

April 2003

Regulating Political Parties under a "Public Rights" First Amendment

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William and Mary Law Review

VOLUME 44

No. 5, 2003

REGULATING POLITICAL PARTIES UNDER A “PUBLIC RIGHTS” FIRST AMENDMENT

GREGORY P. MAGARIAN*

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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 in governmental policies is at the core of our electoral process and of the First Amendment freedoms.¹

INTRODUCTION

The recently-enacted McCain-Feingold campaign finance law² pushes to the fore the questions of whether and to what extent the First Amendment allows government to regulate the electoral activities of political parties. One of the new law's primary components is its attempt to eliminate so-called "soft money"—unlimited donations to national political parties that the Democrats and Republicans have used to circumvent legal limits on campaign contributions.³ One congressional opponent of the new law called it "the death knell" for political parties' role in elections.⁴ Not surprisingly, both major parties have attacked McCain-Feingold. Most Republicans in Congress opposed the legislation, and some of them are leading a constitutional challenge to the law. Democrats, while largely supportive in Congress, encouraged the Federal Election Commission to weaken the law's effects through rule-making.⁵ While opinions differ about whether McCain-Feingold will

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

2. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

3. *See id.* § 101, 116 Stat. 81, 82-86 (amending § 323 of the Federal Election Campaign Act of 1971, 2 U.S.C. § 431). "Soft money" refers to funds, not subject to federal limits on contributions, that political parties use to finance the state portion of an electoral slate. Parties have developed methods of using soft money to fund federal candidates, notably through "issue advertisements"—also a subject of proscription in McCain-Feingold—which advocate positions in federal campaigns without expressly advocating a particular candidate's election. *See generally* Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 628-31 (2000).

4. *Excerpts From House Debate on the Shays-Meehan Campaign Finance Bill*, N.Y. TIMES, Feb. 14, 2002, at A30 (quoting Rep. Thomas M. Davis III (R-Va.)). Advocates of McCain-Feingold do not dispute the characterization of the law as a check on the parties' influence. *See, e.g.*, Briffault, *supra* note 3, at 655-59 (advocating regulations along the lines of McCain-Feingold to control the parties' disproportionate influence on the electoral process).

5. *See* Richard A. Oppel, Jr., *Sponsors Assert Soft Money Ban May Be Diluted*, N.Y. TIMES, June 14, 2002, at A1.

prevent circumvention of contribution limits, the two major parties strongly assert that the law will impede their functioning and thereby disable democracy.

Whether the Supreme Court upholds the statute will depend in large measure on theories about how the First Amendment limits government regulation of political parties.⁶ The present Court, across the terrain of First Amendment doctrine, treats the freedom of expression and the attendant freedom of association as private, negative rights intended to shield individual autonomy against government regulation. The Court balances individuals' expressive interests against the government's regulatory interest without regard to broader societal implications of First Amendment disputes. This approach has led the Court in recent years to show great solicitude for the interests of the two major political parties. In rulings that benefit those parties almost exclusively, the Court has held that the First Amendment's protection of free association bars states from making political parties accept nonpartisans as primary voters⁷ and that the Free Speech Clause bars Congress from restricting parties' expenditures in political campaigns unless the spending is explicitly coordinated with the party's candidate.⁸ In contrast, the Court has taken a narrow view of First Amendment rights where minor political parties' distinct interests have been at issue.⁹ According to recent decisions, the Amendment does not bar states from forbidding minor parties to co-nominate major party

6. This Article discusses only the activities of political parties that relate directly to nominating and electing candidates. Political parties have other important functions—notably their roles in passing legislation, redistricting, and distributing patronage jobs—that I do not address directly.

7. See *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (discussed *infra* Part III.A.1).

8. See *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.* (Colorado II), 533 U.S. 431 (2001); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n* (Colorado I), 518 U.S. 604 (1996) [hereinafter *Colorado I*] (discussed *infra* Part III.A.2).

9. By "major political parties," I mean the Republicans and Democrats, or any party or parties that unseat the Democrats and/or the Republicans as one of the two dominant parties in the United States. I use the term "minor political parties" as an umbrella to cover alternative parties that survive multiple election cycles, such as the Green Party and the Libertarian Party; parties that emerge as vehicles for an individual's candidacy, such as the Reform Party; and independent candidacies, such as John Anderson's 1980 presidential bid. These classifications reflect the present structure of United States politics, the major party duopoly. The categories would require revision if that structure changed.

candidates¹⁰ or excluding minor party candidates from televised candidate debates.¹¹

The Court's autonomy-based theory of expressive freedom may appear unremarkable, but the application of that theory to disputes about regulations of political parties has done remarkable damage to our electoral system. The Court's recent decisions have validated a specific normative vision of partisan politics: that a stable, two-party political system is essential to our democratic institutions, and that the best way to achieve the myriad benefits the major political parties provide is to maximize their autonomy. The major parties' prerogative to participate freely in elections has trumped any reason asserted for regulating them, such as enhancing popular participation in elections or facilitating more robust political debate. In contrast, governmental interests in political stability have outweighed minor parties' expressive interests. As a result of the Court's political engineering, people are more alienated from the political process and less likely to participate in politics; elections are less competitive and incumbent officeholders more secure; and political debate contributes far less to the resolution of important issues than our democratic culture requires.

This Article advocates a different First Amendment theory for cases involving regulation of political parties' electoral activities. It contends that the Court should view the First Amendment not as a mere negative protection against government regulation but rather as an affirmative constitutional commitment to foster a vigorous, broadly participatory electoral discourse. Expressive freedom, on this account, ensures that all members of the political community will have access to the information they need in order to participate thoughtfully in the political process. My alternative understanding of the First Amendment would allow substantial regulation of the major political parties' electoral activities while strengthening the First Amendment's role in protecting minor parties. That state of affairs would facilitate a vibrant participatory democracy, producing a more engaged electorate, heightened electoral competition, and more robust political debate.

10. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (discussed *infra* Part III.B.1).

11. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 686 (1998) (discussed *infra* Part III.B.2).

The first two Parts of this Article build a theoretical framework for analyzing disputes about regulations of political parties. Part I examines the Court's familiar and entrenched approach to the First Amendment: the *private rights theory* of expressive freedom. It demonstrates that the private rights theory compels legal decisions about political parties that comport with a particular perspective on parties' role in our democracy, known by political scientists as the *responsible party government theory*. This Article sheds new light on both theories by demonstrating how the private rights theory serves the ends of the responsible party government theory.

Part II advocates alternatives to both theories. The alternative account of the First Amendment, which I call the *public rights theory*, draws on a venerable tradition of legal scholarship focused on the essential value of expressive freedom for the process of collective self-determination. The alternative account of political parties' role in our democratic system, which I call the *dynamic party politics theory*, reflects skepticism about the two-party system and envisions a political process marked by popular engagement, robust electoral competition, and wide-ranging debate. Part II demonstrates how judicial embrace of the public rights theory would compel judicial decisions about parties' electoral activities that would comport with the dynamic party politics theory.

The remainder of this Article employs the theoretical insights of the first two Parts to take a fresh look at the recent cases and related doctrinal issues. Part III uses the entrenched and alternative constitutional and political theories as filters for analyzing and critiquing the Supreme Court's four recent decisions about regulations of political parties' electoral activities. My analyses demonstrate in concrete terms how the private rights theory of expressive freedom serves the responsible party government theory of political parties. My critiques show how the Court should have decided these cases, explaining how and why judicial embrace of the public rights theory would have resulted in decisions consistent with the dynamic party politics theory. Finally, Part IV discusses some other ways in which applying the public rights theory to regulations of political parties' electoral activities would lead the Court to change present law. It distinguishes between major and minor political parties in identifying state action; reconsiders the aspect of

*Buckley v. Valeo*¹² that allows regulation of political contributions but not of expenditures, in light of the advantage that distinction has conferred on the major parties; and contends that certain subconstitutional features of our electoral system that perpetuate the two-party system—notably states' ubiquitous reliance on single-member congressional districts and plurality voting systems—are within the proper scope of First Amendment concern.

I. THE DOMINANT THEORETICAL APPROACH TO REVIEWING REGULATIONS OF POLITICAL PARTIES

This Part develops a hypothesis that the Supreme Court's present theoretical understanding of the First Amendment will lead it to vindicate a particular theory about what constitutes a good political system. Part I.A describes the Court's prevailing theoretical approach to analyzing expressive freedom claims under the First Amendment, the private rights theory. My discussion identifies five defining elements of the private rights theory: (1) derivation from pluralist political philosophy, (2) treatment of speech rights as individuated, (3) a formal conception of liberty, (4) reliance on a strong public-private distinction, and (5) employment of a balancing methodology. Part I.B describes the prevailing theory of partisan politics that supports the major party duopoly: the theory of responsible party government. My discussion focuses on the three principal ways in which responsible party government theorists claim the duopoly benefits democracy: (1) forcing the formation of broad-based pre-electoral coalitions, (2) discouraging factionalism in politics and government, and (3) providing a voting cue to assist underinformed voters.

The first two Sections of this Part deliberately segregate the dominant theory of expressive freedom from the dominant theory of partisan politics. The separation underscores the distinction ordinarily presumed between judges' explication of the Constitution and policymakers' engineering of political systems. Indeed, the private rights theory and the responsible party government theory have developed independently of one another. That fact makes the analysis in Part I.C all the more surprising: Examination of the two

12. 424 U.S. 1 (1976).

dominant theories together demonstrates that, when their spheres of concern intersect, they operate in perfect harmony. The key elements of the private rights theory consistently validate the assumptions and goals of the responsible party government theory. This synthesis provides the framework for my examination in Part III of the Supreme Court's decisions about regulations of political parties' electoral activities.

A. The Private Rights Theory of Expressive Freedom

Commentators of diverse interpretive stripes have recognized the unusual futility of attempts to capture the meaning and scope of the First Amendment by reference to the text or original understanding of the Constitution.¹³ Judicial protection of expressive freedom, then, must rest on some theory of the First Amendment—some articulable understanding of why the Amendment appears in the Constitution and what it protects.¹⁴ The Supreme Court, especially over the past three decades, has made a resounding theoretical commitment: the Free Speech Clause protects the private, individual right to free expression against invasion by the government.

The theory of expressive freedom as a private right is rooted in the venerable idea of rights as negative, pre-political principles that do no more than limit the power of government. John Locke conceived of liberty as the natural state of human existence.¹⁵ He

13. Especially significant in this regard is the resort to theory of the staunch originalist Robert Bork. See Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Bork discusses historical materials on the ratification of the First Amendment and concludes: "We are ... forced to construct our own theory of the constitutional protection of speech. We cannot solve our problems simply by reference to the text or to its history." *Id.* at 22; see also Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 299 n.31 (1989) (arguing that the understandings of "the historical framers and ratifiers of 1787-89 ... cannot provide much useful guidance to modern constitutional-legal doctrine respecting freedom of speech"); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 256 (1992) ("For those who believe ... that the Constitution's meaning is fixed by the original understanding of its ratifiers, the First Amendment is a particular embarrassment.").

14. See, e.g., Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 371-72 (1997) (contending that judicial integrity compels theoretical inquiry absent more concrete decisional guides).

15. See JOHN LOCKE, *TWO TREATISES ON GOVERNMENT* 269 (Peter Laslett ed., 1988) (1690) [hereinafter LOCKE, *TREATISES*] (describing individuals' natural condition as "*a State of perfect Freedom to order their Actions, and dispose of their Possessions, and Persons as they think*

defined liberty as "the *idea* of a power in any agent to do or forbear any particular action, according to the determination or thought of the mind"¹⁶ Locke posited that individuals formed governments to ensure the enjoyment of their natural rights.¹⁷ Government, on this account, was a police force that prevented freedom from dissolving into anarchy. A government had only the limited powers necessary to perform that function; thus, the very terms of its existence barred it from abridging individual rights.¹⁸ William Blackstone, echoing Locke's ideas about the natural derivation of rights and the limited power of government,¹⁹ emphasized that "the law, which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind."²⁰ From these accounts emerges a conception of rights focused on individual autonomy, centrally concerned with the danger of government tyranny, and subject to limitation based on weightier public priorities.

The Supreme Court's foundational free speech decisions, influenced by Locke and Blackstone, constructed the private rights approach to the First Amendment. The early cases addressed incitement and subversive advocacy, issues that led the Court to weigh individuals' interests in freedom from government regulation against the dangers the government claimed their expression posed to civil order.²¹ The Court in these cases, most notably in the influential opinions of Justice Holmes, defined the expressive rights at issue in terms of the speakers' individual autonomy rather than

fit").

16. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 95 (Kenneth Winkler ed., 1996) (1690).

17. See LOCKE, TREATISES, *supra* note 15, at 350 (explaining that the individual is willing to part with freedom in order to preserve "the enjoyment of the property he has in [the state of nature]").

18. See *id.* at 357 (describing legislative authority as "a Power, that hath no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects").

19. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 122 n.4 (3d ed. 1884) (describing natural rights and the role of government in preserving liberty).

20. *Id.* at 125.

21. See *Whitney v. California*, 274 U.S. 357 (1926); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

any value their expression might have held for collective decision making.²² Building on Justice Holmes' "clear and present danger" formulation of the balance between expressive autonomy and the government's regulatory prerogatives, the Court routinely subordinated the speakers' interests to national security concerns.²³ The fact that the particular speakers in question were marginalized political dissidents mattered only to the extent it arguably rendered them harmless to the government's interests.²⁴ The nascent private rights theory gained rhetorical force from Justice Holmes' analogy of expressive freedom to a marketplace of "free trade in ideas."²⁵

First Amendment doctrine from the 1940s to the 1960s, and in scattered later cases, occasionally departed from the private rights theory. Numerous free speech decisions turned on the Court's recognition of a broad public interest in receiving information, as distinct from a private speaker's interest in expression.²⁶ Cases

22. Even Justice Holmes' famous formulation of expressive freedom as directed at the search for truth emphasized autonomy rather than collective decision making. Justice Holmes called on individuals to realize "that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and ... truth is the only ground upon which their wishes safely can be carried out." *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); cf. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73-75 (1948) (criticizing Holmes' formulation).

23. See *Schenck*, 249 U.S. at 52 ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

24. See *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting) (opposing the Court's affirmance of a conviction on the ground that the speaker's antiwar advocacy was merely "the surreptitious publishing of a silly leaflet by an unknown man"). The notable exception to the private rights orientation of these early decisions was Justice Brandeis' concurrence in *Whitney*, which laid the foundation for Alexander Meiklejohn's theory that the First Amendment comprehensively protects political expression. *Whitney*, 274 U.S. at 372-80; see *infra* notes 141-43 and accompanying text.

25. *Abrams*, 250 U.S. at 630; see also *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (referring to the "marketplace of ideas"); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POLY REV. 236, 239-42 (1991) (discussing the history of the market metaphor for expressive freedom).

26. See *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (striking down a prison's restrictions on prisoners' ability to send mail not because of prisoners' interest in expression but because of recipients' interest in receiving information); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969) (emphasizing the public's First Amendment interest in receiving unbiased information in upholding federal broadcast regulation); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (striking down a prohibition on private possession of pornography based on the First Amendment interest in receiving information); *Lamont*, 381 U.S. at 307 (striking down a federal restriction on receipt of political information from abroad based on First Amendment right to receive mail); *Marsh v. Alabama*, 326 U.S. 501, 505 (1946) (declaring that "the preservation of a free society is ... dependent upon the right of each individual citizen to

arising out of the Civil Rights struggle²⁷ and labor conflicts²⁸ led the Court to affirm the expressive freedom of socially important mass movements and their followers. Some of those decisions set aside private damage awards on First Amendment grounds, reflecting the Court's understanding that private actions drive some restrictions on free speech.²⁹ The Court placed special emphasis on the expressive freedom of political dissidents.³⁰ Scattered cases suggested that the government could play an active role in preventing private interference with free expression.³¹

receive such literature as he himself might desire").

27. See *Brown v. Louisiana*, 383 U.S. 131 (1966) (reversing convictions of civil rights protesters for breach of the peace); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (striking down a libel award against a newspaper and civil rights leaders based on an advertisement criticizing police brutality against protesters); *NAACP v. Button*, 371 U.S. 415 (1963) (upholding the First Amendment right of civil rights groups to solicit clients for litigation); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the First Amendment protected a civil rights organization from a state's demand for the organization's membership list). The Court retained some interest in the First Amendment's protection of civil rights activism even into the 1980s. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (setting aside, on First Amendment grounds, a damage award based on a civil rights organizer's incendiary rhetoric).

28. See *Coates v. Cincinnati*, 402 U.S. 611 (1971) (striking down on First Amendment and due process grounds an ordinance that restricted assembly and overturning convictions of labor picketers); *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968) (holding on First Amendment grounds that a state could not apply trespass law to enjoin union picketing on private property); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (holding that the First Amendment protected dissemination of information concerning a labor dispute). *But see* *Hudgens v. NLRB*, 424 U.S. 507 (1976) (overruling *Logan Valley Plaza* and rejecting a First Amendment role in protecting expression on private property).

29. See *Claiborne Hardware*, 458 U.S. 886; *Logan Valley Plaza*, 391 U.S. 308; *Sullivan*, 376 U.S. 254.

30. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overturning on First Amendment grounds the conviction of a Ku Klux Klan member); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking down a loyalty oath requirement for public employees); *Yates v. United States*, 354 U.S. 298 (1957) (overturning on First Amendment grounds convictions of Communist Party members).

31. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (rejecting, based in part on the public's interest in an electoral process that accurately represented public views, a First Amendment challenge to Michigan's prohibition on expenditures of corporate profits in political campaigns); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (upholding against a First Amendment challenge the FCC's interpretation and application of a statute that authorizes revocation of broadcast licenses for failures to provide political candidates access to airwaves); *Red Lion Broad.*, 395 U.S. at 375-86 (upholding the FCC's "fairness doctrine," which required broadcasters to give persons attacked on the air free response time, based on the public's interest in the airwaves). *But see* *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating on First Amendment grounds a state's restriction on corporate campaign contributions and expenditures); *Miami Herald v. Tornillo*, 418 U.S. 241 (1974) (striking down

Over the past three decades, however, the private rights theory has become entrenched as the dominant mode of analysis in First Amendment cases.³² Most of the Court's major innovations in free speech doctrine during that period—development of the modern public forum doctrine in such cases as *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*,³³ with an attendant emphasis on content-neutrality;³⁴ protection of political campaign expenditures, beginning with *Buckley v. Valeo*;³⁵ and protection of commercial advertising, beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*³⁶—reflect a primary concern with identifying and protecting private expression against governmental regulatory excesses.

on First Amendment grounds a state's analogous provision to the fairness doctrine as applied to a newspaper). The Court faintly echoed its earlier acknowledgements of the government's role in protecting free expression when it upheld an FCC regulation that requires cable television systems to carry local broadcast channels, based on a finding that the regulation is content-neutral. See *Turner Broad. Sys. v. FCC* (Turner II), 520 U.S. 180 (1997); *Turner Broad. Sys. v. FCC* (Turner I), 512 U.S. 622, 657 (1994) ("The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

32. See Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1058 (1999) ("The currently prevailing reading celebrates individual autonomy, viewing the First Amendment as a check on government interference with certain highly favored categories of individual behavior") (footnote omitted); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809-14 (1999) (discussing the prevalence of individualist conceptions of First Amendment rights).

33. 473 U.S. 788 (1985) (upholding the exclusion of a civil rights organization from a federal employee fundraising drive on the ground that the drive was a nonpublic forum); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (upholding a contract provision that allowed only an incumbent union, not a putative rival union, access to school teachers' mailboxes on the ground that mailboxes were nonpublic fora). The public forum doctrine has deep roots traceable to a decision that protected the expressive freedom of labor organizers. See *Hague v. CIO*, 307 U.S. 496 (1939) (striking down a municipal ordinance that unduly restricted speakers' access to streets and parks).

34. See, e.g., *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (rejecting a challenge to the "decency and respect" requirement for federal arts funding based on the absence of any salient viewpoint-based or content-based discrimination).

35. 424 U.S. 1 (1976) (announcing substantial First Amendment restrictions on campaign finance regulations). For a discussion of campaign finance issues under the First Amendment, see *infra* Parts III.A.2 and IV.B.

36. 425 U.S. 748 (1976) (announcing qualified First Amendment protection for commercial price advertising); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980) ("The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.").

Methodologically, the private rights theory requires an initial determination of whether and how seriously a government regulation burdens an individual's expressive freedom.³⁷ The Court then balances the burden on expression against the regulatory interest the government asserts for the challenged action.³⁸ The Court calibrates the balance based on the nature of the regulation: discrimination based on content or viewpoint is subject to strict scrutiny, while a content-neutral regulation receives deferential review.³⁹ An illustrative case is *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*,⁴⁰ which struck down a state statute that diverted profits from books written by accused or convicted criminals about their crimes to a victims' compensation fund.⁴¹ Justice O'Connor, writing for the Court, focused on the state's abridgement of individual speakers' autonomy: "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech."⁴² She invoked the "marketplace of ideas" metaphor, stating that "the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas ... from the marketplace."⁴³ Applying the strict scrutiny formulation of the First Amendment balancing test, the Court credited the state with compelling interests in compensating crime victims and in preventing criminals from profiting from their crimes, but it found the statute not narrowly tailored to accomplish those interests.⁴⁴

This brief examination of the private rights theory's origins and methodology reveals several interrelated elements that characterize the theory:

37. See, e.g., *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 749-65.

38. See, e.g., *id.* at 766 (weighing the state interest in regulating advertising against the freedom of expression).

39. See, e.g., *Turner I*, 512 U.S. 622, 641-43 (1994) (explaining the relationship between the nature of government abridgement of expressive freedom and calibration of the balancing test).

40. 502 U.S. 105 (1991).

41. *Id.*; see N.Y. EXEC. LAW § 632-a (McKinney 1982 & Supp. 1991) (repealed 1992).

42. *Simon & Schuster, Inc.*, 502 U.S. at 115.

43. *Id.* at 116.

44. See *id.* at 118-23.

First, the private rights theory derives from a *pluralist* philosophy of politics and government. Under the pluralist vision, individuals organize into private interest groups to compete for the distribution of social and political goods by the government.⁴⁵ Interest groups act as mediating institutions that prevent conflicts among self-interested individuals from rending the social fabric.⁴⁶ Interest group competition ensures that power will be “dispersed and exercised not solely by governmental officials but also by private individuals and groups within the society.”⁴⁷ The private rights theory draws from pluralism a focus on private autonomy, a suspicion of excessive governmental authority, and a faith in market distributions to guarantee formal liberty.⁴⁸ In particular, the private rights theory’s refusal to impose a constitutional guarantee of access to expressive opportunities for a multiplicity of views reflects pluralism’s “assumption ... that all views and interests are represented” in the competition among interest groups.⁴⁹ The other elements of the private rights theory all follow from its pluralist roots.

Second, in keeping with the pluralist model of competition for social goods, rights under the private rights theory are *individuated*. As the Court has stated, “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”⁵⁰ The theory views expressive freedom as a private

45. See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 49 (3d ed. 2001).

46. See *id.*

47. V.O. KEY, *POLITICS, PARTIES, AND PRESSURE GROUPS* 9 (1958).

48. See ESKRIDGE ET AL., *supra* note 45, at 49 (stating that “[o]ur pluralist system is a marketplace of ideas”). Jack Balkin identifies pluralism, at its historic roots, with some of the progressive concerns that will be shown to undergird the public rights theory of expressive freedom. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 391-92. He views progressives’ subsequent embrace of republicanism as, in part, a reaction to the appropriation of pluralist conceptions of liberty and neutrality by defenders of the economic status quo. See *id.* at 395 n.44. For a discussion of the public rights theory’s correspondence with republicanism, see *infra* notes 173-78 and accompanying text.

49. ESKRIDGE ET AL., *supra* note 45, at 50. For a seminal critique of pluralist confidence in the market’s representation of diverse interests, see ELMER SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* (1960).

50. Turner I, 512 U.S. 622, 641 (1994); see also Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (“Autonomy is the

commodity, analogous to a property right. Indeed, over the past two decades in cases such as *Simon & Schuster*, the Court has vigorously extended the First Amendment to restrict government from imposing financial disincentives to speech.⁵¹ At the same time, the Court has treated private property as a powerful shield against expression—rejecting, for example, a First Amendment challenge to a municipal ordinance that prohibited residential picketing.⁵² The Court emphasized the speaker's private interest in expression over the audience's interest in access to information.⁵³

Third, the individuated character of expressive freedom entails a *formal* conception of liberty. The First Amendment protects all individuals against the threat of government interference with expressive freedom, but it does not entitle anyone to any particular measure of expressive opportunity.⁵⁴ Accordingly, the contemporary

foundation of all basic liberties, including liberty of expression.”).

51. See also *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454 (1995) (striking down a federal restriction on government employees' receipt of honoraria for speaking); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down content-based application of a sales tax to magazines); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down content-based application of a sales and use tax to newspapers).

52. See *Frisby v. Schultz*, 487 U.S. 474 (1988).

53. Even the area where the modern Court has most strongly emphasized the interest in receiving information, commercial speech, notably involves an interest in private economic decision making rather than a collective public interest. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996) (plurality opinion) (discussing “public reli[ance] on ‘commercial speech’ for vital information about the market”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (“[T]he particular consumer's interest in the free flow of commercial information ... may be as keen, if not keener by far, than his interest in the day's most urgent political debate.”).

54. An exception to this tendency has appeared in a few cases where the Court, speaking through Justice Stevens, has emphasized the availability of a particular medium of expression for speakers of limited financial means as a strong reason to protect the medium. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (“[The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds.”); *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (“Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”). But see *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (Stevens, J.). In *Vincent*, however, Justice Stevens stated:

The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means.

Id.

Court focuses relentlessly on ensuring content neutrality in government regulations, rather than equalizing power differentials among speakers.⁵⁵ Indeed, the Court has held that the First Amendment bars government from expanding weaker speakers' expressive opportunities at stronger speakers' expense.⁵⁶ A powerful corporation such as the Coors Brewing Company⁵⁷ or an influential mainstream organization like the Boy Scouts of America⁵⁸ may prevail on a First Amendment claim as easily as an individual or dissident group. Even individual and public institutional speakers have won some important First Amendment cases due in part to corporate support. For example, although the American Civil Liberties Union and the American Library Association were the

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If the First Amendment protects rights intrinsic to essential attributes of individual personhood, autonomy, or dignity, such as the right to self-expression, it is easy to see how one might conclude that First Amendment "rights" should not depend in significant ways on the particular contexts in which they are asserted.

Schauer & Pildes, *supra* note 32, at 1809; see also William T. Mayton, "Buying-up Speech": *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 415-17 (1994) (discussing conditional benefits cases as exemplars of the Court's negative rights approach to expressive freedom).

56. See *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). In another important area of First Amendment law, Free Exercise, the Court has refused to consider special problems faced by minority religious groups. See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (acknowledging, as to the Court's holding that the Free Exercise Clause does not compel accommodation of religious exercise, "that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in"). Similarly, the Court's equal protection doctrine dealing with racial discrimination has barred efforts to correct entrenched differences in societal power based on race. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to a federal race-based affirmative action program and striking down the program because it disadvantaged whites); *Shaw v. Reno*, 509 U.S. 630 (1993) (applying strict scrutiny to a state's redistricting plan and striking down the plan based on the state's purpose of increasing representation of African Americans).

57. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (overturning on First Amendment grounds restrictions on price advertising); see also *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (extending to independent contractors the First Amendment protection accorded public employee speech); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (reversing on First Amendment grounds a tort judgment against a magazine).

58. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (affirming a national membership organization's First Amendment right to nonassociation); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (affirming a large civic parade organizing committee's First Amendment right to nonassociation).

nominal lead plaintiffs in the consolidated cases that produced the Court's landmark decision restricting censorship on the Internet, corporate giant America Online played a leading role in the plaintiff coalition.⁵⁹ If anything, the private rights theory places special emphasis on the interests of more powerful First Amendment claimants, respecting the quantity of information they can contribute to the marketplace of ideas while still treating them as individuals.⁶⁰ The present Court's strongest initiative to raise speech protection above past levels has come in the area of commercial advertising, where most claimants are corporations with significant social and political power.⁶¹

Fourth, the private rights theory's pluralist premises generate another characteristic feature of formal legal analysis: a *strong public-private distinction*.⁶² Every First Amendment dispute pits a private individual with an interest in speaking against a government regulator with an interest in suppressing that individual's speech.⁶³ This formulation leaves no room for ambivalence about the

59. See *Reno v. ACLU*, 521 U.S. 84 (1997) (striking down federal proscriptions on "indecent" online speech). Likewise, where corporations lose First Amendment cases, rival corporate interests may play pivotal roles. In *Turner II*, the Court's most prominent recent rejection of a First Amendment claim brought by private industry, broadcasting corporations fought alongside the government to defend the FCC's requirement that cable television systems carry local broadcast stations. *Turner II*, 520 U.S. 180 (1997).

60. See, e.g., *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (accepting the premise that commercial pornography harms women but striking down an anti-pornography ordinance under the First Amendment because such harm "simply demonstrates the power of pornography as speech").

61. The Court did not understand the First Amendment to protect commercial advertising at all until its decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Court subjected truthful, nonmisleading commercial speech to a species of intermediate First Amendment scrutiny, under which the government must show that a regulation of such speech "directly advances [a substantial] government interest" and "is not more extensive than is necessary to serve that interest." *Id.* at 566. The present Court appears likely to expand protection for commercial speech beyond the *Central Hudson* boundaries. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (plurality opinion) ("[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.").

62. Frank Michelman has argued persuasively that maintenance of a strong public-private distinction requires the pluralist assumptions that I have identified at the roots of the private rights theory of expressive freedom. See Michelman, *supra* note 13, at 314-15.

63. See *Boy Scouts*, 530 U.S. at 658-59 ("[T]he associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other.");

private or public nature of an entity involved in an expressive freedom dispute. The Court therefore insists on defining public or quasi-public entities engaged in expression either as speakers or as regulators.⁶⁴ In one case, a unanimous Court analyzed a gay-lesbian-bisexual group's demand to march in a parade organized by a civic organization, which needed (and had) government permits to operate, as an infringement on the organization's First Amendment rights, because the group had invoked a state antidiscrimination law to press its demand.⁶⁵ A lodestar of the private rights theory is the conviction that government poses a presumptive threat to First Amendment rights,⁶⁶ which renders the idea that the government may, let alone must, regulate in the name of expressive freedom inherently suspect.⁶⁷ Because the government's position in a First Amendment dispute necessarily is that of regulator and putative

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 811 (1984) (rejecting an argument that a speech restriction on public property was unjustified in light of the failure to extend the restriction to private property); Fried, *supra* note 50, at 234-37 (defending the view that the First Amendment governs only state action); William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 344 ("[P]olicymakers and the Court should recognize that free speech and the accompanying right to receive are abridged only by government, not by private censorship.").

64. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833-35 (1995) (characterizing a public university that imposed viewpoint-based restrictions on eligibility for student activity funds as a regulator rather than a speaker); *Rust v. Sullivan*, 500 U.S. 173, 193-94 (1991) (characterizing a federal agency that imposed viewpoint-based restrictions on funding as a speaker rather than a regulator); *FCC v. League of Women Voters*, 468 U.S. 364, 394-95 & n.24 (1984) (treating federally subsidized broadcasters, including public broadcast stations, as private speakers rather than governmental entities). See generally MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983).

65. See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 561 (1995).

66. See, e.g., *Turner I*, 512 U.S. 623, 641 (1994) (discussing the dangers that government poses to expressive freedom); see also Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987) [hereinafter Fiss, *Why the State?*] (stating that conventional First Amendment doctrine "create[s] a very strong presumption against state interference with speech").

67. The Court, under the private rights approach, has allowed the government discretion in subsidizing speech. See, e.g., *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding a provision of the Internal Revenue Code that prohibits lobbying organizations from receiving tax-deductible contributions); cf. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1423-24 (1986) [hereinafter Fiss, *Social Structure*] (criticizing the Court's logic of allowing a state to control speech by subsidy but not by regulation). Likewise, the Court has permitted the government to enhance expressive opportunities by creating public fora. See *supra* note 33 and accompanying text.

infringer of private rights, a case cannot logically present competing free speech claims.⁶⁸

Fifth, the private rights theory measures private expressive autonomy against government regulatory interests using a *balancing methodology*, which provides for restriction of viewpoints perceived as radical or threatening to the social order. A balancing analysis gives the Court substantial discretion to cast expressive interests as trivial in the face of weighty, nonspeech regulatory objectives.⁶⁹ The Court can accomplish this result either by treating a regulation as minimally intrusive, a technique that has characterized decisions upholding regulations of the time, place, and manner of speech in nonpublic fora as applied to political dissidents,⁷⁰ or by treating expression that threatens the social

68. The Court's strong disinclination to view free speech cases as presenting competing First Amendment claims resembles its approach under the Religion Clauses. The Court occasionally struggles to analyze the effects the Establishment Clause might have on a free exercise accommodation claim, or vice versa. See, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26-29 (1989) (Blackmun, J., concurring) (exploring the possibility of a conflict between mandates of Free Exercise Clause and prohibitions of Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 668-69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."). Usually, however, the Court simply ignores the tension. See Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1967-68 (2001) (discussing the tension between the Establishment and Free Exercise Clauses in accommodation cases).

69. See David Kairys, *Freedom of Speech*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 237, 260 (David Kairys ed., rev. ed. 1990) (discussing uses of First Amendment balancing tests, notably the "clear-and-present-danger" test, "to justify repression and punishment of dissent").

70. See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 581 (1998) (upholding a regulation that requires consideration of "decency and respect" in federal arts funding because the regulation "imposes no categorical requirement" on applicants); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (upholding a municipal requirement, applied to political protestors, that concerts in a city park must use city-provided sound equipment and technicians); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding application of a federal regulation that banned camping in certain national parks to protestors against homelessness who slept in tents in Lafayette Square Park and the Capitol Mall); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a city ordinance, applied to supporters of a political candidate, that banned posting signs on public property); see also C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1206 n.62 (1994) (book review) [hereinafter Baker, *Of Course*] ("[A]ll laws affect the availability of expressive options. When the restriction of expressive options is not the governmentally desired aspect of the means or the end, it is incidental and does not violate the constitutional mandate.").

order as having low value, as in decisions limiting protection for sexually explicit speech.⁷¹ Thus, under the private rights theory, an idea may effectively be too radical, or a speaker too marginal, to warrant First Amendment protection. Conversely, protection of dissenting speech may be prudent in the private rights balance to the extent that allowing dissenters “to let off steam”⁷² diverts them from upending the established order.⁷³

In Part III, I will demonstrate how the private rights theory has provided the analytic framework for all of the Supreme Court’s recent decisions about regulations of political parties’ electoral activities. For now, I set the First Amendment aside and turn to a description of the political theory that Part III will show those decisions embody.

B. The Responsible Party Government Theory of the Electoral Process

Political parties serve as mediating institutions that facilitate people’s political activity. Determining what kind of partisan competition a political system will allow—how many parties, how large and diverse, and how autonomous—makes a critical difference in organizing a democratic society. In V.O. Key’s familiar formulation, a political party actually consists of three different entities: (1) the “party in the electorate,” meaning the voters who identify as party members; (2) the “party in government,” meaning the elected officials and political appointees who belong to the party; and (3) the “party organization,” meaning the party’s institutional leadership.⁷⁴ These entities’ interactions define the party’s identity

71. See *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (plurality opinion) (holding that “nude dancing ... is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so”); *Young v. Am. Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion) (“[F]ew of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”); *Miller v. California*, 413 U.S. 15, 24 (1973) (allowing for wholesale classification of “works which depict or describe sexual conduct” and “appeal to the prurient interest in sex” as “obscenity” unprotected by the First Amendment).

72. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 885 (1963).

73. See, e.g., *id.* at 884-86 (discussing the First Amendment’s capacity to preserve the balance between social stability and change).

74. See KEY, *supra* note 47, at 163-65.

and the nature of its electoral activities. As Albert Hirschman has explained, party members in the electorate possess two primary mechanisms for influencing the positions the party organization adopts: "voice," or active participation in intraparty debates; and "exit," the threat of leaving the party fold if it fails to heed their wishes.⁷⁵ A theory of parties' role in the electoral process entails a normative determination of the values the process should advance and a descriptive account of what sort of partisan arrangement, given parties' complex internal dynamics, best serves to advance those preferred values.

For most of our nation's history, two large political parties have dominated electoral competition. The principal theoretical defense of this major party duopoly derives from what political scientists have called the responsible party government theory.⁷⁶ The theory posits that a sustained two-party order maintains political stability—the theory's defining value—thereby ensuring the health of our democratic system.⁷⁷ The legal precondition for maintaining duopolistic stability is a substantial measure of party autonomy, formally extended to all political parties but mainly useful for protecting the two major parties from regulatory initiatives that might weaken them.⁷⁸ Responsible party government theorists argue that a major party duopoly promotes stability, in what might otherwise become an anarchic democratic system, by reducing conflict in the electoral process and, consequently, the processes of

75. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 4-5 (1970).

76. The concept of responsible party government encompasses a wide range of proposals aimed at strengthening the role of parties in government. See, e.g., Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 827-31 (2000) (discussing broad concerns of responsible party government theorists). This Article is concerned with the aspect of the theory that advocates maintenance of the two-party system.

77. See, e.g., LARRY J. SABATO & BRUCE LARSON, *THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE* 5 (2001) ("As mechanisms for organizing and containing political change, the parties are a potent force for stability.").

78. See Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 802 (2001) (arguing for a legal regime that limits party autonomy only so far as necessary to "prevent racial discrimination and maintain the orderly management of the ballot"); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 795, 804-05 & n.206 (2001) (advancing an argument for substantial party autonomy and claiming that "hostility to the two-party system" motivates opponents of party autonomy).

government. The duopoly, according to the theory, stabilizes the democratic system in three principal ways.

First, a two-party system stabilizes the electoral process by compelling preelectoral coalition building. Because only two parties are competitive, each must appeal to varied groups of voters in order to win elections. "The party creates a community of interest that bonds disparate groups together over time—eliminating the necessity of creating a coalition anew for every campaign or every issue."⁷⁹ As the two parties compete for support, they subsume a broad range of opinions prior to any legislative debate. "[T]he party, in its endeavors to win the public to its side, however unscrupulous it may be in its modes of appeal, is making the democratic system workable. It is the agency by which public opinion is translated into public policy."⁸⁰ Both major parties have strong incentives to disdain bold initiatives in favor of incremental policies that will avoid alienating centrist voters. As Elmer Schattschneider explains: "To make extreme concessions to one interest at the expense of the others is likely to be fatal to the alignment of interests that make up the constituency of a major party. The [coalition building] process moderates the course of party action...."⁸¹ Thus, the major parties encourage "the tendency ... to avoid extreme policies."⁸² In addition to curbing extremism, the parties' preelectoral construction of broad-based coalitions counteracts majoritarian pressures by giving

79. SABATO & LARSON, *supra* note 77, at 4; *see also* Persily, *supra* note 78, at 807-08 (describing the major parties' function of building coalitions of diverse constituencies as "the defining characteristic of party associations and thus of parties' associational right"); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 793 (2000) (describing "a normative preference for a party system that can aggregate and account for the intensity of group preferences in the most politically, economically, and ethnically diverse country in the world") (footnote omitted).

80. AUSTIN RANNEY, *THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT* 14 (1954); *see also* Persily & Cain, *supra* note 79, at 795 (explaining that "the American two-party system frontloads the coalition formation process").

81. E.E. SCHATTSCHNEIDER, *PARTY GOVERNMENT* 85 (1959).

82. *Id.*; *see also* SABATO & LARSON, *supra* note 77, at 5 ("The party tames its own extreme elements by pulling them toward an ideological center in order to attract a majority of votes on election day."). Preelectoral coalition building additionally helps to rein in extremism, on the responsible party government account, by "reconciling losers to the ultimate outcome." Michael A. Fitts, *Back to the Future: The Enduring Dilemmas Revealed in the Supreme Court's Treatment of Political Parties*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 95, 97 (David K. Ryden ed., 2000) [hereinafter Fitts, *Back to the Future*].

political minority groups a forum in which to bargain with the party's majority.⁸³

Second, and closely related, major party duopoly *discourages factionalism* in government.⁸⁴ In two leading duopoly advocates' bold terms: "Factionalism in the form of multipartyism at the legislative level is incongruous with the American separation-of-powers system and system of legislative representation."⁸⁵ The responsible party government theory maintains that without two strong parties, the people's representatives would be fragmented and would have strong incentives to focus on local issues and cater to powerful interest groups in order to distinguish themselves for the next election.⁸⁶ However, "because parties must attract diffuse majority support for controlling the Presidency and Congress, they serve to 'generate countervailing collective power on behalf of the many individually powerless against the relatively few who are individually—or organizationally—powerful.'"⁸⁷ Thus, parties serve to refocus members' attention toward national issues, away from strictly local or minority concerns. Likewise, two strong, autonomous parties prevent one another from turning governmental power into partisan advantage.⁸⁸

Third, the sustained dominance of two strong parties, each with a well known set of generally shared beliefs, assists harried or

83. Nathaniel Persily and Bruce Cain's defense of the duopoly places great emphasis on the notion that large, broad-based parties provide the most normatively attractive vehicles for minority participation in the electoral process. See Cain, *supra* note 78, at 796 (stressing "the function and value of protecting minority voices (such as activists and party supporters with noncentrist positions) within the major parties"); Persily, *supra* note 78, at 811 (claiming that "[p]arties give a voice to interest groups ... who are ideologically or otherwise distant from the median voter") (citation omitted).

84. For the classic expression of concern about factions, see THE FEDERALIST NO. 51 (James Madison).

85. Persily & Cain, *supra* note 79, at 804 (footnote omitted).

86. See Michael L. Stokes, *When Freedoms Conflict: Party Discipline and the First Amendment*, 11 J.L. & POL. 751, 758 (1995) (citing Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1609 (1988)).

87. Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1604 (1988) (citing WALTER DEAN BURNHAM, CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS 133 (1970)); see also Persily & Cain, *supra* note 79, at 787 (linking skepticism about party autonomy with "the more atomistic and fractionalizing forces in the American political system").

88. See Persily, *supra* note 78, at 796 (arguing that "[j]udicial protection for party autonomy is indispensable in counteracting ... self-dealing by incumbents").

disinterested voters in making electoral choices by providing a voting cue.⁸⁹ A major, "brand name" political party's position on an issue serves as a substitute for voters that lack the time or ability to understand the positions of individual candidates.⁹⁰ Party identification provides "continuity in the wake of changing issues and personalities, anchoring the electorate as the storms that are churned by new political people and policies swirl around."⁹¹ Thus, a major party duopoly makes elections "competitive, substantive, focused, and comprehensible to the average voter."⁹² The governmental extension of the voting cue is the belief that major party duopoly allows voters to hold officials collectively responsible for government actions:

The individual congressman has very little power over what Congress does or does not do, and he can hardly be held responsible for anything save how he votes.... The fact is, the party-government writers argue, that power in Congress is so fragmented and the whole legislative process so complex and confusing that the bewildered voter usually has great difficulty in deciding whether his representative should be blamed or rewarded.⁹³

An elected official's affiliation with a large party, known to represent a defined set of positions, gives voters a way to gauge where the official stands without having to monitor his or her every action.⁹⁴

All three means by which responsible party government theorists argue that major party duopoly preserves political stability imply a

89. See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1762 (1993) [hereinafter Lowenstein, *Skeptical Inquiry*] (describing the voting cue as "[t]he core of the theory of responsible party government").

90. See SABATO & LARSON, *supra* note 77, at 12 ("One could argue that the platform is valuable, if only as a clear presentation of a party's basic philosophy and a forum for activist opinion and public education."); Persily & Cain, *supra* note 79, at 787 (arguing that "parties provide voters with an important heuristic that organizes and lessens the expense of information about candidates and policies") (footnote omitted).

91. SABATO & LARSON, *supra* note 77, at 5.

92. *Id.* at 8 (suggesting that "[t]hese criteria probably could not be met in America without the parties").

93. RANNEY, *supra* note 80, at 15.

94. See Persily & Cain, *supra* note 79, at 787.

common corollary: for minor parties to influence the electoral process in any substantial way is undesirable.⁹⁵ Preelectoral coalition building, by definition, reflects a choice to air strong political differences at the stage of party formation, rather than allowing those differences to invade the electoral and policymaking processes.⁹⁶ Minor parties in government might aggravate concerns about factionalism, as a multiplicity of voices would ensure that more diverse and disparate interest groups would contribute to policy debates.⁹⁷ Finally, the prominence in politics and government of more parties with a broader range of positions would undermine the utility of the voting cue, which is premised on the belief that voters cannot or will not process too much political information.⁹⁸

So far this Part has introduced the Court's accepted theory of expressive freedom—the private rights theory—and the primary theoretical defense of the political status quo—the responsible party government theory. The next Section explains why we should expect judicial adherence to the private rights theory to generate legal decisions that advance the goals of the responsible party government theory.

95. Professors Persily and Cain lightly acknowledge the utility of "leaving theoretically possible the practically impossible scenario of a defecting interest group or minor party replacing one of the established parties" for keeping the major parties responsive. *Id.* at 797; see also Persily, *supra* note 78, at 803 (stating that "[t]he functions of minor parties in the American two-party system are to offer ideas, demonstrate which and how many voters support them, and with luck, to become absorbed by the major parties") (footnote omitted). However, their proposal that ballot access be limited to parties that have demonstrated at least "the capacity to cause one of the incumbent parties to lose an election," Persily & Cain, *supra* note 79, at 807, shows that the role they imagine for minor parties is theoretical indeed.

96. As Austin Ranney states:

[P]arty government would enable the people to choose effectively a general program, a general direction for government to take, as embodied in a set of leaders committed to that program. It might limit the people's theoretical ... freedom of choice among the almost infinite number of possible specific measures; but it would give them the *effective* choice between alternative general programs.

RANNEY, *supra* note 80, at 13; see also Persily & Cain, *supra* note 79, at 791 ("Encouraging groups to form new parties when they do not get their way only lessens compromise and coalition-building in the electoral stage and postpones it to the legislative stage.").

97. See Persily & Cain, *supra* note 79, at 797-98.

98. Cf. Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1761-62 (explaining how the voting cue is an effective tool for the typical voter).

C. Symbiosis Between the Private Rights Theory and the Responsible Party Government Theory

As the case discussions in Part III will illustrate, the Supreme Court's application of the First Amendment to cases involving electoral regulations has effectively endorsed the major party duopoly.⁹⁹ The Court's private rights theory of expressive freedom advances the goals of the responsible party government theory in numerous ways.¹⁰⁰ The relationship becomes apparent in the abstract if we reexamine the three means by which the responsible party government theory claims the major party duopoly ensures political stability—preelectoral coalition building, discouraging factions by limiting voices in government, and the voting cue—in light of the private rights theory.

1. Political Stability Through Preelectoral Coalition Building

The private rights theory advances the responsible party government goal of maintaining political stability through the major parties' preelectoral coalition building in two ways. First, the private rights theory, with its pluralist underpinnings, protects exactly those expressive interests essential to the responsible party government vision of self-interested political conflict, and it ignores exactly those interests that might undermine such a vision.¹⁰¹

99. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-67 (1997) (holding that a state's interest in maintaining political stability allows it to enact regulations that favor the two major parties); see also Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans From Political Competition*, 1997 SUP. CT. REV. 331, 331 [hereinafter Hasen, *Entrenching*] (emphasizing the *Timmons* Court's favoritism toward the two-party system); Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 10 (1998) [hereinafter Smith, *Black Party*] (contending that "through its First Amendment and equal protection jurisprudence, the Supreme Court has given constitutional sanctity to the American two-party system").

100. Daniel Lowenstein has argued that successful litigation under "[t]he conventional First Amendment framework" (by which he means something like the private rights model, see *supra* Part I.A) ultimately undermines the goals of the responsible party government theory by enhancing the autonomy of party organizations. See Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1791-92. Party organizations, in Lowenstein's view, tend to be undemocratic, and they accordingly undermine the democratic bridge the responsible party government theory posits between the party in government and the party in the electorate. See *id.* at 1764.

101. See *supra* notes 45-49 and accompanying text (explaining how a pluralist philosophy

Responsible party government theorists set forth an explicitly pluralist vision of political parties, in which the major parties serve as mediating institutions that channel interest group competition and prevent conflicts from shredding the social fabric or producing majoritarian tyranny.¹⁰² On this account, the major parties need substantial autonomy from regulation.¹⁰³ Once the private rights theory's rigid public-private distinction¹⁰⁴ identifies political parties as private entities, the theory's essential concern with private autonomy perfectly grounds the major parties' claims for relief from regulation. Because the private rights theory treats expressive rights as individuated rather than commonly held¹⁰⁵ and denies the possibility of clashing First Amendment interests,¹⁰⁶ recognition of the parties' autonomy right precludes any consideration of a popular right to greater electoral debate, competition, or openness than the major parties provide.¹⁰⁷ The private rights First Amendment

animates the private rights theory of expressive freedom).

102. Professors Persily and Cain, the leading advocates in recent legal literature of the major party duopoly, frame the central constitutional question of party regulation as: "What constitutional rules will ensure that the party system serves to aggregate and to represent interest groups?" Persily & Cain, *supra* note 79, at 797. They sympathetically outline a pluralist theory of party politics that envisions parties as broad, decentralized coalitions of ideologically diverse interest groups. *Id.* at 791-96. In a subsequent article, Persily sets forth pluralist underpinnings for his defense of a strong two-party system. See Persily, *supra* note 78, at 807-11 & n.212 (linking pluralism with substantial party autonomy). On the other hand, a different understanding of pluralism can lead to different prescriptions. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 649 (1998) [hereinafter Issacharoff & Pildes, *Lockups*] (avowing "a pluralist commitment to the electoral arena as a robust marketplace for airing the divergent and conflicting impulses that comprise American politics" while criticizing the duopoly).

103. See *supra* note 78 and accompanying text (discussing the responsible party government theory's support for party autonomy).

104. See *supra* notes 62-68 and accompanying text (discussing the strong public-private distinction under the private rights theory).

105. See *supra* notes 50-53 and accompanying text (discussing the individuated character of rights under the private rights theory).

106. See *supra* note 68 and accompanying text (discussing the impossibility of clashing First Amendment claims under a strong public-private distinction).

107. Professor Persily's thoughtful effort to craft a First Amendment defense of party autonomy illustrates this effect. Although Persily astutely deconstructs the major parties' claims of private status, he proceeds to argue that courts should treat the parties as private anyway. See Persily, *supra* note 78, at 790. Once Persily makes that move, he focuses unrelentingly on "political parties' First Amendment rights to define the contours of their organization." *Id.* at 755. Because Persily bases his analysis on an autonomy-centered account of the First Amendment, he fails to consider that the people might have expressive interests

protects only the self-interested expression of individuals, which forms the content of the pluralist electoral interaction posited by responsible party government theorists.

Second, on the responsible party government account, minor parties exploit undesirable breakdowns in preelectoral coalition building. Thus, minor parties' presence in elections foments faction and threatens political stability, which augurs for electoral rules that discourage or impede minor parties' participation. That course appears to present a constitutional problem: Because minor parties express their members' political views, protecting them might seem to be a logical, even essential function of the First Amendment. The private rights theory of expressive freedom, with its individuated conception of expressive interests and formal understanding of rights,¹⁰⁸ provides a solution. Under the private rights theory's pluralist assumptions, major and minor parties alike are "individuals" with expressive interests. The fact that minor parties have less power to advance their interests in the political marketplace makes no difference in how the Court evaluates their First Amendment interests. Minor parties' First Amendment claims carry only the force of their small constituencies' self interest. Conversely, the responsible party government theory's preference for centrist politics¹⁰⁹ comports with the private rights theory's lack of special concern for protecting radical ideas.¹¹⁰

My linkage of pluralist political assumptions with advocacy of a two-party system diverges from the conventional view of the relationship between political theories and preferred party arrangements. James Gardner, for example, argues that pluralists are likely to prefer a multiparty system with proportional representation, because such a system provides better than a two-party system for resolution of interest group conflicts in the legislature.¹¹¹ Two factors account for the differences in our

that contradict and supersede the major parties' autonomy interest.

108. See *supra* notes 54-61 and accompanying text (discussing the formal conception of rights under the private rights theory).

109. See *supra* notes 81-82 and accompanying text (discussing the responsible party government theory's support for large parties that blunt radical positions).

110. See *supra* notes 69-73 and accompanying text (discussing the private rights theory's balancing methodology).

111. See James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 691-92, 694-95 (2000). Gardner also draws something like the converse conclusion, that "populists"

conclusions. First, Gardner's analysis takes no account of the First Amendment, the Supreme Court's primary doctrinal vehicle for evaluating substantive political arrangements. In my view, a pluralist political philosophy animates the Court's private rights theory of the First Amendment, which in turn supports the assumptions of the responsible party government theory. Second, Gardner bases his conclusion that pluralism welcomes legislative conflict on the assumption that pluralists are highly optimistic about the political efficacy of interest group conflicts.¹¹² He shifts the focus from pluralism to utilitarianism, with its normative commitment to optimizing social utility through self-interested behavior.¹¹³ Gardner's conclusion seems reasonable given his assumption of an optimistic pluralism, but prominent responsible party government advocates' avowal of a pessimistic pluralism renders that assumption problematic. My conclusion that pluralism leads to a preference for preelectoral coalition building depends on the assumption that pluralists prize large, disaggregated parties as a check against the dangers of unrestrained interest group conflict and majoritarian tyranny.¹¹⁴

2. *Discouraging Factions by Limiting Voices in Government*

The private rights theory of expressive freedom also supports the responsible party government theory's emphasis on antifactionalism in two ways. First, the private rights theory's rigid public-private distinction is essential for maintaining the two major political parties' dominance in government. In the cases with which this Article is concerned, involving regulations of parties' electoral activities, the Court has treated political parties as private speakers. Because government regulation of private speakers

will prefer a two-party arrangement. *See infra* notes 285-93 and accompanying text (defending a connection between populist-republicans and multiparty competition).

112. Gardner, *supra* note 111, at 692-94 (discussing the implications of John Stuart Mill's ideas about democratic institutions for a pluralist partisan structure).

113. *See id.* at 691 ("According to pluralism, the purpose of politics is to maximize overall utility, and the best way to do so is through free negotiation among all interested parties.") (footnote omitted); *see also id.* at 680 (describing an optimistic utilitarian account of "a political life of competitive struggle") (footnote omitted).

114. *See supra* notes 79-83 and accompanying text (discussing the responsible party government theory's preference for preelectoral coalition building).

generally clashes with the private rights theory, this treatment ensures the two major parties a great deal of political autonomy. That autonomy, in turn, aids the major parties in maintaining their governmental dominance by insulating from challenge any actions taken in government (short of criminal violations) that benefit the major parties' competitive prospects.¹¹⁵ The law in other circumstances restricts the legal autonomy of entities with governmental power,¹¹⁶ but the public-private distinction allows the major parties not only to have their power but to use it as well. The public-private distinction likewise nullifies any claim that the major parties' electoral activities might infringe First Amendment rights, because the distinction denies that private entities have the capacity to infringe those rights.

Second, the private rights theory's balancing methodology allows courts to elevate the interest in governmental stability to a level that trumps minor parties' competing free speech claims. Once the Court accepts the responsible party government premise that a strong major party duopoly is necessary to stabilize government, no mere individuated interest in expression is likely to overcome such an imposing regulatory interest. In order to preserve stability, the Court can manipulate its portrayals of the regulation's intrusiveness and the speech interest's importance.¹¹⁷ This coalescence of private expressive rights and the major party duopoly places minor parties between a rock and a hard place: they play no part in responsible party government's stable power structure, but they cannot articulate any expressive interest forceful enough to relieve them from that structure's consequences.¹¹⁸

115. Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 499, 552 (1997) (stating that legislative prohibitions of seditious libel "arguably reflect legislators' entrenchment motive to secure their hold on office by insulating themselves from criticism") (footnote omitted).

116. See, e.g., Federal Civil Rights Act of 1871, 42 U.S.C. § 1983 (2000) (stating that every person who subjects any citizen to the deprivation of any constitutional right shall be liable to the party injured); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that federal officials may be liable for damages based on violation of the Fourth Amendment).

117. See *supra* notes 69-71 and accompanying text (describing the capacity of the private rights theory's balancing methodology for manipulation).

118. See *infra* Part III.B (discussing unsuccessful First Amendment challenges brought by minor parties against electoral regulations).

3. *The Voting Cue*

Finally, the private rights theory of expressive freedom justifies the responsible party government notion of a bipolar voting cue. The private rights theory assigns no special significance to political speech, because it treats people's expressive interests as individuated rather than social—allowing, for example, the conclusion that commercial price advertising is as important as political information in the scheme of free expression.¹¹⁹ That approach gives no reason to expect that people should be especially well informed about electoral politics, and indeed pluralism presupposes that most voters are not informed.¹²⁰ Enter the voting cue, whose value depends on the idea that voters are too busy or too ill-informed (or both) to make electoral decisions without substantial cognitive assistance. According to the responsible party government theory, a political system that involved either more or less distinct voting cues than the "Democrat" and "Republican" brand names would undermine the utility and integrity of elections.¹²¹ The private rights theory lends legitimacy to that responsible party government claim.

This Part has advanced a hypothesis that the Supreme Court's theory of expressive freedom, the private rights theory, will lead the Court to validate the major party duopoly. My analysis in Part III will prove that hypothesis in the context of legal challenges to regulations of political parties. Thus, anyone who shares the responsible party government commitment to stability above all should feel very comfortable with the present Court's unflinching reliance on the private rights theory. The next Part, however, calls responsible party government priorities into question. It contends that, where political regulations are at issue, we should prefer that the Court adopt a different theory of expressive freedom, and it shows how such a theory would serve superior political values.

119. See *supra* note 53.

120. See Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS*, *supra* note 82, at 245, 248 [hereinafter Lowenstein, *No Theory*] (stating that "pluralists do not rely on voters to be highly knowledgeable about public issues and candidates for office").

121. See generally RANNEY, *supra* note 80, at 12-13.

II. AN ALTERNATIVE THEORETICAL APPROACH TO REVIEWING REGULATIONS OF POLITICAL PARTIES

To the extent the First Amendment plays an essential role in nurturing democratic culture, the private rights theory offers a shallow account of expressive freedom. The Supreme Court decides disputes about electoral politics under a First Amendment that does no more than protect individuals' established capacities for expression from direct governmental invasion. The theory is indifferent about the workings and needs of the political system. Under the pluralist political vision from which the private rights theory emerges, the First Amendment need do no more, because the political process simply replicates individual conflicts, distributing political goods among self-interested groups. As long as each group can speak up for itself, politics does not require any particular quantum or quality of public debate. In contrast, if society uses the electoral process to pursue the common good and to stimulate vital discourse about issues that affect the general welfare, then adjudication of challenges to political regulations requires a different vision of the First Amendment, focused on ensuring the richest possible electoral debate.¹²²

This Part, like Part I, hypothesizes that a particular theoretical approach to the First Amendment will yield judicial decisions that reflect a particular political theory. Whereas Part I examined the Court's accepted theory of expressive freedom and a political theory that Part III will show to characterize the Court's actual decisions, this Part describes, and advocates, alternatives. As in Part I, I introduce constitutional and political theories separately, to underscore their nominal independence, and I then demonstrate their powerful affinities. Part II.A describes a theory of expressive freedom rooted in the public's interest in collective self-determination rather than the individual's interest in expressive autonomy: the public rights theory. My discussion identifies five key elements, parallel to the five elements of the private rights theory

122. My normative thesis is that the public rights theory of expressive freedom is better suited than the private rights theory to adjudicating cases about electoral regulations, particularly regulations of political parties' electoral activities. The case for favoring the public rights theory in other First Amendment contexts extends beyond the scope of this Article.

described in Part I.A, that characterize this alternative theory: (1) derivation from republican political philosophy, (2) treatment of speech rights as collective, (3) a substantive conception of liberty, (4) recognition of a convergence between the public and private, and (5) employment of a categorical methodology. Part II.B derives from academic criticisms of the major party duopoly a theoretical case for a different vision of political parties' role in our system, which I call the dynamic party politics theory. The discussion focuses on that theory's three aspirations for the health of our democratic system: (1) ensuring an inclusive electoral process, (2) preventing entrenchment of elected officials, and (3) facilitating wide-ranging electoral debate. Part II.C demonstrates how the key elements of the public rights theory promote the aspirations of the dynamic party politics theory. This synthesis provides the framework for my critique in Part III of the Court's recent decisions about regulations of political parties' electoral activities.

A. The Public Rights Theory of Expressive Freedom

The seeds of the public rights theory of expressive freedom have been planted in the law reviews, if only rarely in the United States Reports, beginning with the work of Alexander Meiklejohn.¹²³ Professor Meiklejohn's account of the Free Speech Clause proceeds from a paradox: the First Amendment is phrased in absolute language—"Congress shall make no law ... abridging the freedom of speech ..." ¹²⁴—and yet no one believes the government is or should be absolutely barred from any restriction on conduct that takes the form of spoken or written words.¹²⁵ Thus, Meiklejohn reasons, the "speech" as to which the First Amendment contemplates absolute protection must be some subset of all spoken and written expression.¹²⁶ The logical subset, he contends, is speech related to

123. See MEIKLEJOHN, *supra* note 22.

124. U.S. CONST. amend. I.

125. See MEIKLEJOHN, *supra* note 22, at 19-21; see also Balkin, *supra* note 48, at 412 (echoing the argument that First Amendment prohibition cannot be read literally). For an argument that the text and history of the First and Fourteenth Amendments support a characterization of constitutional expressive freedom as a public benefit rather than an individual right, see Mayton, *supra* note 55, at 386-405.

126. MEIKLEJOHN, *supra* note 22, at 24-28.

politics, or to what he calls "the program of self-government,"¹²⁷ because the Constitution is a charter of government and because of the indispensable role speech must play in a democratic system.¹²⁸

Meiklejohn's emphasis on the primacy of political speech has strongly influenced First Amendment doctrine,¹²⁹ but his deeper analysis of expressive freedom opposes the entrenched view of the First Amendment. Meiklejohn rejects the idea of expressive freedom as a private right:

The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare.¹³⁰

Meiklejohn consigns speech unrelated to the general welfare to the limited protection of the Due Process Clause.¹³¹ He initially defined the privileged category of speech to include only "public discussion

127. *Id.* at 79-80. For an alternative argument that posits the structure of the First Amendment as evidence of the amendment's central focus on democratic self-government, see Neuborne, *supra* note 32, at 1069-70.

128. Although Meiklejohn's ideas might appear rooted in political liberalism or even radicalism, they were echoed in part by Judge Bork, who favored limiting First Amendment protection to political speech because he saw that limitation as the only way to prevent judges from usurping the power of the political branches. See Bork, *supra* note 13, at 20-35.

129. See, e.g., William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Indeed, arguments about the importance of political speech can serve both sides in certain First Amendment controversies, including controversies about regulations of political parties' electoral activities. For one example, see *infra* notes 484-86 and accompanying text (discussing the use of Meiklejohn-derived arguments on both sides of disputes about the constitutionality of campaign finance regulations).

130. MEIKLEJOHN, *supra* note 22, at 42; see also *id.* at 79-83 (distinguishing between public and private expressive interests). For an alternative route to the conclusion that the First Amendment protects speech by virtue of its public value, based on the economic insight that information, especially political information, is a public good undervalued by the market, see Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554 (1991).

131. See MEIKLEJOHN, *supra* note 22, at 36-37. This is appropriate because "private rights, including the right of 'private' speech, are liable to such abridgements as the general welfare may require." *Id.* at 80.

and public decision of matters of public policy."¹³² Later, however, he broadened the definition to encompass "all [the] vast array of idea and fact, of science and fiction, of poetry and prose, of belief and doubt, of appreciation and purpose, of information and argument, [that] the voter may find ready to help him in making up his mind."¹³³

Meiklejohn offers as a paradigm of free expression under the First Amendment "the traditional American town meeting."¹³⁴ At such a meeting, he explains, freedom of expression is essential not for the sake of the speaker, but for the sake of the assembled listeners.¹³⁵ "The final aim of the meeting is the voting of wise decisions.... The welfare of the community requires that those who decide issues

132. *Id.* at 42.

133. *Id.* at 117. The challenge of defining "political speech" and distinguishing that category from other sorts of speech remains one of the most difficult features of Meiklejohn's theory, and some critics have questioned the efficacy of the line drawing the theory requires. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 596-97 (1982) (criticizing Meiklejohn's boundaries); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1225-39 (1983) (criticizing the exclusion of commercial speech from the protected "political" category). Those skeptics, however, must answer the converse criticism: That advocating protection of much or all speech creates a serious risk that courts will water the protection down in certain contexts to the detriment of expressive freedom generally. "[A]s the protected categories [of speech] have expanded, there has been justifiable anxiety that the core values of the First Amendment might be diluted in order to accommodate an ever widening circle of applications." Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 110-11 (1992) (footnote omitted); see also Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194-95 (1988) (discussing the danger of "doctrinal dilution" posed by extending First Amendment protection to commercial speech). Continuing examination of the line-drawing problem will be essential for many facets of the public rights theory, such as determining whether and to what extent derogatory speech based on race, sex, and/or sexual orientation contributes to or impedes the process of collective self-determination. See, e.g., Michelman, *supra* note 13, at 313 ("Which is worse—to leave pornographers subject to the vicissitudes of silencing by the lawmaking activities of political majorities, or to leave women subject to the vicissitudes of silencing by the private publishing activities of pornographers?"). In the immediate context of political parties' electoral activities, criticism of the public rights theory as uncertain or underinclusive can be set aside, because electoral activities have undeniable salience for democratic self-government.

134. MEIKLEJOHN, *supra* note 22, at 24.

135. One important consequence of Meiklejohn's emphasis on the interest in receiving information was his refusal to limit expressive freedom to United States citizens. "[U]nhindered expression must be open to non-citizens, to resident aliens, to writers and speakers of other nations, to anyone, past or present, who has something to say which may have significance for a citizen who is thinking of the welfare of this nation." *Id.* at 119.

shall understand them.”¹³⁶ Meiklejohn’s prime directive is that the public must have access to the greatest possible breadth and quantity of information in order to facilitate self-government:

No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community.¹³⁷

Accordingly, restrictions on redundant speech, or on speech that does not actually express any idea, are permissible. “What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹³⁸

In contrast, Meiklejohn adamantly forecloses any restriction on speech based on the idea it expressed. “No plan of action shall be outlawed because someone in control thinks it unwise, unfair, un-American. No speaker may be declared ‘out of order’ because we disagree with what he intends to say.”¹³⁹ Meiklejohn rejects the

136. *Id.* at 26.

137. *Id.* at 74-75. Meiklejohn’s emphasis on the people’s paramount interest in receiving information reaches back to John Stuart Mill, who wrote that “the only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind.” JOHN STUART MILL, *ON LIBERTY* 21 (David Spitz ed., 1975) (1859).

138. MEIKLEJOHN, *supra* note 22, at 26. Robert Post argues that Meiklejohn’s allowance for restrictions on redundant or irrelevant speech imposes an unacceptable procedural constraint on the collective decision-making process. See Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993). The problem Post sees with what he calls Meiklejohn’s “framework of managerial authority,” *id.* at 1120, is that the process of collective self-determination necessarily entails dispute about how the process itself is constituted. Thus, by subjectively preferring a specific procedural model, Meiklejohn “violates th[e] necessary indeterminacy of public discourse” as surely as if he had imposed a particular substantive ideology on the community. *Id.* at 1117. Post identifies an important problem in Meiklejohn’s account, but the problem is intractable enough that it ensnares Post himself. His reliance on “the private status of speakers,” *id.* at 1128, to optimize the freedom of public discourse ultimately rests on a broad generalization about the inevitable, unique tyranny of the state. See *id.* at 1136 (warning against “[s]tructures of control” established by government intervention in the private marketplace of ideas). That generalization depends on historical, logical, and ideological assumptions that are themselves contingent and debatable. See *infra* notes 150-51 and accompanying text (discussing dangers private action can pose to expressive freedom).

139. MEIKLEJOHN, *supra* note 22, at 27; see also MILL, *supra* note 137, at 18 (“If all

idea that speech should be proscribable when it presents a "clear and present danger" of unlawful action.¹⁴⁰ Instead, echoing Justice Brandeis' famous concurrence in *Whitney v. California*,¹⁴¹ Meiklejohn accepts the possibility of riot and revolution as the price of a truly free process of self-government. He accepts restrictions on ideas only "[i]n an emergency ... [where] the processes of public discussion have broken down."¹⁴² Even in such circumstances, he maintains, any restrictions must apply to speech "not by one party alone, but by all parties alike."¹⁴³

Later scholars, most notably Owen Fiss and Cass Sunstein, have elaborated and deepened Meiklejohn's analysis of the First Amendment. Professor Fiss has added to Meiklejohn's conception of expressive freedom a thorough defense of government action to protect open public debate.¹⁴⁴ Fiss embraces the idea that expressive freedom should promote "collective self-determination,"¹⁴⁵ but he complains that elements of the entrenched approach to expressive freedom,¹⁴⁶ and even theorists who recognize the centrality of collective self-determination,¹⁴⁷ undermine public discourse by promoting the autonomy of speakers above all other values. That fixation on autonomy, Fiss contends, is an understandable inheritance from the era when "the street corner speaker"

mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.").

140. See MEIKLEJOHN, *supra* note 22, at 29-50 (discussing and critiquing Justice Holmes' articulation of the "clear and present danger" principle).

141. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

142. MEIKLEJOHN, *supra* note 22, at 49.

143. *Id.*

144. Professor Fiss' advocacy of governmental involvement expands on ideas suggested by Thomas Emerson, who viewed robust public debate as one among several viable justifications for expressive freedom. See Emerson, *supra* note 72, at 953-55 (discussing affirmative measures government might take to advance First Amendment values).

145. Fiss, *Social Structure*, *supra* note 67, at 1407.

146. Fiss targets what he calls the "traditional" approach to expressive freedom, an approach that aims for individual autonomy, seeks above all to prevent content-based regulation, and sees the government as the enemy of free speech. See *id.* at 1408-10.

147. Fiss places Meiklejohn in a tradition that mistakenly advocates autonomy as the instrument for achieving robust public debate. See *id.* at 1409-10. Meiklejohn did not emphasize the value of government intervention to protect speech. Even so, his "town meeting" model and his emphasis on the listener's First Amendment interest over the speaker's belie Fiss' classification. See *supra* notes 131-39 and accompanying text.

dominated free speech controversies,¹⁴⁸ but it renders free speech jurisprudence ineffectual, even counterproductive, in a world where concerns shift “from the street corner to, say, CBS.”¹⁴⁹ Preserving autonomy simply requires preventing government interference with private speakers. Preserving the conditions for effective self-government, in contrast, requires consideration of the actual effects of both government and private action on public discourse.¹⁵⁰ Private actions, as surely as government actions, may impoverish rather than enrich public debate.¹⁵¹ Conversely, just as the New Deal demonstrated the necessity of government intervention in economic markets, the present deficiencies of public discourse demonstrate that the government has an active, essential role to play in the “marketplace of ideas.”¹⁵²

Fiss’ New Deal analogy prefigures his prescription for government intervention to protect collective self-determination. By allowing the economic market to dictate the terms of public debate, the autonomy principle replicates market inequalities in the expressive arena.¹⁵³ “The market—even one that operates smoothly and efficiently—does not assure that all relevant views will be heard, but only those that are advocated by the rich” or others with access to capital.¹⁵⁴ Private action undermines public debate both by privileging the perspectives of “select groups” and by allowing

148. Fiss, *Social Structure*, *supra* note 67, at 1408; *see also* Balkin, *supra* note 48, at 406 (explaining the importance of the technology of speech once First Amendment controversies move beyond “the paradigmatic situation of the speaker on the soapbox”); Kairys, *supra* note 69, at 261 (claiming that “the law and society have frozen the scope and nature of our speech rights at levels appropriate to the 1930s”).

149. Fiss, *Social Structure*, *supra* note 67, at 1410.

150. *Id.* at 1411.

151. *Id.* at 1414; *see also* Cole, *supra* note 25, at 245 (“Both private concentrations of wealth and government authority can be abused to undermine free and equitable access to the political process.”); Michelman, *supra* note 13, at 313-14 (concluding that “[w]e simply cannot say, a priori, that either avenue of social action—state or market—is categorically safer than the other” for protecting expressive freedom).

152. *See* Fiss, *Why the State?*, *supra* note 66, at 781-83 (contrasting the New Deal, in which “[s]tate power ... became the principal instrument for achieving a true and substantive equality,” with First Amendment doctrine).

153. Fiss makes clear that this concern is not unique to market capitalism. “The fear I have about the distortion of public debate under a regime of autonomy is not in any way tied to capitalism. It arises whenever social power is distributed unequally.” Fiss, *Social Structure*, *supra* note 67, at 1412; *cf.* Cole, *supra* note 25, at 271-76 (inquiring whether “democratic capitalism” is a contradiction in terms).

154. Fiss, *Social Structure*, *supra* note 67, at 1412-13.

profit incentives to crowd out "the democratic needs of the electorate."¹⁵⁵ When private action has these effects, Fiss contends, the government has not merely a prerogative, but a duty to "supplement" the market's direction of the flow of ideas.¹⁵⁶ Fiss neither condemns the market nor romanticizes the government, but he posits that the government responds to different incentives than the market, making it a potentially valuable check on a purely market-driven drift in debate.¹⁵⁷ Fiss acknowledges two dangers inherent in government regulation of speech: that the government may act in its own interest rather than the public's,¹⁵⁸ and that it may do more harm than good where it intervenes in a battle between competing First Amendment priorities.¹⁵⁹ In response, he reiterates the courts' responsibility for watching the watchmen.¹⁶⁰

Professor Sunstein casts his "effort to root freedom of speech in a conception of popular sovereignty" in civic republican terms.¹⁶¹ He forthrightly anchors his revisionist view of the First Amendment in a normative distaste for the primacy of corporate interests in

155. Fiss, *Why the State?*, *supra* note 66, at 787-88.

156. *Id.* at 788 ("The state is to act as the much-needed countervailing power, to counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy."). The government may perform its supplementary function either through regulation or through subsidy, a sort of negative regulation. See Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087, 2097 (1991) [hereinafter Fiss, *State Activism*] (contending, in the context of arts censorship, that "the effect of a denial of a grant is roughly equivalent to that of a criminal prosecution"); see also Balkin, *supra* note 48, at 412 (suggesting a First Amendment mandate for "governmental investment in the modern technological equivalents of traditional public forums—for example, radio and television").

157. See Fiss, *Why the State?*, *supra* note 66, at 789 ("[S]imply by virtue of their position government employees are subject to a different set of constraints than those who run the media.").

158. See *id.* at 790-93 (discussing danger of "circularity").

159. See Fiss, *Social Structure*, *supra* note 67, at 1418-19. Fiss distinguishes cases that involve competing First Amendment rights from cases in which the government compromises "an ordinary value," such as property rights, to advance expressive freedom. In the latter sort of case, Fiss has less concern about the costs of government regulation. *Id.*; see also Emerson, *supra* note 72, at 949 (distinguishing between constitutionally problematic regulations of "expression" to protect First Amendment interests and less problematic regulations of "action").

160. See Fiss, *Social Structure*, *supra* note 67, at 1420-21. Fiss notes that "courts will not make these judgments [about the effects of government intervention in public debate] in a vacuum, but will be subject to intense scrutiny of the critical community that attends to matters judicial" Fiss, *State Activism*, *supra* note 156, at 2102.

161. Sunstein, *supra* note 13, at 257.

modern First Amendment doctrine.¹⁶² The basis for Sunstein's analysis is his understanding that the Constitution created a deliberative democracy, "a system that combines a degree of popular accountability with a belief in deliberation among representatives and the citizenry at large."¹⁶³ In line with this view of democracy, Sunstein suggests two alternative paths to refocusing First Amendment protection. His more modest prescription, drawing heavily on Meiklejohn's insights, is for a "two-tier First Amendment," in which courts would subject restrictions on political speech to the strictest constitutional scrutiny while applying a species of intermediate scrutiny to nonpolitical, "lower value" speech.¹⁶⁴ This approach would have the benefit of firmly protecting the speech as to which the government is most likely to be biased and to which regulation is most likely to do serious harm.¹⁶⁵

Sunstein's bolder proposal sketches "a New Deal for speech" that would apply legal realist precepts to the First Amendment, resulting in a milder variation on Fiss' call for aggressive government intervention to ensure expressive freedom.¹⁶⁶ Sunstein observes that government action so strongly influences the shape of the "private" marketplace of ideas, by affecting which speakers have the resources and opportunities to express themselves and be heard, that arguments about *whether* the government should regulate speech are incoherent.¹⁶⁷ He asserts the existence of a distinct

162. See *id.* at 258 (describing corporations' success with free speech claims as "something important and strange [that] has happened to the First Amendment").

163. *Id.* at 313.

164. See *id.* at 301-12. Sunstein refines Meiklejohn's theory of the First Amendment in several significant ways. First, he defines "political speech" broadly as any expression that is "both intended and received as a contribution to public deliberation about some issue." *Id.* at 304. Second, he grants even "lower value" speech some First Amendment protection, in contrast to Meiklejohn's relegation of nonpolitical speech to mere procedural due process protection, because of his belief that "[n]o speech can be regulated on the basis of whim or whimsy." *Id.* at 309. Finally, Sunstein admits all art and literature to the class of fully protected speech, on the theory that "they are frequently political—combined with the severe difficulty of evaluating their political quality on an ad hoc basis" *Id.* at 312.

165. See *id.* at 305-06.

166. See *id.* at 263-66. Dean Balkin's earlier critique of contemporary First Amendment doctrine proceeds along similar legal realist lines. See Balkin, *supra* note 48, at 379-83; cf. Sunstein, *supra* note 13, at 263 n.21 (describing position as similar to Balkin and less extreme than Fiss).

167. See Sunstein, *supra* note 13, at 267-68. Dean Balkin makes a similar point, urging reconceptualization of the "public forum" problem as merely a subset of cases in which private

private sphere,¹⁶⁸ but he contends that courts too often fail to see the state action behind private exercises of power.¹⁶⁹ The Court should enforce the First Amendment in cases where private denials of access, predicated on state-protected property interests, undermine public discourse.¹⁷⁰ For example, Sunstein would not reject on state-action grounds a challenge to a private shopping mall owner's prohibition of expressive activity, because only the government's conferral of a legal right to exclude allows the owner to impose the prohibition.¹⁷¹ The real issue, for Sunstein, is whether any action enabled by government advances or diminishes the effort by which he defines expressive freedom: "an effort to ensure that people are not prevented from speaking, especially on issues of public importance."¹⁷²

Out of these and related scholarly explorations of expressive freedom emerges a powerful critique of the private rights theory and the material for a theoretical alternative. What I call the public rights theory of expressive freedom is characterized by several interrelated elements that directly oppose the elements of the private rights theory discussed above.

First, the public rights theory derives from a republican philosophy of politics and government, focused on deliberation and the public interest, as opposed to the pluralist philosophy that animates the private rights theory.¹⁷³ The Free Speech Clause, on the public rights account, must enable a political discourse aimed at reaching a collective determination of wise policy.¹⁷⁴ "[P]olitics is not

rights, enjoyed by virtue of legally enforceable rules, interfere with rights of access to the means of expression. See Balkin, *supra* note 48, at 398-404.

168. See Sunstein, *supra* note 13, at 267 ("[T]here should be enthusiastic agreement ... that the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question."). For this reason, Sunstein does not claim that his theory requires a new doctrine of "affirmative rights"; rather, he calls for a broader conception of the negative constraints the First Amendment bars the government from imposing. See *id.* at 273.

169. See *id.* at 270; see also Balkin, *supra* note 48, at 401 (discussing the relationship between government and private roles in denying access to means of communication).

170. Sunstein, *supra* note 13, at 270-72.

171. See *id.* at 271-72.

172. *Id.* at 271. This explicit normative commitment to democratic self-government as the defining value of the First Amendment is what distinguishes Sunstein's prescription from Balkin's similar analysis and places Sunstein squarely in the "public rights" tradition.

173. See *supra* notes 45-49 and accompanying text (discussing pluralist underpinnings of private rights theory).

174. See MEIKLEJOHN, *supra* note 22, at 81 (describing the object of political debate as "not

a process in which desires and interests remain frozen";¹⁷⁵ rather, people need to hear one another out in order to make informed, public-spirited decisions. This deliberative vision stands in sharp contrast to the pluralist vision of conflict among private interest groups as the inevitable mode of political decision making.¹⁷⁶ Under the public rights theory, "the public interest cannot be merely the totality of the private interests. It is, of necessity, an organization of them, a selection and arrangement, based upon judgment of relative values and mutual implications."¹⁷⁷ Because the public rights theory emphasizes deliberation, it deplors the model of expressive freedom as a "marketplace of ideas."¹⁷⁸ The other

another different interest superimposed upon our individual desires and intentions [but one] compounded out of them"); Farber, *supra* note 130, at 583 (identifying the "public good" conception of the First Amendment as "communitarian and republican rather than libertarian and individualistic"); Michelman, *supra* note 13, at 293 (situating a discussion of limits on First Amendment protection for pornography in the context of "deliberative politics"); Sunstein, *supra* note 13, at 313 ("[T]he system is intended to ensure discussion and debate among people who are differently situated, in a process through which reflection will encourage the emergence of general truths."); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1018-20 (1976) (contending that the First Amendment embodies a deliberative vision of politics and criticizing the pluralist vision); see also David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 1027-29 (1996) (likening public rights critics of conventional First Amendment doctrine to communitarian critics of individual rights jurisprudence).

175. Sunstein, *supra* note 13, at 313.

176. See *id.* (assailing the argument that the purpose of our democratic system is "to furnish the basis for struggle among self-interested private groups" as "anathema to American constitutionalism"). The public rights theory reflects optimism about democratic culture, but given the frequent divide between actual human behavior and the deliberative ideal, a prudent account of the theory must view the First Amendment as embodying and facilitating an aspiration for political interaction. See Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 45 (1995) [hereinafter Ortiz, *Engaged*] (warning against judicial presumption of citizen engagement in the political process and contending that judicial review of political regulations should aim to encourage engagement).

177. MEIKLEJOHN, *supra* note 22, at 81.

178. See *id.* at 73-74 (criticizing Justice Holmes' "marketplace of ideas" conception of expressive freedom); Baker, *Of Course*, *supra* note 70, at 1183-84 (criticizing the marketplace of ideas theory on the ground that "truths are socially constructed and power, not logic, largely determines their content"); Horwitz, *supra* note 133, at 110-11 (criticizing the modern Court's equation of First Amendment protection with *Lochner*-era substantive due process protection for rights of contract); Rabban, *supra* note 174, at 1037 (acknowledging in the First Amendment context that "the formal protection of abstract individual rights, when wrenched from social context, frequently yields results that reinforce inequality while preventing desirable social change"); Sunstein, *supra* note 13, at 314 ("Aggregative or marketplace notions disregard the extent to which political outcomes are supposed to depend on discussion

elements of the public rights theory all follow from its republican roots.

Second, in keeping with the republican focus on the public interest, expressive freedom under the public rights theory is collective, rather than individuated.¹⁷⁹ The essence of the public rights First Amendment is a primary purpose of advancing democratic self-government. That purpose makes the public's interest in receiving information paramount, eclipsing any individual speaker's interest in expressing herself. "Keeping ideas and information from the public, not the unfair treatment of the speaker, is the gist of the constitutional wrong"¹⁸⁰ Whereas the present Court gives little consideration to expressive interests the people might share collectively, such as the interest in access to a diverse range of ideas,¹⁸¹ the public rights theory deemphasizes individual autonomy as a basis for expressive freedom.¹⁸²

and debate, and on the reasons offered for and against the various alternatives."). *But see* Cole, *supra* note 25, at 241 (attempting to defend the marketplace metaphor on the ground that it "depicts free speech as both an individual and a collective right").

179. *See supra* notes 49-53 and accompanying text (discussing the private rights theory's individuated conception of First Amendment rights).

180. Fiss, *State Activism*, *supra* note 156, at 2100; *see also* MEIKLEJOHN, *supra* note 22, at 74-75 (contending that the First Amendment is concerned primarily with the public's access to ideas rather than the individual's expressive autonomy); Mayton, *supra* note 55, at 390-92 (arguing as a textual matter that the First Amendment protects collective interest in access to ideas). *But see* Lee, *supra* note 63, at 317 (associating the right to receive information with individual autonomy).

181. Occasional exceptions to this tendency still appear. *See, e.g.*, *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 467 (1995) (characterizing as "heavy" the government's burden in defending "Congress' wholesale deterrent to a broad category of expression by a massive number of potential speakers").

182. *See* MEIKLEJOHN, *supra* note 22, at 88 (decrying "the claims of an individualism which, when it becomes excessive, refuses to acknowledge the validity of political obligations"); Farber, *supra* note 130, at 580 (noting the importance of nonfinancially motivated expression for political culture); Fiss, *Social Structure*, *supra* note 67, at 1422-24 (criticizing judicial emphasis on autonomy); Sunstein, *supra* note 13, at 277 ("[T]he interest in legally protected private autonomy from government is not always connected with the interest in democratic self-governance."); *see also* Neuborne, *supra* note 32, at 1058 ("Viewed solely as a means of disabling government, a purely 'autonomy-centered' First Amendment can be affirmatively hostile to democracy by insulating private activity from regulation despite its deleterious effect on democracy."). *But see* Redish, *supra* note 133, at 601 (arguing that "political democracy is merely a means to—or, in another sense, a logical outgrowth of—the much broader value of individual self-realization").

Third, the collective nature of expressive freedom entails a substantive conception of liberty rather than a formal conception.¹⁸³ The First Amendment does not only protect individuals from government denials of their expressive freedom; rather, it empowers courts to facilitate the public debate required for self-government.¹⁸⁴ This difference arises because the public rights theory views the political process as a popular enterprise that requires maximum participation and engagement of the people. "[T]he principle of the freedom of speech is derived, not from some supposed 'Natural Right,' but from the necessities of self-government by universal suffrage"¹⁸⁵ The meaning of the First Amendment is bound up with the principle of "one person, one vote" that we extol as essential to our democratic system.¹⁸⁶ Just as the Constitution dictates universal suffrage, it directs universal access to electoral discourse.¹⁸⁷ Thus, simply ensuring that government regulations remain neutral as between individual speakers, as the private

183. See *supra* notes 54-61 and accompanying text (discussing the private rights theory's formal view of rights).

184. See Balkin, *supra* note 48, at 411 (advocating a substantive rather than formal conception of expressive freedom); Cole, *supra* note 25, at 241 (associating "the republican conception of the town meeting" with "not merely an abstract or formal 'right' to speak, but a more substantive guarantee that ordinary people will in fact have a real opportunity to participate in the exchange") (footnote omitted); Kairys, *supra* note 69, at 264-65 (contending that expressive freedom in the dominant discourse "has been falsely redefined as a set of preexisting natural rights whose essence and history are legal rather than political"); Sunstein, *supra* note 13, at 274 (contending that "the First Amendment, even as currently conceived, is no mere negative right").

185. MEIKLEJOHN, *supra* note 22, at 79; see also Neuborne, *supra* note 32, at 1057 (characterizing the First Amendment as "the primary structural guarantor of a vibrant democracy"); Sunstein, *supra* note 13, at 314 ("The belief that politics lies at the core of the [First Amendment] is an outgrowth of the more general structural commitment to deliberative democracy."); see also Schauer & Pildes, *supra* note 32, at 1814 (characterizing rights as a "means of realizing various common goods, rather than being protections for individualist interests against collective judgments about those common goods").

186. See *Baker v. Carr*, 369 U.S. 186, 208 (1961); see also Cole, *supra* note 25, at 243-44 (discussing how the "one person, one vote" principle reinforces "the norm of equality implicit in the First Amendment's mandate"); Sunstein, *supra* note 13, at 314 ("The First Amendment ... is part and parcel of the constitutional commitment to citizenship."). David Kairys, criticizing the dominant approach to the First Amendment, argues that, "while freedom of speech is essential to any free and democratic society, so is the ability to participate meaningfully in the formulation of social policies and priorities." Kairys, *supra* note 69, at 265. From the standpoint of the public rights theory, those two values are inseparable.

187. MEIKLEJOHN, *supra* note 22, at 116 ("Our First Amendment freedom ... is an arrangement made by women and men who vote freely and, by voting, govern the nation.").

rights theory aims to do, will not suffice to enforce First Amendment guarantees.¹⁸⁸ Rather, the First Amendment compels "an inquiry into the *effect*, in the bright world around us, of a condition respecting speech."¹⁸⁹ The public rights theory deplores the present Court's refusal to enforce especially vigorous First Amendment protection for marginalized speakers and political dissidents¹⁹⁰ and the accompanying emphasis on First Amendment protection for corporations and other powerful speakers.¹⁹¹ A public rights conception of the First Amendment would recognize the distinctive urgency of ensuring that weaker, politically vulnerable members of

188. See Cole, *supra* note 25, at 273-74 (criticizing the formal conception of First Amendment rights); Horwitz, *supra* note 133, at 112-16 (identifying the present Court's increasing reliance on the abstract principle of content neutrality as a factor in unmooring free speech protection from social reality); see also Alon Harel, *Free Speech Revisionism: Doctrinal and Philosophical Challenges*, 74 B.U. L. REV. 687, 702 (1994) (book review) (arguing that a focus on content basis "can in fact be damaging" because it "allows mechanical resolution of cases and consequent lack of attention to important conflicts between societal values and interests"); Mayton, *supra* note 55, at 379-86 (criticizing the Court's formalistic resolution of cases in which government conditions benefits on renunciation of expressive rights and advocating a substantive analysis based on the collective interest in access to information).

189. Mayton, *supra* note 55, at 415.

190. See MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 215 (1991) (criticizing "[c]ontemporary defenders of free speech" for "fail[ing] in a world where the major threat to meaningful debate on matters of public importance is not that many are prevented from speaking but that many do not have the resources necessary to be heard"); Horwitz, *supra* note 133, at 113 (contending that the present Court's First Amendment doctrine "ignores what had originally been the central practical goal of modern First Amendment history: the use of free speech doctrine to 'level the playing field' in order to provide economically or socially weak political dissidents with a chance to engage in political debate"); Kairys, *supra* note 69, at 261 (complaining that contemporary free speech doctrine "does not provide people of ordinary means entrée to society's dialogue on the issues of the day"); Rabban, *supra* note 174, at 953 (describing the concern "that the First Amendment, instead of protecting unpopular dissenters from a repressive state, is now being invoked by the politically powerful to prevent regulation"); Sunstein, *supra* note 13, at 296 ("[M]any content-neutral laws have content-differential effects ... because they operate against a backdrop that is not prepolitical or just.") (footnote omitted).

191. See Balkin, *supra* note 48, at 384 ("Business interests and other conservative groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment"); Fiss, *Social Structure*, *supra* note 67, at 1406-08 (deploring the Court's preference in free speech cases for interests of capital over the public interest in robust debate); Sunstein, *supra* note 13, at 258 (criticizing the focus on First Amendment rights of corporations); see also Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984) (charging that the First Amendment "has replaced the due process clause as the primary guarantor of the privileged" and serves that function "more perniciously than the due process clause ever did").

society could participate equally in the process of collective self-determination.¹⁹² Thus, in contrast to the present Court,¹⁹³ the public rights theory sympathizes with claims that the Constitution confers some measure of access to the means of expression.¹⁹⁴

Fourth, complementing its substantive conception of liberty, the public rights theory recognizes a *convergence of public and private* and thus rejects the rigid public-private distinction of the private rights theory.¹⁹⁵ The convergence reflects, in part, the understanding that the public and private spheres are often conceptually difficult to distinguish.¹⁹⁶ The main rationale, however, is functional: because the public rights theory is concerned with the substantive vitality of public discourse, courts should evaluate asserted threats to and protections of expressive freedom based on their actual

192. See Balkin, *supra* note 48, at 381 ("[T]he right of political participation is no less affected by differences in economic power than is the right of economic participation."); Jeffrey M. Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273 (1983) (contending that the Court should provide absolute protection only to those expressive activities available without regard to class); Rabban, *supra* note 174, at 1037 ("[T]he 'freedom of speech' of a wealthy political candidate is significantly different from the 'freedom of speech' of an unpopular political speaker criticizing government policy.").

193. See Balkin, *supra* note 48, at 398 & n.53 (discussing Court decisions that have rejected claims for an affirmative right of access to private property for expressive purposes); Kairys, *supra* note 69, at 264 (criticizing the Court's rejection under the First Amendment of government attempts to ensure access to means of expression).

194. See Balkin, *supra* note 48, at 401 ("Effective communication, or rather its substantive possibility, is an unavoidable component of the liberty of speech, just as effective bargaining, or its substantive possibility, is an essential component of economic liberty."); Sunstein, *supra* note 13, at 292-93 (advocating access rights in some circumstances). Professor Baker, who shares the public rights theorists' concern with social power disparities, is more wary of access rights. "Unequal distributions [of speech opportunities] are not per se violations of the disadvantaged group's rights. A robust polity must allow for collective choices that have such effects, as well as choices to equalize allocations." Baker, *Of Course*, *supra* note 70, at 1203. The difference reflects Baker's defining dispute with the public rights theory: his understanding of the First Amendment as a guarantor of individual autonomy. See *id.* at 1197 ("Freedom of speech may be a fundamental right because respect for people's autonomy requires that people be free to engage in certain types of actions, to make certain choices.").

195. See *supra* notes 62-68 and accompanying text (discussing the private rights theory's reliance on a strong public-private distinction).

196. See Balkin, *supra* note 48, at 404 (calling for "collapsing the distinction between public and private power in specific contexts"); Fiss, *Social Structure*, *supra* note 67, at 1414 (characterizing broadcaster CBS as "a composite of the public and private" and positing that "[t]oday the social world is largely constituted by entities that partake of both the public and the private"); Kairys, *supra* note 69, at 265 (critiquing the relationship between the "ideology of free speech" and the public-private distinction).

effects on the system of free expression.¹⁹⁷ The theory retains a concern about government tyranny,¹⁹⁸ but it also welcomes government action to ensure substantive expressive freedom in appropriate circumstances¹⁹⁹ and may even require such action.²⁰⁰ The overriding importance of public debate means that the government should intervene to advance debate not in spite of the need for government neutrality but because of it.²⁰¹ In addition, the public rights theory's blurring of the public-private divide creates the

197. See Fiss, *Why the State?*, *supra* note 66, at 786 ("[A]ction is judged by its impact on public debate, a social state of affairs, rather than by whether it constrains or otherwise interferes with the autonomy of some individual or institution."); Mayton, *supra* note 55, at 417-18 (discussing the disutility of public-private distinction in cases where the government crowds out private opportunities for expression); Sunstein, *supra* note 13, at 276 (advocating a focus on "the need to promote democratic self-government" rather than on abstract autonomy values).

198. Even Professor Fiss, the leading advocate of government intervention to protect open public debate, acknowledges that "the state might act wrongfully" and that "[w]e must always stand on guard against this danger." Fiss, *Why the State?*, *supra* note 66, at 787; see also Cole, *supra* note 25, at 270 ("There are indeed legitimate reasons to be wary of empowering the government to ensure a 'fair' debate.").

199. See Farber, *supra* note 130, at 568 (suggesting that First Amendment doctrine has overemphasized avoiding restrictions on speech and that failure of the market to produce sufficient information should lead government to promote speech actively); Fiss, *Social Structure*, *supra* note 67, at 1416 ("We should learn to recognize the state not only as an enemy, but also as a friend of speech; like any social actor, it has the potential to act in both capacities"); Michelman, *supra* note 13, at 313 ("[R]egulatory law [can] be a good antidote or alternative to monopolistic or egoistic oppression in a market.") (footnote omitted); Sunstein, *supra* note 13, at 267 ("[I]n some circumstances, what seems to be government regulation of speech actually might promote free speech, and should not be treated as an abridgement at all."); see also MEIKLEJOHN, *supra* note 22, at 82-83 (suggesting the positive value of government actions to protect expressive freedom).

200. See Balkin, *supra* note 48, at 398-404 (contending that government's provision of access to means of expression, including redistribution of private expressive opportunities, is necessary for expressive freedom); Cole, *supra* note 25, at 277 (positing a First Amendment mandate that "would require government to ensure that the political marketplace not be overrun by concentrations of wealth"); Fiss, *State Activism*, *supra* note 156, at 2101 (contending that the Court should review government allocative decisions, including denials of subsidies, based on their effects on public discourse).

201. See Balkin, *supra* note 48, at 397 ("[T]he groups who most need inexpensive or free access (usually the groups most on the outs) are the ones who end up bearing the brunt of content-neutral regulations.") (footnote omitted); Cole, *supra* note 25, at 274 (contending that "a policy of absolute government 'neutrality' ... not only fails to achieve equality but perpetuates and exacerbates the underlying reality of inequality") (footnote omitted); Fiss, *State Activism*, *supra* note 156, at 2100 ("[T]he state's obligation of neutrality requires that it make certain that the public debate is as rich and varied as possible.").

possibility of competing claims to expressive rights.²⁰² In some instances when an individual brings a First Amendment claim based on autonomy, the government may successfully respond that broader, public First Amendment interests in access to information outweigh the autonomy concern.²⁰³

Fifth, the public rights theory, in the first instance, sorts out conflicts between collective speech interests and competing regulatory priorities through a *categorical methodology*, based on the near-absolute protection of political speech.²⁰⁴ Where speech essential to self-government is concerned, courts may not take the private rights approach of balancing speech interests against competing government regulatory interests.²⁰⁵ Expression has not just relative value when measured against other government regulatory priorities but absolute value for the flourishing of collective self-determination.²⁰⁶ Unpopular, radical, even dangerous ideas need and deserve the most rigorous constitutional protection.²⁰⁷ Thus, the public rights theory rejects the present Court's willingness to silence political dissidents in the name of nonspeech

202. See Fiss, *Social Structure*, *supra* note 67, at 1419 (discussing cases in which "the first amendment appears on both sides of the equation"); Michelman, *supra* note 13, at 304 ("[I]f we did have general rules granting protection against both public and private repression, then neither such rule could be held to govern strongly any case in which the two rules collided."); Neuborne, *supra* note 32, at 1064 ("[I]n a complex First Amendment universe, cases emerge where it is hard to know who is entitled to wear the mantle of First Amendment autonomy.").

203. See cases cited *supra* note 29.

204. See *supra* notes 126-28 and accompanying text (discussing Meiklejohn's distinction of political speech from other categories of expression).

205. See *supra* notes 69-73 and accompanying text (discussing the private rights theory's balancing methodology).

206. See *infra* note 516 (discussing the difference, in the public rights analysis, between competing speech claims and claims that some nonspeech interest should outweigh expressive freedom).

207. "[T]he citizens of the United States will be fit to govern themselves under their own institutions only if they have faced squarely and fearlessly everything that can be said in favor of those institutions, everything that can be said against them." MEIKLEJOHN, *supra* note 22, at 77; see also Sunstein, *supra* note 13, at 313 ("A distinctive feature of American republicanism is hospitality to heterogeneity, rather than fear of it."); cf. Balkin, *supra* note 48, at 379 ("The long term effect of the unequal distribution of power and property is an unequal exposure of particular ideas, and the stifling and co-opting of more radical and imaginative ideas about politics and society."). But see Bork, *supra* note 13, at 29-31 (advocating, in context of a First Amendment theory that emphasizes protection of political speech, restrictions on advocacy of overthrowing government).

regulatory objectives.²⁰⁸ No interest short of the interest in preserving political discourse itself could justify a regulation that compromised the open character of that discourse, including a claimed interest in "political stability."

In the Sections that follow, I will contend that the judiciary's embrace of the public rights theory of expressive freedom in cases involving electoral regulations is essential to advancing the values of democratic participation, electoral competition, and robust political debate.²⁰⁹ Two lines of scholarly commentary, however, have questioned the basic utility of rights language in this area. First, some First Amendment scholars have dismissed the idea I label "public rights" as a misnomer, arguing that the sort of free speech theory I describe here "cannot be translated into the language of rights" because it posits a duty on the part of the state to provide public goods, rather than an individual's claim of right.²¹⁰ Such discomfort with the idea of communal rights resonates with contemporary standing doctrine, which rejects claims of shared rights by classifying them as legally invalid "generalized grievances."²¹¹ My allegiance to rights language in this setting

208. See Balkin, *supra* note 48, at 396-98 (criticizing the Court's "time, place, manner" decisions as representing the failure of formal equality principles to eliminate content-based regulations of speech); Kairys, *supra* note 69, at 263 (criticizing decisions upholding content-based regulations of speech that can be justified based on nonrestrictive purposes).

209. Some First Amendment theorists have adopted a simulacrum of the public rights theory in the electoral context even as they reject the theory's broader premises. See C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 24-28 (1998) [hereinafter Baker, *Expenditures*] (identifying elections as occupying a special, governmentally created sphere and thus properly subject to regulations Baker would find impermissible if imposed on speech in other settings); Neuborne, *supra* note 32, at 1059 (advocating an approach under which "the First Amendment is viewed not only as a protector of individual autonomy, but also as the structural guarantor of a fair democratic process"); Schauer & Pildes, *supra* note 32, at 1834-36 (advocating treatment of electoral speech as distinct from other types of speech and thus properly subject to different sorts of regulation); see also Post, *supra* note 138, at 1132-33 ("Without denying in principle that [campaign finance regulations] may be necessary or desirable, I would emphasize that a democratic state can tolerate them only in the most unusual and limited of circumstances.").

210. Harel, *supra* note 188, at 709-10; see also Mayton, *supra* note 55, at 405 (criticizing the use of "rights" language to describe commonly held interest in access to information).

211. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992) (holding that "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy").

reflects, in part, my belief that standing doctrine is unduly restrictive, as well as my sense that any conception of constitutional expressive freedom must speak in the language of rights to remain grounded in the constitutional text.²¹² Most important is that the theory articulated here does posit *public rights*: legal claims, held by individuals, that we should understand the Constitution to ingrain for communal rather than individuated reasons.

Second, several commentators on the law of politics have argued that a functional analysis is better suited than any rights-based analysis to assessing regulations of the democratic process.²¹³ My advocacy of a collective notion of First Amendment rights reflects sympathy with some functionalists' conclusion that an individuated conception of rights provides an insufficient basis for judicial oversight of democratic institutions,²¹⁴ and my normative concerns more closely resemble those of many functionalists than those of most conventional First Amendment analysts.²¹⁵ In my view,

212. *But see* Mayton, *supra* note 55, at 386-405 (contending that the text of the First and Fourteenth Amendments establishes, in part, something other than a "right" to expressive freedom).

213. *See* Cain, *supra* note 78, at 806-07 (distinguishing functional arguments for substantial political party autonomy from First Amendment arguments); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) (recounting and criticizing the Court's equal protection-based approach to reviewing claims of political gerrymandering); Samuel Issacharoff & Richard H. Pildes, *Not by "Election Law" Alone*, 32 LOY. L.A. L. REV. 1173, 1183 (1999) (advocating "a robust, functional, historically-aware understanding of democracy" as a basis for reviewing political practices); Klarman, *supra* note 115, at 499 (arguing that judicial review aimed at preventing political entrenchment can be justified only by "democratic theory," not by the constitutional text); Persily, *supra* note 78, at 823 (asserting, as to analysis of political party regulations, "the need for a shift in focus away from questions of state action and expression and toward functional arguments"); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) [hereinafter Pildes, *Theory*] ("[T]he content of the rights that ought to be recognized is best understood as derivative of the appropriate structural conception of democratic politics.").

214. *See, e.g.*, Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 282-93 (2001) [hereinafter Issacharoff, *Parties*] (criticizing autonomy-based claims of First Amendment rights of association as bases for assessing the constitutionality of political party regulations).

215. *See, e.g., id.* at 308 (characterizing the object of functional analysis as "the parties' ability to play a role that is crucial to republican government"). Professor Issacharoff, writing alone and with Professor Pildes, has noted in passing the resonance of the functional approach he advocates with the First Amendment. *See id.* at 292-93 ("[T]he history of First Amendment law does not yield a categorical right against regulation, but rather a highly nuanced protection of the structures of democratic participation."); Issacharoff & Pildes, *Lockups*, *supra* note 102, at 673 (suggesting the Court could implement a procompetitive functional

however, the language of First Amendment rights is essential in this context. The fact that the Court's holdings about regulations of political parties (and the alternative holdings I propose below) trace a coherent political theory, even as they reason in terms of rights,²¹⁶ indicates that, from the Court's standpoint, the First Amendment provides a useful and consistent framework for organizing functional insights about democratic politics. From the standpoint of the people and their elected representatives, the First Amendment provides a textually legitimate source of authority for judicial oversight of party regulations.²¹⁷ Rights terminology engages ancillary normative debates—about, for example, priorities among competing values, the legislative-judicial division of powers, and the appropriate pace of constitutional change—that functional insights alone do not address. Finally, the First Amendment properly focuses the judicial inquiry on the interests of the electorate, avoiding the abstraction and elitism into which functional analysis can slip.²¹⁸

My critique in Part III of the Court's recent decisions about regulations of political parties' electoral activities will confirm the descriptive hypothesis that adopting the public rights theory of expressive freedom would dramatically change the outcomes of

vision "when interpreting the various constitutional provisions that protect self-government, such as the First Amendment"). Ultimately, however, Issacharoff disclaims reliance on any constitutional text. See Issacharoff, *Parties*, *supra* note 214, at 310-11; Issacharoff & Pildes, *Lockups*, *supra* note 102, at 715-16.

216. See *supra* Part I.C (contending that the private rights theory of expressive freedom will produce results consistent with the responsible party government theory of the electoral process); *infra* Part II.C (contending that the public rights theory of expressive freedom will produce results consistent with the dynamic party politics theory of the electoral process).

217. See Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 726-28 (1998) [hereinafter Hasen, *Comment*] (contending that rights discourse is necessary to adjudication of challenges involving election regulations because a purely functionalist approach lacks any normative standard). Professor Issacharoff concedes the absence of a textual justification for functional analysis of many electoral problems, leading him to question the courts' institutional competence to resolve questions of electoral regulation absent evidence of anticompetitive motive. See Issacharoff, *Parties*, *supra* note 214, at 311-12 (discussing possible approaches to functional analysis of political parties under the Constitution and concluding as a practical matter that "the functional argument proves to be difficult to sustain"). For an example of how a public rights First Amendment analysis obviates this concern, see *infra* Part IV.C (setting forth a public rights First Amendment analysis of laws that have negative consequences for the political process).

218. See *infra* notes 354-59 and accompanying text (criticizing functionalist arguments against blanket primary elections).

cases involving regulations of political parties. My normative thesis—that we should prefer the public rights theory in this area, because the outcomes it would produce are better than the outcomes under the private rights theory—depends on the appeal of the political values that would characterize the alternative outcomes. Accordingly, I will now set forth an alternative political theory, one whose dynamic vision of political parties' role in electoral politics I believe comports with our best sense of what electoral politics should contribute to democratic culture far more than does the responsible party government theory.

B. The Dynamic Party Politics Theory of the Electoral Process

The theory of responsible party government reflects a pessimistic and elitist view of politics. That theory insists that we need rigid structures to dampen and constrain our political energy, lest we degenerate into factional sniping or majoritarian inertia. The major party duopoly serves as a Janus-faced political crash helmet. The two parties spare us from fighting too long, or too vigorously, about who should lead us and what policies we should pursue. They keep our government orderly, unified, and predictable. Their identities serve as bold political labels that save us from having to think too much about politics.²¹⁹ The trouble with this vision is that its fixation on stability exacts a heavy price in political vitality. Members of the political community, especially but not exclusively those who are uncomfortable in the major party coalitions, have little reason to participate in the political process. The process mutes our boldest ideas, ensuring that electoral debates reflect only the sliver of the political spectrum from slightly left of center to slightly right of center. Political discourse sustains a steady,

219. Professors Persily and Cain illustrate this pessimism and elitism in the course of critiquing the "political markets" approach of Professors Issacharoff and Pildes. See Issacharoff & Pildes, *Lockups*, *supra* note 102. Persily and Cain criticize that approach for "plac[ing] its entire faith in the electorate" and reject it as "a strongly populist approach that leaves little room for leadership, guidance, and assistance from the politically active." Persily & Cain, *supra* note 79, at 791. Even when Persily and Cain astutely decry the inattention of the political markets approach to deliberation, *see id.* ("The Political Markets paradigm merely allows for the articulation of and response to consumer preferences."), they only care about "deliberation and the transmission of information within party networks." *Id.*

moderate pitch, but it lacks the creative energy to outgrow old orthodoxies and rise to new challenges.

In recent years, the legal literature has revealed an increasing level of concern about the judiciary's embrace of the responsible party government theory. A diverse group of academic commentators has questioned the major party duopoly's representative character and effectiveness and, accordingly, the Court's role in sustaining the duopoly. The skeptics attack the duopoly on two levels. One group advances a normative argument that entrenched duopoly harms democratic values by suppressing political competition. A second group advances a descriptive argument that emphasizes empirical weaknesses in the responsible party government theory's claims for the benefits of duopoly. After briefly summarizing the skeptics' attacks, I will derive from their two lines of criticism a theory to counter the responsible party government defense of the duopoly. In order to differentiate its animating values of political vitality and openness from the responsible party government obsession with governmental stability, I call this alternative the theory of "dynamic party politics."

1. Normative Skepticism: The Duopoly's Anticompetitive Effects

In the leading normative critique of the major party duopoly in recent legal scholarship, Samuel Issacharoff and Richard Pildes criticize practices of the duopoly, and judicial support for those practices, by analogy to anticompetitive strategies in corporate law.²²⁰ Issacharoff and Pildes call on policymakers and the Court to enforce a normative standard of competition for American democracy, policing "background rules" that determine the competitive possibilities of the political process.²²¹ They discuss recent corporate law scholarship that has encouraged courts to destabilize the structures, called "lockups," that entrenched managers create and perpetuate to prevent challenges to their authority.²²² In the same way, Issacharoff and Pildes contend, courts should step outside the boundaries of conventional constitutional

220. See Issacharoff & Pildes, *Lockups*, *supra* note 102.

221. See *id.* at 648.

222. See *id.* at 647 (explaining concept of "lockups" in corporate law).

analysis and inquire whether challenged election laws reflect attempts by entrenched political forces to protect their power.²²³ Such "partisan lockups" are easiest to identify when a single political party controls a jurisdiction,²²⁴ but they may also result from the two major parties' collective efforts to bar minor parties from the political stage.²²⁵ Issacharoff and Pildes urge courts to strike down partisan lockups because such structures allow political leaders to insulate themselves from electoral accountability.²²⁶

Daniel Ortiz employs a similar analysis to examine the problems the major party duopoly poses for political responsiveness and participatory democracy.²²⁷ In a democratic society, Ortiz notes, collective action problems ensure that individuals lack incentives to participate in politics.²²⁸ Political parties help the process by acting as agents for the voters in dealing with their representatives.²²⁹

223. See *id.* at 680-81 (urging a functional analysis of background electoral rules); see also Klarman, *supra* note 115, at 509-28 (discussing various features of election law as potentially appropriate objects of judicial review to prevent political entrenchment).

224. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 660-65 (analyzing the "lockup" aspect of exclusions of African-American voters in the *White Primary Cases*); *id.* at 670-74 (discussing the Court's rejection of a challenge to Democrat-dominated Hawaii's ban on write-in voting in *Burdick v. Takushi*, 504 U.S. 428 (1992)).

225. Issacharoff and Pildes' principal example of a duopolistic lockup is the ban on fusion candidacies upheld in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (discussed *infra* Part III.B.1). See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 681-86.

226. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 646 (describing as "one of the central goals of democratic politics" that "the policy outcomes of the political process be responsive to the interests and views of citizens"). In a subsequent essay concerned only in part with political parties, Professor Pildes assesses recent Supreme Court decisions relating to regulations of electoral politics as attacks on a tradition of "democratic experimentalism." Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 704 (2001) [hereinafter Pildes, *Democracy*]. That tradition, as Pildes describes it, reflects the vitality of our democratic institutions, and it trusts those institutions' self-corrective capacities to repair any damage done by experiments that run off the tracks. See *id.* at 714. The present Court, in rejecting or deprioritizing democratic experiments, has emphasized the dangers they pose to political stability. Pildes argues that the Court's concern rests on an anachronistic, mid-twentieth century cultural assumption that regulation to stem political instability—and, in particular, political competition and fragmentation—is necessary to prevent political extremism. See *id.* at 716-18.

227. Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 (2000) [hereinafter Ortiz, *Duopoly*].

228. As Ortiz explains, "[s]ince the chance that their vote will make a difference is extremely small, [individuals] will not expend much effort to vote, let alone obtain information on which to cast the vote properly from their own perspective." *Id.* at 757 (footnote omitted).

229. See *id.* ("[T]he political parties exist as second-order agents to help the voters better produce the kinds of policy goods they desire.") (footnote omitted).

Unfortunately, this agency model faces two problems. The first is intrinsic to the model: parties may act in their own interest rather than in voters' interests.²³⁰ The second problem is that parties do more than act as agents: they "produce product" for the political marketplace, in the form of candidates and policies.²³¹ This model of democracy-as-consumption is truly democratic, however, only if competition is present in the political marketplace, because only voters' ability to reject parties that fail to serve their interests maintains voters' control over the system.²³² The major party duopoly, Ortiz contends, severely limits this control mechanism.²³³ Moreover, the excessive power of the two major parties creates a strong impetus to regulate them, potentially undermining whatever benefits they provide.²³⁴ Ortiz' observations lead him to advocate a political system that accommodates more and stronger parties.²³⁵

2. Descriptive Skepticism: The Duopoly's Dubious Benefits

Richard Hasen, writing in response to the Court's decision in *Timmons v. Twin Cities Area New Party*,²³⁶ has launched the leading legal academic attack on the empirical premises of the responsible party government theory.²³⁷ Hasen contends that the eclipse since the 1960s of the parties in the electorate by the party organizations,²³⁸ renders the duopoly's benefits

230. See *id.* at 759-60. This argument is developed in Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

231. Ortiz, *Duopoly*, *supra* note 227, at 760 ("[Political parties] recruit candidates, provide them opportunities for advancement, make decisions about which ones to push and how hard, raise funds for their races, and help present them on the market. They, in short, produce product—both policy and character—and market it to voters.") (footnotes omitted).

232. See *id.* at 763.

233. See *id.* at 765-66 ("In the two-party world in which we live, democracy-as-consumption leads not to improved democratic institutional arrangements, but to diminished democratic accountability and responsiveness.").

234. See *id.* at 774 ("[I]n a two-party system, we dare not give political parties the autonomy they need to make our politics work best.").

235. See *id.* ("Right now we have a strong two-party system without strong parties. Let us hope that someday we will have the courage to have the opposite.").

236. 520 U.S. 351 (1997).

237. See Hasen, *Entrenching*, *supra* note 99.

238. See *id.* at 351 ("In recent years party organizations have shown remarkable resurgence. But the party-in-the-electorate has all but collapsed.") (footnote omitted); Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 832

apocryphal.²³⁹ First, he asks, what is “stability” supposed to mean? If it means maintenance of a strong party system, the argument is obviously circular. If it means voter confidence in government, present evidence suggests an abject failure. If it means stability of policy, evidence suggests parliamentary systems with proportional representation do a better job of maintaining it.²⁴⁰ As to the duopoly’s supposed antifactionalism, Hasen contends that, as major party candidates have eclipsed their party organizations in importance, the parties have become vehicles for special interest influence, an especially pernicious strain of factionalism.²⁴¹ Finally, Hasen argues that the growing independence of candidates has diminished the informational utility of party labels and thus of the voting cue. Voter behavior, particularly increased ticket splitting, confirms this effect.²⁴² Taken on its own terms, Hasen concludes, judicial support for the major party duopoly is constitutionally untenable²⁴³ and thus indefensible.²⁴⁴

Joel Rogers, also writing in response to *Timmons*, similarly attacks the major party duopoly by casting doubt on its asserted

(2001) [hereinafter Hasen, *Parties*] (dismissing as “myth” the idea “that the party-in-the-electorate still exists and that party registration remains a significant associative act”). For an explanation of the distinct electoral, organizational, and governmental facets of the major parties, see *supra* note 74 and accompanying text.

239. See Hasen, *Entrenching*, *supra* note 99, at 342 (“[T]he responsible party government scholars, have argued that the two-party system promotes political stability, combats factionalism, and provides a valuable voting cue ... however, these scholars have not proven that the two-party system, especially the modern system since the advent of capital-intensive, candidate-centered campaigns, actually has these effects.”); see also Hasen, *Comment*, *supra* note 217, at 727 (reiterating the failure of the responsible party government theory on its own terms as a basis for his critique of judicial support for the duopoly). For a discussion of the benefits of duopoly claimed by the responsible party government theory, see *supra* Part I.B.

240. See Hasen, *Entrenching*, *supra* note 99, at 356-57.

241. See *id.* at 358-60.

242. See *id.* at 360-61. Hasen also notes the obvious tension between the idea of the voting cue and the idea that the duopoly enhances stability by making politics more centrist and less ideological. See *id.* at 350.

243. Hasen sees a First Amendment dimension to the Court’s protection of the duopoly, but his focus is limited to the associational rights of the unsuccessful minor party plaintiffs in *Timmons*. See *id.* at 338-39. Hasen does not consider the deeper First Amendment concerns explored in this Article.

244. Hasen also contends that, even if judicial protection of the two major parties is desirable, it is unnecessary, because structural features of the political system—notably single-member districts and plurality voting—virtually ensure the major parties’ continued dominance. See *id.* at 362-71. For a discussion of the implications of the private rights theory of expressive freedom for those structural features, see *infra* Part IV.C.

value for maintaining governmental stability.²⁴⁵ Rogers defines stability as "a government that, irrespective of ebbs and flows in partisan composition, enjoys sufficient basic institutional support to govern continuously and effectively within the frame of its originating constitutional mandate, and a government whose basic operation in that frame enjoys a ballast of ongoing voter confidence and support."²⁴⁶ He contends, citing contemporary political malaise and governmental ineffectuality, that the duopoly has not achieved either of these purposes.²⁴⁷ Rogers also echoes the normative critique of the duopoly, charging the major parties with two central shortcomings: failure to develop and implement coherent programs, and insufficient representation of partisan and ideological minorities.²⁴⁸ He maintains that a system with a greater number of strong parties, accompanied by a shift to proportional representation, would increase voter turnout and create greater political responsiveness without lapsing into excessive factionalism.²⁴⁹

3. From Skepticism About the Duopoly to an Alternative Theory of Political Parties' Role in the Democratic Process

The duopoly skeptics share with their responsible party government opponents a commitment to effective government and a conviction that political parties must play a leading role in the electorate's selection of that government. The two camps differ fundamentally about what values a political structure should emphasize in ensuring political parties will perform their role well. In contrast to the responsible party government theory's emphasis on stability, the central value that emerges from legal academic critiques of the major party duopoly, with their focus on a robust political discourse and vigorous electoral competition, is dynamism. Thus, I call my alternative to the theory of responsible party government the theory of *dynamic party politics*. The dynamic party

245. See Joel Rogers, *Two-Party Systems: Pull the Plug*, 52 ADMIN. L. REV. 743 (2000).

246. *Id.* at 753.

247. See *id.* at 762 (discussing the federal government's failure to make progress in important policy areas as a cause of voter alienation).

248. See *id.* at 762-63 (discussing the two-party system's tendency to focus candidates on the median voter, which precludes debate on important issues).

249. See *id.* at 765 (advocating "the introduction of a viable third or fourth party" and "some species of proportional representation ... in larger, multi-member districts").

politics theory posits a broadly participatory, multiparty democratic system. The constant potential for change in such a system feeds the spirit of democratic participation, brings political representatives closer to their constituents, and spurs policy innovation. Just as responsible party government theorists claim three ways in which duopoly serves the cause of political and governmental stability,²⁵⁰ the dynamic party politics theory is built on three corresponding aspirations.

First, the dynamic party politics theory envisions an inclusive electoral process. Accordingly, the theory requires political parties to help stimulate participation in democratic processes and, to that end, provide for the representation of minority viewpoints in electoral competition.²⁵¹ The normative duopoly skeptics and others portray the duopoly as a “race to the center,” in which politically “extreme” viewpoints lose all relevance.²⁵² The descriptive skeptics similarly suggest that the “stabilizing” benefits of preelectoral coalition building are apocryphal, and that forcing voters to rally around one of two flags simply produces stagnant politics that precludes meaningful political change. Masses of people—disaffected minorities but also many in the political center—come to feel alienated from the political process, and democratic culture stultifies.²⁵³

250. See *supra* Part I.B.

251. See Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS*, *supra* note 82, at 142, 158 (contending that multiparty systems exceed the duopoly in protecting minority interests because they allow for election of some minority candidates who can press for minority priorities in government); Andrew C. Geddis, *Campaign Finance Reform After McCain-Feingold: The More Speech-More Competition Solution*, 16 J.L. & POL. 571, 578 (2000) (arguing that increased electoral competition creates “greater incentives for voter participation in the democratic process”); Klarman, *supra* note 115, at 501 (discussing normative benefits of maximizing democratic participation).

252. See DANIEL A. MAZMANIAN, *THIRD PARTIES IN PRESIDENTIAL ELECTIONS* 152 (1974) (explaining the utility of third parties in providing a counterbalance to the two major parties' tendencies to move toward the center on every issue); Elizabeth Garrett, *The Law and Economics of “Informed Voter” Ballot Notations*, 85 VA. L. REV. 1533, 1548-49 (1999) (“One result of a two-party system combined with single-member electoral districts is a convergence of the parties with respect to their positions on issues.”); Issacharoff & Pildes, *Lockups*, *supra* note 102, at 675 (explaining the competitive incentives for parties in a duopoly to gravitate toward the political center); Rogers, *supra* note 245, at 762-63 (contending that, because two-party elections typically require a majority of votes for victory, candidates are discouraged from adopting controversial stands on issues).

253. See Hasen, *Entrenching*, *supra* note 99, at 343-44 (discussing social inefficiencies

The dynamic party politics theory shares the responsible party government theory's normative commitment to a political process that allows for participation by minority groups.²⁵⁴ But in contrast to the responsible party government view that preelectoral coalition building affords the best opportunity for minority participation, the dynamic party politics theory posits that minority groups can more meaningfully participate in the electoral process if the political system allows for diverse electoral competition and leaves consensus and coalition building to government.²⁵⁵ Thus, for example, the electoral system should afford African Americans a realistic option of choosing and supporting their own candidates, rather than forcing them to languish in the broad coalition of the Democratic Party.²⁵⁶ Where the responsible party government theory empowers party elites to ensure that minorities have a voice in the electoral process,²⁵⁷ the dynamic party politics theory would empower minorities, and all members of the political community, to speak for themselves.²⁵⁸

caused by the lack of a competitive political market); Rogers, *supra* note 245, at 762 ("Where the elusive 'median voter' winds up [under duopoly] is confused and angry.").

254. See *supra* note 83 and accompanying text (discussing the responsible party government view that broad electoral coalitions offer the best opportunity for minorities to influence policy outcomes).

255. See, e.g., Amy, *supra* note 251, at 156 (distinguishing between preferences for preelectoral and legislative coalition building and suggesting that multiparty electoral competition with legislative coalition building may achieve greater political stability than preelectoral coalition building in a duopoly).

256. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 31 (1994) (discussing "[t]he Democrats' policy of benign neglect toward African Americans" and questioning "the sincerity of the Republican Party's nascent and token outreach"); Smith, *Black Party*, *supra* note 99, at 60-61 (discussing the structural limits on African-American voters' leverage to use the threat of exit to change the Democratic Party's positions).

257. See Persily, *supra* note 78, at 807 (stating that "party organizations themselves involve, by necessity, hierarchy and oligarchy in order to accomplish their tasks of mobilizing voters, winning elections, and executing policy"); Rosenblum, *supra* note 76, at 831 (noting that responsible party government "would bolster the official/professional side of parties" and is committed "not to intra-party democracy but to 'the elite cadre of political activists'") (quoting James L. Sundquist, *Party Decay and the Capacity to Govern*, in *THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE* 42, 66 (Joel L. Fleishman ed., 1982)).

258. Daniel Ortiz properly cautions against romanticizing popular engagement in the democratic process. In particular, he notes that advocates of campaign finance reform often undermine their position by failing to acknowledge the importance of voter inertia in exacerbating the influence of money on politics. See Daniel R. Ortiz, *The Democratic Paradox*

Second, the dynamic party politics theory aims to prevent entrenchment of elected officials in government. Accordingly, the theory requires political parties to provide mechanisms for voters to replace their elected representatives and thus hold them accountable for their actions in government. The descriptive skeptics of the duopoly suggest that two-party dominance simply shifts the locus of factionalism by simplifying small, organized interest groups' path to political influence. The normative skeptics advance the complementary claim that a noncompetitive electoral process degrades the lines of political accountability by protecting elected officials from challenges to their power.²⁵⁹

Again, both the responsible party government theory and the dynamic party politics theory seek a government focused on serving the people's interests rather than catering to interest groups.²⁶⁰ But in contrast to the responsible party government theory's emphasis on preventing factions by limiting the voices present in government, the dynamic party politics theory sees voters as standing in the best position to ensure that elected officials make responsive, public-spirited decisions.²⁶¹

Third, the dynamic party politics theory requires wide-ranging electoral debate. Accordingly, the theory emphasizes political parties' role in fostering and enriching debate. According to critiques of the major party duopoly, elections are deficient in both the quantity and quality of ideas offered to voters. As to quantity, fewer parties

of *Campaign Finance Reform*, 50 STAN. L. REV. 893 (1998); Ortiz, *Engaged*, *supra* note 176. The dynamic party politics emphasis on increased democratic participation rests on the insight that the duopoly encourages political inertia. Although free rider problems make some measure of voter apathy inevitable, the dynamic party politics theory posits that weakening the duopoly will sufficiently increase the value of political participation to inspire increased popular engagement.

259. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 650 (positing that political parties attempt to capture structures that govern political process as a means of perpetuating power); Ortiz, *Duopoly*, *supra* note 227, at 772 (emphasizing diversity of participation as a way of enhancing parties' responsiveness to voters); see also Hasen, *Entrenching*, *supra* note 99, at 344 ("Without third parties to challenge the positions of the two major parties and their candidates, the major parties are likely to become (some would say, remain) complacent and unresponsive to social pressures and movements.").

260. See *supra* notes 86-88 and accompanying text (discussing the responsible party government view that duopoly helps to ensure political accountability).

261. See, e.g., Amy, *supra* note 251, at 159 (arguing that increased electoral competition makes for more representative government to the extent "majority coalitions ... represent a much larger proportion of the voters and a much broader cross-section of public opinion").

contribute fewer ideas to electoral discourse. As to quality, the normative skeptics maintain that the absence of competition degrades the depth and diversity of the major parties' political discourse, and the descriptive skeptics point out that the convergence of the major parties blurs their purportedly distinct identities.²⁶² In addition, forcing politically marginal ideas out of the process seriously undermines prospects for policy innovation by excluding the ideas that depart most emphatically from the status quo.

Like the responsible party government theory, the dynamic party politics theory wants voters informed and recognizes the central informational role of political parties.²⁶³ Whereas the responsible party government theory prescribes a two-party voting cue, however, the dynamic party politics theory encourages political dynamism through a freewheeling exchange of ideas. The dynamic party politics theory posits that voters can and will process more and finer political information than the duopoly provides and that thorough, energetic electoral debate will engage members of the political community and generate policy innovations.

A corollary to the three aspirations of the dynamic party politics theory is that minor political parties can and must make substantial contributions in the electoral process. The major parties in a duopoly have a strong, collective incentive to exclude minor parties from political participation,²⁶⁴ and the responsible party government

262. See Hasen, *Entrenching*, *supra* note 99, at 343 (discussing "informational losses associated with restrictions on third parties"); Rogers, *supra* note 245, at 763 (maintaining that imperative under duopoly to pursue median voter leads candidates to produce "highly personalized policy profiles ... without much regard for party line"); see also Geddis, *supra* note 251, at 595 (arguing generally that increased electoral competition "help[s] to improve the quality of public discourse"). Professors Persily and Cain, in contrast, emphasize that "party identification remains the most valuable predictor of what a voter will do in the polling booth." See Persily & Cain, *supra* note 79, at 787 & n.48 (citing studies). The trouble with that observation is that it indicates nothing about the relative value of the two-party voting cue as opposed to the more varied information that would be available to voters in a more dynamic electoral environment. The fact that self-identified Republicans tend strongly to vote for Republican candidates reveals nothing more than the rigid boundaries of duopolistic electoral deliberation.

263. See Ortiz, *Duopoly*, *supra* note 227, at 758 (discussing the sound informational premise underlying the idea of the voting cue).

264. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 683 (contending that the two major parties share an incentive to prevent minor party competition); Klarman, *supra* note 109, at 521 & n.135 (discussing the bipartisan preference for strong ballot access restrictions).

theory vindicates that exclusion.²⁶⁵ In contrast, minor parties directly serve all three of the dynamic party politics theory's key aspirations. First, minor parties strongly facilitate an inclusive electoral process. They encourage democratic participation by providing outlets for the civic energies of political minorities.²⁶⁶ Moreover, the active presence of minor parties in the electoral process increases the number and variety of political actors with incentives to discover and mine new or underdeveloped veins of political support, thereby expanding the electorate.²⁶⁷ Second, minor parties aid in preventing governmental entrenchment. They serve as instruments of accountability by giving voters an opportunity to express disapproval of the major parties by means of exit.²⁶⁸ Third,

265. See *supra* notes 95-98 and accompanying text (discussing the responsible party government theory's disdain for minor parties). One point on which the responsible party government and dynamic party politics theories agree is that courts should intervene to prevent either major party from using its governmental dominance in a given jurisdiction to undermine the other major party's competitive position. Cf. Persily, *supra* note 78, at 796 (stating that "[d]emocracy entails, at a minimum, that those who control government not be able to use their power to freeze the political status quo" but limiting this concern to "the party out-of-power").

266. See Amy, *supra* note 251, at 157 (describing the tendency of multiparty electoral systems to yield significantly greater voter turnout than the United States achieves and stating that increased turnout occurs because "it is much easier for voters [in a multiparty system] to find a candidate or party that actually reflects their particular political views"); Geddis, *supra* note 251, at 610 (suggesting that minor party competition "can bring new participants into the election process, and help to reinvigorate a tired and jaded body politic") (footnote omitted); Rogers, *supra* note 245, at 766 (arguing that a multiparty system is more responsive to the electorate because smaller, better defined parties speak to more specific constituencies); Smith, *Black Party*, *supra* note 99, at 57-59 (discussing the historical and ongoing appeal of minor parties for African-American voters).

267. This "more the merrier" dynamic provides the best answer to responsible party government advocates who argue that autonomy for the two major parties offers the best hope for increasing political participation because of the major parties' interest in broadening their bases and bringing out voters. See, e.g., Persily, *supra* note 78, at 797-99 (emphasizing the role of major party organizations in encouraging electoral participation); see also *infra* notes 394-99 and accompanying text (summarizing and refuting an argument that increasing regulation of the major parties' campaign expenditures would depress voter turnout).

268. See Paul S. Herrnson, *Two-Party Dominance and Minor Party Forays in American Politics*, in *MULTIPARTY POLITICS IN AMERICA* 21, 39 (Paul S. Herrnson & John C. Green eds., 1997) (explaining that minor parties "serve as vehicles for voters to express their discontent with the two major parties"); STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 5-6 (1984) (describing minor parties as "expressions of discontent with the major parties and their candidates"); Richard Winger, *Institutional Obstacles to a Multiparty System*, in *MULTIPARTY POLITICS IN AMERICA*, *supra*, at 159 (contending that minor parties "giv[e] voice to ideological minorities and foster[] communication between them and the major parties"); Rosenblum, *supra* note 76, at 832-33

minor parties devote much greater degrees of their institutional energies than do the major parties to expanding and enriching electoral debate: they critique the prevailing political order, propose new policies, and often push the major parties in new directions.²⁶⁹ Even where minor parties have no serious chance of electoral victory, they often present sufficiently forceful ideas to shift policy debates and influence the stances of the major parties.²⁷⁰ An especially important example is minor parties' contribution between the mid-nineteenth and mid-twentieth centuries to combating entrenched racism.²⁷¹

So far this Part has introduced an alternative understanding of expressive freedom—the public rights theory—and a political vision that rejects major party duopoly as the primary guarantor of a healthy political order—the dynamic party politics theory. The next Section explains why adherence to the public rights theory should

("The very existence of ballot alternatives provides an outlet for voters to express dissatisfaction."). For an explanation of "voice" and "exit" as means by which voters can influence positions of political parties, see *supra* note 75 and accompanying text.

269. See J. DAVID GILLESPIE, *POLITICS AT THE PERIPHERY: THIRD PARTIES IN TWO-PARTY AMERICA* 24 (1993) ("Their greatest social utility lies in what third parties contribute to our relatively free marketplace of ideas."); Robert Harmel, *The Impact of New Parties on Party Systems: Lessons for America from European Multiparty Systems*, in *MULTIPARTY POLITICS IN AMERICA*, *supra* note 268, at 53-54 (noting that most new political parties, in the United States and elsewhere, form with the primary aim and expectation of promoting policy positions, rather than contending seriously for office); ROSENSTONE ET AL., *supra* note 268, at 8 ("[t]he power of third parties lies in their capacity to affect the content and range of political discourse"). Of course, diversity of parties is not sufficient to produce a dynamic political climate. See Hasen, *Comment*, *supra* note 217, at 729-30 (warning against the assumption that a multiparty system alone would guarantee robust political competition). The pivotal role of parties in our political system, however, establishes that partisan diversity is necessary for dynamic politics.

270. See JOHN F. BIBBY & L. SANDY MAISEL, *TWO PARTIES—OR MORE? THE AMERICAN PARTY SYSTEM* 48-49 (1998) (discussing examples of important minor party contributions to policy debates and noting the role of minor parties as harbingers of bipartisan realignments); Herrnson, *supra* note 268, at 39 (discussing minor parties' distinctive contributions to our political system); ROSENSTONE ET AL., *supra* note 268, at 8 (listing policy innovations attributable to minor parties). Indeed, minor parties' ability to influence debate may even be a function of their inability to compete effectively for electoral victories. See James G. Pope, *Fusion*, Timmons v. Twin Cities Area New Party, and the Future of Third Parties in the United States, 50 RUTGERS L. REV. 473, 490-91 (1998) (arguing that minor party fusion candidacies reflect strategic choices in favor of influence over major parties rather than competitiveness against them).

271. See Smith, *Black Party*, *supra* note 99, at 63-64 (discussing the history of minor parties' participation in racial justice movements).

result in legal decisions that advance the goals of the dynamic party politics theory.

C. Symbiosis Between the Public Rights Theory and the Dynamic Party Politics Theory

This Article has demonstrated how the private rights theory of expressive freedom, to which the present Supreme Court is strongly committed, advances the goals of the responsible party government theory.²⁷² A parallel relationship holds for the alternative theories advocated in this Part. If the Court were to adopt the public rights theory of expressive freedom, it would inevitably advance the goals of the dynamic party politics theory of the electoral process. Following the above analysis of the dominant theories, I now examine the three central ways the dynamic party politics theory encourages political dynamism—creating an inclusive electoral process, preventing entrenchment of elected officials, and fostering wide-ranging electoral debate—in light of the public rights theory.

1. Inclusive Electoral Process

The public rights theory of expressive freedom would advance the dynamic party politics goal of broad participation in electoral politics in two ways. First, the public rights theory's republican precepts,²⁷³ and its attendant conception of expressive freedom as a substantive, rather than formal, liberty,²⁷⁴ would lead the Court to protect exactly the sort of expressive interests essential to the dynamic party politics vision of a broad-based, deliberative electoral process. The substantive view of liberty creates an imperative to maximize electoral participation, with special emphasis on involving weak and marginalized groups, because broad participation in electoral debate is the precondition for informed self-government.²⁷⁵

272. See *supra* Part I.C.

273. See *supra* notes 173-78 and accompanying text (discussing the republican underpinnings of the public rights theory).

274. See *supra* notes 183-94 and accompanying text (discussing the substantive conception of rights under the public rights theory).

275. See *supra* notes 185-87 and accompanying text (discussing the public rights theory's emphasis on broad electoral participation).

The public rights theory's openness to government participation in the protection of expressive freedom would allow the government to regulate the electoral process in ways that facilitate participation.²⁷⁶ For instance, if a particular system of conducting primary elections could be shown to stimulate electoral participation, the substantive liberty principle would provide a First Amendment basis for a state to justify imposing the system.

Second, the public rights theory's substantive conception of liberty and its defining view of expressive freedom as communal would stimulate electoral participation by thwarting the major parties' efforts to prevent minor parties from competing effectively in elections.²⁷⁷ A court applying the public rights First Amendment would judge disputes in which, for example, minor parties sought relief from onerous ballot access requirements, based not on the parties' autonomy interests but rather on their contributions to the electoral process. Because minor parties bring substantial value to the process,²⁷⁸ a public rights First Amendment would afford them substantial success in protecting their competitive positions. Stronger minor parties would provide more meaningful outlets for minority political sentiments and would do more to expand the electorate, thereby advancing the dynamic party politics goal of broadening political participation.

2. Preventing Entrenchment of Elected Officials

The public rights theory would promote the dynamic party politics theory's goal of utilizing multiparty competition to prevent governmental entrenchment in two ways. First, the public rights theory's recognition of a convergence between the public and private spheres²⁷⁹ would eliminate the major parties' effective immunity both from regulations that burden them and from legal challenges

276. See *supra* notes 198-201 and accompanying text (discussing the allowance for government regulation to advance expressive freedom under the public rights theory's recognition of a public-private convergence).

277. See *supra* notes 264-65 and accompanying text (discussing the major parties' tendency to stifle minor party competitors).

278. See *supra* notes 266-71 and accompanying text (discussing minor parties' value to the electoral process).

279. See *supra* notes 195-203 and accompanying text (discussing the public-private convergence under the public rights theory).

to the electoral activities through which they leverage political power into competitive advantages. As discussed above, the private rights theory's rigid public-private distinction draws a favorable line for the major parties: elected officials may wield governmental power, while the party organizations that support them claim First Amendment protection against government regulation and simultaneously undercut opponents' expressive interests with the full prerogatives of private citizens.²⁸⁰ The public rights theory, in contrast, would compel courts to assess the major parties' legal status with full cognizance of their governmental power²⁸¹ and of the election laws that help maintain their political dominance.²⁸² Thus, for example, the court would not have to treat major party campaign finance practices, made possible only by the major parties' government power, as private activity.

Second, the public rights theory's underlying republican conception of politics and government favors the dynamic party politics preference for allowing vigorous electoral competition and leaving consensus to government, as opposed to the responsible party government prescription of preelectoral coalition building. As discussed above, the private rights theory of expressive freedom, with its pluralist underpinnings, validates the responsible party government fear that overly robust electoral competition will allow warring interest groups to rend the social fabric or will produce majoritarian tyranny.²⁸³ In contrast, republican political theory places great faith in the people's ability to engage in constructive political deliberation and in the ability of legislators with diverse political commitments to reach consensus through deliberation.²⁸⁴ Because of these republican precepts, a public rights First Amendment would lead the Court to advance the dynamic party

280. See *supra* note 107 and accompanying text (discussing the private rights theory's treatment of major parties as private entities).

281. For a more extensive discussion of the public rights theory's implications for state action determinations, see *infra* Part IV.A.

282. For a discussion of the electoral structures that facilitate the major party duopoly and the public rights theory's implications for judicial review of those structures, see *infra* Part IV.C.

283. See *supra* notes 79-83 and accompanying text (discussing the responsible party government theory's preference for preelectoral coalition building).

284. See *supra* notes 173-78 and accompanying text (discussing the republican underpinnings of the public rights theory).

politics vision of open electoral competition by, among other things, performing a searching review of electoral district arrangements that consistently prevent minor party competition.

My association of a republican theory of expressive freedom with multiparty politics, like my converse association of pluralism with duopoly,²⁸⁵ departs from prior thinking. Professor Gardner posits that populists, whom he identifies as historical heirs to the founding generation's republican worldview,²⁸⁶ are likely to embrace the responsible party government ideal because large, ideologically diverse parties serve as vehicles for preelectoral deliberation.²⁸⁷ As in the matter of Gardner's treatment of pluralism, two factors account for my contrary conclusions. First, and even more important here than in his consideration of pluralism, Gardner's analysis bypasses the First Amendment. Thus, he can connect populism with duopoly by observing that "[o]n populist assumptions ... nothing is gained by letting fringe groups that are by definition wrong on the merits present platforms and candidacies that pursue incorrect positions and thus waste everyone's time and resources."²⁸⁸ Filtering republican precepts through the First Amendment, however, precludes that sort of substantive dismissal of dissenting viewpoints. Professor Meiklejohn proclaimed an absolute bar on viewpoint-based discrimination in politics debate precisely because he saw the First Amendment as embodying a judgment that self-government required open debate.²⁸⁹ The contentious politics guaranteed by the public rights First Amendment is essential for discovering "the public interest," which defines populist-republican aspirations.

In addition, Gardner's conclusion rests on a questionable story about populist-republican politics. In Gardner's account,

285. See *supra* notes 111-14 and accompanying text (defending the connection between pluralism and a preference for duopoly).

286. See Gardner, *supra* note 111, at 676. Gardner's identification of populism rather than republicanism as the contemporary counterpoint to interest group pluralism appears to stem from the historical grounding of his analysis. Although he distinguishes the two philosophies, he identifies both as holding "that the purpose of politics is to identify and achieve the common good of society." *Id.* at 672.

287. See *id.* at 676-79. Gardner characterizes the responsible party government model as "usually, though perhaps not inevitably, associated with the two-party system." *Id.* at 679.

288. *Id.* at 690.

289. See *supra* notes 139-43 and accompanying text (discussing Meiklejohn's argument against viewpoint-based discrimination).

spontaneous, grassroots politics are the natural aspiration of populism, but citizens' failure or refusal to engage with the political process makes such spontaneity impossible. Thus, populists rely on preelectoral debates within large, diverse parties to settle policy and candidate choices.²⁹⁰ Gardner acknowledges that populism's native mistrust of party elites threatens this reliance, but he concludes that populists can defuse the tension through popular reforms of internal party governance.²⁹¹ Gardner makes two errors here: he binds populism to unduly pessimistic assumptions about the political process, just as he bound pluralism to unduly optimistic assumptions;²⁹² and his salve for the elitism of large party organizations—popular control—runs aground on the very citizen disengagement problem that, according to Gardner, makes populists resort to large parties.²⁹³ If, instead, we expect some substantial measure of public engagement, and we believe small parties will do better than large ones at speaking and listening to voters, then republicanism-populism leads to a preference for a multiparty system.

3. *Wide-Ranging Electoral Debate*

Finally, every key aspect of the public rights theory of expressive freedom would advance the dynamic party politics mandate of wide-ranging electoral debate. The public rights theory, unlike the private rights theory, recognizes the central place of the electoral process in political discourse.²⁹⁴ With its strong emphasis on the

290. See Gardner, *supra* note 111, at 683-84.

291. See *id.* at 684-85.

292. See *supra* notes 112-14 and accompanying text. For a nuanced discussion of the public's oscillation between political engagement and apathy, see Ortiz, *Engaged*, *supra* note 176, at 29 ("In truth, it is likely that most of us are, to various extents of each, both civic slob and civic smarty.") (footnote omitted).

293. Gardner acknowledges this problem, conceding that "any requirement of popular inclusion must after all comport with whatever limitations on popular participation lead voters to turn to political parties in the first place." Gardner, *supra* note 111, at 689. His solution—an indirect process of "mass democratic retrospective approval" in which "the policy development legwork would be performed by a small number of party employees,"—merely replicates the conundrum again. *Id.*

294. As one civil society theorist has stated: "[C]ampaigns are the principal setting for popular political discussion overall. Elections structure participation, create an audience, and provide a temporal focus for association on policies, agendas, and ideals." Rosenblum, *supra*

people's access to information, the public rights First Amendment protects the broadest possible range of expression in order to create the intellectual preconditions for its defining goal of effective self-government.²⁹⁵ The public rights theory's categorical methodology would thoroughly protect the injection into political debate of nonorthodox ideas, up to and including seditious libel. Likewise, the public rights theory would facilitate the electoral participation of minor parties because—in addition to the reasons already noted—minor parties' stock-in-trade is presenting alternatives to the major parties' electoral platforms. The public rights theory's recognition of a public-private convergence would allow for government assistance in expanding speakers' access to the infrastructure of debate through such means as media access regulations. Conversely, the public rights theory would show little patience with the responsible party government idea of the voting cue.²⁹⁶ Given the public rights theory's faith in republican deliberation, the idea of designing the political system to lead voters by the hand in a carefully structured choice between A and B reduces to a patronizing notion that too much political debate is undesirable.²⁹⁷

note 76, at 835.

295. See *supra* notes 204-08 and accompanying text (discussing the public rights theory's categorical methodology).

296. See *supra* notes 89-94 and accompanying text (describing the idea of the voting cue).

297. One might object that my argument proves too much to sustain the relationship I posit between the public rights theory of expressive freedom and dynamic party politics. If increasing political dynamism would bring the benefits I suggest, then surely political dynamism would advance the self-interest of many, perhaps most, individuals. Accordingly, a "private rights" conception of expressive freedom should be able to take into account the failings of the major party duopoly. Assuming this objection rests on an empirically sound base, I think it confuses the pluralist notion of private rights that undergirds the dominant First Amendment jurisprudence with a utilitarian notion of enlightened self-interest. Pluralism posits that unchecked individuals will engage in destructive conflicts over their clashing self-interests, and it accordingly generates First Amendment precepts—balancing expressive rights against collective interests, ignoring social power differentials—that preserve social stability. See *supra* notes 45-49 and accompanying text (discussing the pluralist underpinnings of the private rights theory). This is why the private rights First Amendment aligns so neatly with the responsible party government theory's stability-focused defense of the major party duopoly. In order for an assessment of individuals' interests to change First Amendment doctrine in a way that would undermine the duopoly, the Court would need to accept the republican premise that political organization can lead individuals to interact more through discourse than through conflict—the foundational premise of the public rights theory.

Nathaniel Persily argues that courts should understand the First Amendment to guarantee substantial party autonomy because of the essential role the major parties play in aggregating interest group preferences.²⁹⁸ In his account, autonomous parties counteract the forces of government and the median voter, which seek, respectively, to entrench incumbents and to disenfranchise minorities.²⁹⁹ Persily treats every regulation that limits party autonomy either as an attempt by one major party to disadvantage the other or as median voter tyranny against minorities.³⁰⁰ Thus, he ignores two crucial possibilities: first, that the electorate may require more and better electoral debate than two autonomous major parties have motivation to offer; second, that regulations designed to promote the role of minor parties, which have the effect of limiting major party autonomy, may improve on the level of electoral debate major party autonomy provides. These holes in Persily's analysis betray its curious lack of any concern with debate—speech—as a matter of First Amendment concern.³⁰¹ Although Persily understands the doctrinal necessity of making the case for party autonomy constitutional, he admits his argument is really functional, and he reasons backward to shoehorn it into the First Amendment.³⁰² In contrast, I advocate an organic understanding of the First Amendment as focused on political self-determination. That understanding, in turn, generates a First Amendment justification

298. Persily drapes the major parties' function of aggregating interest groups in the mantle of representation-reinforcing review, claiming that the parties' role of building coalitions protects "discrete and insular minorities." Persily, *supra* note 78, at 809. Where Persily sees the major parties as a bulwark against the tyranny of the people, I see the courts as guarantors of popular access to a political discourse that the major parties, left to their own devices, close off to a broad range of ideas and participants. See *supra* notes 251-58 and accompanying text (discussing the dynamic party politics theory's approach to expanding electoral participation).

299. See Persily, *supra* note 78, at 819.

300. "Party autonomy stands as a bulwark against state attempts to skew electoral probabilities toward certain favored outcomes. Those doing the skewing (i.e., the 'state') could be a party in control of the government, a bipartisan initiative or legislative majority, or the party organizations themselves acting through their governmental arm." *Id.* at 793 (footnote omitted).

301. See *id.* at 818 (noting that a First Amendment argument for party autonomy cannot draw support from a "conceptualization of the First Amendment as limited to expression").

302. See *id.* at 815-20. Persily's refreshingly candid claim for his First Amendment "hook" is that, in justifying a functional analysis, "the First Amendment requires less torturing than other clauses in the Constitution." *Id.* at 816.

for a political theory—dynamic party politics—that emphasizes robust debate, broad participation, and open competition.

The first two Parts of this Article have developed the descriptive hypothesis that the Court's understanding of the First Amendment, as applied to electoral regulations of political parties, corresponds strongly with the political implications of its results in such cases. Thus, judicial adherence in this area to the private rights theory of expressive freedom can be expected to lend remarkably consistent support to the responsible party government defense of the major party duopoly, whereas judicial embrace of the alternative public rights theory can be expected to advance the dynamic party politics vision of multiparty electoral competition. My normative thesis is that we should care more about the values of openness and dynamism, reflected in the dynamic party politics theory, than about the hidebound commitment to stability that is the alpha and omega of responsible party government; accordingly, we should prefer that courts apply the public rights theory of expressive freedom to electoral regulations. The next Part demonstrates how the posited relationships between the constitutional and political theories have played out in the Supreme Court's recent line of decisions about regulations of political parties' electoral activities, and I critique the cases accordingly.

III. ANALYSIS AND CRITIQUE OF RECENT SUPREME COURT DECISIONS ABOUT ELECTORAL REGULATIONS OF POLITICAL PARTIES

The Supreme Court in recent Terms has decided four important First Amendment cases involving challenges to regulations of political parties' electoral activities.³⁰³ The cases fall into two sets: two claims raised by major political parties and two by minor parties, one of which, as to each class of claimants, dealt with

303. I have critiqued some of these cases in the context of assessing the "political safeguards of federalism" theory, which holds that features of the national political system obviate the need for courts to protect states' interests in the federal system. See Gregory P. Magarian, *Toward Political Safeguards of Self-Determination*, 46 VILL. L. REV. 1219, 1250-57 (2001). One sophisticated strand of that theory gives pride of place to political parties as bulwarks of federalism. I contend that the Court's recent solicitude for the major parties, although consistent with the political safeguards theory, undermines federalism by undercutting the best reasons why states' prerogatives deserve protection, which I group under the principle of "political self-determination." See *id.*

political association and the other with access to the means of political expression. In every one of these cases, the Court has vindicated the expressive and associational interests of the major parties or denied those of the minor parties. Contrary to prior scholarship that has denied theoretical consistency in the Supreme Court's review of electoral regulations,³⁰⁴ this Part demonstrates that the Court, in its recent adjudication of political parties' challenges to regulations of their electoral activities, has reached results consistent with the responsible party government view of political parties by adhering to the private rights theory of expressive freedom. This Part also shows as to each case that adherence to the public rights theory of expressive freedom would have led the Court to a result consistent with the dynamic party politics theory of the political process, which I contend would have done more to foster healthy democracy.

A. The Court Sustains Major Parties' First Amendment Challenges to Electoral Regulations

1. Vindicating Free Association in Candidate Selection Procedures: California Democratic Party v. Jones

In *California Democratic Party v. Jones*,³⁰⁵ the two major political parties, along with two minor parties,³⁰⁶ challenged California's system of "blanket" primary elections. Under the blanket primary, which California voters had adopted by initiative, a primary voter could vote for any party's candidate for any office on the ballot,

304. See Fitts, *Back to the Future*, *supra* note 82, at 100 (arguing that the counter-majoritarian difficulty leads the Court to avoid theoretically grounded rulings in cases dealing with electoral regulations); Lowenstein, *No Theory*, *supra* note 120, at 258 (arguing that the Court has not articulated a theoretically consistent basis for its election law decisions).

305. 530 U.S. 567 (2000).

306. Of the two minor party plaintiffs, one, the Peace and Freedom Party, was marginal enough to have lost its "qualified status" under California law by the time of the *Jones* decision. See *id.* at 571 n.3. The other minor party plaintiff was the Libertarian Party, probably the single minor party most likely to favor party autonomy on ideological as opposed to self-interested grounds. Indeed, in California's 1998 primary election, minor party candidates other than Libertarians supported the blanket primary system by a ratio of eight to one. See Christian Collett, *Openness Begets Opportunity: Minor Parties and California's Blanket Primary*, in *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY* 214, 227 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

regardless of the voter's party registration or lack thereof.³⁰⁷ For example, a registered Democrat could express his or her preference on the same primary ballot for a Republican presidential candidate, a Democratic senatorial candidate, and a Libertarian gubernatorial candidate. The parties challenged the blanket primary as an infringement on their First Amendment freedom of association. The blanket primary, the parties argued, forced them to allow nonmembers to participate in selecting their nominees. Nonmember participation diluted a party's message and allowed willful mischief by members of rival parties. Only by excluding nonmembers, the parties claimed, could they sustain their distinct identities.³⁰⁸

Justice Scalia, writing for the Court, took for granted the parties' position as private claimants while casting the state as regulator and putative infringer of rights.³⁰⁹ He then turned to the first legal issue raised under the Court's First Amendment balancing methodology: whether the parties suffered a violation of their rights that required the government to satisfy strict scrutiny. To dissenting Justice Stevens' contention that "an election, unlike a convention or caucus, is a public affair,"³¹⁰ Justice Scalia responded, "Of course it is, but when the election determines the party's nominee it is a party affair as well, and ... the constitutional rights of those composing the party cannot be disregarded."³¹¹ Those rights,

307. See CAL. ELEC. CODE § 2001 (2000), *invalidated by* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).

308. See *Jones*, 530 U.S. at 571.

309. See *id.* at 586 (describing the case as a conflict between "(California's) legitimate state interests and (the parties') First Amendment rights"); see also Cain, *supra* note 78, at 804 (rejecting expressly a characterization of the dispute in *Jones* as "one between the party bosses and the people"); Pildes, *Democracy*, *supra* note 226, at 703-04 (noting the *Jones* Court's insistence on treating the interest behind an open primary as a state regulatory interest rather than a public interest in voter participation). Gary Allison portrays the litigants in *Jones* as having implicitly agreed to characterize political parties as private entities with First Amendment rights based on their common understanding of Supreme Court precedents. See Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 TULSA L.J. 59, 76 (2000).

310. See *Jones*, 530 U.S. at 595 (Stevens, J., dissenting).

311. *Id.* at 573 n.4. The *Jones* Court hedged its bets somewhat in this regard by declaring without further explanation that "a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." See *id.* at 572 (citing *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)). The view that primary elections are private, intraparty affairs enjoys some support among commentators. See Cain, *supra* note 78, at 795 (arguing that "the central question in

according to Justice Scalia, prominently included “the right not to associate” with nonmembers.³¹² That right deserved not merely protection but “special protection,”³¹³ because of the importance of party nominating procedures for democracy.³¹⁴ After reviewing record evidence that confirmed California’s blanket primary forced voters to associate with nonmembers, Justice Scalia concluded that the blanket primary was subject to strict scrutiny.³¹⁵

Justice Scalia proceeded to reject all seven grounds for the blanket primary that California submitted as sufficiently “compelling” to satisfy strict scrutiny. He dismissed the state’s first two asserted interests—“producing elected officials who better represent the electorate” and “expanding candidate debate beyond the scope of partisan concerns”—as “simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices.”³¹⁶ Similarly, he disqualified the state’s third asserted interest, enfranchising independent voters and minority party residents of “‘safe’ districts” dominated by one party, as a mere proxy for “nonparty members’ keen desire to participate in selection of the party’s nominee.”³¹⁷ Such outsiders, Justice Scalia declared, “should simply join the [dominant] party.”³¹⁸ Justice Scalia

Jones concerns the party organization’s right to establish the process and criteria by which it officially confers its party label upon candidates”); Robert C. Wigton, *American Political Parties Under the First Amendment*, 7 J.L. & POL’Y 411, 435 (1999) (arguing that parties deserve categorically greater protection in matters relating to primary rather than general elections because “the primary phase can certainly be seen as implicating greater party interests of association and free speech than the general election process, since it is essentially an intra-party affair”).

312. See *Jones*, 530 U.S. at 574. This same notion of a right not to associate figured prominently in another important First Amendment case from the Court’s 1999 Term, *Boy Scouts of America v. Dale*, which upheld the Boy Scouts’ right to exclude gays from membership. 530 U.S. 640 (2000).

313. *Jones*, 530 U.S. at 575.

314. In asserting the importance for democracy of political parties’ right to maintain strong identities, Justice Scalia did not expressly limit himself to the two major parties. He even emphasized the concern that “[s]ome [minor] political parties ... are virtually inseparable from their nominees.” *Id.* His view of minor parties’ significance, however, is clear from the parenthetical jibe that closes that sentence: “(and tend not to outlast them).” *Id.*

315. See *id.* at 577-83.

316. *Id.* at 582.

317. *Id.* at 583.

318. *Id.* Terry Smith has put the point even more harshly, arguing that the blanket primary benefited “voters who had ‘disenfranchised’ themselves of their own volition.” Terry Smith, *Parties and Transformative Politics*, 100 COLUM. L. REV. 845, 862 (2000) [hereinafter

deemed California's four other asserted interests—"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"—generically legitimate but not "compelling" as to the blanket primary. In particular, he rejected the "choice" and "participation" interests as sops to the political majority, surmising that the blanket primary would only serve those two interests by producing more centrist candidates.³¹⁹

Although *Jones* featured token minor party plaintiffs, the major parties were its big winners.³²⁰ By allowing the major parties to maintain tight control over their nominating procedures, the Court prioritized party autonomy above competing interests³²¹ and advanced all the interests prized by the responsible party government theory of the electoral process.³²² Nonmember participation in the major parties' primaries undermined preelectoral construction of broad-based coalitions, first, by limiting the parties' ability to control intraparty debate and, second, by allowing voters to support minor party candidates for particular offices without forfeiting their role in selecting major party nominees for other offices.³²³ The blanket primary encouraged what responsible party government theorists would view as factionalism by increasing voters' opportunities to vote their interests across party lines and by complicating candidates' abilities to identify and address their constituencies. Each of those effects likely would have undermined the utility of the voting cue by fragmenting candidates' messages. Based on the hypothesis that the responsible party government theory gains reinforcement and support from the private rights

Smith, *Transformative Politics*].

319. *Jones*, 530 U.S. at 583-85. For a discussion of objections to the blanket primary on the ground that it tends to produce more moderate candidates, see *infra* notes 349-60 and accompanying text.

320. I contend below that salient differences between major and minor parties justify the minor party plaintiffs' victory in *Jones* under the public rights theory. See *infra* notes 475-81 and accompanying text.

321. See Persily, *supra* note 78, at 785 (calling *Jones* "the most emphatic defense yet of a robust First Amendment right of party autonomy").

322. See *supra* Part I.B (describing responsible party government theory).

323. By undermining the major parties' preelectoral coalition building, the blanket primary also undermined the responsible party government tenet that minority voters are best served by the opportunity to assert their interests within the major parties. See, e.g., Smith, *Transformative Politics*, *supra* note 318, at 863 (arguing that "the closed primary election is perhaps the best chance that voters of color have to influence the political process").

theory of expressive freedom, the *Jones* opinion should reflect a private rights analysis.³²⁴ Likewise, a public rights First Amendment analysis of the decision should produce a result more favorable to the dynamic party politics theory of the political process.³²⁵

In fact, Justice Scalia's opinion in *Jones* exemplifies the private rights theory.³²⁶ First, the opinion is built on a rigid public-private distinction, uncritically accepting the "private" status of the parties and viewing the countervailing interests as purely governmental and regulatory. That characterization ignores the possibility that California might have been defending First Amendment interests in the case. Indeed, Justice Scalia expressly denied that his prescription for independent voters and safe-district minorities—if you want a voice, go join a political party with power—raised any First Amendment concern, because the predicament resulted merely from the parties' (private) dictates, not from any state directive.³²⁷ The Court's use of strict scrutiny similarly turned on Justice Scalia's characterization of primary elections as substantially private affairs. Second, the *Jones* analysis focused entirely on the parties' autonomy interest in maintaining control of candidate selection procedures³²⁸ while ignoring the public's interests in access to political information, opportunities for meaningful participation in politics, and a more competitive electoral process.³²⁹ Finally, the Court treated First Amendment rights as strictly negative and formal, ignoring the power differential between the strong,

324. See *supra* Part I.C (describing symbiosis between the private rights theory of expressive freedom and the responsible party government theory of the political process).

325. See *supra* Part II.C (describing symbiosis between the public rights theory of expressive freedom and the dynamic party politics theory of the political process).

326. See *supra* Part I.A (describing the private rights theory).

327. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (characterizing a disenfranchised voter's option of joining a viable party as "not a state-imposed restriction upon his freedom of association, whereas compelling party members to accept his selection of their nominee is a state-imposed restriction upon theirs").

328. In fact, the Court should have pronounced the parties' autonomy argument in *Jones* quite weak in light of its prior development of the First Amendment right to free association. See Issacharoff, *Parties*, *supra* note 214, at 282-93 (critiquing the *Jones* Court's free association analysis).

329. Justice Scalia expressed the Court's priorities most succinctly when, at the *Jones* oral argument, he reportedly attacked the blanket primary as "democracy carried to an extreme." Allison, *supra* note 309, at 99 (citation omitted).

centralized parties and the politically impotent voters— independents and safe-district supporters of minority parties—whose interests the blanket primary principally served. Indeed, Justice Scalia all but declared involving disenfranchised voters in the political process an impermissible state objective.³³⁰

In contrast, analysis of California's blanket primary under the public rights theory of expressive freedom³³¹ would have led the *Jones* Court to uphold the system.³³² At the outset, the public rights theory's recognition of a public-private convergence would have caused the Court to consider the possibility that the major parties were undermining First Amendment values that California sought to protect.³³³ With its central emphasis on collective self-determination, the public rights theory would have compelled the Court to characterize primary elections as public proceedings, rather than as private meetings that happen to involve (in California's case) millions of people.³³⁴ That characterization would have drawn support from the fact that voters' tendency to identify as "members" of a political party has weakened dramatically.³³⁵ In

330. See *Jones*, 530 U.S. at 583 (describing California's asserted interest in enfranchising voters as "nothing more than reformulation of a state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as 'disenfranchisement' if that desire is not fulfilled").

331. See *supra* Part II.A (describing the public rights theory).

332. *Jones* falls into a line of cases over the past three decades that have vindicated parties' claims of autonomy in conducting nominating procedures. See *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214 (1989) (striking down a state statute that barred parties from endorsing candidates in primary elections); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (striking down a state bar on opening major party primaries to independent voters); *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981) (upholding a national party's refusal to seat national convention delegates selected through a procedure disapproved by the party); *Nader v. Schaffer*, 429 U.S. 989 (1976) (summarily affirming a judgment upholding a state statute that required primary voters to be members of the party in whose primary they voted). However, I would not uniformly tar the earlier cases with the public rights brush. See *infra* notes 344-48 and accompanying text (favorably analyzing *Tashjian*).

333. Justice Stevens, dissenting in *Jones*, suggested that possibility when he characterized the blanket primary as manifesting "the State's right to define the obligations of citizens and organizations performing public functions." *Jones*, 530 U.S. at 591-92 (Stevens, J., dissenting).

334. See *id.* at 593-95 (Stevens, J., dissenting) (characterizing primary elections as public proceedings).

335. See generally Hasen, *Entrenching*, *supra* note 99, at 351-55 (discussing the recent decline of the party-in-the-electorate); see also Amy, *supra* note 251, at 145 (describing decreased public identification with the major parties, increased public enthusiasm for minor parties, and an increase in minor party candidacies during the 1980s and 1990s); Smith,

a major party duopoly, the two parties' candidate selection processes are private matters only in the most formalistic sense. Candidate selection—narrowing a potentially expansive field to two candidates—often does more than general elections to determine the identities of elected officials, especially in the many states and districts that are “safe” for one major party. Judicial protection of a party's autonomy in primary elections simply allows the parties to control the people.³³⁶

Treating primary elections as public affairs would have effectively ended the case. If the Court had occasion to consider the “regulatory interests” submitted by California, the public rights theory would have led it to view some of them favorably. For example, the Court would have validated the state's asserted interest in increasing voter participation, because maximizing participation is critical to the process of collective self-determination.³³⁷ A study estimated that the blanket primary format increased primary turnout by about nine percent of the expected turnout in a closed primary.³³⁸

Black Party, *supra* note 99, at 65 (suggesting that “the continued dealignment of the electorate ... poses a risk to two-party stability”).

336. See Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1766-70 (expressing doubts about the democratic and representative character of the major party organizations).

337. Justice Stevens' dissent strongly emphasized the state's interest in political inclusiveness, criticizing the Court's disregard for “the distinction between laws that abridge participation in the political process and those that encourage such participation.” *Jones*, 530 U.S. at 592 (Stevens, J., dissenting); see also *id.* at 601 (Stevens, J., dissenting) (“In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials.”).

338. See Wendy K. Tam Cho & Brian J. Gaines, *Candidates, Donors, and Voters in California's First Blanket Primary Elections*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 306, at 171, 175 (noting that California's 1998 primary election turnout increased to 29.8 percent, compared to a 27.4 percent average for recent midterm primary elections prior to the establishment of the blanket primary system). Professor Cain dismisses this increase in participation, calling it “very modest in size,” noting that it was limited to the primary election, and stressing that it consisted almost entirely of independent voters rather than crossover major party voters. Cain, *supra* note 78, at 798; see also Persily, *supra* note 78, at 777 (downplaying the significance of increased turnout under the California blanket primary system). Anyone who, unlike Cain, seriously values electoral participation by independent voters and believes primary elections are important democratic processes should find the increase in turnout more encouraging. Moreover, Cain ignores specific instances in which major party crossover voting apparently contributed to heightened turnout, notably in districts with competitive Latino Republican candidates. See Gary M. Segura & Nathan D. Woods, *Targets of Opportunity: California's Blanket Primary and the Political Representation of Latinos*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 306, at 248, 254-56

Bearing in mind the public rights theory's emphasis on the voters' right to hear the broadest and most inclusive array of political arguments, the Court also would have approved the state's interest in expanding electoral debate beyond the narrow concerns of the targeted voters in a controlled, partisan primary.

The blanket primary's survival under a public rights analysis in *Jones* would have advanced all three goals of the dynamic party politics theory of the electoral process.³³⁹ First, two of the interests California advanced in support of the blanket primary—increasing voter participation and enhancing minority involvement in the electoral process—define the dynamic party politics goal of inclusive elections. The blanket primary appears to have encouraged fluidity in party identification, thereby limiting the preelectoral coalescence of voters under the two major parties' banners. Second, upholding the blanket primary would have undermined the major parties' efforts to foreclose competition and entrench their elected officials, because it would have enhanced minor parties' electoral role.³⁴⁰ Minor parties often succeed in running viable candidates for only one or a few offices on the primary ballot, a circumstance that leads many voters who support the minor party not to vote in the party's primary because doing so would mean giving up the right to choose candidates for other offices. The blanket primary, by permitting ticket splitting, eliminates that cost of casting a primary vote for a minor party candidate.³⁴¹ Finally, allowing primary voters to consider candidates across party lines would have broadened electoral

(contending that crossover voting by Latino Democrats contributed to substantially increased turnout in such races).

339. See *supra* Part II.B (describing the dynamic party politics theory).

340. A thorough study of minor parties' experience with California's blanket primary system concluded that the system aided minor parties' strategic positions against the major parties, and enhanced minor parties' ability to affect electoral debate, by encouraging minor party candidates to run more vigorous primary campaigns; giving minor parties opportunities, and thus incentives, to broaden their bases of support; and attracting the early media attention accorded to candidates who win competitive primaries. See Collett, *supra* note 306, at 224-27.

341. Under California's blanket primary system in 1998, minor party candidates received nearly identical percentages of the total votes cast in the primary and general elections, a phenomenon that "may have been a function of general election supporters being able to cast an earlier ballot for their preferred minor-party candidate." *Id.* at 222. Of course, a minor party would lose this benefit if it did not participate in the blanket primary. See *infra* notes 475-81 and accompanying text (explaining that the public rights theory might have led the *Jones* Court to strike down mandatory blanket primary for minor parties).

debate by giving candidates incentives to address more voters and giving voters opportunities to consider more candidates.

My conclusion that upholding the blanket primary would have advanced the dynamic party politics theory implicates three concerns, but none of them alters the analysis. First, political parties—most prominently, at present, the major parties—~~contribute to the electoral process by providing voters with information.~~³⁴² To the extent the blanket primary, or any electoral reform, hampered parties in communicating their messages, it would undermine rather than advance the dynamic party politics goal of robust political debate. Political parties' campaign activities, however, contribute to meaningful debate only insofar as the parties have incentives to provide information and the information is sufficiently reliable to assist in electoral decisionmaking. If a party perceives its base of support as predictable, it has a relatively small incentive to provide information, and the information it does provide will be aimed at the concerns of a narrow group of targeted voters.³⁴³ Moreover, if only two parties are effectively competing in the election, then only one directly opposing voice is present to challenge the reliability of each party's statements. The blanket primary's scrambling of the electoral landscape and its benefits for minor parties likely would increase, not diminish, the quantity and quality of available political information.

Second, my assessment of the blanket primary does not imply that all regulations of party membership controls should be upheld under the First Amendment or that all such regulations serve the goals of the dynamic party politics theory. An important precursor of the *Jones* case, *Tashjian v. Republican Party of Connecticut*,³⁴⁴ involved a Connecticut regulation that barred political parties from

342. "[B]y making contributions to candidates or independent expenditures on their behalf, engaging in issue advocacy, or holding a party rally (snippets of which appear on the evening news programs), parties can provide information to voters for free that they would not invest in obtaining themselves." Ortiz, *Duopoly*, *supra* note 227, at 758 (footnotes omitted); *see also* Issacharoff, *Parties*, *supra* note 214, at 308 (positing that the blanket primary "threaten[s] ... the [parties'] incentive to undertake voter education and mobilization in the political process"); Rosenblum, *supra* note 76, at 823 (discussing various ways in which parties contribute to public understanding of politics); Smith, *Transformative Politics*, *supra* note 318, at 863 (emphasizing parties' capacity for changing voters' preconceptions).

343. *See supra* note 253 and accompanying text (discussing informational losses associated with the major party duopoly).

344. 479 U.S. 208 (1986).

allowing independent voters to participate in their primary elections. The Court overturned the regulation, citing political parties' First Amendment right to political association.³⁴⁵ Although the *Jones* Court cited *Tashjian* as support for its party autonomy argument against the blanket primary,³⁴⁶ the cases could not be more different from the standpoint of the dynamic party politics theory. In *Tashjian*, a major political party sought to expand voters' opportunities for political participation, and the state sought to limit them. In *Jones*, conversely, the major parties sought to limit voters' opportunities, and the state sought to expand them. Had the *Tashjian* Court embraced the public rights theory, it would have reached the same result the Court actually did reach, although its analysis would have emphasized the public interests at stake more than the party's asserted right of association.³⁴⁷ Under the public rights First Amendment, the major political parties would be free to include but not to exclude.³⁴⁸

Finally, the *Jones* Court charged that the blanket primary system impermissibly reduced the power of political outsiders by producing more ideologically uniform candidates.³⁴⁹ The Court based this

345. See *id.* at 214 ("The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association.").

346. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572-76 (2000).

347. The Republican Party's move in *Tashjian* might appear to have reflected a strategy of co-opting independent voters and eliding political differences in order to strengthen the two major parties. On a practical level, however, the regulation struck down in *Tashjian* appears to have served the dominant Democratic Party's effort to maintain its competitive advantage over the Republican Party. See *Tashjian*, 479 U.S. at 212-13 (describing the political background of the Connecticut bar on independent voters' participation in major party primaries). On a theoretical level, the public rights theory mandates an open, inclusive electoral process, and the dynamic party politics theory assumes such openness helps electoral competition.

348. The *Jones* Court maintained that upholding the blanket primary while prohibiting the *Tashjian* regulation would "guarantee a party's right to lose its identity, but not to preserve it." *Jones*, 530 U.S. at 577 n.7. That objection captures the difference between the private rights theory's overriding concern with the party's autonomy to define its identity and the public rights theory's overriding concern with the political community's interest in open democratic discourse. Cf. *Baker, Expenditures*, *supra* note 209, at 28-29 n.111 ("Regulation of electoral speech should be invalidated if it narrows rather than opens electoral processes.").

349. As the *Jones* Court stated:

[T]he net effect of [the blanket primary]—indeed, its avowed purpose—is to reduce the scope of choice, by assuring a range of candidates who are all more 'centrist.' This may well be described as broadening the range of choices favored

charge on the rhetoric of the California blanket primary advocates, who proclaimed that allowing independents to vote in primaries and letting partisan voters “cross over” would yield more “moderate” representatives.³⁵⁰ The term “moderate” in this context may simply refer to more broadly representative electoral outcomes that necessarily result from the participation of more speakers and voters in the electoral process. In other words, the results of an electoral arrangement that engages more participants may disappoint those whose strong political views have already led them to participate faithfully.³⁵¹ Any constitutional argument against the blanket primary based on this sense of “moderation” would have to make the absurd claim that the First Amendment bars efforts to encourage electoral participation. Functionalist critics sympathetic to the *Jones* analysis, however, have argued that the blanket primary produces excessive moderation in a different way. In their view, opening a party’s primary to nonmembers destroys the capacity of party activists to press for ideologically bold positions.³⁵² Without the activists’ efforts, voters with minority preferences never

by the majority—but that is hardly a compelling state interest, if indeed it is even a legitimate one.

Jones, 530 U.S. at 584.

350. *See id.* at 580 (concluding that “[i]t is unnecessary to cumulate evidence of this [moderating] phenomenon, since, after all, the whole *purpose* of [the blanket primary] was to favor nominees with ‘moderate’ positions”). Coming from Justice Scalia, the Court’s leading textualist, such wholesale reliance on the rhetoric of a measure’s architects to assess its constitutionality is surprising, especially given that the measure was enacted by initiative in perhaps the nation’s most heterogeneous state.

351. Different notions of “moderation” are evident in rhetoric advanced in support of the blanket primary, which spoke variously in terms of ending partisan gridlock, improving the effectiveness of government, and making government more representative of the people. For a summary of the “moderation” arguments advanced in support of the blanket primary, see Allison, *supra* note 309, at 67-68, 84-85.

352. *See* Cain, *supra* note 78, at 809-10 (arguing that increasing parties’ legal autonomy allows party activists to combat median voter pressure); Issacharoff, *Parties*, *supra* note 214, at 300-08 (discussing the importance of pressure from party activists in counteracting median voter pressure); Persily, *supra* note 78, at 802 (arguing that “[t]he blanket primary targets the cohesiveness of strong minority factions or parties and attempts to diminish their power relative to the group occupying the ideological middle ground”) (footnote omitted); Smith, *Transformative Politics*, *supra* note 318, at 866 (claiming that opening major party primaries to independent voters inhibits the ability of party activists to “support a candidate whose views diverge from the median voter’s ... with the intention of reshaping median preferences”); *see also* Allison, *supra* note 309, at 104-08 (making the related objection that a blanket primary allows “apathetic” and “individualist” voters to free ride on the efforts of “partisans,” who do the organizational dirty work of democracy).

have the chance to consider electoral options that appeal to them.³⁵³ According to these critics, *Jones* averted a scenario in which the major parties would lack sufficient autonomy in selecting their candidates to offer minority voters ideologically distinct electoral alternatives and thus meaningful opportunities for participation.

If the *Jones* Court and its apologists were correct that the blanket primary system deprived voters of distinct electoral choices, then that system would stand in great tension with the dynamic party politics theory. However, evidence that the blanket primary system decreases ideological distinctions among candidates is scanty.³⁵⁴ This empirical uncertainty underscores the dubious nature of the assumptions on which the “excessive moderation” argument depends. The argument assumes that the closed primary system provides voters with meaningfully distinct choices. Ideological distinction lies, to some extent, in the eye of the beholder, but the prevailing system’s success in providing it is highly questionable. On a wide range of issues, including significant economic and homeland security matters, Democratic and Republican candidates routinely converge, despite having been selected through closed primary procedures.

The argument also turns on an overly simplistic assumption that the electorate is “centrist.” The substantive preferences of the electorate—which consists of numerous constituencies with complex

353. See Cain, *supra* note 78, at 801 (arguing that, under a blanket primary, “[m]edian voter logic would drive the candidates to nearly identical spots in the center, reducing the selection to a difference in labels, not policies”); Issacharoff, *Parties*, *supra* note 214, at 307-10 (arguing that a fully open primary would produce “two centrist candidates with overlapping electoral bases” but proceeding to question the tendency of a blanket primary to produce the same effect); Persily, *supra* note 78, at 804 n.206 (equating a blanket primary with minority vote dilution); Smith, *Transformative Politics*, *supra* note 318, at 862-63 (arguing that imposing a blanket primary on the Democratic Party diminishes “black voters’ ability to select a nominee who will best embody their aspirations for transformative politics”).

354. Professor Issacharoff, who takes very seriously the concern that the blanket primary would eliminate partisan activists’ counterweight to the median voter pressure of the two-party system, concludes that the minimal empirical evidence regarding the California blanket primary’s moderating effect provided insufficient grounds for a constitutional challenge. See Issacharoff, *Parties*, *supra* note 214, at 308-10; see also Allison, *supra* note 309, at 112-14 (questioning the asserted moderating effect of blanket primary systems based on results of nonpartisan blanket primaries in Louisiana). But see Cain, *supra* note 78, at 800 & n.20 (citing studies reporting increased election of “moderate” candidates in blanket primary states); Persily, *supra* note 78, at 776 (concluding from California data that “[a]ll other things being equal, the blanket primary aided in the election of slightly more moderate candidates”).

and changing characteristics—emerge through an ongoing discourse among people, interest groups, parties, policymakers, and courts. Perhaps if our system placed greater trust in the electorate and less reliance on party insiders, ideologically marginal candidates would find new ways to connect with voters.³⁵⁵ Similarly, the argument assumes a complete or substantial discontinuity between the majority that enacted the California blanket primary initiative and strongly ideological voters. In fact, many minor party members favored the initiative,³⁵⁶ which suggests that many people with substantively marginal views embraced the procedural values of the blanket primary. Finally, the argument presupposes the continued dominance of the major party duopoly.³⁵⁷ Although the major party duopoly benefits from a formidable legal trellis,³⁵⁸ the major parties' public support is increasingly rotting on the vine.³⁵⁹ To the extent a

355. This aspect of the “moderation” dispute reflects a clash between the pluralist and republican conceptions of democracy that animate, respectively, the private and public rights theories of expressive freedom. Pluralism views policy preferences as prepolitical and self-interested; thus, unimpeded pre-electoral coalition building enables the major parties to perform a valuable service by taking minority preferences into account prior to the election. *See supra* notes 101-07 and accompanying text (discussing the pluralist symbiosis between the private rights theory and the responsible party government preference for pre-electoral coalition building). “Minority” and “moderate” are static categories that precede and define the electoral process. In contrast, because republicanism treats preferences as subject to change in the political process and informed by a sense of the public interest, a competitive electoral process in which voters may choose freely among diverse perspectives is essential to protect minority interests. *See supra* notes 283-84 and accompanying text (discussing the symbiosis between the republican underpinnings of the public rights theory and the dynamic party politics preference for multiparty electoral competition). “Minority” and “moderate” are dynamic categories that take on meaning in the crucible of electoral debate.

356. *See supra* note 306.

357. *See* Issacharoff, *Parties*, *supra* note 214, at 305-12 (noting that “[t]he argument against the fully open primary must begin with the propensity of a first-past-the-post system to yield two and only two relatively centrist parties” and tracing the implications of that premise for arguments against the blanket primary); Persily, *supra* note 78, at 819 (tying the asserted importance of two autonomous major parties as checks against median voter tyranny in the primary election context to the use of a plurality electoral system rather than proportional representation); *see also* Hasen, *Comment*, *supra* note 217, at 728-30 (suggesting that the structural legal supports of the major party duopoly preclude courts from meaningfully advancing multiparty political competition); Lowenstein, *No Theory*, *supra* note 120, at 263 (charging Issacharoff and Pildes’ political markets theory with irrelevance because it fails to account for structural supports underpinning the two-party system).

358. *See infra* Part IV.C (discussing electoral structures that help to perpetuate the major party duopoly and proposing a legal basis for reviewing them under the public rights theory).

359. *See supra* note 335 and accompanying text (discussing the decline in popular support for the major parties).

constraint on major party autonomy like the blanket primary strengthened minor parties³⁶⁰—especially if such a constraint was part of a reform agenda designed to encourage minor parties—the blanket primary could greatly enhance ideological diversity in elections.

2. Vindicating Free Speech Rights of Access to the Means of Electoral Debate: The Colorado Republican Decisions

The Court considered another major party challenge to a federal regulation of electoral practices in *Colorado Republican Federal Campaign Committee v. FEC (Colorado I)*.³⁶¹ The Federal Election Campaign Act (FECA)³⁶² places limits on the amounts of contributions various people and entities can make to campaigns for federal office. The Act, however, exempts political parties from those limits and instead contains a special provision that allows parties to make larger contributions to their candidates.³⁶³ When the FEC sued the Colorado Republican Party for exceeding even these more generous limits, the party challenged the constitutionality of the limits under the First Amendment. The party argued that what the FEC treated as party “contributions” to candidates were really “independent expenditures” that the party was making on its own. In *Buckley v. Valeo*³⁶⁴ the Court had upheld various FECA restrictions on contributions on the theory that those restrictions served a compelling government interest in preventing actual or apparent corruption, but had struck down expenditure limits as violating the First Amendment.³⁶⁵ Thus, if the Court viewed the Colorado Republican Party’s challenged campaign activities as expenditures rather than contributions, the First Amendment would force the FEC to drop its complaint.

360. See *supra* notes 340-41 and accompanying text (discussing advantages of a blanket primary for minor parties).

361. 518 U.S. 604 (1996).

362. 2 U.S.C. §§ 431-455 (2000).

363. See 2 U.S.C. § 441a(d)(3) (2000) (limiting party expenditures to the greater of \$20,000 or two cents for every state voter, indexed for inflation from 1974).

364. 424 U.S. 1 (1976).

365. See *id.* at 19-59. For a discussion of the public rights theory’s broader implications for the *Buckley* distinction between contributions and expenditures, see *infra* Part IV.B.

In a splintered decision, the *Colorado I* Court accepted much of the party's reasoning and struck down the FECA limits as applied to the party's expenditures.³⁶⁶ Justice Breyer, writing for a three-Justice plurality,³⁶⁷ first distinguished between two types of party expenditures. "Coordinated" expenditures were made in cooperation with the candidates, and thus closely resembled contributions. In contrast, a party's expenditures made without consulting the candidate were "independent" expenditures, a category as to which *Buckley* had barred regulation.³⁶⁸ Reviewing the record evidence of the Colorado Republican Party's expenditures, Justice Breyer concluded they had been independent.³⁶⁹ As such, the First Amendment shielded the expenditures from regulation, just as it would protect the independent expenditures "of individuals, candidates, or other political committees."³⁷⁰ Justice Breyer rejected the government's argument that parties were so closely and inherently tied to candidates that their "independent" expenditures presented a special, inexorable risk of corruption that justified regulation.³⁷¹ "If anything," he wrote, "an independent expenditure ... controlled and directed by a party rather than [a] donor ... would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor."³⁷² He similarly rejected the related argument that the Court should deem all party expenditures to be "coordinated" as a matter of law.³⁷³ At the same time, he rejected the party's converse argument that all

366. *Colorado I*, 518 U.S. at 608.

367. Justice Kennedy wrote a separate opinion that expressed agreement with much of Justice Breyer's reasoning but found his analysis "beside the point" because, in Justice Kennedy's view, the First Amendment precluded the government from restricting even "coordinated" party expenditures. *See id.* at 626-27 (Kennedy, J., concurring in the judgment and dissenting in part). Justice Thomas also wrote separately to express a similar view. *See id.* at 631 (Thomas, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justice Scalia joined both separate opinions, making a seven-Justice majority for the holding Justice Breyer announced.

368. *See id.* at 613.

369. *See id.* at 613-14.

370. *Id.* at 616.

371. *Id.* at 617.

372. *Id.*

373. *See id.* at 619-23.

party expenditures should be deemed independent and thus protected from regulation.³⁷⁴

The *Colorado Republican* litigation focused completely on the interests of the major political parties. A major party—the Democrats—filed the FEC challenge that triggered the case,³⁷⁵ but that was a challenge of convenience: both major parties subsequently have availed themselves of the increased space *Colorado I* gave them to influence the electoral process.³⁷⁶ Even more directly than the issue of the parties' control over their nominating procedures in *Jones*, the question of their autonomy to spend freely in campaigns implicated the core values of the responsible party government theory. Sustaining the federal government's broad limits on party expenditures would have confounded the major parties' efforts both to pull voters into preelectoral coalitions and to establish the party "brand names" for purposes of the voting cue. In addition, as Justice Breyer's opinion suggested, the limits may have increased factionalism by making candidates relatively less beholden to their parties and relatively more beholden to interested individuals and groups.³⁷⁷ Thus, we would expect the opinion in *Colorado I* to reflect a private rights First Amendment analysis.

Justice Breyer's plurality opinion bears out that expectation. First, adhering to the public-private distinction, the *Colorado I* plurality treated political parties just like individuals who want to express their private views in the political process, declaring that "[t]he independent expression of a political party's views is 'core' First Amendment activity."³⁷⁸ The Court expressly rejected the government's efforts to distinguish the major parties as uniquely proximate to candidates and lawmakers.³⁷⁹ Second, the plurality

374. See *id.* at 623-25. When the case returned to the Supreme Court in 2000, a majority held that the First Amendment did not bar the government from regulating demonstrably coordinated party expenditures as contributions. See *Colorado II*, 533 U.S. 431, 464-65 (2001).

375. See *Colorado I*, 518 U.S. at 612.

376. See Briffault, *supra* note 3, at 628 (noting that, in the months immediately following the *Colorado I* decision, both the Republican and Democratic parties developed large independent expenditure programs).

377. See *Colorado I*, 518 U.S. at 617 (basing the suggestion that party expenditures might reduce corruption on the premise that candidates, in the absence of party financial support, would depend on other donors).

378. *Id.* at 616.

379. See *id.* ("We are not aware of any special dangers of corruption associated with political parties that tip the constitutional balance in a different direction.").

gave almost all of its attention to the parties' interest in speaking and very little to any special positive or negative effects their expression might have on the quantity and quality of political information available to voters.³⁸⁰ Justice Breyer hewed uncritically to the *Buckley* Court's categorical rejection of the interests in expanding the range of electoral debate, equalizing the influence of poorer voters on the political process, and restoring voters' faith in the political system as grounds for regulating money in politics.³⁸¹ All of those interests, which could have been asserted to defend the party spending limits at issue in *Colorado I*, embody core values of the public rights First Amendment—informing the public, engaging marginalized members of the political community in collective self-determination, and ensuring the widest possible range of speakers and ideas in public discourse. None of those interests, however, carries any weight under the private rights conception of expressive freedom, which aims only to prevent government interference with private speakers. The Court in *Colorado I*, as it has in other campaign finance cases,³⁸² saw no occasion to revisit this pivotal aspect of *Buckley*, instead restricting its analysis of viable grounds for regulation to the government's interest in preventing actual or apparent corruption.³⁸³

The majority Justices' opinions in *Colorado I* superficially employ public rights rhetoric to buttress their defenses of party organizations' prerogatives. Justice Breyer emphasized that a party's expression "not only reflects its members' views about the philosophical and governmental matters that bind them together [but] also seeks to convince others to join those members in a practical democratic task, the task of creating a government."³⁸⁴ Even more pointedly, Justice Kennedy's concurring opinion

380. See *id.* at 618 ("We do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.").

381. See *Buckley v. Valeo*, 424 U.S. 1, 19, 56-57 (1976).

382. See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (reaffirming the basic reasoning of *Buckley*).

383. See *Colorado I*, 518 U.S. at 616-19 (considering and rejecting the anti-corruption interest as a justification for the challenged limits on "independent" party spending); cf. *id.* at 609 (noting without comment the government interest, asserted in *Buckley*, in "level[ing] the electoral playing field by reducing campaign costs").

384. *Id.* at 615-16.

celebrated political parties for advancing the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” embodied in the First Amendment.³⁸⁵ Parties serve this principle, according to Justice Kennedy, “in part, by ‘identify[ing] the people who constitute the association, and ... limit[ing] the association to those people only.’”³⁸⁶ On close examination, however, even these statements reflect the tenets of the private rights theory. Justice Breyer’s telltale “not only” formulation makes clear that the “practical” business of creating a stable political order matters more than formulating and considering “views about philosophical and governmental matters” in the abstract. Justice Kennedy’s paean to parties boils down to a call for limiting democratic discourse in order to broaden it.

A true public rights analysis in *Colorado I* would have led the Court to uphold the challenged regulations. First, the Court would have looked past the public-private distinction and recognized that the major political parties are not ordinary private speakers. Rather, they and their leaders seek and hold governmental power, and their means of obtaining power is to support candidates.³⁸⁷ On this premise, treating a major party’s campaign expenditures as distinct from its candidate’s campaign is an implausible formalism. Next, rather than treating the regulations in *Colorado I* as a mere governmental invasion of formal private autonomy, the Court would have examined the substantive effects of unchecked party spending on the quality and quantity of political information available to the public.³⁸⁸ In addition, the public rights theory’s special concern for

385. *Id.* at 629 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

386. *Id.* at 629 (quoting *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981)).

387. “The major political parties [are] quite different from other politically active groups. Party committee spending aims almost exclusively at promoting the election of party candidates to office and thereby securing or maintaining party political power.” Briffault, *supra* note 3, at 640. For a general discussion of the major parties’ governmental power and its implications for constitutional analysis under the public rights theory, see *infra* Part IV.A.

388. Justice Stevens, dissenting in *Colorado I*, suggested this countervailing First Amendment interest. See *Colorado I*, 518 U.S. at 649-50 (Stevens, J., dissenting) (“It is quite wrong to assume that the net effect of limits on contributions and expenditures ... will be adverse to the interest in informed debate protected by the First Amendment.”); see also Smith, *Transformative Politics*, *supra* note 318, at 864-65 (noting that present campaign finance law deters participation by “working class and poor candidates who might champion

disempowered speakers would have led the Court to consider the political engagement of minority groups³⁸⁹ and the electoral competitiveness of minor political parties,³⁹⁰ both of which can dissolve in the flood of unregulated campaign spending. Given the limited expressive value of much major party spending³⁹¹ and contributors' use of liberal party spending rules to perpetuate political exclusion and inequality,³⁹² these inquiries would have led the Court to allow extensive regulation of party campaign expenditures.

Such a public rights analysis in *Colorado I* would have delighted adherents of the dynamic party politics theory. The high success rate of incumbents in national elections³⁹³ indicates that party spending achieves its greatest success in entrenching incumbents rather than promoting challengers. In addition, unregulated party expenditures make elections less competitive by precluding minor party competition, thereby diminishing major party officeholders' incentives to be responsive to their constituents. Thus, greater judicial tolerance for regulation of party expenditures would directly advance the anti-entrenchment aspiration of the dynamic party politics theory. Unchecked party expenditures, a luxury only the major parties can afford, allow the major parties to drown out other voices, notably those of minor parties, thereby constricting outlets

interests that well-heeled candidates do not").

389. One critical disempowering effect of unchecked major party spending in particular and campaign finance law in general is racial. "[A] campaign finance system that treats money as protected speech simply privileges those with such a resource over those who lack it. That this divide falls along the color line is indisputable." Smith, *Transformative Politics*, *supra* note 318, at 858.

390. *See id.* at 865 ("The [campaign finance] system ... discriminates against third parties, which cannot meaningfully compete in financial terms with the incumbent parties, thus again depriving the electorate of alternative political viewpoints.").

391. *See* Briffault, *supra* note 3, at 641 ("Party issue ad spending is, in practice, not a means for politically active, independent citizens to increase the discussion of issues in public life, but rather an integral part of candidate-election strategies.").

392. *See id.* at 647 (discussing corrupting effects of "the ability of private donors to use the parties as a means of evading the limits on donors' contributions to candidates").

393. *See, e.g., Common Cause Reporter's Guide to Money in Politics Campaign 2000: Incumbent Advantage* (2000), at http://www.commoncause.org/pressroom/congress_advantage.html (noting that 98 percent of House incumbents and nearly 90 percent of Senate incumbents prevailed in the 1998 election). No less than 88 percent of House incumbents and 75 percent of Senate incumbents have won in any campaign over the past two decades. Richard Semiatin, *The Context of the 1998 Midterm Elections* (1998), at <http://www.mhke.com/soscience/polisci/patterson/olc/stu/context22.htm>.

for political participation and narrowing electoral debate. Moreover, to the extent the capacity for unchecked spending drives parties' obsession with fundraising, it can contribute to the disproportionate influence of the wealthy few, which foments a popular cynicism poisonous to the dynamic party politics vision of a robust deliberative democracy.

Stephen Ansolabehere and James Snyder argue that allowing regulations of major party electoral spending might undermine the participation value associated with the dynamic party politics theory.³⁹⁴ Writing about another aspect of major party electoral spending, soft money,³⁹⁵ they maintain that a decrease in party spending would depress voter turnout by diminishing the resources state parties use to get out the vote.³⁹⁶ They estimate that eliminating "soft money" would decrease voter turnout by about two percentage points.³⁹⁷ Ansolabehere and Snyder's argument suffers from one of the same logical flaws present in the argument that a blanket primary system diminishes political information because it complicates major party campaigning:³⁹⁸ they rely on an unwarranted assumption that major party autonomy substantially helps matters. First, Ansolabehere and Snyder appear to assume that if funding cuts curtailed parties' grassroots efforts, the voters those efforts target simply would not vote. Presumably, however, some of those voters would get to the polls on their own; organizations such as unions and religious groups, which already have developed substantial capacities to get voters to the polls, would deliver others; and minor parties, empowered by more

394. See Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 COLUM. L. REV. 598, 613-17 (2000).

395. For an explanation of "soft money," see *supra* note 3.

396. Professors Ansolabehere and Snyder first consider, and dismiss, the argument that party spending is essential to electoral competition because challengers benefit more from party largesse than from other sources of funds. See Ansolabehere & Snyder, *supra* note 394, at 609-11. In doing so, they properly emphasize that the boost party money provides challengers is too small to increase their slim prospects for election appreciably. See *id.* at 611. Other problems with the argument include its presumption that two-party competition is the best our system can do and its ignorance of the countervailing harmful effects of party money.

397. See *id.* at 616-17; see also Persily, *supra* note 78, at 797-98 (emphasizing "the fundamental, indeed irreplaceable, role that strong party organizations have played as the primary institutions fostering participation in American democracy").

398. See *supra* notes 342-43 and accompanying text (refuting the argument that blanket primaries cause informational losses).

favorable financial rules, would deliver still more. Second, critiques of the major party duopoly provide strong reason to doubt whether the self-interested whims of the major parties meaningfully enhance democratic participation.³⁹⁹

B. The Court Rejects Minor Parties' First Amendment Challenges to Electoral Regulations

1. Denying Free Association in Candidate Selection Procedures: Timmons v. Twin Cities Area New Party

In *Timmons v. Twin Cities Area New Party*,⁴⁰⁰ the Court's attention turned from the First Amendment concerns of the major political parties to those of minor parties. An upstart left-wing party, the New Party, challenged Minnesota's statutory ban on "fusion" candidacies. A fusion candidacy occurs when two parties nominate the same person as their candidate in a general election.⁴⁰¹ Fusion, a political legacy of the Progressive Era, has at various times served as an important vehicle for new, small parties to advance their agendas and develop their identities.⁴⁰² In some jurisdictions, most notably New York State, fusion remains an important feature of the electoral system.⁴⁰³ Most states, in contrast, ban fusion, through statutes enacted almost entirely by lawmakers of the two major parties.⁴⁰⁴ The New Party's challenge contended that the First Amendment's principle of free association—the same principle the Court would invoke in striking down California's blanket primary⁴⁰⁵—compelled the state to accept fusion

399. See, e.g., Ortiz, *Duopoly*, *supra* note 227, at 760-61 (explaining that the major parties focus only on delivering the voters they believe they need in order to win).

400. 520 U.S. 351 (1997).

401. *Id.* at 353 n.1.

402. See Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288-89 (1980) (discussing the importance of fusion candidacies to minor parties during the Progressive Era).

403. See Pope, *supra* note 270, at 493-99 (assessing the history and persistence of fusion candidacies in New York).

404. See Argersinger, *supra* note 402, at 290-92 (describing the origins of fusion bans as dominant major parties' attempts to prevent their rivals from allying with minor parties); Issacharoff & Pildes, *Lockups*, *supra* note 102, at 685 (describing fusion bans as efforts by the major parties to exclude minor party competition).

405. See *supra* Part III.A.1 (discussing *Cal. Democratic Party v. Jones*, 530 U.S. 567

candidacies. Without fusion, the party maintained, it could not select the candidate of its choice and increase public support for its positions.⁴⁰⁶

The Supreme Court rejected the New Party's First Amendment argument and upheld Minnesota's fusion ban. Chief Justice Rehnquist, writing for the Court, first assessed the gravity of the party's First Amendment interest. He acknowledged "[t]he New Party's ... right to select its own candidate" but noted that a party's candidate of choice might be unavailable for any number of reasons.⁴⁰⁷ Thus, the fusion ban was not a "regulation of political parties' internal affairs and core associational activities" but only an ordinary electoral regulation.⁴⁰⁸ Chief Justice Rehnquist noted that the ban left "up to the party" the choice whether "to endorse a candidate who, because of the fusion ban, will not appear on the ballot as the party's candidate."⁴⁰⁹ He suggested that the fusion ban was not the proximate cause of any uphill struggle faced by the New Party:

Many features of our political system—*e.g.*, single-member districts, "first past the post" elections, and the high costs of campaigning—make it difficult for third parties to succeed in American politics. But the Constitution does not require States to permit fusion any more than it requires them to move to proportional-representation elections or public financing of campaigns.⁴¹⁰

Accordingly, the Court would uphold the ban upon a showing of any state regulatory interest "sufficiently weighty to justify the limitation' imposed on the party's rights."⁴¹¹ Moreover, the Court

(2000)).

406. See *Timmons*, 520 U.S. at 372 (Stevens, J., dissenting).

407. *Id.* at 359 ("A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party's candidate. That a particular individual may not appear on the ballot as a particular party's candidate does not severely burden that party's associational rights.") (footnote omitted).

408. *Id.* at 360.

409. *Id.*

410. *Id.* at 362.

411. *Id.* at 364 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

would not require “elaborate, empirical verification of the weightiness of the State’s asserted justifications.”⁴¹²

Minnesota asserted four interests in support of the ban: avoiding voter confusion, promoting competition by reserving ballot space for opposing candidates, preventing “electoral distortions and ballot manipulations,” and “discouraging party splintering” and factionalism.⁴¹³ The Court accepted all four interests. First, the Court sympathetically noted that “a candidate or party could easily exploit fusion as a way of associating his or its name with popular slogans and catchphrases.”⁴¹⁴ Such a gambit, Chief Justice Rehnquist concluded, “would undermine the ballot’s purpose by transforming it from a means of choosing candidates to a billboard for political advertising.”⁴¹⁵ Expressing a related concern, the Court vindicated Minnesota’s interest in not letting minor parties “bootstrap their way to major-party status in the next election and circumvent the State’s nominating-petition requirement for minor parties.”⁴¹⁶ Second, Chief Justice Rehnquist recognized states’ “strong interest in the stability of their political systems.”⁴¹⁷ He elaborated:

This interest does not permit a State to completely insulate the two-party system from minor parties’ or independent candidates’ competition and influence That said, the States’ interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system, and that temper the destabilizing effects of party splintering and excessive factionalism. *The Constitution permits the Minnesota Legislature to decide that political stability is best served through a healthy two-party system.*⁴¹⁸

412. *Id.*

413. *Id.*

414. *Id.* at 365.

415. *Id.*

416. *Id.* at 366.

417. *Id.*

418. *Id.* at 367 (emphasis added).

Because Minnesota justified its fusion ban by reference to multiple "sufficiently weighty" interests, the ban easily survived the minimal scrutiny to which the Court subjected it.⁴¹⁹

As Chief Justice Rehnquist declared, Minnesota's fusion ban formally "applies to major and minor parties alike."⁴²⁰ *Timmons*, however, was "another skirmish in an ongoing battle between minor and major parties,"⁴²¹ and in no other case has the Court so strongly and openly endorsed the responsible party government theory or validated its overriding concern with political stability.⁴²² Noted one commentator: "[T]he bald purposes and effects of the [fusion] ban are to support major parties, hurt third parties, and force compromise—moving nominees and party voters to the two major parties, reducing the leverage of third parties, and presumably supporting the middle."⁴²³ The interests Minnesota asserted, and the Court embraced, in support of the fusion ban—avoiding voter confusion, preventing minor parties from complicating the electoral process by "manipulating" the ballot, and avoiding "party splintering"—simply use different language to describe, respectively, the three benefits the responsible party government theory claims for the major party duopoly: the voting cue, fostering

419. Another interest that might be asserted for maintaining a two-party system, related to but distinct from concerns about factionalism, is the desire to prevent minor party "spoiler" candidacies that can lead to the election of candidates opposed by a majority of the electorate. See Persily & Cain, *supra* note 79, at 780-81 & n.22 (discussing the risk that a field of more than two candidates in a plurality voting system can lead to uncertain electoral mandates). Validating that interest, however, would justify states' banning minor party candidacies altogether, a step not even the *Timmons* Court was willing to take and a violation of even the most formalist conception of expressive freedom. Moreover, the argument invites the question of how seriously we should take the "mandate" of the victor in a two-candidate election, given the assumption that he attained majority support only because many voters considered him the lesser of two evils.

420. *Timmons*, 520 U.S. at 360.

421. Amy, *supra* note 251, at 146.

422. See *id.* at 150 (noting the novelty of the *Timmons* Court's advocacy of the two-party system and contending that "Rehnquist was clearly going out of his way to make this argument"); Hasen, *Entrenching*, *supra* note 99, at 333 ("Until *Timmons*, the Court had never squarely addressed whether it was permissible for a state to favor the two-party system in crafting its election laws.").

423. Fitts, *Back to the Future*, *supra* note 82, at 102-03.

duopolistic coalition building,⁴²⁴ and discouraging factionalism in politics and government.

As the *Timmons* Court's outright endorsement of the responsible party government theory would lead us to expect, the decision faithfully adheres to the private rights theory of expressive freedom. The Court once again built its analysis on a rigid public-private distinction. Chief Justice Rehnquist characterized Minnesota as advancing neutral, public-minded regulatory interests, never acknowledging that virtually all of the political decisionmakers responsible for enacting and maintaining the fusion ban belonged to the two major parties. Conversely, he treated the New Party as nothing more than a self-interested speaker in the political marketplace, never considering the possibility that the party might be litigating values of broader interest to society. Chief Justice Rehnquist proceeded to manipulate the private rights balancing methodology—of which his circular “sufficiently weighty” balancing test stands as a Kafkaesque parody—to subordinate a “fringe” speaker's expressive interests to a weighty collection of state interests centered on the value of “stability.”⁴²⁵ The Court ignored the power relationships at stake in the case, favoring the powerful major parties over politically vulnerable minor parties.⁴²⁶ The Court also showed no patience for the idea that the New Party's electoral activity had independent expressive value,⁴²⁷ instead vindicating Minnesota's interest in preventing minor parties from using the ballot to express ideas.

A public rights First Amendment analysis in *Timmons* would have led the Court to strike down Minnesota's fusion ban.⁴²⁸

424. Justice Stevens noted the irony that “the activity banned by Minnesota's law is the formation of coalitions” between major and minor parties. *Timmons*, 520 U.S. at 377 (Stevens, J., dissenting).

425. See Pildes, *Democracy*, *supra* note 226, at 708 (discussing the *Timmons* majority's emphatic concern with political stability).

426. See Smith, *Black Party*, *supra* note 99, at 20 (suggesting that *Timmons* reflected the Court's favoritism toward entrenched interests). The *Timmons* Court's disregard for power relationships is especially stark given the plaintiff New Party's disproportionate appeal to people of color. See *id.* at 21-22 (reporting that approximately forty percent of the New Party's national membership, executive committee, and candidates were people of color).

427. See Rosenblum, *supra* note 76, at 835 (emphasizing the *Timmons* Court's rejection of the expressive value of fusion candidacies, and calling fusion “the chief means of minor party expression and influence”).

428. The best public rights argument in support of the result in *Timmons* is that upholding

Although the New Party had a substantial associational interest of its own, the more important consideration on the party's side of the case would have been the public's interest in an open, competitive electoral process.⁴²⁹ The Court would not have dismissed, as Chief Justice Rehnquist blithely did, the communicative value of a ballot line, because the public rights theory extols political expression.⁴³⁰ A public rights analysis would have emphasized that facilitating minor parties' survival and growth through fusion candidacies expands political debate and enhances opportunities for disenfranchised voters to participate in the process. Minor parties' relative weakness and vulnerability in the political process would have lent urgency to the Court's contemplation of their value to the process.⁴³¹ On the other side of the case, Minnesota's political domination by the major parties would have compelled a more critical analysis of its "political stability" rationale for the fusion ban.⁴³² The state's "voter confusion" and "ballot manipulation"

Minnesota's fusion ban vindicated the voters' interest in a coherent electoral process against the self-interested autonomy claim of the New Party. This argument fails, however: it assumes, contrary to the public rights theory, that voters cannot process information; and its indictment of the New Party's motive for challenging the ban obscures any consideration of the ban's actual effects on the electoral system.

429. See *Timmons*, 520 U.S. at 374 (Stevens, J., dissenting) ("[T]he burden of a statute of this kind is imposed upon the members of a minor party, but its potential impact is much broader.").

430.

Our conclusion that the ballot is not principally a forum for the individual expression of political sentiment through the casting of a vote does not justify the conclusion that the ballot serves no expressive purpose for the parties who place candidates on the ballot. Indeed, the long-recognized right to choose a "standard bearer who best represents the party's ideologies and preferences" is inescapably an expressive right.

Id. at 373 (quoting *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

431. Justice Stevens took this factor into account in responding to the Court's statement that the fusion ban still allowed a minor party to endorse another party's candidates if the minor party gave up its ballot line. "Given the limited resources available to most minor parties, and the less-than-universal interest in the messages of third parties ... the Party's message will, in this manner, reach a much smaller audience than that composed of all voters who can read the ballot in the polling booth." *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting).

432. Justice Stevens, again, emphasized the partisan character of laws that ban fusion candidacies. "In most States, perhaps in all, there are two and only two major political parties. It is not surprising, therefore, that most States have enacted election laws that impose burdens on the development and growth of third parties." *Id.* at 378 (Stevens, J., dissenting). Justice Stevens also criticized the Court for elevating the competitive advantage of the major

rationales would have been anathema to a theory of expressive freedom focused on fostering the broadest possible debate: under the public rights theory, a candidate's running for office under the banner of the "God, Mom, and Antiterrorism Party," or courting attention by attaching its label to a popular incumbent, would simply contribute information to the electoral debate.⁴³³ The public rights theory might recognize an extreme point at which such manipulations interfered with the free flow of useful information,⁴³⁴ but the theory places a great deal of trust in voters' intelligence.

The result of a public rights analysis in *Timmons* would have strongly advanced the goals of the dynamic party politics theory. That theory places great importance on minor parties' capacity to involve disaffected voters, particularly those with minority political preferences, in the electoral process.⁴³⁵ Thus, the most direct benefit of a contrary result in *Timmons*, from a dynamic party politics standpoint, would have resulted from the continued availability to minor parties of an electoral strategy that many parties have found useful in broadening their appeal and making their messages heard. In addition, strengthening minor parties' electoral options by striking down the fusion ban would have enhanced their ability to challenge entrenchment of major party officeholders, thereby serving the dynamic party politics goal of enhancing elected officials' responsiveness. More competitive minor parties, with a greater range of strategic options, greatly expand the breadth and depth of electoral debate, whether or not they manage to compete successfully with the major parties.⁴³⁶

parties to the level of a legitimate state interest. "[L]egislation that would otherwise be unconstitutional because it burdens First Amendment interests and discriminates against minor political parties cannot survive simply because it benefits the two major parties." *Id.* at 382 (Stevens, J., dissenting).

433. "[T]he argument that the [fusion ban's] burden on First Amendment interests is justified by this [voter confusion] concern is meritless and severely underestimates the intelligence of the typical voter." *Id.* at 375-76 (Stevens, J., dissenting).

434. The public rights theory would allow the state to bar a party from listing a candidate's name on its ballot line when the candidate had refused the party's nomination. For similar reasons, a state would be justified in restricting practices intended and likely to confuse reasonably intelligent voters, such as a minor party's calling itself the "Democratik" party or the placement of a single candidate's name on fifty distinct ballot lines. *See supra* notes 134-43 and accompanying text (discussing Meiklejohn's "town meeting" paradigm).

435. *See supra* notes 254-58 and accompanying text.

436. James Pope questions the value of fusion candidacies for minor parties' actual chances

2. Denying Free Speech Rights of Access to the Means of Electoral Debate: Arkansas Area Educational Television Commission v. Forbes

The Court again considered a minor party candidate's First Amendment challenge to a state electoral regulation in *Arkansas Educational Television Commission v. Forbes*.⁴³⁷ Independent candidate Ralph Forbes, who had qualified for the ballot in the general election for an Arkansas U.S. House seat, sought inclusion in a candidate debate organized and broadcast by a state-run television station. The station management had decided to limit the debate "to the major party candidates or any other candidate who had strong popular support."⁴³⁸ The station rejected Forbes' request to participate in the debate, claiming in subsequent testimony that neither the electorate nor the press had considered him a serious candidate and that he had little in the way of financial support or a campaign organization.⁴³⁹ Forbes challenged the station's decision, claiming, among other things, that the First Amendment required the station to include him in the debate and that his exclusion had improperly turned on his political views.⁴⁴⁰

The Supreme Court, reversing a decision of the Fifth Circuit, rejected Forbes' contentions and absolved the station of any First Amendment violation. Justice Kennedy, writing for a six-Justice majority, first emphasized that the station was a broadcaster, whose journalistic responsibilities required it to make editorial judgments about the content of its programming. "When a public broadcaster

at electoral success, arguing that, while fusion enhances minor parties' role as advocates of new political messages, it diminishes their role as electoral competitors. See Pope, *supra* note 270, at 491-501. If Pope were correct, fusion would be a mixed blessing for the dynamic party politics theory. But even if the numerous minor parties that have employed fusion candidacies and/or challenged fusion bans considered raising new issues their central goal, the idea that they would employ a strategy that sabotaged their competitive prospects seems unlikely. Fusion appears to serve minor parties as an incremental step toward the eventual ability to compete seriously in elections. In any event, given minor parties' consistent electoral failures under the predominant national regime of fusion bans, they would have little competitive ground to lose in regaining the fusion option.

437. 523 U.S. 666 (1998).

438. *Id.* at 670 (quoting record).

439. *See id.* at 682.

440. *See id.* at 671-72.

exercises editorial discretion in the selection and presentation of its programming," he wrote, "it engages in speech activity."⁴⁴¹ Having thus characterized the station as a private speaker, the Court nonetheless recognized a very limited First Amendment constraint on the station's conduct of a candidate debate. Because "the debate was by design a forum for political speech by the candidates" and "in our tradition, candidate debates are of exceptional significance in the electoral process,"⁴⁴² the debate was appropriately analyzed under the public forum doctrine.⁴⁴³ Having invoked that doctrine, however, Justice Kennedy adjudged the debate a nonpublic forum, rather than a designated public forum, because the station had provided only "selective," rather than "general," access to the debate.⁴⁴⁴ The government's only obligation in a nonpublic forum is to avoid viewpoint-based discrimination, and Justice Kennedy found nothing in the record to support Forbes' claim that his views caused the station to exclude him from the debate.⁴⁴⁵ Accordingly, Forbes' First Amendment claim failed.

Forbes, like *Timmons*, was a major setback for minor party candidates' efforts to make inroads into the electoral process. Under the responsible party government theory, minor parties' participation in a key informational forum like a televised debate undesirably complicates the electoral process. Accordingly, *Forbes* advanced the values of that theory in ways that should by now be familiar. Keeping minor party candidates out of public view maintains the utility of the major parties' voting cue. Keeping minor parties noncompetitive prevents them from diverting voters out of the two major parties' broad preelectoral coalitions. Keeping minor

441. *Id.* at 674.

442. *Id.* at 675.

443. *See id.* at 675-76.

444. *Id.* at 679. Justice Kennedy believed the situation in *Forbes* closely paralleled *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). In that case, the Court upheld the federal government's exclusion of political groups from the list of beneficiaries of the Combined Federal Campaign (CFC), a fundraising effort directed at federal employees. *See Cornelius*, 473 U.S. at 804. Justice Kennedy viewed that exclusion as equivalent to the station's limitation of the debate in *Forbes* to candidates for the House seat in question. "At that point, just as the Government in *Cornelius* made agency-by-agency determinations as to which of the eligible agencies would participate in the CFC, [the station] made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate." *Forbes*, 523 U.S. at 680.

445. *See Forbes*, 523 U.S. at 682-83.

parties out of government promotes stability by limiting factions. Because *Forbes* achieved these ends, we would expect the Court's decision to follow the private rights theory of expressive freedom.

Parsing the First Amendment analysis in *Forbes* is more complicated than in the other decisions I have discussed. The Court's reasoning, even more than in *Colorado I*, seems on the surface to reflect elements of the public rights approach. A public broadcasting station, as a government instrumentality that behaves almost exactly like a private broadcaster, confounds the public-private distinction. The *Forbes* Court seemed to see both sides of the story: it emphasized the Arkansas station's editorial prerogatives, but it ultimately subjected the station to First Amendment scrutiny. In addition, the *Forbes* Court acknowledged the First Amendment significance of receiving information, especially in the context of elections. Justice Kennedy could have been channeling Professor Meiklejohn when he declared that "[d]eliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates."⁴⁴⁶ His concern that mandating inclusion of minor party candidates "would result in less speech, not more"⁴⁴⁷ appears to provide a powerful public rights justification for the Court's decision.

The private rights theory, however, drives the *Forbes* Court's underlying reasoning. Despite the Court's awareness of public broadcasters' ambiguous governmental character, the public-private distinction pulled Justice Kennedy inexorably toward a choice. In his ultimate analysis, public broadcasters are private speakers, save for the tiny proviso that they may not discriminate based on viewpoint in the specialized context of candidate debates.⁴⁴⁸ The more apparent "private speaker" in the case—*Forbes*—was thus perversely cast as the vessel of the speech-threatening regulatory interest. To the extent the Court recognized *Forbes* as a speaker at

446. *Id.* at 676.

447. *Id.* at 680.

448. Justice Stevens' *Forbes* dissent, which nowhere denied the "private" side of public broadcasters' identity, chided the majority for losing sight of the "public" side of public broadcasters, specifically "the risk of government censorship and propaganda." *Id.* at 689 (Stevens, J., dissenting).

all, it refused, as in *Timmons*, to acknowledge any public value to vindicating his expressive interest. Justice Kennedy's concern that public broadcasters would forego debates rather than include minor party candidates cast such candidates as "dangerous" speakers whose interests must fall before weightier regulatory priorities. He rejected the possibility that the First Amendment might compel public broadcasters to run debates, apparently out of a concern about judicial overreaching.⁴⁴⁹ The Court thus elevated the interest of the station as private speaker over the public's interest in receiving political information.

A true public rights analysis in *Forbes*, as in *Timmons*, would have considered the value of minor party candidates for expanding electoral debate and encouraging disaffected voters to participate in the process. The Court would have emphasized the substantive importance of mass media exposure in allowing minor parties to serve those functions. The fact that Forbes had little money and no campaign organization—which the broadcaster offered as a post-hoc rationalization for excluding him from the debate—would have strengthened rather than weakened his case, given the public rights theory's cognizance of power differentials among speakers. The station's other post-hoc justification for excluding Forbes—his lack of public support—seems to recall Professor Meiklejohn's "town meeting" justification for restricting speech. If Forbes' lack of support reflected a considered public judgment that he had nothing useful to contribute, then the station's decision might have served the public interest. Justice Kennedy, however, failed to answer the concern that control over debates effectively confers "the power to eliminate a political candidate from all consideration by the voters."⁴⁵⁰ Allowing the station to exclude Forbes based on its bare assertion of his unpopularity turned that assertion into a self-fulfilling prophecy.⁴⁵¹ A public rights analysis would have compelled some constraint on public broadcasters' discretion to limit debates to candidates of the two major parties.

449. *Cf. id.* at 674 (expressing concern that extending the reach of the public forum doctrine into public broadcasting would lead to undue judicial oversight of broadcasters' editorial decisions).

450. *Forbes*, 523 U.S. at 690 (Stevens, J., dissenting).

451. *See id.* at 684 (criticizing the majority for ignoring "the standardless character of the decision to exclude Forbes from the debate").

The possibility of minor party participation in televised debates would elate dynamic party politics theorists. Expanded televised debates would broaden electoral debate, encourage political participation by exposing people to more varied political ideas, and erode governmental entrenchment by increasing minor party challengers' competitive prospects.⁴⁵² A mechanistic First Amendment mandate that broadcasters open debates to all declared candidates might produce chaos and voter confusion, but any number of intermediate outcomes in *Forbes* would have diversified debates without rendering them unmanageable. Perhaps, as Justice Stevens urged in dissent, the Court simply could have required public broadcasters to apply "preestablished, objective criteria" in considering candidates' requests to debate.⁴⁵³ Alternatively, the Court might have developed rough objective criteria for inclusion, based on factors such as a modicum of public support or a party's having qualified for the ballot in a certain number of elections. If such criteria produced an unmanageable number of candidates, stations might employ a lottery to winnow the roster. Any of these approaches would have offered hope of giving some minor party candidates a forum to submit their ideas for public consideration.

This Part has critically examined how the private rights theory of expressive freedom has led the Supreme Court to analyze cases that present First Amendment challenges to electoral regulations of political parties. In every such recent case, the Court has reached a decision that validates the pro-duopoly assumptions of the responsible party government theory. Just as consistently, the Court's rejection of the private rights theory in favor of the public rights theory would have led it to opposite results, consistent with the dynamic party politics theory. Examining the cases makes undeniable what the theoretical premises indicate: If we believe that the dynamic party politics theory, with its aspirations for an engaged electorate, competitive elections, and robust electoral debate, resonates more deeply than the responsible party government theory with our vision of a vibrant democratic culture, then we

452. On the other hand, mass media exposure may not always benefit political dissidents. See Balkin, *supra* note 48, at 411 n.80 (criticizing market-driven mass media for "generally offer[ing] radical ideas on the left and right only as the intellectual equivalent of a freak show, thereby strengthening our faith in mainstream thought").

453. See *Forbes*, 523 U.S. at 694 (Stevens, J., dissenting).

should strongly desire a change in the Supreme Court's understanding of the First Amendment. When considering regulations of political parties' electoral activities, the Court should embrace the public rights theory of expressive freedom.

IV. FURTHER IMPLICATIONS OF THE PUBLIC RIGHTS THEORY FOR REGULATION OF POLITICAL PARTIES

The preceding critique of the Supreme Court's recent First Amendment decisions about regulations of political parties' electoral activities leaves no doubt that moving from a private rights to a public rights theory of the First Amendment would work major changes in the law. A Court committed to the public rights theory would largely desert the political theory of responsible party government, with its emphasis on maintaining political stability through a strong two-party system. Instead, the Court would resolve disputes about party regulations in ways that advance the dynamic party politics theory, which encourages an informed, engaged electorate, spurred on by a larger number of competitive political parties, to sustain a robust political debate. This final Part briefly examines broader implications of the public rights theory, suggested by but extending beyond the Court's recent decisions, for the ways the Constitution governs regulation of political parties.

A. State Action Distinction Between Major and Minor Political Parties

A threshold question in any constitutional suit not directed at an avowed governmental entity is whether the defendant, at least for purposes of the suit, is a state actor or a private entity. The Supreme Court generally uses a nexus test to ascertain the presence of state action, asking "whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority."⁴⁵⁴ An important aspect of the state action analysis is that it determines the propriety of constitutional plaintiffs as well as defendants.⁴⁵⁵ Just as only state actors are

454. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

455. See Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1748 n.31 (discussing the dual

bound to honor constitutional guarantees, only private actors are entitled to those guarantees. The duality has significant implications for disputes over regulations of political parties' electoral activities, because the state action issue dictates both when parties may claim First Amendment protection and when they may be held to violate the expressive freedom of voters.

The determination whether or not political parties are state actors has proven analytically difficult. In some circumstances—most obviously matters of purely internal party governance—no one seriously disputes that parties are private entities entitled to raise First Amendment claims that trigger strict scrutiny.⁴⁵⁶ In certain other contexts, however, the Court has deviated from the norm and identified partisan practices with government. The classic example is *Terry v. Adams*,⁴⁵⁷ in which the Court actually ascribed state action to a political party that unilaterally controlled the state government.⁴⁵⁸ The most familiar current instance is the line of cases involving partisan patronage hiring or contracting practices, where the defendants typically include governmental entities.⁴⁵⁹ The state action analysis becomes uncertain when parties' electoral activities are at issue. Commentators have proposed two solutions to this uncertainty, neither one satisfactory for the public rights theory of expressive freedom. First, scholars who take a functional rather than a rights-based approach to party regulations argue that courts need not consider state action analysis in cases that involve

nature of the state action inquiry as applied to political parties).

456. See Hasen, *Parties*, *supra* note 238, at 826-27 (recognizing that "party organizations should have First Amendment rights of speech and association when they are conducting their own internal affairs"); Wigton, *supra* note 311, at 421-32 (arguing that courts should treat matters of internal party governance as primarily private activities).

457. 345 U.S. 461 (1953).

458. See *id.* at 469-70 (finding state action because the primary election of Texas' Jaybird Democrats had "become an integral part, indeed the only effective part, of the elective process"). *Terry* was the culmination of a series of decisions collectively known as the White Primary Cases. See *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). For an interesting recent descendent of those decisions, see *Morse v. Republican Party of Va.*, 517 U.S. 186, 214-16 (1996) (plurality opinion) (subjecting a state political party's imposition of a fee for participation in its nominating convention to the preclearance requirement of § 5 of the Voting Rights Act).

459. See, e.g., *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990) (holding that requiring partisan allegiance as a condition of government employment violates the First Amendment); see also Wigton, *supra* note 311, at 443-50 (arguing that courts should generally treat acts of the "party in government" as state actions).

political parties.⁴⁶⁰ Because I remain committed to a rights-based doctrinal analysis, I reject that solution.⁴⁶¹ Second, some scholars have argued that some or all of the parties' electoral activities, particularly those related to primary elections and other aspects of the candidate selection process, are intraparty affairs and thus quintessentially private.⁴⁶² That position is untenable under the public rights theory, which focuses on electoral politics as a key object of First Amendment protection precisely because elections are quintessentially public.⁴⁶³

Adoption of the public rights theory would require the Court to characterize major and minor parties differently in evaluating regulations of partisan electoral activities. The Court tends to treat all political parties alike, regardless of differences in size and power; if anything, the Court shows lesser regard for minor parties' First Amendment claims.⁴⁶⁴ Such treatment makes sense under the

460. See Cain, *supra* note 78, at 807 (stating that parties "exist in a no-man's land between the public and private sectors" and advocating substantial legal autonomy for party organizations); Issacharoff, *Parties*, *supra* note 214, at 280 (arguing that political parties "occupy[] a contested rights terrain falling between the high level of protection owed to individuals ... and the limited protection offered to de facto agents of the state"); Persily, *supra* note 78, at 792 (asserting the "futility of an approach to party rights that depends on a threshold determination of state action"); Pildes, *Theory*, *supra* note 213, at 1623-24 (criticizing the use of conventional state action analysis in political regulation cases); see also Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1752-53 (criticizing application of the public-private distinction to the major political parties and suggesting "that parties bear constitutional rights and that they act unconstitutionally when they deprive any group of citizens of the opportunity for political participation").

461. See *supra* notes 209-18 and accompanying text (defending a rights-based analysis of regulations of political parties' electoral activities). Whether the public-private distinction that undergirds the state action analysis is coherent is a question for a future article. See *supra* notes 195-203 and accompanying text (discussing the public rights theory's rejection of a rigid public-private distinction).

462. See Cain, *supra* note 78, at 806-10 (advocating substantial freedom for parties from regulatory interference); Persily, *supra* note 78, at 755 (arguing that, despite the conclusion that parties have characteristics of state actors, courts should treat parties' electoral activities as private under the First Amendment in order to protect the major parties' functional role in electoral politics); Wigton, *supra* note 311, at 435-39 (arguing that parties' electoral activities should generally be classified as private).

463. See *supra* notes 334-35 and accompanying text (discussing the public character of primary elections under the public rights theory).

464. See *supra* notes 303-04 and accompanying text (noting the major parties' recent success in First Amendment cases and minor parties' recent failure in similar cases); see also Persily, *supra* note 78, at 767-69 (discussing the Court's demonstrated hostility toward minor parties' free association claims). One notable departure was the Court's exemption of certain minor parties from the disclosure provisions of campaign finance laws by virtue of the parties'

private rights theory of the First Amendment, which treats every formally nongovernmental entity as an individual with a claim to expressive freedom. Such an indistinct analysis, however, fails to satisfy the public rights theory, which requires careful attention to a given entity's actual effects on the quality of political discourse. Viewed in terms of their effects on electoral debate, the electoral activities of major parties differ dramatically from those of minor parties.⁴⁶⁵

The two major parties are large, powerful institutions with massive treasuries. They claim the membership and presumed loyalty of virtually every elected official in the federal government and the vast majority of state elected officials.⁴⁶⁶ As Daniel

unpopular ideas. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 101-02 (1982); see also *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976) (per curiam) (discussing a balancing test that must be applied when determining whether disclosure requirements survive judicial scrutiny). In addition, the Court, at times, has acknowledged the distinct character of minor parties when evaluating ballot access restrictions designed to disqualify minor party candidates from elections. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (holding that an Ohio law that required independent presidential candidates to file statements of candidacy in March in order to appear on the ballot in November unconstitutionally burdened the voting and associational rights of independent candidates' supporters). Even in those rare contexts, however, the Court's aim has been nothing more than formal equality: giving minor party candidates the same operational autonomy as major party candidates. See *id.* at 793-94 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.").

465. Others have suggested or defended differential treatment of major and minor parties without fully parsing the state action problem or developing a basis in First Amendment theory for the distinction. See Hasen, *Parties*, *supra* note 238, at 837-41 (arguing that government seldom has a strong interest in burdening minor parties and that minor parties are more vulnerable to regulation); Issacharoff, *Parties*, *supra* note 214, at 287-88 (reading prior cases as "recogniz[ing] a claim that certain regulations, when applied to minor political parties, effectively chill any capacity for these parties to express their political viewpoint"); Persily & Cain, *supra* note 79, at 802 n.103 (suggesting, without explanation, a need for differential legal analyses for major and minor parties); Geoffrey R. Stone & William P. Marshall, *Brown v. Socialist Workers: Inequality as a Command of the First Amendment*, 1983 SUP. CT. REV. 583, 610 (defending exemption of a minor party from a federal campaign finance disclosure requirement on the ground that subjecting the party to the requirement could have adversely affected electoral debate); Wigton, *supra* note 311, at 443 (arguing that courts should strictly scrutinize ballot access regulations only when they disproportionately affect minor parties).

466. For criticisms of the Court's reflexive treatment of the major parties as private entities, see *supra* notes 326-27, 387 and accompanying text. Characterizing the major parties as private actors would be more plausible if the parties were defined primarily by their members. See Rosenblum, *supra* note 76, at 818-23 (arguing that parties can be viewed as membership groups). However, voters' allegiance to the major parties has dropped dramatically over the past several decades, even as the major parties' electoral dominance has

Lowenstein notes, “[the major parties’] major interactions with the government are not as objects of government actions. To the contrary, it is the parties that operate upon and actually constitute the government.”⁴⁶⁷ Both skeptics and advocates of the duopoly acknowledge the major parties’ distinctive governmental power,⁴⁶⁸ which aids those parties’ electoral efforts in numerous ways. When candidates seek access to the ballot, major party officials almost always review their eligibility. When a major party makes a legally questionable decision about how or when to spend its money, the Federal Election Commission, constituted by major party elected officials, assesses the decision’s propriety. When electoral disputes lead to litigation, judges appointed and approved by major party officials—or, as in some states, elected on major party ballot lines—decide the cases.⁴⁶⁹ The major parties sometimes use these processes to gain advantages over one another,⁴⁷⁰ but they maintain a shared interest in disadvantaging potential minor party competitors. The public rights emphasis on an entity’s actual role in shaping public debate, together with the principle of representation-reinforcing judicial review,⁴⁷¹ would compel courts to treat the major parties’ electoral activities as state action.⁴⁷²

continued. See *supra* note 335 and accompanying text.

467. Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1756.

468. See Hasen, *Parties*, *supra* note 238, at 835 (noting that “[t]he [major] parties have the political means to protect themselves”); Persily & Cain, *supra* note 79, at 784 (“The Democratic and Republican parties enjoy far more state resources than most minor parties by virtue of the fact that they hold office.”).

469. See, e.g., BIBBY & MAISEL, *supra* note 270, at 43 (discussing the importance of the major parties’ control of “national patronage” appointments for inhibition of minor parties at state level).

470. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 670-74 (discussing monopolistic lockups of the political process); Persily & Cain, *supra* note 79, at 782, 803 (discussing the danger that the major party in power will use regulatory authority to undermine its major party opponent). My state action analysis fully accommodates the view that courts should intervene in appropriate circumstances to protect either major party from attempts by the other major party to use governmental power to undermine its rival. In such cases, the weaker major party stands in the position vis-à-vis state power that minor parties almost always occupy.

471. See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (introducing the idea that a heightened level of judicial scrutiny may be necessary to correct structural defects in the political process); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 75-104 (1980) (discussing, and advancing three arguments for, representation-reinforcing judicial review).

472. The public rights theory would not, of course, require treating the Democratic Party

Minor parties are different. By virtue of both their weaknesses and their strengths, they resemble, for most purposes relating to the First Amendment, private individuals much more than state actors. As to their weaknesses, no minor party claims the allegiance of more than one federal elected official or state governor. Whereas any harm government regulations do to the major parties is essentially self-inflicted,⁴⁷³ minor parties always lie at the mercy of their powerful adversaries. In addition, minor parties are often unpopular or even despised, making them easy targets for harmful regulation by major party governments. Many have difficulty surviving from one election cycle to another. As to their strengths, minor parties contribute greatly to robust democracy by expanding and enriching electoral debate, providing ballot alternatives that offer voters unmoved by the necessarily centrist pull of the two-party system a vehicle for dissent, and encouraging disaffected voters to participate in politics.⁴⁷⁴ Even in their present, weak state, minor parties offer an essential ingredient for the vibrant electoral process envisioned by the public rights theory of expressive freedom.

As a result of these features of minor parties, the public rights theory would require courts to subject electoral regulations, as they apply to minor parties' electoral activities, to strict First Amendment scrutiny. Consequently, cases often would come out differently for major and minor parties. For example, in *California Democratic Party v. Jones*,⁴⁷⁵ both major and minor parties

and Republican Party per se differently from other political parties. That would amount to impermissible viewpoint-based discrimination against particular speakers in violation of the First Amendment. Rather, if our system continues as a major party duopoly, the two major parties—which have been the Democrats and Republicans for most of the nation's history—must be treated differently than other parties. If the Libertarian Party, for example, were to displace the Republicans as a major party, then it, and not the Republican Party, would become subject to the distinctive treatment described here. Should our political system change significantly—with, say, a third party picking up several congressional seats—the Court would need to reexamine this analytical framework.

473. See, e.g., Lowenstein, *Skeptical Inquiry*, *supra* note 89, at 1758-59 & n.64 (discussing the paradoxical identity between government regulators and the major parties as objects of regulation).

474. See *supra* notes 266-71 and accompanying text (discussing the benefits that minor parties provide to the electoral system).

475. 530 U.S. 567 (2000); see also *supra* Part III.A.1 (discussing and critiquing the Court's analysis in *Jones*).

challenged California's blanket primary system.⁴⁷⁶ Advocates and opponents alike of the *Jones* Court's decision striking down that system have emphasized the potentially devastating effects of a blanket primary on minor parties.⁴⁷⁷ While crossover voting in a blanket primary may hinder the major parties' efforts to orchestrate their nominating processes, it can completely undermine the identity of a minor party. Under the public rights theory of expressive freedom, as I have argued, the blanket primary's advantages in increasing electoral participation and broadening political discourse renders the major parties' autonomy-based objections to the system trivial.⁴⁷⁸ In contrast, if the blanket primary prevented minor parties from advocating distinctive positions, it would directly undercut those very advantages. Accordingly, if minor parties in *Jones* had made a persuasive showing of their distinctive vulnerability under the blanket primary system,⁴⁷⁹ they properly would have won exemption from the mandatory blanket primary under a public rights analysis, even though the major parties would have lost.⁴⁸⁰ This allowance for some differential resolutions comports with the principle of equal treatment of similarly situated entities under the Constitution, because it reflects the reality that major and minor parties are not similarly

476. See *supra* note 306 and accompanying text.

477. See Hasen, *Parties*, *supra* note 238, at 840 (stating that, in California, crossover voting "swamped" some minor party candidates); Persily & Cain, *supra* note 79, at 800 (describing the danger that a blanket primary will allow major party voters to choose minor party candidates).

478. See *supra* notes 337-38 and accompanying text.

479. The empirical viability of the argument that blanket primaries are likely to swamp minor parties is open to question. A study of minor parties' experiences under California's 1998 open primary concluded that the available evidence "undercuts, to some degree, the assertion that candidate selection under a blanket system is made by outsiders with no familiarity with the party or its candidates." Collett, *supra* note 306, at 222. Moreover, minor parties might well conclude that the benefits of opening their primaries to nonparty voters outweigh any risks. See *supra* notes 339-41 and accompanying text (discussing strategic advantages of the blanket primary system for minor parties). In any event, every party remains free not to endorse the winner of its primary. Hasen, *Parties*, *supra* note 238, at 829-30.

480. Professor Hasen advocates the same differential result in *Jones* because of the danger that crossover voting might lead minor parties to moderate their positions, which would "lessen[] the chance that minor parties will raise additional issues to be put on the table for consideration by the major party candidates." Hasen, *Parties*, *supra* note 238, at 841.

situated.⁴⁸¹ That same reality would lead a court that adopted the public rights theory to give serious consideration to First Amendment claims specific to minor parties.⁴⁸²

Minor parties are capable of actions that undermine First Amendment values on a public rights account, and a court applying the public rights theory would need to take care not to let the distinctive features of minor parties obscure that fact. For example, had the Court in *Jones* upheld the blanket primary, a minor party might have brought a new claim challenging California's allowance for the minor party's members to cross over into one of the major parties' primaries.⁴⁸³ Such a case, on the public rights account, would differ greatly from *Jones*. In the actual case, minor parties had reason to fear that nonmembers could swamp their primaries and drown out the voices of their members. In my hypothetical case, the minor party would be seeking only to constrain the electoral options of its own members. Whereas such a constraint might help the minor party cohere and grow, it would seriously limit the choices of the minor party's members and would shield the minor party from competitive pressures to an extent not justifiable in terms of the minor party's duopoly-imposed disadvantages. The hypothetical claim, accordingly, would not be entitled to strict scrutiny under the public rights theory.

B. Contribution Limits, Expenditure Limits, and Political Parties

The public rights theory of expressive freedom has broad, if arguably ambiguous, implications for the First Amendment status of campaign finance regulation. Reformers frequently contend that

481. Dean Stone and Professor Marshall pose, and consider several answers to, the question why, if a regulation cannot constitutionally be applied to minor parties, the correct remedy is not to strike down the regulation on its face, rather than to apply it differentially. See Stone & Marshall, *supra* note 465, at 619-24. They do not consider the answer proposed here: that a given regulation may advance First Amendment interests when applied to major parties while undermining First Amendment interests when applied to minor parties, making facial invalidation a less than optimal remedy.

482. See *supra* Part III.B (discussing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998)).

483. See Allison, *supra* note 309, at 81 (considering the argument that the blanket primary harmed minor parties by encouraging their members to vote in the major parties' primaries).

the interest in robust electoral debate justifies or even compels regulation to combat political money's corrosive effects on political participation and the quality of political discourse.⁴⁸⁴ Conversely, although constitutional arguments against campaign finance reform depend to a great extent on the autonomy principle that the government may not stop individuals from spending their money to express themselves,⁴⁸⁵ opponents also maintain that the central importance of democracy in a system of free expression counsels against state interference in the electoral process through campaign finance regulations.⁴⁸⁶ The broader debate involves issues beyond the scope of this Article. I only mean to note one especially prominent consequence for campaign finance laws of applying the public rights theory to regulation of political parties' electoral activities.

*Buckley v. Valeo*⁴⁸⁷ created a familiar dichotomy in the constitutional law of campaign finance. According to the *Buckley* Court, the First Amendment permits states and the federal government to impose reasonable restrictions on campaign contributions.⁴⁸⁸ Such restrictions are permissible because contributions, although they express political ideas, do so indirectly through the filter of the candidate and/or party organization.⁴⁸⁹ The government's compelling interest in avoiding actual or apparent corruption outweighs the

484. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 93-101 (1993) (advancing a democracy-centered argument that the First Amendment permits campaign finance regulations).

485. See, e.g., Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) (characterizing "[t]he norm in political speech [as] negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources").

486. See, e.g., Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1053-54 (1985) (emphasizing, in arguing against campaign finance regulation, that "[f]reedom of speech helps citizens to become informed so that they can vote intelligently for those who will represent them").

487. 424 U.S. 1 (1976) (per curiam).

488. See *id.* at 29 (holding that "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the [congressionally imposed] \$1,000 contribution ceiling").

489. See *id.* at 28-29 ("Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.").

importance to the speaker of his or her indirect political expression.⁴⁹⁰ In contrast, the First Amendment prohibits governments from regulating campaign expenditures.⁴⁹¹ When candidates spend money in political campaigns, they engage in core, direct political speech.⁴⁹² The state's interest in preventing actual or apparent corruption, according to the *Buckley* Court, is not salient in the context of campaign expenditures.⁴⁹³ That interest provides the only justification the *Buckley* Court accepted for campaign finance regulations.⁴⁹⁴ The Court considered and flatly rejected the contentions that public interests in equalizing electoral voices or improving the quality of political dialogue might justify expenditure regulations.⁴⁹⁵ As discussed above, the *Buckley* ban on regulating expenditures extends to the independent expenditures of political parties.⁴⁹⁶ The Court recently reaffirmed the contribution-

490. See *id.* at 26 ("It is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the \$1,000 contribution limitation.").

491. See, e.g., *id.* at 47-48 (holding that a limitation on independent expenditures "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process [and] heavily burdens core First Amendment expression").

492. See *id.* at 14 ("The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.").

493. See *id.* at 45 (holding that the governmental interests in preventing corruption and the appearance of corruption are inadequate to justify ceiling on independent expenditures).

494. The Court has not explicitly broadened the permissible grounds for campaign finance regulations, although it has at times given a fairly broad account of what "preventing corruption [or] the appearance of corruption" may entail. *Id.* at 45; see also *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (characterizing as corruption "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas").

495. See *Buckley*, 424 U.S. at 48-49.

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608 (e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment

Id.

496. See *supra* Part III.A.2 (discussing *Colorado I*, 518 U.S. 604 (1996)).

expenditure dichotomy in *Nixon v. Shrink Missouri Government PAC*.⁴⁹⁷

The contribution-expenditure dichotomy of *Buckley* and *Nixon* reflects a blend of public rights and private rights impulses about expressive freedom. On one hand, the Court in both *Buckley* and *Nixon* emphasized the centrality of political speech to the First Amendment⁴⁹⁸ and invoked the public's interest in vigorous and unfettered political discourse as a reason to limit government regulation of expenditures.⁴⁹⁹ On the other hand, the dichotomy is deeply rooted in a private rights conception of the First Amendment. As described above, the *Buckley* Court began its analysis by describing and evaluating the importance of political expenditures to candidates and the relatively lesser importance of political contributions to contributors. Essential to the Court's divergent conclusions about the two types of speech was the distinction it drew between their degrees of importance to the respective groups of speakers. The *Nixon* Court uncritically reaffirmed that analysis.⁵⁰⁰ Neither *Buckley* nor *Nixon* focused intently on the First Amendment status of political parties, but the Court implicitly adopted the private rights approach to parties by treating them as private speakers. In addition, neither decision considered the distinct implications of the contribution-expenditure dichotomy for major and minor political parties.

497. 528 U.S. 377 (2000). The *Nixon* Court's vindication of the contribution-expenditure dichotomy surprised many observers who believed not only that the distinction was incoherent but also that the Court had, in intervening decisions, recognized the incoherence. See, e.g., Cole, *supra* note 25, at 249-51 (detailing, almost a decade prior to *Nixon*, the apparent decline and fall of the contribution-expenditure distinction in the Court's campaign finance jurisprudence).

498. See *Nixon*, 528 U.S. at 386 (stating that "the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office") (quoting *Buckley*, 424 U.S. at 15); *Buckley*, 424 U.S. at 39 (characterizing "political expression" as standing "at the core of our electoral process and of the First Amendment freedoms") (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

499. See *Nixon*, 528 U.S. at 387 (stating that "an expenditure limit 'precludes most associations from effectively amplifying the voice of their adherents,' ... thus interfering with the freedom of the adherents as well as the association") (quoting *Buckley*, 424 U.S. at 22); *Buckley*, 424 U.S. at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

500. See *Nixon*, 528 U.S. at 386-87 (discussing the *Buckley* analysis).

A judicial embrace of the public rights theory of expressive freedom would entail, among other things, heightened concern for the electoral role of minor parties. As it happens, the Court's contribution-expenditure dichotomy has dramatically exacerbated federal campaign finance law's bias in favor of incumbents and the major parties, thereby devastating minor parties.⁵⁰¹ The ban on expenditure limits means that the major parties, with their broad support and well-developed fundraising capacities, can spend any minor party challenger into the ground. In addition, the Court's allowance for unlimited independent expenditures benefits the major parties disproportionately, because individuals who seek to influence the political process financially are more likely to direct their resources toward candidates whom they believe have good chances at winning elections.⁵⁰² Conversely, the allowance for contribution limits denies some minor parties' best hope of financial parity with the major parties: identifying a small number of "patrons" able to fund substantial campaign activity despite the party's narrow base of pre-existing support.⁵⁰³ In short, a regime of sharply limited contributions combined with unlimited expenditures

501. See Geddis, *supra* note 251, at 590 ("It is widely accepted that the impact of the FECA rules, as amended by the Supreme Court's review, has been to create a pro-incumbent system of campaign financing."); Klarman, *supra* note 115, at 522-23 (discussing *Buckley* as an attempt to prevent congressional incumbents from entrenching their own power and stating that the decision "arguably has had a greater entrenching effect than the campaign finance restrictions it invalidated"); Rosenblum, *supra* note 76, at 836 ("FECA and state campaign finance laws are overtly designed to advantage major parties and disadvantage minor parties and independent candidates.").

502. This is true for the same reasons that voters in our electoral system are prone to support the candidates of the two major parties, which I discuss below. See *infra* notes 506-08 and accompanying text.

503. The *Buckley* Court's rejection of limits on self-financed campaigns, see *Buckley*, 424 U.S. at 51-54, simply means that campaigns by wealthy individuals tend to displace true minor party candidacies as "maverick" alternatives to established major party candidates. Recent candidacies by wealthy individuals both within (Steve Forbes, Sen. Jon Corzine) and outside (Ross Perot) the major parties suggest that prohibiting limits on independent expenditures may help broaden electoral debate. A public rights analysis, however, could cast doubt on (1) whether indulging the hope that wealthy individuals will spend their fortunes introducing new ideas into political discourse is an effective long-term strategy for expanding that discourse, and (2) whether facilitating wealthy individuals' use of their financial advantages to advocate policies of interest to wealthy individuals, as Forbes clearly and Perot arguably did, truly expands electoral debate.

gives the two major parties an enormous advantage over minor party challengers.

The Court could apply the public rights First Amendment to the problem *Buckley* created for minor parties as part of a larger effort to recast the constitutional law of campaign finance along public rights lines. Thus, the public rights theory would lead the Court to eliminate the distinction between contributions and expenditures based on the differing interests of individual speakers and instead consider what overall regime of First Amendment limits (if any) would best advance the public's interest in opening political discourse to a broad range of viewpoints. That analysis might entail overruling the *Buckley* prohibition on expenditure regulations; conversely, it could lead the Court to overrule the *Buckley-Nixon* allowance for contribution regulations. An alternative, less disruptive approach would be for the Court to weigh the effects of the *Buckley* dichotomy as a significant factor in determining whether any given campaign finance regulation contravened First Amendment values. That sort of analysis might, for example, guide the present Court in its consideration of the McCain-Feingold law: part of the First Amendment inquiry would be whether that statute's elimination of soft money and restrictions on issue advertising exacerbated or ameliorated the *Buckley* dichotomy's damage to electoral competition.⁵⁰⁴ The widespread belief that McCain-Feingold distinctly disadvantages the major parties suggests that such an approach would give the statute a strong chance of survival.

C. First Amendment Challenges to Structural Elements of the Electoral System

A challenging question presented by the law of political parties is how vigorously, and under what standard, courts should review regulations that adversely impact the political process. Many decisions of the political branches that undermine political dynamism are deliberate. A court applying the public rights theory of expressive freedom would subject such actions to the most

504. See *supra* notes 2-5 and accompanying text (discussing the McCain-Feingold law and its implications for political parties).

skeptical constitutional review.⁵⁰⁵ Some legislative actions, however, akin to the Court's decision in *Buckley*, may genuinely be directed toward broader social policy concerns and only incidentally undermine electoral debate. How, if at all, should the Court apply the First Amendment in reviewing such actions?

The most important objects of this inquiry are the sub-constitutional rules about the conduct of elections that define our political order and perpetuate the major party duopoly. Political scientists have posited that two interrelated features of our electoral system—plurality voting and single-member legislative districts—strongly support the duopoly.⁵⁰⁶ A regime of plurality or “winner take all” voting allocates all benefits of the election to the candidate who finishes first. Maurice Duverger, in an insight that has become known as “Duverger’s Law,” explains that this arrangement tends to give each party behind the strongest party an increasingly smaller percentage of legislative seats than its aggregate share of the vote, thus giving voters inclined to support the third most popular candidate a strong strategic incentive to shift their votes to one of the top two candidates in order to maximize the perceived likelihood that their votes will affect the outcome.⁵⁰⁷ Single-member legislative districts, as distinct from multimember districts, similarly create a gravitational pull toward a two-party system by giving all the election’s spoils to first-place finishers.⁵⁰⁸ In contrast,

505. See *supra* notes 428-36, 450-53 and accompanying text (advocating aggressive judicial review of laws that bar minor parties from mounting fusion candidacies and rules that exclude minor parties from televised candidate debates).

506. See BIBBY & MAISEL, *supra* note 270, at 56-57 (identifying plurality voting and single-member districts as important determinants of duopoly); ROSENSTONE ET AL., *supra* note 268, at 16-18 (contending that plurality voting and single-member districts account for the major party duopoly in the United States); Herrnson, *supra* note 268, at 24 (emphasizing the difficulties plurality voting and single-member districts present for minor parties).

507. See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 224-26 (Barbara & Robert North trans., John Wiley & Sons 2d Eng. ed., rev. 1963) (1951). For a useful gloss on subsequent critiques of Duverger’s analysis, see Hasen, *Entrenching*, *supra* note 99, at 367-71.

508. See JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 303 n.24 (1995) (stating that “having single-member districts instead of at-large elections or multimember districts accentuates the pressures plurality elections impose toward two-party systems”); Issacharoff & Pildes, *Lockups*, *supra* note 102, at 674-75 (explaining the tendency of a single-member district electoral system to produce a two-party political system). Federal law requires that members of Congress be elected from single-member districts. 2 U.S.C. § 2(c) (2000).

consider a voting system in which the top two (or more) finishers proceed to a runoff, or a multimember district arrangement in which the top two (or more) finishers in a district are elected. In either of those scenarios, finishing worse than first has value, giving strategic voters a reason to consider three (or more) candidates.

Only political fiat sustains these two principal structural protections of the major party duopoly.⁵⁰⁹ Perhaps exclusion of minor parties partially motivated some jurisdictions' decisions to employ plurality voting and single-member districts, but numerous other justifications for those features of the political system are plausible, and both plurality voting and single-member districts have become ingrained elements of our national political culture.⁵¹⁰ Does the Constitution have anything to say about those structures? Some scholars have suggested it does, focusing on situations in which plurality voting and/or single-member districts disadvantage voters of color, thereby implicating the Equal Protection Clause.⁵¹¹ Nonetheless, even judges and commentators skeptical of legal favoritism toward the duopoly have treated plurality voting and single-member districts as legally sacrosanct aspects of our political system.⁵¹² Indeed, these features are sometimes even advanced as

509. See BIBBY & MAISEL, *supra* note 270, at 53-68 (cataloguing a wide range of legal and structural impediments to the development of competitive minor parties in the United States); ROSENSTONE ET AL., *supra* note 268, at 15-47 (detailing constraints to minor party participation in the political process); Issacharoff, *Parties*, *supra* note 214, at 292 (criticizing the major parties' claims for autonomy under the First Amendment because major parties enjoy the "state-conferred privilege" of strongly favorable electoral rules); Winger, *supra* note 268, at 159 (arguing that unfavorable election laws in most states prevent minor parties from winning elections).

510. Professors Issacharoff and Pildes make a persuasive case that the federal government and early states could not have had anticompetitive motives for adopting single-member districts and plurality voting, because the contemporary party structure had not coalesced at the time those jurisdictions fashioned their electoral structures. See Issacharoff & Pildes, *Lockups*, *supra* note 102, at 677. That argument does not foreclose the possibility that the federal and/or state governments have perpetuated the structures in part to protect the duopoly, although testing such a hypothesis would be extremely difficult. Examination of later-admitted states' affirmative decisions to adopt plurality voting and single-member districts might prove interesting, but those decisions might owe more to simple conformity than to any deliberate purpose.

511. Most notably, Lani Guinier has contended that single-member district systems constitute illegal voting discrimination when those systems have the effect of frustrating African-American voters' attempts to achieve meaningful political representation. See GUINIER, *supra* note 256, at 71-118.

512. See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 379-80 (1997)

evidence that our system is so steeped in two-party politics that judicial interference with that structure would be improper.⁵¹³

By emphasizing the bottom-line effects of electoral rules on the quality of electoral discourse, the public rights theory of expressive freedom offers a basis for judicial review of plurality voting systems and single-member legislative districts. Under the public rights theory, the fairest characterization of such electoral structures would be as neutral laws that, by perpetuating the major party duopoly, cause incidental but potentially serious harm to First Amendment interests. Accordingly, a court that applied the public rights theory would subject these elements of the electoral system to First Amendment review under the familiar standard for judging neutral regulations with incidental effects on speech articulated in *United States v. O'Brien*.⁵¹⁴ Under that test, a regulation is justified when (1) it is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on speech is no greater than is essential to the furtherance of the governmental interest.⁵¹⁵ The *O'Brien* approach would allow the Court to vindicate legitimate regulatory interests while aggressively protecting the public's interest in collective self-determination under the First Amendment.⁵¹⁶

(Stevens, J., dissenting) (arguing that the inability of minor parties to compete in a single-member district system does not implicate the First Amendment and that "the establishment of single-member districts correlates directly with the States' interests in political stability"); Hasen, *Entrenching*, *supra* note 99, at 344-45 n.77 (acknowledging that single-member districts and plurality voting "more than any other [laws] tend to dictate the number of viable political parties," but advocating only rational basis review of those electoral structures because "they do not explicitly restrict the exercise of rights protected by the First Amendment"); Pildes, *Theory*, *supra* note 213, at 1615-16 (suggesting several reasons why judicial overturning of plurality voting and single-member districts would be untenable).

513. See, e.g., Cain, *supra* note 78, at 806 (proceeding, in arguing for party autonomy, from the observation that state laws encourage electoral coalescence around two parties to the conclusion that "[p]olitical parties are part of the informal constitution—institutions that fill in the implied functions that arise out of the formal electoral structure"). For a discussion and persuasive refutation of this sort of argument, see Issacharoff & Pildes, *Lockups*, *supra* note 102, at 676-80.

514. 391 U.S. 367 (1968).

515. *Id.* at 377.

516. A tension exists between the public rights theory of expressive freedom and the application of any form of means-ends scrutiny, including *O'Brien* scrutiny, to political speech. Where the government regulates political speech, the public rights theory all but forbids

How any challenge to plurality voting or single-member districts would arise, let alone how such a challenge might play out, would depend on historical and political nuances of the jurisdiction at issue.⁵¹⁷ Nonetheless, a court applying the public rights theory in the manner I propose would have to identify a substantial non-speech-related benefit of the challenged practice before it could countenance any negative effects the practice carried for robust electoral competition and debate.

Under this approach, the Court in appropriate circumstances could impose a remedy that required fundamental changes in a jurisdiction's electoral system. Such a remedy would undoubtedly represent a sweeping exercise of judicial power in a quintessentially political area. The Court, however, long ago vindicated judicial interference in electoral processes where core constitutional rights are at issue.⁵¹⁸ Adoption of the public rights theory of expressive freedom in the context of electoral regulations would compel a similar degree of constitutional concern regarding electoral structures that undermined partisan competition to the detriment of electoral discourse. The major parties' combination of self-interest

consideration of countervailing government interests. *See supra* notes 204-08 and accompanying text (discussing the public rights theory's categorical methodology). The *O'Brien* test, however, weighs not the government's interest in purposeful suppression of speech but rather its interest in some regulatory purpose entirely unrelated to speech. The test thus does not depend on the premise, essential to other forms of means-ends scrutiny, that the value of protected speech is limited in ways that can justify its purposeful regulation. *O'Brien* imposes a procedural constraint on courts' constitutional authority to question legislative decisions, rather than giving censors a substantive trump over expressive freedom. Even so, the Court's use of *O'Brien* scrutiny to review "time, place, and manner" regulations too often has resulted in cavalier disregard for the value of political dissent. *See supra* note 70 and accompanying text. Thus, practical experience would have to determine whether *O'Brien* scrutiny of electoral regulations that incidentally diminish electoral discourse would prove compatible with the public rights theory.

517. One important consequence of the public rights theory is that it would require recalibration in First Amendment cases of the present Court's standing doctrine, which rigidly requires an individualized injury before a case may proceed. This requirement precludes legal relief for injuries shared by the public generally. *See supra* note 211 and accompanying text. Under the public rights theory, any voter or coalition of voters would stand in an appropriate position to challenge a given policy's negative effects on political discourse.

518. *See Thornburg v. Gingles*, 478 U.S. 30, 80 (1986) (striking down a districting scheme because it diluted the effect of African-Americans' votes); *Baker v. Carr*, 369 U.S. 186, 209-10 (1962) (holding that adjudicating a claim that apportionment of state legislative districts violated African-Americans' voting rights did not transgress the bar against judicial consideration of "political questions").

and power to effectuate it makes electoral structures that favor the major parties distinctly appropriate objects for aggressive representation-reinforcing review.⁵¹⁹ If we take seriously the idea that impediments to electoral competition and vibrant political discourse strike at the heart of the First Amendment, as I have contended we should, then we must accept—indeed, welcome—a substantial judicial role in eliminating such impediments.

CONCLUSION

The public rights theory of expressive freedom set forth in this Article embodies an affirmative commitment to sustaining the conditions for effective self-government. In contrast, the private rights theory embraced by the present Supreme Court does nothing more than protect individual autonomy against governmental tyranny. That approach offers little to enhance the quality of political discourse or to ensure a robust, dynamic electoral process. The Court's application of the private rights theory to cases involving regulations of political parties' electoral activities, which has effectively ratified the "responsible party government" defense of the major party duopoly, bears out this failing. As long as the private rights theory governs constitutional adjudication in the electoral context, the First Amendment will afford the two entrenched political parties formidable protection against government regulation while doing nothing to protect, let alone advance, the electoral role of minor parties. This state of affairs has become familiar, even comfortable. It does not, however, provide the levels of popular engagement, governmental responsiveness, and open debate necessary to a vital democratic culture. We should not understand the Constitution to countenance such an order, much less to require it. The public rights theory of expressive freedom, which would lead the Court to decisions that enhanced electoral competition, stimulated political participation, and broadened

519. See *supra* notes 466-72 and accompanying text (discussing the ability of the major parties to use public sector power to promote their private interests).

democratic discourse—the central aspirations of a “dynamic party politics” theory of our electoral system—offers a far better basis for adjudication in this critical area.