The Legal Status of Political Parties: A Reassessment of Competing Paradigms

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> [T]hough politicians may know something about the law, it is completely unnecessary for a lawyer to know anything about politics. The lawyers as formulators of a philosophy of government have contributed little to the theory of parties because they have a blind spot in the region of the parties. This has been especially true because the lawyers have always been extremely skillful in excluding from the evidence all facts that have seemed irrelevant to the closed theoretical system of the law.[1]

Since E.E. Schattschneider wrote those words, both the caselaw and legal scholarship on regulation of politics have erected a subdiscipline in American law.[2] During the last fifty years, courts (with some assistance from Congress) have become forums for political disputes previously dismissed as mere political questions or as something generally beyond the province of the judiciary. The caselaw on patronage, ballot access, voting rights, racial and political gerrymandering, and campaign finance is largely an innovation of the second half of this century.[3] Despite the innovation, however, the subject of political parties and their relation to the law continues to baffle judges, lawyers and scholars writing in this area.

In part, the difficulty may be due to the ill-fitted and limited array of tools in the legal

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[1] E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 12 (1942).

[2] Two casebooks, for example, now deal exclusively with issues of political law: DANIEL HAYS LOWENSTEIN, ELECTION LAW: CASES AND MATERIALS (1995); SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (1998). *See generally* Symposium, *Election Law As its Own Field of Study*, 32 LOYOLA L. REV. 1095-1272 (1999).

[3] There are, of course, a few earlier cases, such as the *White Primary Cases* where courts dabbled in this area, but finding more than a few Supreme Court cases in this area of the law before 1950 presents a challenge.

scholar or judge's analytical toolbox. These cases, after all, come in two contexts—either in a dispute over statutory interpretation[4] or one where an individual or group challenges a law or other governmental action as violating a provision of the Constitution. The Constitutional cases are also quite limited to (1) disputes centered on First Amendment rights of association and speech[5] (or as incorporated through the Due Process Clause of Fourteenth Amendment) or (2) governmental action that treats individuals differently or burdens fundamental interests such as the right to vote and thus violates Equal Protection.[6]

The judicial mechanics for Constitutional cases involving political parties generally involve four familiar steps. First, characterize the parties: Who is the state actor and whose rights were violated? In some cases the party is the state actor violating the rights of a citizen; in others, the state violates the rights of an individual or a party as a free association of individuals.) Second, define the rights claim: How severe was the deprivation of the private actor's rights? Third, characterize the state interest: Is it sufficiently weighty to justify the restraint on the non-state actor's rights? And then depending on the outcome of steps two and three, decide whether the means the state chose were appropriately tailored (i.e., narrowly or rationally related) to the ends it was trying to achieve.[7]

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[4] *See, e.g.*, Morse v. Republican Party, 517 U.S. 186 (1996) (interpreting Section 5 of the VRA to apply to party primaries).

[5] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (upholding Minnesota law banning fusion candidacies); Eu v. San Francisco County Democratic Committee, 489 U.S. 214 (1989) (striking down California law preventing parties from endorsing candidates in primaries); Elrod v. Burns, 427 U.S. 347 (1976) (establishing First Amendment bar to patronage-based dismissals for low level employees).

[6] *See, e.g.*, Nixon v. Herndon, 273 U.S. 536 (1927) (striking down Texas law that prevented blacks from participating in the Democratic Party primary); Williams v. Rhodes, 393 U.S. 23 (1968) (striking down restrictive ballot access law as denying minor parties Equal Protection of the laws).

[7] *See, e.g.*, Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 213-14 (1986) (Court must "weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule" considering "the extent to which those interests make it necessary to burden the plaintiff's rights."); Timmons, 117 S. Ct. at 1369 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a

Simple mechanics but, as we read the caselaw, unforeseeable results. Something else is at work here. We think it has to do with the worldview that judges and lawyers bring to these cases, and particularly their differing philosophies as to the function political parties play in American democracy.[8] With this article, we hope to explain the varying schools of thought in the caselaw and scholarship on the legal status of political parties. Our principal argument is that each school of thought arises from a set of assumptions and normative positions with respect to the proper role of political parties in American politics. After describing in Part I the nature of the problem of characterizing the legal status of political parties, Part II isolates and critiques five schools of thought: the Managerial, Progressive, Political Markets, Libertarian, and Pluralist. Having rejected any one of these paradigms as achieving desirable results in all cases, in Part III we propose some middle range principles that might guide the Court in deciding two specific types of political regulation cases: ballot access cases and regulation of party nominating procedures.

I. THE NATURE OF THE PROBLEM

The crux of the problem political parties pose for lawyers and judges derives from parties' uncertain constitutional and legal status. Are they state actors and therefore subject to

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State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.") (internal quotation marks and citations omitted).

[8] For example, the Constitution is thoroughly unhelpful in determining what right a restrictive ballot access requirement infringes. First Amendment rights of speech and association? Equal Protection? Any answer would require us to depart from the Constitutional text to arrive at a more intuitive principle: that "excessive" restrictions violate some innate quality of democracy the Constitution ought to protect. *See infra* at __. Similarly, for state laws that regulate party nomination methods or restrict fusion candidacies, do they really impinge on rights of association, as the opinions suggest? Regardless of such laws, party members can gather together and perform the normal functions of associations. Nevertheless, judges try to hang on this First Amendment hook an intuitive proposition we all feel: Such regulations of the primary or general election ballot affect a party's message to the

constitutional restraints imposed by the Bill of Rights and Fourteenth Amendment, for instance, or are they private associations, similar to churches and bowling clubs, that can use the Constitution as a shield against state power?[9] A substantial amount of the caselaw in this area rests on whether judges switch on the state actor toggle. For if parties are state actors, then they have no right to condition membership on the basis of race or other protected characteristics,[10] they cannot raise associational rights claims when the state regulates how they select their members or leaders, and perhaps they would not even have standing to sue the government (or the same level of government, depending on whether we are talking about state or federal parties[11]) for any imposition whatsoever. As most recognize, this sticky state actor question is probably best answered by some categorization of parties as state actor hybrids or as we suggest later, by the familiar law review refrain, "it depends."

An interrelated, but uniformly overlooked, question concerns whether there might be several, perhaps conflicting, dimensions to political parties that have different legal properties about them. In a foundational work of political science[12] rarely cited by lawyers,[13] V.O. Key disaggregated the simple description of "party" into three components: the party-in-the-government,[14] professional political workers,[15] and the party-in-the-electorate.[16] Scholars

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voters, and if excessive should be struck down.

[9] *But see* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (expressing dismay over the Supreme Court's preoccupation with the state actor question).

[10] *See* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 321 U.S. 649 (1944) (hereinafter the *White Primary Cases*).

[11] *See* Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981) (upholding Democratic national Committee's decision not to seat delegates elected under Wisconsin's open primary rules).

[12] *See* V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 163-65 (5th ed. 1964).

[13] Two exceptions in the legal literature are Richard Hasen, *Entrenching the Duopoly*, 1997 SUP. CT. REV. 331, 350; Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1757 (1993).

[14] For Key, this slice of the party included the President and representatives from his party in the legislative branch and executive departments. Here we use it to apply to all elected officials with a given party label. KEY, *supra* note __, at 164.

writing in this area throw around the word "party" as if it had a consistent meaning across a range of legal terrain.[17] This carelessness actually reveals while it obscures. We spend a large part of this article arguing that certain legal decisions follow from one's conception of "party" and preferred hierarchy of power within the party.[18] In other words, one who prefers party organizations as the prime locus of power in the party system will come out differently, for example, on the topic of state regulation of party primaries than one who believes the power should be concentrated in the party in the government or electorate.[19]

In addition to preferring a certain power hierarchy within the party, each paradigm we describe in the next Part has a distinct view of the role parties should play in American politics, how the state should regulate the party system, and an ideal number of political parties. (We set out the main components of the paradigms in Table 1.) Of course, although we have set out each of these paradigms as distinct, individual Justices or scholars may gravitate toward different paradigms in different legal contexts. Often, judges will even shift paradigms in a given case or will coalesce with adherents of other paradigms on an identical result in a given case. Our task here is merely to characterize the worldviews that compete for judicial and scholarly attention in disputes involving political parties. By laying bare their empirical assumptions and implicit normative positions, we hope to find some coherence in what is one of the most complicated and

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[15] This referred to the party's national and state committees and all the people who worked for the party organization at any level. *Id.*

[16] Quite simply, this refers to the rest of us who identify with a party, namely voters whose main form of party work is voting in primaries and general elections. *Id.*

[17] While not citing Key, the Court has on a few occasions has made passing reference to this multidimensionality of political parties. *See* Elrod v. Burns, 427 U.S. 347, 361 (1976) ("[C]are must be taken not to confuse the interest of partisan organizations with governmental interests."); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214, 230 (1989) ("A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials.").

[18] *See generally*, Lowenstein, *Associational Rights*, *supra* note __ (describing much of the Supreme Court's jurisprudence in this area as dealing with intraparty disputes).

[19] *See* text accompanying notes __ - __ *infra*.

ad hoc areas in the legal regulation of politics. We conclude by proposing some middle range principles on topics of ballot access and regulation of party nomination processes that we think follow from the strongest aspects of the paradigms.

II. LEGAL PARADIGMS OF POLITICAL PARTIES

A. *Managerial*

What we call the managerial paradigm, for lack of a better term, has its roots in the approach that dominated the Supreme Court's jurisprudence at least until the *White Primary Cases* and probably through the 1950s. That approach treated controversies involving political parties as something akin to political questions, states had near plenary authority to regulate political parties, and judges were loathe to use the Constitution to interfere with political parties' internal structures or autonomous decisions. In its current incarnation, the paradigm's influence appears in cases where judges recoil once the state asserts interests in preserving electoral stability or maintaining the two party system—interests that always seem to dwarf the associational or other rights advanced by the plaintiffs.[20]

Drawing on the fears of faction so central to the Constitution's creation, the Manager enforces a worldview on the party and electoral system that has as its primary goal the preservation of political order. That order finds its purest expression in the maintenance of the traditional two-party system, in general, and perhaps, in the preservation of the Republican and Democratic Parties, in particular. Managers place their faith in the democratic process "to work

[20] *See, e.g.*, Timmons, 117 S. Ct. at 1374 ("The Constitution permits the Minnesota legislature to decide that political stability is served through a healthy two-party system."); Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) ("The stabilizing effects of such a [two-party] system are obvious"); Davis v. Bandemer, 478 U.S. 109, 144-45 (1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective

things out" and assume that all important interests can find expression through one of the two major parties. The party system is, for the Manager, the state's tool for channeling political participation, and the judiciary is generally seen as ill suited and institutionally incapable of intervening to disrupt the self-regulation of the political branches. Managers accord little importance to a political party's "freedom to associate" since the party system is largely a state instrumentality. Given their lack of fear of political manipulation of the government for partisan ends, the Managers, according to Key's tripartite design, see the party in the government as the preferred location of power in the party system. The party *is* the government for the Manager. And the professional party organization represents, at most, a private arm of a public institution while the party in the electorate is irrelevant.

To their credit, the Managers appreciate a fundamental problem posed by majoritarian electoral systems, such as the first-past-the-post districting structures employed in nearly all legislative elections in the United States. When more than two parties or candidates appear on the ballot, there always exists the risk that a candidate or party will govern with a mandate of less than 50% of the electorate.[21] When voters are faced with at least three choices, there is the perpetual risk that a plurality, rather than a majority, will rule.[22]

When the familiar liberal arguments are waged against the managerial paradigm—

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government").); .

[21] It should be noted, that such is often the case in Presidential elections. Of the last five elections, the winner garnered a majority of the electorate in only two elections, 1984 and 1988.

[22] "Why not hold a run-off between the two highest vote-getters?" a critic of the Managerial approach might ask. The answer is that there is no guarantee that either of the two highest vote-getters would actually defeat the third candidate in a head to head contest. A majority of the electorate might prefer party A over B, while a differently constituted majority from the same electorate will prefer B over C and another, C over A. In fact, as Kenneth Arrow ably demonstrated in his Nobel Prize winning work, there is no value-neutral means of determining an electorate's most preferred outcome between more than two alternatives. *See* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 92-96 (2nd ed. 1963). This so-called "cycling" problem is well explored in the public choice literature and need not occupy us now. Suffice it to say that there is something magical about the number two when it comes to electoral choice – as between two alternatives, at least you can tell which choice is the most preferred

namely, that it stifles competition, entrenches an ideologically homogenous duopoly, stultifies political discourse by silencing voices that should be heard, and leads to underrepresentation of the range of political interests held by a diverse electorate[23]—the advocate for the two party system cites tradition, stability, and the guarantee of a governing coalition.[24] However, even the most ardent defenders of single member, simple plurality rules must concede that they do not *guarantee* a majority winner, and that plurality winners, because of their uncertain mandate, enjoy a shallower legitimacy, undercutting the government's authority to speak for the majority. Managers, therefore, might conclude that the state and the courts have a duty to prevent the siphoning of votes into third parties. By keeping entry costs relatively high, managers might want to discourage frivolous third party efforts and to channel voters into more realistic choices and avoid mere plurality winners. To the degree that the two-party duopoly can be maintained as purely as possible, it increases the likelihood that the plurality winner will also enjoy the formal consent of the majority.

While there is something to be said for the managerial paradigm, especially for its insight that parties serve important functions for and derive valuable resources from the state, its major weaknesses lie in its reification of the state and deceptively simple treatment of party. The state is not simply a unitary actor devoid of party influence, and the party itself, as we stated earlier, is actually composed of three parts. In essence, the state is often controlled by one of the parties for at least some discrete period of time. More accurately, we should say that the state is at that point controlled by the elected official component of one dominant party. Giving the state total authority to set the rules of party organization really amounts in many circumstances to giving

[23] *See generally* Hasen, *supra* note __, at __.
[24] There are other, better arguments in favor of a two party system that we save until the end of this article. We do not find them expressed however by advocates of the managerial paradigm.

the elected officials of one party the right to set the rules for other parties as well as for their own.

This leads to several problematic consequences. First, it potentially favors the elected official party component over the non-elected parts of the parties, turning the parties into service instruments for incumbent office-holders and candidates and depriving activists of playing any meaningful role in brokering interests and formulating policies. Second, it creates the possibility that governing party office-holders might try to prevent competitor parties from organizing themselves in the most effective manner possible. For instance, a plausible interpretation of *Tashjian v. Republican Party of Connecticut*[25] was that Democratic office-holders in Connecticut were threatened by the possibility that Republicans would develop better ties with independent voters if they were allowed to open up their primary elections to them. The Democrats then tried to use their control of the legislature to prevent the Republicans from pursuing that electoral strategy. Because party rules can determine party message and party prospects, it is an important power to give to the "state," especially with no check against abuse. If parties have no right to self-determination, then we cannot be sure that the rules they operate under are the ones they would have chosen themselves. Nor for that matter can we be sure that the party is able to compete as effectively as it might otherwise with the message that it wanted to adopt. Had the Connecticut Republicans opened their primaries to independents, they would have likely had to broaden and moderate their appeals. Not being allowed to do so likely had the opposite effects on their appeals to voters.

In short, the problem with the managerial perspective is that it cannot effectively check the possible "tyranny" of the party as elected officials. It overlooks the fact that the party as

[25] 479 U.S. 208 (1986).

elected officials controls the state, and hence, that actions the state takes can be manipulated to serve the interests of either elected officials generally or elected officials of the governing party specifically.

B. *The Libertarian Paradigm*

Libertarians take the direct opposite view to that of the Managers regarding the electoral and party system. Far from instruments to serve the state, parties are merely a species of private, organized interest groups, which should thus be accorded maximal rights of association, privacy, expression, and freedom from state discrimination. Parties' public role and power are, like corporations' or religious institutions', merely incidental effects of their private operations, and in any event, not the proper subject of state regulation.[26]

For the Libertarian, the electoral and party systems should be as separate as possible. More specifically, parties should not receive any state benefits (e.g., public financing of party primaries) or be subject to state regulation (e.g., state law requiring parties to conduct primaries as the means of selecting general election candidates). Therefore, any regulation of primaries or a party's internal processes could only be justified, if at all, by a truly compelling state interest—a test that almost all such regulations would fail.

While Libertarians view parties as merely one type of interest group, they see elections as serving several different ends. Elections are, of course, the means of choosing leadership for the

[26] *See* Rosario v. Rockefeller, 410 U.S. 752 (1973) (Powell, J., dissenting) ("Self expression through the public ballot equally with one's peers is the essence of a democratic society.); Colorado Republican Federal Campaign Comm. V. Federal Election Comm., 116 S. Ct. 2309, 2316 (1996) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); Tashjian, 479 U.S. at 224 (The Constitution protects a party's

government, but for the Libertarian, they also serve additional functions: They provide an outlet for protest against or influence of the governing party or parties, they embody a citizen's right to have her viewpoint counted equally to that of other citizens, and perhaps, they also provide the means toward a periodic reaffirmation of the social contract between citizens and their government.[27] The polling booth is, for the Libertarian, a public forum where dissent must be tolerated and regulation of "speech" (in this case, the expression entailed in deciding whether to vote or not, coupled with the expression of a preference through casting of ballots) is nearly always contrary to the First Amendment.[28] The judiciary performs an important and active role in enforcing those rights, as the political branches cannot be trusted to rein in their own power. Thus, ballot regulations that limit the choices available to voters (either through difficult signature requirements[29] or the absence of a write-in voting option,[30] for example) are viewed as limiting core political speech. And surely, any measure that presents differential obstacles for the two established parties and minor parties (i.e., makes it more difficult for a third party to form or poses different requirements for ballot access by new parties) is seen as content-based state action that favors certain speech over others.

Naturally, then, the Libertarian tends to view more parties as preferable to two or a few. Although, by considering elections as forums for expression, she concentrates less on the multi-party result of an election than on the opportunity the system provides for that result.[31]

"determination . . . of the structure which best allows it to pursue its goals").

[27] *See generally* Adam Winkler, *Expressive Voting*, 68 NYU L. REV. 330 (1993).

[28] *See id*.; David Perney, *The Dimensions of the Right to Vote: The Write-in Vote, Donald Duck, and Voting Booth Speech Written Off*, 58 MO. L. REV. 945 (1993).

[29] *See* Williams v. Rhodes, 393 U.S. 23 (1968).

[30] *See* Dixon v. Maryland State Administrative Board of Election Laws, 878 F. 2d 776 (4th Cir. 1989); Paul v. Indiana Election Board, 743 F. Supp. 616 (S.D. Ind. 1990); *but see* Burdick v. Takushi, 504 U.S. 428 (1992).

[31] In addition, to the degree that Libertarians distrust government in general (i.e., the classical liberal fear of governmental domination of the private sphere) and generally prefer systems that cripple the government's ability to pass legislation, etc., they might see in multipartyism the promise that no one party might be able to take its winning

Libertarians would also appear to place power primarily in the professional party organizations, since their conception of party is so fundamentally intertwined with a strong conception of First Amendment freedom of association.[32] Fearing cooptation of governmental power for partisan ends, Libertarians would also seek to hobble the party in government as much as possible. To that end, they would encourage judges to use every tool in their arsenal (the First Amendment, Substantive Due Process, Equal Protection) to protect parties' rights to associate and preserve individuals' rights to express their electoral preferences for any party they choose.

The advantage of the Libertarian paradigm is that it provides a counterweight to the claim that parties are a mere state instrumentality. It reminds us that parties can originate among the voters and groups in the polity. Maurice Duverger, for instance, distinguishes between parties that originated as legislative factions (e.g., the Liberal and Conservative Parties in the UK) and parties that emerged as the political arms of external organizations (e.g., the Labor Party in the UK or the Christian Democratic Party in Italy).[33] Not only might the origins of parties differ, but parties might also differ in the degree to which they operate as state instruments. The Democratic and Republican parties enjoy far more state resources than most minor parties by virtue of the fact that they hold office and have access to the legislative resources entailed therein. The major parties plausibly serve a central function in a two-party duopoly by giving

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in any given election for granted and the prospect that a more frequent cleansing of the system (i.e., throwing the bums out) would be possible. The empirical foundations for such beliefs are, to say the least, unproven. European multiparty systems, for example, do not tend to experience greater or more frequents shifts in governmental control. *See* G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE (1982).

[32] Although what we have said thus far about Libertarians is not intended to refer to the minor political party of the same name, we note that the Libertarian Party of California is the only party in that state to require pledges of allegiance from its members. To the degree that the Libertarian Party embraces the philosophy we have elucidated here, this datum offers some support for the notion that professional party organizations are the Libertarian's preferred repository for power ion the party system.

[33] *See* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE __ (Barbara & Robert North trans., Methuen 1954).

choices to voters and forcing exaggerated majorities, but one can hardly say the same of the American Independence Party, Libertarians or the Greens. They receive little from the state and do not perform central functions for the state (although we will argue later that they have a role in making major parties more responsive). What justifies minor party regulation by the state?

However, like the Managerial paradigm, the Libertarian paradigm overlooks the heterogeneity of political parties. Since some parties do act as instruments of the state and since the two party duopoly forces voters into a limited number of choices, a democracy cannot ignore the anti-democratic actions of major parties. If, as in the White Primary Cases, whole blocs of voters are excluded from participation on the basis of race, ethnicity or some other attribute, then they can be effectively cut out of meaningful participation, particularly in noncompetitive, one party dominant situations.[34] On the other hand, we might care less if a minor party that takes no resources from the state and has no role in government organizes itself in anti-democratic ways. The state interest in regulating such minor parties is much less than the major parties, and in a balancing framework that weighs interests against rights, this would argue for cutting the minor parties much more slack in their internal affairs. The point here is only that just as the Managers go too far in the state interest direction, the Libertarian paradigm goes too far in the party rights direction, neglecting the heterogeneity of parties and the legitimate state interests that arise in matters where basic voting rights are effectively denied. If the danger of the first paradigm can be called the "tyranny of the party as elected officials," then the corresponding problem raised by the Libertarian approach is the "tyranny of the party as organization."

C. *The Progressive Paradigm*

[34] *See* Issacharoff & Pildes, *supra* note __, at 652-60.

Emerging at the beginning of this century in response to what was seen as the corrupting influences of party machines on American politics, the Progressive Movement viewed parties, at least in their Americanized form,[35] as an impediment to democracy.[36] This generalized hostility to parties was part of a larger program of institutional reform, of course, that included direct democracy, direct election of senators, direct primaries, women's suffrage, and an enhanced non-partisan civil service.[37] The target of Progressive ire was the party machine, accused of excessive patronage, graft, and wasteful spending, extortion and intimidation, rigging elections, and a host of other unseemly acts.[38] Parties impeded democracy, it was thought, by turning elections into sham competitions while the true kingmakers decided the winner behind closed doors in the prototypical smoke-filled room.

Today, reformers in the Progressive tradition have found new avenues for expression of their hostility to parties. Most recently, in California, for example, a set of politicians and political scientists proposed to the voters that party primaries should be "opened up" so that any voter, regardless of affiliation, could vote in any primary for any office.[39] Proponents of this "blanket primary" initiative, which more than 60% of all voters and comfortable majorities in each party supported, justified the measure as a remedy for particular problems posed by so-

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[35] Many Progressives, such as Woodrow Wilson, favored centralized parliamentary style parties as they existed in Europe. *See* WOODROW WILSON, CONGRESSIONAL GOVERNMENT (1885); Bruce E. Cain & Nathaniel Persily, *Creating an Accountable Legislature: The Parliamentary Option for California Government*, *in* CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce E. Cain & Roger G. Noll eds. 1995).

[36] *See generally* Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL. REV. 21-30 (1997).

[37] *See id.*; KEY, *supra* note __, at 393.

[38] *See* LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 170 (1986); RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE 1893-1910 (1981); AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 17-18, 80-81, 119-21 (1976).

[39] *See* California Democratic Party v. Jones, 984 F. Supp. 1288 (1997).

called "closed primaries," where only party members chose candidates for the general election. The initiative's proponents argued that the blanket primary would produce more centrist (i.e., less partisan) candidates because primary winners would be closer to the median voter in the electorate, rather than the median voter in the party.[40]

For these modern-day Progressives, parties remain obstructive forces for the realization of the general will of the electorate.[41] Progressives therefore tend to favor state regulations that vitiate party autonomy or freedom of association and make parties less relevant for electoral purposes. Thus, the party in the electorate remains the preferred power center for the Progressive with party organizations at the bottom of the pecking order according to Key's taxonomy. Seeking to make parties an irrelevancy, Progressives tend not to concentrate on the issue of new or minor parties. (Indeed, the blanket primary portends the worst effects for smaller parties whose low turnout primary elections may now be swamped with Democratic and Republican voters.[42]) If anything, Progressives' preferred number of parties is zero. For similar reasons, they see the state's interest in the party system as ensuring that party factions or machines do not capture official governmental institutions. Consequently, judges should stay out when confronted with legal regulations that trespass on party autonomy or limit their power. But Progressive judges should assert themselves when parties seek to entrench themselves through manipulation of the rules of the game or the use of state machinery to bias elections in their favor.

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[40] *Id.* There is, incidentally, no empirical support for this argument, and in any event the court adjudicating the blanket primary case found it irrelevant to the constitutional issue presented to it.

[41] *See* Davis v. Bandemer, 478 U.S. 109, 177 (1986) (Powell, J., concurring and dissenting) ("There is no evidence that the public interest in a fair electoral process was given any consideration [by architects of a political gerrymander]."); O'Hare Truck Service v. City of Northlake, 116 S. Ct. 2353, 2356 (1996) ("Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or association.").

[42] *See* text accompany notes __ - __ *infra*.

The real problem from our perspective with the Progressive paradigm is that it does not recognize the essential role that parties play in brokering group interests and solving voters' collective action problems. We outline a pluralist conception of political parties in greater detail later in the paper, but suffice it to say for now that a polity without parties places a greater cognitive burden on individual voters and weakens the collective responsibility of political agents.

On the first point, parties provide voters with an important heuristic that organizes and lessens the expense of information about candidates and policies.[43] Even in the era of weakened parties, party identification remains the most valuable predictor of what a voter will do in the polling booth.[44] Knowing that a candidate is running under a certain party label allows the voter to make reasonable predictions about what that candidate stands for and what he or she will do in office. Moreover, by tying candidates to teams that collectively pursue election goals and policy-making, political parties create a collective responsibility for actions in office that allows voters to reward or punish the policies and conditions that they observe more effectively. In the absence of parties, individual candidates would more easily distance themselves from actions the government takes or claim credit for things that they did not help to produce.

Parties also serve the legislative function of lowering the costs of cooperation among legislators. In a system as decentralized as the United States, parties are one of the few coordinating forces that make positive action possible. Courts that translate the Progressives' animosity towards parties into judicial decisions exacerbate the more atomistic and

[43] At times, the Court has recognized this function. *See Tashjian*, 479 U.S. at 220 ("To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise.").

[44] *See* WARREN E. MILLER & J. MERRILL SHANKS, THE NEW AMERICAN VOTER 283-326 (1996); BRUCE E. KEITH

fractionalizing forces in the American political system.

D. *Political Markets*

Attempting to bring the virtues of law and economics and public choice analysis to the field of election law, adherents to the political markets paradigm fault the Managers and Libertarians for the limited usefulness of their conceptual tools for deciding political regulation cases.[45] By forcing such controversies into the rigid model of "individual rights versus state interests," they argue, judges and scholars inevitably fail to address the chief danger lurking in the background of these cases: namely, the risk posed by partisan manipulation of the rules of the game to secure permanent political advantage.[46] Therefore, to resolve cases of ballot access, campaign finance, and regulation of primaries, for example, judges should "discern which regulations of politics are anticompetitive and lock up democratic competition in impermissible ways."[47] Whether one analogizes the judicial role to that of a trustbuster or watchdog for political lock-ups,[48] the end result is the same: Judges ought to use the Constitution to break down barriers to competition.[49]

ET AL., THE MYTH OF THE INDEPENDENT VOTER (1992).

[45] *See* Issacharoff & Pildes, *supra* note __.

[46] *See id.* at 644-52.

[47] *Id.* at 680.

[48] Although Professors Pildes and Issacharoff devote most of their article to the economic analogy of corporate lockups, *see, e.g., id.* at 647-49, we find the antitrust metaphor apropos. *See also id.* at 710 (discussing the antitrust metaphor as used in JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980)). None of the explanatory power of the political markets approach is lost, however, if we trade corporate law analogies: both focus our attention on maximizing competition and avoiding political monopoly and market breakdowns. In fact, we think this shift makes the paradigm's strengths and shortcomings easier to understand. *See also* LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 155-199 (1986) (comparing political parties to public utilities).

[49] *See* Anderson v. Celebrezze, 460 U.S. 780, 794 (1982) ("By limiting the opportunities of independent minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. . . . In short, the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be

For the political marketeer, the primary purpose of political parties is to offer voter-consumers electoral choices. For it is through unfettered partisan competition that an invisible political hand will operate to supply voter-consumers with goods (in this case, candidates and/or policy positions) that are purchased with votes at the polls.[50] The political market breaks down when incumbent officeholders use their dominant position to place legal or other barriers in the way of those who seek to displace them. In such cases, the political market becomes inefficient, defined and measured, we suspect, by the gap between voters' demand for candidates and parties of a particular ideological brand and the "unnaturally low" supply of such candidates and parties due to the incumbents' rigging of the rules of the game.

It thus follows from such an approach: the more parties, the better. After all, one would not limit restaurant choices to McDonald's and Burger King when consumer demand is better sated with the addition of Arby's and Pizza Hut, let alone LeCirque and Tavern on the Green. If we take the political markets model to its logical conclusion, the optimally desirable number of parties (or for that matter, candidates on the ballot) is the number that will attract votes when costs of entry into the market are zero. Of course, recognizing the logistical difficulties of having ballots quite literally the length of grocery lists, paradigm proponents would not go so far, and we should not force or expect them to. But the values to be maximized, we must keep in mind, are choice and competition, and given the diversity of political beliefs in America, a small

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uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964)—are served when election campaigns are not monopolized by the existing political parties."); Williams v. Rhodes, 393 U.S. at 23 ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and government policies is at the core of our electoral process and of the First Amendment freedoms."); Timmons, 117 S. Ct. 1381 ("[T]he entire electorate, which necessarily includes the members of the major parties, will benefit from robust competition in ideas and governmental policies").

[50] Pildes & Issacharoff, *supra* note __, at 646 ("*[A]ppropriate democratic politics* [is] 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

number of political parties would not satisfy the existing demand.

It also follows from the markets paradigm that the "party in the electorate" is the preferred location of power in the party system. After all, the entire paradigm is geared toward satisfying voter-consumer demand. As Professors Pildes and Issacharoff maintain: "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."[51] The success of a political system is thus determined by its ability to satisfy as many voter-consumers as possible, that is, by its ability to present electoral choices best matched to each voter's political consumption function. The party in the government is viewed with plutocratic suspicion since with them lies the power to manipulate the rules of the game for partisan gain. Professional party organizations, in their capacity as manufacturers of political consumer goods, are servile and responsive to shifting voter-consumer demand. Their purpose is to provide customers with brands that inspire loyalty from the greatest number of consumers possible.

For political marketeers, the state interest in the party system and the role of the judiciary is the same: to construct rules that maximize (or at least provide "adequate") competition among parties. A state, like an economy, is best served, under this view, when the relevant actors compete with each other so as to make their product (i.e., platforms and policy promises) more efficient[52] and popular. As in antitrust law, the judge should intervene to prevent market break-

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interests and views of citizens.") (emphasis added).

[51] *Id.* (emphasis added).

[52] Political efficiency might be determined by the party's ability to construct a platform that includes the minimal amount of political commitment necessary to garner the maximum number of votes. I.e., the party "managers" (whoever they are, *see infra* at __) should make the fewest commitments possible to secure the number of votes needed to attain a majority. This notion of efficiency, like the market metaphor itself, runs into a problem however, since, unlike a corporation and its shareholders whose appetites for profits are unlimited, the value of a marginal voter drops off sharply after a party gains one voter above the 50% mark. Such a voter (while still valued) becomes

downs posed by monopolistic partisan practices,[53] that is, some brand of "heightened scrutiny" should be triggered by laws passed by "ins" that make it more difficult for the "outs" to gain control.[54] Thus, judges should be deeply suspicious of laws passed by incumbent parties that, for example, make it difficult for other parties to develop and gain strength,[55] impose differential burdens on the party controlling the government (e.g., majorities in the legislatures and control of the governorship) and on the party currently out of power,[56] or otherwise give preference to the two established parties.

While there is much to said for a paradigm that promotes electoral competition, this approach suffers from some important weaknesses. To begin with, it overlooks the role of "voice" in politics and relies far too heavily on "exit." Parties may respond to voters because of the threat that they will "exit" the party and vote for another, but they may also respond because important factions within the party want change, and party leaders feel that they cannot ignore these valued members. Parties listen to and rely on their activists to a significant degree since activists provide money and resources that are valuable to winning elections. The issue is not competition for its own sake, but how to produce responsiveness. Maximizing the threat of exit by lowering the barriers to entry into the system is one way to achieve responsiveness, but not the only way. In a two party system, the incorporation of new groups within existing coalitions

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only insurance against possible loss of another voter.

[53] Also like antitrust law, the devil is in the details of when a market breakdown occurs.

[54] We might as well note here that there is nothing special about political parties that makes them the unit of analysis for this approach. Indeed, that might serve as a fundamental criticism of this paradigm. The political markets paradigm could be used just as well to regulate moves by incumbent politicians (individually or collectively) to entrench themselves in office. Expanding the paradigm to this logical extension would then call into question a range of political phenomena from incumbents' use of the franking privilege to send constituent mail, incumbents' privileged position to raise disproportionate sums of campaign contributions that have the predictable effect of preventing opposition by possible challengers, as well as bipartisan gerrymanders that create safe seats insulating incumbents from challengers from another party.

[55] *See* Issacharoff & Pildes, supra note __, at 668-687 (discussing *Timmons* and *Burdick*).

[56] If taken to its logical extreme, this paradigm would therefore increase scrutiny on partisan gerrymanders, for example. *Cf.* Davis v. Bandemer, 478 U.S. 109 (1986) (holding partisan gerrymandering claims justiciable).

is as important as the threat of new parties forming in terms of making the existing parties more adaptable. Encouraging groups to form new parties when they do not get their way only lessens compromise and coalition-building in the electoral stage and postpones it to the legislative stage.

Second, the Markets paradigm places its entire faith in the electorate. As consumers, they are sovereign. As such, it is a strongly populist approach and leaves little room for leadership, guidance and assistance from the politically active. Only the choices at the ballot box matter. There is no allowance for differences between those who are more active and knowledgeable than others. "Civic slackers" rely on parties to provide cues about where candidates stand and which policies will benefit them, but if elected officials and party activists have no important role in setting the platform and choosing the nominees of the parties, then "information" is lost, and the "civic slacker" must look elsewhere (e.g. the press or interest groups) for the information and cues that they need to operate effectively. The political market paradigm merely allows for the articulation of and response to consumer preferences. It does not allow for deliberation and the transmission of information within party networks, particularly in a two party system. Denied the easy ability to exit, groups are forced to work together to forge a common platform and to agree upon acceptable candidates.[57] The absence of exit can enhance deliberative actions and encourage voice. To be sure, a two-party system must have competition between the two parties, but it does not necessarily require the entry of a third party. In fact, the high costs of exit may actually increase internal compromise and coalition building. Sometimes, negotiations work best when the doors are locked.

E. *The Pluralist Paradigm*

[57] See our discussion of the Principle of Electoral Influence, *infra* at __.

Pluralism takes as its point of departure the importance of organized groups in the political process.[58] The Pluralists view the political world as filled with group-based competition, bargaining, coalition formation, vote-trading and the like.[59] Democracy in America, the Pluralist recognizes, is less "government by the people" or even "majority rule" and better described as "minorities rule"[60]—that is, operating under widely understood rules of democratic engagement, teams of factions gather together to advance each others particular causes or advocate collectively for broader public policy programs. These minority factions, or as we call them today, interest groups, can take the form of racial or regional groupings or groups defined, for example, by occupation, ideology, or economic interest.[61] They are sometimes organized by social entrepreneurs from the top-down, at other times they result from the banding together of individuals with shared interests (usually born from the dedication of a few who are most resourceful), or infrequently they spring forth as by-products of mass social movements.[62]

With interest groups as their preferred unit of political analysis, Pluralists advance a particular view of American political parties. Unlike the ideologically rigid and well-defined parties of other democracies,[63] American parties, according to the Pluralist, should be broader,

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[58] The literature of the pluralist school is quite extensive. Some great works include: THE FEDERALIST NO. 10 (Madison) (Clinton Rossiter ed. 1961); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (2nd ed.1951); ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT (1908); ROBERT A. DAHL, WHO GOVERNS (1961); NELSON W. POLSBY, COMMUNITY POWER AND POLITICAL THEORY (date); JACK L. WALKER, JR, MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS AND SOCIAL MOVEMENTS (1991).

[59] *See* Davis v. Bandemer, 478 U.S. at 132-33 ("[T]he question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process….[i.e.,] the opportunity of members of the group to participate in party deliberations in the slating and nominations of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of a winning candidate.")

[60] *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 150 (1989).

[61] *See generally* TRUMAN, *supra* note __; WALKER, *supra* note _.

[62] *See* WALKER, *supra* note __, at 12-13.

[63] *See generally* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN

decentralized coalitions of interest groups.[64] This is not just the Pluralists' objective description of the uniquely American party system. (Indeed, this is increasingly inaccurate as a description of the current party system.[65]) Rather, it represents a normative preference for a party system that can aggregate and account for the intensity of group preferences in the most politically, economically, and ethnically diverse country in the world.[66] A highly ideological party system, such as that prevalent in Europe, would inevitably fail to satisfy the preferences of large population segments of American society.[67] If representatives are less able to adapt their voting behavior to the needs of their constituencies (geographic or programmatic) and must instead follow a party line, the party in the government will fail to capture the diversity and perhaps even ideological inconsistencies of the party in the electorate.

To enhance the function of interest-group aggregation performed by the American party-system, Pluralists would concentrate internal decision-making power in the professional party organizations, particularly at the local level. The party organizations have the flexibility to adapt their policy agenda and promote candidates (to the degree such power resides in organizations)

THIRTY-SIX COUNTRIES (1999).

[64] *See* KEY, at 330 ("All the factors that contribute to the grouping of sectors of the electorate into each of the party followings assure a degree of cohesiveness within the national party machinery. When it is said that national party is a coalition, the reference may be to the coalition or combination of social interests for which the party speaks. That combination induces unity within the political machinery, narrowly defined, and the combination may, of course, be to a degree a product of the workings of the party machinery."); DAHL, WHO GOVERNS?, *supra* note __, at 5 (analogizing parties to "molecules" and interest groups to "atoms".).

[65] *See* WILLIAM J. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 287-317 (7th ed., 1994); MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1988 (1990).

[66] *See* LEON EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 23-30 (1986) (describing the Pluralists as "defenders of indigenous institutions").

[67] *See, e.g.*, HERBERT AGAR, THE PRICE OF UNION xv-xvi (1950) (American parties are "unique. They cannot be compared to the parties of other nations. They serve a new purpose in a new way. . . . It is through parties that clashing interests of a continent find grounds for compromise. . . . . ; *id.* at 689 ("Instead of seeking 'principles,' or 'distinctive tenets,' which can only divide a federal union, th eparty is intended to seek bargains between the regions, the classes, and the other interest groups. It is intended to bring men and women of all beliefs, occupations, sections, racial backgrounds, into a combination for the pursuit of power. The combination is too various to possess firm convictions. The members may have nothing in common except a desire for office."); Nelson W. Polsby, *The American Party System*, *in* ALAN BRINKLEY ET AL., NEW FEDERALIST PAPERS (1997) (comparing American and European systems).

attentive to the unique political culture and legal terrain of each state. The Democratic Party of New York City or Chicago, the Pluralist would argue, faces different challenges and must cater to different constituencies than the party organization in Little Rock or Salt Lake City. Although there is a seemingly elitist side to this preference for party organizational power (i.e., transferring power from the party-in-the-electorate—"the people"—to unelected aparatchiks), the pluralists respond that the organizations are the glue that holds the party in the electorate and the party in all branches of government together.[68]

Because they favor broad parties with weak ideological ties, Pluralists do not place much importance on third or minor parties—except as those parties serve the two-party system. However, they do not view the electoral system as a forum for free expression (i.e., minor parties or their supporters do not have a right to vent their opinions at the ballot box); rather the electoral system functions as an interest aggregation mechanism where parties or candidates compete for group support and form coalitions to gain office.[69] Nevertheless, third parties can perform two critical functions for the two-party system. First, there is the obvious but, in this century, unprecedented function of supplanting one of the major parties if a third party quickly gains massive, widespread electoral support. As this route has not proven fruitful since the rise of the Republicans and the decline of the Whigs in the early 1800s,[70] we need not dwell on it here. Like all democratic spirited folk though, Pluralists, despite their affection for the two party system, would reject a system that completely insulated a duopoly from a preferred realistic alternative party.

The second, more traditional function third parties play in a two party system derives

[68] *See generally* GIOVANNI SARTORI, PARTIES AND PARTY SYSTEMS 25 (1976); Polsby, *supra* note __.
[69] *See* Timmons, 117 S. Ct. 1372 ("Ballots serve primarily to elect candidates, not as fora for political expression.") (citing Burdick, 504 U.S. at 438 (Kennedy, J., dissenting)).

from their ability to influence the policy positions and direction of the two major parties.[71] Several motivations might underlie interest groups' decisions to start a third party: Members of one party might feel that their party has lost touch (i.e., that it has betrayed its following) such that a third party will serve the original purposes of the party,[72] members of both parties might coalesce around an issue or set of issues that cross-cut the two parties,[73] or an interest group that sees itself as outside of and unrepresented by the two parties will seek to organize as a political party in order to gain some voice in the legislature.[74] In each case, the interest group seeks to influence the parties from without, or to use Albert Hirschman's terms, to "exit" from the party system.[75] By going alone, the group can establish itself as a force to be reckoned with by demonstrating its support and brokering its influence with the other parties. More likely perhaps is the scenario in which interest group leaders (or possible candidates from a party sub-faction) threaten to defect so as to influence the party's choice of candidate, running mate, or platform item.[76] In exercising this threat, the interest group leader says, "we may lose the election, but we'll take you down with us."[77] The possibility of such exit is a chip to be played by interest group leaders only in rare and extreme circumstances, but the threat looms over party decisions

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[70] *See* RICHARD SEWALL, BALLOTS FOR FREEDOM 254 (1976).
[71] *See* STEVEN ROSENSTONE ET AL., THIRD PARTIES IN AMERICA 8-9 (1996) ("[T]he power of third parties lies in their capacity to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored. . . . When a third party compels a major party to adopt policies it otherwise may not have, it stimulates a redrawing of the political battle lines and a reshuffling of the major party coalitions.").
[72] Such a possibility frequently presents itself, for example, when the Republicans nominate a pro-choice candidate causing the pro-life faction of the party to run on a Right-to-Life ticket. The same might be said for Strom Thurmond's State's Rights Party or George Wallace's American Independent Party
[73] Such was the case, for example, with the rise of the Progressivism albeit not resulting in a third party created from Democratic and Republican factions.
[74] E.g., the Right to Life Party.
[75] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).
[76] *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-41 (1957).
[77] The 1992 Virginia Senate Race is such an example, perhaps. In that race, Oliver North and George Allen split the Republican vote in the general election thereby ensuring victory to Chuck Robb, the Democratic candidate. Had one of the Republicans bowed out, the other almost certainly would have won the election.

that might cause groups to bolt–either to the other party or toward forming their own.

In sum, the Pluralist school treats questions of regulation of the electoral and party system from the perspective of what changes would further interest group aggregation and coalition formation. This preoccupation with coalition formation does not stem merely from a romantic notion of team building. The Pluralist sees the party system as the main mechanism in American democracy for representing both the size of the group and the intensity of its interest. An unmediated electoral system treats each voter as an equal individual and weighs their preferences (as expressed at the ballot box or in the legislature) equally. One person = one vote = one electoral preference equally weighted by candidates competing for votes.

In the process of party coalition formation, however, groups that are unified and organized by their collective interest can have bargaining power disproportionate to their actual numbers. When preferences are more intense and well-defined, interest groups can focus on those few group-defining issues and exact selective promises from party leaders even if the "majority" of party adherents are indifferent or slightly opposed.[78] Of course, Pluralists must admit that even a weak and porous two-party system can shortchange minorities, particularly those with an array of intense policy preferences all solidly situated at an extreme of the liberal-conservative continuum or those without the resources needed to participate in any coalition.[79]

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[78] *See, e.g.*, E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 85 (1942) ("A large party must be supported by a great variety of interests sufficiently tolerant of each other to collaborate, held together by compromise and concession, and the discovery of certain common interest, and so on, and bearing in mind that fact that a major party has only one competitor and that party managers *need not meet every demand made by every interest*.") (emphasis in original); EPSTEIN, *supra* note __, at 27 ("[A] major American party is a bundle of compromises, a cross section not a segment of the community, and even with majority voting support it has policiews that are the product of pluralistic bargaining.")(citing Austin RANNEY & WILMOORE KENDALL, DEMOCRACY AND THE AMERICAN PARTY SYSTEM 523 (1956)).

[79] *See* E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960) ("The vice of the groupist theory is that it conceals the most significant aspects of the system. The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper class accent. Probably about 90 percent of the people cannot get into the pressure system.").

The process of coalition formation favors those minorities with intense preferences on specific issues, especially distributive ones, such that their inclusion in the coalition will not cause the defection of an even larger faction from the party.

Indeed, this vision of the party system also forces interest group leaders to moderate each individual demand by the long-term value of being part of a policy-making coalition. Interest group leaders must pick their fights and cede ground on those non-crucial issues upon which they disagree. Unlike a multiparty system in which parties have strong incentives to distinguish themselves from each other and interest groups bargain for coalition position only in the process of forming a government,[80] the American two-party system frontloads the coalition formation process forcing groups to form electoral unions (especially for presidential elections).

The party system also has the fortunate benefit of being well-tailored to the American separation-of-powers system (that is, a system that splits lawmaking power between a legislature and a president or governor).[81] Ideologically unified parties heighten the hurdles to policymaking already quite daunting in the American system. Under conditions of divided government, for example, an executive must have the ability to peel off votes from the governing party of the legislature to have any hope of passing legislation or executing his agenda. Conversely, under unified government, the executive faces no obstacles and the minority party in the legislature has no power either to obstruct the passage or to affect the substance of legislation. Unified parties in a separation of powers system create a choice between stalemate and tyranny of the majority.

The Pluralist values a *porous* party system: one where legislators are not afraid of defecting from the party-line (to the degree that there is one), one where interest groups can

[80] *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114-63.

penetrate and bargain for position in the electoral coalition, and one where professional party organizations, particularly at the local level, are free to broaden a party's tent to cover the diversity of interests that exist in this country. However, Pluralists tend to place an irrationally high faith in the representativeness of the interest group system. They tend to downplay the potential for autonomous party organizations to ignore large interest groups with dispersed interests and small groups outside the mainstream or without the resources to make their voice heard. Finally, given their weak ideological cohesion, Pluralist parties at the legislative level often prove ineffective as policy-making bodies and can blur accountability such that no party ever appears "responsible" for anything.[82]

III. SOME MIDDLE RANGE PRINCIPLES[83] AND NORMAL SCIENCE[84]

As the fight between paradigms rages in the background of these decisions, the courts have not come close to adopting even middle range principles that could bring some coherence

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[81] *See* EPSTEIN, *supra* note __, at 40-69.

[82] A concluding thought on paradigms: We do not pretend that the five paradigms we describe constitute an exhaustive list or that each is completely distinct from all others. For example, one could argue quite persuasively, we think, that the Progressive paradigm is merely a manifestation of the Managerial paradigm. Also, we have excluded from our discussion here, but have included in the table, a skeletal description of what might constitute a Critical paradigm. Adherents to such an approach would seek to use the party system to maximize proportional representation, maybe even calling into question the constitutionality of single member districts themselves. Distrusting elites, whether elected or arisen through the party ranks, Critics would probably prefer to locate power in the party in the electorate. They would advocate aggressive judicial intervention to counteract the median voter tendencies of the American system of representation and separation of powers, and might even urge the judiciary to view substantive policy results as one form of representation. In other words, public policies that work to disadvantage one group would be considered evidence of discrimination to be counterbalanced by judicial intervention in the system of representation. Advocates would probably prefer a high number of parties, each with the right to have a proportional share of governmental power with such proportions regulated by judicial overseers. We do not discuss this paradigm at length because we do not find much in the court decisions or legal literature to support it. By taking out of context some of the things that Lani Guinier has written, *see* LANI GUINIER, TYRANNY OF THE MAJORITY (1994), perhaps we could cobble together supportive quotes for this paradigm. But we will leave those unfair characterizations to the many others who apparently relish the opportunity.

[83] *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 39-72 (1968) (distinguishing middle range theories from huge theoretical movements such as Marxism).

[84] *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10-34, (distinguishing normal science from paradigm shifts).

to the caselaw. Recognizing that each paradigm has its own strengths and weaknesses, we attempt to draw from their best features to propose a set of such principles applicable to two areas of the law: ballot access restrictions and regulation of candidate nomination methods.

A. *Exit and Voice in Legal Regulation of the Party System*

We begin with the Pluralists' unit of analysis: the interest group. While others have argued that most political regulation cases involve group rights,[85] we think the group-based analysis particularly apropos when considering questions of ballot access or party nomination regulations. As aggregations of interest groups, parties' claim to autonomy or for space on the ballot necessarily entails a claim made by the groups that compose the party.[86] We then ask the question: What constitutional rules will ensure that the party system serves to aggregate and to represent interest groups? Obviously, if the party system somehow operates to shut out large interest groups, leaving them "voiceless" and unrepresented as were Blacks in the *White Primaries Cases*, we would say the system is broken and somehow judges should intervene to reconfigure the party system so all can participate. On the other hand, interest group leaders should not be able to seek judicial intervention merely because they do not like the candidates on the general election ballot or tend to lose most policy disputes in the legislature. And should all interest groups, regardless of character, size, and intensity of interest, have the same claim for

[85] *See* Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L. J. 869 (1995); *compare* Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring) ("The concept of representation necessarily applies to groups: groups of voters elect representatives: individual voters do not. Gross population disparities violate the mandate of equal representation by denying voters residing in heavily populated districts, as a group, the opportunity to elect the number of representative to which their voting strength would otherwise entitle them."), *with id.* at 148-52 (O'Connor, J., concurring) (rejecting the group conception of the right to vote in defense of a more individualist notion).

[86] As for the right of an individual to appear as a candidate on the ballot, the significant aspect of such a "right" is the opportunity and choice that the candidacy gives the group of voters who wish to support it. The right to appear

judicial intervention?

Like other contexts of political or economic organization, the party system must provide two alternative avenues for interest group influence. The first option, which Albert Hirschman termed "voice," [87] includes those means through which a group can work within the organization (in this case, a political party) to influence its positions, decisions, and leadership. The state often regulates the process of interest group influence within the party through laws that, for example, require parties to use primaries as their mode of nomination, specify who can vote in such primaries (i.e., whether only party members can vote or whether the primary will be "open" to non-party members as well), or require certain organizational forms for the party (such as a nominating committee or local party committees). Through such regulations, the state can bias the party system in favor of certain interests and in favor of certain strategies of influence (e.g., open campaigning versus smoke-filled room elite politics).

When the voice option is unavailable, however, the group must have the ability to exit from the party in order to run its own slate of candidates. The exit option legitimizes the party system by leaving theoretically possible the practically impossible scenario of a defecting interest group or minor party replacing one of the established parties. Minor parties chief mode of service to the two-party system, as we noted above, is their effect on the composition and policy positions of the major parties. As the premier text on the subject explains:

> [T]he power of third parties lies in their capacity to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have ignored. In so doing, they not only promote their cause but affect the very character of the two party system. When a third party compels a major party to adopt policies it otherwise may not have, it stimulates a redrawing of the political battle lines and a reshuffling of the major party

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on the ballot is really just a right to have the opportunity to garner group support for your candidacy.

[87] *See generally* HIRSCHMAN, *supra* note __, at 4-5 (describing "voice" as the mechanism by which one influences an organization from within and "exit" as the process of exercising influence from outside).

coalitions.[88]

Or as an earlier writer also put it, "Let a third party once demonstrate that votes are to be made by adopting a certain demand, then one or the other of the older parties can be trusted to absorb the new doctrine."[89]

Thus, the exit option provides a forum where an otherwise "voiceless" group can be heard. The decision to exit is a serious one (as Pat Buchanan's recent handwringing/grandstanding demonstrated). The potential third party must decide that they have more to gain from bolting and losing than from staying and influencing. The existence of the exit option itself, however, gives credibility to interest group leaders' threat that they will take their votes with them unless the major party shifts its policy positions to accommodate them. The mere availability of the threat may help prevent the party from becoming overly unified ideologically—i.e., the more ideologically homogeneous they become, the greater the risk that they will alienate groups that do not share in the ideological vision. For example, the prospect of the Christian Coalition or Right-to-Life Party running their own candidates in a general election ensures that the Republican candidates, such as George W. Bush, will think twice before alienating them from the Republican Party by compromising their position on abortion. Were the exit option taken away, interest group leaders threatening to defect would be forced to choose between allying with the opposing party (which is usually worse than the one form which the group would defect) or convincing their adherents to stay home from the polls. An election boycott, sometimes employed in other countries, is a poorly tailored and highly ineffective means for brokering influence. Better to demonstrate one's strength at the polls than to brag ex

[88] *See* STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA 8-9 (2nd Ed. 1984); Sweezy v. State of New Hampshire, 354 U.S. 234, 150-51 (date) (opinion of Warren, C.J.).
[89] *Id.* at 8 (quoting John D. Hicks, *The Third Party Tradition in American Politics*, 20 MISS. VALLEY HIST. REV.

post that your group members influenced the election by sitting this one out.

By reiterating Hirschman's conceptualization here, we mean to stress the interrelatedness of the voice and exit options for legal regulation of the party system and the need for judicial protection of both avenues of interest group influence.

B. *Principles from Paradigms*

In this next section, we offer our own set of decision rules that we think flow from the strengths of each paradigm we discussed. These rules will not decide every case, but may reformulate the judicial inquiry in these cases toward what we see as more productive ends.

1. *Principle of Electoral System Symbiosis*

The constitutionality of any given regulation of the party system will usually depend on what other laws accompany it. Judges should be careful not to consider the impact of a single law in isolation.

States vary considerably in how they define political parties, regulate party internal organization and nomination methods, and restrict access to the ballot.[90] In one context, a law might have the effect of decreasing electoral competitiveness or weakening a party's ability to aggregate interest groups into coalitions. In another, it might have no effect at all. But a morselized approach to party system regulations hampers the current caselaw. Judges adjudicate challenges to individual electoral regulations at the time legislatures or voters enact them. If upheld, their constitutionality is forever presumed regardless of subsequent action by policy

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26-27 (1933)).

makers. If struck down, the legislature is forced to achieve the goals of the nullified law through other means.

Perhaps this is the natural consequence of Article III's "case and controversy" requirement. Judges do not make broad policy recommendations or evaluate the sum total effect of a regime of political regulation. They adjudicate cases, usually in the form of a specific challenge to a specific law. But the case method need not always prevent judges from taking a more holistic view of their task in regulating the party system. [91]

The harm of the piecemeal approach was evident in the blanket primary case. Judge Levi (and the Ninth Circuit panel that upheld his decision) glossed over the fact that California not only requires a party's primary ballot to be open to all voters, but a party has no other option other than primary elections for it to nominate its candidates for state office.[92] In other words, the blanket primary, existing alongside California's other party regulations, eviscerates both the voice and exit options from the party system. Parties, on the one hand, cannot require party membership as a precondition to primary voting, thus inhibiting their ability to build coalitions to which the party and its candidates will be responsible over time. Nor can parties use nominating conventions or some other method for selecting state candidates—i.e., to opt out of the primary system altogether.

The court also failed to recognize the different character of minor and major parties and the differential effects the blanket primary would have on them. While fears of raiding and cross-over voting to major party primaries have uncertain empirical foundations, such fears are

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[90] *See* E. JOSHUA ROSENKRANTZ, VOTER CHOICE 2000 (forthcoming from the Brennan Center).
[91] *See* Williams v. Rhodes, 393 U.S. at 39 ("Cumbersome election machinery can effectively suffocate the right of association, the promotion of political ideas and programs of political action, and the right to vote. The totality of Ohio's requirements has those effects.") (emphasis added).
[92] *See* California Democratic Party v. Jones, 984 F. Supp 1288, 1299 (1997).

certainly valid for minor parties' primary elections, which are often squeakers where winning candidates may win by less than a hundred votes. The blanket primary operates to ensure that non-party members will determine who will be minor party candidates. As strong as we think the argument against the blanket primary is for the major parties, the minor parties have the additional argument that their very purpose is threatened by the initiative. For those groups that wish to "exit" from the two-party system, they are now faced with an electoral system that removes from them the power to choose their own candidates. For those that wish to stay and exercise their "voice," theirs is lost in the din of independents and non-party members who may determine primary nominees.

2. *Principle of Party Autonomy*

State laws that dictate party membership, organization, or nominating procedures infringe on the party's protected freedom of association unless they are necessary for expanding interest group participation in the party system.

It should come as no surprise then that we think the Supreme Court got it right (at least in the result) in Tashjian[93] and Democratic Party of the United States v. Wisconsin,[94] and the Ninth Circuit got it wrong in California Democratic Party v. Jones.

The party system, as we noted above, serves as a filter for interest group activity and under certain conditions can counteract the majoritarian bias of the American plurality-based electoral system. Throughout the ongoing process of coalition formation, party leaders and candidates make promises to interest groups and attempt to translate those promises into public

[93] 479 U.S. 208 (1986).

policy by whipping the votes of elected officials. This process of aggregation accounts for both the intensity of interest group preferences and the size of the interest group.

Freedom from state interference in the organization of political parties is a crucial element in preserving party leaders' ability to broker their influence and nominate candidates that respond to the party's electoral coalition. For example, in *Tashjian*, the Connecticut legislature (dominated by Democrats) passed a law that prohibited political parties from allowing non-party members to vote in their party primaries. The state proffered interests in "administrability of the primary system, prevention of raiding, avoiding voter confusion and protecting the responsibility of party government."[95] The Republican Party wanted to allow independents to vote in its primary, challenged the constitutionality of the law, and won.

We agree with *Tashjian*'s result because the Connecticut law inhibited the party's ability to field candidates that catered to the needs of the interest groups whose support the party sought. The party organization decided that an open primary would help broaden its coalition to include interest groups that were not affiliated with either party. Despite the state's admonitions to the contrary, the closed primary law served one purpose only: to prevent parties from catering to individuals and groups that chose not to identify with a party.[96] To allow such a law would permit the state to define the meaning of party membership and more importantly to substitute its judgment for that of party leaders as to what interests should form the basis of its electoral coalition. The law does not fall into the exception to our rule—that such restrictions pass constitutional scrutiny if they increase interest group participation in the party system—so the

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[94] 450 U.S. 107 (1981).
[95] Tashjian, 479 U.S. at 217.
[96] We deal with the state interest in prevention of raiding and the party responsibility issue under a later principle – that the state cannot regulate parties for their own good. The state's articulated interest of avoiding voter confusion would seem to fail even a rational basis test; we cannot fathom how voters would be confused by the Republicans

law fails.

But what about California's blanket primary?[97] Perhaps we should support that law because it forces parties to allow all interest groups to participate in the process—i.e., any group can vote for any candidate in any primary. We disagree (and not just because one of us testified in the district court as an expert witness for those against this initiative). The core of our disagreement with the Court is that we see the law as removing from party organizations altogether the power to broker interest group influence in the candidate selection process or even, as the Libertarians might view it, the power to define what the party is. Without the blanket primary law, a party organization can recruit a candidate, for example, that it believes remains true to the party's ideological bias and interest group alignment, and test its choice in the primary election against other possible competitors to see if the party in the electorate supports the party professionals' choice. The blanket primary, however, nullifies any notion of and prevents any opportunity for a "party's choice." The primary becomes a preview for the highly median dominated general election, with party organizations functionally removed from the process, no organizational filter for interest group aggregation, and the promise of eroding interest group influence within the parties, as opposed to outside the parties, over time. Even if this seems a bit extreme, a less apoplectic diagnosis for the blanket primary predicts that the party organizations will be less able to craft a distinct party message, less able to recruit candidates that respond to that message and win, and less able to organize interest group coalitions that support a party nominee.

For obvious reasons, the Libertarians would support such a principle even without its exception. Party autonomy for the Libertarian is a core component of the First Amendment

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allowing independents to vote in their primary.

freedom of association. Just as one would not want the state determining qualifications for membership in the Rotary Club, so should it not invade the associational sanctum of political parties. Our exception to this principle represents an attempt to temper the Libertarian approach with the Progressive one. The Progressive suspicion of parties arose, in part, from parties' tendency toward parochialism and oligarchy (hence the advocacy of primaries over nominating conventions). Under certain conditions, such as existed in the South during the times of the White Primaries, a parties' associational autonomy must give way[98] to the larger interest of open participation of interest groups in the party system.

3. *Anti-Paternalism Principle*

Any state interest that can be achieved through parties' regulation of themselves is impermissible as a justification for formal state regulation of the political parties.

With this principle we hope to rein in the state when it tries to regulate parties for their own good. So, for example, state interests in preventing party raiding[99] or reducing intraparty factionalism[100] represent illegitimate excuses for state laws when those values can be achieved through internal party regulation. When a party uses the official governmental machinery to regulate itself and its opposition for their own good, judges should be particularly suspicious. Most often, the state's articulated interest in party building masks incumbents' strategic decisions to regulate their opposition.

In *Timmons v. Twin Cities Area New Party*, the state justified its prohibition of fusion

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[97] *See* California Democratic Party v. Jones, 984 F. Supp 1288 (1997).
[98] Or to borrow a phrase from our friends the Marketeers, judges should "pierce the partisan veil."
[99] *See Tashjian*, 479 U.S. at 217.

candidacies (i.e., one where multiple parties endorse the same candidate) by "its interests in avoiding voter confusion, promoting candidate competition[,] . . . preventing electoral distortions and ballot manipulations and discouraging party splintering and 'unrestrained factionalism.'"[101] Finding the fusion ban rationally related to achieving those state interests, as well as interests in preserving stability and the two-party system, and an insignificant burden on parties' First Amendment rights, the Court upheld the law in a 5 to 4 decision. Both the majority and principal dissent in *Timmons* viewed the fusion ban in isolation (violating principle number 1).[102] In the Libertarian tradition, Justice Stevens' dissent saw the law as infringing upon the party's right to self-expression, i.e., its right to choose a "standard bearer" regardless of the fact that another party also chose him.[103] The state could achieve its articulated interests through less intrusive means, he thought, and thus the ban on fusion could not pass heightened scrutiny. Like the majority, the dissent emphasized that "[t]he members of a political party have a constitutional right to select their nominees for public office and to communicate the identity of their nominees to the voting public."[104]

We think both opinions miss the point of Minnesota's fusion ban. The Court should have

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[100] *See Timmons*, 117 S. Ct. at 1379; S.F. County v. Eu, 489 U.S. at 233 n.23.
[101] *Timmons*, 117 S. Ct. at 1373.
[102] Both the majority and the dissent failed to appreciate that Minnesota's primary laws prevent party organizations from specifying the qualifications of its members or candidates. Minnesota's election laws specify the qualifications for candidates' participation in a party primary. Prospective candidates must be eligible voters, who have lived in their electoral district for 30 days before the general election and will be over the age of 21 should they be elected. They cannot file for more than one office and if they seek a major party's nomination, they must sign an affidavit that says they "either participated in that party's most recent precinct caucus or intend[] to vote for a majority of that party's candidates at the next ensuing general election." *See* Minn. Rev. Stat. § 204B.06. If a candidate with those qualifications wins the party's primary, then he is that party's nominee at the general election. The official party organization cannot require additional qualifications (e.g., rejection of third party endorsement if nominated) and cannot stand in the way of the primary electorate's choice being the general election candidate. (The authors confirmed this with the Office of Minnesota's Secretary of State (telephone call, October 19, 1999).)
[103] 117 S. Ct. 1364, at 1377 (Stevens, J., dissenting) (quoting S.F. County v. Eu, 489 U.S. at 224).
[104] *Id.* at 1364 (Stevens, J., dissenting); *see also id.* at 1370 (majority opinion) ("The New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477 (1975)).

asked the question whether state laws, rather than party regulation, were necessary to achieve the party-system effects the state articulated with its fusion ban. Indeed, we think parties without the aid of official regulation could have accomplished the state's paternalistic interests.[105] Both the party in the legislature and the professional party organizations, if they fear cross-endorsement by a minor party, can use all the sanctions at their disposal to prevent or retaliate against candidates who accept multiple endorsements. By using soft money allocations, choice committee or leadership assignments, or mobilization of electoral support as a carrot to solidify party loyalty or a stick to sanction candidates who divide their loyalties, parties as private and legislative organizations can enact their own fusion bans without the aid of a state apparatus. Instead of relying on parties to organize themselves, Minnesota thought it better to use the hammer of state law to force a fusion ban on both parties.

4. Principle of Equal Treatment

State laws that impose unique and disproportionate burdens of ballot access on minor parties violate the Equal Protection Clause.

We are firm believers in the utility and value of the two-party system for American politics. We buy the Pluralist/Managerial argument that has swayed Supreme Court majorities for much of the past half century: that factionalism in the form of multipartyism at the legislative level is incongruous with the American separation of powers system and system of

[105] The majority in *Timmons*, 117 S. Ct. at 1373-74, recognized other non-paternalistic state interests such as preventing the ballot from becoming a billboard for small candidate created parties with slogans such as "Stop Crime Now" or "No New Taxes." Those interests reflect a legitimate, non-paternalistic desire to combat a sort of prisoners' dilemma where parties compete with each other to destroy the ballot as a system of electoral choice and convert it into a system of electioneering. The dissent rightly dismissed that interest and the billboard scenario as

legislative representation. In addition, a choice between two parties provides additional legitimacy by increasing the probability that the winning candidate will have won a majority of the vote and decreasing some of the "cycling" problems we described earlier.[106]

While endorsing the two-party system, we do not mean to endorse the two incumbent parties in particular,[107] nor do we think those parties ought to be able to add to their incumbency advantages by preventing defecting interest groups from securing places on the ballot. But any attempt at a universal rule governing access to the ballot ultimately devolves into a balancing test where access restrictions should be struck down when they are "too severe." Some balancing is inevitable to protect the right of exit,[108] while alleviating the Managers real concerns about factionalism and ballot integrity. Hence, Lawrence Tribe describes the Court's current law of ballot access restrictions as allowing "states [to] condition access to the ballot upon the demonstration of a '*significant* measurable quantum of community support,' but cannot require *so large* or *so early* a demonstration of support that minority parties or independent candidates have *no real chance* of attaining ballot positions."[109]

While we see no way out of some balancing test along the lines currently in use, the principle of equal treatment stated above can operate to rectify some of the more egregious abuses incumbent parties inflict on possible new entrants. In particular, we see this rule as targeting states that pass laws that privilege incumbent parties by regulating *only* access by minor

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farfetched. *See id.* at 1378 (Stevens, J., dissenting). At the very least, some empirical showing of such a danger should be required.

[106] *See* note __, *supra;* Polsby, *supra* note _, at 38-43.

[107] *See* Williams v. Rhodes, 393 U.S at 31.

[108] The Libertarians might also conceive of ballot access as an individual right – i.e., the right of any American to run for office. We do not attach much value to that putative right. The value of the right of running for office, as we see it, derives not from mere access to the ballot, but from the opportunity it gives groups to gain political power. As we noted in our discussion of exit and voice – ballot access provides groups with two routes to political power: (1) the right to place their candidates in elective office or (2) the ability to affect the outcome of an election.

[109] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1110-11 (2nd Ed. 1988) (emphasis added).

parties, giving incumbent parties automatic ballot access. Most state laws specify, for example, that a party gets on a ballot automatically if it polled 20% of the vote in the previous election, but new parties must collect a number of signatures equal to 5% of the voters in the last statewide election. Compliance with signature requirements such as these tends to gobble up most of a minor party's expenditure on an election,[110] thus adding to the head start incumbent party candidates already have in the campaign.

On questions of ballot access, no less than voting,[111] courts should strike down laws that impose burdens only to minor parties. Thus, a ballot access law that allows the two established parties automatic access, but forces new parties to gain a substantial number of signatures should be unconstitutional under the Fourteenth Amendment. For the same reasons that we would not allow the government, for example, to impose heightened voter registration requirements or other impediments to voting on farmers (i.e., an unprotected class), the government should not be able to employ ballot access laws that specifically and intentionally prevent a new Farmer's Party from developing. Such a rule would force established parties to internalize the start-up costs they are imposing on new parties—costs many of them never even had to pay.

Such a rule, if implemented, could have a widespread short-term effect since most states employ a two-tiered system of ballot access.[112] But the effect would be quite minor since states would probably respond by passing universally applicable signature requirements set at a level that accounts both for the rule's inconvenience on all parties and serves the two parties' interest

[110] *See* Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 Harv. J. on Legis. 200 (1991) (estimating costs at 1 dollar per signature).

[111] *See* Williams v. Rhodes, 393 U.S. at 31 ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that 'only a compelling state interest . . . can justify limiting First Amendment freedoms.' NAACP v. Button, 371 U.S. 415, 438 (1963)."); Harper v. Virginia State Board of Elections, 383 U.S 663, 670 (1966).

in preventing factionalism and voter confusion. Although abstract notions of fairness familiar to Equal Protection law by themselves might justify this rule, the rule has particular attraction for Pluralists, we think, because it ensures that the incumbent parties do not use their incumbent status to impose costs on defecting interest groups that the parties themselves would be unwilling to bear.[113] We are well aware that this decision rule does not remove the impediments to minor party ballot access and for that matter, does not prevent state parties from solidifying the two party system. Indeed, as true believers in the value of the two-party system, we would not want the rule to do so. But we think it might add some predictability and coherence to this area of electoral regulation while preventing incumbent parties from imposing unique costs on new political actors.

5. *Principle of Electoral Influence*

A party that can demonstrate the requisite ability to affect the outcome of an election has the right to appear on the ballot.[114]

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[112] *See* Brennan Center's forthcoming book on Ballot Access (will provide full cite in December).

[113] The rule might be applicable to other areas of the law as well. Then-Justice Rehnquist seemed to apply a variant of this rule in his dissent in *Buckley v. Valeo*, which stressed Congress's discriminatory treatment in the public financing of the two major party candidates in presidential elections. Justice Rehnquist thought that Congress had "enshrined the Republican and Democratic Parties in a permanently preferred position, and has established requirements for funding minor-party and independent candidates to which the two major parties are not subject. Congress would undoubtedly be justified in treating the Presidential candidates of the two major parties differently from minor-party or independent Presidential candidates, in view of the long demonstrated public support of the former. But because of the First Amendment overtones of the appellants' Fifth Amendment equal protection claim something more than a merely rational basis for the difference in treatment must be shown, as the Court apparently recognizes. I find it impossible to subscribe to the Court's reasoning that because no third party has posed a credible threat to the two major parties in Presidential elections since 1860, Congress may by law attempt to assure that this pattern will endure forever. I would hold that, as to general election financing, Congress has not merely treated the two major parties differently from minor parties and independents, but has discriminated in favor of the former in such a way as to run afoul of the Fifth and First Amendments to the United States Constitution."
Buckley v. Valeo, 424 U.S. 1, 293 (1975) (Rehnquist, J., concurring and dissenting).

[114] As we noted prior to our discussion of the paradigms, ballot access restrictions do not clearly impinge on identifiable constitutional rights. Nevertheless, we would expect a court to hang this principle, as it does its current approach, *see, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189 (1986), on the First Amendment, substantive due process under the 14th Amendment, or the fundamental interest strand of Equal Protection jurisprudence.

As we noted above, any universal rule of access will ultimately require one to reject restrictions that in some respect are "too severe." This principle attempts to parse "severity" down to its purposes. As our discussion of exit and voice indicated, we believe that access to the ballot should be limited to groups that can influence elections because (1) they have support equal to or exceeding that of incumbent parties or (2) they have the capacity to cause one of the incumbent parties to lose an election. Following from the second, more permissive option then, courts should guarantee ballot access only to those groups with support equal to or greater than the expected margin of victory between party candidates in an upcoming election.

Operationalizing this principle presents some difficulties (although no more than the current standardless approach). Of course, courts can only make assumptions about the expected margin of victory by observing previous elections and deriving some average margin from competitive races in a given electoral district. Although in theory we would want judges to analyze where the new party would garner its support,[115] in practice we should only expect judges to look at raw numbers.

This approach rejects the extreme Libertarian view of expressive voting[116] and any natural rights approach to ballot access. To the degree the ballot under this approach serves any "expressive" purpose, it is only to allow minor factions to demonstrate their potential influence to the major parties. However, we regard this goal as instrumental, rather than expressive: Parties' ballot access rights' depend only on their ability to *influence* an election, not their ability to make a statement. As this principle follows a more Managerial approach, we expect it may be

[115] In other words, a party whose support comes only from the perpetual losing party cannot affect the outcome of an election. For example, if the Republicans in an electoral district always beat the Democrats by 5%, a new Liberal Party formed exclusively from a faction of Democrats will not affect the expected outcome of an election.

somewhat less permissive than the Court's current approach.[117] However, nothing would prevent the Court from merely adopting this principle alongside its current approach, i.e., treating the electoral influence principle as a ceiling for access restrictions but not a floor. Thus, the Court might say that one metric (but not the only one) to measure the constitutionality of a ballot access restriction is whether the relevant law requires a demonstration of support beyond that needed to change the outcome of a typical election.

The Marketeers might respond that this approach does nothing to prevent dominant parties operating under uncompetitive situations. After all, the larger the gap between the two parties, the higher a demonstration of support that judges would permit the state to require for access to the ballot.[118] Recognizing, as we did above, that this principle could operate alongside other ad hoc "severity" or "competitiveness" tests, we would also respond that this approach actually enhances competition in a way best suited to plurality-based systems. This principle could enhance coalition building among "out groups" by forcing interest groups defecting from highly dominant parties to join with opposition parties to increase the probability of uprooting incumbents. Seeking two party competition when it is most needed, the principle directs judges to strike down only those laws that prevent interest group exit when such exit has any electoral significance. By enhancing two party competition when one party is dominant and by decreasing costs of entry under conditions of duopoly or active two-party competition, the principle should allay the Marketeers fears of non-competitiveness while maintaining the Managerial/Pluralist emphasis on broad based political parties.

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[116] *See* note __ *supra*.
[117] *See* BURT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS 57 (1980) (suggesting that the Court abides by an implicit 5% signature requirement).
[118] For example, under conditions where the Republicans routinely beat the Democrats by 20%, a ballot access law requiring a demonstration of 20% electoral support to get on the ballot would be constitutional. Remember though

V. Conclusion

Our principal argument in this paper has been that one must look to alternative philosophies of the party system rather than constitutional provisions to explain the Court's decisions and the individual judges' opinions in party regulation cases. Managers, Libertarians, Progressives, Marketeers, and Pluralists have different philosophies when it comes to the relationship between the party and the state, where power should be located in the party system, and what the preferred number of parties is. Judges then filter these philosophical predispositions through the constitutional provisions in order to arrive at decisions in concrete cases.

In a subsequent work, perhaps we, or others, could deconstruct these paradigms even further and concentrate on specific aspects of judges' political philosophies. There appear to be several dimensions along which decisions on regulation of the party system are made: a "representativeness" dimension with poles at descriptive and substantive representation, a "liberal" dimension along which one locates one's fear of state authority, an "activism" dimension that measures one's preference for legislative as opposed to judicial action, and an "efficiency" dimension that calibrates one's preference for governmental institutions well-fitted for the achievement of public policy goals. We hope others can operationalize this multi-dimensional approach and that this article has spurred some new thinking in this area.

After recognizing the strengths and weaknesses of these paradigms, we proposed five middle range principles relevant to cases involving ballot access restrictions and regulation of a party's method of candidate selection. A similar set could be constructed for other cases of party

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that pursuant to the Equal Treatment Principle this 20% demonstration would need to be required of all parties.

regulation, such as those involving patronage, gerrymandering, and campaign finance, and additional principles for restrictions on ballot access and party nomination methods are also necessary. Neither the paradigms we discussed nor the principles we float here represent an exhaustive or sufficient list. However, acknowledgement that the relevant constitutional provisions are of limited utility and that each paradigm provides a valuable perspective to be considered in development of principles to govern individual cases, we hope, will lead to a more honest and coherent jurisprudence of political parties.