OVERSIGHT OF REGULATED POLITICAL MARKETS

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The purpose of this Panel is to address the role of government regulation in the political process. This strikes me as a peculiar construct since it invites the conception that alternatives are to be drawn between regulated and unregulated conduct. Such a contrast further presumes that government regulation is an artificial or unwelcome inroad into what would otherwise be properly functioning private arrangements or revealed market preferences. Indeed, I noted with some interest that other participants in this Symposium repeatedly invoked certain terms with regard to the regulation of one subset of the political marketplace, campaign finance. Panelists spoke of "spontaneous ordering," "private ordering," and "individual liberties"—classic terms used to attack the incursion of unwarranted regulation into the realm of presumed individual autonomy.[1]

I find this invocation of a world of politics without government as curious as it is unimaginable. Political competition as we know it does not exist except in the context of state-created rules and regulations, and any discussion that presumes the contrary is simply misguided. Just as baseball must presuppose a consensus on how many outs each side has and what constitutes first base, democratic politics cannot exist without fairly rigidly prescribed rules of conduct imposed from outside the political process itself. Without clear ground rules that secure, among other things, that the losers of today can have a fair opportunity to displace the winners in the future, the orderly transfer of governmental authority among

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1. *See, e.g.*, John O. McGinnis, *For Freedom and Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL'Y 25 (2000).

competing political factions would be impossible. But beyond the structural obstacles to democratic governance in the absence of fairly immutable rules of political engagement, there is a further conceptual difficulty in positing some natural order of unregulated politics. The idea of private ordering of majoritarian processes runs deeply counter to the central public choice insight which has grounded so much recent writing on the political process.[2]

The public choice insight is basically that the idea of a revealed majority will is incoherent and that majority preferences are not stable over time or over a range of questions posed to the relevant pool of decisionmakers. As a consequence, those who set the agenda regarding how questions are posed to voters have tremendous power. The agenda setters can both manipulate the majority will and take advantage of the fact that large majorities rarely organize themselves around intensely desired objectives. The basic public choice move is then to call into question the revealed preferences of majorities and to ask whether purportedly majoritarian preferences are anything more than rent-seeking

2. The technical exposition of this critique of majoritarian processes derives from the work of Nobel Laureate Kenneth Arrow. Arrow's Theorem established that there are no coherent sets of preferences for group decisions that meet his four basic "fairness" conditions. Group preferences are unstable or "not transitive" across a series of decision alternatives. The upshot, as generalized from public choice theory, is that no majoritarian decisions truly reflect majoritarian preferences independent of the agenda under which those decisions were taken. This in turn yields a distrust of governmental policymaking as an arena where special interests compete to set the agenda, among other inherent weaknesses of majoritarian processes. KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS (1997), provides a very accessible introduction to the problem of social choice and Arrow's Theorem. For more technical coverage of the same material, see PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION (1986). The original sources are KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963), DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1958), Charles R. Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787 (1967), and Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. OF ECON. THEORY 472 (1976). For less technical discussions of this material, see WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982) and DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). The literature on collective choice is extensive; an up-to-date summary of the mathematics of collective choice is DAVID AUSTEN-SMITH & JEFFREY S. BANKS, POSITIVE POLITICAL THEORY I: COLLECTIVE PREFERENCE (1999). Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 212 (1990), questions the extent to which these mathematics raise concerns for democratic theory.

capture by the most self-interested, energetic groups.

If we pursue this analysis, we find that, as difficult as it may be to discern true majoritarian preferences in a democratic political order, it is impossible to speak of a revealed preference outside of political organizations, political institutions, and, by extension, political regulation. Absent some channeling factor, majorities cannot act. If we were to try to think of the types of governmental action that are most likely to draw favor at this Symposium, be they national defense or the renaming of National Airport as Reagan National Airport, there would be no form by which that clear majoritarian preference could be put into effect except through a preexisting regulatory structure. To put it quite simply, there are no pre-political politics, and unless we are going to go back to the Hobbesian sovereign, we have to understand that there is going to be a regulated environment and that government regulation is a precondition for any kind of effective representative politics. At the most basic level, democracy presupposes strict government regulation of how electoral choices are made.

Unfortunately, recognizing that governmental regulation of the political arena is inevitable only begins the inquiry, for there must still be some normative basis for analyzing the rules and regulations that actually govern our political process. The fact that democratic politics cannot exist independent of a regulatory environment means that the basis for analyzing any workable theory cannot be an unregulated state of nature. What, then, are the bases for evaluating the rules and regulations that risk frustrating majoritarian preferences, as difficult as those majoritarian preferences may be to identify?

Every rule constricts choice in ways both subtle and overt. It is rather evident that a rule requiring a candidate to pay a filing fee or gather a certain number of signatures in order to get on the ballot limits the field of potential candidates—even while it remains perfectly clear that there must be some limits on how many candidates or parties can be listed on a ballot of administrable dimensions.[3] But other rules are no less constricting for operating in the background. For example, the

3. For an overview of the law governing ballot access, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL REGULATION OF THE POLITICAL PROCESS 186-212 (1998).

selection of legislative representatives from first-past-the-post territorial districts also limits the choices available to the electorate. There is a well-known and well-documented propensity for such territorially based elections to result in two and only two relatively centrist parties.[4]

So the question is, how do we judge these types of regulations? There are certain parameters that our jurisprudence has given us. For example, we know that there are extreme cases in which majoritarian preferences are clearly being frustrated, such as the malapportionment that was evident in the facts underlying *Baker v. Carr*,[5] *Reynolds v. Sims*,[6] and cases of that sort. But that alone does not indicate what should be done, or decide whether such frustrations should be left to the normal workings of the political process. Rather, these cases are important not because there were distortions, but because there was no regenerative capacity within the political process. The political process was incapable of overturning incumbent power, resulting in what Richard Pildes and I call a "lockup": entrenched groups had made themselves immune from political challenge.[7] At bottom, this approach looks to the reasoning behind the famous *Carolene Products*[8] footnote's justification for judicial review: court oversight is warranted not only where the political process might be infected by prejudice against the famous "discrete and insular minorities," but more centrally where laws governing the political process "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[9]

There are two circumstances in which such barriers to democratic accountability are likely to arise. The first, as evidenced in the early reapportionment cases,[10] exists where

4. This is the principle known as "Duverger's Law." *See* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara & Robert North trans., 1951). For a fuller exposition of this principle, see Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 675 n.121 (1998).

5. 369 U.S. 186 (1962).

6. 377 U.S. 533 (1964).

7. *See generally* Issacharoff & Pildes, *supra* note 4.

8. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

9. *Id.* at 152 n.4.

10. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

minorities are able to impose obstacles to accountability to the majority of voters. There is little normative justification for permitting the sinecure of an entrenched, unaccountable minority that cannot be dislodged through the normal operation of the political process.[11] But the more difficult problem is when majorities justifiably hold political power, yet use that power to manipulate the rules and regulations of future electoral contests so as to lock in their hold on power in much the same fashion as an entrenched minority. These cases are more difficult because they require a clearer demarcation between the normal perquisites of governmental power and an impermissible constraint on rules of democratic accountability.

Once conceptualized in this fashion, the case law on challenges to the operation of the electoral process turns out to provide many examples of process failure, even if not always presented as such. For example, the problem of gerrymandering can be understood as a constraint upon new majorities being forged for the benefit of those who had prior access to political line-drawing power. The same may be said of restrictive ballot access rules. And, of late, this has emerged as an important way of recasting the campaign finance debate. For example, Justices Breyer and Kennedy in their recent *Shrink Missouri*[12] opinions and Justice Thomas in his *Colorado Republican*[13] opinion clearly express the concern that restrictive access to money may be a way of entrenching or locking up prior distributions of power.[14]

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11. As expressed by Professor Klarman, "It is difficult to imagine a more compelling case for judicial intervention on political process grounds than *Baker v. Carr*; Tennessee legislators had proven fiercely resistant to reapportioning themselves out of a job, and even a 'civically militant electorate' was not about to budge them." Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 757-58 (1991) (quoting *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting)).

12. Nixon v. Shrink Mo. Gov't PAC, 120 S. Ct. 897 (2000).

13. Colorado Republican Fed. Campaign Comm. v. FCC, 518 U.S. 604 (1996).

14. *See Shrink Mo.*, 120 S. Ct. at 913 (Breyer, J., concurring) (noting that "imposing too low a contribution limit . . . significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge"); *Id.* at 915 (Kennedy, J., dissenting) ("[B]y binding him to the outdated limit of $1075 per contribution in a system where parties can raise soft money without limitation and a powerful press faces no restrictions on use of its own resources to back its preferred candidates, the Court tells Mr. Fredman he cannot challenge the status quo unless he first gives into it."); *Colorado Republican*, 518 U.S. at 644 n.9 (Thomas, J., concurring in the judgment and dissenting in part) (observing that campaign contribution limits create "the potential for legislators to set the rules of the electoral game so as to

The lockup problem plays the same role in political markets that monopoly or oligopoly power plays in economic markets. It imposes a significant barrier to entry for rivals. Such anticompetitive obstacles are self-reinforcing, and cannot be overcome without a destabilizing shock to the status quo. The difficulty comes in choosing the source of this shock. It cannot come from within. The normal workings of the political process cannot be trusted to undertake this effort any more than the normal operations of competition can be relied on to overcome monopoly power in commercial markets. In the political process the very institutions of power that could alter the entrenched anticompetitive rules are exactly the ones that have the greatest interest in resisting any change that will destabilize or unlock the political process.

This is the reason why Justice Frankfurter's invocation of the many alternatives to judicial review in *Colegrove v. Green*[15] was unavailing. Each of the instantiations of alternative power happened to be compromised in exactly the same form or by direct connection to the congressional malapportionment that was at issue in *Colegrove*.[16] Thus, for example, malapportionment at the congressional level was unlikely to be cured by state legislative action, since the selection of the state legislature suffered from the same defect and any action taken to address congressional selection would risk state legislative sinecure. Nor does the problem end with institutions directly selected by the same challenged mechanism. The elected Illinois state judiciary was accountable to the same political pressures and political powers that benefited from the historic malapportionment in Illinois. They too were unlikely to act to unsettle the political status quo.

The problem of second-order capture persists in the regulation of the political process. The key example that comes to mind is the Federal Election Commission (FEC), an institution purportedly established to regulate federal electoral behavior. Perhaps not surprisingly, it is structured to be as ineffectual as possible, except in matters of mutual interest to the major political parties. To begin with, it is comprised of an even number of members (six), with no chairman. By

keep themselves in power and to keep potential challengers out of it").

15. 328 U.S. 549 (1946).

16. *See id.* at 553-56.

arrangement, three members have always been selected by the Republicans and three by the Democrats, and any decision requires four votes.[17] In effect, the FEC cannot act except in a manner acceptable to political appointees accountable directly to the major political parties. It is just the sort of regulatory structure that might be expected when legislators are allowed to determine the overseers of their own reelection bids. This is not to malign the individuals who comprise the FEC, including a co-panelist at the Symposium. There may well be an ethos at the FEC of trying to bring order and propriety to electoral politics. But this ethos cannot overcome an institutional structure whose motto might read: "Ineffectual by Design."

This takes me to my final point, which is in effect to reiterate the *Carolene Products* insight about the importance of external vigilance when the functioning of the political process is at issue.[18] One may strongly assert the primacy of politics, worrying that unelected and democratically unaccountable bodies may usurp policy choices that are the rightful province of the legislature.[19] But democratic politics presupposes democratic accountability, and challenges to the anticompetitive contamination of the electoral process can hardly be resolved by pious invocations of recourse to a captured or insufficiently competitive political process. As propounded in the *Carolene Products* footnote, and subsequently developed by John Hart Ely[20] and other advocates of political process approaches, a challenge to the malfunctioning of the political process requires the existence of alternative sources of power that are not immediately accountable to the political process. Unfortunately, the most significant power of this kind is possessed by the judiciary. It is the one independent branch of the national government and the one branch that has shown itself capable of breaking the anti-majoritarian hegemony in place in cases like *Baker* and

17. *See* ISSACHAROFF, KARLAN & PILDES, *supra* note 3, at 618-20.

18. *See supra* notes 8-9 and accompanying text.

19. For a recent, powerful rendition of this theme, see the work of my colleague JEREMY WALDRON, LAW AND DISAGREEMENT (1999), and the responses found in Richard A. Posner, *Review of Jeremy Waldron, Law and Disagreement*, 100 COLUM. L. REV. 582 (2000) (book review), and William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558 (2000) (reviewing JEREMY WALDRON, LAW AND DISAGREEMENT (1999)).

20. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

Reynolds. As shown in the reapportionment cases, the judiciary has a genuine capacity to destabilize the political status quo, particularly when the regenerative capacities of the political process have been structurally compromised.

The reason I introduce this theme with the qualifier "unfortunately" is that the Court's authority in the political domain derives from its role as ultimate interpreter of the ground rules for democracy; however, the Court begins its work with a constitutional blueprint that says little about how democracy is supposed to function.[21] Nor does the Court have a developed jurisprudence of politics. Instead the Court appears largely mired in the doctrinal steps that allowed it to escape the political question doctrine in the first reapportionment cases of the 1960s.[22] Thus, what one tends to find in the political governance cases that come before the Supreme Court are vague and abstract discussions of rights on the one hand and compelling state interests on the other. Both, I would suggest, are misdirections of the correct constitutional inquiry.

Rights in the complex political domain are not individual ordering. They are not a prepolitical domain of autonomy possessed by individuals in some great Kantian sense. Rights in this domain are *rights of participation* in the ordering of the political process. Thus, the Court's jurisprudence places great value on a familiar constitutional balance between two factors neither of which can carry the day. On the one side emerge claims advanced by autonomous individuals to inalienable individual rights in the political process. On the other side is the state interest, alternatively held to a standard of being "compelling" or merely "rational." This interest is advanced as a dispassionate neutral statement of policy allegedly

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21. Professor Pildes and I summarize this point as follows:

> With respect to democratic politics, then, the American Constitution is a curious amalgam of textual silences, archaic assumptions, and a small number of narrow, franchise-focused amendments that reflect more modern conceptions of politics. Particularly in the arena of democratic institutional design, the American Constitution reveals its age. More modern constitutions devote considerable space to the institutional framework for politics and tend to reflect the structures now associated with democracy, such as political parties.

Issacharoff & Pildes, *supra* note 4, at 715-16.

22. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

unmediated, unaffected, or uncontaminated by the fact that its proponents have themselves greatly benefited from the existing distribution of power.

The failure to comprehend the inevitable oversight role that the Court must play in the political process has repercussions in the caselaw. For example, in *Timmons v. Twin Cities Area New Party*,[23] a challenge to Minnesota's prohibition on third-party fusion candidacies, the Court credited uncritically Minnesota's claim of an overwhelming interest in maintaining an orderly, stable, and non-confusing political system. Without any factual basis for claiming voter confusion, the Court accepted that this interest in protecting voters from a more robust political system justified prohibiting the most successful third-party electoral strategy in American history: the use of cross-endorsements to raise the profile of third parties.[24] Because the Court neither questioned the bona fides of the state's articulation of its interest nor credited a claim of right to political participation beyond a simple individual claim to express voting preferences, the Court allowed the State of Minnesota to do what it expediently desired in order to ban nettlesome third parties.

At least as troubling is *Burdick v. Takushi*,[25] a challenge to Hawaii's prohibition on write-in candidacies. In contrasting a trivial claim of an individual's right to write in Donald Duck as a protest vote with the State's invocation of massive voter confusion and the specter of "ballot box factionalism," the Court allowed what was effectively a one-party Democratic state to insulate its political hierarchy from even a minor challenge to its entrenched power. Of course, in the context of one-party rule, ballot box factionalism might just be another name for a contested election. But the Court's mechanical jurisprudence did not admit any functional analysis of the competitive workings of the electoral system in Hawaii.

Burdick exposes the need for a regulatory jurisprudence that assumes the need for oversight of the political process. The oversight need not be based on political ends, the policies that emerge at the end of the day, but rather on the accountability of

23. 520 U.S. 351 (1997).

24. A more elaborate political process critique of *Timmons* can be found in Issacharoff & Pildes, *supra* note 4, at 668.

25. 504 U.S. 428 (1992).

incumbent power to the cleansing process of democratic politics. Without inquiring into the robustness of democratic competition, the Court does not have the tools to assess the regulatory structure that must inevitably accompany democratic politics. But the difficulty the Court faces in this area is daunting. To address the role of democratic competition in a properly functioning electoral system requires moving beyond static conceptions of individual rights and competing state interests. It requires instead a functional account of law as a necessary regulatory device and a functional focus on how politics operates.[26] This approach requires as well a normative structure that explains what the goals of regulation of the political process should be. As I noted at the outset of this comment, this approach cannot be helped by a distracting inquiry into a hypothesized world of deregulated politics.

There is much to be gained by comparing competitive political processes to the competitive search for efficiency and consumer satisfaction in other markets. But reasoning by analogy should not obscure the distinctive nature of political markets, particularly the inherent conflict arising from the fact that they are both the creation of state processes as well as the ultimate source of legitimacy for those same processes. Both democratic politics and democratic legitimacy are possible only in a regulated political market. Neither exists in the deregulated state of nature.

26. Perhaps the most significant case in this area is one recently decided by the Court, *California Democratic Party v. Jones*, 120 S. Ct. 2402 (2000). This case involved a challenge by political parties to California's Proposition 198, which imposed a blanket primary nomination system in which the selection of each party's candidates was opened to all interested voters, not just party members. Although the Court struck down Prop. 198 on associational grounds, this case also raised complex questions about the institutional role of political parties in protecting the competitiveness of the political process. *See* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. (forthcoming 2001).

PANEL III:

VOTING RIGHTS, EQUALITY, AND RACIAL GERRYMANDERING

PANELISTS:

MICHAEL W. MCCONNELL
RICHARD H. PILDES
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