

2002

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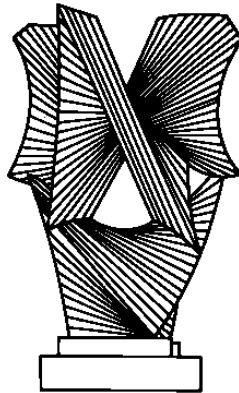
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Elizabeth Garrett, "Is the Party Over? The Court and the Political Process" (University of Chicago Public Law & Legal Theory Working Paper No. 29, 2002).

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CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 29



IS THE PARTY OVER? THE COURT AND THE POLITICAL PROCESS

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Is the Party Over? The Court and the Political Process

*Elizabeth Garrett**

“[M]odern democracy is unthinkable save in terms of the parties,” E.E. Schattschneider wrote more than half a century ago.¹ It is evident to even the most casual observer of the political process that political parties, primarily the two major parties, organize and rationalize politics. Decisions about elections, government structure, the relationship among states and between the federal and subnational governments, and the ability of Congress and the President to pursue their legislative agendas are affected by and affect political parties. Yet, the legal community, in particular the judiciary, has been reluctant to develop sophisticated positive and normative views of political parties, resulting in a jurisprudence of the political process that is inconsistent and unsatisfying in its treatment of these vital institutions. The reluctance to think seriously about political parties may be a lingering effect both of the Founder’s well-known distaste for them and of the unsavory reputation that they developed during the era of party machines. The continued influence of these historical narratives, which themselves oversimplify the role of political parties in our nation’s history, seems to result in an instinctive distaste for parties and an unwillingness to spend sufficient time understanding their complex nature.

Other observers and participants in the political process understand that the Founder’s dislike for political parties was one of their mistakes of institutional design and that the modern party has moved far away from machine politics of the Nineteenth Century. Schattschneider is only one of many political scientists who have worked to rehabilitate parties and to integrate them into political theory; many political scientists have argued for stronger political parties to improve accountability in government, even before these views became fashionable in other disciplines or among segments of the

* Professor of Law, University of Chicago; Visiting Professor of Law, University of Southern California. I appreciate invaluable comments from Phil Frickey, Barry Friedman, Rick Hasen, Sam Issacharoff, Andrei Marmor, Rick Pildes, Eric Posner, Mark Tushnet, and Adrian Vermeule, a helpful suggestion from Efton Park, invaluable assistance from Connie Fleischer at the University of Chicago law library, excellent research assistance by Peggy Cusack (Virginia '02) and Colin McNary (Chicago '04), and the financial support of the James H. Douglas, Jr. Fund for the Study of Law and Government and the Law and Government Faculty Fund, both at the University of Chicago Law School.

¹ E.E. Schattschneider, *Party Government* 1 (1942).

public.² Increasingly, legal academics, often in collaboration with political scientists, are acknowledging the constructive role of political parties in our constitutional structure and developing theories to explain this role and proposals to enhance it.³

These academic trends may encourage the judiciary to overcome its deeply ingrained instinct to slight parties, yet the prognosis for jurisprudence in this arena remains bleak. Courts as an institution are ill equipped to develop and evaluate regulatory strategies affecting political parties. Thus, the continuing absence of a sophisticated judicial understanding of political parties may be a consequence more of institutional incapacity than it is of philosophical predisposition. In the first part of this article, I will describe and analyze some of the features of political parties⁴ that make them among the most complex and dynamic of any modern political institution and therefore among the most difficult to assess accurately and regulate effectively. Some of these characteristics have been discussed or at least mentioned by recent legal scholarship, but they have not received a sustained treatment in the literature, nor have they been assessed as a group to provide a complete picture of the challenges posed by regulation of major and minor political parties.

There are at least five dynamic complexities that affect regulation of political parties. First, political parties are multilayered, fairly decentralized, and loosely controlled, primarily because of constitutional requirements of separation of powers and federalism. Second, as V.O. Key famously observed,⁵ a political party consists of at least three distinct aspects: the party-organization, the party-in-the-electorate, and the party-in-government. In many cases, one part of a political party will work toward objectives not

² See, e.g., *Toward a More Responsible Two-Party System*, Report by the Committee on Political Parties, 44 Am. Pol. Sci. Rev. supp. 1-14 (Sept. 1950); John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* (1995); Leon D. Epstein, *Political Parties in the American Mold* (1986); Joseph A. Schlesinger, *The New American Political Party*, 79 Am. Pol. Sci. Rev. 1152 (1985); *American Political Parties: Decline or Resurgence?* (J.E. Cohen, R. Fleisher & P. Kantor eds., 2001).

³ See, e.g., *Symposium: Law and Political Parties*, 100 Colum. L. Rev. 593-899 (2000); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 Colum. L. Rev. 274 (2001); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000).

⁴ This article is limited to a consideration of political parties in the United States. Any comparative analysis of political parties makes clear the significant differences between the U.S. versions and their counterparts in other Western democracies, where constitutions often explicitly mention parties and where the notions of party membership and discipline are much more developed.

⁵ V.O. Key, *Politics, Parties, and Pressure Groups* 163-165 (5th ed. 1964).

shared, and sometimes even opposed, by other parts of the same party. All these levels and components allow for a great deal of internal change over time and ensure significant competition for control within a political party and among elements of various political parties.

Third, although courts often talk about the “members” of political parties and their interests, it is not at all clear just who are the members of a party, particularly of a major one. This unclarity has led to a significant and overlooked gap in the legal understanding of political parties; judges and other commentators routinely base their decisions and analysis on what they perceive to be in the best interests of party members, and yet they do not indicate which people or institutions they consider as the party membership. Perhaps they assume that we all know what is meant by the term “party members,” but any systematic examination of the concept reveals that its meaning is elusive. Various groups of people involved in the political process might be accurately considered to be a party’s members—people who identify themselves as members, perhaps by voting in the party’s primary; party activists and leaders; office holders and office seekers who affiliate with the party; and interest groups and others who contribute to the party and its candidates. A court’s view of the appropriate constitutional treatment for political parties and a policymaker’s decision about the best regulation depends on how they define a party’s membership, but this definition will inevitably be contested and malleable.

Fourth, the line between political parties and other politically active groups can be indistinct. The most accurate view might place parties and other groups along a continuum that moves from organizations with a public function and formal role in government to those with mainly private characteristics. At the more public end of the continuum would lie the major political parties, and at the other would be found purely private membership groups, perhaps like the Girl Scouts or Rotarians. Minor parties fall somewhere in the middle, with some closer to major parties and others closer to private organizations. A minor party may change its position along the continuum over time, perhaps beginning at a point closer to private organizations and developing, at least in some states, into an institution that fields credible candidates and even elects a few to office. Politically active interest groups also defy easy placement along the line, with

some of the more active differing from minor parties only in that they do not currently use the strategy of running candidates in elections.

Fifth, political parties change substantially over time, in part as a reaction to the rules governing them and in part because of larger social and political developments. The endogeneity of political parties means that the rules governing them largely determine their structure; thus, the institutions that set the rules dictate the contours of political parties both directly and indirectly as those who work within political parties respond to the rules. The reality of constant change and evolution means that policies relating to political parties are best made incrementally in way that allows for change and alteration over time to reflect new information and better understandings. Moreover, to the extent that various party structures are consistent with constitutional provisions and democratic values, it is more appropriate for rules to be set by the political branches and not the judiciary.

In Part II, I will demonstrate more concretely how these characteristics of political parties challenge the judiciary's capacity to understand the effect of regulation on parties, their members, and others affected by them. Controversies that resulted in three Supreme Court cases reflect the complications that political parties produce. First, in *Tashjian v. Republican Party of Connecticut*,⁶ the state Republican Party challenged a law supported by the Democratic legislature that prohibited a party from allowing independents to vote in its primary. The party leaders had proposed, and the party convention had adopted, a primary format that would allow unaffiliated voters to participate in some Republican primaries in the hope that it would produce a candidate who would appeal to more voters in the general election. In this case, at least superficially presenting an interparty dispute between the major parties, the Court struck down the statute and allowed the Republican Party to include independents in its primaries.

Nearly a decade later, the Court faced the issue of fusion candidacies in *Timmons v. Twin Cities Area New Party*.⁷ Minnesota's legislature, dominated by partisans of the two major political parties, had banned such candidacies, which allow an individual to appear on the ballot as the candidate of more than one party. Such multi-party

⁶ 479 U.S. 208 (1986).

⁷ 520 U.S. 351 (1997).

endorsements tend to strengthen the influence of minor parties, which cannot ordinarily hope to elect their own candidates but might be able to demonstrate electoral influence through this strategy. In *Timmons*, the Court upheld the state fusion ban, handing a defeat to the minor party.

Finally and most recently, the Court was asked to pass on the constitutionality of California's blanket primary, adopted as a result of a ballot initiative.⁸ In a blanket primary, voters can vote in the primary of more than one party because each voter receives a ballot listing every candidate in each race, regardless of the voter's party affiliation. So, for example, a voter can choose among Democrats for governor, among Republicans for attorney-general, and among Libertarians for Secretary of State. In a closed primary, only voters who have declared their party affiliation, usually twenty to thirty days before the election, can vote in their party's primary. In an open primary, a citizen votes in a primary without declaring any party preference, although she can participate in only one party's primary.⁹ Major and minor parties challenged the blanket primary as an unconstitutional infringement on their rights of association, even though a majority of each party's membership¹⁰ voting in the election and some of their candidates had supported the format change. The Supreme Court ruled in favor of the political parties, striking blanket primaries down and calling into question open primaries and other formats imposed on parties without their permission.

In Part III, I will offer some conclusions casting doubt on the suitability of judicial involvement in this area. These conclusions cannot be justified merely by the fact of complexity in the context of political parties. After all, regulation of political parties is not the only complicated arena in which judicial intervention has become commonplace. Moreover, even if courts do not handle these cases very well, they may nonetheless be justified in their involvement if important rights and values would be harmed otherwise. I will argue that neither of these factors undermines the general argument in favor of judicial restraint with respect to cases implicating political parties for several reasons. First, courts constitutionalize the policy choices they make with respect to political party

⁸ *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁹ See John F. Bibby, *Politics, Parties, and Elections in America* 170-174 (4th ed. 2000) (describing types of primaries).

cases, which unnecessarily and unjustifiably freezes and sometimes warps the development of political institutions and governance structures. The Constitution says remarkably little about the precise political structures demanded by democratic principles, and a variety of institutions and rules would facilitate a well-functioning democratic government. The pattern of Supreme Court opinions reveals a systematic preference for particular kinds of political structures that are not necessarily compelled by the Constitution. Federalism provides opportunities to experiment with different forms of electoral arrangements, which can be modified over time as people learn and form different opinions about the best way to meet democratic objectives. Judicial decisions, however, tend to inhibit this kind of beneficial experimentation. In contrast, judicial restraint, with court involvement limited to only the most extreme instances of burdensome regulation, leaves decisions about the form of democratic institutions to the political branches which are more flexible, accountable to voters, and designed for incremental decisionmaking.

Second, judicial intervention is unnecessary in these cases because the dynamic characteristics of political parties that make them such a challenge to regulate also afford substantial protection against dangerous encroachments on their autonomy. Indeed, this conclusion may be the key insight provided by the analysis in Parts I and II, and it provides the main distinction between these cases, where judicial intervention is unnecessary, and other cases involving complex institutions but where judicial involvement may be less problematic. As the analysis of the particular cases will have revealed, many of the controversies are fights among aspects of the same major party or between the two major parties or both. In those cases, the parties should be considered as “grown-ups”¹¹ able to protect themselves in the political process in which they operate. Even the members of minor parties, which have less clout in the political process, have avenues to protect themselves from oppressive regulation, either by working as dissidents within the major parties or by allying with a segment of a major party that is out of power

¹⁰ In this context, I am using “membership” to refer to people who identify themselves as affiliated with a political party when asked in exit polls following the blanket primary vote.

¹¹ See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1790 (1993). My conclusions are generally consistent with those reached by Lowenstein, suggesting that little has changed during the past decade. Unlike Lowenstein, I reach the

in a way that benefits both the minor and major parties. Thus, aggressive judicial protection of minor parties is also unwarranted.

Although courts may have a narrow role to play in ensuring that the political environment allows enough competition for parties and their members to protect their interests, this role should be limited to extreme and obvious cases, leaving the more difficult problems to be worked out in the politically accountable branches. The general presumption in favor of judicial review in our system should be jettisoned in the context of laws regulating political parties, and the opposite presumption adopted with nearly conclusive force. In the final section of this article, I provide three relatively objective “red flags” for courts to use to distinguish the very few cases in which judicial intervention is warranted from the vast majority of cases in which courts should decline to become involved. First, timing considerations are relevant, suggesting intervention when rules have retroactive application and perhaps when they are adopted immediately after a new element of political competition has emerged. Second, courts should be suspicious of laws that are not relatively durable. Third, laws that treat political parties differently should raise a red flag for courts, although in practice this criterion may be hard to apply. In most cases, courts would need to find the presence of more than one of these red flags before departing from the new presumption against judicial review of political party disputes.

I. The Complex and Dynamic Nature of Political Parties

It becomes clear when the unique characteristics of political parties are assessed together that they pose challenges for any institution seeking to regulate them, and that these challenges are especially formidable for the judiciary given its particular institutional design. This reality complicates matters for courts and policymakers, but it has positive consequences as well. The structure of political parties means that regulations affecting these institutions are subject to intense debate and scrutiny within the political branches, and the dynamic nature of parties ensures that modifications and

question of judicial restraint in the context of cases involving minor parties and their members. See *id.* at 1744 (limiting his consideration to major parties).

reforms can occur naturally over time without significant judicial involvement, as we will explore further in Part III. The initial task, however, is to identify the features of political parties that justifies characterizing them as complex, dynamic, and endogenous.

A. Decentralized and Multilayered Entities

The most evident complexity of the modern political party, the division into national entities, state parties, and local organizations, is mainly a function of constitutional scheme of federalism. As Nelson Polsby observed, “These differences [in the political cultures of the states] suggest that one may be justified in referring to the American two-party system as masking something more like a hundred-party system.”¹² Thus, the Democratic party is an amalgam of fifty state parties, and it includes as well some strong local parties whose leaders do not always work closely with leaders on the state or national levels. The state and local parties are not branches of a cohesive national entity, nor are they the members of a national party that control its actions. Instead, political parties are noncentralized “confederations of national, state, and local cadres whose most conspicuous features are flabby organization and slack discipline.”¹³ Rifts in some of the layers of the larger minor parties demonstrate that they are also decentralized entities without substantial control from the top.¹⁴ Indeed, minor parties are even less often subject to control by a national entity than major parties because of their grassroots character, limited national resources, and inability to use governmental positions to enhance party organization.

Thus, intraparty disputes take place across a number of levels. For example, partisans in state government can pass a law regulating the nomination of presidential

¹² Nelson W. Polsby, *The American Party System*, in *The New Federalist Papers* 37, 40 (A. Brinkley, N.W. Polsby & K.M. Sullivan eds., 1997).

¹³ Larry D. Kramer, *supra* note 3, at 279. See also E.E. Schattschneider, *supra* note 1, at 129 (labeling the decentralization of power as the “most important single characteristic” of major parties); Richard S. Katz & Robin Kolodny, *Party Organization as an Empty Vessel: Parties in American Politics*, in *How Parties Organize* 28, 24-29 (R.S. Katz and P. Mair eds., 1994) (discussing effects of federalism and separation of powers on organization of political parties).

¹⁴ See, e.g., Cathy Newman & Ben White, *States Left to Pick Reform Ticket: For Party Nominees, Ballot Access is Key to Federal Funds*, *Wash. Post*, Aug. 27, 2000, at A5 (describing the 2000 legal battle between leadership and activists within the Reform over whether Pat Buchanan or John Hagelin was their presidential nominee).

candidates that conflicts with the rules adopted by their national party organizations.¹⁵ State party leaders in such a case may well side with the state parties-in-government rather than with the national party leaders,¹⁶ setting up a contest among factions of the same party that can reach the courts, after it has been fought out in party conventions, meetings and back rooms.

Over time, the power of one level or entity changes in relation to the others. For example, during the era of political machines and patronage, local political organizations wielded more clout than they do now, although their ability to provide human resources in get-out-the-vote efforts and their continuing control over some government jobs allow them modern relevance. Modern political parties are not as decentralized as they were in those early years and national parties are increasingly powerful relative to their state and local counterparts,¹⁷ but they remain resistant to top-down control and hierarchical arrangements. National party entities may be more expert in raising money and providing campaign services, although increasingly state organizations are sophisticated fundraisers and marketers. National parties must also rely on state and local organizations in order to deploy their financial resources to their best effect,¹⁸ a reliance that will only increase if the provisions banning soft money in the new campaign finance law survive judicial scrutiny.¹⁹

¹⁵ See, e.g., *Democratic Party of United States v. La Follette*, 450 U.S. 107, 126 (1981) (national party rule required only partisans to participate in presidential primaries, while the Wisconsin election laws allowed open primaries).

¹⁶ See, e.g., *id.* at 133 (Powell, dissenting) (noting that the state Democratic Party defended the state law that the national party opposed).

¹⁷ See Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 *Nw. U. L. Rev.* 977, 980 (2002) (arguing that state and local parties are not strong enough vis-à-vis national organization to protect federalism values sufficiently but not claiming that they are entirely powerless, and also arguing for increased judicial review to promote the democratic process).

¹⁸ See Paul Allen Beck & Marjorie Randon Hershey, *Party Politics in America* 68-70 (9th ed. 2000) (discussing rise in strength of state party organizations and interaction in fundraising efforts between national and state party organs). See also John F. Bibby, *State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization*, in *The Parties Respond: Changes in American Parties and Campaigns* 23, 39 (L.S. Maisel ed., 1998) (describing how state and national parties coordinate their efforts in fundraising and channeling funds to particularly competitive campaigns).

¹⁹ See Bipartisan Campaign Reform Act of 2002, PL No. 107-155, HR 2356, sec. 101. See also Complaint, *McConnell v. Federal Election Commission*, <http://lawschool.stanford.edu/library/campaignfinance/> (D.D.C. filed Mar. 28, 2002) (No. 02cv582) (challenging the Act as unconstitutional for impermissibly restricting speech). News reports suggest that state parties are poised to take advantage of the provisions in the new campaign finance law that allow them to raise and spend soft money. See, e.g., Richard A. Opiel, Jr., *State Parties Adept at Raising Soft Money, Report Shows*, *N.Y. Times*, June 26, 2002, at A19.

The less evident aspect of fragmentation of political parties, at least to the average citizen, is that even the national party organizations consist of various, relatively independent entities that sometimes work together and sometimes pursue their own objectives. This is also a result of constitutional structure, in this case, separation of powers at the federal level. The President is the nominal head of his party, but his interests may diverge somewhat from those of his party's leaders in the Congress. The interests of copartisans in the Senate and the House may not always be aligned. In recent years, the major parties have organized separate congressional campaign committees for the House and Senate, and the national party organizations have focused on the presidential election and state elections for governors and state legislatures.²⁰ Similar developments are occurring within some states as the state legislative parties have organized their own organizations to assist in maintaining or gaining control of each legislative house, separate from the traditional state party organizations.²¹ Although the federal congressional campaign committees add another, arguably dominant player into the mix at the national level, they remain reliant on state and local organizations for information about particular races and for help in spending money effectively in key races.²²

Although these national organizations coordinate with each other and with state parties, they also compete and check each other, with no layer possessing enough disciplinary power to enforce its will in all cases. Although often their interests will run parallel, they will occasionally clash as politicians make strategic decisions in their own interests. The national congressional committees must target their resources to maximize their chances of winning a majority in each house, which may mean that some state races are ignored or slighted, to the dismay of local and state partisans. Or a state candidate may wish to distance herself from an unpopular presidential candidate running on a

²⁰ See Robin Kolodny, *Pursuing Majorities: Congressional Campaign Committees in American Politics* (1998).

²¹ See Alan Rosenthal, *The Decline of Representative Democracy: Process, Participation and Power in the State Legislatures 177* (1998) ("Legislative campaign committees-under the direction of legislative party leaders – are now the major source of party assistance to legislative candidates. They are particularly helpful to viable candidates who are most in need of assistance. They have become full-service organizations, involved in recruiting, training, research, press, polling, strategy, and phone banks.").

²² See Paul S. Herrnson, *Congressional Elections: Campaigning at Home and in Washington 92-95* (3d ed. 2000); Paul Frymer & Albert Yoon, *supra* note 17, at 1014.

platform different from the ideology espoused by the state and local parties.²³ Although the national party level is increasingly powerful relative to subnational entities, the national level is not monolithic and the various players compete and disagree with each other,²⁴ enlisting the help of other elements of the party. The congressional campaign committees are run by incumbent members of the House and Senate, while the national party committees are run by political operatives, who may have held office in the past or may even hold it currently, perhaps at the state level.²⁵ These various individuals will approach a campaign with different perspectives and objectives, not all of which are compatible.

B. The Tripartite Nature of Political Parties

Key's division of political parties into three elements is now familiar to legal scholars, although less evidently influential in judicial opinions.²⁶ He divided political parties into the party-in-the-electorate, the people who identify themselves as members of a political party and use the party label as a way to choose candidates; the party-organization, the party leaders and professionals who provide campaign services through the party; and the party-in-government, the people in elected and appointed offices who affiliate with a political party.²⁷ There are subparts within each of these elements, further complicating the analysis and providing additional, occasionally contending forces. Take, for example, the party organization. Not only are there layers of organizations because of federalism and separation of powers, but the party leaders should be considered a different group from professional campaign consultants, who may affiliate with a party or an ideology but are, in the end, paid political guns who may work for some candidates

²³ See John F. Bibby, *supra* note 9, at 79 (describing tensions between parts of the fragmented parties).

²⁴ Robin Kolodny, *supra* note 20, at 216 (concluding that "separation of powers in a presidential system prevents meaningful, overarching political parties").

²⁵ See *id.* at 7-8.

²⁶ See David K. Ryden, *The Supreme Court as Architect of Election Law: Summing Up, Looking Ahead*, in *The U.S. Supreme Court and the Electoral Process* 267, 275 (D.K. Ryden ed., 2000) ("The Supreme Court's cursory treatment of political parties reveals no cognizance of [Key's] functional distinctions. If the Court is aware of these distinctions or takes them into account, there is little evidence in its decisions. The Court has not judicially acknowledged the three party dimensions – at least explicitly.").

²⁷ Issacharoff describes these three elements somewhat differently: "[P]arties are an unstable amalgam of voter preferences, an internal apparatus driven by activists and a structure through which party affiliates participate in government." See Samuel Issacharoff, *supra* note 3, at 279.

affiliated with other parties. Separate from both these groups are political activists, whose volunteered time and energy may be very important to the party organization, but who may be more committed to ideological goals than to the overriding objective of party leaders: gaining control of government.²⁸ I will return to these groups, and their varying agendas and objectives, in the next section's effort to identify the members of a political party.

Understanding these separate elements of a political party implicates decisions about regulating political parties in more ways than merely aiding in the quest to define a party's membership. First, the analysis reveals that the generic term "political party" may not be particularly illuminating; more needs to be said about which aspect of the party is relevant to the discussion.²⁹ Policymakers, including courts, must be careful to identify what aspect of a party they refer to when they talk of the "party's interests."

Second, the tripartite framework vividly emphasizes that any regulation enacted by the democratic branches is drafted, advocated or opposed, and ultimately adopted by elements of political parties. In most cases, government officials who are members of one or both of the two major parties are responsible for passage of the law, but in a few cases, such as the blanket primary case, the party-in-the-electorate enacts the regulation through popular vote. If the challenged regulation is an internal party rule that affects primaries or caucuses or some other aspect of party conduct, then the authors can be found in the party-organization. Thus, there are elements of political parties on both sides of every case that comes to the courts. The state consists of elected or appointed partisans, who may be asserting general interests rather than partisan ones, but their arguments and decisions will inevitably be influenced by their party affiliation. The state is not a neutral participant in these controversies; instead, members of political parties constitute government and decide on its actions.³⁰ The party-organization is often an active party in

²⁸ Christian Collet terms this the struggle as one between pragmatism and purity in the political parties and observes that it occurs within both major minor parties. Christian Collet, *Openness Begets Opportunity: Minor Parties and California's Blanket Primary*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* 214, 231 (B.E. Cain & E.R. Gerber eds., 2002).

²⁹ Nathaniel Persily, *Parties, Money, and Corruption* 19 (unpublished manuscript prepared for the Annual Meeting of American Political Science Association 2002) (making similar point in context of campaign finance laws).

³⁰ See Daniel Hays Lowenstein, *supra* note 11, at 1756 ("[I]t is the parties that operate upon and actually constitute the government. A state statute is enacted by men and women who have been elected to office as Republicans or Democrats, who in most instances organize their legislative houses as Republicans or

the lawsuit. The segment of the party that is usually unrepresented in judicial disputes, or that must rely on virtual representation, is the party-in-the-electorate. In the blanket primary case, for example, the interests of the party-in-the-electorate were supposedly represented by state officials, but these officials had (at least) divided loyalties because they were active in and reliant on the party organizations that opposed the reform. In other cases, such as the fusion case, it is not clear who represented the party-in-the-electorate. Perhaps the minor parties represented them in some sense, and perhaps state officials, who claimed to be concerned about voter confusion in ballot access cases, acted as their representatives. The key point here, however, is to underscore that the controversies are between elements of different parties or elements of the same party or both.

Third, disaggregating a party into its elements helps in the assessment of whether political parties have been increasing or decreasing in power in recent years, an analysis that is sometimes relevant to whether a regulation imposes an undue burden on these entities. The Justices do not seem to be able to reach a firm conclusion about the health of the parties, disagreeing, for example, in a recent challenge to campaign restrictions affecting political party expenditures.³¹ This disagreement mirrors the argument among political science and legal scholars. It is hard to resolve satisfactorily because some aspects of the party are stronger, while some are weaker than they were one hundred, fifty or twenty years ago.³² For example, the party label is a more reliable and informative voting cue now than it was a few decades ago because the parties themselves

Democrats, and whose activities and decisions occur in a formal and informal structure fundamentally influenced by the fact that they are Republicans and Democrats.”).

³¹ Compare *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 121 S. Ct. 2351, 2363 (2001) (citing brief of political scientists including Paul Allen Beck for proposition that “political parties are dominant players ... in federal elections), with *id.* at 2375 n.4 (Thomas, dissenting) (citing political science work on parties in the last few years for proposition that “parties in fact have lost power in recent years”). See also Michael A. Fitts, *Back to the Future: The Enduring Dilemmas Revealed in the Supreme Court’s Treatment of Political Parties*, in *The U.S. Supreme Court and the Electoral Process* 95, 105 (D.K. Ryden ed., 2000) (discussing importance of this empirical question for the Court’s decisions and also the difficulty of resolving it).

³² See, e.g., John G. Geer, *A Call for New Perspectives*, in *Politicians and Party Politics* 3, 6 (J.G. Geer ed., 1998). (conclusion reached by some scholars that parties are in decline is not true across the board, some parts have weakened and others have strengthened); Nathaniel Persily, *supra* note 29, at 32-37 (assessing current strength of various parts of political parties and comparing to European counterparts).

have become more ideological and somewhat further apart on important issues.³³ Party-organizations, on the other hand, are certainly not as strong as in the days of bosses and machines, but they are hardly irrelevant because they have evolved to provide essential campaign services and expertise to ambitious candidates.³⁴ Congressional parties are substantially more influential now than they were when committee chairmen dominated the legislature,³⁵ and party cohesion in congressional voting behavior has been on the rise in the last several years.³⁶

Of course, the elements of a political party are not entirely independent from each other. The strength of the party-in-government depends in part on the strength of the voting cue, the desirability of the services and funds that the party-organization can offer to candidates, and the ability of government leaders to reward or punish copartisans if they pursue independent courses of action. The party cue for the electorate is helpful only if the parties pursue ideologically distinct agendas in a credible way,³⁷ which depends in part on the strength of party organs in the government. Nonetheless, general statements about the strength of political parties and the effect of particular regulations on their vitality tend to be unhelpful because they do not distinguish among the various segments, nor do they discuss how a rule plays out in this complicated environment. Although this observation is more compelling in the context of the major parties, which constitute the

³³ See, e.g., William Crotty, *Democracy and the Future of Political Parties in America*, in *The Future of Democratic Politics* __, [13] (G.M. Pomper & M. Weiner eds., 2003) (forthcoming) (noting significant ideological differences in issues and ideologies between the two parties' elites); Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 *Am. J. Pol. Sci.* 35, 44 (2000) (concluding that "the American political system has slipped ... into an era of increasingly vibrant partisanship in the electorate"); Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *Polarized Politics* 9 (J.R. Bond & R. Fleisher eds., 2000) (discussing increased party loyalty in the electorate). See also Mark V. Tushnet, *The Constitutional Politics of the Clinton Impeachment*, in *Aftermath: The Clinton Impeachment and the Presidency in the Age of Political Spectacle* 162, 169 (L.V. Kaplan & B.I. Moran eds., 2001) (discussing reasons for increased polarization of the major parties).

³⁴ See, e.g., Gerald M. Pomper, *Party Responsibility and the Future of American Democracy*, in *American Political Parties: Decline or Resurgence?* 162, 165 (J.E. Cohen, R. Fleisher & P. Kantor eds., 2001); Stanley Kelley, Jr., *Political Parties and the Regulation of Campaign Financing* 11 (2002) (unpublished manuscript available at <http://brookings.org/dybdocroot/gs/cf/KelleyDoc.pdf>).

³⁵ See, e.g., Roger H. Davidson, *Congressional Parties, Leaders, and Committees: 1900, 2000, and Beyond*, in *American Political Parties: Decline or Resurgence?* 187 (J.E. Cohen, R. Fleisher & P. Kantor eds., 2001).

³⁶ See, e.g., Gerald M. Pomper, *The Alleged Decline of American Parties*, in *Politicians and Party Politics* 14, 23 (J.G. Geer ed., 1998).

³⁷ See, e.g., Alan I. Abramowitz & Kyle L. Saunders, *Party Polarization and Ideological Realignment in the U.S. Electorate, 1976-1994*, in *The Parties Respond: Changes in American Parties and Campaigns* 128, 130 (L.S. Maisel ed., 1998); Gerald M. Pomper, *supra* note 36, at 28.

government at all levels, it also has some force with respect to the more durable minor parties. A few have members who are government officials, although only on the state and local levels, and they may be divided between the party-in-the-electorate, which may be quite ideological, and the party-organization, which may have at least some not entirely fanciful hope of success at the polls either in electing its own candidates or influencing major candidates.

C. Defining the Members of a Political Party

Political parties are unusual organizations because, although they are often referred to as membership groups,³⁸ determining who their members actually are may not be possible. When judges consider the interests of a political party in a case challenging a regulation, they often begin by stating that the primary constitutional concern is the interests of the members, but then they do not clearly reveal who are considered party members for purposes of the judicial inquiry. The blanket primary decision is a vivid illustration. The opinion is grounded in the right of association, which includes not only the right to determine who can associate with a group but also the right to exclude some from the association.³⁹ The majority distinguishes between the interests of party leaders, which might be sufficiently served by the ability to endorse primary candidates in a blanket primary format, and the “party members’ ability to choose their own nominee.”⁴⁰ The former is no substitute for the latter, the Court holds. Forced association – that is, opening the party’s candidate selection process “to persons wholly unaffiliated with the party”⁴¹ – is seen as the heaviest sort of burden on associational rights. Although “affiliation” is the term often used by the Court rather than “membership,” membership is clearly an important concept for the majority. For example, the blanket primary is distinguished from the closed primary because a voter must “formally *become a member*

³⁸ See, e.g., Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 Colum. L. Rev. 813 (2000) (but also discussing how they differ from traditional membership groups).

³⁹ *California Democratic Party*, 530 U.S. at 574-75. At other times, justices have recognized the fluidity of party membership and argued that this characteristic of political parties – which sets them apart from other political organizations – undermines any strong notion of associational rights. See, e.g., *La Follette*, 450 U.S. at 131-32 (Powell, dissenting); *Tashjian*, 479 U.S. at 219.

⁴⁰ *California Democratic Party*, 530 U.S. at 580.

⁴¹ *Id.* at 681-82.

of the party”⁴² in the latter, and it is different from the open primary where the act of voting remains an “act of affiliation” with a particular party.⁴³

Clearly, determining with some precision which people or groups comprise a political party is necessary to clarify what interests are at stake in questions concerning the regulation of ballots, primaries and parties.⁴⁴ However, as the dissent in the blanket primary case pointed out in that case,⁴⁵ the Court usually provides no sense of whom it means by the term “party members,” and the justices often utterly fail to appreciate the unique characteristics of political party membership relative to other groups. The definitions of “political party” in many state statutes and party rules reflect the absence of a clear idea of the precise contours of the group of people that comprise its membership. Hawaii defines political party as “an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy, and which maintains a general organization throughout the State.”⁴⁶ The Virginia Democratic Party declares in its Party Plan that “[e]very resident ... who believes in the principles of

⁴² Id. at 577.

⁴³ Id. at 578 n.8 (quoting *La Follette*, 450 U.S. at 130 n.2 (Powell, dissenting)).

⁴⁴ Although the Court and many commentators seek to evaluate the constitutional and legal interests of political parties by assessing the interest of their members, some scholars have suggested that a better approach would be to consider parties as producing a product for various consumers. See, e.g., Daniel R. Ortiz, *Duopoly versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 Colum. L. Rev. 753, 754 (2000). See also Gerald M. Pomper, *supra* note 36, at 17 (arguing that voters are the “clientele” of a party, not its members). Although this perspective might lead to different conclusions about the appropriate regulatory policies, it still demands the sort of analysis that I provide in the text. It is vital to determine what set of people or groups are the consumers of the product that political parties provide before one can assess proposed reforms. Just as the several groups that might be considered as members of parties have different and sometimes competing interests, these same groups would have different tastes and preferences as consumers.

⁴⁵ *California Democratic Party*, 530 U.S. at 596-597 (Stevens, dissenting) (“In the real world ... anyone can ‘join’ a political party merely by asking for the appropriate ballot at the appropriate time, or (at most) registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter’s race, religion, or gender can provide a basis for the party’s refusal to ‘associate’ with an unwelcome new member.”).

⁴⁶ Haw. Rev. Stat. Sec. 11-61(a) (1993). See also Ala. Stat. §15.60.010(15) (Michie 2001) (defining a member of a political party to be “a person who supports the political program of a party”). Many states define political parties in terms of their functions rather than their membership. See, e.g., Ga. Stat. 21-2-2(25). See generally Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2185 (2001) (noting that “a court will search the statutes and casebooks in vain for a clear articulation of exactly which particular personnel share in a political party’s rights or obligations”).

the Democratic Party is hereby declared to be a member of the Democratic Party of Virginia.”⁴⁷

At least four ways of thinking about party membership are possible, with each of the four groups containing subgroups that create internal tensions and divisions. Membership might consist of voters who identify themselves as partisans, of party leaders and activists, of office holders and office seekers using the party label, or of interest groups that contribute to and interact with the larger intermediaries of political parties. The first three categories correspond roughly to Key’s tripartite division; the final responds to current scholarship that views political parties as organizations mediating among other groups with political objectives, individuals and the government.⁴⁸ It seems most plausible that all four of these groups are affiliated in some sense with political parties and all of their interests are relevant in determining the best way to regulate the political process. However, as we will see, their interests are not always parallel, instead they are often conflicting, and they often point in very different regulatory directions. Moreover, none of these groups or individuals can be considered as members of a political party in the same way that people can be considered members of other private groups.

1. Voters as Members

When judges and other commentators use the term “member” with respect to a political party, the context often suggests that they mean to refer to the mass of citizens who think of themselves as adherents to a particular party,⁴⁹ as well as to people who are more intensely involved in party activities. This broad notion of membership can be justified by studies finding that party identification in the mass electorate is a meaningful

⁴⁷ Party Plan of the Democratic Party of Virginia, Art. 2, Section 2.1 (June 22, 2001), available at <http://www.vademocrats.org/public/plan/plan.cfm>. See also Missouri Democratic Party Platform, Introduction, available at <http://www.missouridems.org/talking/platform.htm> (“We are a party of the people, all people, and our only qualification for membership is a genuine concern for the welfare of our nation and its citizens.”).

⁴⁸ See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 Va. L. Rev. 1627 (1999).

⁴⁹ Although most people who think of themselves as independent or unaffiliated nonetheless tend to vote consistently in favor of candidates from one party, such voters would not fall within this broad definition of membership, even though their support is often required for electoral success and many do not behave in ways that differ significantly from people who consider themselves affiliated with a party. See Bruce E. Keith, David B. Magleby, Candice J. Nelson, Elizabeth Orr, Mark C. Westlye & Raymond E. Wolfinger,

concept. The party cue is the most important influence on voting behavior, “considered a long-term and continuing influence on voter choice because one’s party identification is not likely to undergo frequent changes in response to changing events or life circumstances.”⁵⁰

Nonetheless, to equate relatively stable attachments to a party with a robust concept of membership is strange, because the connection of most voters to a political party is extremely attenuated relative to their attachment to other membership groups. Even in states with closed primaries, voters can switch their party affiliation frequently, although in many states they must declare their affiliation a few weeks before an election.⁵¹ Voters cannot be rejected by a party when they register their affiliation, not even if it is clear that the voter has been switching among parties frequently and has demonstrated no durable commitment to any.⁵² Although in some states, a voter’s affiliation can be challenged by a party observer and the voter required to take a some sort of loyalty oath to the party, such challenges never occur now.⁵³ The party cannot reject a voter who registers as a member, or decides to vote in its open primary, because the other members do not wish to associate with her. The party does not expel voters who register as members and participate in party primaries for disloyal behavior or failure to meet ideological litmus tests.⁵⁴ Certainly, it would be surprising if a typical voter who

The Myth of the Independent Voter 203 (1992) (concluding that party identification should remain a central concept in the study of individual’s political behavior).

⁵⁰ John F. Bibby, *supra* note 9, at 322. See also Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 8 (arguing that ordinary voters do have “strong and enduring attachments” to a particular party evidenced by their registration as members, a “strong measure of belonging” in a system without membership dues).

⁵¹ States have different requirements regulating when voters must register to participate in a closed primary. The time periods vary, with some allowing registration as late as a few days before an election, and others requiring registration three months or more before an election. See Federal Election Commission, *Party Affiliation and Primary Voting 2000*, available at www.fec.gov/votregis/primaryvoting.htm. See also Bruce E. Cain & Megan Mullin, *Strategies and Rules: Lessons from the 2000 Presidential Primary*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* 324, 329 (B.E. Cain & E.R. Gerber eds., 2002).

⁵² See Nathaniel Persily, *The Blanket Primary in the Courts: The Precedent and Implications in California Democratic Party v. Jones*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* 303 (B.E. Cain & E.R. Gerber eds., 2002).

⁵³ Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 377 (2d ed. 2001). See also Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 *Colum. L. Rev.* 873, 888 (2000) (explaining that loyalty oaths sometimes required in the past before allowing people to vote in a party primary have never been enforced).

⁵⁴ See Richard S. Katz & Robin Kolodny, *supra* note 13, at 31; Nathaniel Persily, *supra* note 52, at 315.

votes in a primary, even a closed one, has very firm opinions about which other voters should be allowed to vote with her and which should be excluded. Party activists may have strong views on this issue, but in part for that reason, I consider them separately.

Even in states that use a convention to select party nominees, which is a meeting that resembles meetings of typical membership organizations more than does a primary,⁵⁵ membership requirements are very minimal. In Virginia, for example, the only requirement to participate in the state convention is willingness to sign a form endorsing the principles of the party and to agree to support the party's nominee in subsequent elections.⁵⁶ Of course, in open primaries, no evidence of party membership is required for a voter to participate in a party's primary. The only limitation is that the voter cannot also vote in another primary in that election, so her decision to vote in one primary is at least a temporary affiliation with a minimal cost (i.e., foregoing the opportunity to vote in other primaries). Thus, participation in a major party primary or even a convention is not a very significant act of affiliation and may not be more than a momentary attachment.⁵⁷

Minor parties also do not require much affirmative action as a prerequisite for membership, although the decision to register as a minor party member or even to declare oneself an adherent of a minor party may represent a more serious affiliation than the same action with respect to a major party because it is a decision out of the political mainstream. The Reform Party only requires that members fill in a membership form, which can be obtained via e-mail, and prohibits local parties from imposing fees on members who serve as delegates to the party conventions.⁵⁸ The Libertarian Party requires a small donation, as well as written certification that the member opposes "the initiation of force to achieve political or social goals."⁵⁹ The Green Party's membership application process can be done online and involves no payment of any kind by

⁵⁵ Cf. Nathaniel Persily, *supra* note 52, at 305 (arguing that national conventions are an example of the party taking on a "momentary, even if heightened, associational form. Like a large Rotary Club, members assemble to meet and discuss issues of collective concern").

⁵⁶ Since *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), a financial contribution is voluntary.

⁵⁷ See Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 *Chi.-Kent L. Rev.* 493, 503 (2000) (describing the common view of party affiliations of voters as "slight, tenuous, and fleeting").

⁵⁸ Bylaws and Constitution of the Reform Party, available at <http://reformparty.org/PrinciplesIssues/constitution.html>.

⁵⁹ Bylaws of the National Libertarian Party, available at www.lp.org.

members.⁶⁰ It should not surprise us that major political parties and the larger minor parties do not require more costly indications of membership than just signing up or showing up to vote. After all, their success as organizations is not measured by the number of members they claim; it is measured by their success in electing adherents to government office. That is a very different goal from the ones pursued by other membership organizations, including political ones.

Perhaps one can make distinctions among nonactivist, relatively typical voters on the basis of additional indices of affiliation.⁶¹ For example, some voters, in addition to taking the time to come to the polls and choose a party primary, contribute money to political campaigns. Certainly, the act of contributing financial resources is more than a “bare affiliation lacking civic or expressive significance.”⁶² But this action is not an unambiguous signal of affiliation. Contributions to a particular person may be more an expression of support for that candidate than an expression of support for the party she represents. Contributions directly to a party organ, at the local, state or national level, might be a better indication of party membership, but they cannot be used reliably to identify party members either. First, some contributions to a political party are certainly intended to circumvent restrictions on contributions made directly to candidates, and thus are more an expression of support for an individual rather than for the party.⁶³ Second, some groups and individuals contribute to both parties as a way to maintain influence regardless of who is in power rather than as a way to demonstrate affiliation with any specific platform or ideology.⁶⁴

Thus, although it is important to keep in mind those in the mass electorate who have strong feelings of attachment to a particular party, tend to vote consistently over time, and are influenced by the party label, it seems a stretch to consider them as

⁶⁰ Bylaws of the Green Party, available at <http://www.gp-us.org/documents/bylaws.html>.

⁶¹ Cf. *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 204 (1982) (requiring demonstration of “relatively enduring and independently significant financial or organizational attachment” to qualify as member of a nonstock corporation for purposes of giving to a segregated fund to make campaign contributions and expenditures).

⁶² See Nancy L. Rosenblum, *supra* note 57, at 505 (describing this as the general view of voting with respect to membership in a party). See also Nancy L. Rosenblum, *supra* note 38, at 821 (suggesting this distinction).

⁶³ See *infra* text accompanying notes 88 through 93 (further discussing this phenomenon and its scope).

⁶⁴ See Victoria A. Farrar-Myers & Diana Dwyre, *Parties and Campaign Finance*, in *American Political Parties: Decline or Resurgence?* 138, 160 (J.E. Cohen, R. Fleisher and P. Kantor eds., 2001) (discussing double-giving).

members of political parties in the same way that people are members of other political, social or civic groups. Indeed, their affiliation with a political party may most closely resemble an affiliation with a professional sport team, although the party attachment may lack the passion of the average sport fan for a team of players. A voter's attachment to a political party comes at very little cost, even in states with closed primaries or conventions, and voters are not rejected or expelled from membership for ideological or other reasons. Nonetheless, laws regulating the political party may affect them significantly, either by changing the number and identity of candidates on the primary or general election ballots, by strengthening or diluting the party label, or by altering other information provided during campaigns. As this suggests, the interests of ordinary voters implicate information and voting cues, vital for determining voter competence, the choices realistically available to them when they go to the polls, and the level of competition among parties which increases the accountability of elected representatives.

2. Party Leaders and Activists as Members

A second group of people who seem to fit the category of members of political parties more naturally are those who make up the party organization. Such people have made more costly commitments to a particular political party than the ordinary voter, even one who is a registered party member. When a political party brings a lawsuit arguing its interests have been impaired, the decision to sue and the litigation strategy is usually controlled by some part of the organization's leadership. Some courts explicitly identify party leaders as the people in the best position to make decisions on behalf of the party membership, presumably a larger group than the official leaders, in part because they are accountable, at least to the active participants in internal party meetings.⁶⁵ Members of the party-organization also comprise a large enough group of people to stake a credible claim to the title of the "members" of political parties; the major parties require more than 200,000 workers to operate effectively.⁶⁶

The party-organization is not monolithic and includes at least two subgroups: party leaders and party activists. Not only do the two subgroups have conflicting interests in some cases (and interests that are not necessarily the same as those of the mass

⁶⁵ See, e.g., *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996).

⁶⁶ See Nancy L. Rosenblum, *supra* note 57, at 506 (citing Paul Allen Beck & Frank J. Sorauf, *Party Politics in America* 75 (7th ed. 1992)).

electorate), but each subgroup also has internal tensions. For example, party leaders at the state and local levels do not always share the objectives of national party leaders. The more intractable disagreements, however, occur between party leaders, who are often professional and pragmatic politicians, and the scores of devoted party workers without whom political parties could not thrive.

Most activists are volunteers and hold no official position in the party organization; their commitment of time, energy and money differentiates them from those in the mass electorate who merely identify with a particular party and vote for its candidates. It is from this group that the party leaders are recruited, and a few party activists see their involvement as the first step in their quest for elected office. Others seek patronage jobs or contracts, which are still available, particularly at the local level. The vast majority of activists become involved in political parties, however, because of the solidary and ideological benefits they receive from active political participation. In other words, they enjoy working with other people in collective action pursuing ideological objectives. Beck and Hershey contend that even in the two major parties, “the evidence, though limited, shows that issue or ideological incentives – purposive incentives – are now the dominant motive for party activism. Most party workers are attracted by a desire to use the party as a means to achieve policy goals.”⁶⁷

Not surprisingly, those involved in the party organization tend to be more extreme in their positions on issues than ordinary citizens who do not participate in politics other than by voting.⁶⁸ Activists are more likely to vote in party primaries, thus contributing to the now familiar picture of candidates taking relatively extreme positions during primaries and then moving to more moderate positions during the campaign for the general election. The pull to the center in the general election is countered, however, in part by the awareness that “activist-fueled get-out-the-vote drives may prove as effective

⁶⁷ Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 99. See also John H. Aldrich, *supra* note 2, at 291 (also noting trend in modern parties toward activists who are motivated more by issues and ideology than by economic benefits such as jobs and contracts).

⁶⁸ See Samuel Issacharoff, *supra* note 3, at 306. But see John R. Petrocik, *Candidate Strategy, Voter Response, and Party Cohesion*, in *Voting at the Political Fault Line: California's Experiment with the Blanket Primary* 270, 273-74 (B.E. Cain & E.R. Gerber eds. 2002) (presenting findings that cast into doubt conventional wisdom that voters in primaries are systematically different from average voter).

in pulling out a close election as concerted appeals to the center.”⁶⁹ Thus, activists may still provide the crucial margin of victory in the final vote tally as the intensity of their preferences encourages them to incur the costs of voting.

Commitment to ideology is particularly strong with nonprofessional activists; professional party leaders and consultants are more pragmatic than the amateurs and are often willing to compromise on issues in order to assure that their candidates win elections. Placed along a continuum of ideological purity, activists would be found at the far end, pursuing electoral goals as a way to implement policies important to them but unwilling to compromise significantly on issues to win elections. Party leaders are somewhat committed to ideology, both because they tend to come from activist backgrounds but also because they understand the need for a clear partisan message in order to preserve the party label.⁷⁰ Their paramount concern, however, is winning elections. These two groups will often prefer very different organizational structures, with leaders preferring hierarchical arrangements and activists seeking greater voice, and the groups may also favor different primary structures, although both groups will usually dislike blanket primaries.

Activists who become frustrated with the party because its leaders and candidates do not meet their tests for ideological purity may first seek to influence party policy from within the major party organization. If they become alienated enough, they may leave the party to join a more ideologically pristine minor party. The option of exit is less attractive in the American system, however, because minor parties are unlikely to offer a real opportunity to translate a platform into policies adopted by government. This suggests a possible affinity between the nonprofessional activists in the major parties and their counterparts in minor parties – they may be relatively similar in their preferences and behavior, with the minor-party activists representing a more extreme version of their cousins in the major parties.

⁶⁹ Samuel Issacharoff, *supra* note 3, at 307. See also Larry M. Bartels, *Where the Ducks Are: Voting Power in a Party System*, in *Politicians and Party Politics* 43, 68 (J.G. Geer ed., 1998) (noting that candidates have to appeal to two groups with different views: prospective voters who are likely to vote and to make a “partisan conversion” and reliable supporters “susceptible to mobilization”).

⁷⁰ See William Crotty, *supra* note 33, at [14-15] (noting differences in elites’ ideological commitments across parties and segments of the party-organization).

A focus on the interests of activists and their activity within major party organizations illustrates the relationship between “exit” and “voice” as a means for effecting political change.⁷¹ Albert Hirschman argued that a healthy political system should allow for a mix of exit and voice; after all, voice will be less effective in achieving internal reform if the discontented members have no realistic option to leave the organization.⁷² But Hirschman emphasized the challenge of determining the right balance and even entitled one chapter of his book “The Elusive Optimal Mix of Exit and Voice.” He warned that his analysis “does not come out with a firm prescription for some optimal mix of exit and voice, nor does it wish to accredit the notion that each institution requires its own mix that could be gradually approached by trial and error. ... [I]t is very unlikely that one could specify a most efficient mix of the two that would be stable over time.”⁷³ The institutional arrangements that shape the mix between exit and voice will affect not only the behavior of activists and party leaders, but also the choices available to voters on the ballot.

3. Office Holders and Office Seekers as Members

The foregoing discussion, which includes frequent reference to major political parties as groups with electoral objectives and to the choices presented to voters on the ballot, suggests a third collection of people who might be considered as distinct members of a political party: those who seek office using the most valuable of party resources, the party label. There is some overlap between this group and the others. Candidates are often recruited from the ranks of party activists, and some party leaders may also hold political office either concurrently or at different points in their careers. The identity of a party’s candidate on the ballot is crucial to establishing the character of the party. Candidates define the party’s message because they are the face of the parties in campaigns and in government, and they are the means through which party platforms become actual policies. All of the other groups want to influence the identity of the candidates: voters want enough competition to ensure accountability but they also desire choices that reflect their preferences; party leaders search for electable candidates whom

⁷¹ See Albert O. Hirschman, *Exit, Voice, and Loyalty* 4 (1970).

⁷² See *id.* at 82-83. See also Stanley Kelley, *supra* note 34, at 21 (“A constant *threat* of a third party strong enough to replace one of the major parties is a good thing, because it deters collusion by major parties to suppress inconvenient ideas.”).

they can influence in office; and party activists prefer ideologically compatible candidates who might also appeal to enough voters to actually gain office. Candidates seek to satisfy enough of these groups to gain access to the ballot, obtain the advantage of a major-party label by winning the primary, and win the general election so that they can pursue their own objectives once in office.

Although dependent on the other groups of party “members,” features of the institutional landscape give office seekers a significant degree of independence and empower them to use political parties for their own ends. One of the most important of these institutional features is the direct primary, now the predominant method through which parties select their nominees. The rise of the direct primary has severely reduced the power of party leadership to influence the selection of nominees and to determine which person will receive the benefit of the party label in the general election.⁷⁴ Indeed, some of the progressives who advocated use of the direct primary favored this process not only because it democratized candidate selection, but also because it would “cripple the political party itself.”⁷⁵

Although political parties do not necessarily oppose the direct primary, this institution is typically imposed on the electoral process by the state. Depending on the rules governing access to the primary ballot, some party organizations have very little say over the slate of candidates presented to voters, certainly compared to their power in caucuses or during the era of machine politics and bosses.⁷⁶ Parties may be limited to the

⁷³ Id. at 124.

⁷⁴ See Leon Epstein, *supra* note 2, at 70; Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 172-73. See also L. Sandy Maisel, *American Political Parties: Still Central to a Functioning Democracy?*, in *American Political Parties: Decline or Resurgence?* 103, 108 (J.E. Cohen, R. Fleisher & P. Kantor eds., 2001) (arguing that the parties have extremely limited “minor and informal” control over the selection of their nominees); Paul Frymer & Albert Yoon, *supra* note 17, at 990 (describing debilitating effect of primary access rules on parties). But see L. Sandy Maisel, *supra*, at 118 (noting that some states allow parties a formal, but limited, role in nominating contests); Roger H. Davidson, *supra* note 35, at 199 (arguing that parties still exert important influence over the selection of nominees and describing tactics used).

⁷⁵ Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 173.

⁷⁶ See Richard S. Katz & Robin Kolodny, *supra* note 13, at 31 (“Indeed, far from being able to name, or even veto, nominees, in a few cases state law has prohibited the party organization even from endorsing particular candidates in the primaries. The result, and the *intended* result, is that the basic electoral competition is with few exceptions between two candidates ... neither chosen by a party with any organizational control over their selection, campaigns, or actions in office.”). For an example of possible extreme consequences of this system, see *Michigan Dems Say Some Candidates Fake*, N.Y. Times, May 22, 2002 (Michigan Democrats accused Republicans of “planting fake Democratic candidates” in state Senate primaries to force run-offs).

less effective tool of endorsing a particular candidate in the primary; sometimes endorsements carry additional benefits such as automatic access to the primary ballot or the right to be listed first.⁷⁷ The successful contest waged by Senator McCain over ballot access in the New York presidential primary⁷⁸ demonstrates that any remaining relatively stringent ballot access requirements designed to provide party organizations some control over which candidates appear on the primary ballot are increasingly subject to judicial challenge. In addition, candidates often bypass traditional party leaders and appeal directly to activists and voters for money, support, and votes.⁷⁹ Given their dedication and willingness to incur the costs of campaigning and voting, a connection to activists may be the second most important resource that a party provides to candidates.

Not only does the direct primary empower candidates relative to party leaders, it also strengthens the voice afforded to party activists. If leaders stray too far away from the ideological objectives of the committed party faithful, activists can use the direct primary to nominate a fellow extremist. If their candidate wins the office, then they have a voice in government; if their candidate loses in the general election, they have nonetheless forced party leaders to take them into account when developing a winning electoral strategy. Thus, the direct primary, particularly a closed one, is an effective way to amplify the voice of dissident members of major parties so that they affect the future of the party. It therefore reduces the need for insurgents to exit the major parties and form ideologically purer minor parties.⁸⁰ Although in this respect the interests of office seekers and activists are aligned, in favor of institutions like the direct primary, the interests of these two groups can clash. Once in office, most politicians will discover that compromise is required to implement any policies, and ideological purity cannot be maintained if they hope to be effective. Thus, they may rely on party organs in

⁷⁷ See John H. Bibby, *supra* note 9, at 178-81 (describing rules concerning preprimary endorsements by party organizations). See also *id.* at 192 (“In only a handful of jurisdictions are party organizations sufficiently strong that they can bestow their endorsement upon a candidate and assure the individual’s nomination in a primary. Even the much vaunted Cook County (Illinois) Democratic organization can no longer control even mayoral nominations in Chicago.”).

⁷⁸ See Samuel Issacharoff, Pamela S. Karlan, & Richard H. Pildes, *supra* note 53, at 371-72; Nathaniel Persily, *supra* note 46, at 2199-06. See also Lawrence A. Mandelker, *Breaking Down the Barriers to Ballot Access: The 2000 New York Republican Presidential Primary*, 1 *Elect. L.J.* 421 (2002) (discussion of case by one of litigating attorneys).

⁷⁹ See John H. Aldrich, *supra* note 2, at 291.

⁸⁰ See, e.g., Leon D. Epstein, *supra* note 2, at 173.

government to structure votes in ways that shield them from retribution from disappointed supporters or to draft omnibus bills that satisfy the extreme preferences of supporters so that they will accept the simultaneous enactment of policies they oppose.

Again, this analysis reveals that the groups constituting a political party are likely to have vastly differing interests. Candidates may seek access to the primary ballot to capture the valuable party label or to empower some fringe group in the party. Party leaders, seeking control over the political party's future and the ability to nominate candidates who can win the general election and project the message of the party shared by a majority of those who identify with it, may seek to exclude such candidates. In short, candidates want to win the election, party leaders also want to control government once the election is over. Sometimes, the battle is merely one of power, such as was the case in John McCain's battle for ballot access in the Republican presidential primary in New York. At other times, the party-organization may be genuinely concerned that extreme elements of the party or opportunistic politicians are attempting to hijack the party label for themselves and to pervert the party's message. This was arguably the case when David Duke sought the Republican nomination for President or Lyndon LaRouche wanted to appear on ballots in the Democratic presidential primary.

Interestingly, the Court in the blanket primary case stated that it is “ ‘too plain for argument’ ... that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.”⁸¹ This conclusion that mandated primaries – although not blanket in format – are constitutionally permissible clearly favors some parts of the political party over others. It diminishes the power of party leaders to control the message of the party while empowering office seekers and perhaps party activists, although the latter also exert significant influence in conventions. The effect of direct primaries on the electorate's interests is less clear. In some cases, the direct primary allows them more choice, although reducing party leaders' influence may reduce the competitiveness of general elections if extremists nominate fringe candidates. Dilution of the party's message may weaken the voting cue of party affiliation, which is crucial for voter competence. Again,

⁸¹ *California Democratic Party*, 530 U.S. at 572 (quoting *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)).

our search for the members of political parties has led us merely to identify a plethora of conflicting and complicating interests.

4. Interest Groups as Members

The search for individuals who are members of the major parties may be a futile effort because it may fundamentally misunderstand the nature of political parties. Perhaps parties are best seen as a kind of intermediary group, mediating the relationships among government, interest groups and citizens.⁸² To the extent that they have members, and this is an uneasy concept in the context of major parties, then the interest groups through which most individual political action takes place might be more properly considered as the constituent parts of the major parties. In some cases, particular interest groups affiliate with one party consistently over a relatively long period of time;⁸³ in other cases, interest groups shift allegiance according to changes in power and shifts in positions on issues. Increasingly, parties themselves may use interest groups that they may even help to form to achieve objectives; Persily identifies these groups as the informal manifestation of political parties.⁸⁴ This model of interest group membership is less helpful in the context of some minor parties, which often are committed a single issue or a limited agenda and thus do not provide an environment of robust pluralism with interaction among many varied interest groups. In addition, most minor parties lack the connection to government that allows major parties to play the role of a buffer between the power of the government and the rights of individuals engaged in collective action.

Others have begun to explore the implications for regulation and constitutional law that flow from conceiving of political parties as intermediaries, and many include in that analysis the recognition that the mediation occurs not just between individuals and the government but among those entities and interest groups.⁸⁵ Jonathan Macey provides a further twist when he describes political parties as serving the needs of “shadow” or

⁸² See Paul S. Herrnson & Kelly D. Patterson, *Agenda Setting and Campaign Advertising in Congressional Elections*, in *Crowded Airwaves* 96, 158-59 (D.A. Dulio, C.J. Nelson & J.A. Thurber eds., 2000).

⁸³ See Daniel J. Tichenor, *Contentious Elites: Presidents, Interest Groups and Programmatic Ambitions*, in *The Future of Democratic Politics* __, [6] (G.M. Pomper & M. Weiner eds., 2003) (forthcoming).

⁸⁴ See Nathaniel Persily, *supra* note 29, at 25-28 (noting possibility of shift of power to such groups because of provisions in the 2002 Bipartisan Campaign Reform Act).

⁸⁵ See, e.g., Samuel Issacharoff & Daniel R. Ortiz, *supra* note 48; Larry D. Kramer, *supra* note 3, at 267, 272-73.

latent interest groups.⁸⁶ Macey characterizes major parties as a tool for interest groups that do not wish to incur the costs of organizing but who nonetheless hope to influence political outcomes. Such groups can use political parties, which have already borne organizational and other costs, to communicate their preferences to elected officials. This analysis suggests that even individual participation in political parties is better viewed as collective action, as part of aggregations of like-minded citizens who interact directly with parties and who would otherwise consider the more costly avenue of separately organizing.

Acknowledging the possibility that interest groups should be considered as the primary elements of the political parties does not provide easy answers to questions concerning appropriate regulation. Scholars and justices debate the degree of influence with respect to platforms and to the behavior of partisan office holders that interest groups can bring to bear through the structure of political parties. For example, the Court and legislatures have struggled with the optimal role of political parties in campaign finance.⁸⁷ Do the parties act merely as conduits for contributions from organized groups that allow them to influence elected officials? In that case, contributions to political parties are a way to circumvent limitations on direct contributions to candidates, and such funds will have the same influence on candidate behavior as direct contributions. Or do parties have an independent role that diminishes the connection between contributor and government official and allows a greater degree of independence for the latter? Major political parties are aggregations of many interest groups, and they provide an environment that softens the demands of each group in order to reach compromise and formulate more public-regarding policies than would be possible if office holders and interest groups interacted directly. Money from a political party to a candidate is

⁸⁶ Jonathan R. Macey, *The Role of Democratic and Republican Parties as Organizers of Shadow Interest Groups*, 89 Mich. L. Rev. 1 (1990).

⁸⁷ I do not apply the analysis offered in this article to the campaign finance cases, although it is my sense that the appropriate judicial approach is the same, at least with respect to campaign finance regulations that affect political parties and probably with respect to all campaign finance rules. The campaign finance law cases are slightly different from the set of cases that I focus on here because such regulations apply directly to individuals, private organizations, corporations and political parties. It remains for a future project to extend the framework advocated in this article to campaign finance laws. Cf. Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Laws in the Courts and in Congress*, 27 O.C.U. L. Rev. ____ (forthcoming 2002) (discussing institutional limitations of the judiciary in campaign finance cases).

therefore less “corrupting,” according to this view, because it does not allow a few wealthy contributors to capture an elected official. Instead, money represents an amalgam of interests, all of which are consistent with the ideological aims of the party and none of which dominates its agenda.

This debate can be vividly seen in the opinions in the most recent *Colorado Republican* case, where justices argued about the role of political parties when they allocate contributions they receive from wealthy interest groups and individuals to candidates. The majority contended that parties act as conduits for interest groups to pursue their objectives without violating limitations on campaign contributions.⁸⁸ Or to use another phrase found in the opinion, coordinated expenditures by parties should be viewed as “potential alter egos for contributions” by interest groups and wealthy donors to candidates.⁸⁹ This conclusion is similar to the reasoning used by Justice Stevens in dissent in the first *Colorado Republican* case to find the possibility of *quid pro quo* corruption even in independent expenditures by political parties.⁹⁰ In these opinions, political parties are ciphers.

In contrast, Justice Thomas’ dissenting opinion in *Colorado Republican II* disputed the conclusion that political parties are the “mere ‘instruments’ or ‘agents’ of the donors. ... Parties might be the target of the speech of donors, but that does not suggest that parties are influenced by (let alone improperly influenced) by the speech.”⁹¹ Later in the opinion, he characterized the decisionmaking process used by the political parties to determine how to spend hard money donations. Thomas described parties as more independent and active than the majority’s picture suggests. Rather than passing the money from donors directly through to the candidate whom the donor wishes to benefit, the party also considers factors like the competitiveness of the race, whether an incumbent is running, and other aspects of an election contest that make it an attractive investment opportunity for the party.⁹² In a passage dealing with the broader issue, Thomas asked: “[I]f a party receives money from donors on both sides of an issue, how

⁸⁸ 121 S. Ct. at 2364.

⁸⁹ Id. at 2370.

⁹⁰ *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 649 (1996) (Stevens, dissenting).

⁹¹ 121 S. Ct. at 2376 (Thomas, dissenting).

⁹² Id. at 2378 (Thomas, dissenting).

can it be a tool of both donors? If the Green Party were to receive a donation from an industry that pollutes, would the Green Party necessarily become, through no choice of its own, an instrument of the polluters?"⁹³ For Thomas, political parties are superagents that not only serve the interests of donors and voters, but that also pursue their own objectives and produce policies and governance structures.⁹⁴ They provide space to aggregate and modify interest group pressure; they are intermediaries that play an active role in shaping interest group activity rather than serving as mere pass-through entities.

The perspective that political parties serve as forums for interest group activity and may mediate between that activity and governing bodies provides yet another wrinkle for those determining appropriate regulation. The view of parties as organized coalitions of more focused interests provides a different dimension along which intraparty conflict and competition can take place. In addition, the perspective emphasizes structural issues over issues of individual rights, and it underscores the collective nature of political activity and the array of connections among groups that engage in politics. It also illustrates one of the important differences between major parties and other interest groups, perhaps suggesting that different regulatory approaches are justified. As Michael Fitts argues, one of the main functions of a major political party is to facilitate compromise. "Given the prevalence of and high cost of strategic behavior, any successful political system must have a means for reconciling losers to the ultimate outcome. Political parties have a structural incentive to fulfill this mediating role as part of their effort to bring divergent groups together and mobilize the population on their behalf."⁹⁵ Parties work toward such compromise naturally as they discharge their governance function, raise money and garner votes, and construct and prioritize their agenda of issues. Because their overriding objective is governance, rather than implementing policies concerning only one issue, political parties must balance short-term

⁹³ Id. at 2376 (Thomas, dissenting).

⁹⁴ See Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. Rev. 750, 807, 810 (2001) (describing how parties craft bargains among interest groups and provide a check on some interests); Daniel Hays Lowenstein, *American Political Parties*, in *Developments in American Politics* 63, 80 (G. Peele, C.J. Bailey & B. Cain eds., 1992) (arguing that strong parties can resist interest group demands and balance them against competing interests). See also Victoria A. Farrar-Myers & Diana Dwyre, *supra* note 64, at 160 (taking a middle position, but still concluding that it is better for parties to aggregate and mediate interest group donations rather than to encourage direct connections between wealthy donors and candidates).

⁹⁵ Michael A. Fitts, *supra* note 31, at 97.

considerations with a longer-term perspective, and they must moderate extreme positions to construct an agenda that appeals to a majority. Parties are durable institutional players, whereas many interest groups are ad hoc in nature, brought into being by a particular issue and disappearing when that issue fades off the national agenda. Major parties cannot afford to be dominated by a single issue or a small segment of society – although elements in the party, particularly activists, may resist such compromise and balance, a factor that contributes to a dynamic political environment.

In short, the ease with which justices and others refer to political parties as “membership organizations” masks the difficulties involved in figuring out whether there are any individuals or groups that are properly characterized as “members,” at least in the usual sense of that word. To the extent that political parties are entities with distinct constituent parts, the analysis reveals that they are aggregations of many different kinds of interests, some individual and many collective. It is very unlikely that all the various interests will be aligned on a particular issue; thus, ascertaining a single interest of a political party or its members will be a futile task. In the end, one is left with the feeling that the concept of party membership is either not useful at all in devising and assessing regulations of the political process, or, at the least, that we must always be careful to identify which people or groups we are considering as members and what their relevant interests are. The discussion of interest groups as members of major political parties also leads us to a related issue in regulating political parties. All those who create or assess laws regulating parties must determine first if there is something special about political parties that distinguishes them from other political organizations, and second if any difference justifies different legal treatment.

D. Major Political Parties, Minor Political Parties, and Other Organizations

Distinguishing political parties from interest groups has long been a challenge for those who study the political process. Madison might have characterized political parties, even the major ones, as “factions.” His conception of factions focused on majoritarian groups, and he would have seen political parties, like other factions, as “actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the

permanent and aggregate interests of the community.”⁹⁶ If the modern understanding of interest group includes “any group that pursues contesting political or policy goals, and that is widely regarded by the public as being one contended interest among others,”⁹⁷ then perhaps political parties meet those requirements. On the other hand, the major parties provide one of the forums in which other interest groups compete and interact, and the notion of narrowly focused “special” interests would seem not to include the broadly based, programmatic major parties.

Policymakers who want to distinguish between political parties and other organizations face the challenge of devising a test to use in separating the two groups. Developing such a test is particularly difficult in the case of minor parties, which often share more characteristics with private organizations than with the major parties. One judicial approach turns on the observation that “the right to be on the election ballot is ... what separates a political party from any other interest group.”⁹⁸ But that distinction is either unnecessary or circular. The major parties tend to receive automatic access to the ballot, but one does not need the test to tell the difference between the Republican Party and the Christian Coalition. Most entities other than major parties must seek ballot access through petitioning, paying a fee, or using other methods usually intended to demonstrate somewhat broad-based support. The decision to seek a position on the ballot therefore is a strategic decision made by an interest group to further its ideological agenda and to communicate with the public. Most minor parties never expect that their candidates will win, so fielding candidates is merely one way, out of many possible avenues, to advance their policies.⁹⁹ There is no fundamental difference between the Right-to-Life Party,

⁹⁶ Federalist #10. However, Madison and the founders did not conceive of groups like modern major political parties, Larry D. Kramer, *supra* note 3, at 269-70, so any conclusion about Madison’s classification of parties is speculative at best.

⁹⁷ Peter H. Schuck, *Against (and For) Madison: An Essay in Praise of Factions*, 15 Yale Law & Pol’y Rev. 553, 557-58 (1997). Schuck views his definition as “capacious enough to encompass the political parties themselves,” although he accepts that political parties are also coalitions of other interest groups. See also William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 48-49 (3d ed. 2001) (providing definitions and noting that parties are sometimes considered as interest groups and sometimes not).

⁹⁸ *Timmons*, 520 U.S. at 373 (Stevens, dissenting).

⁹⁹ In this respect, the Court in *Storer* is mistaken when it views the objective of all new party organizations as “gain[ing] control of state government by electing its candidates to public office.” *Storer v. Brown*, 415 U.S. 724, 745 (1974). That is not the objective of all, or even most, minor parties.

which seeks ballot position in some states, and a pro-life interest group that uses other methods of influence.¹⁰⁰

It could be that this distinction, which hinges on whether a group appears on a ballot, could be a way of saying that political parties are groups that have demonstrated widespread support in the public because they pursue broader agendas than do single-issue special interests.¹⁰¹ Perhaps such a difference explains why major political parties are different from other political organizations, but it seems insufficient to provide a principled way to separate some minor parties from other political organizations. Again, is the Right-to-Life party an organization with broader support than a pro-life interest group? Is the Sierra Club, with its broad environmental agenda, or the AARP, with its comprehensive platform on the myriad of issues affecting older Americans, fundamentally different from the Green Party or other medium-sized political parties? Perhaps they are different because the major parties, and some minor parties, seek to control the instruments of governance and not merely to influence policy. To do that successfully over the long run, they must develop comprehensive platforms and not focus only on one issue that elicits intense reactions. But in reality, only the two major parties have realistic hopes of controlling government at the national level and all other parties and organizations seek to influence the policy agenda through various tools, including, in some cases, running candidates in political races. In states where ballot access is relatively easy and groups believe a strong showing at the polls and the publicity of a campaign further their objectives, more political organizations will adopt the strategies of political parties than in states where the conditions are less promising for ballot access.

¹⁰⁰ The Right to Life Party, which is affiliated with the National Right to Life Committee, is currently on the ballot in New York. See www.nrlc.org. See also Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. Pa. L. Rev. 815, 826-30 (2001) (also comparing political organizations advocating positions on abortion with similar political parties, but concluding that the resemblance justifies, among other things, court involvement to protect even major political parties from laws that interfere with internal governance).

¹⁰¹ Nancy Rosenblum uses the same distinction – the right to appear on the ballot – to illustrate that parties, unlike private organizations, exercise power from within the government and achieve their objectives by running serious candidates for the array of elected offices and promoting broad policy agendas. Nancy L. Rosenblum, *supra* note 38, at 815. This separates the major parties from other political organizations, but it is less helpful with respect to minor ones. Her discussion appears to center primarily on broad-based parties that “have the publicly-affirmed affiliation and participation of significant numbers of active members [and that] can field candidates and hire experts.” *Id.* at 817.

In the end, the best way to think about the differences between political parties and other groups is to envision them along a continuum that represents the degree of involvement in public governance activities. At one end, with substantial influence on governance and other public functions, lie the major political parties. On the other end are organizations seeking little if any influence in government and working toward purely private goals (although even these have some involvement in the public sphere and thus may be subject to some legal intrusions). Minor parties fall all along this line, as do other political organizations that do not use the tool of ballot access. Minor parties with long histories and some chance of obtaining elected or appointed political office, such as the Libertarian or Green Parties, are closer to the major parties. Fringe parties pursuing one issue assiduously and for a limited time resemble private organizations more than they do major political parties.¹⁰² Some political interest groups have broad based agendas and a great deal in common with parties that subscribe to broader agendas. Beck and Hershey note that major political parties may have more in common with the Chamber of Commerce or a large labor organization than they do with many minor political parties.¹⁰³ Similarly, the Libertarian Party and Americans for Tax Reform have very similar policy positions on some issues; however, one seeks reform through fielding candidates, the other seeks reform through other political means. Perhaps the only way to determine where an organization lies on the continuum is not to apply clearly-specified criteria, but rather to rely on family resemblance concepts¹⁰⁴ which defy definition but can still serve to support distinctions.

In short, there are no clear boundaries that separate all political parties from all other groups, and some groups that currently do not seek ballot access may include the weapon in their arsenals in the future. Moreover, the interest groups that contend within

¹⁰² See Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 16 (“[T]he differences between parties and other political organizations are differences of degree. Interest groups do become involved in elections, and the larger organized interest have achieved considerable stability and symbolic status. They can recruit candidates and give political cues to their members and friends. The unique American nominating process lets them play an important role in influencing the choice of party candidates. Interest groups also promote issue positions, try to influence officeholders, and (through their political action committees) give money to campaigns. ... Most minor political parties are electoral organizations in name only.”).

¹⁰³ *Ibid.*

¹⁰⁴ See Andrei Marmor, *Interpretation and Legal Theory* 133 (1992) (describing Wittgenstein’s metaphor of family resemblance for words that describe things that are related but have no one thing in common that explains the use of the word for all).

the major parties always have the option of exiting that party and forming a minor party or affiliating with a different political party, a fact that shapes some of the character of this competition. As Bruce Cain concludes: “What distinguishes political parties from interest groups is that the former officially nominate candidates under their name (i.e., party label) while the latter do not. Additionally, in certain situations, the parties may receive state money to run campaigns and hold conventions. Otherwise, parties and interest groups can be very similar, especially in an era of independent spending.”¹⁰⁵ This comment reveals the final dynamic complexity of political parties that we will assess. Cain refers to the distinctions between parties and other organizations in this particular era given this particular set of regulations, thereby emphasizing that the characteristics of political parties change over time in part as a reaction to the regulatory scheme in place.

E. The One Certainty Concerning Political Parties: They Will Change Over Time

Political parties, with all their various parts and subparts, are instrumental institutions. They are used by goal-oriented actors to achieve their objectives; these objectives can be conflicting, and they change over time. In most cases, particularly in major parties, the changes are internal because the parties themselves are relatively durable institutions, but such changes can be significant. For that reason, John Aldrich has described political parties as “the most highly endogenous institutions of any substantial and sustained political importance in American history.”¹⁰⁶ This variability means that any current configuration of a political party is likely to change, sometimes substantially, as the preferences of its members, leaders, activists, and interest groups change and as the rules governing them change. Change can come from numerous places. For example, over time the party-organization has ceased to function as a machine led by bosses and earning loyalty through patronage positions and other benefits for its committed members. As legal, technological, and social changes made that old role

¹⁰⁵ See Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793, 802 (2001).

¹⁰⁶ John Aldrich, *supra* note 2, at 19. See also William Crotty, *supra* note 33, at [7] (“[P]olitical parties are not static. They are ‘living’ organisms, which have evolved over time and are continuing to evolve to meet the demands that society places upon them.”); Paul Frymer & Albert Yoon, *supra* note 17, at 981

impossible to sustain, the party-organization changed into a service organization, providing expertise, money and a party label to candidates seeking public office. Aldrich identified the “critical era of the 1960s” as a turning point for party-organizations as they changed dramatically to accommodate a new environment in which ambitious politicians could realize their goals through a personal campaign organization rather than only through a party monopoly.¹⁰⁷ A view of parties that might have been accurate in the 1960s, 1940s, or earlier would thus be flawed if applied to the transformed parties of the last few decades.

The challenges posed by the endogeneity of political parties are serious for any institution, particularly for one like the judiciary that makes decisions in the context of an isolated case often considered with the benefit of very little historical background or political context. It also suggests that rules adopted today will have counterproductive, inefficient, or at least unexpected consequences in the future as political parties alter their structure, in part as a response to the rules applied to them and in part as a reaction to other changes in the political landscape. How can a court effectively deal with the constitutionality of a particular political reform that may have different effects on the associational interests of groups in different parties, or on the interest of groups in the same party at different time periods? For example, a party that controls government and believes it would be benefited from a closed primary system may find after the passage of time and changes in the party-in-the-electorate that an open primary better serves its interest.

Or consider the varied reactions of segments of political parties to the blanket primary. Unlike California where both major party-organizations and some minor parties opposed the blanket primary, in Alaska, the Democratic Party recently did not oppose the blanket primary and the Alaskan Independence Party, a minor party which sometimes elects members to state-wide office, supported it.¹⁰⁸ When it was first enacted in Alaska,

(describing parties as “pliable organizations that leaders and elites use over time to advance their own interests and, as such, lack any fundamental, enduring, and essential nature”).

¹⁰⁷ Id. at Chapter 8. See also Larry D. Kramer, *supra* note 3, at 280-282 (describing how the parties were revitalized after a difficult period caused by progressive reform, technology, election finance law changes, and other alterations in the political scene “by changing what they could offer to candidates to make themselves useful in modern campaigns”).

¹⁰⁸ *O’Callaghan v. State*, 914 P.2d 1250 (Ala. 1996) (case challenging blanket primary brought by the Alaskan Republican Party, in which the Democratic Party did not intervene and the Independence Party

the Republicans were the main advocates (although it received support even then from many Democratic officeholders).¹⁰⁹ However, by 1996 the Republican Party had switched its position, challenging the constitutionality of the blanket primary and adopting a party rule in favor of semi-closed primaries.¹¹⁰ Thus, as long as state used the blanket primary, the party leadership of at least one major party in Alaska did not view the format as a threat to its ability to formulate and communicate a clear message, although the parties have changed their positions on the issue over the years, nor did all minor parties view it as a threat to their existence.

Not only do political parties adapt to new circumstances, most other aspects of the political environment also change over time. These changes in turn affect political parties. All the interactions and feedback effects increase the dynamic complexity facing the courts and virtually guarantee that judicial decisions will have unforeseen consequences not only for political parties, but for all facets of government. If, for example, the combination of the holding in *Colorado Republican II* allowing limitations on party expenditures for candidates and the unqualified endorsement in *California Republican Party* of the direct primary prohibits parties from establishing a clear message and controlling the selection of candidates as aggressively as party leaders would like, this consequence has much wider ramifications. It may keep the party label from providing as much helpful information to voters, and it may reduce the ability of the leaders of party-in-government to overcome collective action problems and implement a coherent agenda. Although the various segments of a political party are only loosely

submitted a brief in support of the primary's constitutionality). See also *id.* at 1255 n.8 (describing the Independence Party).

¹⁰⁹ *O'Callaghan*, 914 P.2d at 1255-56. The history of the blanket primary in Washington is more consistent with the California story. It was adopted by the legislature after a successful petition drive suggested that proponents would enact the blanket primary by popular vote. The major party leadership challenged the primary twice, but it was upheld by the state supreme court. Another challenge was mounted, in light of the Supreme Court's decision in *California Democratic Party*, by both major parties and some minor parties. The District Court granted the State's motion for summary judgment upholding the blanket primary, finding that Washington's primary was relevantly different from California's. See *Democratic Party Wash. State v. Reed*, No. C00-5419FDB (W.D. Wash. Mar. 27, 2002), available at http://www.secstate.wa.gov/office/bp/bpopinion_full.pdf.

¹¹⁰ That challenge was unsuccessful, but in the wake of the Supreme Court's decision invalidating the California blanket primary, the Alaskan Supreme Court has held the format to violate the Constitution. See *O'Callaghan v. Kowalski*, 6 P.3d 728 (Ala. 2000) (finding no "constitutionally significant differences" between the two states' primary election laws). Alaska now has a semi-closed primary system, in which registered party members can vote in a party's primary along with unaffiliated voters if the party's rules permit. See Alaska Stat. §§15-25-010 & -014 (Michie 2001).

connected, the strength of one may depend on the strength of the others. If partisanship in the electorate wanes and the party-organization cannot provide helpful services to candidates, then the party-in-government may be weakened as well.

Although the task generally overwhelms the judiciary, some justices have tried to get a handle on all the interactions and possible unforeseen consequences. Justice Kennedy made a connection between the blanket primary and other forms of nominee selection and the campaign finance rules governing party involvement in elections.¹¹¹ Similarly, he correctly observed in a campaign finance case that the technology of the Internet requires a reevaluation of the legal framework affecting campaign contributions and expenditures, and he also noted that regulating some forms of expenditures merely diverts money into other avenues of communication.¹¹² In a related context, the Court opined that any analysis of ballot access regulations or other political party regulation requires a comprehensive view of the entire regulatory scheme, not a tight focus on only one provision.¹¹³

Unfortunately, even in opinions where the Court or a justice recognizes at least some of the dynamic features of the relevant political environment, adjudication of individual cases is a blunt and often counterproductive tool to use to intervene. A court does not have the resources to generate good information about the larger political environment or to make accurate predictions about the likely effects of its ruling on party members, leaders, and other institutions. Often the Court is presented only with a slice of the entire pie and thus cannot adopt a complete vision of the problem it faces. For example, both *Colorado Republican* cases dealt only with hard money contributions and expenditures; the advocates of the recently enacted Bipartisan Campaign Reform Act¹¹⁴

¹¹¹ *California Democratic Party*, 530 U.S. at 588 (Kennedy, concurring).

¹¹² See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 407-08 (2000) (Kennedy, dissenting). See also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999) (further explaining the substitution effect in campaign finance reform).

¹¹³ See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 34 (1968). But see *Storer*, 415 U.S. at 737 (arguing that the need to look at the totality of the regulatory structure will not arise in each case). Most academic commentators agree that the courts should make a comprehensive assessment in determining the fate of any single provision. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 670-671 (1998) (critiquing *Burdick v. Takushi*, 504 U.S. 428 (1992)). See also *Burdick*, 504 U.S. at 447-48 (Kennedy, dissenting) (criticizing the majority for failing to consider whether the absence of write-in voting cast into doubt the entire scheme of ballot access regulation in Hawaii).

¹¹⁴ P.L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).

argue that soft money expenditures presented more opportunities for corruption or undue influence.¹¹⁵ Moreover, if the system adapts to a particular ruling in unexpected ways, the court does not have the ability to modify its holding unless someone happens to bring a case that allows an adjustment. In an area of rapidly changing institutions and complex relationships among entities, the ability to revise policy over time, engage in new and expanded fact-finding, and make decisions incrementally can be crucial to success. None of these features play to the strengths of the institutional design of the courts.

II. Dynamic Complexity Demonstrated: Three Cases Concerning the Regulation of Political Parties

The foregoing discussion gave some sense of the complexity and dynamic nature of political parties; a closer analysis of three Supreme Court cases involving parties will make these arguments more concrete. In addition, the discussion of the cases will better demonstrate the shortcomings of the judicial institution when faced with regulations of political parties. Finally, by studying these specific examples, we will be able to appreciate how conflict and contending forces within and among political parties work to protect and balance numerous interests and to allow for change over time as politicians and voters develop new structures of democracy through experience. Importantly, this Part does not include an argument that the result reached in each case was necessarily wrong, nor does my analysis depend on proving that proposition.¹¹⁶ For example in *Timmons*, the Court upheld the state's decision to ban fusion candidacies, the same result that would have been reached had the Court declined to review the merits of the dispute, as I will argue was the correct approach in the case. But the results reached by the Court are less important here than its method of analysis. By routinely deciding the merits of challenges to innovative but not clearly unconstitutional political institutions devised through the dynamic interactions of political parties and other actors, the Court ultimately

¹¹⁵ This was one reason the lower court in *Colorado Republican II* struck down the limitation on coordinated expenditures – it could not be tailored to deal with the problems identified by the state as long as it did not also regulate soft money. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 213 F.3d 1221, 1229-30 (2000).

¹¹⁶ Similarly, Issacharoff ends his analysis of the blanket primary case by concluding that although he thinks the blanket primary is a bad idea, it should not be held unconstitutional because there is insufficient

undermines the vibrancy of the political branches and impedes the development of institutions that might better serve the democratic aspirations of the day. We will return to this theme in Part III; for now, let us add some flesh to the bones of the theme of dynamic complexity by analyzing *Tashjian*, *Timmons*, and *California Democratic Party*.

A. *Tashjian v. Connecticut*¹¹⁷

From 1955 to 1984, Connecticut law required major parties to select most of their nominees through conventions of party delegates.¹¹⁸ The party convention could endorse any candidate receiving more than 20 percent of votes cast in a roll call vote at the convention, and any nonendorsed candidate who also received more than 20 percent of the vote could challenge the party-endorsed candidate in a closed primary. The candidate selected either at the convention or through the primary was placed on the general election ballot. In 1976, this nomination system was challenged by an independent voter who wished to vote in the Republican primary without formally affiliating with the party. His lawsuit was opposed by both party-organizations, as well as by the parties-in-government that had adopted the law, and he lost.¹¹⁹ This voter's case was later characterized by the Court as unconvincing because it was brought by a "nonmember" seeking to participate in a crucial activity of a party, rather than by members seeking to define who could participate in party activities. Of course, there was not much to separate an independent who voted for most or all of the Republicans in the general election from a voter who registered as a Republican at the last moment, which in Connecticut at that time was as late as noon on the last business day preceding the primary.¹²⁰ Nonetheless, the latter voter had formally affiliated with the party and had voted in the party primary, two slightly costly activities that a Connecticut independent had not engaged in. The decision to forego only one of these activities – not formally registering as a party

evidence to conclude that the format would have compromised "the necessary functions of the political parties." Samuel Issacharoff, *supra* note 3, at 312.

¹¹⁷ 479 U.S. 208 (1986).

¹¹⁸ See *Tashjian*, 770 F.2d at 268. This system applied to multi-town districts, which included all statewide offices, federal legislative offices, and many state legislative offices. Compare Conn. Gen. Stat. §§ 9-390, 9-405, 9-406 (applying to one-town districts) with §§ 9-400, 9-416 (applying to multi-town districts).

¹¹⁹ *Nader v. Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U.S. 989 (1976).

¹²⁰ See *Tashjian*, 479 U.S. at 216 n.7.

member – was made freely by the independent, however; state law prohibited her from voting in the primary.

In 1984, the Republican party leadership and its partisans in government determined that they needed to appeal to independent voters in Connecticut to increase their electoral strength. Independent support was a demographic necessity: there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered but unaffiliated voters in the state. Accordingly, the party convention considered and adopted a rule that would open the party primary for federal and statewide offices to independents as well as registered Republicans. This change in the position of the party-organization and some other elements of the party with respect to the format of its primary illustrates how parties change over time to account for developments in the electorate that implicate their ability to elect people to office. The Republicans in the state legislature, a minority in both houses at that time, sought to amend the law requiring closed primaries, but they were defeated in party-line votes. The state party, Republicans holding federal office, and the Republican state chairman then brought suit challenging the state law. In a 5-4 decision, the Court struck down the state law as an impermissible burden on the party members' associational rights.¹²¹

Tashjian implicates many of the characteristics of political parties described above, some of which members of the Court explicitly acknowledged in their opinions. First, there is some discussion of what it means to be a member of a political party, perhaps because the distinction between an independent and a voter who registers as a party member only a few days before the primary seems at first glance to be fairly trivial. The majority discounted the extent of the affiliation between a political party and ordinary voters who register as partisans. Justice Marshall explained: “A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization’s activities. Some of the Party’s members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial

¹²¹ Another issue figured in the case but is not discussed here. The Court found, with two dissenting on this ground, that the differing treatment for voting in primaries for federal offices and in primaries for local offices did not violate the Qualifications clause. This discussion highlights one of the complexities we have identified – the decentralized nature of political parties. It is not unusual for states to have different rules for elections for different offices; for example, the blanket primary law at issue in *California Democratic*

financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important."¹²² Justice Scalia, in dissent, viewed formal affiliation as meaningful, observing that "[t]he Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster."¹²³

In both opinions, the mass of voters who register as partisans were seen, in at least some sense, as members of the party. Yet, it is difficult to discover what their interests were and who was asserting those interests on their behalf. An absence of discussion of their interests is not surprising for the majority because it downplayed the importance of formal affiliation. Justice Scalia, who had a thicker concept of membership, spent most of his time focusing on party activists, whom he called the "rank and file"¹²⁴ of the party, than he did analyzing ordinary voters. It is possible to view some of the interests articulated by the state to support closed primaries as vindicating the interests of the mass electorate. Because the state consisted of Democratic office holders, however, one suspects that its desire to protect the interests of the ordinary voters was at least as strategic as it was sincere.

For example, the state supported its law with claims about voter confusion, arguing that voters would be confused about what ideology a candidate in the general election represented if the candidate had been selected by independents as well as partisans. This claim depended on a conclusion that the involvement of independents in primaries diluted the party label, which is possible if independents who vote in party primaries have preferences that systematically diverge from partisans who vote in primaries. Certainly, the Republican Party believed that there were different perspectives because it hoped that the involvement of independents would produce more moderate

Primary allowed a different method to tabulate votes for delegates to the national conventions to select presidential nominees.

¹²² *Tashjian*, 479 U.S. at 215.

¹²³ *Id.* at 235 (Scalia, dissenting).

nominees who would appeal to the greater number of independents voting in the general election and perhaps to some Democrats. The Court's handling of this state interest is unsatisfactory, in part because it dismissed the importance of the information contained in the party label. Although Marshall acknowledged that party labels act as voting cues and "play[] a role in the process by which voters inform themselves in the exercise of the franchise," he concluded that voters should be expected to seek out better and more complete information. This faith in the dedication of voters to spend a great deal of time gathering information about candidates will often be unwarranted and may be unfair, given the competing demands on people's time and attention.¹²⁵

The more convincing argument made by the Court in rejecting the claim of voter confusion was that other aspects of the nomination process guaranteed the vitality of the party label. Committed party members determined which candidates would appear on the ballot through a party convention. Although more of those candidates defeated at the convention might now participate in an open primary hoping to attract significant independent support, only those receiving more than 20 percent of the votes of the convention delegates would be eligible to appear on the primary ballot.¹²⁶ This control over the identity of the candidates by the party organization would sufficiently preserve the strength of the party label. Of course, the Court's reliance on rules preserving the party-organization's influence over the identity of its candidates is somewhat discordant in an opinion that affirmed the state's right to require candidate selection through a direct primary,¹²⁷ thereby allowing an environment where states routinely limit the power of the party to freely select its nominees.¹²⁸

Perhaps the most interesting feature of political parties relevant to *Tashjian* is how the competing interests of segments of the political parties other than the mass electorate were affected by the Republican rule change. First, the state, a key player in the case, was the majority party-in-government which competed against the Republican party and at

¹²⁴ Id. at 236.

¹²⁵ See Elizabeth Garrett, *supra* note 87 (discussing importance of voting cues for voter competence).

¹²⁶ See *Tashjian*, 479 U.S. at 221 (requirement that all candidates in the primary have received substantial support at the convention attenuates concern that the relationship between party and nominee is merely a "marriage of convenience").

¹²⁷ See *id.* at 237 (Scalia, dissenting) (making similar point: "It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.").

the time of the case enjoyed substantial control over elected offices. The majority in *Tashjian* explicitly described the state as a segment of a political party and viewed that fact as relevant to its analysis. In response to the state's claim that closed primaries protect parties from raiding and disintegration, the Court dismissed this argument because it "to some extent represent[s] the views of the one political party transiently enjoying majority party power."¹²⁹ Claims by Democratic office holders that they knew what was best for their Republican competitors rang false to the majority. In this respect, *Tashjian* involved one party imposing a regulation on its competitor in order to retain power and majority party status. Such a circumstance is arguably a compelling one for judicial involvement to overturn tactics used by entrenched actors to maintain power and reduce electoral competitiveness.¹³⁰

But, as usual in the case of political parties, the circumstances were more complicated. It is very possible that this case was also an intraparty dispute. Justice Scalia's dissent argued that the decision to allow independents to vote in Republican primaries was a decision made by party elites and office holders and imposed without their consent on party activists. Party leaders and ambitious office seekers wanted to enhance candidates' electability, even at the price of compromising ideological commitments. As Scalia noted: "We have no way of knowing that a majority of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by the Party's state convention – which, for all we know, may have been dominated by office holders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-à-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file."¹³¹ At the least, it is not clear that the only group supporting a closed primary was the opposing major party in Connecticut.

¹²⁸ See Daniel Hays Lowenstein, *supra* note 11, at 1790.

¹²⁹ *Tashjian*, 479 U.S. at 224.

¹³⁰ See, e.g., Richard L. Hasen, *supra* note 100, at 836. See also Daniel Hays Lowenstein, *supra* note 11, at 1788 (noting that an interparty dispute is more appropriate for judicial resolution when the minority party has worked to achieve its objective legislatively and most of its partisans in government supported the change). But see *id.* at 1790 (nonetheless, providing reasons in favor of judicial restraint in *Tashjian*).

¹³¹ *Tashjian*, 479 U.S. at 236 (Scalia, dissenting).

Moreover, the case supporting outside judicial intervention invalidating the state law is weak because it is possible. The dynamism that characterizes political parties provides significant opportunities to revisit and revise any decision about primary format. Perhaps party activists could succeed in repealing the rule at the next convention. Perhaps the Democratic leadership could decide more open primaries were in its electoral interests as Connecticut, along with the rest of the nation, became more competitive. Or, perhaps the Republicans would gain control of the state legislature and change the law. This latter possibility was a very real one at the time *Tashjian* was decided. Although the Republican Party in Connecticut tended to be in the minority in the legislature more than it was in control of one or both of the houses, Connecticut was not a one-party state. During the period between 1955 and 1984, the Republicans had controlled the Senate twice and the General Assembly six times, and they were often a sizable minority in Democratic-controlled legislatures.¹³² Indeed, notwithstanding the system of closed primaries, the Republican Party again took control of both state houses after the 1984 election and passed a law allowing independents to vote in primaries when authorized by party rule; the law was vetoed by the Democratic governor.¹³³ Currently, both major parties restrict voting in their primaries to registered members, although state law allows them to open their primaries to nonmembers if they choose to do so.¹³⁴

The Connecticut primary system continues to provide opportunities for judicial intervention into the political process. The laws allowing party control over access to the primary ballots were retained in substantially the same form after *Tashjian*, although the amount of support at the convention required for a nonendorsed candidate to obtain access to the primary ballot was reduced from 20 percent to 15 percent. This law has been the subject of political attack; for example, in 2001, a law implementing a direct primary had the support of the Governor and passed the General Assembly but lost in the

¹³² See Connecticut Register and Manual, available at <http://www.sots.state.ct.us/RegisterManual/SectionIII/Leg3.htm>.

¹³³ *Tashjian*, 479 U.S. at 212-13 & n.4.

¹³⁴ See Conn. Gen. Stat. § 9-41(a); Party Rules for Connecticut Democratic Party and Connecticut Republican Party, available at <http://www.sots.state.ct.us/ElectionsDivision/TCRules/PartyRules.html>. The law states that if the parties choose semi-open primaries, unaffiliated voters can vote in only one such primary.

Senate in a close vote.¹³⁵ Even with the implicit acceptance of the current arrangement in *Tashjian* and the possibility of change through the political branches, a federal district court recently ruled the law unconstitutional because it placed too great a burden on nonendorsed (and usually nonincumbent) candidates seeking to gain access to the primary.¹³⁶ Connecticut is currently fighting the ruling, in part because the party rules of both major parties retain the requirement and thus it is not clear how the upcoming primaries should be conducted. Interestingly, at least one party to the lawsuit, Common Cause of Connecticut, hailed its court victory as a way for it to leverage its legislative proposals in the state legislature,¹³⁷ demonstrating that political losers will eagerly turn to the courts even when they have future political channels for change if they believe that aggressive judicial review is available.

Tashjian demonstrates the continuum of affiliation for groups of members and the various interests of the different segments of the party. The opinions show that the justices were aware of these aspects of political parties, at least to some extent. The opinions in the next case, in contrast, lack much explicit awareness of the complexity of political parties, both of the major parties that sought to eliminate fusion candidacies in Minnesota and the minor parties that supported them.

*B. Timmons v. Twin Cities Area New Party*¹³⁸

Minnesota had banned fusion candidacies since 1901, retaining the prohibition when it revised its election code in 1981. In 1994, State Representative Andy Dawkins was nominated by one of the two state major parties, the Democratic-Farmer-Labor (DFL) Party, and subsequently by a minor party, the Twin Cities chapter of the national

¹³⁵ See Carrie Budoff & Michael Grynbaum, *Judge Voids Ballot Law, Ruling Meant to Open up Primaries; State Seeks Stay*, Hartford Courant, July 24, 2002.

¹³⁶ *Campbell v. Bysiewicz*, 2002 U.S. Dist. LEXIS 13804 (D. Conn. 2002) (granting preliminary injunction enjoining state from enforcing laws regarding multi-city district primaries). The district court does not cite or even consider the relevance of *California Democratic Party* to its analysis. See *infra* text accompanying notes 158 through 159 (noting that the language of *California Democratic Party* sits uneasily with the judicial willingness to impose direct primaries even when parties prefer to use conventions or other methods of selection).

¹³⁷ See Connecticut Common Cause, *Important Victory for Democracy in CT*, July 24, 2002, available at <http://www.commoncause.org/states/connecticut/072402.htm>.

¹³⁸ 520 U.S. 351 (1997).

New Party. Neither Dawkins nor the DFL Party objected to the second nomination. Nonetheless, state officials, including the Secretary of State who was a member of the DFL Party,¹³⁹ refused to accept the New Party's nominating petition or to list Dawkins as the nominee of both parties on the ballot because state law prohibited multiple-party nominations.¹⁴⁰ The New Party, a minor party in Minnesota that was pursuing a multi-state strategy of nominating or endorsing major party candidates to increase its influence, filed suit. In an opinion that has drawn criticism from many legal scholars, the Supreme Court upheld the ban.

The criticisms flow from the Court's failure to appreciate many of the features of political parties described above. First, unlike the majority in *Tashjian*, the majority opinion contained no explicit recognition that the antifusion law was passed by partisans in government, rather than by some neutral entity called "the State." The Court held that the "Minnesota Legislature," mentioned without any reference to its partisan make-up, could justify the fusion ban on the ground that "political stability is best served through a healthy two-party system."¹⁴¹ The legislature could favor the two-party system through regulations, although it could not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence."¹⁴² Because there is no apparent recognition in the opinion that the legislators adopting these rules were also members of the two major parties, there is no discussion about whether these partisans-in-government were likely to construct rules to entrench themselves and their copartisans in office.

In contrast, some scholars have indicted the fusion bans as examples of "partisan lockup" of the government by the two major parties¹⁴³ or of duopolistic behavior that may reduce competition.¹⁴⁴ In general, major parties will be strengthened and better able

¹³⁹ Joan Anderson-Growe, the elected Secretary of State, had previously served in the Minnesota House of Representatives. See <http://minnesotapolitics.net/SecretariesOfState/19Growe.htm>.

¹⁴⁰ 520 U.S. at 360.

¹⁴¹ *Timmons*, 520 U.S. at 367. See Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision*, in *The U.S. Supreme Court and the Electoral Process* 142, 163 (D.K. Ryden ed., 2000) (arguing that the Supreme Court "cannot afford to accept at face value the arguments put forth by state legislatures, whose inherent conflicts of interest render them incapable of objectively evaluating what is in the public interest").

¹⁴² *Ibid.*

¹⁴³ See Samuel Issacharoff & Richard H. Pildes, *supra* note 113, at 683-87.

¹⁴⁴ See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 *Sup. Ct. Rev.* 331, 337-41.

to resist dissident voices if minor parties remain weak and unable to exert significant influence on electoral outcomes; thus, they have an incentive to cooperate and pass laws that disadvantage minor parties. However, antifusion laws provide a compelling example that the explanations for laws regulating political parties are seldom simple and certainly may not be the result of partisan lockup in all cases. In some cases, both major parties may act cooperatively to oppose fusion, but in other cases the prohibition is supported only by the dominant major party as a way of eliminating one avenue for the other major party to garner support.¹⁴⁵ In the early days of antifusion laws, the Republican Party, dominant in many Western states, passed such laws to ensure its continued preeminence over the Democratic Party, although it often receive help from conservative Democrats. Surprisingly, the Republicans also found support for the bans from some third parties who hoped to become more significant electoral forces in their own right and thought fusion politics maintained their position as peripheral, albeit occasionally crucial, players in the two-party system.¹⁴⁶

Moreover, it is often the case that not all the elements of the party (or parties) apparently working to ban fusion are in agreement. *Timmons* itself provides good evidence of the disagreement about fusion within one of the major parties: the party-organization of a major party and its candidate, an incumbent legislator, did not object to the nomination by the New Party nor seek to remove the multiple party label from the ballot, although the law had been passed by members of the same major party and enforced by officials affiliated with that party. This reality suggests that laws regulating fusion candidacies and cross-nominations can undergo change over time as the various forces create new alignments. Moreover, political parties have several ways to implement a fusion ban, depending on the constellation of forces within the state electoral system and the party itself. For example, rather than enacting laws, parties can use internal party rules to prohibit their nominees from accepting the nomination of other parties and threaten the loss of the more valuable major party label.¹⁴⁷ Thus, striking down or

¹⁴⁵ See Peter H. Argersinger, "A Place on the Ballot": Fusion Politics and Antifusion Laws, 85 Am. Hist. Rev. 287 (1980) (discussing history of antifusion and finding that the laws were often the tool of the Republican Party to maintain superiority over its rival Democratic Party).

¹⁴⁶ Id. at 290.

¹⁴⁷ See Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 803-04 (2000). Following the lower court's decision in

repealing state laws that prohibit fusion may not allow multi-party endorsements to flourish if the parties discipline any of their candidates who accept such endorsements.

A second and equally glaring omission in the Court's analysis is any sophisticated discussion of the role of minor parties, an issue that the dissent addressed more usefully. There is no discussion of the relationship between voice and exit, and the dissent's observation that fusion candidacies allow minor parties some vitality while generally preserving political stability¹⁴⁸ is unanswered. Although both opinions included conclusions about the effect of fusion on minor parties and major parties, there is very little empirical proof provided to support their claims. Instead, "the Court moved in dramatic fashion to wrap the two-party system in the shroud of constitutional legitimacy" on the basis of "assumptions about the effects of various party systems and electoral systems [that] were outdated, misleading, and often simply mistaken."¹⁴⁹ Furthermore, the Court viewed minor parties as seeking the same objectives as major parties: to elect their own nominees to office. The majority situated minor parties at the wrong end of the continuum of organizations, placing them closer to major parties than to political organizations that primarily serve as means to express political viewpoints and to influence government actors who are not members of the organizations themselves. The main difference between the New Party and an organization that does not consider itself a political party is that the former sought to use the ballot to achieve its objectives, as well as other mechanisms to effect change.

This observation leads us to the majority's real difficulty with fusion candidacies: the worry that use of this particular tool, ballot labels, is inappropriate as a means of communication to voters and of influence over people who are not members of a party. As Rehnquist put it succinctly: "Ballots serve primarily to elect candidates, not as fora for

Timmons that the antifusion law was unconstitutional, Minnesota amended its law to allow fusion candidacies only if the state chairs of the nominating parties provided their consent in writing. It also punished a candidate who sought the nomination of both a minor and major party but who did not receive the major party nomination by requiring her also to forfeit the minor party nomination. See 1996 Minn. Sess. Law. Serv. Ch. 419 (S.F. 2720) (West). Under the terms of the amendment, it was suspended as soon as the Eighth Circuit's ruling was repealed; the amendment included a statement that the law was intended "to provide an orderly procedure for complying with the [Eighth Circuit's] decision while retaining prior law prohibiting simultaneous nominations to the extent permitted by the United States Constitution."

¹⁴⁸ *Timmons*, 520 U.S. at 380-81 (Stevens, dissenting) (noting that fusion candidacies are "the best marriage of the virtues of the minor party challenge to entrenched viewpoints and the political stability that the two-party system provides").

¹⁴⁹ Douglas J. Amy, *supra* note 141, at 160.

political expression.”¹⁵⁰ The majority was worried that multiple endorsements from single-issue political parties (what I have described as essentially interest groups using the ballot as a tool) would transform the ballot into “a billboard for political advertising.” This would occur, Rehnquist argued, if the minor parties endorsing the major party candidates had names that indicated positions on policies, like “No New Taxes” or “Healthy Planet” Party.¹⁵¹ Major party candidates might encourage this practice to provide voters with more information about their position on the issues (or to influence voters with misleading but effective slogans) at the crucial moment of voting. The majority never provided evidence to support its fears, and the dissent pointed out that experience with fusion candidacies is not consistent with Rehnquist’s claims.¹⁵² Furthermore, the majority did not tie its analysis of ballot cues to voter competence, the primary objective served by party labels and other ballot information. Rehnquist did not discuss whether fusion candidacies would either dilute the voting cue of political party (thereby decreasing voter competence) or enhance it by providing more particularized information (thereby improving voter competence).

Timmons is an unsatisfactory opinion because the analysis offered by the majority is simplistic and full of unsupported, and intuitively unpersuasive, assertions. The Court rested its analysis on its erroneous view of the merits of fusion, rather than relying on the existence of dynamic forces that could modify laws affecting fusion over time through formal and informal mechanisms. Much of the discussion in *Timmons* fits uneasily with the next case, the decision striking down California’s blanket primary, because the majority in *Timmons* treated the New Party’s interest in selecting its own candidate, and thus shaping its own message, with little respect. The majority argued that the New Party’s inability to nominate other parties’ candidates, an admittedly small universe of

¹⁵⁰ *Timmons*, 520 U.S. at 363.

¹⁵¹ *Id.* at 365.

¹⁵² See *id.* at 375 n.3 (Stevens, dissenting). However, for a sense of the complications possible in a fusion system, particularly for major party candidates, see Adam Nagourney, *Small Parties Have Big Voices in New York Governor’s Election*, N.Y. Times, May 21, 2002, at A21. Fusion candidacies are a typical part of the political landscape in New York where the Conservative Party usually endorses the Republican candidate and the Liberal Party the Democratic candidate, though not always. Minor parties are important to outcomes, such as when the Conservative Party backed Alphonse D’Amato over Jacob Javits in 1980 and may have played a crucial role in the defeat of the more moderate candidate. See *New York Conservatives Celebrate Fortieth Anniversary*, Wash. Times, May 17, 2002. In the fall of 2002, Governor Pataki may be the nominee of three parties: the Republicans, the Conservatives, and the Independents. See *Pataki’s Seedy Courtship*, N.Y. Observer, July 10, 2002, at 4.

people, only “slightly” impaired the party’s ability to select its standard bearer and communicate its message to voters.¹⁵³ This lack of concern is consistent with the Court’s belief that a direct primary can be imposed by the state on party-organizations, although it appears inconsistent with the strong language in *California Democratic Party* emphasizing the importance of the Party’s ability to choose its own candidate and to shape its own message. Perhaps one way to reconcile these opinions is to focus on the amorphous concept of “membership” and to remember that the Court often tries to protect the group it views as the members of a political party. In *Tashjian*, the Court protected the Party’s ability to expansively define the group of people it wanted to participate in its primary, although it was unwilling in an earlier case to let a nonmember force his way into the primary. In *Timmons*, the Court was not terribly concerned with the limitation on the New Party’s power to nominate Andy Dawkins because Dawkins was an active member of the DFL party and not a member of the New Party, although he was willing to affiliate with them through a fusion nomination. And, in the blanket primary case, the Court was explicitly concerned that the participation of nonmembers would overwhelm political parties and render them ineffective in the political process.

*C. California Democratic Party v. Jones*¹⁵⁴

Before 1996, California used a closed primary system so that only registered members of a political party could select the party’s nominees.¹⁵⁵ Closed primaries were required by state law, and party rules echoed that choice. In 1996, voters passed an initiative that amended the election laws to implement a blanket primary. Supporters of the reform explicitly intended to force changes in the nomination decisions of the political parties and to alter the message that the parties promoted. A blanket primary format, where voters can vote in different primaries for different offices and thus avoid both the cost of formal affiliation with a party and the cost of choosing only one party’s primary, thereby losing the chance to vote for any race in any other party’s primary, is

¹⁵³ 520 U.S. at 363.

¹⁵⁴ 530 U.S. 567 (2000).

¹⁵⁵ The deadline for registering to vote in the party primary in California was about a month before the primary. See Cal. Elec. Code §2102(a).

likely to result in candidates that appeal more to the median voter than to activists. Blanket primaries are moderating devices designed to move all parties closer to the political center, or, in the words of the California ballot pamphlet, to “weaken” party “hard-liners” and empower “moderate problem-solvers.”¹⁵⁶ In striking the initiative down as an unconstitutional infringement on the associational rights of political party members, the Court placed great emphasis on the significant outside influence on internal party decisions about its message and its candidates that occurs under a blanket primary system.

The majority reasoned that the state’s decision to force party members to associate with nonmembers during a primary had the intended effect of changing the party’s ideological message, and “[w]e can think of no heavier burden on a political party’s associational freedom.”¹⁵⁷ It is difficult to reconcile this strongly-worded protection of this aspect of party activity with the Court’s unquestioning acceptance of laws that require parties to select their candidates through a direct primary rather than a convention or caucus.¹⁵⁸ The Court left open the question of the constitutionality of the state-mandated open primary, although it cited, apparently approvingly, a passage from a prior dissent that the mere act of voting in a party primary “fairly can be described as an act of affiliation” with that party.¹⁵⁹ The blanket primary, in contrast, raises the possibility that a party’s nominee will be selected primarily by nonmembers who have not been willing to associate even briefly with the party through choosing its open primary and foregoing participation in all other primaries.

¹⁵⁶ *Id.* at 570. Since the Supreme Court disallowed the blanket primary, pundits have argued that the decision has made a difference in the outcomes of primaries, allowing, for example, a more extreme Republican candidate for governor to defeat a moderate with greater appeal to Democrats and others who could not participate in a closed primary but who might have made a difference in a blanket format. See Tony Quinn, *Simon’s Best Hope: Be a New Riordan*, L.A. Times, Mar. 10, 2002.

¹⁵⁷ *Id.* at 582. It is not clear that blanket primaries inevitably weaken political parties. The Washington Republican Party is one of the strongest state parties, notwithstanding the blanket primary in that state. See Richard L. Hasen, *supra* note 100, at 834. The court which upheld Washington’s blanket primary relied on expert testimony that the strength of the segments of political parties in Washington were very similar to the strength of those throughout the nation. *Democratic Party Washington State v. Reed*, *supra* note 109, at 24-26.

¹⁵⁸ See 530 U.S. at 572 (finding it “‘too plain for argument’ ... that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion) (quoting *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)).

¹⁵⁹ See 530 U.S. at 577 n.8 (quoting *La Follette*, 450 U.S. at 130 n.2 (Powell, dissenting)). See also Nathaniel Persily, *supra* note 52, at 315 (noting that while the line between open and blanket primaries may be “arbitrary” it is “easier to specify than others”).

But the majority's analysis is more than merely incomplete; it inaccurately described the significance of membership in a political party. First, its use of the term "members" is inconsistent. Much of the time it appears to be used in its broadest sense to include voters who are qualified to vote in the closed primary, and the dicta about open primaries suggests that the mere act of voting in a party primary results in some sort of constitutionally-meaningful affiliation between voter and party. Yet these members of the party (i.e., voters who register as partisans) supported the initiative, signaling their desire to allow unaffiliated voters the opportunity of voting in some of one party's primary races but not all of them. The majority of the party-in-the-electorate of all the parties voted in favor of the blanket primary,¹⁶⁰ imposing this structure on the party-organizations and the parties-in-the-[traditional]-government. In addition, joining the voters in their support of the initiative were a number of major and minor party candidates and office holders.¹⁶¹ If the problem is that the blanket primary imposes unwanted participants on these members of political parties, the facts suggest that a majority of them welcomed the broader involvement.

In other passages of the opinion, however, the majority's definition of "members" seemed more limited, focusing on party leaders and party activists, assuming that latter group is what Scalia referred to when he talked of the "rank and file."¹⁶² That is the phrase he also used in his *Tashjian* dissent to describe committed party members who do not hold official party positions. And that group is suggested by the passage in *California Democratic Party* in which he worried that "the party rank and file, who may themselves not agree with the party leadership, ... do not want the party's choice decided by outsiders."¹⁶³ Of course, it is clear that there is some limit to the Court's protection of this group of people; they may prefer to use party conventions to choose nominees rather than

¹⁶⁰ See 530 U.S. at 601 (Stevens, dissenting).

¹⁶¹ Two Republicans, moderate Tom Campbell and maverick Becky Morgan, endorsed the initiative, as did a prominent independent and former Democrat, Lucy Killea. See Brian J. Gaines & Wendy K. Tam Cho, *Crossover Voting before the Blanket: Primaries versus Parties in California History*, in *Voting at the Political Fault Line* 12, 30 (B.E. Cain & E.R. Gerber eds., 2002). In addition, Governor Davis, elected in part because of the blanket primary, filed an amicus brief arguing for its constitutionality in the Supreme Court. See *Brief of Amicus Curiae California Governor Gray Davis*, *California Democratic Party v. Jones*, 2000 WL 340234 (Mar. 31, 2000). See also Christian Collet, *supra* note 28, at 227 ("Minor-party candidates seemed to sense the potential benefits of the primary and, as a result, supported it.").

¹⁶² 530 U.S. at 571 (also citing passage in district court's opinion discussing the deleterious effects of the blanket primary on party activist).

¹⁶³ *Id.* at 581.

the direct closed primary which involves people who are not really committed members of the party, but that is an option they can be constitutionally denied.

The other aspect of the blanket primary decision that stunningly reveals the Court's indifference to the dynamic complexity of political parties is its failure to mention as significant the collection of plaintiffs challenging the law. The blanket primary did not present the usual constellation of major parties opposing minor parties, or of one major party opposing the other major party. Instead, the challenge was brought by an alliance of the two major party organizations, the Libertarian Party, and the Peace and Freedom Party.¹⁶⁴ In short, there were representatives of the range of organizations that use the political party format and the ballot, from those that also have significant governance roles, to a well-established, durable, minor party that occasionally places its candidates in government positions, to a little known organization that is essentially an expressive organization with no hope of electoral success.¹⁶⁵ The only mention of minor parties in the majority opinion is the inaccurate observation that for many such parties, the party itself is "virtually inseparable from [its] nominees (and tends not to outlast them)."¹⁶⁶ Not only is the concept of membership different in the case of minor parties, making some of them more like private organizations to which the majority's framework of associational rights more properly applies, but they are also affected differently by the blanket primary. An amicus brief had argued to the Supreme Court that cross-over voting, which empirically has not been a problem in major party races, was of such a

¹⁶⁴ Not all minor parties joined in the challenge, however. See Christian Collet, *supra* note 28, at 224-25 (describing that reasons that the Reform Party, although it did not have an official position, "gave lukewarm backing to the blanket primary").

¹⁶⁵ In California, the Libertarian Party has had some success with placing its candidates in local offices, often in nonpartisan positions. It claims 50 officeholders as members, including members of planning commissions, city council persons, and a district attorney. See <http://www.ca.lp.org/>. The Peace and Freedom Party, which appears to exist only in California, is a feminist socialist party which calls for the public ownership of industries, financial institutions and natural resources, as well as a change to a "peace economy." See <http://www.peaceandfreedom.org>. It may have some members who serve in local offices. Unlike the Libertarian Party, it no longer appears on the ballot for state-wide elections because of its poor showing in 1998.

¹⁶⁶ 530 U.S. at 575 (listing as examples the Theodore Roosevelt Bull Moose Party, the La Follette Progressives, the Henry Wallace Progressives, and the George Wallace American Independent Party). See also Nathaniel Persily & Bruce E. Cain, *supra* note 147, at 800.

magnitude in minor party primaries that it “can often make the participation by minor party members irrelevant.”¹⁶⁷

In the end, whatever one thinks about the results of these cases, one is left with the impression that the Court has not really come to grips with how complex political parties are, how quickly they and their environment change, in part as a consequence of judicial decisions, and how these characteristics of parties affect the policy that partisans in government (or in the electorate) devise. Of course, many equally complicated and murky areas of life are left to judicial resolution, and the Court’s performance in a range of cases may be disappointing but necessary either because judicial decisionmaking is better than the alternatives or because there are no alternatives. But, as these cases also suggest, the dynamic aspects of political parties that make them a challenge for policymakers and courts may also ensure sufficient conflict and change over time to provide ample protection for important values without court involvement.

III. The Role of the Judiciary in Cases Concerning Political Parties

The discussion of only three cases of the many that the Court has decided affecting political parties gives a flavor of both the complexities that they present and the shortcomings of the judicial institution as a forum to assess laws regulating parties. However, many of the areas in which we routinely accept, and expect, judicial intervention are complex and pose challenges, some insurmountable, to courts because of their institutional limitations.¹⁶⁸ We have apparently concluded that judicial review is nonetheless appropriate in such cases, perhaps because we have decided either that their institutional strengths counterbalance the limitations and allow judges to produce generally acceptable results or that there is no other institution that can make important

¹⁶⁷ See Brief for the Brennan Center for Justice at New York University School of Law as *Amicus Curiae* In Support of Neither Party, *California Democratic Party v. Jones*, No. 99-401, U.S. Supreme Court, at 26 and Tables 1 & 2. But see Christian Collet, *supra* note 28, at 225 (arguing that minor parties would benefit from blanket primary). Perhaps because of the blanket primary, traditionally minor parties in Washington have qualified at times for major party treatment. See *Democratic Party Washington State v. Reed*, *supra* note 109, at 5 (describing the Libertarian Party as a “fledgling major party”).

¹⁶⁸ See Barry Friedman, *The Birth of an Academic Obsession* (unpublished manuscript 2002) (describing the obsession of academics with the countermajoritarian difficulty of judicial review notwithstanding the otherwise broad acceptance of review and involvement as the norm).

decisions necessary to carry on with governing, so flawed results are better than no results at all.

Cases concerning political parties differ in significant ways from many of these other contexts. First, there is very little constitutional basis on which to determine what political arrangements are consistent with the democratic design of the federal government and no explicit constitutional guidance concerning the role of political parties. Thus, judges are very likely to decide cases based on their view of the best governance structures for a stable democracy. This reality means that one contested view of the appropriate role of political parties in a democracy is constitutionalized, thereby eliminating the chance for states and the federal government to experiment with other democratic forms and to alter them over time. As Justice Frankfurter observed in a similar context, “What is actually asked of the Court in [these cases] is to choose among competing bases of representation – ultimately, really, among competing theories of political philosophy – in order to establish an appropriate frame of government” for the states and finally the United States.¹⁶⁹ In the case of the blanket primary, for example, the Court determined that the Constitution does not allow for democratic structures that empower the median voter over citizens with more extreme partisan preferences, even though such an electoral structure is consistent with one reasonable vision of democracy that may be supported by a majority of citizens at certain times.

However, other areas of law in which judicial review is accepted as a necessary component of policymaking may also reflect some of these characteristics. In those cases, the disadvantage of judicializing and constitutionalizing policy in an area of cryptic or nonexistent guidance from the constitutional text is outweighed by other advantages of judicial review. Thus, after discussing this aspect of the political party cases, I will turn to the key difference between these cases and other contexts. Throughout the foregoing discussion, I have emphasized not just the complexity of parties, but the *dynamic* nature of these institutions. The very vibrancy and endogeneity that make political parties difficult entities for courts to understand mean that important interests receive significant protection through the competition and interactions of the various components of major and minor parties. Even minor parties, which have little if any power in the government,

¹⁶⁹ Baker v. Carr, 369 U.S. 186, 300 (1962) (Frankfurter, dissenting).

are better protected by the political process, where they can serve the interests of at least some aspect of the major parties, than they are by the courts. This aspect of my argument in some ways resembles the argument by Justice O'Connor when she explained why claims of partisan gerrymandering should be considered nonjusticiable.¹⁷⁰ In her view, not only was such redistricting “fundamentally a political affair,”¹⁷¹ but the major parties are also the dominant groups in the process capable of “fending for themselves.”¹⁷² Relying on political science work, O'Connor observed that gerrymandering is a “self-limiting enterprise,” further rendering judicial intervention unjustified.¹⁷³ Left out of O'Connor's analysis, but perhaps implied, is the awareness that political parties, laws regulating the political process, and other political institutions can change over time to reflect new agreements and new interests as they developed.

Unlike O'Connor's approach to partisan gerrymandering, however, my proposal is not to hold all political party cases nonjusticiable. Instead, I argue that the judicial role should be limited to intervention in only the most extreme cases when one segment of a party works successfully, perhaps with other party entities, to impose anticompetitive structures. Although my solution relies on the work of a number of scholars arguing that courts should police the conditions of the political market to ensure robust competition,¹⁷⁴ I anticipate that the approach I describe would justify judicial intervention in far fewer situations than their theories appear to support. In addition, I provide a list of factors that should serve as red flags to courts working to fulfill only a modest oversight role.¹⁷⁵ I

¹⁷⁰ *Davis v. Bandemar*, 478 U.S. 109, 144 (1986) (O'Connor, concurring in the judgment).

¹⁷¹ *Id.* at 145.

¹⁷² *Id.* at 152.

¹⁷³ *Id.* (citing Bruce Cain, *The Reapportionment Puzzle* (1984)).

¹⁷⁴ See, e.g., Samuel Issacharoff & Richard H. Pildes, *supra* note 113.

¹⁷⁵ To continue with the comparison to partisan gerrymandering, my approach somewhat resembles the search for objective factors advocated by Justice Stevens in *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (concurring), and Justice Powell, joined by Stevens, in *Davis v. Bandemar*, 478 U.S. at 161 (concurring in part and dissenting in part). Although the approach is similar, it differs from my proposal, most significantly in that their objective test is advocated without a simultaneous shift to a nearly conclusive presumption against judicial review in such cases. In other words, these justices do not appear to find judicial intrusion problematic; rather, they disagree with the way the Court goes about its intrusion. Ironically, in the partisan gerrymandering context, a more objective test might well increase judicial involvement because it would be easier for courts to apply than the very nebulous and unsatisfactory standard articulated by the plurality in *Davis v. Bandemar*. See 478 U.S. at 110 (holding “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole”). See also Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 *Tex. L. Rev.* 1643 (1993) (critiquing plurality). No partisan gerrymander has been invalidated by a federal appellate court under the

also argue that courts should exercise restraint not only in the context of cases in which major parties seek protection, but also in cases where minor parties allege that their interests have been unconstitutionally burdened.

A. Aspects of Political Party Cases that Militate Against Judicial Review

Decisions in cases concerning political parties tend to institutionalize—and constitutionalize—one vision of democracy and of political parties. Not surprisingly, it is a vision that reflects the backgrounds and biases of the judiciary, a group “grossly unrepresentative of the population.”¹⁷⁶ Judges are not politically naïve; after all, they have developed enough connections with politicians and other political actors to win nomination to the federal bench or to win election or appointment in the states. A few even have experience in government, in either elected or appointed positions. But they overwhelmingly, if not entirely, come from the ranks of the major parties – a fact which perhaps explains the lack of judicial concern for minor parties – and they have chosen careers on the sidelines of politics, perhaps indicating a preference for order and stability that is reflected in the jurisprudence. The prior (and sometimes current) involvement of many judges in political parties as more active participants than ordinary voters may explain the unexamined assumption that the concept of “party membership” has some easily accessible and widely understood meaning.

Rick Pildes has argued convincingly in work drawing together a number of political process cases that the Supreme Court exhibits a “cultural conservatism” toward democracy. He describes this worldview: “To ensure ‘political stability’ and avoid ‘ruinous competition,’ American democracy required regular organizations, a highly ordered two-party system, a style of politics that was channeled and contained, lest too

plurality’s standard. In contrast, courts have invalidated numerous regulations of political parties and have done so increasingly in recent years; thus, a new test with a limited number of objective red flags against a background that reverses the traditional presumption in favor of judicial review promises to leave more issues to the political branches for resolution.

¹⁷⁶ Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 Chi.-Kent L. Rev. 89 (1988) (concluding from this and other reasons that the judiciary ought not to be the institution solely responsible for constitutional decisionmaking). See also Roderick M. Hills, Jr., *Are Federal Courts More Impartial than Voters* 11 (unpublished manuscript 2002) (“[L]awyers as a class tend to have values and beliefs that differ significantly from those of the public generally. They put a greater premium on precedent and stability.”)

much politics undermine democracy itself. Perhaps it also required, or came to be seen as requiring, an active judicial role to ensure that too much democratically-adopted restructuring did not undermine the stability of democracy itself.”¹⁷⁷

Such a culturally conservative vision of democracy is only one of many possible frameworks through which to organize institutions of governance. The Constitution contains very few design details, and the few it provides are compatible with a variety of institutional arrangements.¹⁷⁸ To the extent that the Constitution permits various forms of democracy, it should be left to the politically accountable branches and the voters to determine which model will govern in any particular time.¹⁷⁹ Otherwise, unelected federal judges and somewhat insulated state judges determine important aspects concerning the form of the United States’ democracy and do so in a way that discourages further innovation and experimentation. Furthermore, because political parties are endogenous, the rules set by the Supreme Court play a significant role in shaping political parties, both directly and indirectly as political actors make changes in party structure to react to judicial decisions. Judicial intervention through these political party cases allows judges to rule some arrangements out of bounds, such as the blanket primary, and to advance their particular political perspective. It denies the democratic process some of the advantages of a federal system consisting of multiple jurisdictions with various visions of the best governing arrangements. Because the judicial agenda typically

¹⁷⁷ Richard H. Pildes, *Democracy and Disorder*, in *The Vote: Bush, Gore, and the Supreme Court* 140, 164 (C.R. Sunstein & R.A. Epstein eds. 2001) (arguing that several recent political process cases underscore the judicial culture that is leery of political developments that appear chaotic or unfamiliar); Richard H. Pildes, *Constitutionalizing Democratic Politics*, in *A Badly Flawed Election: Debating Bush v. Gore*, the Supreme Court, and American Democracy 155 (R. Dworkin ed., 2002). See also Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001) (discussing generally the current strength of the idea of judicial supremacy, particularly in areas of structural constitutional concerns and political questions and discussing the proper role of “popular constitutionalism” whereby the courts would allow the people more room to determine which political arrangements are consistent with the Constitution).

¹⁷⁸ See Samuel Isacharoff, *supra* note 3, at 310 (noting that “the initial federal Constitution is conspicuously silent on the actual conduct of democracy”); *id.* at 311 (“[B]road-gauged constitutional principles turn out to be exceptionally difficult to apply to limit the potential range of institutional arrangements consistent with republican governance.”). See also Dan M. Kahan, *Democracy Schmocracy*, 20 Cardozo L. Rev. 795 (1999).

¹⁷⁹ Members of the Court have sometimes made this argument. Although the most famous iteration is probably Justice Frankfurter’s dissent in *Baker v. Carr*, see also *Williams v. Rhodes*, 393 U.S. at 54 (Harlan, J., concurring in the result) (“One may perhaps disagree with the political theory on which the objectives are based, but it is inconceivable to me that the Constitution imposes on the States a political philosophy under which they must be satisfied to award election on the basis of a plurality rather than a majority vote.”).

proceeds by constitutional pronouncement, it entrenches judicial values far into the future, denying legislatures or the people (through direct democracy) the possibility of change and relying solely on subsequent judicial decisions to sanction modification.

In contrast, judicial restraint allows the federal and state legislatures and the people of some states to experiment with various systems and to change institutions as our views of democracy evolve over time. Certainly, there may be some arrangements clearly out of the constitutional bounds, vague and incomplete as those may be, but judicial enforcement to prevent only clear violations of constitutional principles and values would look very different than the current robust judicial review. When legislatures enact a particular set of regulations, elected officials act on their own theories of democratic governance, knowing that they are subject to the accountability of the ballot box. As long as the legislature's approach is reasonable, the Court should not rule that vision out as unconstitutional, and therefore unacceptable at all times in all states, simply because it is not the reasonable theory that a majority of the justices would select.¹⁸⁰ Nonetheless, the Court has chosen not to follow this more modest path of judicial review. Rather than ruling a few things out but allowing innovation and change within a broad set of cases, the Court has worked to entrench its own contested view of democracy.

Thus, Bruce Cain misses the real problem of the decision striking down the blanket primary. He argues that a decision upholding the blanket primary would have made the Court "party to yet another, unnecessary lock-in of one representational theory (i.e., hypercentrism)."¹⁸¹ On the contrary, the Court's decision ruled out a choice that the people of California had made about the way to organize their election process. Moreover, it prohibited a choice that is not necessarily detrimental to democracy if one visualizes democracy as a way to reach decisions consistent with the views of voters in the center of the ideological spectrum and to moderate an increasingly partisan political

¹⁸⁰ Cf. Frank I. Michelman, *Brennan and Democracy* 28-29 (1999) ("[I]f someone is going to use 'moral readings' of highly interpretable constitutional texts to resolve for the country such basic and contested issues of morality and prudence ..., it ought to be the people acting democratically and not any cadre of independent judges.") See also *id.* at 55-57 (noting fact of disagreement on correct lawmaking procedures in a democracy and arguing that respect is due to reasonable decisions even when there is disagreement as to correctness, but approving of relatively aggressive judicial review of political arrangements).

¹⁸¹ Bruce E. Cain, *supra* note 105, at 795.

system.¹⁸² One may not agree that this is the best kind of democracy for the country or for California, but it is hard to see how the Constitution mandates that this vision be rejected.

Moreover, California's decision to adopt a blanket primary would not have been the last word about the precise form of the state's electoral institutions, although the Supreme Court's decision rejecting blanket primaries is essentially the last word for the entire country. Had voters in California become dissatisfied with the government produced by blanket primaries, they could have changed the system again to reflect a new version of democracy. Even without repealing the initiative, government actors and major political parties could have adopted rules and laws that would have compensated to some extent for any loss in influence or control. For example, in California, parties have little control over who can run in a party's primary; essentially, a candidate seeking access to the primary ballot need only be a registered member of the party for at least three months, not have recently been a registered member of another party, and submit a petition with 100 or fewer signatures, depending on the race.¹⁸³ Parties exert influence over primary outcomes through fundraising and providing electoral support to favored candidates. Parties can endorse candidates in a primary, providing information to voters about the candidate whom party leaders and activists believe best carry forward their message, but the Court in *California Democratic Party* properly refused to equate the ability of parties to endorse particular candidates with other mechanisms, like closed primaries, that provide stronger control.¹⁸⁴ If party leaders had wanted more control after the adoption of the blanket primary, they could have worked to convince legislators to adopt a different

¹⁸² For a theory of democracy preferring structures that favor the median voter, see Robert Cooter, *Constitutional Consequentialism: Bargain Democracy versus Median Democracy*, 3 *Theoretical Inq. in Law* 1 (2002). See also *O'Callaghan*, 914 P.2d at 1263 (in case before *California Democratic Party*, seeing dispute about blanket primary law as a conflict between different visions of the role of political parties in a democracy and holding that "it is not the function of any court to resolve" the conflict).

¹⁸³ See Cal. Elec. Code §§8001(a), 8062. Similarly, in Alaska, the political parties had virtually no role in the candidate selection process for the blanket primary. Any person could declare herself to be a candidate of a political party by merely registering to vote as a member of the party, an action that could take place on the same day she declared her candidacy. Ala. Stat. §15.25.030(a)(16) & §15.07.040 (Michie 2001). See also *O'Callaghan*, 914 P.2d at 1265-66 (Rabinowitz, dissenting) (placing great weight on the lack of control that a political party exercises over who can run as candidates with its party label in arguing that the blanket primary in Alaska was unconstitutional).

¹⁸⁴ 530 U.S. at 580. Some states had laws prohibiting parties from endorsing candidates in elections, but the Supreme Court ruled those laws unconstitutional. See *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). Had the Court not intervened in *Eu* but let the matter be determined by the interplay of political forces, it seems very likely that party leaders and officeholders would have repealed or modified the law banning party endorsements as a response to adoption of the blanket primary.

system of determining access to a party's primary ballot, perhaps similar to the system used by Connecticut where party conventions play an essential role in deciding which party members can run in primaries.¹⁸⁵

The adoption of the blanket primary did not absolutely lock in a vision of democracy that gave primacy to the median voter, at least not to the extent that the Court's decision has locked out this particular primary format. The Court acted to deny supporters of this reasonable vision of democracy one effective means to implement it, and at the same time drew into question arrangements much less unusual than the blanket primary. The emphasis on the fundamental interest of party members, whoever those may be, to refuse to associate with nonmembers casts doubt on state-imposed open primaries; it has led to the demise of the state-imposed blanket primary in Alaska and cast doubt on the blanket primary in Washington, where the format has been used for decades without apparent harm to the strength of the major parties or to the vitality of electoral competition; and it draws into questions rules allowing cross-nominating that have been in place in some states at various times, including California.¹⁸⁶

Perhaps judicial intervention can be justified nonetheless because it provides a necessary element of stability in the political process by ruling some structures out-of-bounds, even in the absence of any constitutional mandate to do so. This pragmatic justification overestimates the danger of instability in the absence of judicial involvement, and it under-appreciates the institutional features of the political process that make significant instability unlikely in the United States. Legislative procedures favor the status quo, erecting procedural hurdles to enacting legislation at all levels of government, so any radical change in political structures is difficult. Initiatives are certainly not easier to pass than traditional legislation; most issues never qualify for the ballot and, of those that do, most are defeated. Thus, the court does not add much stability to the political process; it is not designed to deal with these cases in a sophisticated manner and thus is likely to commit errors; and its decisions constitutionalize contested visions of democracy and freeze structural arrangements that might require change over

¹⁸⁵ See *supra* text accompanying notes 118 and 126 through 128. If it survives on appeal, the recent decision striking down this system as unconstitutional would eliminate this option at least in Connecticut.

¹⁸⁶ See Brian J. Gains & Wendy K. T. Cho, *supra* note 161 (discussing history of cross-filing in California and noting similarities with blanket primary).

time. Arguments that judicial involvement is a necessary evil because the political branches are likely to implement policies so radical that they would destabilize or undermine democracy do not correspond to the inherently conservative legislative process put in place by the federal and state constitutions.

However, determining the propriety of aggressive judicial intervention into the political process requires balancing the costs and benefits of the involvement. Constitutionalizing a particular political philosophy and stifling innovation and change may be a cost, but perhaps it is one worth paying if fundamental rights and values would otherwise be unprotected.¹⁸⁷ In discussing the vote dilution and other political process cases, Cain succinctly states this tension: “Those who sympathize with what the courts were trying to do have had to weight the short term gain of getting a desired outcome against the long term problem of ‘judicializing’ politics and institutional design.”¹⁸⁸ In many areas where the Constitution provides little or no guidance, the Court has nonetheless stepped in and provided a constitutionalized law of democracy requiring, among other things, protection of the right to vote and the doctrine of one-person, one-vote. Cases involving laws regulating political parties are different from many other political process cases, however, because judicial intervention is largely unnecessary given the ample protections provided in the tumultuous and competitive realm of politics.

¹⁸⁷ For example, scholars who propose a party autonomy theory of judicial review justify their conception of appropriate judicial intervention as providing an environment that better protects the interests and rights of voters. Some articulations of this approach state that the functional theory of party autonomy “grants the party organizations near-absolute First Amendment rights to determine who can vote in their primaries.” Nathaniel Persily, *supra* note 94, at 793. The party autonomy approach appears to have the virtue, from an institutional competence perspective, of providing the courts a simple decisional rule: to aggressively protect the party-organization. Of course, this approach entrenches a contestable view of the appropriate governance structure for a representative democracy by protecting one segment of the political party – the leaders of the party-organization – and not the party-in-government or party-in-the-electorate that has passed laws arguably infringing on party autonomy and possibly not party activists who might disagree with decisions reached by party leaders. Moreover, the approach is clearly more complicated than the above description suggests and thus might challenge the ability of the courts in much the same way that the current case law has produced questions and tests beyond the capability of the judges to answer or apply. Persily concludes that judges using the theory as a touchstone will still have to make some difficult judgments: “The more that scholars and courts recognize the unique constitutional position of political parties and the need to construct rules that account for their uniqueness, the richer the debate will become on *which party functions, if any*, judges ought to protect.” *Id.* at 824 (emphasis added). Drawing the line between protected and unprotected party functions seems to lead the Court back into the mess it now finds itself in.

¹⁸⁸ Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 *Loy. L.A. L. Rev.* 1105, 1111 (1999).

The analysis in Parts I and II provide a basis for reaching this conclusion, but it is helpful to identify more specifically some of the protections for the interests involved in major political parties and for those in minor parties. This discussion necessarily underestimates the level of protection that conflict within and among the parties could provide and the outcomes it would produce because the current level of conflict takes place in a world where all the actors know that judicial intervention is possible and likely. In other words, a loser in the political process now might not continue to fight in the political realm but instead choose to move the battle into the courts, perhaps because it believes that success would be less costly (given the state of the precedents) and more permanent (because the outcome may be characterized as constitutionally mandated thus eliminating further political development). If the courts adopted a much more modest role in these cases, then the political conflict would only increase and continue into the future as players sought to mold the ever-changing institutions of political parties to better serve their objectives.

With respect to cases involving the major parties, they are often merely disputes between different segments of the party. The party-organization opposes a regulation passed by the party-in-government, or the national party dislikes a law supported by parts, but perhaps not all, of the state party. In these cases, it is easy to understand why courts should decline to referee an internal dispute. Just as the court instructs disgruntled legislators who have lost in the political process that their redress lies in the use of political remedies,¹⁸⁹ so should courts make it clear in internal party disputes that the contestants need to resolve the issue in other arenas. No segment of the party is completely powerless because of the interdependence of each of the parts. The party-in-government is dependent on the party-organization to help elect more copartisans and ensure control of the government; party activists are crucial components in a winning electoral strategy (although any tendency toward extremism must be kept in check by leaders and office seekers); and the unorganized party-in-the-electorate actually elects candidates.

It is relatively straightforward to argue that the party-organization can protect itself from regulation by legislatures because of its intimate connection with and

¹⁸⁹ See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997).

influence over legislators.¹⁹⁰ There is plenty of competition between these two segments of the party, a competition which ensures that many interests will be heard and considered and that change over time is inevitable as those who lost in the political process today emerge victorious tomorrow. Consider the complicated relationship in the context of campaign spending. Political parties, at the local, state and national level, play vital roles in raising money, providing expertise to candidates on fundraising techniques, and encouraging interest groups to contribute to viable candidates. Although recent changes in campaign laws will force a restructuring of this relationship, probably giving more influence to state and local organizations, the expertise provided by parties will still be valuable to office seekers. The intertwining of the party-in-government and the party-organization can be seen in the growth of the congressional campaign committees and in the recent explosion of leadership PACs to facilitate contributions from influential members of Congress to the campaigns of other candidates. For example, many credit Newt Gingrich's efforts to raise money for other House members as partly responsible for the success of the Contract with America agenda in the 104th Congress.¹⁹¹

Of course, not all members of Congress with excess funds in their political warchests make contributions to others to enhance party government. Some, like John McCain, hope to forge personal bonds with other legislators so they can succeed in a maverick agenda and actually undermine the discipline of their party on matters like campaign finance reform.¹⁹² Others work to further personal objectives, like improving the chances for a successful run for the Presidency by earning the gratitude of influential

¹⁹⁰ However, some commentators have concluded that courts should step in to invalidate legislation that regulates "purely" internal party decisions, such as the ability to endorse candidates in primaries and rules concerning election of party leaders. See, e.g., Richard L. Hasen, *supra* note 100, at 826-27 (although generally concluding that the two parties can protect their own interests, viewing as correct the Court's decision in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)). Like Lowenstein, I favor judicial restraint even in these cases because the party-organization has effective political channels that will allow it to prevail at some point (or to force a compromise) without recourse to the judiciary. See Daniel Hays Lowenstein, *supra* note 11, at 1786.

¹⁹¹ See Barbara Sinclair, *Evolution or Revolution? Policy-Oriented Congressional Parties in the 1990s*, in *The Parties Respond: Changes in American Parties and Campaigns* 263 (L.S. Maisel ed., 1998). See also William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *supra* note 97, at 247 (describing Senate Majority Leader Lott's use of leadership PACs to solidify his control); Juliet Eilperin, *House Whip Race Seen as Indicator of Democrats' Future*, *Wash. Post*, Sept. 8, 2001, at A1 (detailing use of leadership PACs by members of the House running for leadership positions in current Congress).

¹⁹² See Philip Shenon, *House Critics Call McCain a Bully on Campaign Bill*, *N.Y. Times*, July 9, 2001.

lawmakers throughout the country.¹⁹³ In other cases, a powerful committee chair will seek to increase his influence at the expense of party leaders. Even though virtually all government officials are members of a major political party, they have different views about the appropriate strength of the party-in-government and the party-organization and will favor different regulatory schemes depending on those views. It is this group of people who enact the vast majority of laws regulating political parties, and this dynamic environment allows protection for a variety of interests, as well as guaranteeing that no outcome is permanent but subject to revision.

In addition, the party-organization and party-in-government are able to combat efforts by the electorate to regulate the electoral process through ballot initiative. Not surprisingly, given their expertise, parties are influential players in initiative campaigns and can effectively use a variety of tools to defend against ballot propositions that would impair their interests.¹⁹⁴ They also control the executive branch that will implement any proposal and the legislative branch that may control funding decisions necessary for the effectiveness of a popularly enacted law.¹⁹⁵ They can actively protect their interests at this stage of the process if they lose in the campaign. At first glance, one of the mysteries about the blanket primary campaign in California is that the major parties were not more active opponents of the ballot question.¹⁹⁶ The mystery disappears, however, when we understand that the parties were merely waiting to mount a judicial challenge after the election because they thought their chances of victory were good and any victory through a court decision would firmly entrench the result by constitutionalizing it. If the parties had believed that judicial intervention was unavailable, they would have adopted different strategies in order to prevail at an earlier stage or exert substantial influence over the final outcome.

¹⁹³ See, e.g., John F. Harris, *Democrats Vie to Stand Out in the 2004 Crowd; McCain's Limelight is a Magnet for Opposition Senators Seeking Notice as Future Contenders*, Wash. Post, May 14, 2001, at A1; Dan Balz & Ruth Marcus, *As Gore Plans his Next Move, A Debate Brews; Democrats' Split Underscores Obstacles to Presidential Bid*, Wash. Post, Aug. 12, 2001, at A1.

¹⁹⁴ See Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 Colum. L. Rev. 731 (2000) (discussing power of political parties in the initiative process generally). See also Daniel A. Smith & Caroline J. Tolbert, *The Initiative to Party*, 7 Party Pol. 781 (2001).

¹⁹⁵ For a discussion of effective techniques employed by partisans in government to undermine ballot initiatives that succeed at the polls, see Elisabeth R. Gerber, Arthur Lupia, Mathew D. McCubbins & D. Roderick Kiewiet, *Stealing the Initiative: How State Government Responds to Direct Democracy* (2001).

¹⁹⁶ Richard L. Hasen, *supra* note 100, at 836-37 (noting that parties did not aggressively work to defeat the blanket primary proposition).

The problem of disputes between the major parties, rather than within one party, is more difficult. Again, however, the major parties are powerful political agents able to protect themselves in the political process. Even in jurisdictions that are largely dominated by one party, the opposition party is not wholly without resources. For example, a party-organization at the national level may decide to devote resources to empower a faltering state party organization. In recent years, competition between the two parties has become more robust not only on the national level but also at the state level. By the mid-1990s, a majority of states were considered competitive, and there were no longer any one-party Republican or Democratic states, a significant change from the 1960s and earlier.¹⁹⁷ This change to “greater interparty competition throughout the fifty states than has existed before”¹⁹⁸ occurred despite the fact that governments in one-party states presumably had been able to pass laws that handicapped the other major party and were intended to entrench a noncompetitive environment as long as possible.

Furthermore, the political landscape changes fairly rapidly, so a law that seems firmly in one party’s favor today may work to its disadvantage in the relatively near future. Such appears to have been the case with the blanket primary in Alaska, for example, where the major parties’ support for the form of primary has changed over time. And in Connecticut, the Republican Party’s position on the kind of primary that best serves its interests – closed or semi-open – has changed several times over the last few decades. Although it fought all the way to the Supreme Court for the ability to have independents participate in some of its primaries in the mid-1980s, it now prefers to use closed primaries, as is its option under current law. At some level, this recognition that circumstances will change may encourage a political party in firm control of the government to pass laws that work to entrench it more firmly and delay any shift of political fortunes. But the inevitability of change in politics and the likelihood that the dominant party today may be the opposition in future years may also encourage more moderate policies, especially if party leaders have relatively long time horizons.

¹⁹⁷ See John F. Bibby, *supra* note 9, at 70-71 & 72, Figure 3-1. See also Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 33 Table 2.2 (showing 27 states as competitive and the rest either modified one-party Democratic or Republican). One of the most important changes leading to greater major-party competition was the rise of the Republican Party in the South. See generally Earl Black & Merle Black, *The Rise of Southern Republicans* (2002).

¹⁹⁸ See Paul Allen Beck & Marjorie Randon Hershey, *supra* note 18, at 32.

Finally, it can be difficult to correctly diagnose an interparty dispute. Justice Scalia plausibly saw *Tashjian*, the case that is usually cited as a classic example of one party in power passing a law to significantly disadvantage its other major rival, as an intraparty dispute between party leaders and party activists. Scalia's analysis also suggests that an aggrieved opposition party may well have allies within segments of the dominant political party, providing it additional political tools to fight off, delay or reverse oppressive regulation.

In short, my conclusion with respect to major parties is consistent with Lowenstein's reached a decade ago with respect to intraparty and interparty disputes, and it is further supported by recent evidence that the two parties are increasingly competitive at all levels of government. As he wrote: "The political process is broad and never-ending. When party matters are decided in state legislatures, they are decided subject to political constraints and give-and-take. The same is true if these issues are decided in party committees, in Congress, in state or national party conventions, or in elections. The parties function in all these settings, and the outcomes in each of these settings reflect the diverse web of associations that make up our major parties."¹⁹⁹ I would go further, however, and argue that the minor parties are also amply protected through the political process and do not need the additional protection of judicial intervention.

Some legal scholars writing about judicial involvement in the political process argue that courts need to be particularly solicitous of the interests of minor party members.²⁰⁰ An amicus brief in *California Democratic Party* tried to convince the Court to adopt two different standards of review and provide more judicial protection to minor parties, thereby explicitly recognizing that minor parties are often more like private political organizations than like major parties.²⁰¹ However, the case for greater judicial protection of minor parties is not persuasive. First, advocates of this approach are overly optimistic about the willingness of the judiciary to protect minor parties. The judicial vision of the ideal democracy tends to be of a stable, two-party system without the chaos

¹⁹⁹ Daniel Hays Lowenstein, *supra* note 11, at 1786-87.

²⁰⁰ See, e.g., Richard L. Hasen, *supra* note 100, at 839 ("Minor parties are in much greater need of protection than major parties. Minor parties do not have easy recourse to the legislature or the executive, for example, when the people act by initiative. Minor parties are likely to be ideologically driven groups, and sometimes their ideologies are unpopular.").

and uncertainty caused by strong and independent dissident voices and without the prospect of candidates winning regularly by slim pluralities. This vision inevitably leads to hostility toward third parties, not toward meaningful support. In some sense, the judicial dislike of minor parties is strange; the language courts use about membership and rights of association in opinions like the blanket primary majority opinion comes closer to describing the affiliation between minor parties and their members than it does to the relationship between major parties and individuals or groups. But the cultural predisposition of judges and their past involvement in major political parties mean that courts are unlikely to provide much support for minor parties – minor parties have lost virtually every case implicating their rights brought to the Supreme Court in the last quarter-century, unless those interests happened to coincide with the asserted interests of the major parties. Furthermore, in most of the cases dealing with minor parties, the Court has not fully appreciated their unique role in our political process, considering them as entities designed to elect their own candidates rather than as instruments for debate and dissent.²⁰² This fundamental misunderstanding of the role of third parties in American democracy means that the judiciary will not provide much protection in cases challenging regulations of third parties because it will undervalue the interests of minor parties when assessing the burden of regulations.

Not only do those arguing for increased judicial involvement on behalf of minor parties engage in baseless optimism with respect to judicial attitudes toward minor parties, they also underestimate the protections for these parties within the political process itself. First, dissident voices need not use the outlet of minor parties in order to influence political outcomes. As Hirschman's work demonstrates, some dissident voices, perhaps most, can influence the major parties from within. For example, the direct primary allows activist groups to support their own candidate in the nomination process, capturing the party label and influencing the direction of the party. Generally, decentralization of the electoral process and the increasing importance of new

²⁰¹ Brief for the Brennan Center for Justice at New York University School of Law as *Amicus Curiae* In Support of Neither Party, *California Democratic Party v. Jones*, No. 99-401, U.S. Supreme Court.

²⁰² See, e.g., *Timmons*, 520 U.S. at 363. But see *Munro v. Socialist Workers Party*, 479 U.S. 189, 201, 202-03 (1986) (Marshall, dissenting) (characterizing as a major contribution of minor parties their objective of adding new voices and changing the substance of political debate).

technologies like the Internet tend to help third parties and other outsiders in their effort to play a more significant role in the electoral process.²⁰³

Second, minor parties will sometimes find allies within segments of one of the major parties in particular cases. If the party-organization believes that a minor party candidate is apt to take votes from the other party's candidate and allow more of its candidates to win in plurality votes, it may favor easier ballot access for third parties.²⁰⁴ The analysis of the *Timmons* case suggests that major parties may sometimes work with minor parties and thus can be counted on in some circumstances to oppose laws that impose substantial burdens on third parties. Although in that case the party-organization of one major party apparently disliked fusion candidacies and the party leaders of both major parties in government may have believed that multiple endorsements diluted party discipline, at least one party organization and a major party incumbent candidate believed that they benefited from the endorsements. Moreover, despite the majority's unsubstantiated concerns about voter confusion, the party-in-the-electorate may have been empowered by the additional ballot notations that would have helped to refine the information provided by a single party cue. In states with robust direct democracy, voters have been supportive of ballot notations that would provide additional information about candidates' positions on certain issues, a movement abruptly halted by the Supreme Court's decision in *Cook v. Gralike*.²⁰⁵ These voters may be interested in reconsidering fusion laws as a way to use third-party endorsements to improve voter competence. More generally, major party activists who want to maximize the influence of their voices may provide some opposition to laws that would entirely eliminate third parties, because they understand that the existence of relatively credible minor parties is strategically helpful to

²⁰³ See Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America: Citizen Response to Major Party Failure* 226 (2d ed. 1996).

²⁰⁴ This possibility is not fanciful. A Republican party operative in Washington recently supported a Green Party candidate actively, providing expertise and money, because he expected the third party candidate would harm the Democratic contender and improve the chances of a plurality win for the Republican. See Sam Howe Verhovek, *Green Party Candidate Finds He's a Republican Pawn*, N.Y. Times, Aug. 8, 2001 (campaign consultant for Washington Republican party encouraged Green Party candidate by providing expertise and money in order to draw votes from the Democratic candidate). The Green Party in New Mexico has become a significant player in state politics as both parties use it to siphon off support from their opposing major party in various races. See Michael Janofsky, *New Mexico Greens Go From Gadflies to Players*, N.Y. Times, July 21, 2002, at A17.

²⁰⁵ 531 U.S. 510 (2001). See also Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 Va. L. Rev. 1533 (1999).

them when they threaten more mainstream party leaders. Perhaps because segments of major parties understand that the existence of some credible third parties and independent candidacies may sometimes serve their own purposes, few states have adopted all the constitutionally permissible devices identified by commentators as tools that can be used to silence minor parties and empower major ones.²⁰⁶

Finally, groups that seek to influence political change and who also want strong judicial protection could opt into a regime of more aggressive intervention by declining to use the tool of the ballot and focusing instead on all the other kinds of political activity. Judicial restraint in the context of political party cases need not include judicial restraint with respect to other political associations. If courts continue to protect private political actors aggressively, interest groups could avoid burdensome state regulation by deciding to use means of influence other than that provided by ballot access.

B. Ending the Party in the Courts: Judicial Restraint in Political Party Cases

Given the complex realities of the political process, what should courts do when presented with a dispute involving elements of political parties? By and large, they should decline to intervene, letting the parties, major and minor, fight it out in the many forums of the political realm. Thus, my proposal would first alter the general presumption that judicial review is available and appropriate to a nearly conclusive presumption in political party cases that courts should decline to become involved. Judicial intervention should be limited to cases presenting extreme examples of anticompetitive laws and regulations designed to ensure success of one party over another or of the major parties over the minor ones. Intervention should be exceedingly rare because competition is possible not only among parties but also within parties. Before providing three “red flags” that courts could use as signals to depart from an otherwise strong presumption against judicial review in cases concerning political parties, I will discuss briefly the

²⁰⁶ See, e.g., Daniel K. Lowenstein, *The Supreme Court Has No Theory of Politics – And Be Thankful for Small Favors*, in *The U.S. Supreme Court and the Electoral Process* 245, 262 (D.K. Ryden ed., 2000) (noting that most states do not have a ban on write-in voting, which is surprising if one believes, as other commentators do, that “banning write-in votes does squelch third-party competition and ... major party politicians are as preoccupied with that competition as Pildes and Issacharoff assume”).

relationship between my approach and the judicial approach urged in such cases by influential theorists advocating a political markets perspective.

Other scholars have suggested a role for courts similar to the one I provide here, although they appear to accept a larger judicial role than I envision. These political markets theorists argue that the courts should work to promote healthy competition in the electoral arena.²⁰⁷ Much as they do in the corporate context, judges should identify regulations and institutions that lock up the electoral system in favor of a dominant political party or in favor of the two major political parties. By guarding against rules that entrench the duopoly of the major parties, judges can construct an environment more conducive to robust competition, allowing voters to rely on political processes to protect their other interests. Thus, these theorists argue for a different kind of judicial intervention, based on structural concerns and an awareness of the inherently collective nature of political activity and not grounded on rhetoric and theories of individual rights. Their approach might lead to less judicial involvement in the process overall, but that is not clear.²⁰⁸ Indeed, the main project of the political markets theorists is to change the judicial approach to one that focuses on structural issues and organizational effects, thereby “redistribut[ing] judicial concerns away from some contexts and towards

²⁰⁷ See Samuel Issacharoff & Richard H. Pildes, *supra* note 113; Richard H. Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605 (1999); and Daniel R. Ortiz, *Duopoly versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 Colum. L. Rev. 753 (2000) for leading presentations of the political markets theory. Hasen often uses economic language to describe the judicial approach to these cases that he advocates, although he has expressed serious doubt about using competition as the objective of judicial review. See, e.g., Richard L. Hasen, *supra* note 144; Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 Stan. L. Rev. 719 (1998). Theorists other than those identified as political market scholars also believe that competition is a key component of a healthy system and should be part of any judicial analysis of cases concerning the political process. For example, the advocates of the party autonomy perspective contend that only by ensuring that there are two robust major parties can the Court serve the objectives of strong political competition and minority representation. See, e.g., Nathaniel Persily & Bruce E. Cain, *supra* note 147; Nathaniel Persily, *supra* note 94. In addition, Richard Briffault has argued that preserving and enhancing political competition should be considered a compelling state interest by the court in its campaign finance cases. See Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729 (2001).

²⁰⁸ See, e.g., Richard H. Pildes & Samuel Issacharoff, *supra* note 113, at 644 (noting that “judicial oversight over the political process has expanded to a level unimaginable when the Supreme Court first entered the political thicket” but mainly critiquing the Court for failure to develop a sophisticated and workable framework to use in its review); Richard H. Pildes, *supra* note 207, at 1607 (intimating that the logic of rights perspective means such claims “will always demand an increasingly aggressive judicial role”).

others.”²⁰⁹ Their approach is relatively agnostic as to the right level of judicial intrusion under that perspective.²¹⁰

Although increasingly influential and successful in changing the terms of discourse and analysis concerning these cases, political markets theorists have been criticized on a number of grounds. Skeptics have noted a problem of baseline,²¹¹ a problem that would certainly make adjudication using a market-based theory to strike down laws very difficult, if not impossible. How much competition is necessary for a healthy system? What is the appropriate level of state protection for the two-party system as a stabilizing influence, and how much room must be left for third parties and alternative players? Are all structures that favor the current duopoly invalid, including plurality voting in single-member districts? How does a court determine the appropriate baseline – rely on historic levels of competition, use political science to guide the decision, or import inexact analogies from the corporate context? Recent scholarship urging the Court to alter its jurisprudential approach and seek to promote “political competition” reaches vastly different conclusions about how much judicial intervention is appropriate and what well-functioning political competition looks like,²¹² perhaps demonstrating the indeterminacy of the competition standard.

²⁰⁹ Richard H. Pildes, *supra* note 207, at 1619 (also arguing that the theory “is not an expansive invitation to more aggressive judicial action across the board as much as it is an effort to make the target of that action more focused and better justified”).

²¹⁰ *Id.* at 1611 (“Our principal aim is to provide a theoretical perspective on legal issues surrounding democratic politics, rather than to defend a specific role for courts or for constitutional law.”). However, Issacharoff’s recent application of a political markets perspective to political gerrymandering cases suggests that he is comfortable with relatively aggressive judicial intervention. Samuel Issacharoff, *Gerrymandering and Political Cartels*, __ Harv. L. Rev. __ (2002) (forthcoming).

²¹¹ See, e.g., Bruce E. Cain, *Garrett’s Temptation*, 85 Va. L. Rev. 1589, 1600-03 (1999); Nathaniel Persily, *supra* note 94, at 794-95 n.179; Richard L. Hasen, *supra* note 207, at 724-28 (arguing that the problem is particularly acute with respect to claims of two-party partisan lockup). See also Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491, 542-543 (1997) (noting problem generally in political process cases). Issacharoff and Pildes recognize the problem when they acknowledge that they “do not have a comprehensive and complete theory that offers necessary and sufficient conditions for identifying” anticompetitive regulations.” Samuel Issacharoff & Richard H. Pildes, *supra* note 113, at 680 (also acknowledging that “it is far easier to identify dramatically anticompetitive practices than to specify precisely what optimal competition would look like”). Pildes provides a more complete response in Richard H. Pildes, *supra* note 207, at 1611-15.

²¹² Compare Samuel Issacharoff & Richard H. Pildes, *supra* note 113, and Richard H. Pildes, *supra* note 207, with Paul Frymer & Albert Yoon, *supra* note 17 (the latter arguing for aggressive judicial intervention along the lines of recent federalism cases and focusing on state and local actors).

Furthermore, determining the background level of actual political competition is tricky. Even in jurisdictions with one dominant political party,²¹³ the opposition party can be strong enough to produce some competition, perhaps by electing sufficient numbers of state legislators or occasionally sending a partisan to the Governor's mansion. It is not enough to know that one party generally wins most elections; to develop a sophisticated sense of the level of competition, one must know more about the opposition party and its power to influence campaigns and policies,²¹⁴ as well as levels of competition within parties themselves.²¹⁵ Electoral competitiveness may be very different when one compares different levels of government and different races even within the same state.²¹⁶ Moreover, competition within a particular region can be affected by national political conditions or by trends in other states. Thus, the South, which was a region locked up by one party for decades, has now become an area where both parties are competitive, with the Republican Party's power currently greater in many areas than the Democratic Party's influence. This shift occurred despite regulations crafted by Democrats-in-government doubtlessly designed to entrench themselves and their copartisans.

If the Court is working to measure the strength of the duopoly in states with strong two-party competition but little activity by minor parties, it also faces a tough task. First, the Court cannot just count up the number of parties and candidates that appear on the ballot. The mere number of third parties on the ballot or regularly fielding candidates may not alter the fundamental nature of the competition. In the past when minor parties were more powerful in some states than they are now, the two major parties still dominated the political system.²¹⁷ More importantly, the formation of minor parties and their appearance on the ballot is not the only way to measure the strength of alternative voices in politics. Not only may activists have an interest in some credible system of third parties, but the facts of *Timmons* reveals that major parties, incumbent lawmakers, office seekers, and voters may sometimes have interests that align with third parties.

²¹³ See Samuel Issacharoff & Richard H. Pildes, *supra* note 113, at 667 (noting that courts would find measuring level of competition easier in cases from states with only one real political party).

²¹⁴ See Leon D. Epstein, *supra* note 2, at 128 (noting that even if one party routinely wins all elections, if the races are contested and close, then competition is not meaningless and the second party remains a plausible electoral alternative).

²¹⁵ See Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: Why the Constitution Favors Incumbent Control of the Redistricting Process*, __ Harv. L. Rev. __, [12] (2002) (forthcoming).

²¹⁶ *Id.* at [8-9].

My approach benefits from the insights of the political markets theorists but has the advantage of minimizing the problems they face because it allows only a very modest role for courts, limiting their involvement to extreme cases. Political markets theorist Mike Klarman observes correctly that any judicial concern about entrenchment, or partisan lockup, must be calibrated to take account of “the extent to which it is self-correcting.”²¹⁸ In that I agree with the political markets approach; our disagreement lies in our differing faith both in the competence of the courts to answer the questions about competition right and in the political market to provide self-correction. Given the multiplicity of interests and players and the change that is possible in institutions over relatively short periods of time, we should assume that self-correction is possible and allow judicial intervention only when it is patently clear that anticompetitive behavior has taken place and no political redress is likely. For example, a political markets rationale apparently would have been sufficient to justify overturning the fusion ban in Minnesota,²¹⁹ but under my approach, the Court would not have been justified in departing from the presumption compelling judicial restraint. A prohibition on fusion candidacies is not an egregious enough policy to justify intervention, particularly because there appear to be alternate ways for the losers in this legislative round to prevail in the future. Moreover, a law allowing fusion candidacies would not diminish the strength of the major parties significantly enough to warrant judicial invalidation, in part because the major parties have ways to encourage their candidates to forego such endorsements if they wish to.

How can we tell which cases are the few in which judicial involvement is warranted? I suggest that scholars and judges attempt to identify relatively objective red flags that can be used by courts to justify departing from the otherwise compelling presumption against judicial review. Thus, my approach is more objective than the approach advocated by Pildes and Issacharoff, who favor an “intent-based intermediate

²¹⁷ See Adam Winkler, *supra* note 53, at 885.

²¹⁸ See Michael J. Klarman, *supra* note 211, at 541.

²¹⁹ This conclusion seems to follow from the work of political markets theorists Issacharoff and Pildes, *supra* note 113, at 685 (arguing that fusion bans should trigger strict scrutiny). Demonstrating his disagreement with the political markets theorists notwithstanding the use of similar language, Hasen concludes, however, that the question of the benefits of the two-party system is sufficiently unresolved that courts should refuse to intervene, allowing states to either permit or ban fusion. See Richard L. Hasen, *supra* note 144, at 341.

analysis.”²²⁰ Not only will such a system of red flags provide guidance for judges, but it will also help advocates who can calibrate the presentation of their cases to focus on these issues. At least three red flags come to mind.

First, timing considerations are relevant. Rules that are developed after a problem develops and are applied retroactively should be presumptively illegitimate. In the context of elections, it is important for the rules to be specified well in advance of any contest so that combatants can play by the rules and develop strategies in light of those rules.²²¹ Rules that set forth clearly and in relatively objective terms the requirements for people seeking to obtain the party label in a primary are vastly superior to ad hoc proceedings where party leaders determine that a candidate like Lyndon LaRouche or Patrick Buchanan does not share the ideological commitments of the Democratic or Reform Parties. If open textured ideological tests are nonetheless adopted, then the procedures for applying those tests should be specified in detail well before a candidate is challenged.²²²

In addition, rules developed immediately after a new element of political competition has emerged and targeted at that development should be suspect because of their timing.²²³ Antifusion laws might well raise this red flag because many were passed after fusion candidates had allowed the weaker major party to make electoral gains and empowered some third party candidates in several states. This consideration is a bit harder for courts to apply thoughtfully because it is possible that opponents of such a new rule might be able to overturn or modify it in the political process, particularly if they are denied access to the courts and thus have an incentive to wage a political rather than judicial battle. For example, as I have discussed, the political environment surrounding antifusion laws and multiple nominations is sufficiently robust that the situation is likely to change over time and thus does not require judicial intervention. Imposition of a new

²²⁰ Samuel Issacharoff & Richard H. Pildes, *supra* note 113, at 681.

²²¹ Cf. Elizabeth Garrett, *The Impact of Bush v. Gore on Future Democratic Politics*, in *Proceedings of the Symposium on the Future of Democratic Politics* (G.M. Pomper & M. Weiner eds., 2003) (forthcoming) (making the point in the context of laws governing election contests and protests); Samuel Issacharoff, *supra* note 3, at 1695 (advocating use of formula-driven reapportionment processes adopted before release of final census data).

²²² See Nathaniel Persily, *supra* note 46, at 2211-12.

²²³ Klarman makes this point and provides examples of ballot access requirements adopted to combat an unexpectedly strong third party. See Michael J. Klarman, *supra* note 211, at 536 & n.207.

regulation to deal with an emerging threat to entrenched players should therefore justify intervention only when it exhibits other suspect characteristics.

Second, a law that is not relatively durable should raise a red flag for the courts. Because political fortunes change relatively quickly, self-interested actors are less likely to pass restrictive laws if they must be concerned that the regulations may work to their disadvantage in the future. Thus a law that applies only to the next election and then expires is much more likely to serve anticompetitive goals than a law that must be repealed through the ordinary legislative process – or a constitutional amendment that can only be repealed through supermajority votes and popular votes. This concern is heightened in the context of internal party rules that might be adopted only to defeat a faction in the short-run but not to bind party leaders or other currently powerful segments of the party that realize they may find themselves in different circumstances in the future. Of course, no law or rule is permanent in the political process, nor should it be because the ability to deal with problems incrementally over time is one of the advantages of legislative institutions. However, a relatively temporary law that also exhibits suspicious timing might be sufficient to convince a court that it faces an extreme case of anticompetitive behavior.

Third, rules that apply generally are less suspect than laws targeted at one party or at only minor parties. Cain and Persily identify a similar principle in their recommendations to guide judicial intervention: The Principle of Equal Treatment which encourages courts to invalidate “[s]tate laws that impose unique and disproportionate burdens of ballot access on minor parties.”²²⁴ In some cases this principle is relatively easy to apply, such as with rules that provide rebates of filing fees only to candidates of major parties.²²⁵ In many circumstances, identical treatment of parties and candidates is impossible so a well-crafted law should work to provide equivalent treatment. Ensuring that the law has provided equivalent treatment is problematic, however. How does one determine, for example, how many signatures on a petition for an independent candidate or a new party is equivalent to the automatic ballot access provided to major parties?

²²⁴ Nathaniel Persily & Bruce E. Cain, *supra* note 147, at 804.

²²⁵ See, e.g., *Libertarian Party of Florida v. Smith*, 687 So. 2d 1292 (Fla. 1996) (upholding such a statute because it strengthened major parties and reduced factionalism, both appropriate state interests in the court’s view).

Persily and Cain believe that a balancing test “along the lines currently in use” would be required to implement the principle, and they conclude that the principle could effectively target only extreme examples of unequal treatment, such as laws that affect only minor parties.²²⁶ They also counsel that courts should assess any challenged regulation in the context of the entire electoral law framework to determine its impact on party autonomy or the political process.²²⁷

Unfortunately, the more subtle the determinations required of the court, such as would be required by a comprehensive analysis of the state electoral system, the less suited the judicial institution is to make the assessment. Given the prevalence of different actors with competing goals and forming shifting alliances with other political players, it can be hard for judges to correctly identify laws that are targeted at relatively weak entities. Furthermore, it may be impossible for courts to predict accurately when any problems in apparently unequal treatment will be corrected through the interplay of the political process. In addition, there is a cost to a preference for uniform laws such as the use of this red flag promotes rather than laws providing different treatment for different parties and institutions. In his discussion of the restrictive ballot access rules adopted by the New York Republican Party and challenged by Senator McCain, Persily notes that one way to read the court’s decision is “to conclude that no party’s ballot access rules can be more restrictive than any other’s. If only neutral, nonpartisan state interests can be used to justify heightened ballot access requirements, then it is difficult to see how the state could justify both a restrictive and a lenient ballot access regime operating in the same election.”²²⁸ Yet the Republican Party may have different interests than the Democratic Party in New York, and those legitimate partisan interests might support a different ballot access regime. For example, in *Tashjian*, the Republican Party may have been better served by using an open primary, and the Democrats by using a closed primary, given their different strengths and the demographics of the state. Nonetheless, the fact that the law requiring closed primaries in Connecticut applied to all parties should have been a factor in its favor, and combined with the absence of any other of the

²²⁶ Nathaniel Persily & Bruce E. Cain, *supra* note 147, at 805.

²²⁷ *Id.* at 799 (discussing the Principle of Electoral System Symbiosis).

²²⁸ Nathaniel Persily, *supra* note 46, at 2206.

red flags, should have led the Court to exercise restraint in that case.²²⁹ One way to balance the need for uniformity as a prophylactic and the need for flexibility to take account of differences among parties is for legislatures to craft laws that provide uniform treatment but allow particular parties to opt out through party rules. Thus, a law could require closed primaries, but allow parties to decide to open their primaries to independent voters if they wish.

The identification of these three red flags is only a starting point in the analysis to indicate clearly and with relatively objective rules when courts should depart from an otherwise compelling presumption of judicial restraint. The key change is the reversal of the presumption, based on a more sophisticated understanding of the dynamic political process which provides more confidence in its ability to allow for change and correction over time.

IV. Conclusion

Within the very broad outlines provided by the Constitution, courts should largely leave it to the political processes of local, state and federal governments to work out the precise form of representative democracy (with ingredients of direct democracy) that we will use to govern ourselves. This form will doubtlessly change over time, and such beneficial evolution is more possible without judicial interference which rules some options off the table. The arguments that political scientists, legal scholars, and others offer about the merits of any particular form should be made in the political arena, not in the courtroom through expert testimony and amicus filings. Judicial restraint may mean that the Court leaves untouched some state regulation many may find objectionable; for example, the prohibition on fusion candidacies upheld on the merits by the Supreme Court is inconsistent with a vision of a robust and perhaps somewhat chaotic democracy with more voices being heard via the ballot. The adoption of a blanket primary empowers median voters relative to those with outlying preferences, and it may dilute the party

²²⁹ See Daniel Hays Lowenstein, *supra* note 11, at 1790 (“[T]here is some advantage in uniformity for its own sake. When both parties operate under the same rules and procedures, the overall system is likely to seem fairer and more natural to voters.”); see also *id.* (“[S]pecific reasons for uniformity may be subtle and

label. But that is a fight for the legislative arena or an initiative campaign; it is not a fight for the courtroom to be determined by a small group of elite lawyers and judges.

Judicial restraint in this area would be a significant change from current jurisprudence in which the Court enthusiastically jumps into the political thicket and adopts solutions consistent with its view of healthy democratic institutions. Yet, there is a way out for the Court if it chooses to take it. Just as it did in the federalism realm in *Garcia v. San Antonio Metropolitan Transit Authority*,²³⁰ the Court could announce that the political process provides ample protection for the important interests implicated by these cases and thus judicial involvement will be limited to a small set of extremely anticompetitive laws. Pam Karlan has characterized this approach as an exit strategy of declaring victory and leaving the field of battle.²³¹ The relatively recent changes in the levels of partisan competition in the states, where no state is wholly dominated by one party and both major parties have realistic chances for victory in many national and subnational races, could further justify a decision to reverse the traditional presumption of judicial review at this time.²³² I am not hopeful that the Court will take this opportunity to exercise restraint, given its increasingly enthusiastic willingness to intervene in cases implicating the political process and quintessentially political decisions.²³³ A greater sense of modesty about the institutional capabilities of the judiciary and a greater faith in the rough-and-tumble of the political process, however, would lead to a more

escape the state deputy attorneys general and judges, neither of whom are necessarily attuned to the workings of party politics.”)

²³⁰ 469 U.S. 528 (1985).

²³¹ See Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket* 9-15 (unpublished manuscript 2002) (and applying to voting rights cases).

²³² Cf. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517 (2002) (discussing how change in levels of political competition throughout the country, and particularly in the South, may require a reexamination of the Voting Rights Act and associated law).

²³³ See Michael J. Klarman, *supra* note 211, at 549 (noting that the history of the modern Supreme Court makes it “difficult to resist the conclusion that Justices have a difficult time declining the exercise of power”); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237 (2002) (describing demise of passive virtues in Court’s recent jurisprudence and arguing for a revitalized “classical” political question doctrine); Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N. C. L. Rev. 1203, 1235 (2002) (concluding pessimistically that there is little possibility that we will retrieve a sense that “judicial supremacy is in principle a bad thing”). See also Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. Colo. L. Rev. 923 (2001) (hoping that “informed and balanced criticism of judicial overreaching” might work to confine judicial review of politics into a narrower realm than it has occupied in recent years).

satisfactory, but much less expansive, jurisprudence and perhaps an increase in the vitality of political institutions like political parties.

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