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6-25-2006

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## The Place of Competition in American Election Law

Nathaniel Persily

In recent years it has become fashionable for legal academics to conceive of problems in American election law as ones concerning regulation of the political marketplace as opposed to infringements on constitutionally guaranteed individual or associational rights.<sup>1</sup> This shift in scholarly attention derives from several sources. First, although new challenges such as increased disfranchisement of felons and restrictive voter identification provisions have emerged, most of the classic barriers to participation have been replaced with complicated and subtle strategies dedicated to maintaining incumbent parties and officeholders in their current positions of power. Second, while often phrased in the language of individual rights derived from earlier cases, the alleged harm these new strategies cause is broadly shared and systemic (a harm to the “polity”), as opposed to discrete and targeted. The constitutional material used to redress government infringements of individual political rights, the argument goes, is ill-suited to the task of regulating political

Thanks are owed to Dana Powers, Javier Serrano, David Spiegel, Erika Wayne, and Richard Winger for assistance with this chapter.

1. See, for example, Garrett (1999, 2004); Hasen (1998); Issacharoff (2000, 2001, 2002, 2004); Issacharoff and Pildes (1998); Karlan (1999); Levinson (2000); Lowenstein (2000); Persily (2001a, 2001b, 2002); Persily and Cain (2000); Pildes (1999, 2004, 2006).

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monopolies or duopolies or of checking self-serving moves by incumbents. Finally, unprecedented parity in membership of the national political parties, ideological polarization among officeholders, and remarkable rates of incumbent reelection have given rise to fears that self-serving election laws have made the electoral system unresponsive and unrepresentative of the underlying electorate. Or, even if the law is not responsible, both statutes and judge-made constitutional law might help correct these problems.

The task of this chapter is to identify the problem of diminished political competition, describe the relevant legal analogies concerning regulation of economic competition, and explain how the law shapes the competitive environment for elections. I also detail how Supreme Court justices have sometimes tried to incorporate competitiveness concerns into their election law decisions in cases concerning ballot access, redistricting, campaign finance, party reform, and term limits. For the most part, constitutional law proves to be both a blunt and a coarse instrument for addressing excesses of partisan greed or self-interest, but justices of varying ideological leanings have invoked such concerns (usually in dissent) to highlight why one or another election law violates the Constitution.

### **The Definition, Purpose and Tradeoffs of Electoral Competition**

Although the other chapters in this volume do a good job of assessing the level of competition in American elections, it is worth spending a few paragraphs here identifying the legally relevant measures of competition. The specific concerns of political scientists may differ considerably from those of lawyers and judges, though, and the law may be able to shape the competitive environment in some respects, but not others. Furthermore, if judges are to create or administer a legal regime with promoting competition as a guidepost, we need to know how better to define such a goal.

Leaving aside for the moment the normative question as to whether competition is an inherent good, and the empirical questions as to whether elections today are, in fact, uniquely uncompetitive and what the causes of the lack of competitiveness might be, we can easily identify the features of an uncompetitive electoral system. The following constitutes a nonexhaustive list:

—Rates of contestation: How many races go uncontested and how many parties and candidates tend to appear on the primary and general election ballot?

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—Incumbent reelection rates: How often do incumbents get reelected? How much of an electoral advantage do incumbents have over challengers?

—Actual or expected margins of victory: Do winners usually win by a lot? What is the expected vote share of the candidates competing in a given election?

—Rates of turnover and length of time in office: How often do open seats materialize? How stable is the membership in the legislature from one election to the next? What is the average length of tenure in office?

—Changes in control of government: How likely or frequently is there a change in which party controls the legislature or government?

Different election laws will have different competition-related effects, and maximizing competitiveness along one dimension might diminish it on another. Partisan gerrymanders may decrease competition for control of legislative chambers, for example, but they may increase the competitiveness of many individual districts where the majority party has spread its supporters too thin. Term limits, almost by definition, will lead to greater turnover in government, but may lead to less contestation and higher margins of victory in the years when incumbents run for reelection because challengers will bide their time until the seat opens up.

Not only should we be aware of the different dimensions of political competition in our assessment of legal strategies to increase them, but we should acknowledge that political competition is primarily a means to other ends: namely, greater accountability, responsiveness, representation, and participation in government. Competition fosters greater accountability, the argument goes, by keeping legislators honest with the omnipresent threat that they might lose their jobs. It also makes elections meaningful (responsive) by translating shifts in voter preferences into shifts in the partisan competition of the legislature. Moreover, others argue that competitive districts lead to less bias or polarization in the legislature: they maintain that if districts are more balanced politically then their representatives will be more moderate than if the districts are heavily skewed toward one or the other party.<sup>2</sup> Likewise, in such districts perhaps turnout will increase as parties and candidates put greater effort into mobilizing voters, who also might feel their vote has more value than in a district where the victor is all but assured.

Whether electoral competition produces the alleged benefits of responsiveness, accountability, representation, and participation is a matter of empirical debate, as are the alleged tradeoffs from a pro-competition election

2. Issacharoff (2004); Eilperin (2006).

law regime. Critics point to the fact that a singular focus on increasing competitiveness could lead to a very unrepresentative legislature, if, for example, small shifts in voter preferences in many evenly split districts led to heavy overrepresentation of the dominant party in the legislature.<sup>3</sup> Just as a redistricting plan filled with noncompetitive districts could be biased in favor of the political extremes, so too competitive districts could be biased in favor of the moderate median voter. Finally, although foreordained, noncompetitive elections, in theory, might alienate voters who think their vote does not matter, the same could be true with respect to competitive election campaigns with their higher costs and acrimony and with their guarantee that close to half of the electorate will have voted for the loser.

### Importing Competition from Corporate Law into Election Law

The above description of the concept, benefits, and tradeoffs of competition is useful in assessing the constitutional importance (if any) of political competition. On the one hand, the Constitution is silent on the topic of electoral competition, as it presupposes that elections and the franchise can be largely regulated by state legislatures and Congress.<sup>4</sup> On the other hand, article 4, section 4 of the Constitution provides that “the United States shall guarantee to every State in this Union a Republican Form of Government,” and the notion that totally uncompetitive elections might suggest something less than republicanism does not constitute a radical idea. Although the courts have not enforced that constitutional command, they have found other avenues—principally in the First Amendment and the Equal Protection Clause of the Fourteenth Amendment—to derive a right to vote and to delineate permissible and impermissible forms of political regulation. Both of those provisions, as discussed further in the cases in the next section, establish norms against unreasonable treatment in favor of one group, association, or set of ideas to the detriment of another. Those who would work within the current constitutional doctrine to further judicial innovations in the direction of greater

3. Persily (2002).

4. Article I, section 4 of the Constitution provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.” Some have recently latched onto this phrase to suggest that this power to regulate federal elections does not include the power to remove from them any competitive content. Pildes (2006); Brief of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes as Amici Curiae in Support of Appellants at 1, *League of United Latin Am. Citizens v. Perry*, Nos. 05-204, 05-254, 05-276, 05-439 (U.S. Aug. 11, 2005).

political competition view self-serving election laws as equal to any others that reinforce the position of the already powerful or limit the permissible scope of debate.<sup>5</sup>

Rather than obsessing over the textual constitutional hook for a political markets theory of election law, the new generation of scholarship advocating this view focuses on analogies to corporate law. In particular, Samuel Issacharoff and Richard Pildes's seminal article that redirected the focus of the legal academy toward barriers to electoral competition attempted to find analogies in antitrust law and the law governing the market for corporate control.<sup>6</sup> In the economic sphere, these two bodies of law serve to check actions by firms to diminish competition for consumers and actions by managers to insulate themselves from replacement. In both contexts the bad behavior that judicial action restrains concerns an abuse of economic power to the detriment of some group (consumers, shareholders, competitors) for whom vigorous competition otherwise would be expected to provide benefits (lower-priced, high-quality products or shares of greater value).

The analogy to antitrust is straightforward: just as a firm can strategize to become an economic monopolist or a set of firms can behave like a cartel, so can one or two parties behave in ways to diminish political competition. Whereas in the economic sphere competition keeps firms honest by forcing them to strive toward lower prices and better quality in order to win over consumers, in the political realm competition could force parties and officeholders to be honest—that is, not to stray too far from the median voter or not to deliver a low-quality “product” (for example, unresponsive legislators or poor constituent service). Political monopolies or duopolies, under this view, lead to unrepresentative and unresponsive government as reflected in politicians who are “out of touch” and legislatures that ignore shifts in voter preferences.

The analogy to the market for corporate control comes from the identification of a similar problem: incumbents' use of their lawmaking or rule-writing power to insulate themselves from competition that might result in their losing their jobs. In the case of a typical “poison pill,” directors seeking to prevent a takeover will bind a corporation into agreements that then make the corporation less attractive to outsiders who may be bidding for control. As a result, the shareholders lose the potential benefit in an increased share price that would inure to them if competition for control of the corporation were unfettered.

5. Ely (1980).

6. Issacharoff and Pildes (1998).

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So too with politics, the argument goes. Incumbent politicians can write election laws to diminish the chance that viable competitors will emerge and to ensure that they do not lose their jobs. For those who urge it, judicial action in both spheres prevents some breach of a duty of loyalty to shareholders or constituents when the managers or incumbents place their personal interest over the firm's or public's interest. Judicial oversight can check abuses of power by those in charge by removing conflicts of interest, and by ensuring that fidelity to one's faction or firm does not lead to monopoly politics or political market breakdown.

This thumbnail sketch of the relevant corporate law analogies is necessarily a caricature of what are complicated and developing concepts in a vast area of law. An active theoretical and empirical debate exists over what constitutes a competitive market or whether "poison pills" actually harm shareholders in the short or long run. Moreover, the analogy to politics fits uncomfortably: we do not have a metric akin to price with which to measure the relative desirability of government policy to constituents. We also do not have many market analogies that produce natural duopolies similar to those produced by single-member election districts operating under plurality-based rules. Even so, conceptualizing election law problems as problems of competition, as opposed to group or individual rights, might lead to different judicial policymaking, or at least to a redefinition of the nature of the problem litigation in this arena is designed to remedy.

### How the Law Shapes the Competitive Environment

Incumbent parties and officeholders can use election law in any number of ways to hobble the competitive position of outsiders. They can raise the barriers to entry, skew or divide up the relevant market, or sabotage competitors' efforts to win over voters. Judges are in the best position to regulate anticompetitive behavior, it is thought, because lawmakers will be unwilling to rewrite the rules in ways that threaten their own positions of power. Just as they can best protect powerless political minorities who have no chance of gaining control of government, judges are also institutionally situated to prevent the political foxes from guarding the henhouse and to clear the "channels of political change."<sup>7</sup> Despite the ominous predictions of dissenters, our experience with the one-person, one-vote cases demonstrates that the courts, on occasion, can break political strangleholds and do so without losing credibility or inviting backlash.

7. Ely (1980); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

As difficult as it might be for judges to assess competitive economic markets, though, regulating or promoting political competition presents greater challenges given the few articulable constitutional standards available. As mentioned, there is no agreed upon indicator for political market breakdown or any obvious way to prevent it. In many, if not most, election law contexts a court adopting the political markets approach can do no better than declare that those in charge simply went too far, were too greedy, or were too hostile to their opponents. In the case law concerning ballot access, redistricting, campaign finance, term limits, and regulation of party primaries, the Supreme Court has not identified incumbent protection—whether of individual officeholders or dominant parties—as an impermissible motivation. Indeed, in several contexts it has specifically given its blessing to anticompetitive state action in the election law arena.

Whether courts intend it or not, judicial decisions shape the environment for electoral competition. Even if they do not reference competitiveness concerns explicitly, the courts' decisions whether and how to be involved in a domain of election law affect the strategies of the actors seeking to immunize themselves from competition. Involvement by the judiciary, whether justified under the First and Fourteenth Amendment or otherwise, constrains the available options for parties and politicians seeking to entrench themselves or hobble their competitors. Moreover, litigation over election laws has become part of the competition for office and power itself, as lawyers fight out the ground rules for how and when votes will matter.

What follows in the remainder of this chapter is a cataloguing of the case law that bears on the topic of electoral competition, even though majority opinions rarely analyze an issue from a political markets perspective. With that said, one can see flickers of the competitiveness rationale in the debates among the justices in these cases, even if the argument rarely wins over a majority. For each topic, I also try to sketch out the proposals often made to judges and legislatures to increase electoral competition.

### *Ballot Access*

Through regulation of the number of parties or candidates appearing on the ballot, those with the power to write electoral rules can raise the barriers to entry for new participants in the electoral system. Competition in this realm focuses on levels of (or at least the potential for) contestation. A true antitrust approach to politics would seek to ensure that enough parties and candidates appear on the ballot, such that elections actually reflect voter demand instead of being the product of the artificial constraints imposed by



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the dominant parties crafting the law. Perhaps because it provides the best analogy to antitrust, ballot access law is the only arena of election law where the Supreme Court has explicitly analyzed the problem from the standpoint of its anticompetitive effects. However, because it has clung to available doctrine emphasizing competition in the marketplace of ideas as opposed to competition for office per se, the marketlike language the Court employs supports a metaphor more than it pushes a theory of democracy.

Restrictions on ballot access endanger First Amendment freedoms of speech and association when they curtail a voter's ability to express his preference on the ballot and associate with the candidate of his choosing. Moreover, the ballot access rules can chill the participation of parties and candidates in campaigns, thereby narrowing the scope of political debate, and as such the Court has borrowed liberally from First Amendment precedent emphasizing the importance of a marketplace of ideas. Of course, ballots are not public forums, and the First Amendment does not require that the number of "speakers" allowed access to the ballot be comparable to that allowed on the Boston Commons. Therefore, the Court is always confronted with the task of balancing between the state's interests in preserving order and preventing confusion and the party, voter, and candidate's right to express themselves in the campaign and on the ballot.

It is worth excerpting at length the few cases that place the market metaphor front and center. *Williams v. Rhodes*, which struck down a 15 percent signature requirement for minor parties attempting to get on the Ohio presidential ballot, clarified that ballot regulations favoring the Democratic and Republican parties, in particular, raise serious constitutional questions: "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."<sup>8</sup> *Anderson v. Celebrezze*, which struck down early filing deadlines that prevented independent candidate John Anderson from getting on the Ohio ballot in 1980, sounded a similar theme:

By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside the two major parties have been fertile sources of new ideas and new programs;

8. *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment—“a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,”—are served when election campaigns are not monopolized by the existing political parties.<sup>9</sup>

For all the flowery talk about competition among candidates, parties, and ideas, however, these early signals of an aggressive judicial role in eliminating barriers to entry have not carried the analogy too far. In fact, while *Williams v. Rhodes* may stand for the proposition that ballot regulations cannot advantage the Democratic and Republican parties, in particular, *Timmons v. Twin Cities Area New Party*, makes clear that such laws can be biased in favor of a two-party system.<sup>10</sup> In striking down Minnesota’s ban on fusion candidacies, which prohibited a candidate from being the nominee of more than one political party, the Court explained: “[T]he States’ interest [in political stability] permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and that temper the destabilizing effects of party-splintering and excessive factionalism. The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.” In other words, just as the single-member district system should not raise judicial eyebrows because of its bias in favor of two parties, so too regulations of the ballot can naturally be biased in favor of a duopoly. Of course, the practical effect of such a rule is to bias the system both in favor of two parties in the abstract and in favor of the current two parties in control.

While paying lip service to the notion that the barriers to political market entry should not be too high, the Supreme Court has stressed that there is no “litmus-paper test” that can separate valid from invalid ballot access restrictions.<sup>11</sup> Indeed, one cannot avoid a rule of decision in these cases that avoids a totality-of-the-circumstances type of analysis. The actual “test,” if one can call it that, applied in such cases is the following:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the “character and

9. *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (internal citations omitted).

10. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 382 (1997).

11. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

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magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.”<sup>12</sup>

All of the work in this analysis is done at the front end with the decision concerning whether the burdens imposed are severe. Rarely, if ever, will a court determine a severe burden to be constitutional or a nonsevere burden to be unconstitutional. The severity of the burden, though, is on rights of expression and association, not on the competitive position of minor parties. A ballot access regime that protects minor parties’ ability to get their message out will usually be upheld, despite the fact that it ensures they will not compete effectively against the two major parties. This is true even when the context is a complete ban on write-in voting, which dissenters viewed as entrenching a single party in office.<sup>13</sup>

For the most part, a similar type of analysis is at work whenever courts consider barriers to entry by minor parties or independent candidates: for example, in the context of candidate debates or receipt of public funding.<sup>14</sup> Administrative necessities, scarce resources (whether ballot positions, time in a debate, or the amount of money to be distributed), and a desire to draw the line somewhere lead inevitably to context-specific decisions about how burdensome or necessary the regulations are. In general, when it presents itself, the competition argument is not so much about electoral competition as it is about promoting the marketplace of ideas, with marginal candidates and parties tolerated but removed as threats to the two parties’ hegemony.

It is also somewhat unclear how a political antitrust approach would differ from the one currently in place. A presidential system with single-member

12. *Timmons*, 520 U.S., 358 (internal citations omitted).

13. *Burdick v. Takushi*, 504 U.S. 428, 444 (1992) (Kennedy, J., dissenting). Justice Kennedy viewed Hawaii’s ban on write-in votes as impermissibly advantaging the dominant Democratic Party: “The majority’s approval of Hawaii’s ban is ironic at a time when the new democracies in foreign countries strive to emerge from an era of sham elections in which the name of the ruling party candidate was the only one on the ballot. Hawaii does not impose as severe a restriction on the right to vote, but it imposes a restriction that has a haunting similarity in its tendency to exact severe penalties for one who does anything but vote the dominant party ballot.”

14. *Arkansas Educational Television Comm’n v. Forbes*, 5235 U.S. 666 (1998).

districts and plurality voting rules is biased in favor of two parties. In such a system, minor parties and independent candidates pose little threat of replacement and have claimed only sporadic and localized electoral successes. Their *competition* with the major-party candidates manifests itself in their offering ideas that influence the campaigns and incumbents' policies (as already recognized in the jurisprudence) and in the threat they pose from spoiling the election (à la Nader in the 2000 election). At most, a jurisprudence focused on the value of contestation would look askance at those states (such as Florida, Georgia, Arkansas, and West Virginia) that had fewer than two candidates, on average, appearing on ballots for the 2004 elections to the House of Representatives.<sup>15</sup> In the end, though, adopting such an approach would do little more than establish a rule that ballot access requirements cannot be so high as to make contestation unlikely.

### *Redistricting*

The Texas redistricting controversy, as well as failed redistricting reform initiatives in Ohio and California, has placed redistricting at the top of the reform agenda.<sup>16</sup> The grab bag of problems that proposed reforms (either judicial or legislative) target are some subset of those described above—low turnover, few high-quality challengers, high victory margins, low responsiveness, heavy bias, and increasing polarization. The spate of gerrymandering in the 2000 round, followed as it was by uncompetitive elections in many House districts and biased delegations in several states, has caused many to blame redistricting for one or another democratic malady or at least to look to redistricting reform as a potential cure.<sup>17</sup>

Despite the urgings of plaintiffs and academics, thus far the political markets approach has not won over a majority of the Court in the gerrymandering cases. Indeed, while some dissenting justices may mention “competition,” for the most part, the Court has been preoccupied with issues of representation and bias. Such is the case when the Court has considered either partisan gerrymanders or bipartisan gerrymanders. The injury, to the extent that one exists and has remained unremedied, is conceived as underrepresentation or the dilution of a group's votes.

*Bipartisan and Incumbent-Protecting Gerrymanders.* Although complaints against gerrymandering take many forms, those who worry about intra-

15. Richard Winger, “How to Compare U.S. House Ballot Access,” *Ballot Access News*, May, 5, 2005 ([www.ballot-access.org/2005/0505.html](http://www.ballot-access.org/2005/0505.html)).

16. Reform Institute (2005).

17. Pildes (2006); Mann and Cain (2005).

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district competition focus on districting plans that divide the state into safe Republican and Democratic enclaves or otherwise protect incumbents from effective challengers.<sup>18</sup> As noted above, this critique usually dovetails with a concern about polarization, since it is presumed that politically homogeneous districts will produce representatives farther away from the median voter in the given state. Not only has the Supreme Court failed to entertain this critique; it has all but blessed incumbent protection as a legitimate state interest and bipartisan gerrymanders as furthering a rational policy of proportional representation.

With respect to bipartisan gerrymanders, the only case directly on point is *Gaffney v. Cummings*.<sup>19</sup> There the Court upheld a plan that divided the state into safe Democratic and Republican strongholds in an effort to create a legislature that mirrored the partisan balance in the state. Doing so was not only constitutionally permissible but arguably desirable. The Court explained that “judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.”<sup>20</sup> Because it assessed the potential constitutional injury solely in terms of representation in the legislature rather than competition within the district, the Court found no problem with bipartisan gerrymandering.

In other contexts, the Court has even gone so far as to declare incumbent protection to be a legitimate (and traditional) districting principle.<sup>21</sup> In fact, protection of incumbents<sup>22</sup> or the creation of a safe district for a party<sup>23</sup> can

18. See Issacharoff (2002, p. 594); Persily (2002, p. 649)..

19. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

20. *Gaffney v. Cummings*, 753.

21. *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966) (“The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.”); *White v. Weiser*, 412 U.S., 797. See also *Johnson v. Miller*, 922 F. Supp., 1565 (finding that the protection of incumbents was a legitimate consideration for a court-drawn plan); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 647 (D.S.C. 2002) (finding incumbent protection to be a traditional state interest in South Carolina); *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688–89 (D. Ariz. 1992) (three-judge court) (“The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. . . . The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering” [citation omitted]); *Prosser v. Elections Bd.*, 793 F. Supp. 859, 871 (W.D. Wis. 1992) (discussing the court plan’s lack of incumbent pairings and the correlative avoidance of “perturbation in the political balance of the state”).

22. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (“We have recognized incumbency protection, at least in the form of avoiding contests between incumbents, as a legitimate state goal.”).

23. See *Easley v. Cromartie*, 532 U.S. 234 (2001).

be a defense to an otherwise unconstitutional racial gerrymander. In other words, one way for a jurisdiction to defend a district that might raise concerns because it used race predominantly would be to argue that it was drawn to be a safe Democratic district or one that avoids the pairing of two incumbents. Far from suggesting constitutional liability because of its anticompetitive effect, incumbent protection could be the legal saving grace of a district.

*Partisan Gerrymanders.* Given the voluminous discussion and briefing connected to the two high-profile cases of partisan gerrymandering the Supreme Court has considered in the past four years, precious little remains to be said about the jurisprudential difficulties such cases present. From a political markets approach, one would consider partisan gerrymanders to be a means through which the party in control of the legislature undercuts the competitive position of the “out” party that otherwise might be in a better position to win a greater number of seats and perhaps control of the legislature. In practice, dominant parties tamper with the market for legislative control by packing their opponents into a few safe districts (packing), spreading their supporters efficiently (cracking), and pairing incumbents so as to favor the party in power (kidnapping). Some partisan gerrymanders do not look characteristically different from bipartisan gerrymanders, since shoring up the partisan balance of the status quo may be the most efficient strategy for insulating the dominant party from challenge.

Dissenters in the recent case concerning a challenge to Pennsylvania’s congressional districts, *Vieth v. Jubelirer*, have appeared concerned about the use of partisan gerrymanders to entrench political minorities and hinder political competition.<sup>24</sup> As Justice Souter’s dissent explained: “the Court’s job must be to identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.”<sup>25</sup> While all those who would provide a judicial check on gerrymandering worry about the bias such gerrymanders produce, Justice Stephen Breyer has focused on the possibility that through gerrymandering a minority party might be able to entrench itself such that any change in the partisan preferences of the electorate would not translate into electoral risk. This argument is best suited to

24. *Vieth v. Jubelirer*, 541 U.S. 267, 361 (2004) (Breyer, J., dissenting) (“political gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification.”); *idem.*, 318 (Stevens, J., dissenting) (“In my view, when partisanship is the legislature’s sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially.”).

25. *Vieth v. Jubelirer*, 344 (Souter, J., dissenting).

redistricting of the state legislature, as opposed to Congress, since entrenchment only really occurs when a majority party draws its own district lines, rather than those of the congressional delegation it sends to Washington.<sup>26</sup> Moreover, such concerns are less relevant to gerrymanders like that which occurred in 2003 in Texas where the majority increases its representation as opposed to a minority insulating itself from challenge. Nevertheless, drawing on the concerns that motivated the Court to enter the political thicket with the one-person, one-vote rule, Breyer warns of the “unjustified use of political factors to entrench a minority in power.” Just as representatives from rural districts maintained their power by leaving century-old district lines in place, parties that redraw lines to insulate themselves from challenges to their hegemony should violate the Equal Protection Clause.

For the moment (which is to say, until the Court renders a decision in the Texas case), claims of partisan gerrymandering remain justiciable but unsuccessful. The absence of any judicially administrable standards has convinced four justices that courts should remove themselves completely from this arena. Entrenchment in this realm usually does not present a constitutionally cognizable concern, although unlike protection of specific incumbents, no one has described it as a legitimate interest.<sup>27</sup> Because the success of an entrenchment strategy is only recognizable after the fact—that is, after the gerrymander produces warped results over the course of several elections—and because the line between entrenchment strategies and political skill may be hard to discern, the Court has not embraced an approach to districting that would prevent dominant parties from insulating themselves from competition.

Plenty such judicial decision rules exist, however. In fact, each of the three *Vieth* dissents proffered its own standard for excessive partisan gerrymandering, and all of them differed from the standards suggested by the plaintiffs in that case or established by the previous precedent.<sup>28</sup> For the most part, all of those standards attempted to establish criteria as to when partisanship had infected the redistricting process too much, according to irregularities of process, intentions of the line-drawers, strangeness of the districts, or the dis-

26. One might say that the alignment and strategic coordination of state and national parties allows one to broaden the entrenchment argument beyond the drawing of one’s own districts to the drawing of fellow partisans’ districts in an effort to maintain control of the U.S. House of Representatives.

27. Even the plurality in *Vieth* assumed that “the excessive injection of politics is unlawful.” *Vieth v. Jubelirer*, 293 (plurality opinion). That opinion wanted to deem the partisan gerrymandering claim nonjusticiable because of the absence of any judicially administrable standards.

28. *Davis v. Bandemer*, 478 U.S. 109 (1986).

proportionality of results. In the recent Texas gerrymandering case, a group of political scientists has urged the Court to adopt a rule of “partisan symmetry,” which would require redistricting plans to treat each party equally with respect to the propensity of shifts in voter preferences to be reflected in shifts in legislative composition.<sup>29</sup>

In addition to these standards urged in the context of the partisan gerrymandering cases, reformers have proposed a variety of legislative and judicial remedies for the anticompetitive effects of gerrymandering. The most extreme may be to mandate—either by statute or judicial decree—a requirement that districts be drawn with the goal of increasing competition. Arizona does so in its constitution. In theory, judges could interpret such a requirement in the U.S. Constitution, striking down districting plans unless a certain share of districts have a partisan balance that suggests the election will be competitive. (Again, of course, the questions are what constitutes a competitive district, how many districts need to be competitive, what lengths one should go to contort a state so that districts can be competitive, and so forth.) Somewhat less drastic would be a requirement akin to that governing the redistricting process in Iowa, which forbids partisanship or incumbency to be taken into account in the redistricting process. Ignoring such factors (or requiring that only considerations such as compactness and respect for political subdivision lines influence redistricting) does not necessarily lead to greater competition, especially in the many states with stark political segregation. However, such requirements, if followed and enforced, at least prevent the use of political criteria in the furtherance of a noncompetitive districting plan.

In addition to these substantive proposals, procedural requirements enforced by judges or inserted into statutes could mute the anticompetitive tendencies of politicians drawing their own districts. One option that Samuel Issacharoff has advocated is for judges to enforce a prophylactic rule deeming any redistricting conducted by self-interested officials to be unconstitutional.<sup>30</sup> Many states indeed conduct redistricting through commissions, although such institutions vary considerably in their degree of insulation from political pressures. The proposed but ultimately defeated initiatives in Ohio and California would have had retired judges appoint redistricting officials or draw the lines themselves. Others would urge redistricting by a commission made up of ordinary citizens selected through some aspirational nonpartisan process.

29. Grofman and King (2006).

30. Issacharoff (2002).



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As we have seen in the recent cases and failed initiatives, redistricting reform is easier said than done. Judges cannot agree on when partisan concerns have too much influence over the line-drawing process, and voters, who would supposedly benefit from such measures, are not exactly enthusiastic about recent reform proposals. Without action by the judiciary or through direct democracy, though, redistricting reform will be left to the politicians who have the least incentive to change the process.

*Campaign Finance Regulations*

Regulation of campaign finance presents an interesting problem for advocates of a market approach to election law regulation. Antitrust- or anti-entrenchment-style arguments concerning the effect of the campaign finance regime on incumbents and challengers are thrown about by both reformers and their opponents. When the cases come to the Court, however, a majority has yet to endorse this approach, relying instead on the formulaic arguments about the speech and associational interests campaign finance regulations present. For the most part, the Court upholds limits on contributions and strikes down limits on expenditures (except in the special context of corporate or union electioneering) based on the gravity of the speech interests implicated by the restrictions. Once again, however, dissenters who urge greater judicial scrutiny of the anticompetitive effects of these types of election laws have focused on the relative benefits they bestow on incumbents and challengers.

On the one hand, reformers argue that incumbents have a disproportionate advantage when it comes to fundraising, so restrictions on contributions or expenditures are necessary to allow challengers to mount effective campaigns. Like a firm with bountiful marketing resources available to drown out an upstart competitor's advertisements, incumbents have such a natural advantage in fundraising that legal restrictions are necessary to "equalize the playing field." At least outside the unique context of corporate and union electioneering, the Court has specifically and repeatedly rejected such equalization as a legitimate reason for regulating campaign expenditures or contributions.<sup>31</sup> Although expressed in classic First Amendment form, the Court has reasoned that it is impermissible to favor one person's speech over that of another. Thus, preventing corruption or its appearance, but not promoting competition by leveling the electoral playing field, is a permissible interest for regulating campaign contributions.

31. *Buckley v. Valeo*, 424 U.S. 1, 25–27 (1976).

For critics of reform, the political markets approach rears its head in a critique of the incumbent-protecting effects of campaign finance reform. Because incumbents, given their name recognition and access to the perks of office, naturally have an electoral edge, restricting the flow of money into and out of campaigns places challengers at a distinct disadvantage in getting their message out.<sup>32</sup> In other words, the only way challengers can close the gap between themselves and incumbents is to raise and spend enormous sums to achieve name recognition and mobilize their electorate.

This latter argument has found its way into the opinions of Justices Antonin Scalia and Clarence Thomas. Consider Justice Scalia's assessment of the intentions behind the Bipartisan Campaign Reform Act, which banned soft money contributions to political parties and corporate and union treasury expenditures on electioneering advertisements:

To be sure, the legislation is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.

. . . . [T]he present legislation targets for prohibition certain categories of campaign speech that are particularly harmful to incumbents. Is it accidental, do you think, that incumbents raise about three times as much "hard money"—the sort of funding generally not restricted by this legislation—as do their challengers? Or that lobbyists (who seek the favor of incumbents) give 92 percent of their money in "hard" contributions? Is it an oversight, do you suppose, that the so-called "millionaire provisions" raise the contribution limit for a candidate running against an individual who devotes to the campaign (as challengers often do) great personal wealth, but do not raise the limit

32. See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 921 (1995) (Thomas, J., dissenting) ("Congress imposes spending and contribution limits in campaigns that 'can prevent challengers from spending more . . . to overcome their disadvantage and name recognition.' . . . Many observers believe that the campaign finance laws also give incumbents an 'enormous fund-raising edge' over their challengers by giving a large financing role to entities with incentives to curry favor with incumbents.") (internal citations omitted).

for a candidate running against an individual who devotes to the campaign (as incumbents often do) a massive election “war chest”? And is it mere happenstance, do you estimate, that national-party funding, which is severely limited by the Act, is more likely to assist cash-strapped challengers than flush-with-hard-money incumbents?<sup>33</sup>

This general theory concerning the appropriate suspicion that should be brought to evaluations of campaign finance reform has not found favor with the Court’s majority. However, on the specific question whether a campaign finance reform is appropriately tailored toward combating corruption or its appearance, the Court pays some lip service to competitiveness concerns. The Court has promised to strike down contribution limits that prevent a candidate from “amassing the resources necessary for effective advocacy”<sup>34</sup> or “drive the sound of the candidate’s voice below the level of notice,”<sup>35</sup> even if they are based on genuine intentions to combat corruption. This requirement has not proved too difficult for contribution limits to pass. For the most part, the Court has shown a remarkable level of deference to Congress and state legislatures in the exercise of their “expertise” concerning the conduct of campaigns. Far from demonstrating skepticism of politicians’ motives, the Court’s holdings and reasoning evince a level of trust sometimes even exceeding that brought to bear outside the election law context.<sup>36</sup>

While the litigation has focused on campaign contribution and expenditure limits, many reformers, recognizing that such regulations of the supply of money do not affect politicians’ demand, have turned to public financing

33. *McConnell v. Federal Election Com’n*, 540 U.S. 93, 249–50 (2003) (Scalia, J., dissenting) (internal citations omitted); see also *Colorado Republican Federal Campaign Committee v. Federal Election Com’n*, 518 U.S. 604, 644 n. 9 (1996) (Thomas, J., dissenting) (“There is good reason to think that campaign reform is an especially inappropriate area for judicial deference to legislative judgment. What the argument for deference fails to acknowledge is the potential for legislators to set the rules of the electoral game so as to keep themselves in power and to keep potential challengers out of it. Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups.”) (citations omitted).

34. *Buckley v. Valeo*, 21.

35. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 397 (2000).

36. True to his tendency as the most distrustful of politicians’ motives, Justice Stevens has issued words of caution concerning such deference, despite his pattern of upholding all sorts of reforms: “We should not defer in respect to whether [the state’s] solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge.” *Nixon v. Shrink Missouri Gov’t PAC*, 404 (Stevens, J., concurring).

to enhance electoral competition. The most recent empirical study of the effect of public financing argues: “There is no question that public funding programs have increased the pool of candidates willing and able to run for state legislative office. This effect is most pronounced for challengers, who were far more likely than incumbents to accept public funding. . . . Public funding appears to have increased the likelihood that an incumbent will have a competitive race.”<sup>37</sup> Although some argue that contribution restrictions also enhance competition, the fact that we live in an age of both unprecedented regulation of contributions and unparalleled incumbent reelection rates suggests that such an effect is quite minor. However, public funding programs vary considerably in the process by which they are funded, the incentives they provide for participation, the amounts they make available to candidates, and the restrictions they impose as a tradeoff for participation. They extend from inadequate programs with low participation to generous schemes with greater compliance. If public financing does in fact make elections more competitive, we should expect to see an effect only when such programs are well enough funded to engender widespread participation.

#### *Regulation of the Primary Electorate*

The political markets approach can be expanded beyond general elections to the regulation of party primary voters and candidates.<sup>38</sup> In such cases, the Court confronts state regulations that seek to tell a party who can and cannot vote in its primary. Although the Court usually considers these laws from the standpoint of the party’s associational rights and the right to choose its standard-bearer, in the background is always the question whether, through regulation of the primary, one party is attempting to hobble the competitive position of its opponent.

As with campaign finance, the political markets approach to primary election regulation often cuts in opposing directions. On the one hand, just as one firm ought not be able to dictate the way its competitor can choose its CEO, so too a party that crafts the nomination rules ought not be able to structure them in a way that gives it an advantage. On the other hand, party leaders can capture the nomination process and structure it in a way that hinders competition in both the primary and general elections. In effect, party leaders may have a conflict of interest when it comes to regulating their

37. Mayer, Werner, and Williams (2005).

38. I do not deal here with the context of primary ballot access because the analysis with respect to competition is the same as in the general election context. For a lengthy analysis of the relevant issues, see Persily (2001a).

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membership, thus the Court ought to allow for the membership (for example, through a ballot initiative) to check party leaders' pro-management selection policies.

Concerns about incumbent entrenchment usually present themselves when the state (that is, the party controlling the lawmaking process) prevents a party from opening itself to nonmembers. For example, in the case of *Tashjian v. Republican Party of Connecticut*, the Republican Party wanted to broaden its base of support by allowing independents to vote in its primary.<sup>39</sup> Doing so would presumably lead the party to nominate more moderate nominees (that is, nominees closer to the median voter) who would have a greater chance of winning general elections. State law, justified on the grounds of protecting the party from nominating candidates who did not share its message, prevented them from doing so. The Court found that the law abridged the party's right of expressive association, in part because it distrusted the "views of the State, which to some extent represent the views of one political party transiently enjoying majority power."<sup>40</sup>

The same concerns animated several opinions in a recent and similar case involving a challenge by the Libertarian Party to Oklahoma's law that prevented parties from allowing members of other parties to vote in their primary.<sup>41</sup> Although the majority opinion distinguished *Tashjian* and upheld the law, five justices signed on to opinions reflecting some concern about the potentially anticompetitive effect of this regulation or similar ones in the future. Justice Sandra Day O'Connor's concurrence (joined by Justice Breyer) explained:

Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. . . . As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted

39. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

40. *Tashjian v. Republican Party of Connecticut*, 224.

41. *Clingman v. Beaver*, 544 U.S. 581 (2005).

interests are not merely a pretext for exclusionary or anticompetitive restrictions.<sup>42</sup>

Justice Stevens's dissent (joined by Justices Souter and Ginsburg) was more adamant:

It is the [Libertarian Party's] belief that attracting a more diverse group of voters in its primary would enable it to select a more mainstream candidate who would be more viable in the general election. Like the Republicans in *Tashjian*, the [Libertarian Party] is cognizant of the fact that in order to enjoy success at the voting booth it must have support from voters who identify themselves as independents, Republicans, or Democrats.<sup>43</sup>

While focusing in general on the expressive associational right of a party to define the contours of its organization, critics of compelled open primaries also lodge a complaint founded on a political markets theory: namely, that forcing the party to accept outsiders could also hurt the chances of its nominee in the general election. In particular, advocates of closed primaries suggest that forcing a party to open its primary could subject it to raiding: that is, the strategic voting of nonmembers in an opposition party's primary so as to nominate a weaker opponent for the general election.<sup>44</sup> In theory, forcing a party to open itself up to a takeover could harm its ability to compete in elections. However, the empirical support for widespread raiding when primaries are opened up is quite thin.<sup>45</sup>

Outside the context of race discrimination, the Court has been uniformly protective of parties' ability to exclude voters the "state" wants to force into its primaries.<sup>46</sup> For the most part, the opinions in such cases reflect general concerns about parties' First Amendment right to select their standard-bearer and to be free from the primary regulations that adulterate the message of the party membership. When it comes to the parties' right to include outsiders, the case law is more mixed. The party has a constitutional right to include unaffiliated voters but not voters that have registered with another party.<sup>47</sup>

42. *Clingman v. Beaver*, 603 (O'Connor, J., concurring).

43. *Clingman v. Beaver*, 614 (Stevens, J., dissenting).

44. *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

45. Cain and Gerber (2002).

46. *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Democratic Party of the United States v. LaFollette*, 450 U.S. 107 (1981).

47. *Tashjian v. Republican Party of Connecticut*; *Clingman v. Beaver*.

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The effect of primary voter rules on levels of general election competition is not well understood; thus the character of a reform agenda founded on enhancing competition is unclear. I think it is fair to say that most reformers with such intentions prefer open systems to closed systems on the assumption that more opportunities for voter participation make the emergence of a quality challenger at some stage more likely, or may provide some incremental potential for accountability through the primary in districts where the general election is skewed in favor of one party. In addition, political marketers are naturally suspicious of party leaders whose incentives to keep the primary “pure” sometimes run contrary to those of a party membership who might welcome greater choice and access.

*Term Limits*

The nuclear weapon when it comes to enhancing competition is limiting the number of terms an individual can serve in office. If one’s measure of the competitiveness of an electoral system depends on turnover, length of time in office, or the number of open seats, term limits would appear to be about the most procompetitive measure a state could adopt. For state offices, state constitutional law governs, and voters acting through direct democracy have successfully limited the number of terms one can serve in the state legislature, as governor, or in any other office.<sup>48</sup> For Congress, however, the Court has struck down term limits as unconstitutional, and quite ironically, it has done so in the service of preventing incumbent manipulation of qualifications for office.

In *U.S. Term Limits v. Thornton*, the Court ruled unconstitutional a provision of the Arkansas constitution that prevented an incumbent member of Congress from appearing on the ballot if he or she had served a specified number of terms (two terms for U.S. senators and three terms for members of the House).<sup>49</sup> The Court held that the provisions of the U.S. Constitution setting forth the qualifications for those offices prevented either Congress or states from adding qualifications, such as the requirement that one would be disqualified to serve after a certain time spent in office. Moreover, in a later case, the Court went even further and struck down a state constitutional provision that did not limit the number of terms per se, but rather added a ballot notation indicating whether that candidate had supported term limits.<sup>50</sup>

48. Persily and Anderson (2005).

49. *U.S. Term Limits v. Thornton*.

50. *Cook v. Gralike*, 531 U.S. 510 (2001).

In both of these cases the Court noted the intent of the Framers of the Qualification Clauses that neither state legislatures, nor Congress itself, ought to be able to limit the types of people who could serve in the federal legislature. Echoing Madison, the Court explained that “reposing the power to adopt qualifications in Congress would lead to a self-perpetuating body to the detriment of the Republic,”<sup>51</sup> and citing Hamilton it described the state’s power to regulate elections as merely a “grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, [or] to favor or disfavor a class of candidates.”<sup>52</sup> In other words, the fear that incumbents might manipulate the qualifications for office to entrench themselves or to serve their own interests prevents voters from adopting term limits grounded on the exact same motivation.

This irony was not lost on Justice Thomas, who would have allowed states to adopt term limits. Pointing to incumbents’ “astonishingly high reelection rates” due to name recognition, campaign-related perks of office, and benefits with respect to campaign financing, Thomas warned that “current federal law (enacted, of course, by congressional incumbents) confers numerous advantages on incumbents, and these advantages are widely thought to make it significantly more difficult for challengers to defeat them.”<sup>53</sup> Installation of term limits or even the more conservative measure that forces incumbents to run as write-in candidates after serving a certain number of terms could counterbalance “the thumb on the . . . scale” that the law otherwise provides in favor of incumbent reelection. At the very least, argued Thomas, the Qualifications Clause does not force voters to accept as inevitable the possibility that the incumbency advantage could be so strong as to make elections an ineffective check on the other legal maneuvers politicians engage in to make themselves irremovable.

As Cain, Hanley, and Kousser’s contribution to this volume explains, the effect of term limits on competition has not exactly turned out as advertised. Quality challengers who previously may have taken a shot at an incumbent, now often bide their time until a seat becomes open. As a result, elections throughout an incumbent’s allotted terms may be less competitive, even though competition in open seats is more frequent and fierce.

51. *U.S. Term Limits v. Thornton*, 794 n. 10.

52. *U.S. Term Limits v. Thornton*, 833–34; *Cook v. Gralike*, 525 (noting the potential for ballot notations to “handicap candidates” by placing “their targets at a political disadvantage”).

53. *U.S. Term Limits v. Thornton*, 921 (Thomas, J., dissenting).



## Conclusion

As the media and reform groups have focused on the problem of safe districts and uncompetitive elections, so have legal scholars (and to a lesser extent judges) begun to think about how the Constitution might be viewed as regulating self-serving moves by incumbents. The solutions—to be found either in policy or in constitutional law—are not simple. We have become quite accustomed to thinking about election law controversies as battles between state interests and individual, associational, or group rights. Shifting focus toward the background conditions of the political market requires a reconceptualization of the judicial role as political trustbuster with the available decision-rule in contexts, such as partisan gerrymandering and ballot access, being no better than declaring that incumbents or the party or parties in power have gone “too far.” In other arenas, such as campaign finance, the judicial role would be geared more toward looking into the minds of the drafters of an election law to see if incumbent or party entrenchment constituted the true motivation of the law. As difficult as it may be to come up with administrable election law standards to promote competition, reformers will continue to view the courts as the most promising agents for “clear[ing] the channels of political change.”<sup>54</sup> The alternative—hoping that those in charge of the crafting of election laws will become amenable to rules that make their jobs less secure—has never shown much promise.

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54. Ely (1980, p. 105).

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