

New York University
School of Law

Public Law and Legal Theory Research Paper Series
Research Paper No. 56

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Richard H. Pildes

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THE INHERENT AUTHORITARIANISM IN DEMOCRATIC REGIMES

*Richard H. Pildes**

Published in OUT OF AND INTO AUTHORITARIANISM, pp.125-151 (Andras Sajo ed. 2002) (Kluwer Law International Publishers)

INTRODUCTION

Authoritarianism is an inherent structural tendency of democratic regimes. Constitutional theory and constitutional courts would do well to recognize this fact. Although the United States is viewed as the democratic country that, over the longest period of time, has most avoided this tendency, that is not quite accurate. For most of the 20th Century, an entire region of the country, the South, was a one-party political State. The Democratic Party had an unchallengeable monopoly on political power; there was no meaningful oppositional party, no likelihood that candidates from an opposing party would be able to challenge the existing exercise of political power, let alone be elected.¹ Even today, a few states in the United States retain this character as one-party political systems.²

If democracy means accountability of public officials to voters in elections that involve meaningful electoral competition,³ portions of the United States, for extended periods of time, have effectively been authoritarian regimes.

*Professor of Law, NYU School of Law. email address: rpildes@umich.edu

¹For the classic detailed histories of the process by which electoral rules were redesigned to create this one-party monopoly, see J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974); this work builds on the earlier important work of V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949).

²The State of Hawaii is for all practical purposes a one-party Democratic Party monopoly, as the United States Supreme Court recognized in *Burdick v. Takushi*, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting). Ironically, the Court there upheld a state law banning write-in voting; the Court accepted the State's justification that such a ban was an appropriate means of "avoiding the possibility of unrestrained factionalism." *Id.*, at 439-40. One might have thought that in a one-party state, a little unrestrained factionalism would be another way of describing competitive democratic politics. *Burdick* is a classic example of the United States Supreme Court's failure to perceive how electoral laws are often used to entrench dominant parties in power and eliminate the sources that might put competitive pressure on them.

³As one democratic theorist puts it, "[t]he step from having no elections to having genuine electoral competition is undoubtedly the major one on the road to democracy." Ian Budge, *The New Challenge of Direct Democracy* 179 (1996).

Nor was the absence of electoral competition the result of “natural” democratic processes or a mere reflection of the “preferences” of voters for one-party rule. It resulted instead from a fundamental characteristic that all democratic regimes should be recognized to face: the tendency of the partisan forces that gain temporary democratic control to attempt to leverage that control into more enduring and effective political domination. In the South for much of this century, this authoritarian control of politics was accomplished through techniques like the gerrymandering of election districts; the use of state law to shift electoral control back and forth from local to statewide level for various offices as doing so further the interest of the dominant party; the manipulation of the electorate through devices like poll taxes as pre-conditions to voting; and numerous others.⁴ In other contexts, the techniques by which existing political powers will, predictably, seek to entrench themselves can include regulation of how campaigns are financed; what qualifications candidates and parties must have to be eligible to compete in electoral politics; how political institutions are designed; and other process-defining choices. The specific mechanisms vary from country to country, but the fundamental paradox is the same: democratic processes must be structured through law, but those in control of designing those laws are themselves self-interested political actors. To be sure, constitutions seek to remove some of these issues from day-to-day democratic politics. But constitutions can provide only the skeletal frameworks for democratic institutions. Inevitably, ongoing regulation and oversight of democratic processes through further legal adjustment will be required. And inevitably, to the extent legislative bodies are the primary vehicle for designing those adjustments, the tendency to manipulate the laws of democracy to insulate existing political officials and parties from meaningful electoral competition will manifest itself. The accretion of anti-competitive electoral laws is one of the processes by which democratic regimes can slowly transform into authoritarian ones.

This essay seeks to identify this tendency as a fundamental, but largely neglected one, for constitutional analysis. Drawing on the American judicial experience, it also seeks to show how conventional frameworks of constitutional analysis -- especially the discourse of individual “rights” -- are badly organized to recognize and address this tendency. I will propose an alternative framework, one that suggests that constitutional law conceive of

⁴These techniques are documented in Kousser, *supra* note 1.

democratic politics less in terms of rights and more in terms of structures of competition characteristic of economic markets.⁵

Politics shares with all markets a vulnerability to anticompetitive behavior. In political markets, this takes the form of alteration of the rules of engagement to protect the established powers that be from the risk of successful challenge. This market analogy may be pushed one step further by viewing the elected officials of today as a managerial class, imperfectly accountable through periodic review by a diffuse body of equity holders denominated the electorate.

Like the managerial class well known to the laws of corporate governance, these political managers readily identify their stewardship with the interests of the corporate body they lead. Like their corporate counterparts, they will act in the name of the corporate entity to protect against outside challenges to their authority. Again like their corporate counterparts, they will use procedural devices implemented in their incumbent capacity to attempt to lockup their control.

Antitrust and private corporate law recognize these tendencies in private markets. At some point, robust and appropriate competition transmutes into monopolistic domination, as the recent Microsoft litigation illustrates. In free markets, the State stands apart from that competition and regulates its groundrules through antitrust and other laws. We need to begin to see politics in terms similar to markets: the organizations that compete in political markets -- principally, political parties -- will similarly seek to dominate and eliminate their competition. This is an inevitable tendency of the good electoral competition democracy seeks to encourage. But here, unlike private markets, there is no State that can stand above the competitive arena and ensure that the groundrules of robust and appropriate competition are maintained. For the State at any one moment in time is controlled by the very political and partisan forces that the State, in theory, is supposed to monitor and check. This, then, is a central task for constitutional analysis: how can constitutional law be structured to provide the equivalent of antitrust law to ensure that the groundrules of democratic politics remain robustly and appropriately competitive?

⁵For a fuller elaboration of this theory, see Richard H. Pildes, *A Theory of Political Competition*, 85 U. Va. L. Rev. 1605 (1999); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998). This is also one of the theoretical themes of the first casebook in the United States devoted to systematic study of the legal structures of democratic institutions. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 239 (1998).

I. THE ALLURE OF ROMANTIC INDIVIDUALISM

To provide an appropriate framework for constitutional oversight of democracy, it is first necessary to clear away two recurring mistakes that currently characterize the typical judicial approach to these questions, at least in the United States. The first is a myth of romantic individualism that exercises a dangerous hold over discussion of politics, in both public discourse and judicial decisions. This is the illusion that the ideal politics is one in which unmediated individuals are the key agents of electoral politics -- with individuals somehow exercising control, making decisions, and monitoring officials. The central fact of democratic politics in modern societies with universal suffrage and large territories is that individual participation can be meaningful only when mediated through organizational forms. The central organizational actors in politics are, of course, the political parties; but ideological groups, ideological, economic organizations, watchdog groups, and others play an important role also in well-functioning democratic regimes.⁶ Any constitutional law of democratic politics must begin by recognizing the organizational form of modern politics. Such a law must be designed with an understanding of organizational behavior, and the effects of legal rules on that behavior -- particularly that of the central vehicles through which individual views are mobilized and given effective expression, the political parties.

Several dangers flow from the judicial tendency to cast issues of democratic politics in terms of conventional "rights" adjudication. The one I will mention here is that decisions to uphold or reject claims of "right" frequently fail to appreciate the consequences of such rulings for the system of electoral politics overall. This can be true whether courts issue purportedly "liberal" decisions extending rights or "conservative" decisions rejecting such claims. Let me provide an example of the former: the United States Supreme Court held that constitutional principles of political equality required that representative institutions be composed of officials elected from election districts that have equal numbers of people.⁷ At the time of this decision, one technique by which existing officeholders entrenched themselves in power was through refusing to re-draw the boundaries of election districts as populations changed. By the time of the Court's decisions, the disparities were truly shocking: some districts had 41 times the number of people as others, so that voters in the large districts had only

⁶The centrality of organizations to modern politics is explored in Daniel R. Ortiz and Samuel Issacharoff, *Governing Through Intermediaries*, 85 Va. L. Rev. 1627 (1999).

⁷*Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

2.5% the power of voters in small districts. Put another way, 13 % of the voters could control a majority of legislative power in representative institutions.⁸ Existing legislators had no incentive to change this system because they were elected under it. This is precisely an example of the authoritarian tendency of democratic regimes, when electoral practices are controlled by existing political powers: where these disparities existed, government was effectively in the hands of a minority of voters, not the majority. The Supreme Court was right to unfreeze this situation and restore competition by requiring that election districts be re-drawn on a regular basis and have equal numbers of people.

But in reaching this result, the Court did not hold that the constitutional problem was that the districts had come to frustrate majoritarian democracy. Instead, the Court held that the districts violated the “right” of every voter to have his or her vote weighted exactly equally with every other voter.⁹ And this individualistic way of framing the constitutional approach came home to roost when the Court faced a very different context than the one it had initially confronted.¹⁰ A majority of voters in one state voted to design one chamber of the state legislature so that representation was by territorial subunits (counties) rather than by population. The reason for doing so was that voters in rural areas feared domination by the one large central city in the state; to ensure that these minorities were not swallowed up by the leviathan center city residents, voters throughout the state agreed to provide a degree of overrepresentation to these interests in the state Senate. The lower house continued to be based on population equality. Unlike the initial context, this was not a system in which majoritarian control of democracy was frustrated, with the state legislature in the hands of a small minority. Instead, this was a context in which the majority had agreed to cede some of its power to accommodate the minority; the majority had chosen an electoral system that it believed would be more generally perceived as legitimate and fair because credible protections had been built into representative institutions for minority voters. Far from being a perversion of democracy, this would seem to be an ideal form of democratic deliberation and choice.

⁸As was the case with the Alabama legislature at issue in *Reynolds v. Sims*, 377 US 533, 545 (1964).

⁹As the Court put it, “[t]o the extent that a citizen’s right to vote is debased, he is that much less of a citizen. . . . the weight of a citizen’s vote cannot be made to depend on where he lives.” 377 U.S., at 567.

¹⁰The case is *Lucas v. The Forth-Fourth General Assembly of the State of Colorado*, 377 U.S. 713 (1964).

Yet the United States Supreme Court held that the majority did not have power to cede some degree of control to the minority in this way. The Court treated the “right” of political equality it had previously recognized as a completely abstracted, individualized right; this right was an individual right of every voter to equal treatment that could not be violated regardless of the context or the reasons for doing so. Thus, regardless of whether a majority was ceding power to a minority, and regardless of whether there might be justifiable reasons for departing from strict equality of numbers to construct a more representative legislative body, such options were unconstitutional because they would violate the “right” to political equality. Indeed, the Court cited precedents on freedom of religious conscience: just as no majority could vote to deny the individual right to free religious conscience, the Court held that no majority could design democratic institutions to deny the “right” to political equality.¹¹

But when it comes to the design of democratic institutions, courts err to think in terms of intrinsic individual rights that stand against the majority’s control. The familiar model of “rights as trumps” is misplaced here.¹² The processes of electoral politics are designed not to realize conventional individual rights, but to achieve various common goods: to create a government that is responsive to the interests of its citizens; that can act effectively; that will be widely perceived as fair and legitimate; that will encourage political participation; that will represent the various interests of the community fairly. To the extent constitutional law conventionally invokes the language of rights, most of the rights of electoral politics should be seen as instrumental toward realizing the various goods that justify democratic elections in the first place. When courts oversee democratic politics, they should do by focusing on the structures of democracy at stake,

¹¹Citing the Court’s decision uphold the right to refuse to be forced into saluting the American flag, *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624 (1943), the Court asserted that “[a] citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.” That is certainly so when it comes to intrinsic rights of individual conscience; the question is whether it is the correct way to understand the rights in many cases involving the structure of democratic institutions.

¹²This metaphor is famously associated with Ronald Dworkin, *Taking Rights Seriously* (1977). For fuller discussion of why conventional rights analysis fails to appreciate the distinct nature of rights at issue in cases involving the design of democratic institutions, see Richard H. Pildes, *Two Conceptions of Rights in Cases Involving Political "Rights"* 34 *HOUS. L. REV.* 323 (1997); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 *TEXAS L. REV.* 1705 (1993); Samuel Issacharoff, *Polarized Voting And The Political Process: The Transformation of Voting Rights Jurisprudence*, 90 *MICH. L. REV.* 1833, 1856 (1992); Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 *U. CHI. LEGAL F.* 23; Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, And Constitutionalism*, 27 *J. LEGAL STUD.* 725 (1998);

not on abstracted, atomized, individual rights. Failing to do so in the context described led the United States Supreme Court to invalidate representative structures that were likely to be perceived as more representative and more legitimate than those that replaced them.

In sum, in cases involving democratic politics constitutional courts (at least, the United States Supreme Court) predictably assimilate these cases to the more conventional framework with which those courts are most familiar, that for classic individual rights adjudication. But when it comes to the structure of democratic institutions and electoral processes, very few cases involve matters of “intrinsic” individual rights. The central question is how the constitution requires that the structures of democratic institutions be designed, with what justifying aims; courts ought to be assessing whether particular electoral rules are consistent with these aims or tend to promote less competitive and hence more authoritarian politics. By conceiving of such cases as involving purely individual rights, courts fail to focus on the structural and systemic issues central to ensuring an appropriate democratic order. At times, this can lead courts to intervene too aggressively and use right analysis to invalidate structures that in fact provide fairer and more representative institutions, as in the example above. At other times, this narrow focus on individual rights analysis can lead courts to be too deferential to existing practices by failing to appreciate the structural effects on the system of democratic politics as a whole from the particular law at issue. The first step in constructing anti-authoritarian constitutional doctrine to deal with the distinct issues in cases involving the structuring of democratic institutions, then, is for courts to recognize that it is the structural features of the electoral system, not the intrinsic rights of individuals, that such cases are best conceived as presenting. Rights-adjudication is a vehicle for bringing these structural issues to the constitutional courts, but the rights at stake are instrumental toward constructing appropriately democratic structures as a whole.

II. THE REIFICATION OF “STATE INTERESTS”

The conventional individual rights framework encourages courts towards a second recurring mistake in cases involving democratic politics. In the standard framework, courts assess the rights of individuals against the “State interests” offered in justification of the alleged infringement. But we now confront the second reason that this framework collapses and needs to be rethought for cases involving electoral politics. In such cases, “the State” cannot be viewed as a detached or non-partisan entity. The State is always a constellation of currently existing political and partisan forces; any State legislative regulation of democratic politics has emerged from a potentially

self-interested process. Reviewing courts cannot approach such regulations with the ordinary presumption of constitutionality, then, but must instead start from a posture of potential skepticism.

This poses considerable difficulty. On the one hand, the State must necessarily be inextricably involved in structuring the electoral and democratic processes. These processes are highly channeled and organized events; there can be no electoral processes without State law that reflects choices about how, and for what ends, to structure politics. The conditions under which voting will take place, the qualifications to appear on the ballot, the system through which individual votes will be aggregated, and a host of other decisions all entail State involvement and choice. The justifications offered for any of these decisions will appeal to relatively abstract values: the need for political stability; or for orderly elections; or for coherent structures of choice.

But at the same time, it is precisely these same abstract values that will be appealed to when “the State” seeks to make democratic regimes more authoritarian through manipulation of the groundrules of democratic politics. Electoral regulations justified in the name of preserving “political stability” can just as easily be the vehicles through which partisan political actors seek to entrench their power. Historically, the language of “political stability,” “orderly processes” and the like have been the masks behind which partisan political forces have hidden their efforts at stifling political competition. In the United States, we can identify a litany of such justifications from the caselaw: the need to prevent elections from becoming vehicles for “unrestrained factionalism;” the importance of preventing “party raiding;” the need to protect voters from “confusion;”¹³ discouraging “party splintering;” and the ever present threat States constantly see to “the stability of their political systems.”¹⁴

¹³For a summary of the American cases involving these justifications, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 239-257 (1998).

¹⁴This is the central rationale the United States Supreme Court recently, and in my view wrongly, accepted to justify state laws that ban minor parties from cross-endorsing major-party candidates, even when the candidates and parties all approve. In the United States, such cross-endorsements are a crucial means to maintain the viability of minor parties, which must show a certain level of electoral support to maintain the automatic right to reappear on the ballot in election cycle after election cycle. The state laws banning such cross-endorsements appear to have been enacted early in the 20th century precisely for the purpose of diminishing minor-party pressures on major-party organizations. For the case, see *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997); for the history of these laws, see Peter H. Argersinger, “A Place on the Ballot”: Fusion Politics and (continued...)

Courts cannot dismiss these interests out of hand. Certainly, with the more fragile history of democratic regimes in parts of Europe, one can appreciate how difficult it is to achieve democratic institutions that are indeed stable, orderly, effective, and supported. But at the same time, courts need to recognize that good reasons can become bad ones when manipulated for self-serving partisan ends. My experience from the American cases is that this is precisely what tends to happen: courts accept these justifications at face value with far too little skeptical examination. Courts fail to appreciate the tremendous incentives political parties face to design these laws for self-interested ends; courts therefore fail to see when these justifications actually hide electoral groundrules whose purpose and effect is to diminish partisan political competition and leave the dominant party in increasingly complete control.

The short answer, then, as to what courts can do is not to reify the State in cases of politics, but to recognize that behind every state electoral regulation is the configuration of political forces that happened to hold power at the moment that law was enacted. Courts should approach these cases not with the usual presumption of constitutionality, but with a skeptical eye that does not cower in the face of State assertions that political stability is at stake, but instead requires the State genuinely to justify the law in question. This is not to provide a formula for how courts should sift through different electoral laws, but to encourage courts to recognize the structural tendencies of democratic systems to self-entrenchment. Once courts appreciate the danger potentially lurking behind these laws, they will more readily approach these cases with a mindset less intimidated by State appeals to momentous sounding interests in political stability and the like. In the next section, I will suggest a more general structure within which the analysis of laws of politics can be judicially assessed.

III. POLITICS AS MARKETS

What is to be done if courts move away from balancing individual “rights” against purported “State interests” in the conventional way when it comes to cases involving democratic politics? What would a judicial approach look like that abandoned the romantically individualistic view of democratic politics and placed political organizations, instead, at the center of judicial analysis? What values ought to inform a judicial approach less oriented toward the rhetoric and style of thought associated with analysis of

¹⁴(...continued)

Antifusion Laws, 85 Am. Hist. Rev. 287 (1980); for criticism of the decision, see Issacharoff and Pildes, *supra* note 4, at 683-88.

the intrinsic rights of individuals and more toward the structural system of democratic politics as a whole?

I want to suggest a mindset, or a loose framework for such an approach, given that a fully elaborated theory cannot be developed here.¹⁵ The starting point is to view democratic politics more in terms of economic markets -- as a system of competition, largely between organizational entities, that is most likely to realize the ultimate ends that justify democracy through an appropriately competitive set of process-oriented groundrules. Even if this process approach is not sufficient to ensure all the values that justify democratic regimes, it is at least necessary. There is no one overarching value that justifies democratic government, but among the central aims are making policy responsive to the interests and judgments of citizens; respecting the equal sovereignty of citizenship by ensuring effective citizen voice and participation in government; and holding public officials accountable through regular, competitive electoral processes. In mass democracies, courts do best to focus on ensuring that these background rules of political competition between the organizations of politics remain robustly competitive. This means recognizing the inherent tendency of political organizations to seek to use the state to entrench their power; it therefore means penetrating abstract appeals to "State interests" to ensure that they do not mask these anti-competitive aims and effects. It also means recognizing that what is central in these cases is not rights conceived as the intrinsic liberties of individuals, but rights defined in such a way as to further the appropriate system of robust, partisan political competition *through which* the values of democracy must, of necessity, be realized today in mass democracies.

In developing such a market-oriented approach toward the constitutional law of democratic politics, it is useful to turn to private-law scholarship on economic markets. The main reason is that private-law scholarship has been focused for some time on organizational behavior, organizational responses to legal rules, and organizational efforts to capture the economic system of regulation for self-interested reasons. Private-law scholarship is far advanced of public-law scholarship on theorizing about how to structure the background conditions of organizational competition appropriately to benefit consumers. But because constitutional-law scholarship has been so focused on conventional issues of rights and equality in the post-WWII era, constitutional thought has matured less in thinking about organizational behavior and on the system of democratic politics as a whole.

¹⁵For more details, the reader should consult the sources in note 4 and 5 *supra*.

Two more specific lessons, at least, can be taken for public law from the more advanced study of private organizational behavior and its legal regulation. First, as private-law scholarship has advanced in the United States over the last generation, it has come to argue that legal regulation is more effective when shifted from the previous era's attempt to impose and enforce first-order duties on corporate managers, such as duties of loyalty and fiduciary duties. To police these first-order duties when contrary conduct aligns with self-interest requires constant monitoring, oversight, and enforcement. Thus, private-law scholarship has changed its focus and attempted to align public and private incentives by ensuring that the background conditions within which corporate behavior takes place will occur under the appropriate, robust competitive conditions. Thus, corporate-law scholarship has emphasized the importance of effective "markets for corporate control" and the like. The theory behind this shift toward focusing on structural conditions, rather than first-order substantive legal commands, is the same as Madison's famous theory of how governmental structures ought to be designed: Organizations police each other -- ambition counteracts ambition -- more effectively than the law can directly police them. For public law as well as private law, if the background competitive conditions within which the central organizations of politics compete can be judicially maintained so that the private incentives of political parties align with behavior that furthers the proper aims of the democratic system as a whole, this is likely to be the most effective way courts can intervene to maintain the health of democratic political orders. Thus, rather than focusing directly on first-order concerns of rights and equality -- while often missing the structural or organizational stakes involved -- the law (and judicial oversight) might do better to ensure maintenance of the second-order conditions for effective, inter-organizational competition. Absent judicial oversight, we know from theory and experience that this will not occur; temporarily dominant political parties will seek to capture the law of politics toward self-serving ends. This is neither nefarious nor unpredictable; indeed, it is entirely to be expected. The question is whether judicial review can be a useful device for destabilizing such uses of electoral laws or preventing their rise.

There is a second reason that constitutional thought can learn much from private law. Effective organizations are quite effective at finding subtle devices by which to preserve their competitive position. The techniques by which they do so are well-documented in the private-law cases, in part because the American courts, at least, have been more vigilant in policing private anti-competitive behavior than such public behavior. Familiarity with the techniques by which private organizations pursue self-entrenchment can make courts more astute at ferreting out analogous

behavior of public firms. For example, political parties can seek to raise barriers to entry for new parties by imposing regulatory conditions that are particularly difficult for new parties to meet. Or, the dominant parties can raise the cost of defecting from their organizations by raising the stakes involved in seeking to challenge them from outside the existing party structures. At times, one dominant party can devise rules that it knows will damage its principal competitor; at other times, several currently dominant parties can collude to pursue their own interest in maintaining the competitive status quo by making it difficult for new challengers outside the existing forces to arise. Political parties can use techniques that are the equivalent of what are called “lockups” in the corporate context; these are devices that effectively limit competition in the “market for corporate control” by favoring certain bidders and raising the costs to others.¹⁶ In the political context, the equivalent are rules that make it costly for party dissidents to leave the party and attempt to form other organizations or vote for an alternative candidate or party -- as with “sore-loser” statutes, which prevent independent candidates from running in a general election if they had been registered members of an existing party *within one year* prior to the primary.¹⁷

¹⁶Lockups are a familiar concern in the law of corporate governance. Our use in the political sphere generally corresponds to anticipatory lockups by which incumbent management seeks to raise the costs to would-be rivals for corporate control. *See generally* Marcel Kahan and Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539 (1996). As a general matter, American courts view corporate lockups with great skepticism. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985). This has prompted some academic concern that anticipatory lockups should be treated differently than lockups attempted by bidders for management of a company, whereby the lockup provision might trigger higher competing bids, *see* Larry E. Ribstein, *Takeover Defenses and the Corporate Contract*, 78 GEO. L. J. 71 (1989), and some argument that lockups should be subject only to the business judgment standard of review. *See* Stephen Fraidin & Jon D. Hanson, *Toward Unlocking Lockups*, 103 YALE L. J. 1739 (1994). For present purposes, the key insight from the corporate literature is that there is an active market for managerial control, that there are well recognized devices for frustrating challenges from outside suitors, and that raising cost barriers is a critical feature of a lockup.

¹⁷The United States Supreme Court uphold such restrictions, citing the need for “order, rather than chaos, [] to accompany the democratic processes.” *Storer v. Brown*, 415 U.S. 724 (1974). The relevant state laws also barred independent candidates if they had voted in the immediately preceding primary; if these candidates were not disqualified for these reasons, they then had to collect a substantial number of signatures -- in a 24-day period that ended 60 days before the general election, in other words, long before most voters would be focused on the race -- and none of these signatures could be from a person who had voted in a party primary. This system is a classic example of the dominant parties’ use
(continued...)

The American cases are replete with examples of these techniques.¹⁸ Because of its first-past-the-post electoral structure, the United States has long essentially had a two-party system. In individual states with one dominant party, that party has often adopted rules -- justified in public-regarding terms, of course, like avoiding the prospect of political instability -- that in purpose and effect enshrine or accentuate that party's dominance. Even where two parties are actively competing, their shared interest in excluding nascent rivals sustains collusive laws that "artificially" reduce competition. Skepticism toward the self-serving managerial practices in the political domain is, in fact, even more warranted than in the corporate domain; if all else fails in the latter, the option of "exiting" to another firm always remains.¹⁹ No such exit strategy is available in a political system where competition is artificially frozen through electoral rules. Yet, paradoxically, the American courts have been more sensitive to self-interested organizational manipulation of competitive conditions in the private-market arena than in the public realm. To minimize the inherent authoritarian tendencies of democratic regimes, this focus needs to change.

Two qualifications are required to this brief sketch of how constitutional courts might properly view democratic politics through analogy to private markets. First, private markets are, of course, justified by different aims than democratic elections; these differences must be taken into account in thinking about politics as the ideally structured competition between political organizations. Second, the approach I suggest here is more a suggestive one than an analytical theory of necessary and sufficient definitions for appropriate levels of political competition. It is meant to shift perspective, to enable us to notice problems we are less likely to see from other perspectives, and to consider less conventional solutions once we recognize these problems. We cannot apply the market analogy in a mindless fashion to analyzing democratic politics, but a shift toward this perspective seems to me helpful as way of recognizing the centrality of organizations to modern politics; of emphasizing that the best way of sustaining the values of democracy and avoiding creeping authoritarianism is often the more indirect strategy of ensuring appropriately competitive

¹⁷(...continued)

of electoral laws to insulate themselves from effective independent competition. It is also a classic example of the United States Supreme Court's failure to approach these cases with a focus on limiting such anti-competitive political practices.

¹⁸Numerous examples are offered in Issacharoff and Pildes, *supra* note 4.

¹⁹On competing means of expressing dissent from organizational practices, the classic is Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States* (1970).

inter-organizational conditions; and of making sure that conventional frameworks of individual “rights” balanced against competing “State interests” do not cause courts to fail to appreciate the authentic structural issues at stake in building the constitutional law of democratic politics.

IV. THE APPROACH APPLIED: COMPARATIVE CONSTITUTIONAL EXAMPLES

Cases involving democratic politics are increasingly arising before constitutional courts, both in newly formed constitutional systems, and in longstanding ones, such as the United States, where such cases are becoming a rapidly growing portion of the Court’s workload. In some system, courts already approach these cases in the more structural terms advocated here; whether that is because the constitutional text encourages such a focus, such as in texts that expressly recognize not just individual rights, but the structural role of organizations in politics (the political parties, most importantly), or because of a constitutional culture that is less rights oriented from the start, is difficult to say. But this section begins with illustrations from the Czech and the German Constitutional Courts of the kind of structural approach to democratic-politics cases advocated here. These decisions contrast with the approach and attitude of the American Court to these cases, and in my view, adopt a better approach to constitutional oversight of democratic politics that more effectively resists the subtle transformation of democratic regimes into less competitive ones through self-interested partisan capture of the groundrules of electoral politics. These cases provide general examples of the kind of approach this article suggests.

A. The Czech Court: Thresholds of Exclusion and Minor Parties

A recent, law-of-politics decision from the Constitutional Court of the Czech Republic illustrates the approach suggested here. There a minor political party challenged the constitutionality of a statutory five-percent clause, similar to those in most other European proportional-representation systems,²⁰ which required a party to attain a threshold of 5% of the votes before it was entitled to representation in the Czech parliament. The minor party argued that the statutory threshold violated the 1993 Constitution’s right to vote; the right to stand for election; and right of direct election.²¹

Rather than approach these claims of “right” as abstract and intract

²⁰Germany, for example, has a similar threshold of exclusion, as the opinion reports. *Id.*, at 171.

²¹PI Us 25/96-37, 5 East European Case Reporter of Constitutional Law 159 (1998).

interests of individuals, the Constitutional Court first appropriately concluded that the political rights at stake were derivative of the “the purpose and function of elections in a democratic society.” The Court then noted that, in theory, there were plausible justifications, based on the need to establish effective governing majorities, for establishing an electoral threshold but also dangers that existing political actors would manipulate the threshold for normatively unacceptable reasons. To adjudicate between legitimately integrative thresholds and inappropriately anti-competitive and hence rights-violating ones, the Court reached two conclusions: (1) any limitation had to be conditional on the existence of actual grounds for concern about excessive fragmentation of the legislature and (2) any increase beyond the 5% threshold once the first condition was met required “especially momentous reasons.”²²

In an impressively contextualized factual phase of its analysis, the Court found the first condition satisfied based on actual Czech elections and the degree of party splintering that had resulted. Based on the common European practice of a 5% threshold and the specific facts of Czech partisan politics, the Court further permitted the 5% threshold. The guiding legal principle was that any “limitation of the equality of the voting right is the minimum measure necessary to ensure such a degree of integration of political representation as is necessary for the legislative body to form a majority (or majorities) required” to form a government and adopt decisions.²³

The decision is much in the spirit of the functional, antitrust approach to political rights that I sketched out above. For those who believe legal doctrine must be formulated in ways capable of generating determinate answers, such an approach is undoubtedly troubling. Such skeptics might ask is 7% too high? 6%? How would a court fix an optimal threshold? But how can a court strike down any threshold without such a single-right answer in mind? Yet notice how the Czech Court applied what is essentially the political-competition approach to resolve tensions between legitimate needs for effective governance structures and potentially anti-competitive manipulations. First, the Court would not permit resort to abstract appeals alone about the need for stability and integration, but rather required some basis in the facts of Czech politics for the threshold (and suggested the doctrine could change if those facts changed). Second, having found good reason for some threshold, the Court in evaluating the specific threshold was not bereft of all guidance apart from that which would be provided by a

²²Id., at 170.

²³Id., at 170.

“perfect competition” model specified in full; instead, the Court found a permissible floor of 5% based on those facts and a baseline provided by comparative examples of electoral thresholds in similar democracies. Third, the Court signalled powerfully that political actors would have to prove exceptionally convincing reasons for raising that threshold. The doctrinal adoption of the political-competition approach itself might strongly discourage political manipulations of this threshold and thus obviate the need for further judicial oversight. And should more stringent thresholds be enacted, the Court has indicated that burdens of proof, the kinds of evidence, and the contextualized inquiries that it would employ. No more technically precise definition of “optimal competition” than this is needed -- or, for this problem, would be desirable -- for judicial oversight.

B. The German Court: “Oligarchical” Partisan Capture of Politics

Unlike the American Supreme Court, the German Constitutional Court has consistently recognized the tendencies of dominant parties to seek to lockup democratic politics. Like the American caselaw mentioned above, the German cases also confront justifications for anti-competitive practices dressed up in rhetorical appeals to “stability,” “effective governance,” the “avoidance of factionalism,” and similar claims. Confronted with such claims, however, the German Court has rejected the deferential stance toward oversight of political competition that the American Court has adopted. Instead, the German Constitutional Court assumes precisely the opposite stance: “Parliament’s discretion is severely limited when legislating on the right to elect representatives to legislative bodies: this [limitation] follows from the principles of formal voter equality and equal opportunity of parties.”²⁴ Some German Justices have gone even further and begun to articulate a politics-as-markets theory similar to the one advanced here; they have warned that the Court must be especially vigilant against legislation that bolsters the “oligarchical” and “careerist” features of the established political parties, lest the representative character of the legislature be undermined.²⁵ This perspective on the need for courts to preserve appropriate ground rules of political competition -- as against the inevitable partisan efforts to capture those rules -- has led the German Court to a more aggressive role in reviewing ballot access restrictions, safeguarding the rights of minor political parties, striking down campaign-

²⁴5.6 National Unity Election Case, 82 BverfGE 322 (1990), translated at Kommers, p.188.

²⁵Kommers, at 174 (quoting dissenting opinions of Justice Bockenforde).

finance provisions that entrench the dominant parties, and similar competition-enhancing interventions.

Before turning to the decisions, it is important to note that the German Court's approach is particularly significant in light of the experience of the Weimar period. That experience almost certainly makes German political and judicial culture more sensitive than American to the dangers of fringe parties, paralyzing factionalism, and political fragmentation. Germany has the highest threshold requirements for representation of political parties (5 percent) of any Western European system of proportional representation,²⁶ and its Constitution directly bans political parties that "seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany."²⁷ The German Court itself has firmly acknowledged the legitimacy of election laws that seek to create an "effective" governing body and to avoid splintering of parties, "which would make it more difficult or even impossible to form a majority."²⁸ Yet even so, the German Court has been extremely sensitive -- far more so than the American Court, for example -- to the danger of anti-competitive partisan manipulation of electoral structures. That the German Court has been more willing to penetrate the veil of abstract appeals to "political stability" than the American Court, and to recognize when such appeals are merely hiding partisan efforts at self-entrenchment against competitive political pressure, is thus all the more remarkable.

1. Representation of Minor Parties.

²⁶Thresholds between 3-5 percent are typical in party-list proportional representation systems, and France at some periods in time has also used a percent threshold. Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990*, at 22 (1994) (Table 2.2 listing legally-mandated thresholds of exclusion for different countries). Lijphart observes that most PR countries do not have any legal threshold of exclusion. *Id.*, at 12. The most widely known extreme lower end among major countries is probably Israel, which had only a 1 percent threshold until 1992, when it was raised to 1.5 percent, Douglas Amy, *Real Choices, New Voices* 169-70 (1993), although the Netherlands for many years had a threshold of 0.67 percent. Lijphart, *supra*, at 22. Some recently formed democracies employ higher thresholds even than Germany; Poland has a 7 percent requirement, while the Czech Republic uses a complicated formula in which a party must obtain 5 percent of the vote to get a seat, unless it is in coalition, in which case a coalition of two parties requires only 7 percent, three parties 9 percent, four parties 11 percent, and so on. David Farrell, *Comparing Electoral Systems* 70-71 (1997).

²⁷Article 21 (2), quoted in Kommers, at 218.

²⁸Kommers, at 187.

Since 1949, Germany's electoral laws have legally mandated that a party must receive at least 5 percent of the vote to gain a seat in the national legislature.²⁹ By 1952, this same threshold of exclusion had been adopted at most other levels of government.³⁰ Given the history of political instability and party proliferation from the Weimar period, the achievement of political stability was a major concern behind the drafting of the Basic Law or Constitution, and the drafting body discussed writing the 5 percent threshold into the Constitution. But the decision was made to leave the setting of electoral thresholds to the regular political process.³¹ The issue of electoral thresholds has led the German Court to a series of important decisions in which it has drawn judicial lines between permitting thresholds in the service of enhancing political stability while striking down ones that it perceives as excessively entrenching the existing distributions of political power.

For example, one state -- that is, one set of existing officeholders -- sought to impose a 7 percent threshold. But the Court found such a threshold unconstitutional, relying on the general equality clause, as applied to political parties, and on the general presumption above, that a particularly compelling reason would be required to justify departing from the common practice of 5 percent. Unlike the American Supreme Court, the German Court did not allow a generalized concern for political stability to become an all-purpose justification for any and all regulations adopted by existing officeholders that diminished partisan competition. At the same time, the German Court did uphold the 5 percent threshold for national elections when it was challenged in the *Bavarian Party* case as itself violating principles of equality, direct elections, and the constitutional protections for political parties. The Court accepted the 5 percent threshold as a reasonable means of avoiding splintering the legislature into too many small groups, which would make it difficult to govern or form a majority.³²

The line-drawing became even more interesting for the Court in the wake of German re-unification, but here too, the Court considered it necessary and appropriate to monitor the political regulation of elections. In the first elections after unification, East German leaders expressed

²⁹Kommers, at 186.

³⁰*Id.*

³¹Some German commentators apparently take the position that the failure to write any electoral threshold into the Basic Law indicates a deliberative decision not to have any thresholds at all, a position the German Court has rejected. *See* Currie, *supra*, at 109 n.39.

³²The cases in this paragraph and the following ones discussing the first national unity elections are discussed in Kommers, at 186-87.

concern that the 5 percent rule would preclude political reform groups in East Germany that had played a central role in re-unification from becoming effective political parties and gaining seats in the unified Bundestag. In response, the Bundestag enacted a “piggyback” arrangement that enabled parties or groups in East Germany to meet the 5 percent rule by forging alliances with larger parties in the West. But this plan favored some smaller parties over others, such as the old Communist party, renamed but unlikely to find willing partners in the West. That party, together with other small parties in the West, petitioned the Court to invalidate this arrangement.

The Court did so. It reasoned that the constitutional principle of equality in the electoral field required equal opportunities for parties and voter organizations to compete for political support, and that the legislature had to take different contextual circumstances into account in meeting its constitutional obligations. Examining the “special, unique” circumstances of the first post re-unification election, the Court concluded that the 5 percent rule had to be relaxed beyond what the legislature had already done with the “piggyback” provisions. The Court found that the three-month timespan from unification to the elections would not give parties from the former East Germany much time to become active and compete effectively for votes; as a result, the 5 percent rule would have more severe consequences in the old East Germany, which would generate considerable inequality unless a one-time adjustment in election rules were made. The Court then suggested that it would be constitutional were the 5 percent rule to be applied separately in former East and West Germany, and were the rules for parties in East and West “piggybacking” made easier and more equal. The Bundestag amended the election law in accord with these judicial suggestions; in the ensuing elections, some East German groups did manage to achieve representation.

The *National Unity Election Case* reveals just how seriously the German Court adheres to the pro-competition principle that “Parliament’s discretion is severely limited when legislating on the right to elect representatives to legislative bodies.”³³ Even in the politically complex and charged setting of the first national elections in a united Germany, the Court recognized the dangers of dominant parties using election laws to stifle competition -- whether intentionally or inadvertently. In summing up the German Court’s jurisprudence on the law of politics, the leading American commentator has said: “The protection that the Federal Constitutional Court has extended to minor parties in the Federal Republic suggests that any tampering with electoral mechanisms to the significant disadvantage of such

³³Kommers, at 188.

parties would be the subject of intensive judicial scrutiny.”³⁴ This is in marked contrast to the American Supreme Court, which has allowed one-party monopoly or two-party self-perpetuation to cloak themselves successfully behind vague appeals to the need for political stability, electoral efficiency, and the avoidance of party splintering.

2. *Ballot Access Restrictions.*

The German Court has struck down regulations of access to the ballot for new parties that the American Court has upheld routinely. Thus, in the *Ballot Admission Case*, the German Court found unconstitutional a requirement that the candidate of a party not already represented in the national or state legislatures collect 500 signatures from each electoral district (districts averaged 140,000 voters) to qualify to be on the national ballot, while existing parties needed only the approval of the relevant state party executive committee.³⁵ In contrast, the American Court has upheld requirements that independent candidates present petitions signed by five percent of eligible voters.³⁶ While it is true that smaller parties have a greater chance of electing candidates in Germany’s PR system, it is also true that the dangers of party proliferation and independent candidates might be thought even greater in just such a system. The American system of first-past-the-post elections already provides powerful structural incentives for minimizing the number of effective parties; a fact borne out by the poor record of electoral success for third parties and their candidates (let alone for fourth and fifth parties). Nonetheless, in Germany, where PR already encourages multi-party competition, the German Court found even the 500-signature requirement for new parties to interfere with open and fair political competition.³⁷

The German Court has been even more concerned when new political groups challenge restrictions on ballot access in local elections. For example, it held unconstitutional one state’s requirement that a candidate nominated by local voters’ groups secure a minimum number of signatures to appear on the ballot, while political parties did not face a similar

³⁴Kommers, at 192.

³⁵*Ballot Admission Case*, 3 BverfGE 19, 23-29 (1953), described in David P. Currie, *The Constitution of the Federal Republic of Germany* 108 (1994) and Kommers, at 558 n.20.

³⁶See, e.g., *Jenness v. Fortson*, 403 U.S. 431 (1971).

³⁷The Court did uphold a separate provision of the same law that required roughly 18,000 signatures for a party that sought to field an entire slate of candidates throughout the country. Currie, at 108 n.34.

obligation. Again adopting a more skeptical stance than American courts toward electoral regulations, the Court reasoned that “[i]n the field of election law the legislature enjoys only a narrow range of options. Differentiations in the field always require a *particularly compelling* justification.”³⁸ To reach this result, the German Court on the Constitution’s general equality clause and on a provision essentially the same as the American Constitution’s republican form of government clause.³⁹

3. *Campaign Finance Regulation and Minor Parties.*

No area of electoral practices in the U.S. is currently under greater scrutiny than campaign finance. At a doctrinal level, the regulation of campaign finance remains moored in the distinction between constitutionally-protected expenditures regulatable campaign contributions.⁴⁰ Relatively unexplored in this country is the public funding side of the Federal Election Campaign Act of 1974, which has been caustically termed “a major party protection act.”⁴¹ Nonetheless, the American Supreme Court has not found any aspects of the campaign-finance system to unconstitutionally disadvantage third parties.⁴² In contrast, the German Court has been extraordinarily attentive to the possible partisan manipulation of financing regulations by dominant parties. “In fact, the court’s intervention in the field of party finance has few parallels in other areas of public policy; it has virtually dictated the rules and regulations governing the public funding of political parties.”⁴³

In one of its first and most striking (from an American perspective) forays into this area, the German Court in 1958 struck down provisions

³⁸Kommers, at 558 n.20.

³⁹ By contrast, the U.S. Supreme Court has held that the enforcement of the constitutional guarantee of republican form of government clause is not judicially enforceable. *See Luther v. Borden*, 48 U.S. 1 (1849). This issue has been most directly addressed in the contest of challenges to referenda and initiatives as supplanting representative government. *See Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912).

⁴⁰ This is the analytic divide inherited from *Buckley v. Valeo*, 424 U.S. 1, 19-21 (1976). That distinction continues to grip a highly divided Court. *See Colorado Republican Federal Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996). *See generally* SAMUEL ISSACHAROFF, PAMELA KARLAN & RICHARD PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 616-665 (1998).

⁴¹Rosenstone, at 26.

⁴²*Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (per curiam).

⁴³Kommers, at 210.

making donations to political parties tax deductible. The Court reasoned that because “the income tax rate increases with the size of taxable income, . . . the possibility of deducting donations to a political party from taxable income creates an incentive primarily for corporate taxpayers and those with high incomes to make donations. . . . The challenged provisions, therefore, favor those parties whose programs and activities appeal to wealthy circles.”⁴⁴ Tax deductible party contributions were unconstitutional, therefore, because their effect was to favor certain parties over others, hence violating the constitutional principle of equality of opportunity for political parties. Slightly earlier, the Court for similar reasons also struck down other tax provisions that disallowed deductions for party contributions unless the party had actually succeeded in electing at least one representative to the national or a state parliament.⁴⁵ In this line of cases, the Court suggested that in order to ensure effective competition and diminish special-interest influence, the government could provide public financing to parties. But even here, the Court was careful to stress that such financing could not increase existing *de facto* inequalities between parties.⁴⁶

When the German government began public financing, the laws provided that only parties that had actually won seats were eligible for public funding. Parties that had actively campaigned but not reached this level of success then challenged these limitations; given the legitimate public policy of avoiding the splintering of party politics reflected in the Court’s willingness to uphold the 5 percent threshold requirements, this challenge posed an interesting question. The Court might have simply invoked the general policy aim of “political stability” and upheld these limitations on minor party financing (in U.S. presidential campaigns, for example, third parties are able to receive public financing only after the election, and only after they receive at least 5 percent of the national vote and appear on the ballot in at least ten states).

Instead, the German Court struck down these electoral thresholds as unconstitutional infringements on the rights of minor parties: “It is inconsistent with the principle of equal opportunity for [the legislature] to provide these funds only to parties already represented in parliament or to those which . . . win seats in parliament.”⁴⁷ At the same time, the Court recognized that public reimbursement would encourage new parties, and that the legislature could act against the formation of “splinter” parties, given the

⁴⁴*Party Finance Case II*, 8 BverfGE 51 (1958), discussed in Kommers, at 230.

⁴⁵Kommers, at 203.

⁴⁶*Id.*

⁴⁷*Party Finance Case III*, 20 BverfGE 56 (1966), discussed in Kommers at 206.

legitimate policies of the 5 percent threshold. Thus, the legislature could make reimbursement contingent upon a new party obtaining a certain percentage of votes -- but this could not be 5 percent, because such a restriction “would practically prevent a new party from being seated in parliament” and “would double the effect of the 5 percent clause.”⁴⁸ When the Bundestag responded by imposing a 2.5 percent of the total vote threshold, the Court *again* struck this down on the ground that it was too high and violated general equality principles as well as constitutional provisions mandating universal and equal suffrage.⁴⁹ The Court then specified, as a matter of constitutional law, that any party that captured 0.5 percent of the vote “manifests its seriousness as an election campaign competitor” and had to receive public funds if other parties were deemed eligible.⁵⁰ Finally, in a separate case, the Court also held that, contrary to the existing electoral laws, independent candidates under certain circumstances also had to receive public financing.⁵¹

The German Court has been active in drawing the constitutional boundary between political parties, which ought to have certain autonomy from existing state arrangements, and the state -- a difficult task in any legal system⁵² -- but all the moreso in one with public financing. Here the Court’s theory justifying judicial involvement is not protection of the equal opportunity rights of all parties, but the construction of the appropriate structural relations between parties and the state. For many years, the Court struggled to implement a doctrine distinguishing between public funding to defray legitimate campaign costs, which it held constitutional permissible, and public funding for the general support of parties, which it held impermissible. But eventually the Court abandoned that distinction as unworkable, and instead held that the total of state funding could not exceed the total amount the parties themselves raised. The Court argued that a line

⁴⁸Id., at 208.

⁴⁹Id., at 210-211.

⁵⁰The most recent laws appear to establish a base payment for smaller parties that amounts to 6 percent of the total state funds given to parties as reimbursement for their campaign costs in a federal election should they receive 2 percent of the votes on the second ballot in Germany’s two-ballot electoral system. Kommers, at 214. Kommers also notes that a 1968 decision of the Constitutional Court held that any party that receives 0.5% of the vote “manifests its seriousness as an election campaign competitor.” Id., at 211. There is a conflict between the percentages described, though both are quite low and indicate strong support for minor parties’ rights to participation and financing.

⁵¹*The Daniels Case*, 41 BverfGE 399 (1976), discussed in Kommers at 211.

⁵²For discussion of the American constitutional law struggle with these issues, see Issacharoff, Karlan, Pildes, *supra*, in Chapter 4.

of this sort was constitutional necessary to ensure that the parties remained tied to their voters and did not become too entrenched, solidifying their internal bureaucracies at state expense.⁵³ The Court has also continued to examine tax deductions for party contributions very attentively, and has held unconstitutional altogether tax deductions for corporate contributions to parties, while enforcing its earlier decisions by striking down tax deductions for individuals (and couples) when the amounts involved become high enough to raise the equality-between-parties concern that has been a constant theme of the German Court's constitutional jurisprudence of politics.

Political markets, like economic markets, always face the prospect of anticompetitive behavior. In some constitutional systems, particularly more recently adopted ones, independent commissions have been constitutionally established to oversee the groundrules of electoral competition.⁵⁴ For example, the South African Constitution creates six constitutionally independent commissions, including an Electoral Commission, to "strengthen constitutional democracy."⁵⁵ Whether these agencies will work appropriately is too early to know. But in many systems, including the American one, the Constitution does not create such agencies, and by default, the task of overseeing democratic politics has fallen to the courts. As with economic markets, some external institutions must be capable of providing vigilance against monopolistic and anti-competitive abuses. Because the primary anticompetitive threat to democratic politics emerges from the incumbent powers in the elected branches, some institution outside of normal politics is required to provide this vigilance. In many systems, that task of necessity falls to Constitutional Courts.

The German constitutional caselaw reveals, in my view, a sophisticated appreciation of the dangers that lurking behind asserted "State interests" in political stability, the avoidance of faction, and the like, can often be partisan efforts to insulate dominant powers from the political competition new organizations provide. By focusing on the structural dimensions of democratic politics, the German Court has steered an appropriate line between an expansive "rights" orientation oblivious to its structural consequences, and an overly deferential acceptance of nearly all justifications for state regulation of electoral politics -- the latter of which

⁵³Kommers, at 215.

⁵⁴For a brief survey of these democracy-enhancing commissions in non-American systems, and proposals for the creation of additional such institutions, see Bruce Ackerman, *The New Separation of Powers*, 113 Harv. L. Rev. 633, 716-22.

⁵⁵See Constitution of the Republic of South Africa arts. 184-186, *reprinted in* 27 *The Constitutions of the Countries of the World* (Gisbert H. Flanz ed., Oceana Publications 1997).

characterizes the American approach. Perhaps the German experience with the ways in which democratic regimes can, in fact, be transformed into authoritarian ones, accounts for this more attentive judicial role.

CONCLUSION

Like private firms that seek market power, the organizations central to democratic politics, particularly political parties, will similarly seek domination of political markets. There should be nothing surprising in this. But unlike private economic actors, political organizations are in a position, when they temporarily become legislative majorities, to leverage that power into more permanent form through the erection of State laws regulating electoral politics. That the State will necessarily regulate electoral politics is an unavoidable fact; electoral politics requires a set of groundrules that the State, in one way or another, must set. But democratic regimes slide into authoritarian ones in part through the manipulation of these groundrules to entrench existing powers against the competitive pressures they would otherwise face. The experience of the United States, where manipulation of electoral laws enabled one-party political monopoly for nearly a century in some regions, confirms this tendency.

This dynamic suggests the need for external institutions capable of overseeing the design of democratic institutions. These institutions need not be constitutional courts; in some systems, alternative institutional possibilities have been created. But in many systems, including the United States, there are no other institutions well-positioned to play this role. The task of overseeing the structure of democratic institutions, then, has fallen to courts by default.

This essay has argued that if courts are to be an important safeguard in resisting these inevitable tendencies, they should be guided by several principles. First, courts should not too blithely assimilate cases involving the law of politics to conventional cases that balance “individual rights” against “State interests.” On the rights side, cases involving democratic politics rarely involve the intrinsic rights of individuals; instead, rights are the instruments through which the ideally structured system of democratic political competition is judicially overseen. Thus, courts in these cases must focus on the structural and systemic consequences for the system of democratic politics, rather than on abstract rights analysis alone. The German and Czech Constitutional Courts, in the examples cited, have done a better job of that than the United States Supreme Court. On the “State interests” side of these cases, courts must bring a skeptical eye and avoid the presumption of constitutionality precisely because “the State” in these cases is always an existing constellation of political and partisan actors with a

direct political stake in the rules in question. In overseeing democratic politics, it would be helpful if courts began to see politics as a form of market competition, one in which the central players are now organizations, like political parties, rather than individual citizens, and in which organizations will compete with each other for political power. This competition will tend toward self-entrenchment and therefore authoritarianism. A central task for constitutional courts is to appreciate when this tendency is being realized. By viewing politics as a form of market competition, with the always present risk of anti-competitive behaviors, courts can seek to ensure that the groundrules of democratic politics and electoral processes remain appropriately competitive. This emphasis on maintaining the structural conditions of appropriate organizational competition is one important means by which constitutional courts can attempt to preserve their democratic regimes.