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# Democracy and Electoral Processes

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## DEMOCRACY AND ELECTORAL PROCESSES

Samuel Issacharoff<sup>1</sup> and Laura Miller<sup>2</sup>**Introduction**

For most of American history, the right to vote was part of a contested terrain over the inclusiveness of American politics (Keyssar 2000). Over time, the franchise expanded to include women and, belatedly black and other minority citizens. Indeed for the hundred years between the ratification of the Fifteenth Amendment and the passage of the 1965 Voting Rights Act, the continued frustration of the franchise to black Americans was the defining issue of voting in America. Remarkably, and imperfectly, the combination of the Voting Rights Act and federal enforcement took most of the elementary issues of a formal right of participation off the historical table. Although disputes remain over the sweeping disenfranchisement of released felons and identification requirements for casting a ballot, these are decidedly secondary and would count at best as marginal burdens on the franchise.

So long as the critical legal issues in voting were confined to a first-order claim for equal rights of participation, there was little pressure on legal scholarship to refine a law of the political process independent of the standard constitutional categories of equal protection or due process. Two developments, however, began to push toward the emergence of a distinct body of law, now known as the law of democracy or, more generically, as election law. Both of these developments addressed a concept of "vote dilution," a difficult category of improper burdening of the franchise even where all individuals are given full capacity to register and vote. Vote dilution necessarily implicates the capacity for a vote to be aggregated effectively with those of like-minded citizens to translate into representation and agreeable legislative policies. Once

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defined in the aggregate, such voting claims (sometimes referred to as second-generation claims in the minority voting rights literature) quickly transcended the customary individual rights claims that dominate equal protection law.

The first challenge to push beyond the simple right of participation came with the Court's great reapportionment cases, beginning with *Baker v. Carr*.<sup>3</sup> In these cases, the grotesque malapportionment of many of America's legislative districts gave some votes a numerical weight dozens of times greater than those in districts in the same jurisdiction. Although the Supreme Court disingenuously claimed that the equal voting strength claim could be fitted within "familiar" categories of equal protection, this was not the case. In the malapportioned districts, there need not be any formal prohibition on participation by any individual or group. Nor was there a content-basis to the claimed burden such that persons were disadvantaged because of their party affiliation or their race. Either formal prohibitions or burdening disfavored groups would have implicated constitutional categories that were indeed "familiar." In *Reynolds v. Sims*,<sup>4</sup> the case that enshrined the one person, one vote doctrine, the Court went further to define the constitutional guarantee as being one of an equally "effective" vote. Since no vote can be effective in the absence of potential inclusion in a winning coalition, *Reynolds* effectively invited the law of democracy to push beyond the customary rights domain that had been the hallmark of the post-*Brown* Warren Court.

While much of the law of political exclusion in America concerned the ongoing and shameful exclusion of black citizens from the franchise, the post-Voting Rights Act period challenged the simple model of exclusion. Once black voters were for the most part ensured the right of participation, the question became why minority voting rights law was not obsolete (Issacharoff 1993). Courts, and subsequently Congress in the 1982 amendment of Section 2 of

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<sup>3</sup> 369 U.S. 186 (1962).

<sup>4</sup> 377 U.S. 533 (1964).

the Act, came to understand that the aim of minority enfranchisement was not simply the ability to cast a vote as a formal matter, no less than that was sufficient for citizens facing the consequences of serious malapportionment. In the case of black citizens, particularly in the Democratic strongholds of the South, the ability to cast a vote revealed secondary obstacles in the form of at-large elections, staggered terms, single-slate requirements, and other mechanisms that had the effect (and often the purpose) of over-rewarding majority coalitions and frustrating the ability of minority coalitions to secure any representation at all. In jurisdictions marked by both the absence of partisan competition and by high levels of voting along racial lines (“racial bloc voting”), these structural features of the voting systems resulted in the continued absence of elected black officials, even as the black franchise expanded.

As with the post-*Baker* reapportionment cases, the second generation minority voting cases forced the law to confront a richer set of problems concerning the proper allocation of electoral opportunity. This was an inquiry for which the narrow categories of equal protection or due process would serve only as placeholders for structural debates over the nature of representation and the role of courts. In turn, the apportionment and vote dilution cases led to the development of a new field of constitutional law, one that heavily intersected corresponding developments in political science.

This chapter will proceed in three parts. The first gives a brief state of the developments in political science from Kenneth Arrow’s pioneering work to the refinements in public choice theory to the emergence of institutional approaches to politics. This review is not intended to be comprehensive but instead is designed to give the background for the emergence of structural approaches (i.e., non-rights derived claims) to legal oversight of the political process. Second, we trace the emergence of a distinct approach in law, one drawing more from Joseph Schumpeter and public choice models of political competition, than from classic constructs of equal protection.

Despite the centrality of minority voting rights in the development of this area, these issues are treated more fully elsewhere and so our focus will be on the issues of campaign finance, gerrymandering, and the role of political parties. Finally, we conclude with the emerging areas in this field of law, particularly as concerns the institutional dimensions of the political process.

### **Public choice<sup>5</sup> and representative democracy**

Participation in a democracy is by nature a collective enterprise. Through some agreed-upon process, individual opinions, values, and beliefs are combined and translated into a societal preference, a collective choice. That choice is then further mediated through a host of governmental and non-governmental institutions into the realization of public policy. Although the law came late to the recognition of the central role of institutional arrangements in defining the effectiveness of the franchise, social science did not.

The problem of minority vote dilution provides an excellent bridge from law to social science. Let us assume a community that is 60 percent white and 40 percent black, and is one in which historic disenfranchisement has finally been overcome such that all white and black voters can register to vote and fully participate. But assume that blacks and whites have different political preferences, and that the cleavages between the groups define local politics – not an unreasonable assumption given the prevalence and persistence of racially polarized voting patterns in American political life. If the town has five members of the city council elected at-large (meaning each voter casts five votes for five representatives), and in particular if the elections are for designated places (e.g., Councilmember A, Councilmember B . . .), the enfranchisement of minority voters will not change the make-up of the city council. The majority

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<sup>5</sup> We follow Farber and Frickey (1991, pp. 6-7) in defining the field of public choice broadly as the application of economic models to political science.

will be able to reproduce itself across all five designated places.<sup>6</sup> There are many ways in which this majority tyranny can be mitigated. Limited voting, with each voter getting three instead of five votes, or cumulative voting, or Hare preference voting, all would address this overrepresentation of the majority.<sup>7</sup>

Most common in the U.S., however, would be simply to divide the population into five single-member districts and allow each voter only one vote based on geographic residency. Standing alone, however, districting does not answer the proper level of opportunity for representation. Were each district to be 60 percent white and 40 percent black, the same patterns of majority domination could recreate itself. If that is unacceptable, then what is the right mix? It is possible to create two concentrated black districts, or three majority black districts or four majority white districts, and so forth. The limits are only ones of cartographic fantasy. As Justice Thomas was to assert pointedly, some recourse to political theory is necessary to answer this problem.<sup>8</sup>

The fact that the institutional arrangements of democracy will yield different outcomes with the same number of votes and the same apparent preferences presented a new problem for law. So long as the problem of minority voting remained the outright denial of the franchise, and so long as malapportionment and gerrymandering remained safely in the category of non-justiciable matters of the political thicket,<sup>9</sup> this issue stayed out of the legal pantheon.

Not so for social science. By the time the legal inquiry took on the problems of aggregation, the study of public choice had come to dominate a research agenda dedicated to understanding how various decision rules and other institutional frameworks shape and determine

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<sup>6</sup> For a critique of single-member districting in the context of minority voting rights and representation, see Guinier (1993).

<sup>7</sup> For a description of alternative voting procedures, see Stearns (pp. 22-26).

<sup>8</sup> *Holder v. Hall*, 512 U.S. 874 (1994) (Thomas, J., concurring).

<sup>9</sup> The “political thicket” metaphor can be traced back to Justice Frankfurter’s opinion in *Colegrove v. Green*, 328 U.S. 549 (1953).

the social outcome. Public choice assumes that in modern democracies, voting for representatives is the primary means by which a citizen participates in government. Since the discovery of the “voting paradox,” public choice theorists have wrestled with a basic dilemma: under simple aggregation rules like majority voting, the rational, well-ordered preferences of individuals lead to irrational and incoherent preference orderings by the whole. The field of public choice has grown considerably since the discovery of this basic paradox, with various refinements and analytical solutions, but the fundamental problem of how meaningfully to combine the preferences of individuals into a coherent expression of what might be termed the public will remains. To solve the “aggregation problem,” public choice theorists and political scientists turned to the role that institutions play in determining social outcomes.

#### *Arrow’s theorem*

Any study of voting should begin with the seminal work of Kenneth Arrow.<sup>10</sup> Arrow (1951) generalized the previous finding that simple majority voting can result in cycling, or “the paradox of voting.”<sup>11</sup> This occurs in a situation in which there are at least three alternatives and at least three voters. If the alternatives compete in a series of pair-wise voting, no single alternative will beat all other options. Beginning with a handful of normatively minimalist axioms, Arrow proved that no preference aggregation rule can produce a social ordering that simultaneously meets all of his decisional conditions. As refined by numerous public choice scholars, the five conditions are: 1) unanimity (Pareto optimality), 2) non-dictatorship, 3) transitivity, 4) unrestricted domain (universal admissibility), and 5) independence of irrelevant alternatives.<sup>12</sup>

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<sup>10</sup> Stearns (pp. 8-10, 51-71) provides a more detailed treatment of Arrow’s Theorem.

<sup>11</sup> Specifically, Arrow’s work builds on that of French political theorist Condorcet and Duncan Black (1948).

<sup>12</sup> These conditions have been variously stated and restated throughout the literature. See Mueller (2003 p. 583) for a concise technical description of the proof. See also Sen (1977) and Riker (1982) for an

*Unanimity* merely requires that if all individuals agree on a preference ordering, that ordering is the social ordering. This rule basically states that the revealed preference of the electorate is the highest democratic authority. The condition of *non-dictatorship* means that no distinguished individual's choice between alternatives will necessarily prevail in the social ordering, when everyone else opposes that preference ordering. *Transitivity* requires a consistent preference ordering. If A is preferred to B, and B is preferred to C, then A is necessarily preferred to C. The fourth condition, *unrestricted domain*, requires that the decision rule not exclude any possible ordering of alternatives. In other words, "[c]itizens should be free to prefer any policy option at all and to rank options in any way they want, meaning that no institution should have power to declare certain choices or rankings out of bounds at the start" (Pildes and Anderson 1990, p. 2132). Finally, *independence of irrelevant alternatives* requires that in determining the social ordering between two alternatives, only the individual preferences of those two alternatives are considered, and not the preferences over a third alternative.

Given how normatively weak the conditions are, the impossibility result is often viewed as extremely dispiriting (Pildes and Anderson 1990, pp. 2124-27). In order to restore some dignity to democracy as a system whose primary virtue, per Winston Churchill, is how it stands up against all other choices, some way out of the toxic implications of Arrow's Impossibility Theorem had to be discerned. A number have been explored. The most obvious is to relax one of the five axioms, which turn out to have more bite than might appear on the surface.<sup>13</sup> The unanimity rule and non-dictatorship rule are such basic requirements of democracy that they are generally not considered candidates for abandonment. The transitivity requirement can be

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examination of the implications of Arrow's Theorem. Pildes and Anderson (1990) and Farber and Frickey (1991, ch. 2) give excellent non-technical accounts for the legal audience.

<sup>13</sup> Of course, an alternative line of argument against the potentially dire consequences of Arrow's Theorem is to question the validity of the basic assumptions of public choice. This is largely the enterprise in Pildes and Anderson (1990).

relaxed, shifting away from “the search for a *best* alternative, *the* social preference,” and instead relying on some other norm of democratic theory, such as fairness or equality (Mueller 2003, p. 595). Abandoning the transitivity requirement means accepting the possibility of cycling and unstable collective choices. In other words, for any alternative, some other alternative may be found that will be preferred by society. If we are unwilling to accept intransitive social preference orderings, the other common candidate for attack is the independence of irrelevant alternatives (Riker 1982, pp. 129-30). If the independence axiom is relaxed, decision rules can be devised that will lead to unique outcomes.

A generous interpretation of Arrow’s Theorem might be that voting has severe limitations as a method of aggregating individual preferences into a collective choice. Somewhat more dramatically, Riker (1980) described the public choice literature at the time as “*the* dismal science:”

[W]e have learned from it that there are no fundamental equilibria to predict. In the absence of such equilibria we cannot know much about the future at all, whether it is likely to be palatable or unpalatable, and in that sense our future is subject to the tricks and accidents of the way in which questions are posed and alternatives are offered and eliminated (443).

In the last few decades, the public choice literature has focused on ways in which the voter’s paradox is constrained in the real world. The two most significant are 1) preferences are sufficiently ordered to prevent frequent cycling, and 2) institutions provide the necessary structure to constrain collective choice.<sup>14</sup> The process of political decision-making in the actual political environment of the real world of governance means that not all decisions can be

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<sup>14</sup> Even without a constraining institutional design, cycling might not be likely. For instance, assuming that each preference profile is equally likely, if there are only three alternatives and three individuals, the likelihood of a cycle is 5.6 percent. As the number of alternatives and individuals increases, the probability of a cycle also increases, reaching 100 percent in the limit. See Riker (1982, p. 122).

considered – as, for example, with the use of committees to filter proposals before they can be presented to Congress. Thus, the important question is not how cycling occurs, but why we observe so little of it.

*Rescue by the median voter*

It is well accepted in political theory that winner-take-all elections from single-member districts will tend to produce two parties that, over time, will drift ideologically toward proximate centrist positions. The concept can be expressed, based on the work of Harold Hotelling in economics and Anthony Downs in political science, by relying on a spatial model of political distributions. The model, as originally envisioned by Hotelling, runs as follows. Imagine a town that runs along a one-mile main street, with its population spread evenly along that distance. Further imagine that there are two gas stations in town. The optimal arrangement in terms of minimizing driving distance to a gas station would be for each to be half way between the town boundary and the midpoint. The problem is that if one sets up at the quarter-mile marker, the other one will set up just on the other side, so as to be able to be the closest station for three quarters of the town's population. In the artificial world of zero transaction costs, the two competitors would then leapfrog each other until they arrived at a stable equilibrium. As anyone who has ever driven into a small town with two filling stations knows, that equilibrium is in the center of town, where each filling station is located right across the street from the other.

Downs (1957) generalized this spatial model to the political process. The basic voting model consists of a fixed number of voters and two candidates. In this model, voters have preferences arrayed along a spectrum, which can be conceptualized as the typical liberal-conservative policy spectrum. The candidates know the voters preferences and simultaneously select a platform along the policy line. (Equivalently, the candidates select their policy platforms

sequentially, but the second candidate does not know the choice of the first candidate.) In the basic model, the candidates have simple preferences—they want to win. Further, the model assumes that the candidates can credibly commit to implementing the platforms they advertise as they have no independent preferences over policy – an assumption that translates imperfectly to the real-world of political parties. But the core intuition is certainly correct: politicians are rationally self-interested actors who select policy positions in order to increase their vote share or to at least increase the probability of victory. They “formulate policies in order to win elections, rather than win elections in order to formulate policies” (Downs 1957, p. 28). This assumption might sound immediately objectionable to those who advocate normative theories of democracy requiring civic-minded and altruistic elected officials, but it has several advantages. As a simplification, it allows for a baseline model that captures a central truth: Even allowing that candidates have preferences over policy (which they surely do), the first step in being able to realize preferred outcomes is getting elected.<sup>15</sup> Thus, responsiveness to the policy preferences of a majority of voters is a necessary first-order concern of aspiring representatives.

After the candidates announce their positions, each voter chooses between the two candidates and the votes are simply added together. The analytical result is that each candidate will choose the policy platform preferred by the median voter.<sup>16</sup> To see why, imagine if party A were to stake positions more liberal than those held by seventy percent of the population. Another party could choose one of two ideologies. It could be slightly more liberal, and therefore be more appealing to the thirty percent of voters to the political left of A. Or, more successfully, the second party could stake an ideological position slightly to the right of A, thereby appealing

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<sup>15</sup> Several public choice models have relaxed the assumption that candidates have no preferences over policy (independent of the median voter). See, for example, Wittman (1973) and (1977), Kollman, Miller and Page (1992), and Poole and Romer (1985).

<sup>16</sup> Formal proofs of the median voter theorem can be found from a variety of sources. The original exposition is in Black (1948), with a more accessible explanation in Downs (1957).

to seventy percent of the voting public. Not to be outdone, of course, in a two party system, political theory forecasts that parties will continue this game of maneuvering ideologies to capture voter interest until both parties represent positions around those of the median voter. Where one party is marginally more liberal than the median voter and the other party is marginally more conservative, each party's policies appeal to fifty percent of the electorate. At this point, equilibrium is reached and no more maneuvering can be successful in attracting a greater share of the electorate. Where parties have not hewn back toward the center, as with the failed candidacies of Barry Goldwater in 1964 and George McGovern in 1972, the result has been an electoral fiasco.<sup>17</sup>

The Median Voter Theorem provides a stable equilibrium: a single coherent outcome is reached. The difficulty comes with the mix of preferences held by most voters. As soon as the assumptions of the model are relaxed and voters are allowed to array themselves across a number of policy areas, it becomes difficult to map political behavior onto a linear spatial model. As an example, consider the preferences of three hypothetical voters over a proposed surge in United States troop levels in Iraq.<sup>18</sup> Voter 1 believes that the United States is making a positive change in Iraq and supports a major increase in troop and equipment levels. Voter 2, on the other hand, thinks that the current level of troops in Iraq is best, and prefers to maintain current policy against either a withdrawal or a surge. Both of these voters have single-peaked preferences along this policy dimension. Voter 1's utility strictly increases as troop levels go up (to some point within reason), while Voter 2's utility strictly decreases as the American presence in Iraq increases or decreases. Voter 3, though, has multi-peaked preferences. She believes that the worst-case

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<sup>17</sup> This is, of course, a simplification. The institutional context of elections creates pressures that keep parties and candidates from moving completely to the median voter. The important case of the party primary is discussed below. Canes-Wrone, Brady & Coogan (2002) offer systematic evidence that voters punish House members that move too far away from the center of their electoral constituency.

<sup>18</sup> The example of defense spending on the Vietnam War is used in Mueller (2003, p. 87).

scenario is the status quo, in which the United States has not committed enough resources to bring about a peaceful democratic state, and has only succeeded in increasing the violence in the region through its limited presence. She prefers *either* a complete withdrawal *or* a surge in troop level. With this universe of voters and policy alternatives (withdrawal, status quo, and surge), it is possible for cycling to occur—the winner of any pairwise vote can be beaten by another alternative. Of course, this example might be a bit strained. Generally, voters support either more, less or the same of some government activity. If desiring *either* more *or* less than the status quo rarely characterizes a voter preferences, cycling of this kind might not be particularly troublesome.

But what happens when we relax the other critical assumption of the Median Voter Theorem, the unidimensional policy space? Even the most casual observer of politics is aware that there are countless policy issues that divide up the political arena. Just because two people disagree over abortion does not mean they cannot find common ground on tax policy. Once a multidimensional space is added to the model, the clarity of the median voter equilibrium is muddied for two basic reasons. First, while single-peaked preferences might be the most plausible situation in a one-dimensional policy space, this is probably not so in a multi-dimensional world. Second, even if preferences are single-peaked, majority rule will only result in equilibrium under very specific conditions (Plott 1967).<sup>19</sup>

All of this might lead one to wonder how a group of individuals is ever able to pool its preferences and make a collective decision. Fortunately, we have a few answers as to why we observe relatively stable outcomes through real-world majority voting rules. First, considerable empirical research has found that the political preferences of the population basically line up

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<sup>19</sup> The highly restrictive Plott conditions are that the equilibrium point maximizes the utility for one individual, and all other individuals are exactly paired off against each other, so that their vote “cancels” the other.

along a single liberal-conservative dimension.<sup>20</sup> To the extent that this is true, the instability and arbitrariness predicted in the multi-dimensional models just does not happen very often in the real world. Second, voters are never asked their preferences in the abstract but rather through a series of mediating practices or institutions, such as elections with fixed questions presented or dominated by identifiable political parties with specific candidates running for office. As a result, there is ample space for agenda-setters to frame questions or decision so that stable and predictable outcomes can be reached (Romer and Rosenthal 1978, McKelvey 1979).<sup>21</sup> This solution tends not to be normatively appealing, however, as it allows the agenda-setter excessive control over the outcome. The third, and most relevant for electoral law, is the concept of structure-induced equilibria, as opposed to preference-induced equilibria (Shepsle and Weingast 1981). The key here is that “institutional structure—in the form of rules of jurisdiction and amendment control—has an important independent impact on the existence of equilibrium and, together with the distribution of preferences, co-determines the characteristics of the equilibrium state(s) of collective choice preferences” (Shepsle 1979, p. 29).

In apparent contradiction with the predictions of the Median Voter Theorem, candidates in United States elections rarely, if ever, announce the same policy platforms, and the platforms they do announce tend not to be those of the median voter. Public choice has a number of explanations for why we observe divergence between candidates. One common extension of the Downsian model is to relax the assumption that candidates are only motivated by the desire to win office. When the candidates’ utility curves are modified to include policy preferences,

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<sup>20</sup> Poole and Rosenthal (1985, 1991 and 1997) show that voting within Congress can largely be explained along a single policy dimension. Historically, however, this has not always been the case, as when civil rights issues opened up a second dimension in the 1940s, 1950s and 1960s.

<sup>21</sup> The literature on stability conditions in majority voting is, of course, extensive and so it is not possible to survey it all here. For a good summary of the literature, see Mueller (2003, ch. 5).

divergent equilibrium can emerge (Calvert 1985).<sup>22</sup> Further, the models can be modified to include more complicated voter preferences, where they value valence issues, such as seniority and personality. While these models do provide some plausible circumstances when party divergence can occur, they generally only predict minor divergence from the median voter. To help explain the separation we see between candidates in elections, a nuanced understanding of the institutional context—specifically the role of parties—is needed.

### *Political Parties and Duverger's Law*

Political parties are an essential component in modern democracy. Even the United States, with our avowedly anti-faction Constitution, could not escape the development of the political party as the central organizing unit of democratic decision-making. Although political science has generated numerous and diverse theories of political parties,<sup>23</sup> public choice models generally abstract the party into a single entity with well-behaved policy preferences. For instance, the Downsian model (1957, p. 25) defines a political party as “a team of men seeking to control the governing apparatus by gaining office in a duly constituted election.” The “team” is a group of individuals who agree on all policy issues, and whose primary goal is to win elective office. While these models serve as an important analytic basis for determining a great variety of election outcomes, they do little to explain why parties exist in the first place, and the nature of collective action within the party apparatus.

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<sup>22</sup> A further requirement for a divergent equilibrium is probabilistic voting, i.e. the candidates do not know for certain the policy preferences of each voter. See Austen-Smith and Banks (2005, p. 301).

<sup>23</sup> For a summary of the various understandings of political parties, see Aldrich (1995, pp. 7-14). The eminent political scientist V.O. Key (1964) emphasized the multiple personalities of the political party, as an unstable amalgams of voter preferences, an internal apparatus driven by activists, and a structure through which party affiliates participate in government. A significant portion of the caselaw on political parties has involved difficult battles between the party-in-government, the party-in-the-institutional-apparatus, and the party-in-the-electorate over control of important internal party functions, most notably the right of participation in the internal processes of the party. For further discussion of this, see Issacharoff (2002).

Aldrich (1995) expands on this basic theory of political parties, maintaining that they are a coalition of self-interested political elites seeking electoral office, but allowing for party members to have additional goals, beyond just winning elections. Rather than assuming preexisting parties as given, Aldrich asks why rational actors would create and maintain such organizations in the first place. In this theory, the political party is an endogenously created institution that solves three related problems faced by office-seeking politicians.<sup>24</sup> First, the party regulates and limits entry into politics. For a career-minded politician, party affiliation provides a predictable institutional path for sustaining officeholding. Second, the parties organize the policy space to avoid the Arrowian dilemmas of instability and ambiguity in collective choices. Finally, the party solves the intense collective action problem inherent in any large modern democracy. Political parties help politicians persuade and mobilize voters into their camp. Voting is costly for individuals, as it requires becoming at least minimally informed about the election and then taking the time actually to go to the poll to register their vote. The party mechanism can help candidates reduce the costs faced by voters by providing a well-known brand name (Snyder and Ting 2002). Party cues have long been identified as a critical tool by which voters come to a vote choice (Campbell et al. 1960). Additionally, in most elections, multiple members of a given party will be running for a variety of offices, both local and federal. Get out the vote efforts provide economies of scale—once a voter is at the polling place, it takes little effort to vote in an additional race. The party is a mechanism by which candidates can pool resources to encourage voter participation.

A key assumption in this view of parties is that they exist as an enduring coalition of individuals, seeking their own self-interest. Aldrich (1983, 1995) proposes that, in addition to the ambitious politician, the party organization is also composed of policy-motivated party activists,

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<sup>24</sup> A growing literature within political science addresses the dynamics of endogenous institutions. See Calvert (1995), Aghion, Alesina and Trebbi (2004), and Greif and Laitin (2004).

citizens sufficiently motivated to volunteer time and money to campaign for their party and its candidates. In making the decision of whether to become an activist, the citizen looks at the policy positions of the two parties and evaluates their own spatial distance from the party center. So long as they are not indifferent or alienated from the party median, they may choose to become an activist both for the party with regard to the outside world and within the party itself. Indifference results when the two parties are sufficiently close to each other, presumably at the median position, so as to offer little difference in the policy they are likely to enact once in government. Alienation occurs when the citizen is so far from the party centers that it is not in her self-interest to devote time and energy to getting one or the other elected. Aldrich shows that equilibria exist in this model, and more importantly, those equilibria do not converge to the median voter. While the exact position of the party centers will depend on the relative distributions of the party activists, the decision-calculus of the activist pushes the party away from the center, due to the assumption that citizens will not become party activists if there is no discernible difference between the two parties and that viable parties and candidacies require the specific contributions made by the activist wing of the party. At the same time, the parties will not diverge too much from each other, as the electoral core of the party could become alienated should the party activists have so much control that the party becomes more extreme and further from the preferred policy positions of the median voters. This model, while adhering to the basic framework of spatial voting, helps explain why we observe the two political parties with divergent policy platforms. While the general electorate, composed of individuals who decide not to become activists, exerts pressure on the parties toward the center, party activists pull them apart.

The primary nominating system offers an additional explanation for why parties become ideologically divergent. Despite the fact that the population as a whole has not changed its levels

of partisanship, Congressional Republicans and Democrats have ideologically shifted to the right and left, respectively (Fiorina 2004). To run successfully in the general election, a candidate must first capture the nomination of one of the two major parties. If we crudely characterize the Democrats as the party of the left and the Republicans as the party of the right, then the same Hotelling-Downs equilibrium will play out in the primary process, yielding candidates who are likely to be significantly to the left and right of the center. The result is the familiar practice, at least historically, of Democratic candidates running left in the primary and rediscovering the center in the general election, while Republican candidates look decidedly more conservative in the primaries and more compassionate in the general election. As Aldrich (1995) has explained, it is the need to prevail in the primaries and to maintain the aroused support of the party faithful that keeps the American parties from collapsing entirely into the center, as Downs might have predicted.

This discussion leads to the rather remarkable empirical result, known as Duverger's Law. Simply put, Duverger's Law states that under plurality voting rules, in single-member districts, only two parties will sustainably emerge.<sup>25</sup> Minor third-parties will find it nearly impossible to survive unless their support is geographically concentrated. The common intuitive explanation for this phenomenon is that individual voters do not want to waste their vote on a third-party candidate with little chance of electoral success. Imagine an election with three parties: A, B and C. Sometime prior to the election, the voter determines that A and B each enjoy support from 45% of the electorate, while C only has the support of the remaining 10%. If a voter prefers C to all other alternatives, but would rather see A elected over B, she will strategically choose to vote for A, rather than "wasting" a vote on C. Since her first-choice

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<sup>25</sup> There have been numerous revisions and more formal articulations of Duverger's Law. See Riker (1976 and 1982); Palfrey 1989, Feddersen (1992) and Fey (1997). For a less technical description, see Issacharoff and Pildes (1998, p. 675 n. 121) and Issacharoff et al. (2007, p. 1129-32).

candidate has no hope of winning, the voter maximizes her utility by increasing the probability that her second-choice candidate prevails over her last-choice candidate. In this model, the individual votes strategically, foregoing her sincere first choice in order to realize the best “realistic” outcome.

A second mechanism that prevents the entry of viable third-parties into a first-past-the-post electoral system is the cost structure for the parties themselves. Assuming that entry into an election is costly, parties (and candidates and donors) will not want to bear the cost unless they have some minimal probability of gaining electoral benefit. In a winner-take-all system, only the top vote-getting party gets the political power. Unlike in a proportional system, a party with little political support cannot count on attaining any seats in the legislature. Faced with this situation, the would-be third-party is motivated to form a coalition with an existing party, rather than strike out on its own.

Duverger (1963) called the tendency of only two parties emerging from plurality voting systems the closest thing that we have to a “true sociological law” (p. 217). Cox (1997) provides considerable empirical evidence that in plurality voting, voters do act strategically and support for third-party candidates diminishes as the election nears. A notable exception to this rule can be found in Canada, where local minority parties still manage to gain serious political support. The accepted explanation for this exception is that a decentralized political structure among provinces separated by region, culture, and language allows for sufficient political benefits of gaining provincial office to carry parties unviable nationally (Rae 1971, pp. 301-04). Thus, Duverger’s Law is frequently qualified in countries where there is substantial variation in party strengths across regions.<sup>26</sup> In an interesting extension of the Downsian model, Callander (2005) employs the cost structure for third party emergence in geographically heterogeneous districts to show

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<sup>26</sup> For a discussion of other exceptions, and a revision to Duverger’s Law, see Riker (1982, p. 761; 1976, p. 94).

that, in order to deter entry, the two major parties will adopt divergent policy platforms. Here, the two parties compete in multiple districts, but are forced to select a single “national” platform. If they both select platforms relatively close to the multi-district median voter, this will mean that they are relatively far away from median voters in some of the districts, making it possible for a third-party to enter as a viable contestant. To prevent this, the parties are pulled away from the median voter.

### **The law of democracy: “politics as markets”**

Since the Court entered the political thicket, constitutional cases involving the law of politics have generally adopted the familiar cast of traditional constitutional rights doctrine. Campaign finance laws are viewed through the lens of the First Amendment, along with the regulation of political parties. Equal protection and due process jurisprudence dominate the area of redistricting and the representation of political minorities.

As the legal issues developed toward questions of effective representation and the proper aggregation of voters, inherited constitutional doctrines became inadequate for two separate reasons. First, most constitutional law on matters concerning political participation emerged as prohibitions on forbidden state conduct, rather than as affirmative considerations in judging whether the political process was sufficiently porous to permit groups to vie effectively for political power. Second, and perhaps most significantly, dispersed constitutional doctrines could not well harness the overlapping problems of representation and responsiveness that presented themselves across the different claims over vote dilution, party autonomy, reapportionment and redistricting, and the myriad other issues encompassed in the law of the political process.

In the late 1990s, the dispersed issues concerning the legal regulation of the political process coalesced into a distinct legal discipline with the publication of two casebooks.<sup>27</sup> For the most part, this was accompanied by a decided shift away from the individual rights-based models common to other areas of constitutional law to structural accounts, more concerned with the functioning of the system as a whole. Daniel Ortiz (1999) describes the structural approach of the political-competition model as moving “from rights to arrangements.” The use of public choice models and principles, particularly with regard to structure-induced equilibria, was a natural fit with this shift in emphasis.<sup>28</sup> The general theme in this line of legal scholarship is that electoral institutions shape and channel democratic politics.

The structural approach to the law of democracy criticizes the rights-based jurisprudence as having a variety of basic weaknesses. First, pitting a claimed individual “political right” against a competing state interest does a poor job of adequately representing either side of the controversy. Because electoral politics is inherently a collective enterprise, individualistic claims of harm are problematic for issues of standing (Issacharoff and Pildes 1998, p. 645). Further, the rights-based approach is inadequately equipped to address the true nature of the political party. Courts generally view the political parties as formal legal entities, analogous to individuals or corporations. By comparison, Kang (2005b) theorizes that the party is more appropriately understood as a set of shifting alliances and relationships between various actors and institutions, working ostensibly toward common goals.

On the other side, the courts similarly tend to treat the government as a single and enduring institution, rather than a temporary collection of partisan interests, eager to remain in power after the next election (Pildes 1999, p. 1606; Issacharoff and Pildes 1998, p. 653). The

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<sup>27</sup> For the most recent editions, see Lowenstein, Hasen and Tokaji (2008) and Issacharoff, Karlan and Pildes (2007). Many scholars in the field have noted this trend. See, for example, Cain (1999), Ortiz (1999), Persily (2002).

<sup>28</sup> See Shepsle (2006) for an introduction to this theory of political institutions.

traditional rights model, by adhering to rigid legal formalisms, fails to allow for a realistic positive account of how strategic political actors operate within the government. Even critics praise the structural approach for making it harder for courts to hide behind questionable state interests such as “political stability” and “voter confusion” (Hasen 1998, p. 728). Given the stability of the two-party system described by Duverger’s Law, courts should be highly skeptical of arguments regarding states’ interests in political stability and effective governance. Pildes (1999, p. 1611) offers this summary of the need for a structural approach to the laws governing our democracy:

[C]ourts should become more aware of the need for external oversight of potentially anticompetitive practices that masquerade under the hoary labels of good order, stability, and similar homilies. When claims of rights are asserted, courts should attempt to recognize the structural and organizational implications of the resulting decisions. The way to sustain the constitutional values of American democracy is often through the more indirect strategy of ensuring appropriately competitive interorganizational conditions. It is in this way that central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.”

A second problem with the rights model is that it treats each area of the law surrounding elections separately, creating an array of disconnected subfields. This contrasts sharply with the reality of our highly integrated political system, which is flexible and adaptable, with highly strategic players. When a court decides a case in a particular way, the outcomes are felt across the entire universe of election law.<sup>29</sup> These collateral consequences are critical to the overall functioning of the system, and ignoring them can create bad outcomes overall (Pildes 1999, pp.

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<sup>29</sup> This point is made in two papers emphasizing the “hydraulics” of elections law: Issacharoff and Karlan (1999) looks at campaign finance reform, and Kang (2005b) examines the impact of party regulation.

1606-07). One of the chief criticisms of the Court is that it has failed to develop any kind of coherent theory of what democratic politics should look like. This is particularly problematic given the parallel failure of the Court to define the boundaries of its more aggressive role in policing democratic institutions since the 1960s. Taken as a whole, the jurisprudence in this area emerges as largely ad hoc.

Insights from the public choice literature animate the structural approaches to elections law. The first lesson drawn from the public choice literature is that the theoretical construct of a “popular will” is incoherent, except as mediated by electoral institutions. Recognizing this, law of democracy scholars have turned their attention to the institutional framework that shapes and defines the politics experienced in this country. The second major lesson that comes from public choice literature is that those in power—whether they be incumbents or parties—will work, at least in part, in their own self-interest to maintain their control. To the extent that there is no third-party arbiter checking this behavior, the elite can manipulate the rules of the game so as to increase their likelihood returning to power after the next cycle of elections. Issacharoff and Pildes (1998) argues that this is the primary danger in our laws governing democratic politics. When those in control of the structures of government lock themselves into place, ensuring that they cannot be effectively challenged, the democratic process breaks down.

The step away from the rights paradigm crystallized with the introduction of the “politics as markets” approach (Issacharoff and Pildes, 1998).<sup>30</sup> Rejecting the traditional balancing between the various constitutional and statutory individual rights connected with elections and state interests, the “politics as markets” approach is an attempt to provide a single coherent and

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<sup>30</sup> This article was followed by a series of others by the co-authors: Issacharoff (2001 and 2002) and Pildes (1999, 2004, 2006).

workable framework for adjudicating “law of democracy” cases.<sup>31</sup> As a tool for making the political competition approach more concrete, Issacharoff and Pildes (1998) looks to the more developed fields of corporate and antitrust law. Politicians are analogized to a managerial class and the electorate to equity holders. Rather than attempting to give legal substance to the fiduciary obligations of corporate managers to shareholders, modern corporate-law scholarship instead advocates establishing market structures that create a competitive environment such that the managers’ interests are aligned with those of the shareholders. Along these lines, the “politics as markets” approach rejects the attempt to build laws of politics around court-enforced individual rights with respect to state actors, and instead focuses on establishing electoral institutions that ensure robust political competition. As with all metaphors, the competitive market has its limitations as a descriptive device for politics. For example, unlike the corporate setting, voters lack the ability to “exit,” perhaps the most powerful tool of the shareholder. However, such focus largely misses the bigger points the politics as markets approach was attempting to make. The analogy to markets is employed primarily to emphasize that institutional design is critical in determining outcomes and proper design of those institutions can structure incentive mechanisms for those in power to better align with societal interests.

A comprehensive structural approach to issues of democratic elections requires the identification of a normatively desirable conception of democracy. Cain (1999a) raises the important point that, as inherently positive endeavors, empirical political science and public choice remain neutral with regard to competing normative claims about democracy. The normative lens with which the observer views the empirical literature can have a profound impact on the conclusions drawn from positive findings. For example, a determination that term limits

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<sup>31</sup> The “politics as markets” approach has been variously called by many names, including the “antilockup approach” (Cain 1999) and “functional lockup theory” (Hasen 1998). For the purposes of this discussion, we adopt the term “political competition approach,” as it emphasizes the primary goal of the theory without resting too hard on the market metaphor.

undermine legislative expertise can be negative for a democratic theorist who sees value in professional legislators, but would be positive for a traditional populist favoring an amateur citizen-assembly (Cain 1999a, p. 1107, note 6). Issacharoff and Pildes (1998) propose accountability and democratic responsiveness, best achieved through free and competitive elections, as the primary goal of the laws establishing the rules of politics. This draws on several lines of thought found in democratic theory, most directly with the revival of Schumpeter's conception of "elite democracy." Posner (2003) separates democratic theory into two dominant camps. Concept 1 democracy is idealistic, deliberative, strong, and most closely identified with political theorist John Dewey. The primary aim of this view of democracy is to facilitate citizen participation in democratic decisionmaking. Concept 2 democracy is Schumpeterian democracy. For Schumpeter, the central feature of democracy is the competitive election of leaders.<sup>32</sup> With voting as the central mechanism, "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" ([1950] 1976). In opposition to various strong forms of democracy, with their model of an informed, deliberative and public-spirited electorate, the theory of elite democracy emphasizes process, competition, and allows for a somewhat more modest view of the capabilities and interest of voters. The key to democratic control is the ability to vote elected representatives out of office. Voting is thus viewed as a "popular veto" (Riker 1982, p. 244).<sup>33</sup>

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<sup>32</sup> Przeworski (1999) also endorses a minimalist definition of democracy, on the grounds that more demanding conceptions are difficult to logically support. Issacharoff (2002, p. 614) argues that "[t]he essence of republicanism then becomes not the lack of direct participation in government by the *demos* but, critically, the fact that the elected representatives were forced to compete in the arena of political accountability."

<sup>33</sup> Riker (1982) is perhaps excessively pessimistic about the possibility of democracy. He argues that the only form of democracy that survives public choice is not "popular rule, but rather an intermittent, sometimes random, even perverse, popular veto...Liberal democracy is simply the veto by which it is sometimes possible to restrain official tyranny (p. 244)."

*Critiques and developments of the politics as markets approach*

The political competition approach in Issacharoff and Pildes (1998) and subsequent work was followed by considerable critical response. While there was some resistance to the use of economic approaches to political questions at all, the more interesting criticisms came from within the framework of public choice and other tools of economics.<sup>34</sup> In the former category, a seemingly obvious critique of the politics as markets approach, or more generally a shift of focus to the larger structural properties of election law, is that it will have the negative consequence of providing weaker protection of “political rights.” Issacharoff and Pildes (1998) anticipate this response in a few different ways. One is to point out that an underlying premise of the structural approach to election law is that rights are derivative of the overall political structure. To discuss a generic “right to vote” divorced from the context of how that vote is treated by the electoral system is meaningless. A second point, and one that more directly goes to the heart of the concern, is that the first-order concerns of rights and equality are best protected by ensuring that the second-order condition of rigorous partisan competition is ensured (Pildes 1999, 1610).

Within the public choice framework, one of the primary critiques of the political competition model is that, because there is no such thing as an optimal level of political competition, this legal theory invites courts to charge aggressively into the political arena, but then fails to supply them with adequate tools for deciding political disputes. This is essentially a slippery slope argument. The other variant of critique looks more closely at the underlying normative goal of rigorous political competition. Here, scholars are concerned that the political

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<sup>34</sup> Hasen (1998, 2002, and 2003) is most vocal in maintaining that election law cases can all be addressed within the traditional rights paradigm of constitutional rights adjudication. In particular, he maintains that courts should only be in the business of protecting individual rights, and should only interfere with the workings of the democratic process when such are rights are threatened. See also Cain (1999b) and Lowenstein (2000).

competition model is only one of a several possible supportable theories of democratic representation, and balk at encouraging courts to lock this one theory into case law.

Unlike corporate law, with its straightforward pursuit of wealth maximization, the political world has no agreed-upon goal (Hasen 1998, p. 720). While Issacharoff and Pildes (1998) identify a competitive political environment as a goal, critics contend that because there is no normative baseline establishing the optimal level of competition, courts have nothing to compare current electoral practices with (Hasen 2003, Persily and Cain 1998, and Cain 1999b). Similarly, Cain (1999b, p. 1600) argues that the functional approach outlined in Issacharoff and Pildes (1998) does not offer any sustainable boundaries to the intervention of courts in the political arena. Even if such a standard were discoverable, the courts are not a particularly reliable arena for determining whether a given situation meets that criteria (Hasen 1998, p. 728). Part of this concern focuses on the fact that even though federal judges are life-tenured, they are still political appointees, with strong partisan inclinations.

Against this attack, Pildes (1999, p. 1612) has responded by pointing out that all reform measures are doomed, if they require a concurrent an “affirmative theory of what the ‘optimal’ social practice would be instead.” The original political competition approach was introduced to highlight the weaknesses of the Court’s jurisprudence in the area of election law—most significantly, the failure to identify and root out the anticompetitive practices of the major political parties. Setting out a normative theory of ideal partisan competition is admittedly a far more daunting task. As Pildes (1999, p. 1612) states, “[i]n theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”

While some critics have argued that the political-competition approach will encourage courts to enter into the political fray at unprecedented levels, this is not the intent. One of the

proposed advantages of focusing legal doctrine on the electoral institutions rather than the behavior of the elected is that when the structure ensures competitive partisan activity there is less room for the political elites to act against the interests of society. With properly competitive institutions, the self-interested actions of the representatives should align with the interests of the represented (Pildes 1999, p. 1619). Further, with regard to partisan control of the redistricting process, Issacharoff (2002) proposes a prophylactic rule that would remove redistricting decisions from the self-interested state legislatures entirely. Relocating the critical decisions on where to draw district boundaries to disinterested parties would presumably have the effect of eliminating a large segment of litigation dealing with political issues. Charles (2007, p. 651) defends the political competition approach against the slippery slope criticism by arguing that it is time to “acknowledge the virtue of the distinction between judicial regulation of the fundamental rules of the democratic process and judicial involvement in ordinary politics.” While there should be a presumption against judicial involvement in ordinary public policy decisions, this presumption is inappropriate when the issue is one of the basic elements of the political process.

Some scholars have criticized the “antilockup approach” as requiring an extreme form of proportional representation at its logical limit (Cain 1999b; Persily and Cain 2000). The question is whether the political competition model requires courts to step in whenever possible to reduce the costs of third-party entry. The concern here is that the most important reason that we see only two dominant parties is that the United States system for electing legislative representatives is based on a single-member simple plurality rule. Cain (1999b) argues that attacking laws and practices that limit third-party entry such as antifusion laws, rules governing participation in debates, and campaign finance laws are all window-dressing compared to the behemoth that is the simple plurality voting rule. Cain (1999b) distinguishes between “political lock-ups” that are derivative of the basic representational system and pernicious “political lock-outs,” which should

be regulated by the courts. In a plurality winner-take-all system only two parties will sustainably emerge, following Duverger's Law. The subsequent difficulty of third-parties emerging in such an environment, according to Cain, should not be an invitation for court intervention.<sup>35</sup> Similarly, Hasen (1998, p. 724) argues that "functional lockup theory" is more applicable to situations in which a single party entrenches themselves—as with the White Primary Cases—than it is when the two major parties conspire to reduce the competitiveness of elections. Single party domination of the electoral process is universally considered a detriment in a democratic society. Hasen argues that two parties dominating the political sphere is not so obviously problematic. In particular, he finds difficulty in establishing standards that would allow a court to determine whether a political system was sufficiently competitive.

“Without a social wealth criterion, we need some other baseline with which to measure appropriate political competition. Although two parties are better than one, it is not so clear that three are better than two, or even that two parties being influence by third parties are better than two parties not so influenced.” (p. 726)

Schleicher (2006) makes a point similar to this when he recasts the two-party system as a “natural duopoly.” Under these circumstances, the efficient move for society is to maintain the duopoly, and actually impede the introduction of a third-party competitor.

Pildes (1999) dismisses the criticism that the political competition approach requires either a radical departure from the American electoral system, such as striking down first-past-the-post districts, or only speaks to rather marginal reforms. On the first attack, he denies that the political markets paradigm is intended to be so radical as to force proportional representation.

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<sup>35</sup> Cain (1999b, pp. 1601-02) defines three conditions for a “fair party system:” 1) “[t]he rules are impartial in their discriminatory effects—the system is, on average, equally discriminatory or advantageous to any particular party that gets a certain level of electoral support;” 2) “the system allows for the free contestation of offices at some level;” and 3) “the system satisfies the condition of popular sovereignty such that alternatives with more numerous support are generally preferred over others.”

The original purpose of the legislative districting systems in the United States was not to diminish electoral competition. Additionally, geographic representation might promote responsiveness, the end goal of a competitive election system, by strengthening the tie between representatives and the electorate. At a more fundamental level, however, the structural approach distinguishes between the enabling rules that establish the game, and the restraining rules designed to limit competition (Issacharoff 2002). Basic rules of engagement are necessary for any competitive system.

Finally, Pildes (1999, p. 1617) also dismisses the claim that the anti-entrenchment model can only tackle insignificant institutional defects. Laws governing elections that lack the grandeur of enabling rules can still have pronounced effect on political outcomes. The history of restricted ballot access, the prevention of fusion candidates, and radical malapportionment all point to the role that election laws can have on the level of competition within the system.

Determining when the system is insufficiently responsive to the people will always be a problem, as this is somewhat empirically intractable. While the concept of enabling robust competition within the electoral sphere may be open-ended, it does not follow from this theory that any aggregation of voter preferences is permissible. The next step for the structural approach in election law is to define the boundaries between law and politics, but this requires some analytical framework to stand on. The concept of maintaining rigorous competition between parties and candidates for office provides the starting point for this analysis.

### **Applications of public choice to the law of democracy**

Despite the early criticism of the structural approach to the law of democracy, it has come to be the dominant approach in this field. Its success is principally due to the combination of the

simplicity of the model and its ready application to the full range of topics within elections law.<sup>36</sup>

The second generation of work in this area has taken the basic insights—the focus on institutions and the critical role of electoral competition in regulating the system—and begun to explore the boundaries of the “politics as markets” models.<sup>37</sup>

The structural approach to the law of democracy has developed rapidly since the late 1990s, and any attempt to survey it all is doomed from the start. Instead, we look at three areas of election law—campaign finance, redistricting, and party regulation—traditionally treated as distinct under the rights paradigm, and trace how the political competition approach helps to explain and bring order to these fields. These three topics are particularly interesting in the current discussion, as they are all rather poorly served by the rights paradigm. The First Amendment jurisprudence that has dominated campaign finance law since the landmark decision in *Buckley v. Valeo*<sup>38</sup> has never adequately addressed the full nature of campaign donations and expenditures. Similarly, the Court has struggled with fitting the admitted difficulties in partisan redistricting into equal protection. Finally, political parties have proven to be extremely difficult to classify within the First Amendment rights paradigm. The tension between the party role as a private association and a state actor makes delineating the contours of its associational rights complex and inconsistent. The structural approach attempts to fold these disparate issues into a single analytic framework, focusing on how various laws and regulation in these areas affect political competition. Again, the concern is in structuring the political environment to allow

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<sup>36</sup> “Although relatively simple, [the political competition] model has proved remarkably robust, providing analytical insight on issues as distinct as gerrymandering, blanket primaries, fusion candidates and campaign finance. 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 election law cases.” (Schleicher 2006, p. 177).

<sup>37</sup> Schleicher (2006), for instance, has expanded on the “parsimonious” markets model to include a theory of the two parties as a “natural duopoly.” Charles (2007) attempts to make structuralism less abstract, and hence more useful to courts, by wedding individual rights approaches to an account of how political institutions affect those rights.

<sup>38</sup> 424 U.S. 1 (1976),

responsiveness to the collection of individual interests within the electorate. This is what we have termed the “aggregation problem.”

### *Campaign Finance*

Most legal scholarship on campaign finance centers on the inherent tension between desires to limit the role of money in political campaigns and First Amendment rights. This discussion follows the analytic structure of *Buckley v. Valeo* and the cases that followed in trying to distinguish the expressive impact of limitations on campaign expenditures as opposed to campaign contributions (Issacharoff and Karlan 1999, 1706).<sup>39</sup> The traditional rights approach to campaign finance, with its focus on freedom of speech, clearly only captures one aspect of the role money plays in politics. While many contributors to campaigns are no doubt intending to publicly express political loyalties, the instrumental reasons for donating money, like influencing policy or getting a favored candidate elected, are arguably more important. Much of this comes down to a theory of how individuals decide to spend money in the political sphere. On the one hand, if expressing a political message was the primary reason for donating or spending money in a political campaign, we might expect to see a far higher incidence of independent expenditures, where the individual controls the message, than in donations to a campaign, which gives the candidate control (Ortiz 1999, pp. 1223-1225). On the other hand, others have argued that voters donate money to candidates, rather than putting those resources towards independent political expenditures, because they recognize that candidates are the most effective mouthpiece for their

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<sup>39</sup> See, for example, *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000). The contribution/expenditure distinction has proven difficult to maintain with the inevitable attempts at circumvention by candidates, parties and interest groups. In upholding the major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Court went to heroic lengths to preserve the *Buckley* framework. See *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

political expression.<sup>40</sup> The preoccupation with free speech, accompanied by the lack of attention to the greater political environment, has resulted in a largely ineffective discussion regarding the regulation of money in politics. A structural approach to elections law, informed by the public choice field, takes the focus away from just individual First Amendment rights and instead balances these against the impact various campaign finance regulations have on the wider political system.<sup>41</sup>

The first major area of campaign finance research in public choice looks at how campaign spending correlates with the number of votes a candidate receives. Vote totals are obviously predicted to increase as campaign expenditures increase, but the exact nature of that relationship is the subject of debate. Many factors other than spending by a candidate go into the determination of vote share, including spending by the other candidate, personal characteristics of both candidates, and the specific partisan and socioeconomic composition of the district. Various formal models predict diminishing marginal returns (as measured in votes) to campaign spending for incumbents (Coates 1998 and 1999). Additionally, following an analogy from the marketplace, a challenger first has to build up a certain level of name recognition among the electorate, and so will initially face relatively low marginal returns to campaign spending (Grier 1989, Lott 1991, Mueller and Strattman 1994).

The *S*-shaped relationship between campaign spending and votes, combined with the fact that incumbents and challengers likely have differently shaped curves, has a few implications for laws regulating campaign spending. First, laws that artificially restrict the absolute levels of

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<sup>40</sup> Justice Thomas, for example, has made this argument. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (Thomas, J., dissenting) (“The decision of individuals to speak through contributions rather than through independent expenditures is entirely reasonable....Citizens recognize that the best advocate for a candidate (and the policy positions he supports) tends to be the candidate himself.”)

<sup>41</sup> This is not to say that free speech rights are ignored or devalued. The free and open exchange of political speech is a key concern for the political competition approach. See Issacharoff and Karlan (1999, p. 1712). (“Political expression in the electoral arena is not *I Am Curious Yellow* or even *Ulysses*; this is the very heart of expression on matters of self-governance. Nowhere else should the hand of government be viewed with such distrust.”)

spending may have the perverse consequence of benefiting the incumbent. Since the incumbent is likely to already have high levels of name recognition, she will not face the same early uphill battle for translating spending into votes. Further, because she is more likely to experience diminishing returns more quickly, she will be relatively less harmed than a challenger when she reaches the spending limit. The challenger, on the other hand, will have to pour far more resources into establishing his name with the electorate early on. If the models hold predictive power, it is possible to cut off spending at the point where the challenger is just seeing large gains in vote share relative to spending compared with the incumbent. In sum, limiting overall campaign expenditures can exacerbate the already high barriers to entry that a challenger faces. In a world where the lack of political turnover is lamentable, we should be at least skeptical of proposals to curb campaign expenditures.

Empirical studies support the prediction that campaign spending, particularly for the incumbent, has diminishing marginal returns. In fact, it is common to find that the marginal impact of campaign expenditures for incumbents is statistically insignificant, while that of the challengers is positive and significant.<sup>42</sup> Studying the relationship between campaign expenditures and the impact on vote share is notoriously difficult. Stratmann (2005) observes that the political science literature finding only a small impact of campaign spending on elections has to overcome the basic observation that politicians certainly behave as if money is critical to winning. Part of the problem is the inverse relationship between gains by one candidate with losses by the other. Further, spending levels between the two candidates tend to be highly correlated, which is likely to mute any statistical relationship that can be determined (Jacobson 1978, 1985). An additional difficulty is that incumbent spending is a response to a relatively high

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<sup>42</sup> For a comprehensive review of the empirical literature on campaign spending, see Mueller (2003, pp. 482-86). These studies endeavor to isolate the effect of campaign spending from other factors, including the relative quality of the challenger and incumbent, district characteristics, etc. See Jacobson 1978, 1980 and 1985; Abramowitz 1988, Levitt 1994, and Coates 1998.

quality challenger. Since most incumbents win most of the time, even when challenged, races with the highest levels of campaign spending may also be the ones where incumbents tend to do the worst. Close elections tend to exhibit the highest levels of spending (Strattman 1996).

A second area of campaign finance in the public choice literature examines how the ideological platform of the candidate, her support for a particular interest group in the past, and her likely support in the future affects the amount of money donated.<sup>43</sup> In public choice models, contributors generally want to increase the probability that the candidate they most agree with ideologically wins. Additionally, they hope to influence the future votes of the candidate to whom they give campaign donations. Empirical evidence offers some support to these twin goals of campaign contributors. Donors act strategically, giving money where it is most likely to alter election outcomes. Interest groups are more likely to give money in close races, to candidates who already have seniority in the legislature, or to those who have plum committee assignments (Ortiz 2005, Kroszner and Stratmann 1998). However, an important point often overlooked in popular and legal-academic accounts of the supposed corrosive effects of money in politics is that interest group donations form a relatively small portion of overall campaign contributions, with the lion's share coming from individual small donors (Ansolabehere, de Figueiredo, and Snyder 2003, de Figueiredo and Garrett 2005). Further, only a small fraction of individual and interest group contributions reach the statutory limit for campaign contributions. Ansolabehere, de Figueiredo, and Snyder (2003) have argued that, rather than viewing campaign donations as political investments, with the expectation of some sort of policy return, contributions are better understood as a consumption good. In other words, people donate money because they want to participate in the political process, not because they believe that their small contribution will result in personal gain.

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<sup>43</sup> Mueller (2003, pp. 486-88) summarizes the extensive theoretical and empirical literature in this field.

Another area of public choice campaign finance literature looks at how the behavior of the representatives in office is conditioned by campaign contributions they received in the past and those they expect in the future. The empirical political science literature has generally had a difficult time showing that campaign contributions “corrupt” politicians (Cain 1999a, pp. 1115-16). Whether contributors give money to induce a candidate to support their position, or whether they give money to candidates that already support their position is a thorny inference problem. While some empirical studies have purported to show a causal relationship between contributions and subsequent roll call votes in Congress, the majority show no statistically significant relationship between campaign contributions and an increased likelihood of recipients voting in the preferred manner of their donors.<sup>44</sup>

The legal literature on campaign finance exhibits the influence of public choice models in its attention to how regulation of contributions and spending affects the strategic behavior of the players in the political arena. Restricting how money can enter and be used in politics does not stop the ambition and self-interest of the elite actors: “[m]oney, like water, will seek its own level. The price of apparent containment may be uncontrolled flood damage elsewhere” (Issacharoff and Karlan 1999, p. 1708). Reformers can “clean up” soft money, only to see it seep back to the surface through independent expenditures in the next campaign cycle. Further, Issacharoff and Karlan (1999, p. 1711) argue that artificially limiting the supply of campaign money may eliminate the filtering effect of candidates and politicians who have to campaign before the broad public and may even, paradoxically, cause politicians to be even more dependent on independent actors who carry the campaign for them.

As in all markets in which demand runs high but supply is limited, the value of the good rises. In campaigns, the result is an unceasing preoccupation with fundraising. The

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<sup>44</sup> For a comprehensive review of this literature, see Ansolabehere, de Figueiredo, and Snyder (2003); see also Mueller (2003, p. 489, n. 24).

effect is much like giving a starving man unlimited trips to the buffet table but only a thimble-sized spoon with which to eat: chances are great that the constricted means to satisfy his appetite will create a singular obsession with consumption.”

This tendency has caused some scholars advocating a structural approach to campaign finance jurisprudence to endorse significantly relaxing the restrictions on campaign contributions and expenditures. Caps on campaign contributions has not effectively limited campaign spending, and has instead forced politicians to spend enormous time and energy in soliciting smaller donations from more sources. To ensure accountability, calls for lifting the caps on campaign donations are accompanied by more extensive disclosure requirements (Issacharoff and Karlan 1999, p. 1736).

### *Redistricting*

Since the original malapportionment cases, the Court’s doctrinal approach to redistricting cases has primarily focused on the Equal Protection Clause (Issacharoff, Karlan and Pildes 2007, ch. 10). Perhaps ironically, the grossly disproportionately populated districts prior to the “reapportionment revolution” in the 1960s are one of the best historical examples of entrenched political elites maintaining a stranglehold on the political system. Rural politicians benefitted from a districting system that predated the population explosions in urban and suburban areas, and were able to veto any attempt to redistribute representation based on population for decades (Ansolabehere and Snyder 2004). In addition to the early “one-man, one-vote” series of cases, the Equal Protection Clause has figured prominently in the vote dilution cases and the racial-redistricting cases. When the Court first recognized the justiciability of partisan gerrymandering claims in *Davis v. Bandemer*,<sup>45</sup> it again focused on possible violations of equal protection.

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<sup>45</sup> 478 U.S. 109 (1968).

Although the Court has given some attention to structural approaches in recent partisan gerrymandering cases, the jurisprudence in this area continues to be dominated by the rights paradigm (Kang 2007). Despite the unique nature of claims arising from the political arena, the Court since *Baker* has steadfastly held to an equal rights framework without offering any coherent theory of what equality should mean in the voting context (Gerken 2002).<sup>46</sup>

No rule protecting the competitiveness of the political system can be generated by compelling only that all legislative district be equipopulous. (Issacharoff 2002, p. 613; Pildes 2006, p. 255.) While the “one-person, one-vote” rule is a simple and normatively appealing standard, it does little to protect against misuse of the redistricting process either to protect against an incumbent party using the tools of redistricting to burden its opponent, or even against a “non-compete” agreement in which incumbent officeholders of both parties agree to redistrict to protect their own sinecure. Perversely, the requirement of strict numerical equality actually offers state legislatures an opportunity to entrench the existing political elites through sweetheart gerrymanders at least once every decade. Put simply, the Equal Protection Clause is a poor tool for policing the systematic suppression of competitive elections through purposeful manipulation of the redistricting process.

Redistricting poses two, potentially conflicting, types of political entrenchment.<sup>47</sup> The first is a gerrymander that benefits one political party over the other. In this form of redistricting, the party fortunate enough to control the state office charged with redistricting seeks to improve its own electoral outcomes in the next election by increasing the number of seats it is likely to

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<sup>46</sup> The Court remains deeply divided on how to address partisan gerrymandering, disagreeing on the threshold question of whether partisan gerrymandering is justiciable, the constitutional harm at issue, and the appropriate standard of review. For the recent demonstration of this division on the Court, see *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>47</sup> Some scholars have divided strategic redistricting into three categories: partisan, *bipartisan*, and incumbent-protecting (Persily 2002). While this might bear some analytical advantages, we discuss only partisan and incumbent gerrymanders for the sake of simplicity. Further, the concern over bipartisan and incumbent-protecting gerrymanders is the same—fewer competitive districts.

win. The concern here is that the majority party will effectively prevent the minority party from improving its seat-share, even if it improves its support within the electorate. Based on highly detailed demographic data and powerful computer models, redistricters can predict how a proposed district will tend to vote. In a partisan gerrymander, the party in power will attempt to shift voters around to make incumbents of the other party vulnerable, while preserving enough favorable voters in their own districts to maintain a high level of success. The “efficient” partisan gerrymander creates as many districts as possible with a majority of voters from that party, without “wasting” any voters. The overall effect of such manipulation can be an increase in competition, as each district becomes more politically heterogeneous (Kang 2005a and 2005b). The negative consequence of such a gerrymander, party bias, still remains though, and recent attempts to break the norm of only one redistricting per decennial cycle threaten to exacerbate this problem. Cox (2004) argues that mid-decade redistricting is most likely to result in increased partisan bias, as the push to redraw the lines will likely come after one party gains a new or substantial electoral advantage over the other. He advocates process rules limiting the frequency of redistricting to ameliorate this problem, although it has rarely been presented in recent American politics.

The second type of gerrymandering occurs when incumbents from both parties coordinate to lock themselves into their districts by ensuring that they contain a favorable blend of constituents such that incumbents are generally immunized from serious electoral challenge. This type of gerrymander that lends itself to the criticism of politicians choosing their constituents, rather than constituents choosing their elected representatives. The incumbent-protecting form of redistricting, which Kang (2005a) refers to as “defensive” gerrymandering, should be the most alarming. This is a particularly pernicious form of elite entrenchment, as the normal course of politics is unlikely to correct the problem. When one party uses the power of

law to manipulate electoral institutions to solidify its interests, the electorate retains at least some recourse, by voting for the party out of power, and a strong ally in that quest in the form of the opposition party. When the two major parties agree to electoral institutions that increase their natural advantage over minor third parties, voters are left with very few options to affect change. This bipartisan “cartelization” has largely been left alone by courts because it does not directly impinge on any individual participation right or upset equal protection principles (Issacharoff 2002, p. 600). Kang (2005a) concurs that incumbent-protecting redistricting is the worst form of gerrymandering because it reduces competition and overall accountability within the system.

In perhaps the most controversial of the political markets articles, Issacharoff (2002) advocates that the Supreme Court view redistricting conducted by partisan representatives in the state legislatures as inherently suspect: “the harm to be avoided may not be limited to *wrongful districting* but rather must encompass *purposeful districting*, much as the antitrust laws reach not only the actual cartelization of markets but also conspiracies set out to frustrate competition” (p. 601). This has the advantage of avoiding the sticky questions of how long a leash to give partisan gerrymanders before deeming them “excessive,” or what triggers the “consistent degradation” test of *Davis v. Bandemer*.<sup>48</sup> It also addresses the general criticism of the political competition approach concerning a lack of any objective standard for “optimal competition.” Self-interested political elites simply should not be given the invitation to determine something as politically determinative as district lines. Finally, if the Court adopted a prophylactic rule requiring non-partisan redistricting, it could get it out of the fiction of policing the redistricting process by giving a “safe harbor” to plans produced under such a system (Charles 2007).

The concern over party collusion to protect incumbent politicians through redistricting is not shared by all legal scholars, particularly for those whose focus is not on the centrality of

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<sup>48</sup> 478 U.S. 109 (1986).

political accountability. If voters are thought to have more fixed political identities, then accountability of the governing elites *ex post* for their performance in office may be of secondary concern. Instead, the question may be thought of as ensuring that the distribution of political power adequately represents the preferences of the polity, even if we admit concerns for the problem of excessive majoritarian control of state authority. Thus, it may be argued that “there is no a priori reason to prefer a districting system that produces many competitive races over one that produces proportional representation” (Persily 2002, p. 650). If elections are competitive, the electorate will be relatively evenly split down the middle in terms of partisan identity. Whichever party the median voter belongs to will win, making nearly half of the electorate unhappy with the result. An elected representative from a politically homogenous district will be a closer match for a higher proportion of voters, and that representative will better reward her constituency as the power associated with legislative seniority accrues. Thus, even if intradistrict competition is reduced in an incumbent-friendly gerrymander, representation might benefit. This argument has no obvious limiting principle and the specter of one-party states in which all voters get to vote for the winner (and only for the winner on penalty of state sanction) cannot be an attractive ideal.

Public choice and political economy scholars studying redistricting have yet to come to any consensus on the extent to which decennial redistricting allows for systematic gains for those drawing the lines. Empirical political science has documented a trend since the 1970s of the diminishing number of competitive congressional seats capable of being decided by swings in public sentiment on election day. (Issacharoff and Nagler, 2007)<sup>49</sup> The degree to which this is attributable to redistricting is less certain. Several election law scholars maintain that the purposeful manipulation of election districts is a leading cause of non-competitive races for state

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<sup>49</sup> Tufte (1973), generally credited for recognizing this trend first, argued that the reduction in competitive seats was attributable to redistricting. See also Erikson (1971) and Mayhew (1974). Jacobson (1987) argues that although average vote margins increased, incumbents were no more safe; Ansolabehere, Brady and Fiorina (1992) partially dispute this finding.

legislative and congressional seats. In particular, the 2002 midterm elections, the first after the 2000 census, were the least competitive in the history of the United States when judged by several measures, including the number of incumbents defeated, the number of incumbents voluntarily retiring and the proportion of incumbents winning by a landslide (Pildes 2006).

On the other side, a growing body of empirical literature on incumbent and partisan entrenchment through redistricting casts serious doubts on the degree to which redistricting can serve as the sole or even primary cause for the high levels of incumbent electoral success. Using an extensive database including information on state legislators and executives from 1942 to 2000, Ansolabehere and Snyder (2002) find that the incumbency advantage for executive offices had the same historic gains as those for legislators, casting serious doubt on the theory that redistricting was a significant cause of growing incumbency. Similarly, Abramowitz, Alexander and Gunning (2006) test three competing hypotheses regarding the decline in competition in the U.S. House. The study confirms that marginal districts have disappeared and that more districts are “safe” for one party than in the past. However, their empirical analysis indicates that this may be due to demographic shifts and a general political realignment, rather than the increase in redistricting.

Another concern regarding incumbent-protecting gerrymanders is that as districts become increasingly homogenous politically, the median voter within the district drifts away from the median voter of the whole populace. If Americans are choosing to live in areas defined by a homogeneous set of political preferences, then gerrymandering is not the cause of noncompetitive districts across the parties, but may simply reflect the facts on the ground. Recall that the original formulation of the Downsian model assumes a single election with voters stretched long a spatial continuum according to their political preferences. The model assumes that the candidates for office will ultimately move toward the center of the political space so as to compete more

effectively for the decisive marginal voter. In reality, however, American elections are typically two-stage events that start with primary elections. The primary in a competitive district reveals the same Downsian pressure, but only with half the political spectrum represented. This yields the typical understanding of American politics that candidates run to the poles during the primaries and then move to the center for the general election, as will be discussed more fully below. In districts dominated by one party, that second stage will be missing. This will reduce the pressure on candidate to move to the center, and might even encourage more extreme politicians. To the extent that we view the polarization of politics to be a problem, we should be wary of electoral systems that encourage candidates to move to the ideological extremes (Issacharoff 2002).

A common criticism of removing the redistricting process from the political arena is that no definitive set of normative criteria emerges from the democratic theory literature and there is no guarantee that a common set of criteria would not yield conflicting commands when it comes to drawing the actual lines. Candidate standards for fair redistricting include continuity and compactness, maintenance of communities of interest, stability over time, competition between parties, proportional representation across districts, and incumbent protection or challenger encouragement. This again brings us to the point raised by Pildes (1999, p. 1612) that we can recognize inherent problems within the system without having a full theory of the optimal solution: “[t]he best can be the enemy of the good when it comes to legal doctrine as well as other policies...” Further, an examination of the experiments with independent redistricting commission in some of the states, as well as a comparative look at other countries with similar electoral systems, reveals that the lack of a definitive fair standard for drawing lines is not paralyzing.<sup>50</sup>

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<sup>50</sup> For overviews of independent electoral reform commissions, see Elmendorf (2006) and Gerken (2007).

As a final point, whether or not the effect of partisan redistricting can be empirically shown to protect incumbents, they clearly act *as if* it does. Redistricting reform measures often fare poorly when put before state legislatures. Just as most legislators are adverse to limits on campaign spending, both political parties and incumbents generally line up against taking away the power to redraw their district lines. It is worth noting that part of the disconnect between the empirical political science literature and the basic intuition of virtually all politicians and political commentators is that we still do not have adequate data to test seriously whether the new developments in redistricting since are affecting incumbency protection. Although the “reapportionment revolution” occurred in the 1960s, the rise of sophisticated computer-based redistricting only began with the 1990 plans. With less than two decades of such precision in redistricting under our belts, it might be premature to declare that redistricting is innocent when it comes to entrenching political elites in the system. But, even if we accept that the increasing precision with which districts are redrawn is only one of several causes of the significant incumbency advantage, powerful political interests continue to behave as if they do. In terms of democratic legitimacy and the perceptions of the public, redistricting by those with the biggest stake in the outcome remains problematic. As Pildes (2006, p. 258) states, “[t]he virtual elimination of competitive congressional elections has come about as a result of multiple causes. But of these causes, only one is subject to easy change, has little justification, and is capable of being reached through constitutional law: political gerrymandering of election districts.”

### *Regulation of Parties*

The Constitution was intended to be an anti-faction document.<sup>51</sup> The Framers purposefully attempted to prevent the formation of intermediary organizations that would buffer

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<sup>51</sup> See Issacharoff (2001), pp. 276-77, note 6.

elected officials from the voting public. But as early as the elections of 1796 and 1800, it was clear that this was a failure. The Supreme Court has had a difficult time trying to classify the major political parties, treating them at times as equivalents to common carriers subject to ordinary state regulation, but at other times as rights-bearing entities, as in the California blanket primary in *California Democratic Party v. Jones*.<sup>52</sup> The Court's move to resolve the tension by expanding the ability of the party to claim the right of expressive association is doomed from the start because of how embedded the parties are in our democratic system (Issacharoff 2001). The major expressive form they take, the presentation of candidates for public office, occurs in a state-sponsored and state-regulated environment in which the states routinely condition the terms under which parties may place candidates on the ballot, may endorse candidates for office, and are otherwise directly involved in the administration of the electoral process. Rather than trying to balance questionable associational rights with the state interests, the political competition approach instead focuses on the proper role of political parties in maintaining the integrity of the competitive electoral system, which serves as the basis for maintaining accountability between the elected representatives and the people. In the terminology of public choice, parties solve the major collective choice problem of political organizing (Aldrich 1995).

The political competition approach shares a general advantage with all structural theories of the laws governing democracy—it avoids the pitfalls that come with separating the political arena into preexisting constitutional formalisms. Rather than forcing the tensions of associational rights and state action doctrines onto political parties, the political-competition paradigm takes a

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<sup>52</sup> 530 U.S. 567 (2000). See Lowenstein (1993) for a discussion of the difficulties in engaging in debates as to whether parties are public or private organizations. Kang (2005b, p. 146) argues further that the law has a difficult time regulating parties not just because of their multi-faceted nature, but also because they are a moving target: “The major political parties have displayed remarkable capacity for adaptation to changing political circumstances. Throughout the twentieth century, parties have found new ways to accomplish their goals when old ways of achieving those goals have been cut off. Although reformers attempted periodically to affect the way that parties operate, political parties each time recovered to reassert control over their affairs.”

step back and first asks what purpose parties play in our electoral system. Most scholars share the view that parties are a critical component in our representative democracy, serving as an essential intermediary institution that organizes citizens, allowing for a competitive election environment.<sup>53</sup> But parties can take on many faces. Persily and Cain (2000, p. 778) reference the work of political scientist V.O. Key in arguing that some of the doctrinal confusion in how to treat parties has to do with the fact that parties have multiple organizational personalities: the party-in-the-electorate, professional political workers, and the party-in-the-government.<sup>54</sup> Parties are an uneasy coalition of voter preferences, the institutional framework within which activists pursue their goals, and the organizing structure through which elected representatives function within the government. Two prominent and interrelated issues raised in structural approaches to party regulation are the extent to which parties should be able to remain autonomous decision-making bodies, and whether third-party participation should be protected against the major party duopoly.

Parties must be able to retain some level of organizational identity in order to function in their role as intermediary in the electoral structure. If the parties were simply to become beholden to the median voter, they would not be able to sustain themselves as organizations.<sup>55</sup> Activists would have little incentive to expend energy and resources within a party, as there would be only a negligible difference in policy outcomes depending on the electoral winner. Cain (2001) argues that party autonomy is functionally important for four reasons. The first reason is that it helps to prevent the party in power from using its electoral advantage over the other by restructuring the rules to its advantage. Examples of the type of abuse include primary rules that might advantage one party over the other, such as preventing the minority party from

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<sup>53</sup> For instance, see Issacharoff (2001) and Cain (2001).

<sup>54</sup> V.O. Key (1964) describes these three aspects of the political parties organizational behavior.

<sup>55</sup> Various arguments from the political science literature support the existence of political parties as important for the development of citizen participation and engagement in the political process. See, for example, Putnam (2000) and Rosenblum (2000).

opening its primary to independents, and partisan redistricting plans. The second functional reason to allow for maximal party autonomy is protection against majority abuse. This concern might also be labeled “tyranny of the median voter.” As in the situation in *Jones*, the moderate majority can attempt to use their procedural advantage to drive politics even further towards the middle, at the expense of those on the ideological extremes. While this might sound unobjectionable, Cain (2001) notes that most third-parties exist in this spectrum. Additionally, reformers and policy entrepreneurs do not generally emerge from moderate political positions (e.g. Ralph Nader). A third benefit to advantaging party autonomy is that it encourages compromise within big-tent parties. This allows coalition-building between the non-centrists in the electorate and the more mainstream elements within a political party. A final benefit is that, by freeing the parties to diverge from the median voter, the electorate is given a real choice when it comes time to vote: “[a] two-party system becomes noncompetitive when it produces only one viable choice for extended periods of time and at various levels of the system. A virtually noncompetitive system is one in which both choices are effectively the same choice; in which technically there is a choice between two labels, but substantively there is little or no difference between them” (p. 810).

Empirical evidence tends to support the notion that open primary systems encourage more moderate candidates (Cain 2001, p. 800). As discussed, single-member plurality voting rules put pressure on candidates and parties to move to the median voter. When this simple election model is divided into the two stages of a party primary and a general election, candidates will face two different median voters. The first will necessarily be more extreme than the second, as the median voter in the primary is at the center of that party, and not the overall electorate. Exacerbating this tendency is the empirical finding that primary voters tend to be more ideologically extreme than their general election counterparts, much like party activists tend to be

more extreme than the general electorate (Aldrich 1995). The result is that candidates will feel pressure to run to the right or left in the primary election, followed by the moderating pressures of the general election. This cross-pressure fuels the desire of politicians to reduce the competitiveness of elections through control of the nominating process, an increase in the levels of constituent services they can command, and sweetheart gerrymanders designed to ward off serious election challenges (Issacharoff 2001).

Persily and Cain (2000) criticize the politics as markets approach for relying too heavily on the role of “exit,” while ignoring the power of “voice” in the relationship between voters and the political parties. Because of the threat that voters will “exit” membership in a particular political party if it drifts too far away from their policy preferences, the parties in a competitive political arena will feel pressure to remain centrist.<sup>56</sup> “Voice,” on the other hand, is the mechanism by which a party member can influence the party from within, by affecting policy and leadership decisions. While the theoretical distinctions between “exit” and “voice,” particularly within the public choice literature, are somewhat fluid, Persily and Cain (2000) make the point that modifying institutions to reduce the cost of exit by making it easier for third parties to form and compete is only one way to increase responsiveness in the system. Another method is to establish institutions that create incentives for parties to incorporate new groups within the existing party coalition (790-91). They go on to highlight a potentially detrimental effect of encouraging “exit”: [e]ncouraging groups to form new parties when they do not get their way only lessens compromise and coalition-building in the electoral stage and postpones it to the legislative stage” (p. 791). This account of the tension over the autonomy of political parties echoes major debates over the relative effects and benefits of proportional representation as opposed to single winner elections.

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<sup>56</sup> See Hirschman (1970).

The role of the party activist has been ignored to a certain extent in the political competition approach.<sup>57</sup> Democracy demands a lot of citizens, who have little incentive to engage in the costly search for adequate information with which to match their underlying policy preferences with a vote choice. Downs (1957) argued that in a democratic society with rational decision-makers, an electorate that is fully informed, or even equally informed, is not in equilibrium. The impact that the party activist has on policy divergence between the two parties has already been touched on. Obtaining political information requires expending scarce resources, and rational citizens will look for ways to significantly reduce those costs. Citizens thus delegate both the procurement and analysis of political information to specialists, which include political parties, interest groups and the government itself.

Much of the work in political behavior over the last thirty years picks up on this intuition.<sup>58</sup> In a candidate-centered campaign (as opposed to a choice among parties in list-based proportional representation systems), cues such as party, incumbency, and likability significantly reduce the complexity of the vote decision by narrowing the choice space available.<sup>59</sup> In addition to research on how voters use heuristics to choose which candidate to vote for, other work has looked at how voters make policy choices. Mondak (1993) looks at “source cues,” “references to prominent political leaders,” and how they affect the incidence of both holding an opinion and the direction of that opinion on a given issue. Empirically, he finds that respondents are more likely to give a policy opinion (in this case the issue was California State Supreme Court merit retention elections) if their attitude toward the political leader source is more extreme. Additionally, the

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<sup>57</sup> Persily and Cain (2000), for instance, criticize the political competition approach for failing to differentiate political activity levels within the electorate.

<sup>58</sup> See Garrett (pp. 24-30) for an overview of the voting cues literature as it pertains to ballot initiatives.

<sup>59</sup> The early research into political heuristics includes Ferejohn and Kuklinski (1990), Carmines and Kuklinski (1990), McKelvey and Ordeshook (1990), Sniderman, Brody, and Tetlock (1991), and Popkin (1991). Voters do not need to know where a candidate stands on every policy issue to choose which candidate best reflects their own views (McKelvey and Ordeshook 1986). Given simple but very informative signals, such as the candidate’s political party, allows the voter to choose as if she had full information.

directional impact of a source cue is dependent on the respondent's opinion of the source. Those more favorable to the political leader become more likely to support the leader's position, and those more unfavorable are less likely to support the position.<sup>60</sup> Persily and Cain (2000, p. 791) argue that a model of political competition should take into account the specialization that occurs when political activists within the parties invest time and energy into shaping the policy debate and setting the political agenda. They are concerned that if this role is overlooked, the relatively cheaper information provided by political elites will be lost. When party activists are not allowed to perform this role, voters will be forced to turn to other outlets for political information, such as interest groups and the press.<sup>61</sup> This can have negative consequences in terms of further fractionalizing the electorate by limiting the leadership role of the parties.

The role of third parties in our political system is difficult. One might first ask why we should expect to ever see third-party candidates in a single-member first-past-the-post system. Even more puzzling might be why we tend to see ideologically extreme third parties. If the Median Voter Theorem has any bite, the existence of even marginally viable third-party insurgents like Ralph Nader or Ross Perot should not happen. Quite early, public choice scholars relaxed some of the assumptions of the basic model, and offered explanations for why third parties might emerge. One explanation is that the two dominant parties, situated on or near the ideal point of the median voter, might be so far away from a given voter that they are sufficiently alienated to "waste" their vote in protest. For the most part however, we do not see stable third-parties in the United States, as predicted by the public choice literature. Those that do emerge

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<sup>60</sup> American voters were commonly portrayed as being rescued by the heuristics research from the depths of political incompetence that minimalism had placed them in. Still, some remain skeptical, not about whether voters use heuristics, but rather about how well these information and cognitive shortcuts work (Kuklinski and Hurley 1994, Kuklinski, Quirk, Jerit, Schwieder and Rich (2000), Lau and Redlawsk (2001), and Kuklinski, Quirk, Jerit and Rich (2001). Kuklinski and Quirk (2000), for instance, are suspicious about citizen competence "in choosing policy preferences, responding to policy rhetoric, and influencing policy making (154)." Their fear is that distortions in the use of political heuristics would cause the public to offer their leaders "misguided signals."

<sup>61</sup> Ortiz (1998) makes a similar point about "civic slackers"—disengaged voters.

tend to be devoted to single issues of the moment, such as gold-backed currencies, and do not last beyond a single election cycle.

The challenge for third parties is not merely a question of political theory. Oftentimes it is difficult even to obtain the right to participate by getting on the ballot in the first place. State legislatures—with the two major parties often coordinating for a mutually beneficial outcome—can pass laws that prevent write-in candidates or limit minor-party endorsement of major-party candidates.<sup>62</sup> But politics, like any system, has to have rules of entry and has to be made administratively workable. The question is how to think about access rules given the need to administer the complicated process of holding primaries, printing ballots, establishing eligibility rules, and so forth. Cain (2001) and Hasen (1998) argue that more electoral choice, at least when defined as an increase in the number of parties viable in the system, does not necessarily improve a democratic system and that there is no necessary reason to believe that more parties improve the system. On this view, the absence of an overriding normative theory means that the choice of background rules should be left to the political process and that proper role of the courts is to stay on the sidelines (Cain 2001). The political competition model is more interventionist against rules inspired by incumbent officials decreeing that ease of challenger entry is undesirable; just because plurality voting rules “tend to produce two-party politics does not mean that courts should deduce a general license for those parties to further entrench the two-party system” (Issacharoff and Pildes 1998, pp. 679-80).

### **Conclusion: Directions for the future in the law of democracy**

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<sup>62</sup> For instance, see *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii’s ban on write-in voting) and *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (upholding Minnesota’s prohibition on fusion candidates).

For much of American history, the political and legal issues surrounding the franchise were dominated by the types of exclusions that the society would permit. Exclusions from the franchise based on property-holding, race, and gender each took their turn as dominant issues in American democracy. When American law entered the political thicket in the early 1960s, the issue of status-based exclusions based on race continued to dominate the American political landscape.

Much has changed in the lived experience of American democracy, and much has changed as well in legal scholarship. Perhaps the greatest development – other than the emergence of an independent field of study – has been the effort to provide a comprehensive structural account of democratic politics, as opposed to the traditional rights paradigm, as a given. While most legal scholars adopt a structural approach to election law, it still remains unclear how best to operationalize this theory.

This is true across several different domains. The first is dealing with first-order problems of fairness in electoral outcomes, as with the persistent problem of minority voting rights. Another is to see to what extent partisan competition can be harnessed to improve the functioning of political institutions (as with bipartisan election boards) or to what extent control in nonpublic hands risks self-serving behavior (as with bipartisan agreements on redistricting).

Most centrally, however, legal scholarship must wrestle with the proper divide between legal intervention into the structure of politics, primarily in the form of constitutional law, and when politics should be allowed to work through its own institutional form. Once the political question doctrine stepped aside, there was a critical need for new boundaries to limit potential court intervention into elections – including, as with *Bush v. Gore*,<sup>63</sup> intervening to decide the outcome of elections (Karlan 2002). This is the driving force behind the debate of whether

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<sup>63</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

competition can ever be an adequate guide for courts in the political arena. Although the concept of process theory has been around at least since *Carolene Products*,<sup>64</sup> the bounds of that with regard to court-policing of politics is still relatively underdeveloped (Dorf and Issacharoff 2001). All this pushes in the direction of “a structural account that seeks to understand the pathologies of the political process in institutional terms” (Charles, 2007, p. 657).

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<sup>64</sup> United States v. Carolene Products, 304 U.S. 144 (1938).

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