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“Politics as Markets” Reconsidered:  
Economic Theory, Competitive  
Democracy and Primary Ballot Access

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# **“Politics as Markets” Reconsidered: Economic Theory, Competitive Democracy and Primary Ballot Access**

by David Schleicher<sup>1</sup>

Over the past decade, mainstream election law scholarship has been based largely on a simple but forceful set of analogies: politics are like markets, parties are like competing firms and voters are like consumers that decide at election-time what type of public policies they would like to buy.<sup>2</sup> This theory has been criticized for taking the analogy between markets too far and for relying too heavily on one method – electoral

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<sup>2</sup> “In the marketplace of ideas, the idea of the marketplace of ideas enjoys a dominant market share. When it comes to legal scholarship dealing with the electoral process, this dominance is reflected in both focus and method. Current scholarship seems directed primarily at the aspect of the system that is most expressly economic, namely, campaign finance. And even when scholars examine other aspects of the electoral system, they phrase their arguments in market rhetoric: They write about ‘lockups,’ ‘rent-seeking,’ ‘agency problems,’ and ‘externalities’; they propose antitrust as a model for judicial oversight.” Pamela Karlan, *Politics by Other Means*, 85 Va. L. Rev. 1697 (1999). The leading article in the vein is Samuel Issacharoff and Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998) (Hereinafter *Politics as Markets*).

competition – as the solution for all political problems.<sup>3</sup> The true problems of the “politics as markets” theory, though, lie at the inverse of these criticisms. Our understanding of markets can explain a great deal about electoral behavior, but scholars working in this vein have failed to consistently apply the lessons of economic theory, particularly a branch known as natural monopoly theory, to their studies of election law. Moreover, competition is not too narrow a concept on which to base the regulation of elections, but rather is too broad. There are a number of conflicting normative justifications for using competition as a guide for electoral regulation, each of which suggest different policy outcomes. While the Supreme Court has not made itself clear on this score, it has created a constitutional election law jurisprudence that does not suffer from these flaws. Its holdings in the area of ballot access law, much pilloried by “politics as markets” scholars, are in fact consistent with the application of economic theory to electoral markets and feature a balanced approach to the conflicting normative justifications for favoring competition. This paper stands as a defense of the Court’s

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<sup>3</sup> See, e.g., Karlan, *supra* note \_\_, at 1688-89 (“We hold both market and nonmarket understandings of what politics is about simultaneously. We are both drawn toward and resistant to understanding politics as simply another form of market. This is a fruitful ambiguity. Incomplete commodification should not be seen as simply a transitional phase, as we move from the previous conventional wisdom, which saw the political process as an alternative to the market system, to a new equilibrium, which sees politics simply as market competition by other means. Rather, it reflects something real and enduring in our understanding of politics. Thus, we should neither unquestioningly reject nor wholeheartedly embrace the idea of politics as a market.”); DENNIS THOMPSON, JUST ELECTIONS, 7-8, 167 (2002) (arguing that competition is just one among a number of values that should be considered in shaping electoral systems).

approach from the viewpoints of both economic theory and competitive democratic theory.

## **I. Introduction: Primary Ballot Access Laws and Optimal Regulation**

Political party primaries were not introduced into the American political scene until the 1880s,<sup>4</sup> and, as such, it is not surprising that the Constitution does not require political parties to hold primaries to select their standard bearers for the general election.<sup>5</sup> The Constitution leaves regulation of elections to the states,<sup>6</sup> and although states are by no means obligated to force political parties to use primary elections as a way to select their candidates, the Supreme Court made clear that it is “too plain for argument...that the State ... *may* insist that intraparty competition be settled before the general election by primary election.”<sup>7</sup> What is less clear is the extent to which a state can do more than just require a primary, but decide the rules by which it will be run.

The wide range of efforts by states to regulate primaries can be roughly divided into two general categories. The first set involves attempts by the state to either limit or

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<sup>4</sup> See Adam Winkler, *Voters' Rights and Parties's Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 Colum. L. Rev. 873, 876 (2000) (“Between 1882 and World War I, state legislatures across the country adopted “Australian” (i.e., state-printed, secret) ballot and party primary laws to regulate general elections, party nominating procedures, and the internal governance structure of parties.”)

<sup>5</sup> The Twenty-Fourth Amendment does make reference to party primaries, but only states that, if held, they may not feature poll taxes. U.S. CONST. amend. XXIV (“The right of citizens of the United States to vote in any *primary* or other election ... shall not be denied or abridged ... by reason of failure to pay any poll tax or other tax.”).

<sup>6</sup> U.S. CONST. art. I, § 4.

<sup>7</sup> *American Party of Texas v. White*, 415 U.S. 767, 781 (1974) (emphasis mine).

extend who can be a member of a political party – against the wishes of that party -- for the purposes of voting or running for election in primaries. The second category involves attempts by undisputed members of the political parties to overcome state or party rules to get onto primary ballots.

The Supreme Court settled many of the questions about the first type of case in *California Democratic Party v. Jones*.<sup>8</sup> It held that a California law that forced parties to use a blanket primary in which any voter could participate was unconstitutional, thereby granting political parties broad powers to define their own membership, subject to limitations against discrimination and, potentially, against party-raiding.<sup>9</sup>

However, neither *Jones* nor any other case has provided much guidance on how to resolve the second type of case, regarding rules governing access to primary ballots for party members. Lacking guidance from above, lower courts have created a variety of often-conflicting rules in these cases.<sup>10</sup>

Resolving the problems of this messy case law requires weighing the various constitutional interests of candidates, voters, political party organizations and states. In

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<sup>8</sup> 530 U.S. 567, 586 (2000)

<sup>9</sup> *Id.* at 572, 586. *See also* *Rosario v. Rockefeller*, 410 U.S. 752 (1973) (upholding a state rule requiring a significant period of party registration in order to avoid party raiding); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that the Democratic Party could not exclude blacks from participating in primary elections).

<sup>10</sup> Compare, e.g., *Opinion of the Justices to the Governor*, 385 Mass. 1201 (1982) with *Campbell v. Bysiewicz*, 242 F. Supp 2d 164 (D.Conn 2003). *See also* Nathaniel Persily, *Candidates v. Parties: The Constitutional Restraints on Primary Ballot Access Laws*, 89 Geo. L. J. 2181, 2207 (2001) (Hereinafter *Candidates v. Parties*).

order to do so, it is necessary to develop a theoretical metric for evaluating these relative claims. Even if theoretically “thin” opinions maximize judicial flexibility, developing a consistent jurisprudence on a topic as complicated as this one will require some organizing principle.<sup>11</sup>

Samuel Issacharoff and Richard Pildes have developed one such organizing principle, a theory they describe as “politics as markets.”<sup>12</sup> They argue that election law should attempt to maximize the extent to which voter preference guides the choice of elected officials.<sup>13</sup> In order to do so, they argue, it is useful to analogize elections to markets, voters to consumers and political parties to firms. However, the United States uses single member districts for legislative elections and a “first past the post” (FPTP) voting system under which the candidate with the most votes wins, no matter what percentage of the vote she gets, there is a natural inclination towards having only two political parties. This a natural duopoly, a structural market failure that raises the

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<sup>11</sup>See Heather Gerken, *One Person, One Vote: A Theoretical and Practical Examination of The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C.L. Rev. 1411, 1434

(“Another problem stemming from the Court's failure to adopt an adequate intermediary theory is doctrinal inconsistency.”)

<sup>12</sup> See *Politics as Markets*, *supra* note 1, at 643.

<sup>13</sup> *Id.* at 646 (“The key to our argument is to view appropriate democratic politics as akin in important respects to a robustly competitive market - a market whose vitality depends on both clear rules of engagement and on the ritual cleansing born of competition. Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.” See also Bruce Cain and Nathaniel Persily, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 789 (2000).

possibility of collusion and makes elections an inefficient means of translating voter preferences into policies.<sup>14</sup> To solve this problem, Issacharoff and Pildes turned to anti-trust law.<sup>15</sup> The Constitution should be used to invalidate elections laws that are merely efforts by elected officials from the two major parties to take advantage of their dominant market position to exclude entry by third-party candidates or to eliminate competition through some type of major-party collusive agreement.<sup>16</sup>

This paper will use the “politics as markets” hypothesis as a way to evaluate the various claims of parties, voters and states in ballot access cases. However, it will argue that *Politics as Markets* and the articles that have followed it have failed are flawed in two basic ways: (1) they fail to flesh out the implications of comparing politics to markets by ignoring economic theory, particularly natural monopoly theory and (2) the

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<sup>14</sup> In a “first-past-the-post” system (FPTP), the candidate with the most votes in a single round election wins the seat. For a discussion of how FPTP elections promote a two-party system, see Richard Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and the Republicans From Political Competition*, 1997 Sup. Ct. Rev. 331, 367-70 (1997) (hereinafter “Entrenching the Duopoly”). See also notes *infra* and related text.

<sup>15</sup> They originally relied on metaphor to corporate lock-ups, but have since abandoned this for the more robust anti-trust metaphor. See, e.g., Samuel Issacharoff, *The Role of Government Regulation in the Political Process Oversight of Regulated Political Markets*, 24 Harv. J.L. & Pub. Pol’y 91,96 (2000) (“The lockup problem plays the same role in political markets that monopoly or oligopoly power plays in economic markets.”); Richard Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605, 1614 (1999) (“The decision is much in the spirit of the functional, antitrust approach to political rights that we advocate.”)

<sup>16</sup> See *Politics as Markets*, *supra* note 12, at 647; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593, 599 (2003).

normative lens they embrace fails to capture and balance the variety of normative reasons for valuing political competition. A theory that solved these problems would view current Supreme Court doctrine on primary ballot access laws as a success rather than a failure of the politics as markets approach.

### **a) Natural Monopoly Theory and Election Law**

*Politics as Markets* and the articles that followed proceeded from the description of electoral markets as a natural duopoly to an argument that the courts should examine election laws the way the Department of Justice or the Federal Trade Commission would examine firm behavior in an ordinary market in which a few firms exhibit a great deal of market power, focusing on collusive deals and the formation of new barriers to entry.<sup>17</sup> This ignores the factors that make electoral markets a “natural,” rather than an ordinary, duopoly.

French political scientist Maurice Duverger found that an electoral system that featured both first-past-the-post vote counting and single member electoral districts would always tend towards producing a stable two-party system.<sup>18</sup> He gave two

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<sup>17</sup> Issacharoff and Pildes are not the only scholars to use a simple antitrust metaphor. “It should be apparent by now that the model that I am proposing to guide judicial decisionmaking with respect to the democratic process is antitrust law.” RICHARD. A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 245 (2003). Posner makes noises about using a dynamic, Schumpeterian view of antitrust, but he makes clear that his focus is on barriers to third-party entry, leaving his view of the use of antitrust similar to the static model used by Issacharoff and Pildes. *Id.* at 246-47. At other points he seems to be hinting at a natural duopoly view, *id.* at 237, but he never follows through with enough analysis to make this clear.

<sup>18</sup> Maurice Duverger, *Political Parties: Their Organization and Activity in the Modern State*, trans Barbara North and Robert North (2d Ed 1959). For discussions of Duverger’s law, see *Entrenching the Duopoly*,



explanations for this: one “psychological,” the other “mechanical.” The psychological explanation is that voters do not like to waste their votes.<sup>19</sup> If one assumes that voters make their choices in order to influence the election, they will vote for the candidate closest to their views with a chance to win.<sup>20</sup> This has the effect of strengthening two major parties, because any vote for a third party candidate will not affect the result. The mechanical explanation is that parties that win less than a majority of the vote win no seats in the American electoral system.<sup>21</sup> This lack of actual success reduces the incentives for leaders and donors to support the party. Self-interested politicians and donors flee to the major parties, which are thereby strengthened.

Implicit in the first of Duverger’s explanations is that, given the structural problems of FPTP electoral systems, having only two parties produces the most representative elected officials. This is because it produces majority, rather than plurality, elections (*i.e.*, a candidate disfavored by a majority of voters cannot win an election because the other side is divided between two candidates). Having only two parties is not only the likely result of a FPTP system, but it is the *best* result inside such a system, if the value one desires to maximize is “representativeness.” Therefore, rules that

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*supra* note \_\_, at 367-70; William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 *Am Pol Sci Rev* 753, 754 (1982).

<sup>19</sup> See Duverger, *supra* note 16, at 224.

<sup>20</sup> This has been criticized for violating some public choice ideas of voter participation. See Riker, *supra* note 16, at 764. However, Hasen notes that there is an extensive literature showing that politicians have been successful making the wasted votes argument and that voters in fact do behave this way. See Hasen, *supra* note 16, at 369.

<sup>21</sup> See Duverger, *supra* note 16, at 226.

enhance the likelihood of having only two parties increase the chances for this best result.<sup>22</sup>

However, Issacharoff and Pildes are right to note that having a duopoly raises concerns that the two parties will not produce a robustly competitive electoral market. In the language of economic theory, a natural duopoly is a structural market failure. That said, its structural nature – because of FPTP elections, we will almost always have only two major parties – means that policies that would ordinarily be efficient in dealing with a market failure, like the anti-trust approach of *Politics as Markets*, are not necessarily efficient means of regulating a market with this peculiar feature.

Economists have long attempted to solve a similar problem that besets commercial markets, the problem of natural monopoly. Natural monopolies occur when, as a result of peculiar market forces, an industry is most efficient when one firm dominates production because of economies of scale. In these markets (*e.g.* electricity distribution, local telephony), unlike most, it is better for the economy if there is a monopoly, but there is the danger that the monopolist will take advantage of its favored position.

The enormous economic and legal literature on natural monopolies is organized around the principle that in some markets there are natural barriers to entry and promoting the entry of new firms would be inefficient. The literature advises regulators to give natural monopolists the opportunity to entrench themselves, because natural

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<sup>22</sup> This, of course, presumes that political competition between the two parties and the possibility of entry (and of replacing one of the existing two parties with another organization) keeps the major parties active in their pursuit of voters. A law that ensured that only two parties could exist would, of course, violate this presumption and not enhance the likelihood of a most representative result.

monopolies only arise, by definition, when “production of a particular good or service by a single firm minimizes cost.”<sup>23</sup> However, regulators should make sure that natural monopolists do not use their market power to raise prices. Further, they should try to segment related markets that do not feature the structural market failure of natural duopoly and thereby create possibilities for free down-stream competition.

Though courts have used a variety of explanations and theoretical assumptions in this murky jurisprudence, almost all of the actual holdings in primary ballot access cases follow the natural monopoly model of regulation. The Supreme Court has permitted states to favor a two-party system, which fits with the idea that it is inefficient to replicate firms/parties in natural monopoly or duopoly situations.<sup>24</sup> The Court has also permitted party organizations to define their membership how they see fit,<sup>25</sup> but have, potentially, limited this right by allowing states to make sure parties do not allow members of other

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<sup>23</sup> W. Kip Viscusi, John M. Vernon and Joseph E. Harrington, Jr., *ECONOMICS OF REGULATION AND ANTITRUST*, 3<sup>rd</sup> edition, 2000, MIT press, Pg. 337 (Hereinafter *ECONOMICS OF REGULATION*).

<sup>24</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1996) (“[T]he States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system...and that temper the destabilizing effects of party-splintering and excessive factionalism. The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.”) (citations omitted). See also *Davis v. Bandemer*, 478 U.S. 109, 144-45 (1986) (O’Conner, J., concurring) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government”); *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973) (“[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the [two major] parties in accordance with their voting strength”).

<sup>25</sup> See *California Democratic Party v. Jones*, 530 U.S. 567, 583 (2000); *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

parties to participate in their primaries.<sup>26</sup> These membership rules help keep parties distinct from one another, which prevents collusion and thus fosters competition.<sup>27</sup> This competition limits their ability to take advantage of their favored positions in the political firmament.

The Court, however, has not followed the final important implication of the analogy to natural monopoly regulation. It has never settled on a rule on how the Constitution regulates party rules that limit who among party members can be on the primary ballot. It should adopt a rule that ensures downstream, or primary election, competition using the constitutional right to associate with candidates of one's choice to ensure that neither states nor party organizations create serious hurdles to primary ballot access for party members. Such a rule would maximize the extent to which elected officials were representative of the preferences of voters in an electoral market characterized by "natural duopoly," even if it did not create a perfectly functioning market for elections.

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<sup>26</sup>See *Tashjian v. Connecticut*, 479 U.S. 208, 213 n.13 ("Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects."). *But see Cool Moose Party v. Rhode Island*, 183 F.3d 80, 88 (1<sup>st</sup> Cir. 2001); *Beaver v. Clingman*, 363 F.3d 1048 (10th Cir. 2004) (holding that state laws stopping parties from allowing members of other parties to vote in their primaries are unconstitutional).

<sup>27</sup>*Rosario*, 410 U.S. at 752 (upholding a state law imposing an eleven month waiting period for voting in a primary for people switching parties in the interest of avoiding party raiding).

## b) Competitive Democratic Theory and Election Law

Just as the application of economic theory can improve the “politics as markets” approach, democratic theory can be mined for insights into how to create a jurisprudence out of a theory of political competition. Many theorists have criticized the idea that elections and politics should be understood through a market metaphor because it is too simple, reducing the rich realm of democratic society to simple power politics.<sup>28</sup> While it is beyond the ambit of this paper to respond to this critique,<sup>29</sup> any attempt to use competition as a value for Constitutional adjudication faces a nearly opposite problem. There are too many normative justifications for using competition rather than too few and the policies that flow from an embrace of one such justification conflict with those that would flow from the use of another.

“Competitive” models of democracy are, generally speaking, of two types: the kind exemplified most clearly by Issacharoff and Pildes and the model associated with famed Austrian economist Joseph Schumpeter. Issacharoff and Pildes state quite clearly what value they think a competitive party system should maximize. “Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”<sup>30</sup>

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<sup>28</sup> See, e.g., *Politics by Other Means*, *supra* note \_\_, at 1697; JUST ELECTIONS, *supra* note \_\_, at 7-8, 167.

<sup>29</sup> Others have responded to these and other criticism of competitive democratic theory models clearly and decisively. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM AND DEMOCRACY*, 206-49 (2003); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, 23 in *DEMOCRACY’S VALUE* (Ian Shapiro and Cassiano Hacker-Cordon eds., 1999) (hereinafter “*Minimalist Conception*”).

<sup>30</sup> See *Politics as Markets*, *supra* note 12, at 646.

Schumpeter, on the other hand, cared little about the representativeness of government.<sup>31</sup> Elections, he argued, were merely competitions between elites in order to control the machinery of the state.<sup>32</sup> Voters did not have an interest in developing their capacity to discuss political issues, meaning that a government produced simply through their negotiations would not be competent; the capacity of individuals is merely to be able to determine their local interests and to determine whether the current government is meeting them.<sup>33</sup> Voters, though, are intimately aware of their own situation and should be given the opportunity to use their vote merely as a vote of confidence in the current state of affairs.<sup>34</sup> This requires major parties to be different from one another; otherwise, there can be no referendum on the current government and hence no retrospective voting.

Even individual voters did have an interest in thinking clearly about politics Schumpeter argued that negotiations among them about difficult issues in a mass society would lead to conflict.<sup>35</sup> Once the problems of individual incentive to engage reasonably

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<sup>31</sup> “If results that prove in the long run satisfactory to the people at large are made the test of government for the people, then government by the people...would often fail to meet it.” Joseph Schumpeter, CAPITALISM, SOCIALISM AND DEMOCRACY 256 (1943).

<sup>32</sup> “To put it differently, we now take the view that the role of the people is to produce a government...And we define: the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” *Id.* at 269

<sup>33</sup> *See id.* at 254-66.

<sup>34</sup> “But since electorates normally do not control their political leaders in any way except by refusing to reelect them...it seems well to reduce our ideas about this control in the way indicated by our definition.”

*Id.* at 272.

<sup>35</sup> *Id.* at 255-56.

with politics are added to this natural conflict, people will disagree and disagree to an extent that would imperil the stability of the government and perhaps lead to revolt in times of crisis.<sup>36</sup> What is necessary is an individual or party with decisive control over governmental decisions, checked, though, by the prospect of being thrown out of office in the next election (or by party revolt). The key is the decisive control of the machinery of government – if it is clear who, by dint of majority election, is in power then the government can make decisions in response to external concerns and individuals will be less likely to dispute governmental decisions because they will clearly represent the mandate of the majority.<sup>37</sup>

Electoral competition in Schumpeter's model, then, serves two purposes; it gives myopic voters clear, simple choices and provides society as a whole with clear result about who will constitute the government, thereby improving the functioning of government in times of stress and, perhaps most importantly, reducing the likelihood of revolt.

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<sup>36</sup> "First, even if there were no political groups trying to influence him, the typical citizen would in political matters tend to yield to extra-rational or irrational prejudice and impulse...At certain junctures, this may prove fatal to his nation." *Id.* at 262.

<sup>37</sup> "It is in fact obvious that proportional representation [which Schumpeter has noted is an effort to make elected officials representative of the opinions of the populace] will offer opportunities for all sorts of idiosyncrasies to assert themselves but also that it may prevent democracy from producing efficient governments and thus prove a danger in times of stress.... If acceptance of leadership is the true function of the electorate's vote, the case for proportional representation collapses because its premises are no longer binding. The principle of democracy then merely means that the reins of government should be handed to those who command more support than do any of the competing individuals or teams." *Id.* at 272-73.

The simplest way to understand the connection between these two theories is to think of the Pildes and Issacharoff model as focusing on the way competition makes a democratic state more democratic, while Schumpeter's ideas focus on the ways in which elite competition allows a democratic state to survive as a state. Another way of thinking about this is to note that Issacharoff and Pildes have adopted an equilibrium approach to maximizing public satisfaction, arguing that laws that limit the extent to which government policy reflects the policy preferences of voters *today*, while the Schumpeterian method is dynamic, trying to maximize satisfaction *over time*, assuming that no one (or, at least, very few people) prefers to have their short-term lack of knowledge translated into governmental policy or societal strife created by unclear electoral results. This type of dispute is directly analogous to one of the crucial debates in antitrust law, where Schumpeter himself (he was primarily an economist) claimed that maximizing short-term efficiency harmed the incentive to create new ideas (or to engage in "creative destruction").<sup>38</sup>

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<sup>38</sup> "To summarize somewhat brutally, Schumpeter advanced three related principles concerning innovation: (1) capitalist economies are characterized by a continuous process of "creative destruction," in which innovative technologies and organizational structures constantly threaten the status quo; (2) technological innovation provides the opportunity for temporary monopoly profits, and the pursuit of these profits has spurred the tremendous growth of the Western economies; and (3) because of the expense of conducting research, large firms are necessary to keep the engine of capitalist change going. Therefore, despite its advantages in terms of short-term social welfare, an industry structure that encourages competition among many small firms is not the best structure for fostering technological innovation." Robert P. Merges, *Commercial Success and Patent Standards: Economic Perspectives on Innovation*, 76 Calif. L. Rev. 805, 843 (1988). See also CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note \_\_, at 81-103. This has been seen as one of the most important questions facing antitrust law and its interface with patent law. Michael



Current Supreme Court doctrine in election law strikes a balance between the positive and negative, static and dynamic efficiency.<sup>39</sup> The first way it does this is laid out above; by defining rights in a way consistent with natural duopoly competition (or rather, by protecting the component parts of natural duopoly competition) the Court allows states to promote an electoral system that naturally respects the two Schumpeterian constraints. FPTP/single district elections tend to promote a two-party system and therefore clear choices for voters and clear winners and losers in elections. Beyond this, the Court has given states the ability to justify regulations that impinge on the component parts of natural duopoly competition if the state interests are strong and legitimate and the regulation is necessary to vindicate these interests.<sup>40</sup> The interests that

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A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. Pa. L. Rev. 761 (2002). Determining whether and under what circumstances permitting monopolies to function improves innovation is a long-running and unresolved debate among antitrust economists. "Schumpeter's insights began a debate that has never ended over the relationship between large firm size and innovation, or between monopoly power and the rate of innovation." Herbert Hovankamp, *Exclusive Joint Ventures and Antitrust*, 1995 Colum. Bus. L. Rev. 1, 23 (1995). The belief that dynamic efficiency gains of monopoly mean that courts should only use antitrust laws to limit the most egregious monopolies is most associated with Frank Easterbrook. *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 15-16 (1984)

<sup>39</sup> Whether antitrust law strikes a reasonable balance between dynamic and static efficiency is matter of some contention. *See* Carrier, *supra* note \_\_, at 811-12 ("Courts today begin and end their antitrust examination with economic analysis. Of the economic efficiencies, courts have focused primarily on allocative efficiency - the optimal allocation of goods and services to consumers. Courts therefore have analyzed the effect of challenged practices on price or output in the relevant markets. But courts also have analyzed innovative efficiencies.")

<sup>40</sup> "Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus paper test' that will separate valid from invalid restrictions.... Instead, a court must resolve

the Court has found to be even potential justification for burdening electoral rights have been those that promote decisive results and clear choices for voters.<sup>41</sup> If there is a fundamental conflict between representative and Schumpeterian values, the Court is left to weigh the relative harms. This is not a solution to the fundamentally moral question about the relative value of representation and stability,<sup>42</sup> but it does limit the grounds on which such a decision can be made. Further, it lays out the possible justifications and factual predicates for deciding that one or another of these values should win out. This is the most one can expect of doctrine – it limits but does not remove the necessity of judicial judgment – and therefore is a reasonable approach to an irresolvable conflict.

### **c) Combining the Two Critiques: Politics as Markets Redeemed**

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such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.” *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (citations excluded)..

<sup>41</sup> “States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials....States also have a strong interest in the stability of their political systems.” *Timmons*, 520 U.S. at 364, 366.

<sup>42</sup> Richard Posner has argued that a court cannot, in the end, rely on moral argument to create firm doctrine when moral claims are contested. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 109-15 (1999). Even if one does not accept Posner’s claim that moral argument can *never* serve to guide adjudication, in this case wisdom seems to lay on the side of not solving rather than solving this moral dilemma.

This paper, then, consists of two, interlocking arguments. The first is that the First and Fourteenth Amendment rights the Supreme Court has decided to recognize in the field of election law are consistent with a “natural duopoly” regulation, and that this promotes representative government given the structural features of the American electoral system. The second is that the test the Court has used in these cases – one that promotes duopoly competition but permits states to impose regulations that burden the component parts of competition if they are necessary to promote clear choices for voters or decisive election results – provides a fair, reasonable metric by which fundamental differences about the nature of democracy can be resolved. Thus, though it has not made itself perfectly clear on this score, the Supreme Court created a jurisprudential scheme that nearly optimally marries the two conflicting normative justifications for electoral competition.

In his insightful dissent in *Vieth v. Jubelir*, Justice Breyer made clear that the Supreme Court shared this vision of its role:

“There must also be a method for transforming the will of the majority into effective government. This Court has explained that political parties play a necessary role in that transformation. At a minimum, they help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. Those voters can either vote to support that status quo or vote to “throw the rascals out.” .... A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates the transformation of the voters' will into a government that reflects that will.”

“[O]ne should begin by asking why single-member electoral districts are the norm, why the Constitution does not insist that the membership of legislatures better reflect different political views held by different groups of voters. History, of course, is part of the answer, but it does not tell the entire story. The answer also lies in the fact that a single-member-district system helps to assure certain democratic objectives better than many ‘more representative’ (i.e., proportional) electoral systems. Of course, single-member districts mean that only parties with candidates who finish “first past the post” will elect legislators. That fact means in

turn that a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties. But single-member districts thereby diminish the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decisionmaking (and which rascals to throw out), while simultaneously providing greater legislative stability.”<sup>43</sup>

Breyer endorsed a view that the Constitution prohibits state laws that impair the single-member district system from producing decisive electoral results, easy distinctions between the parties and competition between the major parties. Though this was a dissent, this remains the best definition of what current Supreme Court doctrine is in the area of election law. This paper stands as an explanation and defense of this understanding of the Constitution’s role in elections.

The rest of the paper will be organized as follows: Section II will examine the justifications inside democratic theory for privileging competition as a constitutional value and explain how the Supreme Court has succeeded in coming up with a metric for weighing conflicting justifications. Section III will show how incorporating natural monopoly theory would improve the idea of electoral markets; Section IV will survey the state of primary ballot access law and argue that it is largely consistent with existing ideas about optimal regulation under natural duopoly conditions; Section V serves as a brief conclusion.

## **II. Two Theories of “Competitive Democracy”**

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<sup>43</sup> *Vieth v. Jubelirer*, 124 S. Ct. 1822-25 (2004) (Breyer J., dissenting).

When contrasted with “deliberative” or “participatory” models of democracy, “competitive” models are usually treated as being of a type.<sup>44</sup> This rhetorical move groups together all theorists who rely on the analogy between markets and politics and view elections through the lens of competition between candidates for votes rather than as a discussion between voters on how to best make decisions. However, such a move masks deep divisions among the theoretical justifications for valuing competition.

Broadly speaking, there are two types of competitive models: (1) those that focus on maximizing the extent to which electoral outcomes are representative of the opinions of voters and (2) those, like Joseph Schumpeter’s, that support competition because it promotes clear choices for voters and decisive electoral outcomes and therefore reduces societal conflict. The policies that believers of either of these models support inevitably conflict – the system of election laws that produce the most representative legislature would not necessarily produce decisive results and vice versa.

An examination of these two models shows that it is impossible to determine *theoretically* which is more important for a democracy. Yet conflicts persist and must be solved. The Supreme Court has solved this problem as well as it could possibly be expected to, by reducing this theoretical conflict to a factual one. It defines associational rights in the electoral context in such a way that states are not allowed to engage in regulation that harms the component parts of the type of competition that promotes representative outcomes in a FPTP system, unless their regulations are enacted to ensure

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<sup>44</sup> See, e.g., LAW, PRAGMATISM AND DEMOCRACY, *supra* note \_\_, 166-69 (discussing “Concept 2”

democracy, a model that combines Schumpeter and theories based on the importance of representation); Bruce Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. Pa. L. Rev. 793, 794 (2001) (grouping together Robert Dahl, Anthony Downs and Schumpeter).

decisive outcomes and clear choices for voters. If these regulations are enacted for these purposes, the Court weighs the effect of the regulation along these axes and determines which is more significantly harmed.

Thus, while in extreme cases the Court would be forced to choose between the two concepts of competition, the jurisprudence has reduced the type of arguments that can justify restrictive electoral regulations and provided a set of factual predicates on which an ultimate decision-maker could base her decision. In contested matters, this is the best doctrine can achieve and the Supreme Court's electoral jurisprudence should therefore be considered a success.

Arguing for the essential reasonability of the Supreme Court's approach to resolving conflicts between the two basic competitive models requires, as a first step, laying out both of the models. This will be followed by a discussion of the jurisprudence in the language of the models.

#### **A. Competition and Representativeness:**

In contemporary legal literature, Samuel Issacharoff and Richard Pildes have created one of the most complete models for the examination of elections laws.<sup>45</sup> In "Politics As Markets: Partisan Lockups of the Democratic Process," they argue that the best way to judge election laws is to determine how representative the elected are of the preferences of the electorate.<sup>46</sup> This is analogous to the question we ask of markets, namely whether they are operating efficiently. Constitutional review of election laws

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<sup>45</sup> See *Politics as Markets*, *supra* note \_\_, at 643.

<sup>46</sup> "Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens." *Id.* at 646.

should exist to fix any market failures.<sup>47</sup> The particular failure Issacharoff and Pildes were worried about was the way in which elected officials, as members of parties, create rules that favor the existing parties and hence violate the efficiency of the electoral market.

Although relatively simple, the model has proved remarkably robust, providing analytical insight on issues as distinct as gerrymandering, blanket primaries, fusion candidacies and campaign finance.<sup>48</sup> One of the reasons for its success is its parsimony; it proposes that courts use one value, competition, rather than a complex mélange of interests, as a guide to deciding all election law cases.

Competition, though, is a means and not an end. The reason for valuing party competition, in Issacharoff and Pildes's view, is that it produces governmental policy-making that is responsive to the preferences of voters.<sup>49</sup> This concept draws heavily upon the work of political scientists working in a public choice idiom. Specifically, it is based on a vision of political party behavior most famously seen in the work of Anthony

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<sup>47</sup> "But politics shares with all markets a vulnerability to anticompetitive behavior... Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment." *Id.* at 646, 648.

<sup>48</sup> See, e.g., Samuel Issacharoff, *Why Elections?*, 116 Harv. L. Rev. 684, 687 (2003) (applying the *Politics as Markets* hypothesis to gerrymandering); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms and Partisan Competition*, 101 Colum. L. Rev. 274, 276 (2001) (Hereinafter "Private Parties") (blanket primaries); *Politics as Markets*, *supra* note 12, at 683-91 (fusion and campaign finance laws).

<sup>49</sup> See *Politics as Markets*, *supra* note 12, at 646.

Downs, who saw parties as rational actors with the sole goal of maximizing their vote totals.<sup>50</sup> Downs surmised that parties would change their policies in order to maximize their vote, much like firms operating in a consumer market tailor their goods to the tastes of consumers. For example, businesses locating themselves along a street will space themselves differently based on the number of competing stores in order to gain competitive advantage by reducing the transportation costs of consumers located along the street.<sup>51</sup> Imagine a street with only one store: it would open shop in the middle of the street to make it easier for all customers to reach it. If another firm decided to open on the street, it would logically locate directly next door to the existing store, giving it an advantage with exactly half the customers – those that are closer to it than they are to the old store.<sup>52</sup>

This, according to Downs, is what happens with parties. Assuming voters are arrayed along an ideological spectrum, two political parties will propose nearly identical platforms, vying for the median voter.<sup>53</sup> The party that gets the median voter will presumably win all voters to her right/left (depending on which party it is.) Public policy is hence what voters in the middle of the spectrum want.

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<sup>50</sup> See ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY, 114-16 (1957); *Private Parties*, *supra* note 30, at 300 (“As set out initially in the work of Anthony Downs, we may follow the spatial model of how...a party seeking an advantageous position among a heterogeneous electorate ... would gravitate toward the center so as to position himself or herself in proximity to the preferences of the greatest number of voters.”).

<sup>51</sup> See Downs, *supra* note \_\_, at 117; Harold Hotelling, *Stability in Competition*, 39 Econ. J. 41 (1929)

<sup>52</sup> See Hotelling, *supra* note \_\_, at 41.

<sup>53</sup> See Downs, *supra* note \_\_, at 115-17.



This view of parties and of the electorate is admittedly simplistic, but it is still a reasonable assumption that competition between political parties forces elected officials to at least attempt to generate policies that represent the preferences of the electorate.<sup>54</sup> Issacharoff and Pildes want to make sure that elected officials are responsive to these pressures and are not able to insulate themselves from this competitive pressure by passing laws that ensure electoral success.<sup>55</sup> Removing such anti-competitive laws will result in more representative policies because it will force the parties to compete more vigorously for the median voter – just like the two businesses that end up side-by side on a strip.

What should be noted is that this is an equilibrium or static model; that is, it seeks to make each election produce a government that is as responsive as possible to the preferences of voters. As will be seen below, the weight of Schumpeter's critique of both market anti-trust laws and democratic systems, springs from his argument that markets and democratic systems need to be understood dynamically, or over a number of periods (elections) because attempting to produce the most efficient outcome in each and every period does not necessarily produce the most efficient outcome over time.<sup>56</sup>

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<sup>54</sup> *But see Entrenching the Duopoly*, *supra* note \_\_, at 721 n.13 (discussing the work of political scientists who have criticized the median voter hypothesis).

<sup>55</sup> *See Politics as Markets*, *supra* note \_\_, at 647.

<sup>56</sup> Schumpeter model is often mistaken for focusing on equilibrium concerns. See JOHN MEDEARIS, JOSEPH SCHUMPETER'S TWO THEORIES OF DEMOCRACY 178-82 (2001) (discussing how political scientists have misunderstood Schumpeter as having created an equilibrium model). The reason he has been misunderstood is that his was the first real model of competitive democracy and the economist/political scientists who adopted a competitive framework were working in a neo-classical economic milieu. While

That said, the general concept of producing a government that acts like the people would like it to is a basic value of democracy, and in the popular conception, perhaps the only value.<sup>57</sup>

### **B. Schumpeter's Competitive Vision**

For a theorist of democracy, Joseph Schumpeter cared little for the opinions of the *demos*. In his most famous work, *Capitalism, Socialism and Democracy*, Schumpeter laid out what he argued was a positive description of what democratic states really are like, and in this vision, the opinions of voters about individual policies played little role. Rather than being a system by which the people, with opinions on the issues of the day, chose leaders to express and enact those preferences, “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”<sup>58</sup> Elected officials enact policies then look to the populace for sanction based on their effect; their opposition claims that these policies were ineffective and that there are better alternatives. Effective elections, under this understanding, are not those that accurately translate the pre-existing preferences of the populace into policies – Schumpeter, rejected the idea that the populace had meaningful preferences<sup>59</sup> – but rather those that give voters clear choices and produce decisive results, because such decisive results make it easier

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Issacharoff and Pildes are an heir to this intellectual tradition, it is notably not consistent with Schumpeter’s own ideas.

<sup>57</sup> See *Minimalist Conception*, *supra* note \_\_, at 32 (“[R]epresentation, or its cognates, is frequently treated as quintessential, if not definitional, for democracy.”)

<sup>58</sup> See *CAPITALISM, SOCIALISM AND DEMOCRACY*, *supra* note \_\_, at 269.

<sup>59</sup> *Id.* at 270 (“Collectives act almost exclusively by accepting leadership.”)

for governmental officials to enact a program that can then be judged by the electorate. Perhaps more importantly, decisive electoral results reduce societal conflict, because it is clear to losers that a majority of their peers disagree with them, and produce governments solid enough to survive internal conflict and external crises.

While Schumpeter claimed his ideas were merely positive description,<sup>60</sup> it is important to see that, while this was not, broadly speaking, a falsehood, his model does contain powerful normative ideas. The reason for this apparent contradiction is that his ideas relate to the question of how a democratic state can survive. Schumpeter believed his “thin” conception of democracy, as opposed to those that rely heavily on “thicker” ideas about complex mass deliberation, was the only one that produced governments able to survive crises and reduce societal conflict to a tolerable level.<sup>61</sup> Therefore it stood as a positive description of existing mass democratic states that they were, in fact, behaving as Schumpeter claimed they were because if they did not, they would not exist (or would move to a system based on a thinner conception of democracy). Thus, though it was, in his mind, descriptive, Schumpeter was actually arguing that a certain conception of democracy increased the likelihood of state survival and was, when the problems of mass

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<sup>60</sup> “Democracy is a political method, that is to say, a certain type of institutional arrangement for arriving at political – legislative and administrative—decisions and hence incapable of being an end in itself, irrespective of what decisions it will produce under given historical conditions.” CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note \_\_, at 242.

<sup>61</sup> *Id.* at 252-62; For a modern day Schumpeterian’s argument that the strongest justification for democracy is its ability to reduce societal conflict and the possibility of revolution, see *Minimalist Conception*, *supra* note \_\_, at 48-49.

decision-making in nations featuring severe disagreements among its people and external pressures were taken into account, the only real choice for modern democracies.<sup>62</sup>

This distinction between modern, mass democracies, which feature conflict between its citizens and no meaningful way of mediating these differences through deliberation, and democracies in homogenous, small nations, where these are not serious problems, is crucial to understanding Schumpeter's rejection of "classical" theories of democracy.<sup>63</sup> His argument against such earlier conceptions was that they misunderstood the difficulty of aggregating preferences and translating that into public policy. "There is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument."<sup>64</sup> The idea of a common good, a best set of government policies, that can be generated out of negotiations and

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<sup>62</sup> Schumpeter argued that the "classical doctrine" of democracy, rooted in an opposite conception of democracy, did describe some political communities. "[I]t must not be forgotten that there are social patterns in which the classical doctrine will fit facts with a sufficient degree of approximation. As has been pointed out, this is the case with many small and primitive societies which as a matter of fact served as a prototype to the authors of that doctrine. It may be the case also with societies that are not primitive provided they are not too differentiated and do not harbor any serious problems. Switzerland is the best example. There is so little to quarrel about in a world of peasants, which, excepting hotels and banks, contains no great capitalist industry, and the problems of public policy are so simple and so stable that an overwhelming majority can be expected to understand them and agree about them. But if we can conclude that in such cases the classical doctrine approximates reality we have to add immediately that it does so not because it describes an effective mechanism of political decision but only because there are no great decisions to be made." *Id.* at 267.

<sup>63</sup> *Id.* at 250-68.

<sup>64</sup> *Id.* at 251.

discussions between the people is a fiction, except perhaps in a small New England town where disagreements can be hashed out in town hall.<sup>65</sup> In a large heterogeneous society, people disagree about what is good and, even where they agree about a metric for what is good, disagree about which policies will best produce that good, and disagree to the extent that mere argument is unlikely to get them to resolve their disagreements.<sup>66</sup> Further, in a mass rather than a small society, people have little reason to understand the complex issues of governance, making broad societal agreement about either means or ends even more difficult.<sup>67</sup> Support for democracy cannot be based on the belief that such an agreement will occur; rather, democracy exists as a political method to produce workable policies despite the existence of such disagreement.

In his crucial if flawed book “Joseph Schumpeter’s Two Theories of Democracy,” John Medearis misses this point.<sup>68</sup> He argues that Schumpeter’s career and earlier writings reveal that he really believed that democratic deliberation and education had a transformative effect on citizens and could serve to convince people who otherwise would disagree to come to common answers about contested questions in certain areas.<sup>69</sup> In *Capitalism, Socialism and Democracy*, Schumpeter rejected that agreement could ever

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<sup>65</sup> *Id.* at 246.

<sup>66</sup> “Americans who say, ‘We want this country to arm to its teeth and then to fight for what we conceive to be right all over the globe’ and Americans who say, ‘We want this country to work out its own problems which is the only way it can serve humanity’ are facing irreducible differences of ultimate values which compromise could only maim and degrade.” *Id.* at 251.

<sup>67</sup> *Id.* at 256-64.

<sup>68</sup> See Medearis, *supra* note \_\_, at 1.

<sup>69</sup> *Id.* at 57-64

be found on political issues in a modern democratic state. In Medearis's view, the reason for this apparent contradiction was ideological.<sup>70</sup> Uncomfortable with the potential radical results of expanded democracy, Schumpeter created an elite conception of democracy as a method in order to blunt the tendencies towards the extreme versions of socialism he thought were the likely outcome of democratic methods.<sup>71</sup>

This view fails to understand Schumpeter's work in the context of explaining modern mass democracies. To understand why, it is necessary to explain exactly what assumptions Schumpeter made and did not make about the behavior of voters when making political decisions. In his section "Human Nature in Politics," Schumpeter makes heavy use of famed "mob" theorists Pareto and Le Bon.<sup>72</sup> They argued that men were far from rational, but rather prone to irrational group behavior. Schumpeter concluded "the *electoral massis* incapable of action other than a stampede."<sup>73</sup>

The key to Schumpeter's reading of these writers, though, is that he thought them insightful but not absolutely correct. Le Bon, he noted, "overstress[es] the realities of human behavior."<sup>74</sup> Human beings do not, after all, always act as crazed mobs.

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<sup>70</sup> "To put this differently...the only reason he could have to insist on the elite assumptions about human nature he chose was to preclude the kind of spread of democratic practices proponents of developmental theories would favor." *Id.* at 133

<sup>71</sup> "But the full import of his elite conception of democracy is best understood in light of the deeply authoritarian picture he drew of democratic socialism. While this was by no means a picture of Schumpeter's idea society, it was his version of a society in which elite rule and conservative values could persist despite the tendencies leading toward socialism." *Id.* at 139.

<sup>72</sup> See CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note \_\_, at 256-64.

<sup>73</sup> *Id.* at 283 (emphasis mine).

<sup>74</sup> *Id.* at 257.

Medearis places a great deal of weight on the small passage in *Capitalism, Socialism and Democracy* where Schumpeter limits his reliance on the mob theorists.<sup>75</sup> In this passage, Schumpeter claims that individual citizens can act rationally and without the “irrational prejudice and impulse;” when making decisions about “himself, his family, his business dealings, his hobbies, his friends and enemies, his township and ward, his class, church, trade union or any other social group of which he is an active member – the things under his personal observations, the things which are familiar to him independently of what his newspaper tells him.”<sup>76</sup> This is, in Medearis’s view, an enormous concession to “theorists of democracy who have stressed the importance of developing the capacity for democratic participation” because, if one believes that citizens could develop the capacity to make rational choices about their trade union or social group, then, if given the opportunity, citizens are, in fact, capable of developing the capacity to engage in decision-making about national affairs.<sup>77</sup>

Schumpeter did reply to this critique, making a sharp distinction between those things that people can know about (matters close to home) and those they could not, like political affairs. Medearis calls this “deeply dissatisfying,” but only because he misunderstands the point.<sup>78</sup> Schumpeter was an unconventional economist, to be sure, but an economist all the same<sup>79</sup> and his belief that people were able to develop the

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<sup>75</sup> See Medearis, *supra* note \_\_, at 120-33.

<sup>76</sup> *Id.* at 258-59.

<sup>77</sup> Medearis, *supra* note \_\_, at 120

<sup>78</sup> *Id.* at 121.

<sup>79</sup> “Schumpeter was a great economist; and though his theory of democracy is not formally economic, it bears the stamp of his profession.” LAW, PRAGMATISM AND DEMOCRACY, *supra* note \_\_, at 188.

capacity to make decisions (through repetition) about their everyday life was rooted very firmly in his belief that it is in their *interest* to act rationally in those fields.

Normally, the great political questions take their place in the psychic economy of the typical citizen with those leisure-hour interests that have not attained the rank of hobbies, and with the subjects of irresponsible conversation. These things seem so far off; they are not at all like a business proposition: dangers may not materialize at all and if they should they may not prove so very serious; one feels oneself to be moving in a fictitious world. This reduced sense of reality accounts not only for a reduced sense of responsibility but also for the absence of effective volition..... All of this goes to show that without the initiative that comes from immediate responsibility, ignorance will persist in the face of masses of information however complete or correct.<sup>80</sup>

The assumption he makes about human nature here is not radical; he merely claims that people are better at solving easier questions than they are at hard ones and are more likely to be good at solving questions that are important for them (on a personal level) to solve. In economic terms, he is arguing that learning how to make good political decisions is a public good, with a positive net benefit for society but where no individual has the incentives to bear his or her share of the costs. Schumpeter believed that average citizens had little reason to develop the capacity to think about the big issues facing a nation and, as such, the people (rather than people) could not make anything other than uninformed, irrational decisions about policy.<sup>81</sup> Moreover, issues important to the state generally will never have the level of independent importance to individuals that their work and families will because their share of the benefits will be low as will their share of the

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<sup>80</sup> CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note \_\_, at 261-62.

<sup>81</sup> “Thus the typical citizen drops down to a lower level of mental performance as soon as he enters the political field.” *Id.* at 262.



costs.<sup>82</sup> The capacity of individuals is, for the most part, unimportant— even if certain people have the ability to learn how to make such decisions, the people as a whole (“the electoral mass”) have no such capacity because it will never be in the interest of any one of them (except those who run for office and hence receive the perks of office) to develop it. For Medearis, this is a limit of democratic planning, because democratic systems *ought* to be designed such that people develop their capacity to make decisions.<sup>83</sup>

Schumpeter believed that democratic systems in massive, modern democracies could not be developed in such a way because of the inevitable difference in interest for almost all citizens between making local decisions that affect them directly and high political decisions that affect them at a level of remove.

Medearis’s misunderstanding of the distinction between the ability of *people* and the ability of *the people*, or the electoral mass, in Schumpeter’s work is central to his claim that Schumpeter was really a transformative theorist. Schumpeter notably thought of politicians as “entrepreneurial innovators” who “create new combinations, innovative party programs and platforms that exploit long-standing political opportunities and unmet preferences and needs.”<sup>84</sup> Medearis responds to this by asking “why should we suppose that only elite professional politicians can engage in this sort of innovation?”<sup>85</sup> The short

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<sup>82</sup> “However, when we move still farther away from the private concerns of the family and the business office into those regions of national and international affairs that lack a direct and unmistakable link with those private concerns, individual volition, command of facts and method of inference soon cease to fulfill the requirements of the classical doctrine.” *Id.* at 261.

<sup>83</sup> Medearis, *supra* note \_\_, at 133.

<sup>84</sup> Medearis, *supra* note \_\_ at 180-81 (recounting Schumpeter’s beliefs about political entrepreneurs).

<sup>85</sup> *Id.* at 182.

answer is that we do not (or, rather, Schumpeter does not). Schumpeter did not define “elites” to only include a small class of people but rather all people who try to run for office. It is an empirical observation (and one that holds up under many different political systems) that this is a small fraction of the population. The analogy holds: Only a few people, a small percentage of the population, are entrepreneurs. The issue is not whether anyone has the ability to start a successful firm, since clearly someone can. Acknowledging this does not mean that everyone is capable or has an interest in coming up with innovative ideas for products and services that others will want to buy. Similarly, the question is not whether *people* have the ability to deliberate on political issues, as clearly some do, but rather whether *the people* can do so on a mass scale. Schumpeter argued that they cannot.

Moreover, he argued it would be dangerous if they did. Mass decision-making, unimpeded by elite competition, could in Schumpeter’s model, lead to state collapse. Because he did not believe in a stable, easily identifiable social consensus along the lines of Rousseau, he believed that interference with a competitive model that produced decisive results would lead to conflict and potentially state collapse.

Schumpeter wrote a review of F.A. Hayek’s *The Road to Serfdom* that makes this view clear.<sup>86</sup> He claimed that “the book, for a political book, takes surprisingly little account of the political structures of our time.”<sup>87</sup> While he, like Hayek, hated socialism, in this article Schumpeter praises the English conservatives who had embraced part of a

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<sup>86</sup> Joseph A. Schumpeter, *Review: The Road to Serfdom, Friedrich A. Hayek*, 54 *Journal of Political Economy* 269-70 (1946).

<sup>87</sup> *Id.*

socialist agenda (and were criticized by Hayek).<sup>88</sup> His argument, *contra* Hayek's libertarian claim that socialism and democracy are incompatible, was that the drive towards some type of democratic socialism was inevitable and that it was important for elites to control the situation to avoid social collapse. Medearis writes "the point was to understand those tendencies and theorize a form of democratic socialism that would still be consistent with Schumpeter's conservative values."<sup>89</sup> This is a mischaracterization: Schumpeter's 'conservative values' were a belief that social structures needed to take certain forms in order to survive. Medearis excoriates Schumpeter for embracing a conception of the democratic state that was, in his view, questionably democratic. Schumpeter focused on the other side of this: what makes democratic states – socialist or not – remain states. It was his belief that the decisiveness of elite competition provided the means by which governments could be formed and decisions could be made inside a mass state where people disagreed with one another.

It is important, then, to return to his beliefs about how people and the people make their decisions. The one crucial assumption in *Capitalism, Socialism and Democracy* about individuals is not, as Medearis claims, that Schumpeter believed they cannot learn about issues if given incentives, but rather that, even after negotiation and thought, people are likely to disagree with one another.

"[E]ven if the opinions and desires of individual citizens were perfectly definite and independent data for the democratic process to work with, and if everyone acted on them with ideal rationality and promptitude, it would not necessarily follow that the political decisions produced by that process from the raw material of those individual volitions would represent anything that could any convincing sense be called the will of the people. It is not only conceivable but, whenever individual

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<sup>88</sup> See Medearis, *supra* note \_\_, at 102-04.

<sup>89</sup> *Id.* at 104.

wills are much divided, very likely that the political decisions produced will not conform to “what people really want.” If people were to deliberate and actively participate in politics, but were faced with both their limited capacity and the inevitability of conflicting. Nor can it be replied that, if not exactly what they want, they will get a “fair compromise.” This may be so. The chances for this to happen are greatest with those issues which are quantitative in nature or admit to gradation... But with qualitative issues, such as the question whether to persecute heretics or to enter upon a war, the result attained may well, though for different reasons, be equally distasteful to all the people...[In such a situation] deadlock or interminable struggle, engendering increasing irritation, would have been the most probably outcome of any attempt to settle the question democratically.<sup>90</sup>

This is because people disagree with another about fundamental questions. As noted above, Schumpeter claimed, “There is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument. This is due not primarily to the fact that some people may want things other than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things.”<sup>91</sup> The key is that even rational argument or negotiation will not serve to produce solid outcomes.

But a state needs to make choices in order to survive – it needs to make policies to produce security and economic welfare – and it needs to make choices in such a way that those choices are accepted (at least in the passive form of not being rebelled against) by the citizenry. If the decision about who will make decisions is not clear, then there will be “deadlock and interminable struggle.”<sup>92</sup> This is made worse by the problems of the mass state, in which people are not fully informed (and, as was noted above, have no

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<sup>90</sup> CAPITALISM, SOCIALISM AND DEMOCRACY, *supra* note \_\_, at 256.

<sup>91</sup> *Id.* at 251.

<sup>92</sup> *Id.* at 255.

incentive to be). Who wins the struggle for office is less important than that someone wins clearly. If election results are not decisive, then elections have failed to solve the problem of decision-making in a mass state and there will be continued conflict over policies.

In ordinary times, perhaps, such indeciveness is not a problem. Certain societies, including “small and primitive” ones, and nations that do not have existential crises to face, may feature enough agreement that clear electoral decisions are not necessary.<sup>93</sup> However, in times of “stress,” the failure of a society to produce clear decisions could lead to revolution or external weakness. The inherent conflict between the individual values means that some system must be devised whereby the choices of individuals are translated into clear, stable governments.

This is why Schumpeter opposed proportional representation. “It is in fact obvious not only that proportional representation will offer opportunities for all sorts of idiosyncrasies to assert themselves but also that it may prevent democracy from producing efficient governments and thus prove a danger in times of stress.”<sup>94</sup>

In contrast, in Schumpeter’s model, power resides entirely in the hands of the Prime Minister and his government, who, once selected, enjoy full power to make decisions until they are defeated (either by the parliament or in the next election). This puts enormous power in the hands of one person, of course, but this was, for Schumpeter, both inevitable (because otherwise there would be disagreement) and agreeable, because it created incentives for creative leadership.

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<sup>93</sup> *Id.* at 267.

<sup>94</sup> *Id.* at 272.

In order to understand this last point, we have to turn towards Schumpeter's economic theory. Even more than his contributions to democratic theory, Schumpeter is known for his idea of "creative destruction."<sup>95</sup> His effective claim is that, were equilibrium models of competition accurate to reality, there would inevitably be economic stagnation. This is because, in a competitive equilibrium, there are no profits – competition has squeezed them out. As such, there are no resources to capture and to reinvest in the creation of new ideas. This would ruin the central part of a capitalist economy: the creation of new ideas that will serve to destroy old forms of production. Fortunately, according to Schumpeter, actual competition does not produce equilibrium efficiency, but rather produces dynamic efficiency or is efficient over time.<sup>96</sup> Competition between firms has winners and losers, with the winners in a monopoly like position and able to charge super-normal prices. Any effort to use governmental power to limit this monopoly power was misguided because, even if it did serve to create an economy that was more efficient today, it would not serve to create an overall more efficient economy because there would be less incentive to create.

Economists have debated endlessly whether such monopolistic power leads to more innovation or less.<sup>97</sup> However, the connection between Schumpeter's argument in favor of monopoly and his theory of democracy is clear. An electoral system should produce decisive electoral results for the same reason it should produce decisive

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<sup>95</sup> See *Merges*, *supra* note \_\_, at 843.

<sup>96</sup> See Medearis, *supra* note \_\_, at 150-52 (summarizing the claims of JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* (1911)).

<sup>97</sup> See generally Herbert Hovankamp, *Exclusive Joint Ventures and Antitrust*, *supra* note \_\_, 23.

economic ones – it increases the stability and hence the desirability of winning. The result should be better policies and a surer hand at the helm (because the competition for the position had been fierce) during times of stress.

All of this leaves us with an important question; what role can Schumpeter's model play in resolving constitutional problems dealing with election law. From Schumpeter's model, one can draw two major values that he thought were necessary for the maintaining a stable democracy: decisive electoral results and simple, binary choices for voters. A Constitutional system that respected Schumpeterian principles would ensure that no electoral rules were passed that violated these conditions.

### **c. Combining The Two Models: The Supreme Court's Steady Hand**

From these two discussions, it should be clear that the two models conflict both about the reasons for valuing political competition and about the rules by which that competition should be guided. Without coming to some kind of accommodation (or the rejection of one side or the other) between Schumpeterian and equilibrium efficiency principles, competitive democratic theory cannot serve to help create a consistent jurisprudence.

One way to approach this problem is to note the weakness of the idea that elections can ever truly be representative. Political scientist Adam Przeworski adeptly makes this argument.<sup>98</sup> He notes that there are two major problems with any attempt to justify the use of democratic methods because they produce representative government: (1) the citizenry may have no definite opinion about political issues and (2) may be poor judges of what is in their interest even when making determinations about whether a

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<sup>98</sup> See Przeworski, *supra* note \_\_, at 31-39, 46-50.

politician has done well in office in the previous term.<sup>99</sup> If people do not have a definite idea about what is in their interest, it becomes illogical to claim that elected officials can be representative of the desires of the electorate, because there is nothing they can be representative of. If people are myopic, and are hence bad judges of what is in their long-term interest, *ex post* evaluations (i.e. retrospective voting based on performance) also are flawed.

Both of these assumptions about voters seem reasonable – voters have little interest in forming definite opinions about issues of the day and are often myopic. Thus, the only way to determine if politicians act in the interests of voters is some outside standard – a determination based on some objective criteria.<sup>100</sup> But there is no outside body to determine these criteria. “We will arrive at different judgments, for we are ‘people,’ participants rather than impartial observers.”<sup>101</sup>

The combination of these problems leaves representation at a loss. Unless the citizenry know what is good *ex ante*, or can figure out *ex post* that some performance was good, there is no way to judge whether a politician was representative of the people. Further, decisions made by any type of majority rule (at the level of elections or in the legislature) do not necessarily include the views of those who lose, leaving it unclear whether decisions are representative of the entirety population or some subset.<sup>102</sup> If we cannot judge whether elections are representative, maximizing the extent to which they are representative seems foolhardy.

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<sup>99</sup> *Id.* at 32.

<sup>100</sup> *Id.* at 33.

<sup>101</sup> *Id.* at 34.

<sup>102</sup> *Id.* at 38-39.



Przeworski moves from this dismissal to a defense of a Schumpeterian system. His normative starting point is that “we want to avoid bloodshed, resolving conflicts through violence.”<sup>103</sup> He first argues that the possibility of being able to change governments through some means limits this type of violence. This is because losers in any political contest will see the likelihood that they will win in the future. Therefore, even if they could gain in the short-term by revolting and, at some cost to themselves, prevail in the political contest, they will not revolt because they see the possibility of winning in the future.<sup>104</sup> This condition is met by flipping a coin to decide political problems, though, and hardly justifies having a decision system based on voting.<sup>105</sup>

His second claim is more persuasive; he claims that voting constitutes “flexing muscles,” or that majority rule broadly though not specifically coincides with the ability of a majority to impose its beliefs on the minority through force.<sup>106</sup> Put in simple terms, minorities accept majority rule through elections because they couldn’t upset it through violence.

“If elections are a peaceful substitute for rebelling...it is because they inform everyone who would mutiny and against what. They inform the losers – ‘here is the distribution of force: if you disobey the instructions conveyed by the results of the election, I will be more likely to beat you than you will be able to beat me in a violent confrontation’ – and the winners ‘if you do not hold elections again or if you grab too much, I will be able to put up a forbidding resistance.’”<sup>107</sup>

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<sup>103</sup> *Id.* at 45.

<sup>104</sup> *Id.* at 45-46.

<sup>105</sup> *Id.* at 47.

<sup>106</sup> *Id.* at 47-49.

<sup>107</sup> *Id.* at 48.

This, though, is a contingent claim. Even if we ignore the problem that there is no particular reason to assume, *a priori*, that a majority is more likely to win in a violent confrontation than certain minorities,<sup>108</sup> we are faced with the problem that we need only worry about differences that are so serious that people will revolt against them no matter what the result. Institutional design should only respond to actual and not to theoretical problems and so it should only create systems that deal with this problem when it actually occurs.<sup>109</sup>

Przeworski's dismissal of representation is similarly contingent. While people certainly do not have absolute views about all political issues, they certainly have some. Similarly, citizens may not be perfect judges of their long-term interests but they are not utterly incapable of making any such determinations. Representation, as an absolute matter, may not be possible, but this does not mean that a limited conception of it is incoherent or false; it just is not perfect.

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<sup>108</sup> The likelihood of minority success in physical confrontation has even become a fixture in some quasi-democratic states. In Turkey, the military has intervened, mostly peacefully, overturning election results as recently as 1997, to preserve secularism. See Patrick R. Hugg, *The Republic of Turkey in Europe: Reconsidering the Luxembourg Exclusion*, 23 Fordham Int'l L. J. 606 (2002)

<sup>109</sup> Przeworski is cognizant of this point. "Elections alone are not sufficient for conflicts to be resolved through elections.... Thus, a minimalist conception of democracy does not alleviate the need for thinking about institutional design. In the end, the "quality of democracy," to use the currently fashionable phrase, does matter for its very survival. But my point is not that democracy can be, needs to be, improved, but that it would be worth defending even if it could not be." Przeworski, *supra* note \_\_, at 50. Nothing here should be taken as critical of Przeworski's work, which in this article and others, has served as an important inspiration for this paper.

Thus, the Schumpeterian model and the representative model are similarly problematic and, as an objective theoretical matter, there is no way to reject one in favor of the other. Fortunately, courts at least do not need to solve these questions in absolute, afactual manner. They can solve problems as they come up. Rather than attempting to choose one model or another and solving their conflict, a court can maintain their conflicting values and see, in certain cases, whether to favor representation as a value or whether the stability that comes as a result of decisive election results should be privileged. In each case, facts can be developed to show how much representation will be harmed, and how democratic stability will be endangered, leaving a court with the proper information to engage in its ultimate task of judgment.

The Supreme Court's election law jurisprudence takes this approach; it maintains the conflict between the two models as a matter of doctrine. To see whether state election laws are constitutional, it first asks whether they burden protected constitutional rights.<sup>110</sup> This determination, as will be shown below, effectively amounts to a judgment about whether they impermissibly infringe on rights that are necessary component parts of the type of political competition that serves to produce representative outcomes.<sup>111</sup> The Court determines whether these rights have been burden severely or not; that is, it weighs the harm to representation. If there is any burden, a state must produce an interest that could justify this burden, but the strength of the interest that can justify a burden varies with the weight of the burden. The interests that the Court has recognized as

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<sup>110</sup> This test was first used in *Anderson*, 460 U.S. at 789, and best fleshed out in *Timmons*, *Timmons*, 520 U.S. at 359.

<sup>111</sup> See notes \_ and accompanying text.

potentially justifying burdens are those inherent in the Schumpeterian model: ensuring clear choices for voters and decisive results in elections.<sup>112</sup> The Court then decides whether the interest justifies the burden.

This approach does not solve the problem created by the two conflicting justifications for valuing political competition, as it leaves the final determination to the Court with little guidance about which should win when the interests conflict. However, by reducing the matter to facts and permissible arguments, the approach does create some degree of predictability and fairness. Parties know what types of claims to bring and states know they are limited to only a narrow set of justifications for restricting political liberties. Further, the doctrine limits the arbitrariness of judicial decisions in this area – they must justify their decisions with a type of argument that has theoretical justification. Without some greater guidance about how to resolve fundamental conflicts of this type (and it is unclear from where this could come), this is the best one can expect.

America's peculiar history has given the Court some help. For much of American history, the United States has used a single-member district/FPTP electoral system in all Congressional races and in most legislative races throughout the country.<sup>113</sup> As even the avatars of representation argue, this is a permanent feature of American elections and, because of their long-standing use, one that the Constitution should not be used to

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<sup>112</sup> See notes \_ and accompanying text.

<sup>113</sup> Congress first required single-member districts in 1842, repealed it in 1929 and reinstated it 1967. The alternative was never proportional representation, but instead state-wide at-large elections. Richard Pildes and Kristin A. Donahue, *Cummulative Voting in the United States*, 1995 U Chi Legal F 241 251 n. 43 (1995); James Gardner, *Madison's Hope: Virtue, Self-Interest, and the Design of Electoral Systems*, 86 Iowa L. Rev. 87, 90-91 (2000).

upset.<sup>114</sup> The next section of this paper will argue that, under this constraint, the results that promote representative outcomes also often serve Schumpeterian ends.

### III. Politics as Imperfect Markets: Regulation under Natural Duopoly Conditions

While theorists have disputed both the merits of both the simple “representativeness” metric and Schumpeter’s competitive democratic framework, Issacharoff and Pildes have been subject to other lines of attack as well. Most important among these is that their theory is not rooted at all in the Constitution and that it fails to comprehensively deal with the implications of the market metaphor.<sup>115</sup>

Issacharoff and Pildes oppose a rights-based view of electoral systems. Such a view has led, they argue, to a sterile constitutional discourse in which the deeper theories of democracy embedded in judicial decisions are selected *ad hoc*.<sup>116</sup> Since the Constitution protects rights and does not speak much to the structural needs of

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<sup>114</sup> See *Politics as Markets*, *supra* note \_\_, at 677.

<sup>115</sup> See, e.g., Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protection Gerrymanders*, 116 Harv. L. Rev. 649, 653 (“Most would criticize Issacharoff’s argument...on the grounds that it is completely disconnected from the text of the Constitution.”)

<sup>116</sup> *Politics as Markets*, *supra* note 12, at 646 (“[T]he failures of current doctrinal frameworks are not limited to the artificial narrowness of the rights-versus-state-interest formula. For in organizing an overview of judicial approaches to evaluating the political process, we have become more acutely aware that the Court’s electoral jurisprudence lacks any underlying vision of democratic politics that is normatively robust or realistically sophisticated about actual political practices. [W]e increasingly see the images of democratic politics that underlie the Court’s decisions as simply *ad hoc* - different views of the point of politics emerge almost at random as the Court confronts questions that range from patronage to redistricting to restructurings of the political process through voter initiatives.”).

democracy, charges of atextualism are not wrong, but they are not, in the end, important either. Issacharoff and Pildes intended to create a theoretically firm concept of democracy that can serve as a way to interpret rights clauses in the Constitution. Issacharoff has argued:

“There is no narrow textual justification for almost any of the body of law governing the political process.... It is difficult to see the gain from making believe that the need to fill in the gaps in an aging Constitution is anything other than a response to our experience with democratic governance. There is certainly no gain in pretending that the answers to the questions of how to make democracy work are compelled by vague terms such as "due process," "equal protection," or "republican form of government." The same theoretical work would have to be done to make concrete the democratic values to be read into these open-textured clauses. Sometimes it is simply best to tell poor Virginia the sad truth: sorry, there really is no Santa Claus.”<sup>117</sup>

This is right; in almost all election law cases, a number of individuals and groups – political party organizations, individual party members, states, minority voters – have Constitutional rights claims. Engaging in Constitutional review in this field must by necessity privilege some theory; underlying the choice and application of types of scrutiny must be a metric by which courts can weigh the variety of valid claims brought before them.<sup>118</sup> Moreover, though a variety of scholars have argued that, even if it is not directly rooted in constitutional text, election laws should be built around a system of individual rights,<sup>119</sup> such a jurisprudence would fail to deal with the problems at the heart

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<sup>117</sup> See *Why Elections?*, *supra* note 32, at 687-88.

<sup>118</sup> See Gerken, *One Person, One Vote*, *supra* note 11, at 1434.

<sup>119</sup> This is an enormous and rather constant debate in the election law literature. Rather than engaging with this literature, though, I am simply taking one side – the “structuralist” position advocated by Pildes, Issacharoff and others. See *Politics as Markets*, *supra* note \_\_, at 645 (“At one level, the focus on rights poorly explains the nature of vote dilution claims, in which individuals can only show harm as part of an aggregate entity. Thus, in this area we have written critically of both the limited relevance of individualistic

of the Constitutional regulation of elections. As Heather Gerken argues, “The salience of political structures and groups to voting claims makes it difficult to fit them into a conventional individual rights framework.”<sup>120</sup>

The Supreme Court has declared that competition is *a* value inherent in many of these claims: “Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.”<sup>121</sup> Issacharoff and Pildes argue that a decision by the Supreme Court to privilege this value consistently over others would create a more coherent (and better) jurisprudence. As Pildes wrote in his article, *The Theory of Political Competition*, “Samuel Issacharoff and I attempt to make these ideas concrete by developing one structural aim that the history of American law and democracy suggests should be a particular focal point for courts. This aim is the assurance of an appropriately competitive partisan political environment, or, to put it more accurately, the assurance that “artificial” barriers to robust partisan competition not

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claims and the difficulty in resting standing to sue on traditional, individualistic conceptions of harm. At another level, the conventional taxonomy of state interests relevant to regulating politics is too narrow to capture the range of considerations the courts actually take into account. Thus, in these areas we have argued that constitutional doctrine is also concerned with “expressive harms” that can result from the values the state expresses when it structures democratic institutions. These are not the conventional harms of constitutional doctrine in other fields, but we have suggested that special concerns for the content of the political culture seem to emerge from Supreme Court decisions that address the proper construction of democratic politics.”)

<sup>120</sup> See Gerken, *One Person, One Vote*, *supra* note \_\_\_, at 1448. See also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1671-72 (2001). Pildes and Issacharoff are similarly clear

<sup>121</sup> *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)

be permitted.”<sup>122</sup> As noted above, this process-based solution has as normative backing the goal of ensuring that elected officials are as representative of the opinions and interests of voters as possible. Moreover, this is one instance in which the Supreme Court is not faced with a “counter-majoritarian” difficulty; rather than frustrating democratic will, it is serving to enhance it.<sup>123</sup>

While the “politics as markets” theory is proposed as a coherent alternative to current *ad hoc* decision-making, it suffers from internal flaws. The largest of these is that it fails to respond adequately to the problem caused by Duverger’s Law.<sup>124</sup> As noted

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<sup>122</sup> Richard Pildes, *The Theory of Political Competition*, 85 Va. L. Rev. 1605, 1609 (1999)

<sup>123</sup> See Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 Geo. L.J. 491 (1997); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). This is a persuasive claim and is at the heart of one side of the debate about the “counter-majoritarian difficulty.” It is also a claim that maps nicely onto the Schumpeterian conditions suggested in this paper. If it is true that courts are the only actors that can police political competition, it is also true that they are the actors least likely to care about the specific outcomes of elections (and the trappings of power that come with them) and be in a position to protect political stability from myopic, self-interested politicians. This is effectively Richard Posner’s claim about *Bush v. Gore*, that the Justices properly took into consideration the need to avoid a constitutional crisis. Richard A. Posner, *Bush v. Gore as Pragmatic Adjudication*, in *A BADLY FLAWED ELECTION (DEBATING) BUSH V. GORE, THE SUPREME COURT, AND AMERICAN DEMOCRACY* 187-213 (ed, Ronald Dworkin, New Press, 2002) (Hereinafter *Pragmatic Adjudication*). Hence, the judicial role is well-suited (and perhaps only suited) to solving both of these types of political problems.

<sup>124</sup> Issacharoff and Pildes have been criticized for ignoring the true import of Duverger’s law before. See Daniel Lowenstein, *The Supreme Court Has No Theory of Politics*, pg 260-633 in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* (Daniel K. Ryden ed. 2000). Lowenstein makes several claims about the way Duverger’s law clashes with *Politics as Markets*. The first is that, even if the Supreme Court ruled in the way Issacharoff and Pildes advocate, overruling decisions like *Burdick v. Takushi*, 504 U.S.



above, Duverger argued that FPTP systems inevitably result in a two-party system.<sup>125</sup> Issacharoff and Pildes describe this as the “natural duopoly” problem of the American electoral system. As a result, they argue, designing an election law system to create third parties is futile; without getting rid of single member districts and FPTP, it would be impossible. However, because elected officials come from political parties, there is a chance for “inside dealing.” Borrowing from corporate law, they argue that rules that

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428 (1992) and argued that the Constitution required voters to be able to write-in candidates on both primary and general election ballots, there would still be a two-party duopoly because of Duverger’s Law. “It is not clear what difference it would make if the Court were to subscribe to their theory of partisan lockups as the key to election law adjudication.” *Id.* at 263 This criticism misses the mark – *Politics as Markets* makes explicit that the changes it proposes will not bring down the two-party system but will instead create competitive pressures on it. Lowenstein makes no attempt to refute this claim. The problem with the proposals of *Politics as Markets* is not that they would have no effect, as Lowenstein claims, but rather that their effect would be to worsen that value they seek to enhance – the degree of representation – and would endanger the Schumpeterian stability of the American electoral systems, rooted in the decisiveness of two-party elections.

Lowenstein’s second criticism is that “academic theories such as those of...Issacharoff and Pildes inevitably are woefully insufficient as guides to adjudication...The starting points for their theories are much too narrow...These authors’ failure to make any serious inquiry into the nature of political competition in the United States is more indicative than idiosyncratic.” *Id.* at 263. This paper is an attempt to solve this problem – both by providing guides to solving certain future cases and by examining more closely the effect structural factors like FPTP elections have on electoral markets.

<sup>125</sup> A few countries with FPTP elections – notably Canada, India and Great Britain – have had periods where there have been more than two viable parties. However, these are the exceptions that prove the rule. *See* *Politics as Markets*, *supra* note \_\_, at 675 (“Modern studies confirm Duverger’s analysis”).

favor the two-party system should be given a “hard look.”<sup>126</sup> Rules that incidentally help the two parties should be considered acceptable, but, for instance, bans on “fusion” candidates should be barred because they entrench the two parties.

As an effort to fashion a coherent jurisprudence, this view faces a major problem; it does not explain why the Constitution should protect FPTP/single member district elections at all. A consistent application of the values inherent in the rules favored by Issacharoff and Pildes use would lead, rather mechanically, towards proportional representation (PR). While a few authors have disputed this, it is relatively clear that our FPTP system imposes a severe burden on the extent to which elected officials are representative of voters’ preferences when compared with a PR scheme.<sup>127</sup> Without some other justification, like balancing Schumpeterian values with those of representation, it is impossible to consistently apply the rules favored by Issacharoff and Pildes and maintain FPTP elections.

Issacharoff and Pildes justify this claim by arguing that the Framers of the Constitution did not favor FPTP/single-member district elections because they produced

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<sup>126</sup> See *Politics as Markets*, *supra* note 12, at 680-681 (“Regardless of how permissive ballot access laws are, third parties are never going to be able to do more than put competitive pressure on dominant parties. The FPTP system virtually ensures continuing two-party dominance. Any “state” interest in additional regulations designed to buttress the two-party system would therefore seem largely superfluous. But within that structure, more scope for competitive pressure will produce politics that is more responsive to the interests of voters. At times, this pressure might take the form of existing forces defecting from the party at election time; at other times, it might take the form of new parties temporarily arising to express viewpoints shut out of the two-party dialogue.”)

<sup>127</sup> See Thomas Christiano, *The Rule of the Many*, 224-40, 258-61.

two-party politics. “Indeed, when the Constitution was formed and early elections held, the very idea of political parties was anathema to the reigning conception of democracy...The idea that the FPTP system would have been justified because of its tendency to produce party politics, let alone two-party politics, could hardly have formed any part of the justification for these structures.”<sup>128</sup> As such, they argue that, though FPTP/single member district elections should be protected as a historical anomaly, like the Electoral College. “Courts should not infer out of these structures broad normative principles that ought to govern the entire political process.”<sup>129</sup>

Even if one accepts this line of argument, the effect of constitutional regulations on the political process changes when constraints, like FPTP/single member district elections, are added. A doctrine that would produce efficient (*i.e.* representative) results absent structural constraints does not necessarily do so when faced with implications of such constraints. Even if the sole goal is to produce efficient/representative results, it makes sense to build FPTP/single-member districts into the model because, otherwise, we may diagnose a solution that cannot treat the problem that actually exists.

*Politics as Markets* and the articles that followed it acknowledge that there is a market imperfection, a “natural duopoly,” but then merely argue that anti-competitive behavior by the parties as a result of their market dominance should be constrained. They treat this “natural duopoly” like an ordinary one. This is a mistake, but in order to understand why it is a mistake, it is important to understand the extensive economic literature on natural monopolies.

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<sup>128</sup> *Politics as Markets*, *supra* note \_\_, at 677.

<sup>129</sup> *Id.* at 679.

Natural monopoly stands as one of the classic problems in the economics of industrial organization.<sup>130</sup> Natural monopolies exist when the cost of production of a good is minimized when a single firm produces the entire market output because of economies of scale (or, formally, declining long run average cost curves).<sup>131</sup> The larger a firm is in this type of industry is, the cheaper it will produce goods. This creates barriers to entry – firms generally start off small and, in industries like these, small firms cannot compete because their costs are too high. As a result, these markets tend towards having one large firm. Moreover, by definition, this is the most efficient result. However, this raises the risk of monopoly pricing: once there is only one firm, that firm will be able to raise prices because of its monopoly position.<sup>132</sup> An ideal form of natural monopoly regulation would permit society to gain from economies of scale – by allowing one firm to control all production – without allowing the monopoly to take advantage of its market power.

In some industries, natural monopoly is a temporary condition.<sup>133</sup> Often, there will be economies of scale, but only to a point – average cost will stop declining and level

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<sup>130</sup> See Herbert Hovenkamp, *Technology, Politics, and Regulated Monopoly: An American Historical Perspective*, 62 *Tex. L. Rev.* 1263, 1270 (discussing the history of economic analysis of the monopoly problems caused by economies of scale). For a general discussion of the natural monopoly problem see, e.g., Richard Posner, *ECONOMIC ANALYSIS OF LAW* 139-45 (1972); Richard Posner, *Natural Monopoly and Its Regulation*, 21 *Stan. L. Rev.* 548 (1969); Richard Schmalensee, *THE CONTROL OF NATURAL MONOPOLIES* 3-5 (1979) William W. Sharkey, *The Theory of Natural Monopoly* (1982).

<sup>131</sup> See Economic Regulation, *supra* note 20, at 337.

<sup>132</sup> See *id.*

<sup>133</sup> See Posner, *Natural Monopoly and Its Regulation*, *supra* note \_\_, at 636 (“But natural monopoly conditions are quite likely to be transient”).

off. If demand increases enough, then, another firm can enter the market because it, too, will be able to get the efficiencies of scale.<sup>134</sup> Also, in some industries there are natural monopolies, but the effect of high prices spurs technological change, which creates competition.<sup>135</sup> Actual natural monopolies are rare, and situations in which the picture is as simple as this are almost non-existent, because natural monopolies usually involve the production of more than one type of good.<sup>136</sup> For instance, selling electricity transmission includes the provision of two services, putting wires into houses – which is, because of the huge necessary capital outlay, almost a pure natural monopoly – and generating electricity, which is almost certainly not.<sup>137</sup>

This problem has been explored for decades and a number of alternatives have been proposed.<sup>138</sup> The most generally accepted model of natural monopoly regulation includes a restriction on anti-trust actions against the firm in return for some type of complex pricing restriction.<sup>139</sup> Various models that create efficient or near-efficient outcomes have been proposed, but remain subject to the realization that the cost of imposing them, in the direct and indirect costs of creating a regulatory apparatus, creates

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<sup>134</sup> See Economic Regulation, *supra* note 20. at 338-39.

<sup>135</sup> See, e.g., Posner, *Natural Monopoly and Its Regulation*, *supra* note 43, at 556.

<sup>136</sup> W.J. Baumol, *On The Proper Cost Tests for Natural Monopoly in a Multiproduct Industry*, *American Economic Review*, December 1977.

<sup>137</sup> See, e.g., Andrew J. Roman, *Electricity Deregulation in Canada: An Idea Which has Yet to be Tried?*, 40 *Alberta L. Rev.* 97, 106 (2002)

<sup>138</sup> See generally Stephen Breyer, *REGULATION AND ITS REFORM* 15 (1982).

<sup>139</sup> For a discussion of the general model, see Sidney A. Shapiro & Joseph Tomain, *REGULATORY LAW AND POLICY* 196-97 (1993)

inefficiencies.<sup>140</sup> On top of this, efforts are made to split off markets that are actually competitive from those that are natural monopolies (e.g. allowing competition in long distance telephony while regulating the firms that own the lines that actually enter people's homes).<sup>141</sup> This combination allows competition where it is efficient to have more than one firm, but permits society to gain from the diminishing average cost of production without suffering from monopoly pricing where it is not.

The question, then, should be, to what extent is this metaphor useful for understanding elections. To answer this question affirmatively, we need to identify what the relevant equivalent to declining average cost, or, in other words, why is it efficient (rather than merely likely) to have only two parties in our electoral system. The answer is rather simple; in a single district/FPTP system, having only two parties increases the likelihood that there will be a candidate selected by a majority rather than a plurality of the voters. This increases the likelihood that policies represent the interests of the electorate. For instance, a 60% right-center majority cannot lose an election in a two-party system as the result of that vote being divided between two parties while the opposition is united. As such, the likelihood of majority election can serve as a way to judge electoral natural duopoly in the way declining average cost does in an economic natural monopoly, since both reveal the extent of gains from not having multiple entrants.

Moreover, as discussed above, majority elections in a two-party system have other benefits. They confer legitimacy on the winner (who has received the support of more than half the population) and allow (and force) all voters to make an analytically

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<sup>140</sup> *Id.* at 356.

<sup>141</sup> *See* Roman, *supra* note 49, at 108.

simpler choice between two rather than many candidates.<sup>142</sup> These are exactly the values Schumpeter detailed as necessary for democracy in a mass society.

Therefore, rules that serve to promote a two-party system are good and not bad. Issacharoff and Pildes understand this to a point, but back off when confronted with the implications of the argument. They acknowledge the likelihood of two-party government and argue that rules, like districted FPTP elections, that “incidentally” benefit a two-party system are acceptable. They reject, though, those rules that explicitly favor a two-party system.<sup>143</sup> There are good reasons to avoid rules that help the current two parties: None of the benefits of a two-party system are dependent on the parties being known as “Democrats” and “Republicans” and, if the organizations of either of those parties ceases to be responsive to voter concerns, there is no particular reason why one of them should not be replaced. However, rules that entrench the existence of a two-party *system* are, according to this model, beneficial. Moreover, there is nothing about the benefits created here that are incompatible with the two-party system consisting of the two parties we have now. So rules that help entrench the two-party system are fine so long as they are not directed at ensuring that one of the existing parties is able to survive without

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<sup>142</sup> The substantive values created by the existence of only two parties has been chronicled at length by a group of scholars known as the “responsible party government” school. See, e.g., *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties American Political Science Association* (Rinehart, 1950). For a critical discussion of their work, see Hasen, *supra* note 16, at 345-351.

<sup>143</sup> See *Politics as Markets*, *supra* note 12, at 674 (“[T]he fact that FPTP elections strongly tend toward two-party politics does not mean that courts should license those parties to manipulate electoral systems to further insulate the dominant parties from those few possible sources of competitive pressure that do potentially remain.”)

being responsive to voter needs and desires.<sup>144</sup> This natural duopoly understanding of constitutional oversight of electoral regulation, as will be seen below, closely tracks current Supreme Court doctrine.

That problem resolved, the question becomes how to ideally ensure effective “pricing” in an electoral natural duopoly. Most of the strategies used in natural monopoly situations would not make much sense in an electoral situation, and those that do have little to do with the regulation of party primaries. However, the very fact that it is a duopoly and not a monopoly will result in competition between the parties. Duopolies generally create either a perfectly optimal market or a market that is sub-optimal but still better than a monopoly, depending on your assumptions about the ways firms interact.<sup>145</sup> For this to work, though, the parties have to be distinct from and

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<sup>144</sup> In *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973), the Supreme Court made this explicit. The Court held that a redistricting plan that created safe seats for both parties in equal proportion to their support from voters was constitutionally permissible. “[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.” In *Vieth v. Jubelirer*, though a plurality found that there was no judicially standard courts could rely on to identify partisan gerrymanders, all nine members of the Supreme Court agreed districting decisions that resulted in electoral results grossly different from voting tallies violated the Constitution. 124 S. Ct. at 1769.

<sup>145</sup> Each of the three major static duopoly models, “Bertrand,” “Cournot” or “Stackelberg” competition, result in different levels of market inefficiency (or in the case of Bertrand, or price, competition, perfect efficiency). None result in the monopolistic level of inefficiency. See Robert F. Lanzillotti, *Coming To Terms With Daubert In Sherman Act Complaints: A Suggested Economic Approach*, 77 Neb. L. Rev. 83, 95 n.31 (1998) (citing Augustin Cournot, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (Nathaniel T. Bacon trans., Macmillan Co. 1927) (1838); Edward Chamberlin, THE THEORY OF



actually compete with one another. The latter is not really a part of the regulation of primary elections – the debates over political gerrymandering and campaign finance are more relevant for this discussion– but the former is exactly the rule set out in *Jones*. Retaining distinct parties is necessary not only to ensure that parties issue representative policies (because competition has, as a pre-condition, an assumption that each market player can freely devise policy), but also to ensure that the system retains for the citizenry the ability to replace a government they do not like with something different, a central goal of a competitive democracy model.

Finally, the third piece of natural monopoly regulation is to separate off competitive markets. Deregulation in telephony and electricity has in some situations accomplished this by creating competitive markets in long distance phone calls and electricity generation, creating a more efficient overall industry. Similarly, in order to reach the goal of policies that are representative of the interests of voters, members of that political party should be able to vote in primary elections free from restrictive rules about who can appear on the ballot imposed by a party's organization. The reason free primaries promote representative general election is that members of the party only interest is in choosing the most competitive candidate. Party officials, on the other hand, have strong incentives for inside dealing (*i.e.* for party officials trying to favor other active members of the party organization, rather than the most competitive candidate)

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MONOPOLISTIC COMPETITION (5th ed. 1946); Heinrich Von Stackelberg, MARKTFORM UND

GLEICHGEWICHT (Wien & Berlin 1934); Wassily Leontief, *Stackelberg on Monopolistic Competition*, J.

Pol. Econ. Aug. 1936, at 554, 554-559; J. Bertrand, *Book Review*, 67 Jour. Des Savants 499

(1883)(reviewing THEORIE MATHEMATIQUE DE LA RICHESSE SOCIALE and RECHERCHES SUR LES PRINCIPES MATHEMATIQUES DE LA THEORIE DES RICHESSES)).

because it increases the value of being a party member. Moreover, people who invest time and energy into running parties are generally more radical politically and they may use party rules to promote candidates who are further from the mainstream.<sup>146</sup> As such, opening up the primary ballot to any party member is more likely to produce competitive general election candidates than permitting the party organization to pass strict ballot access rules, and, hence, to create policies that are responsive to the interests of the electorate *in toto*.

This vision of election law requires a Supreme Court willing to strike down a number of state statutes that do not conform to this idea of competition. However, since current Supreme Court doctrine basically follows this line of reasoning, this model would not require changes in doctrine. It would also not require the Court to be more activist than Pildes and Issacharoff would want it to be -- it would just require the Court to overrule different laws. The organizing principle behind the constitutional review of electoral regulation would be *efficient competition*, given the imperfect nature of electoral markets, rather than the simpler competitive model Pildes and Issacharoff propose. Restrictions on efficient competition could be justified, though, if the rules served to protect the two Schumpeterian constraints – clarity and decisiveness. However, with the proper understanding of efficient competition, few laws or executive decisions will need to be justified, because the factors that contribute to creating efficient competition also

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<sup>146</sup> See Note \_ and accompanying text.



produce clear choices for voters and decisive results, specifically protecting the two-party system and free competition between the parties.<sup>147</sup>

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<sup>147</sup> This is not to say the Schumpeterian constraints never bind. The example that shows how these work in practice is the most famous election law case, *Bush v. Gore*. The Per Curiam decision found a violation of one of the component parts of efficient competition, arguing that applying the “intent of the voter” standard would result in unfair competition between the parties and that there was not time to create a fair, statewide standard. 532 U.S. 98, 109 (2000). Moreover, the state had no compelling reason – no reason that furthered the ends of clarity of choice or decisiveness of result – to recount the ballots. Just the opposite, recounting the ballots would result in a *less* decisive result. See *Pragmatic Adjudication*, *supra* note \_\_, at 187-212. This meant that the state could not justify damage to representation. The reasonableness of the determination that the state could not fashion a fair standard in time notwithstanding, *Bush v. Gore* stands, under this understanding, as a rather straightforward application of the test this paper argues is central to election law.

It is in the concurring opinion, though, that we see the application of the Schumpeterian constraints. The concurring opinion claimed that Article II gave the Court the power to overrule the state court decision to have a recount. *Bush*, 532 U.S. at 112. If, for a moment, we ignore the federalism problems of this interpretation and accept that Article II gives the Supreme Court the right to review state court interpretations of state election law regarding Presidential elections, the concurrence becomes an application of the Schumpeterian constraints. The Florida Supreme Court had argued that “the need for prompt resolution and finality is especially critical in presidential elections where there is an outside deadline established by federal law. Notwithstanding, consistent with the legislative mandate and our precedent, although the time constraints are limited, we must do everything required by law to ensure that legal votes that have not been counted are included in the final election result.” *Gore v. Harris*, 772 So. 2d 1243, 1261 (Fla. 2000). In the framework of this paper, this is effectively a statement that efficient competition would have been harmed (because the results of that competition would not be known) by not counting the votes, even if doing so did not promote finality. The concurrence argued that the state legislative rule, which put certification in the hands of local canvassing boards and the Secretary of State,

### III. Current Law: Two Legs of a Tripod

The case law regulating political parties is notoriously complex, under-theorized and internally contradictory in its rhetoric. One way of looking at this mishmash is through the lens of natural monopoly regulation. It is not necessary to believe that courts consciously had this paradigm in mind to believe that existing doctrine accommodates state policy that fits within this idea of how elections should operate (and looks askance at policy that does not). The “natural duopoly” theory would require the constitutional review of election law to consist of three major components – a lack of regulation of state efforts to permit the retention of the market power of political parties, active regulation of their “pricing,” and an effort to segment downstream markets from the market suffering from the natural monopoly problem. As will be seen below, the first two parts of this are clearly visible in Supreme Court doctrine while the third leg is still up in the air. That leg consists of a variety of lower court and indirectly applicable Supreme Court opinions about restrictions laid down by states or by political parties on access primary ballots to candidates who are certainly members of that political party.

Moreover, in each of the cases discussed below, the test employed by the Supreme Court to test electoral regulations will represent an effort to balance two

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should be enforced and that the state court should not have overruled their decisions. *Id.* at 122. This is an implicit claim that the state was justified in limiting the counting of fair votes. It effectively upended the logic of the Florida Supreme Court and held that “the need for prompt resolution and finality in Presidential elections” did justify limiting fair representation. The concurrence is hence saying that the state legislature had the right (and did) to limit the representativeness of government in order to produce more decisive elections.

competing visions about the value of electoral competition: representation and Schumpeterian decisiveness and clarity. Though the steps sometimes merge, the rights the Supreme Court has recognized are necessary to maximize representativeness in a FPTP system, specifically free decision-making inside parties, but not the right to interfere in the decision-making of other parties (the three legs of the tripod). The interests the Supreme Court has found to be compelling enough to infringe on these rights are those that promote clarity and decisiveness, the two values essential to the Schumpeterian model of democracy.

A. The First Leg: Ignoring Market Power

The key insight of natural monopoly theory is that, under certain circumstances, it is more efficient to have only one firm producing a certain good because certain markets exhibit a diminishing marginal cost of production.<sup>148</sup> The resulting regulation seeks to take advantage of these economies of scale while avoiding the problems associated with monopoly control. If the American electoral system is a “natural duopoly,” then constitutional review of electoral regulation of parties should permit rules that favor the existence of a two-party system, but not those rules that create extensive protection of the existing two parties.

Courts following this paradigm would view the entrenchment of a two-party system as a reasonable, even laudable, goal of state regulation. After years of accepting in theory but being suspicious in practice of this type of policy,<sup>149</sup> the Supreme Court

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<sup>148</sup> See notes \_\_ and accompanying text.

<sup>149</sup> See, e.g., *Rhodes*, 393 U.S. at 32 (1968) (“The fact is, however, that the Ohio system does not merely favor a “two-party system”; it favors two particular parties -- the Republicans and the Democrats -- and in effect tends to give them a complete monopoly.”).

established the principle that states could privilege a two-party system in their regulation of primaries in *Timmons v. Twin Cities Area New Party*.<sup>150</sup>

*Timmons* involved a Minnesota state law that said no candidate could appear on the general election ballot as the candidate of more than one party. While technically this is a general election regulation, it is actually a regulation of primaries in that it restricts the choice-set of parties to those candidates not endorsed by any other. “Fusion” of this type has been a classic strategy for third parties to influence the political system, because it allows third parties to gain a toehold in certain elections while running their own candidates in others.<sup>151</sup> The New Party – a small left-leaning party -- challenged Minnesota’s law on the grounds that it restricted their First Amendment right associational rights.<sup>152</sup>

The Court rejected this claim, arguing that, while the First Amendment protects decisions by political parties about their own internal structure and activities, states can and must regulate primary elections.<sup>153</sup> The test to see whether a particular regulation is

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<sup>150</sup> 520 U.S. at 367. See generally James Gray Pope, Fusion, *Timmons v. Twin Cities Area New Party and the Future of Third Parties in the United States*, 50 Rutgers L. Rev. 473 (1998); Hasen, supra note \_\_\_, at 347.

<sup>151</sup> See Argersinger, “A Place on the Ballot”: Fusion Politics and Antifusion Laws, 85 Amer. Hist. Rev. 287, 288 (1980); Douglas Amy quotes New Party leader Dan Cantor as saying it “is no exaggeration to state that fusion voting is the key to a durable multiparty system in a country (like ours) that does not have proportional representation.” Douglas Amy, *Political Parties: the Key to – or the Scourge of – Representations*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 146 (Ed. David K. Ryden 2000).

<sup>152</sup> *Timmons*, 520 U.S. at 355.

<sup>153</sup> *Id.* at 370.

unconstitutional is straight-forward: “[W]e weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary.”<sup>154</sup> If a burden is severe, the regulation must be narrowly tailored and advance a compelling state interest. States are, unsurprisingly, given more leeway when imposing less substantial burdens.<sup>155</sup>

The Court found that the burden placed on the New Party was not severe. The provisions only slightly reduced the number of people that the party could chose as their standard-bearer and barely limited the party’s ability to communicate to the general population who was its most favored candidate.<sup>156</sup> “Many features of our political system--*e.g.*, single-member districts, "first past the post" elections, and the high costs of campaigning--make it difficult for third parties to succeed in American politics.”<sup>157</sup> Because the restriction imposed no direct limit on the Party’s ability to organize or develop, it was not a severe limitation of the Party’s First and Fourteenth Amendment associational rights.<sup>158</sup>

Minnesota provided a number of justifications for this limited restriction. Among these was an interest in political stability. The Court said that, while “this interest does not permit a State to completely insulate the two-party system from...competition and influence,” it does permit it “to enact reasonable election regulations that may, in

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<sup>154</sup> *Id.* at 358 (internal citations omitted).

<sup>155</sup> *Id.* at 359. This test was first developed in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

<sup>156</sup> *Timmons*, 520 U.S. at 362.

<sup>157</sup> *Id.* at 362.

<sup>158</sup> *Id.* at 365.

practice, favor the traditional two-party system.”<sup>159</sup> As such, a state statute banning fusion was not unconstitutional.

This is consistent with the ideas of optimal natural monopoly regulation. A natural monopoly regulator would not “completely insulate” a monopolist by, say, banning the development of new technology that could change the market into a normally competitive one. It would however actively regulate the market and, by doing so, favor the natural monopolist over potential competition. The Court’s reasoning in *Timmons*, then, permits a natural monopoly style regulation of elections.

Applying this concept to fusion is not analytically simple. After all, fusion initially increases the chances of a majority victor, because votes for third parties can accrue to one of the top two candidates. However, its overall effect might aid third parties, which will lead to more plurality elections down the road.<sup>160</sup> Doing so might lead to a less representative electoral scheme – though it also may not because the availability of fusion will help ensure more majority elections when there are third parties. The determination of whether permitting fusion is more likely to produce representative results than banning it is a difficult question and it is therefore reasonable that state legislatures can and should make decisions about it. Analytically, it is similar in this respect to run-off elections; run-offs promote majority winners but also promote third parties. Run-off elections are not constitutionally mandated, nor are they barred, and it is a reasonable result to allow states the same discretion in making policy about fusion.

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<sup>159</sup> *Id.* at 366-367.

<sup>160</sup> This, after all, is the reason third parties want fusion. Hasen, *supra* note \_\_, at 331.



The Court allowed Minnesota to favor a two-party system at two points in its analysis. First, it defined the right to association in such a way that the ability to choose a candidate who was the candidate of a major-party candidate was not protected by the First Amendment and the fusion ban's limit on a third party's ability to express information to its voters only the most minor of infringements on First Amendment association rights.<sup>161</sup> A model based on ordinary antitrust principles would have viewed this as a major limitation on the right to compete. Thus, the way the Court defines rights is consistent with natural duopoly regulation.

The second way the Court favored the two-party system was to permit it to serve as a justification for a state's decision to limit associational rights. The reasons Minnesota gave and the Court accepted for permitting the state to ban fusion were straight out of Schumpeter: "avoiding voter confusion and overcrowded ballots, preventing party-splintering and disruptions of the two-party system, and being able to clearly identify the election winner"<sup>162</sup>

In *Timmons*, the Court held promoting the Schumpeterian values of clarity of choice and decisiveness of result are justifiable state interests. The Court's analysis then

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<sup>161</sup> "Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the Party's access to the ballot. They are silent on parties' internal structure, governance, and policy-making. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the Party's ability to send a message to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the Party's First and Fourteenth Amendment associational rights--though not trivial--are not severe." *Id.* at 364.

represents a balancing of the values of representation and the Schumpeterian model of democracy. While it ultimately rested on a determination that the state's interest in stability was more important than the limited way in which it burdened representation, the Court's doctrine narrowed the scope of judicial discretion to a few variables on which factual evidence could be marshaled and by which the Court could come to a reasoned, principled decision.

The Court's decision in *Timmons* has been criticized by most commentators, including Issacharoff and Pildes.<sup>163</sup> The harshest of these critics has been Rick Hasen. Hasen attacks the value of the two-party system, but the central part of his argument is that because of Duverger's Law, the two-party system needs no protection by state law.<sup>164</sup>

This argument is flawed. He correctly notes that, because of Duverger's Law, a third party is unlikely to make a major impact in American political life. But this ignores the reasons why a two-party system is seen as a positive; it mistakes means for ends. Arguments in favor of a two-party system rely on the fact that it provides clear choices

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<sup>162</sup> *Id.*

<sup>163</sup> See *Politics as Market*, *supra* note \_\_, at 683-86.

<sup>164</sup> Hasen, *supra* note \_\_, at 333 (“[E]ven if the two-party system is a valuable institution, the Supreme Court need not uphold laws like those at issue in *Timmons* in order to preserve the two-party system.”); *Politics as Markets*, *supra* note \_\_, at 679 (“Regardless of how permissive ballot access laws are, third parties are never going to be able to do more than put competitive pressure on dominant parties. The FPTP system virtually ensures continuing two-party dominance. Any “state” interest in additional regulations designed to buttress the two-party system would therefore seem largely superfluous. But within that structure, more scope for competitive pressure will produce politics that is more responsive to the interests of voters.”).

for voters and decisive results (the two Schumpeterian values) and creates majority winners (promote election results as representative as possible under the condition of FPTP). A two-party system with somewhat viable third parties – something that prohibiting states from creating rules like fusion bans would make more likely – achieves none of these ends. Voters would face more complicated decisions and it would be possible for a majority to lose elections because it is divided between two candidates, which would be less decisive (because the losing majority would be disaffected with the result) and less representative (because the majority would have lost). Thus, creating rules that favor a two-party system is necessary to achieve the benefits of a two-party system even if two parties would continue to dominate elections even in their absence. The Court was right to recognize that promoting a two-party system is a compelling justification for state policy.

#### The Second Leg: Competition and Distinctness as a Pricing Mechanism

In order for society to gain from having only one producer in a natural monopoly setting without losing from a monopolist exploiting its market power, there need to be regulations on the prices that the (natural) monopolist can charge.<sup>165</sup> A variety of different schemes have been proposed, but, since electoral markets are a natural *duopoly*, one available way to get the “firms” to limit their prices is to make sure they compete with each other. While much of the policy about this is made in realms other than political party primaries (*e.g.*, campaign financing, redistricting), one piece of regulation in this area is necessary in order to have this price-limiting competition: distinct parties. For political parties to be able to use their policy mixes to appeal to voters, they must be

<sup>165</sup> See notes \_\_\_ and accompanying text.

able to freely define those policies. This entails the ability to define their membership. If decision-making about standard-bearers is made at the primary level, the party must be able to define who is a member, so that interlopers cannot interfere with its decisions. This way the parties are able to independently come up with a set of candidates and policies that appeal to voters.

In *California Democratic Party v. Jones*, the Supreme Court established just this principle, that the party organization can define who can be a member of the party.<sup>166</sup> In order to understand *Jones*, it is necessary to briefly go over the case law surrounding state laws (or judicial interpretations of Constitutional rights) that sought to define party membership. The modern age of party primary regulation started with the White Primary Cases, in which the Supreme Court struck down a number of different barriers to the participation of African-Americans in Democratic primaries in one-party states.<sup>167</sup>

Nathaniel Persily summarized these cases thusly:

Alongside poll taxes, grandfather clauses, literacy tests, and other more violent and coercive tactics of disenfranchisement, white primaries were used by Southern states and the Democratic Party and its subdivisions to prevent African Americans from voting in what turned out to be the critical and determinative election in those one-party states. Between 1927 and 1953, the Court overruled its previous precedents and struck down a state statute that forbade the participation of African Americans in the Democratic primary, and a statute that delegated to the party executive committee the power to determine qualifications

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<sup>166</sup> 530 U.S. 567 (2000). That the party organization, rather than party members, have the right to set rules about who is and who is not a member is well-established in case law. “Although the Supreme Court has not explicitly said that only the party proper, and not individual members of the party, may challenge a state’s regulation of a political party’s primary, the case law points toward such a result.” *Osburn v. Cox*, 17 Fla. L. Weekly Fed. C 553 (N.D. Ga. 2004);

<sup>167</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. at 649; *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

to vote in a party primary which it then exercised to ban African Americans from the primary. Moreover...the Court struck down the Democratic Party's practice (not mandated by state law) of excluding African Americans from primaries. The Court held that "the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the State." Considering the primary in this way, the Court interpreted the Fifteenth Amendment as preventing a state from "casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." Then, in a highly fractured decision in the last of the White Primary Cases, *Terry v. Adams*, the Court extended this reasoning even to the conduct of a party's unofficial subdivision or alter ego, whose candidate selection mechanism effectively determined the Democratic nominee that appeared on the ballot.<sup>168</sup>

The crucial question in all of these cases became state action or, rather, determining when policy, created by the direct action of the state legislature, by political party rules propagated by the party organization or by some subset of the party organization, is subject to the restriction of the Equal Protection Clause. The Supreme Court, in these cases and others, developed a three-part test for state action. "As a general rule, state action will not be found unless: (1) the actor is an agent of the government; (2) the actor performs a function "traditionally exclusively reserved to the State;" or (3) the government "jointly participates" with the private actor."<sup>169</sup> Political parties, at least when controlling party primaries, meet all three of these conditions and do so rather easily.<sup>170</sup> While these cases made clear that parties were state actors when conducting primaries, they did not resolve the question of whether political parties retained any First Amendment right to exclude people from their primaries.

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<sup>168</sup> Nathaniel Persily, *Towards a Functional Defense of Party Autonomy*, 76 N.Y.U.L. Rev 750, 755-56 (2001).

<sup>169</sup> *Id.* at 760.

<sup>170</sup> *Id.*

Until *Jones*, this question was not clearly answered. This is not to say the Court did not encounter these issues. The two most relevant of these cases were *Democratic Party v. Wisconsin ex rel. La Follette*<sup>171</sup> and *Tashjian v. Republican Party*.<sup>172</sup> In *La Follette*, the Court upheld a national party rule that excluded delegates to the Presidential nominating convention selected by a state mandated “open primary” process (a primary in which any voter, regardless of party, could participate).<sup>173</sup> In *Tashjian*, the Court struck down a state law that prevented the Republican Party of Connecticut from including independents in its primary.<sup>174</sup> In these cases, the Court embraced the concept that parties bear meaningful associational rights, even when conducting primaries. At the same time, though, the Court was developing a contrary strain of jurisprudence. In *Rosario v. Rockefeller*, the Court upheld a state law declaring that person must enroll in a political party at least 30 days before the November general election in order to be eligible to vote in the party's primary election held during the following year.<sup>175</sup> The Court found that a state interest in maintaining orderly elections and in the stability of

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<sup>171</sup> 450 U.S. 107 (1981).

<sup>172</sup> 479 U.S. 208 (1986). See also *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 216 (1989) (holding that a political party organization could not be prohibited by state law from endorsing a candidate in a primary election); *Cousins v. Wigoda*, 419 U.S. 477, 483 (1975) (holding that Illinois state courts could not force the Democratic Party to seat delegates chosen by procedures contrary to internal party rules).

<sup>173</sup> 450 U.S. at 112.

<sup>174</sup> 479 U.S. at 212.

<sup>175</sup> 410 U.S. 752, 754 (1972). See also *Storer v. Brown*, 415 U.S. 724, 726 (1974) (holding that a state law that prevented any person from being the candidate of a party (or running as an independent) if they had been a member of another party within the past 12 months was unconstitutional).

party structures justified the limitations on the rights of voters. Though internal party rules were not in question in the case, *Rosario* made the constitutionality of a party rule permitting quick party switching seem dubious. The extent to which a political party's power could determine its own rules about party membership when faced with constitutional challenges or contrary state law was not certain.

The *Jones* case was a response to Proposition 198, a statewide initiative passed in 1996. The voters of California changed their system for selecting candidates from a "closed primary," in which only registered party members could participate, to a "blanket primary" system, which allows any voter to vote for any candidate in any primary in same electoral cycle.<sup>176</sup> Blanket primaries are supposed to promote moderate candidates because they dilute the power of core partisans. A majority of the members of all parties voted for the law, which passed with overwhelming support.<sup>177</sup> The California Democratic, Republican, Libertarian and Peace and Freedom parties, however, all had internal rules barring non-members from participating in their primaries.<sup>178</sup> They challenged the state law as violating the First Amendment "right not to associate."

Overruling a Ninth Circuit decision in favor of the state,<sup>179</sup> the Supreme Court invalidated the law.<sup>180</sup> The Court first distinguished the blanket primary from the rules in question in the White Primary Cases. Those cases dealt with political parties that, in their capacity as state actors, developed rules that violated an "independent constitutional

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<sup>176</sup> See *Jones*, 530 U.S. at 570.

<sup>177</sup> *Id.* at 601 (Stevens dissenting).

<sup>178</sup> *Id.* at 571.

<sup>179</sup> See *California Democratic Party v. Jones*, 160 F.3d 646 (9th Cir. 1999).

<sup>180</sup> *Jones*, 530 U.S. at 586.

proscription.”<sup>181</sup> This case was distinguishable because it dealt with the question of whether an otherwise constitutional party rule mandating a closed primary could be removed by state laws.

The Court did not deny that party rules were state action, but stated that “when States regulate parties’ internal processes, they must act within limits imposed by the Constitution.”<sup>182</sup> One of those restrictions was the right to freedom of association possessed by political parties, as represented by the party organization. “[T]he constitutional rights of those composing the party cannot be disregarded.”<sup>183</sup> While the Court noted that “an election, unlike a convention or caucus, is a public affair,” it argued that “when the election determines a party’s nominee it is a party affair as well, and ... the constitutional rights of those composing the party cannot be disregarded.”<sup>184</sup>

This associational right included the right to exclude people from the party. Ruling otherwise without overruling *Tashijan*, the Court argued, would lead to “nonsensical” results. *Tashijan* stated that political parties had the constitutional right to permit independents to vote in their primaries. Failing to acknowledge a correlative right to exclude would mean that “[t]he First Amendment would thus guarantee a party’s right to lose its identity, but not to preserve it.”<sup>185</sup>

The Court, though, overstated the holding of *Tashijan*, which merely permitted the Republican Party to include independents in its primary, not members of another

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<sup>181</sup> *Id.* at 573 n.5.

<sup>182</sup> *Id.* at 508-09.

<sup>183</sup> *Id.* at 509.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 511 (citing *Tashijan*, 479 U.S. at 208).



party. This avoided the potential for conflict between the holdings in *Tashijan* and *Rosario*. The Court in *Tashijan* noted but did not resolve this question. Footnote 13 of the opinion stated, “Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking...to open its primary to all voters, including members of other parties, would... threaten other parties with the disorganization effects which the statute in [*Rosario* was] designed to prevent.”<sup>186</sup> *Jones* glides over this problem, leaving it as a potential exception to the general holding affirming party autonomy in determining membership lists.

The Court’s strong defense of the right of parties to exclude made Proposition 198 unconstitutional. The Court noted that “[t]he record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful.”<sup>187</sup> Because of this and because the selection of candidates is crucial to party identity, the burden placed on parties by the blanket primary was grave enough to justify strict scrutiny.<sup>188</sup> The interest of the state in promoting moderate candidates was not sufficient because the state simply could not force private parties – or political parties

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<sup>186</sup> *Tashijan*, 479 U.S. at 213 n.13.

<sup>187</sup> *Jones*, 530 U.S. at 578.

<sup>188</sup> *Id.* at 581.

– to change their political message.<sup>189</sup> Proposition 198 was found unconstitutional because it was intended to do just that.

This vision of parties with powerful rights to define their own membership fits the natural duopoly model of electoral regulation. This ability is necessary for parties to be able to freely compose a set of policies that can be used to compete for voters, which serves as a check on the “pricing” power the two-parties have as a result of Durverger’s Law. The Court defined the right of association, then, in line with the concept of natural duopoly regulation.

It should be considered why the state’s interests did not justify impinging on those associational rights. In *Timmons*, the Court was clear that policies that harmed the right to association could be justified if they improved the clarity of decisions for voters, the two-party system or the decisiveness of elections.<sup>190</sup> In *Jones*, the Court rejected that other justifications, like the fact that blanket primaries would produce more moderate candidates, could ever justify burdening the right to association. Moreover, California could not have relied on the Schumpeterian justifications in *Jones*; the blanket primary law reduced rather than enhanced the clarity of choices that general election voters face. Less distinct parties mean that voters are less able to use party identification as a cue meaning someone different than the incumbent. Blanket primaries were designed to create less distinct parties – it allows members of one party to vote in the primary of another. Though this is impossible to prove (because it requires proving a negative),

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<sup>189</sup> See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (holding that the City of Boston could not force a parade organizer opposed to homosexual lifestyles to permit gays and lesbians to participate in their parade though its public accommodations law).

<sup>190</sup> See notes \_\_\_ and accompanying text.

these two cases make it seem that the only justifications the Court will accept as reasons for limiting associational rights are those that promote Schumpeterian values.

A number of lower court cases have fleshed out the broad discretion that political parties have to define their own membership. The right for parties to ideologically self-define has not only served as a reason for finding that a state law impermissibly abridges a party's First Amendment rights, but has also served as a compelling state interest to justify a law that preserves that autonomy against a claim by a candidate that he had a right to appear on a primary ballot. David Duke's repeated efforts to run for President as a Republican and the efforts of the Georgia Republican Party to keep him off the ballot lead to extensive litigation that culminated in *Duke v. Massey*.<sup>191</sup> In that case, the Eleventh Circuit held that the state law that gave a committee selected by the Republican Party the right to determine who was a candidate for President was state action, but that it was constitutional because of a compelling state interest in political parties being able to define their own identity and because it was narrowly tailored to advance that interest.<sup>192</sup> Moreover, internal party rules excluding Duke as a member of the party were constitutional even though the party was a state actor when running its primary. The court made the clearest declaration of this right on record: "The Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs."<sup>193</sup>

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<sup>191</sup> 87 F.3d 1226 (11<sup>th</sup> Cir. 1996)

<sup>192</sup> *Id.* at 1235.

<sup>193</sup> *Id.* at 1234.

It should be noted that this is substantively different than state party restrictions dealing with whom, among members of a party, can appear on a primary ballot. The Georgia Republican Party argued that Duke's racist ideology disqualified him from being a member, not a candidate, of the party. This rule creates a problem, however. Given that it is relatively easy to become a member of a party and parties do not review the membership rolls for ideological, an ideological test that is solely in the hands of the state party leadership could become a way for the party organization to simply eliminate from the party any candidate that the organization did not like. Nathaniel Persily offers a clever solution to this problem: courts should only accept party organization limitations on membership that are based on "criteria for candidacy well before the primary campaign begins"<sup>194</sup> Doing so would avoid the possibility that party leaders could use their right to ideologically define themselves to create impervious barriers to challenging their favored candidates.<sup>195</sup>

*Jones* also helps explain *Timmons*. One way for parties to define themselves, and to separate themselves from other parties, would be to enact an internal rule saying that no one who is the candidate of another party can receive their endorsement. The holding in *Jones* would force courts to overrule any state law that tried to overrule this internal rule. Fusion, then, can be banned either by the state (*Timmons*) or by a political party

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<sup>194</sup> Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 Geo. L.J. 2181, 2212 (2001)

<sup>195</sup> Persily's elegant solution does not solve all of the potential problems with giving a party the ability to ideologically self-define. Theoretically, a party could define its ideology such that it includes a prohibition on challenging the choices of the party leadership. This is, of course, more of a theoretical problem than a real one; authoritarian parties are unlikely to be popular in American election.

(*Jones*). Hence, the Supreme Court has not just ruled that a rule against fusion is tolerable state policy, but rather that Constitutional oversight of political parties permits either the major parties acting in their own interest or the state, acting in the interest of a two-party system, to reject fusion.<sup>196</sup>

While *Jones* and the related case law deals with the right of political parties to define their membership, the question of its potential conflict with *Rosario* was left open. The Supreme Court has simply left open the question it posed in footnote 13 of the *Tashjian* opinion, whether state regulation that limited a “party seeking...to open its primary to all voters, including members of other parties, would... threaten other parties with the disorganization effects which the statute in [*Rosario* was] designed to prevent.”<sup>197</sup> While *Tashjian* clearly limits the rights of states to paternalistically tell parties what is best for them, states do potentially maintain a compelling interest in distinct political parties.

Two circuit courts have dealt with this issue. In *Cool Moose Party v. Rhode Island*, the First Circuit found for the political party, but only because the state failed to make the relevant argument.<sup>198</sup> The Tenth Circuit, though, in *Beaver v. Clingman*

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<sup>196</sup> This leads to an interesting question. In a state like New York, which permits fusion, the major political parties would both be better off without it, but individually have an interest in getting extra ballot lines for their candidates. This is a classic Prisoner’s dilemma and legislative fusion bans serve to bind the parties to a result pareto superior to the Nash equilibrium.

<sup>197</sup> *Tashjian*, 479 U.S. at 213 n.13.

<sup>198</sup> 183 F.3d 80, 88 (1<sup>st</sup> Cir. 2001) (“*Tashjian* leaves the door open for the State to argue that [the state law] is necessary to prevent distortions of the electoral process that affect not only [the Cool Moose Party], but

addressed the question directly but found that the state had not shown any factual basis that allowing members of other parties to vote in a Libertarian Party primary would harm political stability.<sup>199</sup>

This model calls for the contrary result; a state's interest in maintaining distinct political parties should be considered compelling. Distinct political parties create free competition between the parties, and hence promote both representative election and the Schumpeterian ends of clear choices for voters and decisive electoral results. A state's embrace of this vision of political stability – created by competition from distinct political parties – was considered a compelling interest in the Supreme Court's decision in *Timmons*, allowing the state to limit the otherwise sacrosanct ability of a political party to choose its candidate freely. If state laws can limit the ability of a party to choose as their nominee the candidate of another party, it stands to reason that they can limit the ability of political parties to choose as the membership members of other parties.

The natural duopoly argument would also point to accepting this as a compelling state interest. *Jones* and *Tashijan* support two values essential to the model – giving parties the ability to freely choose their political message and ensuring that the two major parties remain distinct from one another. A decision by one political party to allow members of other parties to vote in its primary would undermine both of these values. In order for competition to serve as a constraint on the advantages of the two major parties,

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also other parties or the party system generally. Curiously, however, the State failed to make such an argument ... on appeal.”).

<sup>199</sup> 363 F.3d 1048, 1060 (2004) (“We ultimately conclude that Oklahoma's interest on this record and in the circumstances of this case is not a compelling one”).

they cannot collude and having all voters participate in one party's primary would constitute collusion.<sup>200</sup>

Subject to this proviso, though, the case law on a party's ability to define its membership fits within the natural duopoly model of electoral regulation.

### C. The Missing Third Leg: Downstream Competition

Even where natural monopolies can be perfectly regulated, the problem still produces a less than optimal market, if for no other reason than the heavy cost of monitoring the natural monopolist's behavior.<sup>201</sup> In a situation like the natural duopoly in electoral markets, even the best possible regulations will, most likely, leave significant distortions. Hence separating those markets that do have natural monopoly (or natural duopoly) characteristics from those that do not is generally considered good policy (*e.g.* separating electricity generation from electricity distribution). The reason given above for considering the natural duopoly of electoral markets akin to natural monopolies in other markets – that increasing the likelihood of majority elections is like the efficiency gains from increasing returns to scale in an economic market – does not apply to primary elections. As such, it is sensible to make primary elections as free as possible to candidates who are members of the party.

When faced with state laws regulating primaries, the Supreme Court has generally been rather strict. When state laws have conflicted with the expressive associational rights of members of a political party to appear on the primary ballot, the Court has

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<sup>200</sup> See Bruce Cain, *Party Autonomy and Two-Party Electoral Competition*, U. Pa. L. Rev. 793, 810 (arguing that a blanket primary reduces party competition and decreases party difference).

<sup>201</sup> See ECONOMIC REGULATION, *supra* note 20, at 343.

looked at them askance except to the extent these laws are necessary to avoid confusion on the ballot.<sup>202</sup> However, it has never dealt directly with the more difficult question of how to analyze party organization rules restricting who, among party members, can appear on the ballot. As a result, courts faced with challenges by candidates to party rules around the country have differed. If the natural monopoly model of electoral regulation is to succeed, it is necessary for the Court to resolve this question by ruling that party organization rules are subject to the same restrictions as state laws. Otherwise, primary elections will not have the chance to operate as freely functioning markets untainted by the natural duopoly problems of general elections.

The reason party rules dealing with primaries should be treated like state laws and not given much deference has to do with the role of primaries in elections. In order to explain this, though, it is necessary to discuss what we mean when we say “party.” V.O. Key famously broke political parties down into three parts: “the party-in-the-electorate,” (the general membership of the party), “the party-in-government,” (governmental officials elected on the party ticket), and the “party organization,” (those individuals who work for the party).<sup>203</sup> When we discuss party rules restricting who can be on a primary

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<sup>202</sup> *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (“The right to vote is heavily burdened if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot”)

<sup>203</sup> See V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS*, 163-65 (5th ed. 1964). These groups are, of course, not so easily separated. “They are functionally inseparable, of course; party organization is principally though not exclusively geared toward running winning candidates in elections in order to control the levers of government and put its policies and philosophies into operation.” Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 Colum. L. Rev. 813, 818 (2000). Moreover, the



ballot, we are talking about the ways in which the party organization creates rules to limit the choices of the party-in-the-electorate. Similarly, when we discuss state laws limiting access to primary ballots, we mean that the party-in-government (presuming the party has power in government at the time) is restricting the choices of the party-in-the-electorate.

The first question in any such case would be whether a party rule or state law restricts a right that would serve to make elected officials (and hence policy) more representative of the preferences of the electorate given the restraints of FPTP elections. The key is to look at which understanding of associational rights would result in a general election that produced more representative outcomes. There is no compelling policy reason that we should interpret the Constitution to protect the right of the “party,” however defined, to have officials representative of their preferences except if it serves to produce actual elected officials that are representative of the whole population.

These questions turn on motive. For state laws, it is easy to see that the party-in-government has little interest in creating primary rules that will produce the most competitive general election candidates. If the party-in-government controls the government, the incumbent officials will have a strong interest in protecting themselves from primary challenges. If the party-in-government does not control the government, allowing restrictive state rules to govern a primary would be tantamount to letting a party’s major competitor set its rules, surely something that is not likely to produce strong general election candidates. Both the party-in-electorate and the party organization have stronger interests in producing competitive party candidates. Free

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party organization is often composed of elected officials. That said, as analytic categories, they have proved remarkably useful and they will be treated as functionally separate for the purposes of this paper.

primaries, rather than those impeded by restrictive state laws, are hence more likely to produce competitive general election candidates. Having competitive general election candidates from both parties is a condition necessary for competition between the parties to result in representative elected officials. Hence, the Supreme Court's suspicion of state laws that interfere with the ability of candidates to get on primary ballots makes sense inside the general framework laid out in this paper.

Making determinations about rules created by the party organization is more difficult. They, unlike elected officials, have an interest in having the strongest possible candidate come out of the primary for the simple reason that winning election enhances their power and influence. However, most people willing to devote time and energy to party organizations are not much like the party as a whole – they are generally speaking more ideologically-driven and radical than their counterparts among the party electorate.<sup>204</sup> They also generally have relationships with elected officials (or want to be elected officials themselves) and have incentives to promote their friends rather than the best candidates. As a result of these ideological and personal commitments, rules promoted by the party organization will, on average, produce less competitive candidates than those chosen by party electorate. If we assume that party members share some ideological similarity, created through the party's ability to ideologically self-define, it seems safe to argue that primary voters will vote for the candidate they think is most likely to win, especially given the generally more committed and interested electorate

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<sup>204</sup> See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 Sup. Ct. Rev. 95. 104-05 (2002).

that shows up for primary elections. As such, primaries free from party rules are more likely to promote competitive general election candidates

Because of the competing motives of party officials, this difference may not be large, making the state interest in protecting the associational rights of party members to participate in primaries freed from restrictive party rules a relatively weak one. Even so, a state would have to have an interest in overriding even weak associational interests.<sup>205</sup> None exists in this context. According to the model created in this paper, one that is consistent with both the reasoning and holding of the entirety of the Supreme Court's jurisprudence in this field, the only interests that can be used to justify limiting associational rights are those that create general elections with clear choices for voters and clear, decisive results. Party rules that restrict ballot access in primaries cannot be said to promote either of these ends – no matter what form the primary takes, the party will still only elect one candidate, leaving the general election with only two major party representatives, leaving the general electorate with a clear choice between two different candidates. That the candidates will be different from one another is ensured by the rules allowing the party (notably the party organization) to ideologically self-define. Further, as long as there are only two candidates from the two major parties, there is no reason to think that the identity of the candidate will affect the decisiveness of the election.

Thus understood, there should be a right to participate in free primary elections and simply no reason to allow a party organization to create significant hurdles to the primary ballot beyond those necessary for an orderly election.

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<sup>205</sup> If party rules are not state action, then the Constitution cannot influence them. This paper, though, is predicated on a contrary assumption – that all primaries do constitute state action, but that

The current law tracks this understanding to a point. The Supreme Court has developed relatively clear rules about how to deal with state laws that limit primary ballot access – they closely track, but are not identical to, the way courts treat laws about general elections. For instance, *Gray v. Sanders* involved a state law (and a party rule) that gave rural areas more votes in primaries.<sup>206</sup> The Court rejected this as violating the one-person-one-vote rule and stated the Equal Protection clause applied because this constituted state action.<sup>207</sup> No mention was made of the independent interests of the party or the state interest in providing political parties with autonomy to make their own decisions.

Two later cases continued this tactic of determining that state laws controlling party primaries were state laws like any other and then judging them by the standards developed for general elections. In *Bullock v. Carter* and *Lubin v. Panish*, the Court held that high filing fees for primary candidates violated the Equal Protection Clause.<sup>208</sup> Because the laws affected candidates, and not voters directly, they were not subject to strict scrutiny, but because restrictions on candidates affect voters indirectly, the standard applied was that “the laws must be closely scrutinized and found reasonably necessary to

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<sup>206</sup> 372 U.S. 368 (1963)

<sup>207</sup> *Id.* at 374.

<sup>208</sup> *Bullock v. Carter*, 405 U.S. 134, 139 (“The filing-fee requirement is limited to party primary elections, but the mechanism of such elections is the creature of state legislative choice and hence is “state action” within the meaning of the Fourteenth Amendment”); *Lubin*, 415 U.S. at 709. *See Bullock* at 139 n. 16 (“Appellants contend that not every aspect of a party primary election must be considered “state action” cognizable under the Fourteenth Amendment. But we are here concerned with the constitutionality of a state law rather than action by a political party”).

the accomplishment of legitimate state objectives in order to pass constitutional muster.”<sup>209</sup> In neither case did the state meet this burden. While the proffered reason of “keeping its ballots within manageable, understandable limits is of the highest order,” it was not enough to justify the filing fees.<sup>210</sup> Courts have, following *Bullock* and *Lubin*, applied this general election test to state laws regulating primary elections.

Applying the general election test to state primary laws is not the same thing as treating them in the same fashion. General elections feature candidates selected by parties, thus limiting who is on the ballot. States and courts regulate party behavior, which in turn effects who is on the general election ballot. Thus, even if the same standard is used to judge laws determining what it takes for a party member to get on the primary ballot as are used to judge the laws determining how independents can get on the general election ballot, the regulation of primary and general elections remains very different.

Determining what is a severe restriction on candidates or voters and, if a restriction is severe, what justifications can be compelling are complicated questions. While there are a variety of general election rules that raise these issues, the most common in primary elections are rules that require candidates to get a certain number and type of signatures to get on to the primary ballot.<sup>211</sup> These cases turn out to require

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<sup>209</sup> *Bullock*, 350 U.S. at 145-146 (quotation marks and citations omitted).

<sup>210</sup> *Id.* at 143-44.

<sup>211</sup> *See, e.g., Krislov v. Rednour*, 226 F.3d 851 (7<sup>th</sup> Cir 2000); *Lerman v. Bd. Of Elections*, 232 F.3d 135 (2d Cir. 2000); *Green v. Mortham*, 155 F.3d 1332 (M.D.Fla 1998). Some states also use the “news media” test, limiting access to the ballot to those with some significant measure of public support or notoriety. This has received a mixed reaction in the courts. *See, e.g., Duke v. Connell*, 790 F. Supp. 50, 54-55 (D.R.I. 1992)

extensive factual inquiry based on how restrictive the requirement actually is. The most famous of these cases was *Rockefeller v. Powers*, which involved a challenge to the complex New York presidential primary laws by Steve Forbes in 1996.<sup>212</sup> After an extensive factual analysis to determine the extent of the restriction, the court held the state law unconstitutional.<sup>213</sup> In doing so, it made clear that only justifications that could be used at the general election level – like avoiding ballot confusion -- would work for primaries.<sup>214</sup> One scholar noted that “[the] court rejected almost out of hand any *party* interest in filtering out its disfavored candidates, let alone a *state* interest in giving the party the right to define its own membership.”<sup>215</sup>

The case law surrounding 1996 New York Republican Presidential Primary showed that state laws that limited access to primary ballots are judged by the same standard used in general elections. The 2000 New York primary opened the door to discussing how to treat party rules that are merely enforced by the state. After the state law that permitted the convoluted primary system was struck down in 1996, the state passed a law allowing major political parties to choose one of two possible ways for candidates to get their delegates on the presidential primary ballot.<sup>216</sup> Clearly designed to

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(holding state statute unconstitutionally vague); *LaRouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993) (upholding use of news media test because of the availability of alternatives); *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980) (upholding news media test).

<sup>212</sup> 917 F. Supp 155 (E.D.N.Y. 1996) *aff'd* 78 F.3d 44 (2d Cir. 1996).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 156-65, 66.

<sup>215</sup> *Candidates v. Parties*, *supra* note 10, at 2200.

<sup>216</sup> 1999 Sess. Law News of N.Y. Ch. 137. See *Molinari v. Powers*, 82 F. Supp. 2d 57, 59 (E.D.N.Y. 2000).

allow each party to continue its favored system, the law permitted the Republican Party, as an internal decision, to choose a system that continued the high signature requirements eliminated from state law in the 1996 election. Supporters of John McCain filed a claim, “related” to the 1996 litigation, arguing that the rules were still unconstitutional.<sup>217</sup> In *Molinari v. Powers*, a federal district court, after determining that each of the other proffered reasons for the strict rules on ballot access were clearly insufficient, noted that the “only present comprehensible purpose of the [policy] is to disadvantage a candidate for President who does not enjoy the support of the Republican State Committee.”<sup>218</sup> Because the Supreme Court stated that “that the particular interests of the major parties cannot automatically be characterized as legitimate state interests,” the court found that interests of the Republican Party organization did not justify the restriction.<sup>219</sup> The policy limited the rights of voters and candidates and was not justified by a legitimate state interest, making it unconstitutional.

This ruling, formally discussing a state law that permitted parties to make one of two choices, leads to an obvious question – what happens when a party rule that is not codified at all in state law (except to the extent the state enforces party rules) significantly limits access to a primary ballot. Language in the *Molinari* decision seems to point to not making a distinction between party rules and state laws. “While [this law/choice] may further the interest of the Republican State Committee, as distinguished from the 3.1 million New York voters affiliated with the Republican Party, it undermines the very

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<sup>217</sup> *Molinari*, 82 F. Supp 2d at 58-59.

<sup>218</sup> *Id.* at 75.

<sup>219</sup> *Id.* at 66 (quoting *Anderson*, 460 U.S. at 830 n.30).

purpose of a primary, which is to protect the general party membership against this sort of minority control by the party leadership.”<sup>220</sup> This inclination is by no means universal, however. Looking at how two different courts treated virtually identical party organization primary ballot access restrictions makes this clear.

In two cases in the early 1980s, the Supreme Judicial Court of Massachusetts dealt with the constitutional status of a Democratic Party rule that required candidates for office to get 15% support from the state party convention in order to get on the primary ballot. The state tried to pass a law that allowed candidates to get on the ballot without getting 15% support and the Governor asked the SJC for an advisory opinion on its constitutionality. In *Opinion of the Justices*, the SJC ruled that the state could not overrule the party rule because doing so would violate the Democratic Party’s First Amendment right to freedom of association.<sup>221</sup> The court argued that the state had an interest in an orderly ballot, which allowed it to restrict the number of candidates on the ballot, but did not have an interest in eliminating party rules which made the ballot more orderly still (*i.e.* restricted access for candidates). Then, in *Langone v. Secretary of the Commonwealth*, the SJC ruled that state enforcement of the rule was constitutional against a First Amendment challenge brought by individual candidates and voters.<sup>222</sup> First, the court held that the party rule did not heavily burden the fundamental interests of candidates and voters because candidates were still free to try and get the 15% support and because they could run as independents.<sup>223</sup> As such, the rule was only subject to

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<sup>220</sup> *Molinari*, 82 F. Supp 2d at 64.

<sup>221</sup> 385 Mass. at 1207.

<sup>222</sup> 388 Mass. 185 (1983).

<sup>223</sup> *Id.* at 197.



rational basis review, and the court held that enforcing the rule was rationally related to the legitimate interest the state had in maintaining the integrity of political parties.<sup>224</sup>

The interests of the state party organization were hence found to be state interests.

Recently, a federal district court in Connecticut faced nearly the same issue but came to the opposite conclusion. In state-wide elections and elections in multi-town districts, state law required that, for a candidate to force a primary, she had to have 15% support from all the relevant town (and state) party committees.<sup>225</sup> The Republican and Democratic parties both had internal rules which seconded the state law, meaning that, even if a court found the state law unconstitutional, it would still have to rule on the question of whether the state could constitutionally enforce the party rules.<sup>226</sup> In

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<sup>224</sup> *Id.* at 198.

<sup>225</sup> *See Campbell v. Bysiewicz*, 213 F. Supp. 2d 152, 153 (D.Conn 2002) (Campbell I).

<sup>226</sup> *Campbell v. Bysiewicz*, 242 F. Supp 2d 164, 167 (D.Conn 2003). (Campbell II). There were different rules for districts that were entirely contained in one town. This implicates the Equal Protection clause, but that argument (about an earlier version of the same statute) was rejected in *Tansley v. Grasso*, 315 F. Supp 513 (D.Conn. 1970). The *Campbell* case had a complicated procedural history. After the claim was brought, the district court enjoined the Secretary of State from enforcing the law. *See Campbell I*, 213 F. Supp at 159. This left the law for the upcoming primary unclear – the decision was issued only a few months before the primary. Interestingly, the political parties were not party to the suit. After the ruling, the legislature did not change the law and the district court issued another injunction forcing the Secretary of State to permit any Connecticut resident who met minimal standards. This injunction was overruled by the Second Circuit on procedural grounds (because the second injunction had been issued before the appeal of the first had been heard on appeal) and because the political parties were, oddly, not party to the first suit. *See Stars Align for Direct Primary*, Hartford Courant, Feb, 9, 2003 at C2; David Herszenhorn, *Court Overturns a Ruling on Open Primaries*, N.Y. TIMES, Aug. 10, 2002 at B5. After the 2002 primary election, the district court heard the case in full. On summary judgment, it held the state law

*Campbell v. Bysiewicz*, the court held that both the law and the enforcement of the party rules were unconstitutional.<sup>227</sup> The court found that the party rules imposed a heavy burden on the First and Fourteenth Amendment rights of candidates and their supporters. The state argued that it had a compelling interest in maintaining the associational freedom of the parties, but the court rejected this out of hand. “While the state may not impair the right to associate, either of the party or individual voters, that prohibition ... does not insulate a party monopoly, particularly against insurgents within the party seeking to carry its banner.”<sup>228</sup> The court then spoke directly to the question of whether parties had an independent right to make rules more restrictive of primary ballot access than the state. “Even though party interests may differ from state interests, where parties are deemed state actors they are not permitted to adopt rules found to be unconstitutional when adopted by the state.”<sup>229</sup> In doing so, the court issued a *per se* rule that party rules regulating primary ballot access were subject to the exact same Constitutional scrutiny as state law.

The approach in *Campbell* and *Molinari* is consistent with the natural duopoly theory of electoral regulation because it effectively turns primary elections into free markets separate from the natural duopoly constraint of general elections. The First Amendment should protect the rights of voters to participate in primaries free from restrictive party organization imposed rules because it at least weakly promotes more

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unconstitutional and the state, rather than appealing, changed the law. *See id*; *Campbell II*, 242 F. Supp 2d at 167.

<sup>227</sup> *Campbell II*, 242 F. Supp 2d at 171.

<sup>228</sup> *Id.* at 174.

<sup>229</sup> *Id.* at 177.

representative general elections.<sup>230</sup> The state has no reason to impinge on these rights, because doing so would not promote clear choices for voters in general elections or decisive election results.

Nathaniel Persily, using a very different normative perspective, has come to a very similar conclusion, but with two crucial differences.<sup>231</sup> Rather than judging party-organization-created primary ballot access rules by the same standard as state laws regulating general election ballot access, he argues that they should be judged by a sliding scale depending on how important the primary is as a barrier to winning the general election (*e.g.* restrictive primary ballot access rules in one-party states should be treated more harshly).<sup>232</sup> Moreover, courts should consider party interests separately and should, depending on the importance of the party interest, find those interests to be either “legitimate” or “compelling” enough to justify restrictions on the First and Fourteenth Amendment rights of candidates and voters. It is necessary to consider both of these proposals in turn.

While it makes some kind of intuitive sense that elections in which one party is dominant should be treated differently than those in competitive districts, it is hard to see on closer inspection why party organizations in competitive areas should be able to close off access to the primary ballot. If internal party competition is a good, then it should be a good everywhere. Even if it is more important to have party competition in areas dominated by one party, because it is the only way to influence politics there, it still is

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<sup>230</sup> This includes the correlative – party organizations should not have a First Amendment right to impose restrictive rules on party primaries.

<sup>231</sup> See *Candidates v. Parties*, *supra* note 10, at 2210-13

<sup>232</sup> *Id.* at 2212-13, 2213-16

better to have competition in primaries than not to have it. These rules often flourish in areas that are generally competitive in general elections. For instance, *Campbell* overruled a primary ballot access rule in Connecticut, which has a great deal of inter-party competition.

Also, Persily's rule would create an adjudicative nightmare. While it is easy to recognize a one-party state, like the Texas of the White Primary Cases, courts would have to come up with a metric for determining when a district is competitive. The panoply of choices – votes by party for President, votes in the particular race discussed, party registration – bespeaks the difficulty of determining how competitive a district is. This is especially problematic given the power of individual incumbents, which could skew the results of any of these determinations. Also, courts would have to figure out how their determination of competitiveness relates to the level of the harm and how compelling the state's (or the party's) proffered interest is. Given the already confusing and inconsistent nature of constitutional law surrounding elections, this rule hardly seems advisable.

Persily also argues that courts should consider the separate interests of parties as possible justifications for restrictive primary ballot access rules. He notes that determining which of these interests are constitutionally permissible will be a difficult task. For instance, he rules out arguing that a restriction is justified by wanting to rule out those candidates without much support because “the *primary election*, not the ballot access requirement, serves as the principal means of estimating the candidate's support.”<sup>233</sup> The only interest Persily can devise that would justify restrictions is a desire to have a primary election winner selected by the majority, rather than a plurality, of the

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<sup>233</sup> *Id.* at 2223.

party.<sup>234</sup> This may be in the party's interest (as defined by the party organization) but it is not in the general interest. Permitting a policy that aids political party organizations while harming the general public would be harmed hardly seems advisable.<sup>235</sup>

For these reasons, it is probably best to use same standard to judge state laws and party rules regulating primary ballot access. Doing so, as part of the whole system of constitutional oversight of electoral regulation proposed in this paper, would best effectuate the ends of ensuring that officials are as representative of the preferences of voters as possible inside the structural constraints of the natural duopoly caused by Duverger's Law and the normative constraints of maintaining party difference and ensuring the legitimacy of elections.

#### **IV: Conclusion: The Court Redeemed**

It is easy for scholars to criticize the Supreme Court's jurisprudence on election law as overly simplistic and under-theorized. After all, it surely is these things; the sheer number of cases requiring Supreme Court review in this area is testament to the fact that the current Constitutional jurisprudence in this area is unclear. The opinions themselves seem all over the place in terms of their reliance on different theories of democracy. However, the actual answers the Court has given in election law cases are consistent with a sophisticated understanding of the effect of FPTP elections and competing ideas about the value of competition in a democratic state. Justice Breyer's dissent in *Vieth*, though,

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<sup>234</sup> *Id.* at 2225.

<sup>235</sup> See JUST ELECTIONS, *supra* note 24, at 82 ("To determine what rights parties should have, we should decide what ends they serve for citizens.")

makes clear that at least one member of the Court understand the case law in these terms.  
This paper, hopefully, has provided ballast for this understanding.