DUOPOLY VERSUS AUTONOMY: HOW THE TWO-PARTY SYSTEM HARMs THE MAJOR PARTIES

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In this Article, Professor Ortiz argues that the two-party system perversely harms those it would seem to benefit the most: the major parties themselves. Professor Ortiz posits that parties present a bundle of choices for the voter/consumer. Under this view parties should not slavishly implement the voters' will, but rather should offer a range of policy choices for the voters themselves to choose among. Under this democracy-as-consumption theory, the two-party system stifles competition. It gives the parties too much control, distorts political choice, and enriches the parties at the voters' expense. Professor Ortiz applies this model to primary elections, and argues that the blanket primary reflect voters' concern over the potential power and autonomy of the two major parties.

INTRODUCTION

We like our major parties. Despite our partisan gripes about one or the other of them, most of us agree that the two-party system represents all that is good and great about America.1 Unlike apple pie, moreover, the two-party system does much real, down-in-the-trenches work. It organizes both electoral competition and legislative politics and it structures many far-ranging features of our government—from federal judicial appointments2 to appointments to many administrative agencies.3 No wonder many people, including some on the Supreme Court itself, view the two-party system as a quasi-constitutional value. Justice O'Connor, for one, thinks "[t]here can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to

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1. See 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, 345-50 (describing dominant view of party system, the theory of responsible party government, and collecting major original sources).

2. See Constance L. Hays, Shortage of Judges Slow Cases, N.Y. Times, Aug. 6, 1991 at B1 (describing how "[w]hile the senator from the President's political party is entitled to pick all [federal] judicial candidates, in New York, the senator from the party out of power selects every fourth candidate").

3. See, e.g., 2 U.S.C. § 437c(a)(1) (no more than half the members of the Federal Election Commission may come from a single party); 15 U.S.C. § 2053(c) (no more than three of the five Commissioners of the Consumer Product Safety Commission may come from a single party).
sound and effective government," and she would not hesitate to protect it.\(^4\)

I will not question this national treasure by pointing to the various political pathologies it may entail. Many have already done that.\(^6\) I want to argue instead that the two-party system perversely harms those it would seem to benefit: the major parties themselves. Although it may allow them greater benefits in splitting the spoils of politics, it ultimately causes them to lose their freedom, much as the one-party system in large parts of the country led to the institution of the direct primary at the beginning of the twentieth century. My argument proceeds in several steps.

Part I of this Article lays out the traditional theory of political parties.\(^7\) This traditional view sees parties as necessary democratic intermediaries. Although they stand between voters and representatives, they do so in order to help voters better choose and supervise those who govern them. The parties’ presence tightens relationships of democratic accountability. By positioning themselves between voters and representatives, they help political principals ride over their primary political agents. They thus reduce the agency costs inherent in representation itself.

Part II of the Article points out this theory’s central problem. Although the theory accurately describes part of what parties do, it is radically incomplete. We expect and demand of parties much more than this. They not only act as superagents who monitor and discipline primary agents on our behalf, but also produce policy goods themselves. In fact, we might well view voters in modern mass democracy more as political consumers than as political principals. Instead of employing political structures and institutions to produce policy themselves, they might better be seen as consuming bundles of policy produced by others—most notably, political parties. In this picture, citizens still rule supreme, but more as the consumer sovereigns of economics than as the political sovereigns of traditional democratic theory.

This change of perspective poses great problems for traditional democratic theory, which rests political legitimacy on strong notions of the individual citizen’s political agency.\(^8\) Whereas the traditional picture of parties as agents has the advantage of conforming political practice to

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5. See id. at 144 (arguing that partisan gerrymandering claims of major parties should be nonjusticiable).
8. Although there are many, many different brands of democratic theory, see David Held, Models of Democracy (2d ed. 1996) (describing many different theories of democracy), they all share, as the root meaning of the word indicates, a belief in “a form of government in which . . . the people rule.” Id. at 1. See also id. at 297 (“Part of the
these notions, the consumer picture does not. In fact, it argues much the opposite. Under this view, voters act as political consumers because inevitable collective action problems block effective individual agency. Because an individual vote nearly always makes no difference, individuals have little reason to devote time and money to educating themselves on politics and voting. It is simply irrational. If they do, they do so not so much because their participation will make a difference to the outcome but because it will make a difference to them—either because they simply enjoy politics or because they dread violating the social norms encouraging civic participation.

The consumer view does have some advantages, however. It not only may offer a more accurate description of how politics operates but also carries powerful normative implications for political practice and suggests new ways of strengthening democratic institutions. In particular, it justifies strong roles for parties, which stand as something of an embarrassment to the agency view of politics. Insofar as parties work to manage political agents on behalf of principals, they are unobjectionable under the traditional agency approach, of course. But to the extent they make policy for largely passive voters to ratify, they look more like wayward agents trying to usurp their principals. Under this new view of democracy-as-consumption, however, a certain degree of party independence from the voters is appropriate. The parties' role, after all, is not to slavishly implement the voters' will, but to offer a range of policy bundles for the voters themselves to choose among. And the more political work the parties do, the less there is for voters to worry over—a great advantage in a world where voters have little incentive to vote, let alone collect and sort through political information. We need parties, it turns out, even more than we realized.

Part III argues that the two-party system jeopardizes this view. Although democracy-as-consumption may work well in a party-competitive system, it has perverse consequences in a world that restricts party competition. When only two parties effectively compete, granting parties

attraction of democracy lies in the refusal to accept in principle any conception of the political good other than that generated by 'the people' themselves.

13. See Downs, supra note 10, at 267 (“Rational men in a democracy are motivated to some extent by a sense of social responsibility relatively independent of their short-run gains and losses.”).
14. See Issacharoff & Ortiz, supra note 7, at 1646–59 (discussing agency and superagency costs of political intermediation).
a larger and more independent role in political decisionmaking back-fires. Under duopoly, democracy-as-consumption fails to sensibly allocate political work between parties and voters. It gives the parties too much control, distorts political choice, and enriches the parties at the voters' expense. Democracy-as-consumption thus works as political theory only if the political marketplace is free. Employing it in our present political environment presents such great dangers of voter exploitation that the parties cannot be trusted with the role democracy-as-consumption sees as necessary for them to play.

Part IV focuses this discussion on political nomination processes—an area in which the courts have subjected the parties to some state regulation. This Part argues that the major parties cannot now claim the autonomy over nominations they covet. Democracy-as-consumption may give them good arguments for more complete autonomy, but not in a world with only two competitive parties. When, as in our political system, only two political parties can really compete, party arguments for more absolute autonomy are democratically perverse. Some consumers' choices determine all the choices available for others, and politics—though perhaps decisive—is insufficiently representative. This Part then argues that recent efforts to open up party primaries in some states, particularly California, reflect exactly this concern.

The conclusion lays out the paradox of two-party systems. The more the major parties enjoy duopoly advantages, the more subject to certain forms of regulation they necessarily become. And that is completely appropriate. The stronger the two-party system, in other words, the less autonomous the two major parties must be. In one sense, then, two of America's great civic slogans—a strong two-party system and "strong" parties—necessarily collide.15 We cannot have both without opening ourselves up to unacceptable exploitation by the very entities we justify as serving us.

I. PARTIES AS SUPERAGENTS

In traditional democratic theory, the citizen comes first. Primary political sovereignty resides with the individual and government is legitimate only insofar as its actions reflect the will of those governed.16 At first glance, political parties seem an embarrassment.17 They stand between the citizen and her representative and would seem to attenuate the agency relationship between the representative and principal. The less

15. I use "strong" here and elsewhere in the Article only in the sense of highly "autonomous," which is only one of the popular meanings of the word in this context. Some justices, for example, have used the term to refer to other qualities. See Rutan v. Republican Party of Illinois, 497 U.S. 64, 104-08 (1990) (Scalia, J., dissenting); Branti v. Finkel, 445 U.S. 507, 528-31 (1980) (Powell, J., dissenting).
17. See Issacharoff & Ortiz, supra note 7, at 1628-29.
direct and unmediated that relationship stands, the more democratic
slippage we might suspect. The representative would, after all, appear to
be following the wishes of others than the voters themselves. Intermedia-
tion would seem a fancy term for partial usurpation.

To avoid this embarrassment, we tell ourselves a comforting story.
The parties stand between voters and representatives, to be sure, but they
do so not in order to distance them from each other, but to bring them
closer together.\textsuperscript{18} The parties, along with some other types of powerful
intermediaries, represent "superagents" who superintend on behalf of
the voters the primary agency relationships that run between them and
their elected representatives. In other words, the political parties exist as
second-order agents to help the voters better produce the kinds of policy
goods they desire.\textsuperscript{19}

They do this in many different ways, most of which address the cen-
tral collective action problems that afflict individuals in politics. As many
have long noted, it is mostly irrational for individuals to invest much time
and money in politics.\textsuperscript{20} Since the chance that their vote will make a
difference is extremely small, they will not expend much effort to vote,\textsuperscript{21}
let alone obtain information on which to cast the vote properly from their
own perspective. The mystery, in fact, is not why so few people vote and
why they are so innocent of political knowledge, but why those few who
do vote bother and why they know anything relevant at all.\textsuperscript{22}

Recent apologists for democracy solve this mystery in a common way.
They point out that much information comes free, and that organiza-
tions like political parties help voters overcome the collective action obstacles
of politics.\textsuperscript{23} Voters, for example, can base much of their political deci-
sionmaking on information they already know.\textsuperscript{24} In order to evaluate the
incumbent party's economic policies, they can consider their own eco-
nomic well-being and the economic fates of their friends and family.\textsuperscript{25}
Someone laid off and unable to find new work has an obvious personal
measure of economic well-being and distributional fairness to consult.
Or the pensioner living on a fixed income may have to look no further
than the monthly heating and grocery bills to judge the incumbent
party's success in fighting inflation. In fact, one's personal circumstances
may be so pressing that they may not even have to be consciously consid-

\begin{thebibliography}{25}
\bibitem{18} See id. at 1629-30.
\bibitem{19} See id. at 1649–52.
\bibitem{20} See, e.g., Downs, supra note 10, at 245.
\bibitem{21} The most spectacular formal demonstration of this insight is John Ledyard's proof
that in an election with two candidates the equilibrium level of voting turnout is zero. See
\bibitem{22} See Robert A. Dahl, Who Governs? Democracy and Power in An American City
279 (1961).
\bibitem{23} See Popkin, supra note 11, at 7–12.
\bibitem{24} See id. at 22–28 (discussing by-product theory of political information).
\bibitem{25} See id. at 23–24 (discussing daily life information).
\end{thebibliography}
ered. New-found immiseration may spark such resentment that the voter cannot even see a real choice to be made.

Other information may be unknown to voters but can come to them for free.\textsuperscript{26} Candidates, for example, provide much information about themselves and their opponents in the course of campaigning. Much of their television advertising, mass mailings, stump speeches, and sound bites provide information on their and their opponents' policy positions, character, and values,\textsuperscript{27} although each of these means may well try to sway voters through non-informational appeals as well.\textsuperscript{28} Issue groups may score various candidates in voting guides and unions may endorse particular candidates on the basis of their positions on certain issues.\textsuperscript{29} Even other individuals may provide helpful information, like the politically engaged co-worker who slams a particular candidate during lunch. All these sources provide the voter with low cost information—some reliable, some not—about politics and so help overcome political ignorance.

Political parties provide information as well. First, by making contributions to candidates or independent expenditures on their behalf,\textsuperscript{30} engaging in issue advocacy,\textsuperscript{31} 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. Second, by labeling candidates as their own, parties provide a kind of easy brand identification for candidates.\textsuperscript{32} A voter trying to choose between two candidates may know nothing about them other than their party affiliations and yet feel that she knows enough not to make a politically careless decision. Third, the party, better than any other entity, can effectively monitor the political performance of individual representatives once elected.\textsuperscript{33} An interest group can, of course, track individual representatives' legislative performance on a limited number of issues, but it cannot easily follow the representative's overall performance in the legislature. Not only is much of it, like constituent work, largely invisible and

\begin{itemize}
\item \textsuperscript{26} See Downs, supra note 10, at 221–25 (discussing free information stream).
\item \textsuperscript{27} See Daniel R. Ortiz, The Engaged and the Inert: Theorizing Political Personality Under the First Amendment, 81 Va. L. Rev. 1, 27 (1995) (describing candidates and parties as "primary sources of information" and explaining "strategy of ambiguity" they may follow).
\item \textsuperscript{28} See id. at 28 ("Voters have much of their political decisionmaking on their brute affective reactions to the candidates . . . .").
\item \textsuperscript{29} See, e.g., Americans for Democratic Action, Heroes and Zeroes (visited Feb. 18, 2000) <http://adaction.org/> (rating best and worst legislators and individual state delegations by liberal advocacy group).
\item \textsuperscript{30} See 2 U.S.C. § 441(a)(2), (d) (1995) (regulating contributions and expenditures by political parties on behalf of their federal candidates).
\item \textsuperscript{31} For a full discussion of issue advocacy, see Trevor Potter, Issue Advocacy and Express Advocacy, in Campaign Finance Reform: A Sourcebook 227–39 (Anthony Corrado et al. eds., 1997).
\item \textsuperscript{32} See Issacharoff & Ortiz, supra note 7, at 1629.
\item \textsuperscript{33} See id. at 1649–52 (discussing monitoring of political agents by intermediaries, particularly political parties).
\end{itemize}
of little interest to them, but much of it can only be judged accurately by others within the legislature itself. Party leaders, for example, can best tell whether an individual legislator is really a loyal player because they best understand the internal politics of the legislature. Did a legislator’s vote on a particular bill represent the legislator’s true position on a general issue, a forgivable concession to powerful interests within the legislator’s district, a “payback” for certain campaign contributions, or logrolling for a vote on a different issue entirely? Outsiders have much more difficulty than political insiders making judgments such as these.

Even more important than providing information to voters, political parties discipline elected representatives. By rewarding and punishing representatives partly according to how loyal to party policies they remain, the political parties help keep them true to brand and thus presumably to the wishes of the voters who elected them. By promising to spend party money to elect loyal candidates and to defeat their opponents, by threatening to withhold party support, by barring a party member from running as a candidate in a party primary, and by assigning a representative to a high or low profile legislative committee or to a committee of high or low salience to the legislator’s constituency or fundraising prospects, the party can wield great power over the members living under its tent, no matter how big that tent is. Money, the party label, and power and position within the legislature are just a few of the effective tools parties have to reward and punish their candidates and representatives.

Through all these means and others, parties help voters better manage their primary political agents, their representatives. In this story, the parties pose no problem to traditional democratic theory but better empower the voters they serve. To the extent they seize the reins of control over voters’ representatives, they do so only to allow the voters to control their agents better. Since they wield power for the ultimate political principals, these powerful entities strengthen, not endanger, democratic accountability and responsiveness.

II. BEYOND SUPERAGENCY: SUPERAGENTS AS PRODUCERS?

Several problems with this picture immediately spring to mind—some internal to agency theory and one not. In a different piece, Sam Issacharoff and I have discussed the internal problems. Foremost is the danger of superagents pursuing their own interests at the expense of their principals. Just as agents beget so-called agency costs, superagents beget superagency costs. And these costs are potentially quite high. A
superagent like a political party that superintends many primary agents may bolt with the whole stable, whereas a primary agent who cheats is just one bad apple. Any defense of political parties as democracy-enhancing institutions must surely consider the possibility of superagent disloyalty, just as any analysis of overall agency costs must consider not just the costs inherent in the primary agency relationship but those in any associated superagency relationship as well.

Another internal problem stems from the fractionated supervision of interests superagents provide. Since we give different superagents different sets of interests to superintend—environmental interests to the Sierra Club and retirement interests to the corporation, for example—even superagents completely loyal to us may act at cross-purposes and waste our resources representing us. These two particular superagents may go head-to-head—neither one of them representing our complete interests—and the exhausted resolution of their conflict is unlikely to well reflect our actual position.

In this Article, however, I want to focus on the external problem with this democratic defense of political parties. The truth is that political parties do much more than the agency model admits. They certainly provide information to voters that voters might otherwise not acquire, help voters evaluate that information, and serve to discipline political representatives. But the political parties do much more. They 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. Modern mass democracy allocates much of the work of politics away from the individual voter to cadres of professionals—pollsters, fund-raisers, lawyers, policy advisors, and, of course, the ubiquitous political consultants. They tell party candidates how to present themselves, how taking certain positions on particular issues will pay off, and how to manage their campaigns effectively. The party also organizes important get-out-the-vote efforts to ensure support for all its candidates at the election. The rise of soft money,

38. See id. at 1654–56.
39. See id. at 1656. Robert Reich, former Secretary of Labor, nicely makes this point about the Microsoft litigation. See Robert B. Reich, A Shareholder, and a Citizen, N.Y. Times, Nov. 5, 1999, at A33.
42. This is not to say, of course, that parties completely control their candidates. Candidates can sometimes buck the party, as Democratic members of the House of Representatives did who voted to impeach President Clinton.
in fact, has greatly enhanced the parties’ power over their candidates and partly reversed the much-noted move towards candidate-centered elections of recent decades.\textsuperscript{44} Increasingly, the parties look less like faithful handmaidens to the voters than corporations competing for the voters’ business. In politics, they, not the voters, are the ones who produce a product; they, not the voters, develop and manage candidates and their associated policy positions. Or at the very least the parties do enough of this to dispel any characterization of them as “mere” superagents.

This movement is probably inevitable. The collective action problems that lead to rational voter ignorance and weak participation force us to seek institutional arrangements to do the work of democracy instead. Those arrangements, however, go past agency and superagency. Indeed, the assumptions of insufficient individual interest in politics that drive the agency defense of traditional democratic theory largely unwind that defense in the end. The more we allocate political work away from ourselves to others, the less we look like political principals. At some point, agency tips towards production; agents towards producers; and principals towards consumers. And our model of democracy as highly intermediated agency gives way to democracy-as-consumption.\textsuperscript{45}

But is there any justification for democracy-as-consumption apart from inevitability? Can the move from individuals actively managing politics to driving it as consumers through the invisible hand of choice on the market be justified in terms of democratic theory? Perhaps. First, this move may allow us to better see what our political institutions are doing. Right now many, including political parties, do not fit the descriptions we have of them. If we see many political organizations as agent-intermediaries, much of what they do seems inexplicable, if not dangerous. We should never, for example, in this view give political parties rights as against their collective members, yet the courts sometimes do.\textsuperscript{46} To make

\textsuperscript{44} See Anthony Corrado, Party Soft Money, in Campaign Finance Reform: \textit{A Sourcebook} 165 (Anthony Corrado et al. eds., 1997) (providing a full description of soft money and how it works).

\textsuperscript{45} Democracy-as-consumption runs counter to two different ideals of democracy: civic republicanism and progressivism. Unlike those two ideals, which rest on the belief that individual citizens will deeply engage in politics, see, e.g., John W. Epperson, \textit{The Changing Legal Status of Political Parties in the United States} 90 (1986) (“At the center of Progressive political thinking was the ideal of the individual political man who had a high-minded interest in civic affairs and the desire and ability to inform himself adequately about the issues of the day. If given the opportunity such a man would make enlightened decisions directed at the public welfare and not the promotion of a special or partial interest.”); Cass R. Sunstein, Democracy and the Problem of Free Speech 241–52 (1993) (discussing civic republican ideal of “deliberative democracy”), democracy-as-consumption assumes they will not. It is largely consistent, however, with minimal democratic populism, although it is not identical to it. See Amy Gutmann, Democracy, in \textit{A Companion to Contemporary Political Philosophy} 411, 412–13 (Robert E. Goodin & Philip Pettit eds., 1993).

\textsuperscript{46} See, e.g., California Democratic Party v. Jones, 169 F.3d 646, 653 n.16 (9th Cir. 1999), cert. granted, 120 S. Ct. 977 (2000) (rejecting argument that majority of party
the traditional description fit, we must wilfully blind ourselves to the huge amount of work we fail to do that political parties pick up.

Second, and more importantly, despite the negative connotations of the label, democracy-as-consumption might offer a better normative theory for contemporary politics. If collective action problems make ignorance and nonparticipation rational, perhaps we should design institutional structures to place the major part of politics outside the individual, to lodge it some place where it might get done. Although the traditional agency picture is flattering, to the extent it relies on voters to do much actual work it might be dangerous. That work might just not get done. An individual's vote just makes too little difference to justify the costs of actually acquiring political information—let alone voting itself. Some people vote, to be sure, but they do so either because political participation holds some special consumption value for them as political “hobbyists” or because our weak social norms still do some work.47

If for quite understandable reasons, then, we cannot rise to the demands of traditional democratic theory, we should consider designing our political institutions around this brute fact. In a world where it makes little sense for most people to do much political work, we should not pretend that we do much but instead construct institutions that allow us to do as much work as we will and then grant that work the best political effect possible.48 Democracy-as-consumption may represent such a system. Recognizing that most individuals understandably have little reason to deeply participate in politics, it grants much power and independence to political parties, who have a great incentive—victory and the spoils it brings—to do the actual work.

The model, in fact, has an interesting dynamic quality. To those individuals who take the greatest interest in politics—party activists and other politically engaged individuals—the model grants more power than it does to others. Indeed, with respect to party activists, the party does look more like agent than producer. Since party activists are the ones who trek to party conventions and party committee meetings and regularly vote in party primaries, they are the ones who disproportionately set the party's agenda—along with party bosses and party candidates—and pick its candidates. They help make the conscious production decisions for the rest of us.

Democracy-as-consumption allocates work away from those individuals who quite reasonably do not want to do it to institutions that do. It members could bind party in vote taken by initiative rather than through amendment of internal party rules).

47. For an amusing discussion of this insight, particularly in public choice theory, see Jonathan Cohn, Irrational Exuberance, The New Republic, Oct. 25, 1999, at 30 (explaining the public choice theory premise “that people vote when it makes them feel good or when they feel morally obligated to do so”).

48. For a similar argument that we should think of campaign finance reform in this way, see Ortiz, supra note 27, at 45.
does, however, ultimately allow those individuals to guide politics through their role as consumers of the goods these institutions produce. Every vote represents a consumption decision among various bundles of political goods and the aggregate of those decisions guides the markets. The invisible hand thus rewards those producers who provide the particular bundles of goods the voters want and keen competition among producers should ensure that they actually serve the market rather than themselves. A party that refuses, after all, to provide the goods voters want will fail in the face of competition from others.

To many, including myself, this view stands depressingly agnostic as to how people should make political decisions.49 Like most economic models, democracy-as-consumption respects consumer preferences as given. Whether someone votes on the basis of ideology, policy, naked self-interest, advertising effect, or candidate looks matters not. Democracy-as-consumption aims to give voters what they want no matter why they want it. Yet, this may be the best we can do. The unavoidable collective action problems of politics may make this the most sensible vision of democracy obtainable. We may be able to soften some of its more worrisome features through campaign finance regulation,50 but we would be rightly suspicious of any inquiries into why voters hold certain preferences and would presumptively reject any efforts to exclude some from voting because of those reasons. This form of democratic agnosticism, however, is not new. It actually underlies much current political practice. Most of the existing constitutional rules of campaign finance, for example, reflect it.51 The only difference is that democracy-as-consumption makes agnosticism more pressing because it makes it more transparent.

III. EXPLOITING THE DIVISION OF LABOR

Democracy-as-consumption depends on one critical assumption—that the political market is robustly competitive. Like other economic approaches, it benefits the consumer only to the extent the market is free. Without full competition, producers will serve themselves at the consumers' expense.52 And the more power and autonomy we give producers, the more dangerous that exploitation can be.

Two-partyism presents exactly this danger. Through many different means—ranging from winner-take-all-elections, to ballot access restric-
tions on third parties and independent candidates, to campaign finance rules that hobble third-party candidacies—our system protects the existing two parties.\footnote{For a full discussion of these issues, see Issacharoff & Pildes, supra note 6, at 670–90; Hasen, supra note 1, at 366–71.} It creates a duopoly in which the Democrats and Republicans compete between themselves with no great fear of competition from others. Occasional threats, like Ross Perot’s presidential challenge, may temporarily spoil the controlling dynamic, but their influence is short-lived and unlikely to touch more than a handful of offices.\footnote{The Reform Party, in fact, seems close to exploding. Just recently, its highest elected officeholder, Minnesota Governor Jesse Ventura, withdrew from it after “describing party leaders as ‘hopelessly dysfunctional.’” Michael Janofsky, Ventura Quits the Reform Party, Citing Leaders, N.Y. Times, Feb. 12, 2000, at A1.} Year-in and year-out, voters in most partisan elections, if they are lucky, face a choice between two competitive candidates—the Democrat and the Republican. If they are unlucky, they don’t even get that. They instead face the common prospect of ratifying the incumbent or voting for the candidate of the single party that can carry the particular election.\footnote{See Burdick v. Takushi, 504 U.S. 428, 442–43 (1992) (Kennedy, J., dissenting) (describing competitiveness of Hawaii elections).} Right now \textit{two} competitive candidates represent the best we can hope for in the vast majority of single-member district elections. Multimember districts, of course, demand competition among more candidates, but here too the two-party system usually restricts real competition to at most two candidates per seat.

This basic fact of our political system, which we often celebrate, even in the pages of Supreme Court opinions,\footnote{See Daniel R. Ortiz, Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself, 4 J.L. & Pol. 653, 672–75 (1988) (discussing how uncompetitive elections lead to agency costs in representations).} makes democracy-as-consumption perverse. Although in a free marketplace there may be good, indeed compelling, reasons for allocating much of the work of politics to political parties, all those reasons turn hollow in a market restricted to two producers. Indeed, those reasons turn against consumers. Knowing that consumers have at most only one other real choice in elections, parties will act less responsively to voters.\footnote{This is, for example, a common view of the McCain-Bush struggle in the 2000 Republican presidential primaries. See, e.g., Allison Mitchell, The 2000 Campaign: The Populist Appeal, Wash. Post, Feb. 5, 2000, at A1 (describing McCain candidacy as “a seat-of-the-pants populist candidacy that has turned the Republican Party establishment on its head and is now threatening its chosen candidate, Gov. George W. Bush of Texas”).} They will, to be sure, usually run candidates certain not to deeply alienate a majority of voters, but they will feel little need to produce the same product they would in the face of stiff competition. Instead, they may run candidates matching their own policy preferences or hard-working, though uninspiring, party loyalists. In short, they will feel some freedom to run the people they rather than the consumers want.\footnote{In economic terms, they will try to capture some of
the consumer surplus by placing people they like rather than those a free market itself would demand.59

Duopoly is not monopoly, of course. Even two secure parties will have to compete against each other and this more limited competition can often be counted on to produce candidates that somewhat reflect consumer preferences.60 After all, if one major party completely ignores the market, the other will clean up in the election. But this degree of competition, while comforting, is inadequate. Weak markets do discipline—just too weakly. Think of two businesses that manage to erect high barriers to entry to their field. They must still worry about each other. This worry will stop both from acting as they would if each were a monopolist. They will each charge lower prices and provide better service than each would if it had the market to itself. The prices will not be nearly as low, however, as in a free market. For this reason, the antitrust laws do not stop with ensuring just a single competitor.61 Just as high market concentration sparks worries that economic producers will exploit consumers, so too in politics.

Democracy-as-consumption, in fact, heightens these standard worries. It rests on the notion that voters have too little incentive to individually do the work of politics. Its division of labor between voter and party acknowledges that fact and structures institutions in such a way to live with it. It gives parties great power and independence exactly because voters have insufficient incentives to do much of the great work of politics themselves. They simply are unable or unwilling to supervise their representatives. They are, to be sure, not lazy consumers—just smart ones who know not to give more thought to any choice than it warrants to them.62 The parties, however, like any producers, should recognize the quality of consumer choice. If consumers do not investigate the long-term reliability of a product, producers will have no great incentive to design it to last. Similarly, to the extent collective action problems make it unlikely that many voters will invest much time, money, and energy in evaluating the candidates, parties will have no great incentive to produce those candidates the voters would actually want on full investigation. Thus, the great power and independence democracy-as-consumption grants parties, combined with the little care it assumes rational voters apply in their decision-making, compound the danger of exploitation by duopolists. In the two-

59. See Hirshleifer, supra note 52, at 212–25 (discussing concept of consumer surplus).
60. See id. at 389–407 (discussing potential for extracompetitive returns under oligopoly).
61. The FTC, for example, has recently moved to block the takeover of ARCO by BP Amoco on the ground that their 70% control of North Slope oil production would be "strongly anti-competitive." Stephen Labaton, U.S. Moves to Halt $30 Billion Union of Oil Companies, N.Y. Times, Feb. 3, 2000, at A1.
62. Hence the problem of "rational ignorance" in voting. See Downs, supra note 10, at 259 ("In general, it is irrational to be politically well-informed because the low returns from data simply do not justify their cost in time and other scarce resources.").
party world in which we live, democracy-as-consumption leads not to improved democratic institutional arrangements, but to diminished democratic accountability and responsiveness. It just backfires.

IV. COMPETITION AND NOMINATION

The nomination process is central to the life of political parties and voters. It determines both what political product the parties offer and what choices consumers have. The candidates that emerge from the nomination process embody bundles of policy goods. Just as important, the prospect of future nomination battles helps keep the representative tied to certain interests through her term. If party committees nominate candidates, candidates will be careful not to stray too far from the party committee's wishes. If party conventions nominate them, by contrast, candidates will be careful not to stray too far from the values of that larger group that might attend the next convention. And if primaries nominate them, candidates will be careful not to stray too far from the values of that still larger group that is likely to vote in the next primary.

Since each of these constituencies has somewhat different values, moreover, the choice of nomination mechanism affects the type of candidates nominated and so changes the policy bundles that all the voters can choose among at the next general election. As we move the power of nomination away from party committees, to party conventions, to voters in the party primary, we not only increase the size of the constituency to which the candidates respond, but also change the types of interests the constituency represents. Since party committee work requires much more time and effort than does attending a nominating convention, which, in turn, requires more time and effort than voting in a party primary, the move from nomination by committee to convention to primary allows increasingly less active and engaged individuals to participate. This is not to say that voters in party primaries care little about politics. To the contrary, they care a great deal—much more than most people, in fact. Most party members do not even bother to vote in primaries. Although less engaged on average than the people who attend conventions or serve on party committees, primary voters do care. They just care less than those other two groups of people.

By itself, of course, different degrees of care do not necessarily entail different interests and ultimately different choices among candidates. A person who cares enough to vote in a primary but not enough to be on the party committee might well have the same preferences and choose the same candidates as some person on the party committee itself. In

63. Seldom, however, will the representative be completely tied to those interests. Incumbency advantages, for example, will allow a representative to deviate some from those interests without fear of punishment.

64. Most nomination reforms, in fact, have proceeded from voters' unhappiness with the character and type of candidates selected. John Epperson tells this story in illuminating, book-length detail. See Epperson, supra note 45.
general, however, party activists are different from others. They often have stronger policy preferences or just different ones. Left to themselves, they would often pick different candidates than primary voters would.65

The choice of nomination process also determines how responsive candidates are to the particular constituencies they are tied to. Because the different constituencies have different incentives and abilities to monitor and discipline candidates once elected, different nomination processes make candidates differentially responsive to whatever group they represent. Party committees, for example, have the best knowledge of how party representatives behave once elected. Party committee members get more, cheaper, and better information than do voters on the street, and have more skill in evaluating the information they receive.66 They also have more power to discipline candidates.67 They, not the primary voters, decide how to allocate the party’s money among its various candidates. Candidates nominated through party committees, then, will not only respond to different interests than candidates nominated through party primaries but also respond to them more keenly. This differential responsiveness to different interest constituencies makes the nomination process quite significant.

History offers some indication both of the importance of nominating processes to parties and of how those processes affect the kinds of candidates produced. In Burson v. Freeman, the Supreme Court colorfully described the history of balloting as follows:

During the colonial period, many government officials were elected by the *viva voce* method or by the showing of hands, as was the custom in most parts of Europe. That voting scheme was not a private affair, but an open, public decision, witnessed by all and improperly influenced by some. The opportunities that the *viva voce* system gave for bribery and intimidation gradually led to its repeal.

Within 20 years of the formation of the Union, most States had incorporated the paper ballot into their electoral system. Initially, this paper ballot was a vast improvement. Individual voters made their own handwritten ballots, marked them in the privacy of their homes, and then brought them to the polls for counting. But the effort of making out such a ballot became increasingly more complex and cumbersome.

Wishing to gain influence, political parties began to produce their own ballots for voters. These ballots were often printed with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance. State attempts to standardize the ballots were easily thwarted—the vote

65. It was this insight, in fact, that led to regulation requiring parties to nominate by direct primary rather than by convention. See id. at 101–03.
66. See Issacharoff & Ortiz, supra note 7, at 1649–50.
67. See id. at 1650–52.
buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box. Thus, the evils associated with the earlier *viva voce* system reinfected the election process; the failure of the law to secure secrecy opened the door to bribery and intimidation.

Approaching the polling place under this system was akin to entering an open auction place. As the elector started his journey to the polls, he was met by various party ticket peddlers "who were only too anxious to supply him with their party tickets." Often the competition became heated when several such peddlers found an uncommitted or wavering voter. Sham battles were frequently engaged in to keep away elderly and timid voters of the opposition. In short, these early elections "were not a very pleasant spectacle for those who believed in democratic government."

The problems with voter intimidation and election fraud that the United States was experiencing were not unique. Several other countries were attempting to work out satisfactory solutions to these same problems. Some Australian provinces adopted a series of reforms intended to secure the secrecy of an elector's vote. The most famous feature of the Australian system was its provision for an official ballot, encompassing all candidates of all parties on the same ticket.

After several failed attempts to adopt the Australian system in Michigan and Wisconsin, the Louisville, Kentucky, municipal government, the Commonwealth of Massachusetts, and the State of New York adopted the Australian system in 1888.

The success achieved through these reforms was immediately noticed and widely praised. One commentator remarked of the New York law of 1888:

"We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end."

"The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls."

Similar results were achieved with the Massachusetts law:
Quiet, order, and cleanliness reign in and about the polling-places. I have visited precincts where, under the old system, coats were torn off the backs of voters, where ballots of one kind have been snatched from voters' hands and others put in their places, with threats against using any but the substituted ballots; and under the new system all was orderly and peaceable.

The move towards previously prepared and distinctively marked paper ballots gave power to those who prepared them. A party could

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69. Id. at 204 n.8 (citations omitted).
70. See Epperson, supra note 45, at 81–82.
place a list of candidates on its ballots, mark the ballots so it could monitor whether a voter actually placed his ballot in the ballot box, and then reward or punish the voter accordingly. The reward or punishment could come through the party itself in the form of booze or patronage or through others, like employers, who had an interest in one party doing well in the election. Controlling the physical ballot thus allowed parties not only to determine which candidates made it to the election, but also to deliver votes. Through the ballot, party leadership enjoyed both gatekeeping power over candidates and disciplinary power over voters.

The secret ballot undid the second feature immediately and provided the opportunity to undo the first as well. No longer could the parties effectively monitor how people voted. Without that knowledge they could not well discipline consumers and possessed much less power to deliver votes to their candidates. So long as the state, which now prepared the secret ballot, deferred to the party leadership's choice of who should appear on it, the party leadership could maintain its gatekeeping power on the supply side. That too, however, failed to last long. Lack of party competition led party leadership to act unresponsively. Knowing that the voters had little choice, especially in one-party jurisdictions, party leaders nominated people they wanted more than did the voters. And voters in many parts of the country rebelled. In the Progressive Era, they took away the party leadership's gatekeeping power by instituting the direct primary. No longer could party leadership define the choices for the general electorate. The voters in the party primary would.

The need for reform, however, did not spring simply from the fact that party leaders had different interests than party voters. That could be true and yet no problem if party leaders felt unable to act on their different interests. The cause of the problem was that lack of competition in the market allowed party leaders to do exactly that. Since the product market failed to discipline producers, they felt free to exploit consumers by imposing their own preferences on them. Frank Sorauf has nicely made this point:

Viewed historically, the direct primary is a recognition that . . . electoral parties act responsively as nominators only when other competitive parties threaten them. By the beginning of the 20th century many sectors of the country had drifted into one-party-ism. Within these dominant parties powerful leaders and caucuses, usually fully aware of their monopolistic power, nominated ruthlessly and often in disregard of their electorates. Candidates of meager abilities and complete subservience to the party often resulted. If there were no competitive party system to control the monopolistic nominators, then public policy

71. See Issacharoff & Ortiz, supra note 7, at 1650–52 (discussing inter-relationship of monitoring and discipline).
would. What antitrust legislation was to the corporate monopo-
lists, the direct primary was to the single, dominant party.\textsuperscript{73}

It was lack of competition in the market, just as much as having dif-
ferent interests, that led party leaders to overlook voter preferences.

On its face, of course, Sorauf’s final point is puzzling. The direct
primary looks very different from antitrust. Whereas antitrust breaks up
monopoly to create competition, the direct primary neither breaks up
the party nor increases the number of parties competing in the general
election. It does not even reduce the high barriers to entry faced by third
parties. Instead, the direct primary allows political consumers (or at least
those of them entitled to vote in the primary) to dictate production deci-
sions to the producer. Since indirect consumer discipline through the
market is unavailable, it allows direct consumer discipline instead. Like
antitrust, it responds to market failure but through a different strategy.
Recognizing that a standard market solution is impossible in a world with
such a deeply entrenched two-party system, it gives consumers themselves
the power of production.

Some have complained that such a move weakens parties and
amounts to pseudo-democracy.\textsuperscript{74} To them, the direct primary does not
empower the little people but rather allows “self-selected elites and pow-
erful, wealthy groups [to] dominate the unorganized mass.”\textsuperscript{75} Because,
in this view, the elites, but not the masses, vote in primaries, taking
gatekeeping power away from party leaders hurts mass politics. This view
is, of course, consistent with one of the major assumptions of democracy-
as-consumption. It agrees that many voters have so little incentive to par-
ticipate in politics that they will not vote, thereby ceding control to those
who help make the decision. Yet, the critics’ view ignores the insight that
in a world of duopoly party leaders will be tempted to pick candidates for
themselves rather than for “the unorganized masses.” Why should they
do that? The gatekeeping power gives them even more control over polit-
ics than the elites the critics complain of. And party leaders, of course,
are elites too, just different ones. In a world with real competition among
parties, then, democracy-as-consumption might well take the critics’ posi-
tion. But in a world without it, the direct primary makes great democ-
ocratic sense.

Today we argue less about the wisdom of the direct primary than
over which of its various forms we should use. There are several—closed,
open, partially closed, and blanket—each of which has different implica-
tions.\textsuperscript{76} The closed primary allows only voters of the party to choose the
party’s candidates. Thus, in a closed primary, only registered Republi-

\begin{thebibliography}{9}
\bibitem{73} Id.
\bibitem{74} See Arthur Lipow, Political Parties and Democracy: Explorations in History and
\bibitem{75} Id. at 23.
\bibitem{76} See California Democratic Party v. Jones, 169 F.3d 646, 650–51 & nn.8–9 (9th Cir.
1999), cert. granted, 120 S. Ct. 977 (2000) (discussing different forms of primary).
\end{thebibliography}
cans can vote for Republican candidates. The open primary, on the other hand, allows any voter to help choose a party's candidates so long as the voter chooses only among that party's candidates for all offices. Thus, in an open primary, a registered Democrat can vote for a Republican candidate for a particular office, but if he does so he can vote only for Republican candidates for all the other offices as well. The partially-closed primary, as its name suggests, stands in between. It allows some, but not all, voters outside the party to help choose the party's candidates, but again only so long as they choose among that party's candidates for all offices. Thus, in a partially-closed primary, an independent, but maybe not a Democrat, may vote for a Republican candidate. However, if she does so, she can vote only for Republican candidates for all the other offices at issue. The blanket primary is the most unique. It allows all voters to vote for any party's candidates for any office. Thus, in a blanket primary, a Democrat can vote for a Republican candidate for one office, a Democratic candidate for another, and a third-party candidate for a third. Of all the systems, the blanket primary allows the voter the most flexibility and greatest range of choice. It is also the system party leaders hate the most.77

This is no accident. For just as the move from nomination by party committee to party primary broadened the interests to which a candidate had to respond and progressively moved the center of those interests away from party leadership's, so too the move from closed to blanket primaries broadens the interests to which a candidate must respond and moves the center of those interests further away from party leadership's. In other words, as primaries open up participation to more and more diverse groups, the candidates selected do not as well reflect the interests of party leaders. The party leadership's opposition, then, should come as no surprise. It is like their opposition to holding direct primaries at all78—only more so.

The ongoing litigation over California Proposition 198,79 the voter initiative that put a blanket primary in place in that state, helpfully reveals what is at stake. In the litigation, for example, party leaders argue not that the blanket primary hurts leadership but rather that it hurts the party. Opening up the primary to outsiders, they argue, will allow others to impose their preferences on the party itself. In one sense, their complaint is puzzling. Reliable exit polls reported that a majority of the members of each major party who voted on Proposition 198 supported it.80 For the most part, major party voters wanted to be able to vote in primaries for some candidates of other parties or welcomed the participation of

77. Thus, in California Democratic Party, the parties sought to distinguish open primaries from blanket ones although the same associational arguments the parties mustered against the one type would apply against the other. See id. at 647.
78. See Lightfoot v. Eu, 964 F.2d 865 (9th Cir. 1992).
79. See California Democratic Party, 169 F.3d. at 648–51.
80. See id. at 649.
outsiders in their own. It is easy to understand why party voters might feel this way. Like independents, who could not vote for any candidates in the prior closed primary system, major party voters who find themselves in a district safe for the other major party had no effective voice at that most critical stage of the election. The blanket primary, for independents and many major party voters alike, then, extends the effective franchise.

The blanket primary has another effect that many party voters might prefer. It modifies the structural equilibrium. Indeed, this is one of the effects party leaders complain of most. In a two-party system, a closed primary produces nominees who reflect the policy positions of two specific groups: the members of each party who voted in the primary. These two groups get to define the complete choice set for the general election. During the general election campaign, of course, these candidates will move (or appear to move) closer to the median voter's position in order to capture a majority. But the movement will be from the sides towards the center and will fall short of it depending upon how greatly the primary voters differ from the ones who participate in the general election. This movement will be incomplete because although candidates want to appeal to median voters, they cannot completely give up the distinctive policy positions the primary voters nominated them for. Their primary positions are baggage they cannot easily be rid of.

Nor would they want to. Nominees need the energetic support of party activists to wage the general election campaign, and they do not wish to squander one of the biggest advantages party organization allows: majoritarian leverage. After all, the greatest prize to a party is being able to leverage the will of a (perhaps bare) majority of voters into the "will" of all. The bigger and more diffuse that majority, however, the less the leverage means. At the extreme, a party so broad that it gets 100 percent of the vote would gain no leveraging advantage. It would have no minority to impose costs on while steering benefits disproportionately to itself. It could only exploit its majority status by discriminating among its own supporters in bestowing benefits, but then many of those discriminated against would quickly lose their enthusiasm for the party.

If it did not have to worry about the possibility of defections, a party would gain most from majority status when supported by minimally winning coalitions in a bare majority of districts. That way it could split the spoils of majority among as few people as possible. In this sense, a party's incentives are always different from its candidates'. The candidates want to maximize their support to ensure continued incumbency. A

81. See id.
82. This picture differs from Downs's. He treats candidate and party interests as identical. He defines a political party as a team of men seeking to control the governing apparatus by gaining office in a duly constituted election. By team, we mean a coalition whose members agree on all their goals instead of on just part of them. Thus every member of the team has
walk-over election is always welcome to the winner. Parties, however, while they want to win, are more tightly tied to their base. Indeed, they exist partly in order to obtain—by winning a majority in the legislature—greater benefits for that base than it is, strictly speaking, entitled to. If they competed for voters from the middle out rather than from the outside in, they would be leveraging the interests of people other than their members into governmental policy. To the extent parties control candidates, then, they should exert some pull away from the middle.

The closed primary will thus generally produce nominees representative of smaller, more cohesive groups than of the general electorate. There is nothing wrong with this in truly free political markets. Consumers will have a broad range of policy goods to choose from in the general election and some sort of equilibrium among different interest groups will arise in the legislature. In a duopoly, however, the case is different. The general election will produce not an equilibrium representative of these various different groups but a result reflecting the interests of just one of them. The equilibrium may fluctuate, of course, from one major party to the other over the course of several general elections, but this is hardly comforting. It means only that our political institutions will lurch from reflecting the interests of one subgroup to reflecting those of another on the opposite side.

The blanket primary achieves quite a different equilibrium. Since it allows any voter to vote for any candidate for any office in the primary, it expands the pool of interests candidates will appeal to. Now they will be tempted—with the party leaders' understanding, if not blessing—to appeal to primary voters in the overall electorate, not just in the party. As exactly the same goals as every other. Since we also assume all the members are rational, their goals can be viewed as a single, consistent preference-ordering.

In effect, this definition treats each party as though it were a single person. This makes his picture of party competition similar to the proverbial competition between two grocery stores on a single street. Indeed, Downs uses this example to justify his view of party equilibrium. But while this picture may accurately describe candidate behavior in a single-stage election process, it does not accurately describe the behavior of parties. Because it overlooks the leveraging advantage parties exist for, especially in a two-party system, it fails to understand how parties' motivations differ from their candidates'.

The danger, of course, is that the majority-take-all decision rule of the legislature may give some parties power disproportionate to its support. At the extreme, for example, in an 11-person legislature where two parties hold five seats apiece and one party holds one, in each case commensurate with their overall support in the electorate, the smallest party will likely exert too much influence. Although smaller than the other blocs, it is just as able as they are to form winning legislative coalitions. To win, any two parties need to join force. In this example, their relative size does not matter. This may seem arbitrary but it is no worse—and arguably better—than a two-party system where one group gaining the support of 50% + 1 persons in the electorate gets to determine all the outcomes.

the parties complain, this can be expected to change the type of nominees produced. They will be more representative of the voters overall than those produced by the closed primary system. How much more? That depends on several factors, including how many voters from outside the party are interested enough in a particular candidate to support her. But since the blanket primary system is, in fact, structurally identical to a general election (followed by a run-off among the top vote-getters from each party), it will produce over time candidates more representative of the whole electorate. Unlike closed primaries in a two-party system, it should produce an equilibrium within the legislature near that which closed primaries in a free market would. The blanket primary would also retain the decisiveness of the two-party system, an attractive feature to some.

CONCLUSION

"A strong two-party system" and "independent parties" are two of our favorite civic slogans. As I have tried to show, however, we cannot shout both. We cannot grant parties the independence—particularly complete autonomy to nominate candidates—they desire when we cannot rely on the political market to adequately discipline their decisionmaking. If in the existing duopoly regime we grant them the degree of autonomy they wish for, we set ourselves up for political heartbreak. Like any producer in a controlled market, they will serve their own interests first and as much as possible. They will exploit us as much as they can.

This is unfortunate because mass democracy makes the role of the parties quite important. Given our rational political indifference, we truly need these institutions to do much of the work of politics. Democracy-as-consumption will not work well without independent producers. But in a two-party system, we dare not give political parties the autonomy they need to make our politics work best. To give them independence without free competition would turn these institutions against us. 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. While that will be a better world, it will take much thoughtful and tough reform to get there. In the meantime, more moderate reforms like the blanket primary may help us avoid the worst dangers of the strong two-party system we have created for ourselves.

85. In fact, the blanket primary in a two-party system would avoid the danger of a small third party creating an arbitrary legislative equilibrium. See supra note 83.

86. See Downs, supra note 10, at 138 (discussing direct primary requirement and some other forms of regulation of political parties as ways of preventing them from "exploit[ing] the citizenry").