment.[267] When the question is whether the political self-interest of politicians is stronger than the economic self-interest of businessmen, vis-à-vis the interest in maintaining white domination of politics or the social and economic sphere, there is a historical basis for thinking the pursuit of power is a more effective drive than the pursuit of lucre, suggesting rational parties would not exclude needed supporters. Even in the aftermath of slavery during the Reconstruction era, as long as the rules of political competition were relatively open, whites aggressively competed for black votes that could help them win.[268] The *White Primary Cases* show that partisan competition for black support was likely to be intense even in states like Texas, where the black population was relatively small.

Moreover, further questions still arise: Should a politics-as-markets approach be applied at the wholesale or retail level? Should judicial doctrine apply differently depending on whether active partisan competition exists in each race or in each election as a whole? What importance should courts place on intent?

Again, our aim is not to recommend any particular approach to vote dilution at this stage. We seek to provoke better thinking about that issue, and others in the regulation of politics, by encouraging a mode of analysis that takes a market view of competitive politics and assesses the implications of such a view for specific policies.

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267. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 109-17 (1962). For a contemporary form of this argument, see generally RICHARD EPSTEIN, FORBIDDEN GROUNDS (1993); for a critique, see generally Samuel Issacharoff, *Constitutional Liberties in Discriminatory Markets*, 70 TEX. L. REV. 1219 (1992).

268. *See* LUBLIN, *supra* note 263, at 18-21 (describing African American representation during the Reconstruction era).

V. POLITICAL MARKETS AND POLITICAL THEORY

Although this article has examined the legal regulation of politics from the vantage point of market-based partisan competition, we have departed quite significantly from prior attempts to apply economic insights to politics. We now return to a theme mentioned in the introduction: The legal incorporation of public choice theory does not adequately consider this vantage point. We go beyond the standard public choice account of politics in the legal literature in two ways. First, we have not accepted the rules of the game as a given in order to examine the strategies by which legislators might seek to enhance their election prospects by satisfying identifiable blocks of constituents. Instead, we have explored how manipulation of the rules of engagement might provide incumbents with the optimal strategy for retaining power. Second, we have moved away from the highly individualistic account of the utility-maximizing legislator to examine a more realistic picture of political actors within the framework of party organizations. We now spell out the methodological significance of these analytic steps more directly.

A. *Insider Manipulation of the Electoral Process*

Most contemporary public choice analysis still works within the structure that Anthony Downs initially developed.[269] Downs postulated that elected officials are utility maximizers who pursue actions that maximize their chance of reelection. He then suggested that legislators defined utility as the delivery of a bundle of constituent services that would maximize the likelihood of building a winning coalition for the next election. Successful politicians accurately evaluate and respond to critical constituents' demands. At their most cynical, critics see special interests' efforts to secure wealth through legislation as the driving force that turns the entire legislative arena into a forum for rent seeking.[270] Contemporary public choice theory follows Downs by working out further implications from this foundational perspective.

In many contexts, public choice theorists' single-dimensioned focus on maximizing reelection prospects is too simple to adequately explain or predict actual political decisionmaking. But for present purposes, we find it most curious that critics underestimate another strategy politicians use for self-advancement, one that does not require them to rely on indirect benefits

269. *See generally* DOWNS, *supra* note 16.

270. *See, e.g.*, DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE 13-62 (1991) (describing a public choice analysis of interest groups' role in the political process); WILLIAM RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 137-68 (1982) (explaining how agenda setting and other forms of strategic voting can be used to manipulate legislative outcomes).

for constituents. Indeed, the indirect strategy is particularly clumsy: In any market, information barriers and other transaction costs can prevent politicians from realizing the desired ends. More direct methods are likely to be more efficient. In politics, incumbents can create direct benefits by acting, not on behalf of constituents, but on behalf of themselves. By manipulating the rules of the game, incumbents can frustrate challengers directly. Through reducing the prospect of challenge, elected officials act as monopolists who create significant entry barriers and then exact monopoly rents.[271] The more secure their hold on power, the more existing officeholders are free to pursue their own interests rather than interests of their constituents.[272]

Although many theorists have considered politicians' self-interest in legislative agenda setting, relatively little has been said about their self-interest in defining the electoral process.[273] But the behavioral assumptions of public choice theory might better explain politicians' motives to manipulate the election process than their substantive public policy choices. For procedural rules affect politicians directly, and politicians have particular expertise in the ways these rules affect their interests (compare the efforts of voters to understand the partisan consequences of various campaign-finance proposals). Many politicians and politically sophisticated journalists focus intense interest on such rules, but they remain relatively obscure to ordinary voters (consider partisan gerrymanders, or ballot-access restrictions whose effects, once in place, might be relatively invisible, especially to the extent they discourage new challenges from even arising). Like some carcinogenic agents, many of these political poisons also have long latency periods, which insulate those who enact them from causal responsibility.

The problem of political lockups is analogous to the problem of monopoly economic power: Incumbents do not have to change the existing rules of competition to remain in office as long as they possess the power to fend off challengers. Thus, differential expertise and intensity of interest, obscure and often remote effects, and vested interests in maintaining the political status quo suggest that we ought to pay greater attention to the capacity of political actors to capture democratic structures.

Others have offered critiques of self-serving manipulation of the rules of political engagement, most notably John Hart Ely, who defined a process-

271. *See* Ernst-Urich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 469 n.21 (1996) (defining monopoly rents and rent seeking).

272. For Professor Daniel Ortiz, these barriers allow for greater "agency costs," defined as "an increased ability to deviate from the representational role." Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653, 675 (1988).

273. For example, the extensive compilation of leading public choice materials in STEARNS, *supra* note 17, includes no sustained discussion of the electoral process itself.

reinforcing theory of judicial review.[274] Ely drew on an antitrust analogy to suggest that courts should intervene only when the political market "is systematically malfunctioning."[275] Ely's pioneering work took this insight one step further by tying the legitimacy of judicial review to the correction of systematic distortions of the political market:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in . . . and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.
>
> Obviously our elected representatives are the last persons we should trust with identification of either of these situations.[276]

Ely began with the *Carolene Products*[277] insight advocating judicial intervention on behalf of groups who could not compete within the political process, most notably "discrete and insular" minorities.[278] But Ely focused primarily on the civil libertarian concern with individual rights and minority group interests, rather than on the task of constructing the core structure of the political process itself.[279] Ely also focused on sociological and psychological reasons why some groups undervalue the interests of "others" and focused less on the struggle for the monopoly capture of state institutions.[280]

B. *Theorizing the Role of Political Parties*

Both the original constitutional Framers and the law-centered public choice critics inadequately address the role of political parties. We can

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274. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); *see also* Sally Dworak-Fisher, Note, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131 (1997) (arguing that white legislators' interest in retaining their seats hurts minority voting power); Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83, 154-60 (1997) (applying a process rather than outcome-based approach to defend term limits); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1702-03 (1993) (arguing for precommitment strategy in gerrymandering as process-based cure to incumbent self-dealing); Klarman, *supra* note 101 (emphasizing the problem of legislative entrenchment); Ortiz, *supra* note 272, at 681 (explaining how electoral roles designed to entrench incumbents can "damage the heart of the democratic process"); Kristen Silverberg, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 929-41 (1996) (arguing against judicial deference to incumbents' districting decisions).

275. ELY, *supra* note 274, at 102-03.

276. *Id.* at 103 (footnote omitted).

277. United States v. Carolene Products Co., 304 U.S. 144 (1938).

278. *Id.* at 152 n.4; ELY, *supra* note 274, at 75-77.

279. *See* ELY, *supra* note 274, at 135-79 (discussing how to facilitate the representation of minorities).

280. *See id.* at 153 (describing the virtues of his "psychological approach," which helps "ferret out" unconstitutional motives).

speculate on at least three reasons why applied public choice theory devotes so much attention to individual political actors and so little to the role political parties play in democratic institutional struggles. First, public choice theory, like the economics from which it derives, is strongly committed to the tenets of methodological individualism.[281] Public choice theorists fail to examine the interests, motivations, actions, and incentives of groups, such as political parties, because the behavior of groups must be reduced to that of the individuals that comprise them to be made both intelligible and capable of rigorous analysis.[282] Whereas Downs began his initial inquiry into political markets with a heavy emphasis on the role of parties,[283] subsequent work of leading public choice theorists such as Buchanan and Tullock shifted the inquiry decidedly to the level of the individual. Buchanan and Tullock characterized Downs as focusing too heavily on the "attempt of parties to maximize voters support [which] replaced the attempt of individuals to maximize utilities in the market process."[284] Rather, they directed the inquiry to "the behavior of the individual as he participates in a voting process and upon the results of various voting or decision-making rules."[285]

Second, since the influence and power of political parties in the United States has arguably declined recently, public choice theorists might find the study of parties less compelling.[286] Modern campaigns depend less on voters' party allegiance and more on American politicians acting as entrepreneurs in personality-based campaigns.[287] Finally, in order to manage their task of predicting and explaining political behavior, public choice scholars,

281. *See* GREEN & SHAPIRO, *supra* note 19, at 15 (explaining that the assumption that "commands widespread agreement among rational choice theorists . . . [is] that relevant maximizing agents are *individuals*").

282. *See, e.g.*, John Elster, *Introduction* to RATIONAL CHOICE 3 (John Elster ed., 1986); William H. Riker, *Political Science and Rational Choice*, *in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 171 (James E. Alt & Kenneth A. Shepsle eds., 1990); WILLIAM RIKER & PETER C. ORDESHOOK, INTRODUCTION TO POSITIVE POLITICAL THEORY 78-79 (1973).

283. *See* DOWNS, *supra* note 16, at chs. 2, 8, 9; *see also* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA (1995).

284. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 8 (1962).

285. *Id.* at 9.

286. For two of many works in political science that document the decline of parties from the peak of their influence in the late nineteenth century to today, see J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING 135-76 (Bernard Grofman & Chandler Davidson eds., 1992), and Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7 (1965).

287. *Cf.* Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 351 (describing how campaigns have changed from "party-centered, labor-intensive campaigns to candidate-centered, capital-intensive campaigns").

almost by necessity, construct theories within the constraints of existing electoral structures.[288]

But the context of analysis matters. In contests over the framework of political competition, none of these reasons justifies ignoring the dominant role of political parties. Individual candidates might often deviate from the party line when voting on substantive issues. But on political process issues, the incentives of candidates and their parties are frequently aligned. Indeed, in this context, individual candidates have less at stake than the party. For example, ballot access rules do not typically affect existing officeholders, but the two dominant parties have powerful incentives to manipulate ballot access rules to consolidate party control. Moreover, political process regulations change infrequently; because the parties are enduring entities, they have more at stake than individual officeholders.

In other contexts, the interests of individual politicians and the interests of their parties conflict. When legislatures redistrict a state, incumbents seek to maximize personal support within their own districts,[289] while parties seek to maximize the total number of districts with party majorities.[290] Even in an age of declining party power, a theory of appropriate political competition must consider the incentives both individual legislators and parties have to manipulate the background rules of the political market for partisan ends. While methodological individualists might resist considering the interests of "parties," rather than those of individuals, in many contexts incumbents have strong motivations to pursue partisan objectives.

C. *The Absence of Democracy from the Original Constitution*

The critique of the relative absence of political parties from public choice models suggests a more systemic inquiry into the role of partisan politics in a representative democracy. Modern scholars often view constitutions as constraints on majoritarian power in the service of rights or minority interests.[291] But constitutional ground rules also create relatively stable and nonnegotiable structures that enable political competition to emerge and endure.[292] As expressed by Jon Elster, "Unchanging rules facilitate the

288. *See, e.g.*, DOWNS, *supra* note 16, at 142-63 (describing rationality within the structure of coalition governments); RIKER, *supra* note 270, at 41-111 (comparing the different behavior of rational actors in majoritarian voting systems).

289. *See* CAIN, *supra* note 149, at 52 ("[B]ecause their careers are at stake, [legislators] quite naturally use whatever political means they can to ensure the adopted plan is favorable to them.").

290. *See id.* at 148 (describing how political parties might redistribute surplus votes in one district to create majorities in other districts).

291. *See, e.g.*, ELY, *supra* note 274, at 78-87 (describing the need for both explicit and implicit constitutional protections of minority rights).

292. *See, e.g.*, JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37-47 (1979) (discussing precommitment strategies); *see also* Thomas C. Schel-

change of majorities, without which democracy has little substance."[293] In this vein, our approach is to focus on the American Constitution as an enabling vehicle for the construction of an appropriate framework for democratic politics.

Paradoxically, however, the Constitution offers little textual or historical guidance on this framework. In part, this results from the great silences of the Constitution regarding the structure of electoral politics—a silence that often reflects America's peculiar federal structure, which delegated the power to define the ground rules of political competition to the states.[294] In fact, neither the original Constitution nor the Fourteenth Amendment secure even the basic right to vote.[295] The Constitution is silent on virtually all the important issues regarding elections, from the method to be used for casting ballots, to the electoral system for all public offices save the President and Senate, to issues of how elections are to be run and financed, to eligibility for voting, and so forth.

The failure of the Constitution to offer much specific guidance also reflects the premodern world of democratic practice and the long-since rejected assumptions of that world—a point that the Supreme Court and many commentators often neglect when they seek to define democracy from the Constitution itself.[296] Most importantly for present purposes, the constitutional structure was specifically intended to preclude the rise of political parties, which were considered the quintessential form of "faction."[297] Yet political

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ling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORG. 357 (1985). Other scholarly works apply precommitment theory to constitutions. *See* Jon Elster, *Intertemporal Choice and Political Thought*, *in* CHOICE OVER TIME 35 (George Loewenstein & Jon Elster eds., 1992); Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988); Klarman, *supra* note 101.

293. Elster, *supra* note 292, at 39.

294. *See* U.S. CONST. amend. X ("The Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

295. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 6, at 17-21 (discussing constitutional clauses affecting the right to vote).

296. For example, in *Storer v. Brown*, 415 U.S. 724 (1974), the Court upheld various California restrictions on ballot access because of a state interest in political stability. In support, the Court offered originalist justifications: "California apparently believes with the Founding Fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. *See The Federalist No. 10* (Madison)." *Id.* at 736. *The Federalist No. 10* is a particularly ironic place to seek support for entrenchment of the two-party system, given that Madison argued that political parties were anathema to healthy democratic politics. *See* note 23 *supra* and accompanying text. For the modern Court to equate political stability with the two-party system reveals its continuing failure to recognize how little insight the original constitutional design provides into modern problems.

297. For a classic study of shifting concepts of political representation in the eighteenth century, see J.R. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 530-31 (1966). As Pole puts it:

> [W]hen [Madison] discussed the problem of interests in the tenth number of *The Federalist*, he was occupied immediately with the problem of so dividing the government as to resist the

parties have become the principal organizational form for mass democracy, as more modern constitutions recognize explicitly.[298]

Similarly, the original Constitution reflected a particularly elite conception of democratic politics, in which, as the leading historian of the period puts it, "[T]he new federal government might restore some aspect of monarchy that had been lost in the Revolution."[299] But this more aristocratic conception of democracy was already being displaced by the 1790s and was supplanted as early as the Jacksonian era. The Framers who witnessed this phenomenon worried that democracy had fallen "into the hands of the young and ignorant and needy part of the community."[300] This transformation in the conception of democracy eventually culminated in structural changes to the Constitution, such as the Seventeenth Amendment's shift to direct senatorial elections,[301] and the various franchise-expanding amendments. But these changes are layered onto a document and set of institutional structures that reflect the premodern vision of democratic politics.[302]

> formation of political parties. . . . Madison anticipated the division of the country into conflicting and competing economic interests . . . . The political organisation of these interests he called factions, a disparaging name for parties—but he hoped that parties would merely come and go as their temporary objects dictated. By an irony which he cannot have either anticipated or enjoyed, Madison himself soon became one of the leading agents in the process by which interests were consolidated into parties . . . .

Id.

298. *See, e.g.*, SCHATTSCHNEIDER, *supra* note 148, at 1 ("[P]olitical parties created democracy, and . . . democracy is unthinkable save in terms of parties."); Morris P. Fiorina, *The Decline of Collective Responsibility in American Politics*, 109 DAEDALUS 25, 26 (1980) ("The only way collective responsibility has even existed, and can exist given our institutions, is through the agency of the political party.").

299. GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 255 (1992) (discussing Madison's constitutional vision). As Wood elaborates: "With 'the purest and noblest characters' of the society in power, Madison expected the new national government to play the same suprapolitical neutral role that the British king had been supposed to play in the empire." *Id.* Bernard Manin argues that the debate between Federalists and Antifederalists focused on how aristocratic political leadership should be, or whether it should mirror the electorate. *See* BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 121 (1997) ("The Federalists, however, all agreed that representatives should not be like their constituents. Whether the difference was expressed in terms of wisdom, virtue, talents, or sheer wealth and property, they all expected and wished the elected to stand higher than those who elected them.").

300. WOOD, *supra* note 299, at 366 (quoting Benjamin Rush). Wood comments that the Framers "found it difficult to accept the democratic fact that their fate now rested on the opinions and votes of small-souled and largely unreflective ordinary people." *Id.* at 367; *see also* POLE, *supra* note 297, at 165 (discussing changing definitions of appropriate campaign practices).

301. For a critical history of the Seventeenth Amendment, see C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY (1995); for an exploration of the effects that direct elections had on constitutional doctrine, see Vikram Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347 (1996).

302. Modern conceptions of democratic politics that emerged in the early nineteenth century are fundamentally at odds with the conception of democracy that underlay the original Constitution and Bill of Rights. *See, e.g.*, WOOD, *supra* note 299, at 256-59.

In addition to the changing conception of parties, the act of voting quickly changed its social meaning and significance from the Framers' original vision. Initially, the open ballot played the role of ratifying social and political hierarchies: "[L]eaders still assumed political office as their right and instructed the people as their duty."[303] Elections focused on personal qualities, not political issues: In the elections to the Virginia ratifying convention, many districts elected their two leading candidates—even though they held opposite opinions on whether the Constitution should be embraced.[304] By the early nineteenth century though, the open ballot had come to symbolize citizens' political equality and independent sovereignty.[305]

With respect to democratic politics, then, the American Constitution is a curious amalgam of textual silences, archaic assumptions, and a small number of narrow, franchise-focused amendments that reflect more modern conceptions of politics. Particularly in the arena of democratic institutional design, the American Constitution reveals its age. More modern constitutions devote considerable space to the institutional framework for politics and tend to reflect the structures now associated with democracy, such as political

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303. ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY 29 (1995); *see also* DON HERZOG, HAPPY SLAVES 197-98 (1989) (distinguishing voting as a genuine collective choice from voting as "a ritual of acclamation, a public act that recognizes (and reconstitutes) the superior status of the candidate"). For a discussion of evolving voting concepts in England, see MARK KISHLANSKY, PARLIAMENTARY SELECTION: SOCIAL AND POLITICAL CHOICE IN EARLY MODERN ENGLAND 225-30 (1986). Kishlansky argues that the meaning and significance of voting shifted in England from "selection" or ratification to "election" roughly around 1640, and, even after the civil war, the late seventeenth century saw a return and even consolidation in elections of gentry and aristocracy. *See id.* For a similar view of the role of deference in English elections in the eighteenth century, see MANIN, *supra* note 299, at 95-96. Manin writes:

> [Before the English civil war, r]eturning a Member was a way of honoring the 'natural leader' of the local community. Elections were seldom contested. It was seen as an affront to the man or to the family of the man who customarily held the seat for another person to compete for that honor. Electoral contests were then feared, and avoided as much as possible. . . . This distinctive feature of British political culture later came to be termed 'deference.' The term was coined by Walter Bagehot in the late nineteenth century, but the phenomenon to which it referred had long been typical of English social and political life.

Id. (footnote omitted).

304. Pole concludes that in Revolution-era society "[i]ssues seldom entered elections, and even when they did it was often agreed that the natural leaders were the best men to entrust with the decisions." POLE, *supra* note 297, at 151.

305. *See* WIEBE, *supra* note 303, at 29-30. Wood argues that, within one generation following the Constitution's formation, the original views on these practices had changed dramatically:

> In the generation following the formation of the Constitution, the Anti-Federalist conception of actual or interest representation in government— the William Findley conception of representation—came to dominate the realities, if not the rhetoric, of American political life. . . . Elected officials were to bring the partial, local interests of the society, and sometimes even their own interests, right into the workings of government. Partisanship and parties became legitimate activities in politics. And all adult white males . . . were to have the right to vote. By 1825, every state but Rhode Island, Virginia, and Louisiana had achieved universal white manhood suffrage.

WOOD, *supra* note 299, at 294.

parties.[306] As we have explained, the German Constitution explicitly establishes competitive political structures absent from the American Constitution.[307] The German Constitution, according to its Court, has "raised [political parties] to the rank of constitutional institutions" and defines parties as "constitutionally integral units of a free and democratic system of government."[308]

The contrast between the American Constitution and its more modern counterparts reveals how much of our constitutional law must be judicially created. In the last thirty years, the Supreme Court has seemed willing to assume this role: The Court has defined voting as a fundamental right,[309] has found that political equality requires one person, one vote,[310] despite longstanding historical practice to the contrary, and has generated and created recent constitutional constraints on political and racial gerrymandering.[311] But in our view, the Supreme Court's efforts to fill the gaps of the American Constitution's framework for democratic politics have remained tentative and uncertain, and its conception of an appropriately competitive democratic system has remained unsophisticated and underdeveloped.

CONCLUSION

Our aim is to read into the Constitution an indispensable commitment to the preservation of an appropriately competitive political order. We do not seek to justify that reading here, but simply assume its legitimacy and focus on beginning to sketch out a normative structure for what such a commitment might mean substantively. In beginning to develop a functional account of anticompetitive regulation of political markets, we find that public choice theory offers a useful starting point—although the theory as absorbed in the legal literature remains insufficiently attentive to partisan, as opposed to personal, motivations. Despite the many limitations of public choice approaches, we agree with Jerry Mashaw that "[t]he important question . . . is whether the public choice approach can assist in institutional design."[312] In

306. *See* G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE 54-73 (1982) (discussing modern constitutions' attention to political structure).

307. *See* text accompanying notes 244-268 *supra*.

308. KOMMERS, *supra* note 189, at 201, 209.

309. *See, e.g.*, *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 670 (1966) (stating that "the right to vote is too precious, too fundamental to be . . . burdened [by] or conditioned" on payment of a poll tax); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society.").

310. *See, e.g.*, *Reynolds*, 377 U.S. at 557-58 (citing Gray v. Sanders, 372 U.S. 368, 381 (1963), which first uses the "one person, one vote" language).

311. *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 657 (1993); Davis v. Bandemer, 478 U.S. 109, 143 (1986).

312. JERRY L. MASHAW, GREED, CHAOS & CORPORATE GOVERNANCE 200 (1997).

the context of ensuring competitive politics, we believe that it can. At times, this perspective will argue for a more aggressive judicial role than the Court currently plays. But this article is not a plea for more activist constitutionalism across the board. For we also believe that courts have often approached issues involving democratic politics in either formalistic or rights-oriented terms, failing to inquire instead whether an appropriate market in political competition exists. Where such markets exist, we argue that little further judicial oversight is required. Nor is our theoretical focus limited to courts or constitutional law. Legislative policies are sometimes misguided, or misapplied by courts in their roles as statutory interpreters, because the relevant issues are not understood against an appropriate background conception of well-functioning competitive markets in partisan politics. Thus, we also suggest that such a conception can provide necessary critical insight into policies like that of the Voting Rights Act, both as originally adopted in 1965 and as dramatically amended in 1982.

Our main objection, however, continues to be to the stagnant discourse of individual rights and competing state interests. In our perspective, the crucial issues are not so much ones of individual rights of participation as ones of the preservation of the robustly competitive partisan environment. The threat to political markets is most direct and palpable when insiders control the instrumentalities of the state to raise barriers to competition. Thus, the Court's focus on individual rights both misidentifies the structural concerns over functioning political markets and the source of that monopolistic and oligopolistic threat. Our objective is to refocus attention on the partisan markets for political control and thereby to provide an organizing principle for structuring legal oversight over democratic politics.