BYU Law Review

Volume 2008 | Issue 5 Article 2

12-1-2008

Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism

Gur Bligh

Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism

Gur Bligh[*]

Abstract: *This Article explores the limitations that the American electoral system imposes upon extremist parties and candidates. Its thesis is that extremists, and particularly anti-liberal extremists, are excluded from the American electoral arena through a combination of direct and indirect mechanisms. This claim challenges the crucial premise of American constitutional theory that the free speech doctrine is a distinct area of "American exceptionalism." That theory posits that the American strict adherence to viewpoint neutrality, the strong emphasis upon the "dissenter," and the freedom granted to extremist speakers is exceptional among liberal democracies. The Article argues that once we focus upon the electoral arena as a distinct arena, we discover that in this domain of core political expression, dissenting extremists are marginalized and blocked and their viewpoints are not represented. The Article demonstrates how various structural elements which characterize the American electoral system create an insurmountable barrier for extremist parties and drive them out of the electoral system. Some of these elements have been created intentionally to impede extremist political parties. In addition, the Article analyzes several federal court decisions that appear to play a crucial role in sealing the fate of these extremists by endorsing the right of the major parties to exclude extremists from the parties in the name of preserving the party's "right to define itself." The Article concludes with an examination of the various implications of this analysis. It compares the American approach to extremism in the electoral arena with the approach adopted in other democracies, and then the Article reflects upon the lessons that can be drawn for relevant issues in American electoral law.*

* Morris Fellow, J.S.D. candidate, LL.M. Columbia Law School; LL.B. Hebrew University of Jerusalem. I am very grateful to Richard Briffault, Michael Dorf, and Kent Greenawalt for their support and invaluable comments on previous drafts of this Article. I also wish to thank Nathaniel Persily, Richard Winger, Marc DeGirolami, Carolijn Terwindt, the participants in the J.S.D. colloquium at Columbia Law School and the editors of the BYU Law Review for their valuable comments. Finally, I would like to extend special thanks to my wife, Naava, for her enduring support.

TABLE OF CONTENTS

I. INTRODUCTION 1369

II. BACKGROUND 1372

III. EXTREMIST SPEECH OUTSIDE OF THE ELECTORAL SYSTEM 1374

IV. EXTREMISM IN THE ELECTORAL ARENA 1376
A. The Electoral System 1376
B. State Electoral Laws 1383
1. Ballot access laws 1384
2. Anti-fusion laws 1386
3. Resulting effect 1388

V. INTENTIONAL USE OF STRUCTURAL FEATURES 1391
A. Ballot Access Laws 1393
B. First-Past-the-Post 1396
C. Conclusion 1398

VI. EXCLUSION OF EXTREMISTS FROM MAJOR PARTIES 1399
A. The "Big Tent" Party 1399
B. Exclusion of Extremists from Major Parties 1401
1. David Duke 1402
2. Lyndon LaRouche 1406
3. Frazier Glenn Miller 1409
C. What Type of Extremists Are Excluded? 1410
D. Conclusion: The American Banning System 1413

VII. IMPLICATIONS 1416
A. Comparison Between the American Banning Regime and Formal Banning Regimes 1417
B. Examining the Exclusion of Extremists from Major Parties 1423
C. Ballot Access Laws Targeting Minor Parties 1434

VIII. CONCLUSION 1439

> [T]he constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office.[1]

I. INTRODUCTION

American constitutional theory regards free speech doctrine as a distinct area of "American exceptionalism."[2] Indeed, the American strict adherence to viewpoint neutrality,[3] the strong emphasis upon the "dissenter"—the lone critic, the non-conformist[4]—and the total rejection of any limitations upon extremist speakers, except in very

1. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

2. *See, e.g.*, Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 32–42 (Michael Ignatieff ed., 2005) ("Although hate speech and defamation provide the most vivid and well-discussed examples, American exceptionalism in fact exists throughout the domain of freedom of expression. . . . Where in the rest of the world freedom of expression appears to be understood as an important value to be considered along with other important values . . . in the United States the freedom of expression occupies pride of place, prevailing with remarkable consistency in its conflicts with even the most profound of other values and the most important of other interests."); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1, 37 (1995) ("The United States, with little tradition of a fascist or monarchical right or a truly revolutionary left, generally adheres to a procedural tolerance confident in its ability to diffuse extremist threats through open debate.").

3. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."); *see also* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 688 (1959) (stating that banning film because it advocates an unconventional idea "str[ikes] at the very heart of constitutionally protected liberty"); Yates v. United States, 354 U.S. 298, 344 (1957) (Black, J., concurring in part, dissenting in part) ("The First Amendment . . . leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.").

4. LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 133 (1986) ("[E]xtremes are not to be understood as the peripheral cost of an inevitably imperfect world, in which no one can be trusted to draw the proper lines properly, but rather as integral to the central functions of the principle of free speech."); STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 10 (1999) ("If we must have a 'central meaning' of the First Amendment, we should recognize that the dissenters—those who attack existing customs, habits, traditions, and authorities—stand at the center of the First Amendment and not at its periphery.").

rare circumstances, is exceptional among liberal democracies. While other liberal democracies severely limit antidemocratic speech, hate speech, and racism,[5] the First Amendment protects the right of Neo-Nazis to march in Jewish neighborhoods,[6] the Ku Klux Klan to freely call for hostile acts against African Americans and Jews,[7] and hate groups to distribute their messages on the Internet.[8] Moreover, American exceptionalism holds that this libertarian approach has particular significance in the context of political speech, especially within electoral campaigns.[9] Thus, although various liberal democracies, mostly in Europe, impose explicit limitations on extremist political parties, the American exceptionalist conventional wisdom has been that the question of limitations upon political parties is a largely "un-American" issue, relevant only in countries in which the libertarian tradition of free speech is not so central to the constitutional framework.[10]

This Article challenges the validity of this exceptionalist paradigm as applied to extremist parties and candidates in the American

5. *See, e.g.*, John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006); Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 J. TRANSNAT'L L. & POL'Y 253 (2003).

6. Collin v. Smith, 578 F.2d 1197, 1210 (7th Cir. 1978) (examining the Skokie Affair).

7. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

8. *See* Knechtle, *supra* note 5, at 540 ("While the United States is becoming a hub for Internet hate speech, other countries are prohibiting hateful content distributed on the Internet in their countries."); *see also* Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5 (2002).

9. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) ("[T]he constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office."); *see also* Buckley v. Valeo, 424 U.S. 1, 39 (1976) (characterizing "political expression" as standing "'at the core of our electoral process and of the First Amendment freedoms'" (quoting Williams v. Rhodes, 393 U.S. 23, 32 (1968))).

10. The limitations which were imposed in the past, specifically upon Socialist speakers and the CPUSA—the American Communist Party—are considered part of the "Red Scares" of the 1920s and of the 1940s and are looked upon with shame and indignation. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 215 (1994) ("We like to think we are more tolerant in this country. . . . But the fact is that in periods of real or imagined danger we have tended to adopt measures strikingly similar in effect to those expressly countenanced by the [German] Basic Law . . . ."); Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 93 (2004) ("The constitutional concern should be for how our government behaved and for the ominous messages that governmental behavior sent to the populace. Nothing in the revelations of the Venona or Comintern documents in any way alters the fundamental inconsistency between governmental action during the McCarthy era and the values of a free society.").

electoral arena. The Article argues that once we change our point of reference and focus upon the electoral arena as a distinct arena,[11] we discover that in this domain of core political expression, dissenting extremists are marginalized and blocked, their viewpoints are not represented, and the ideological landscape is centralized and limited. The exclusion of extremists, and particularly anti-liberal extremists, from the electoral arena is conducted through a combination of direct and indirect mechanisms. Thus, various structural—seemingly "neutral"—elements which characterize the American electoral system create an insurmountable barrier for extremist parties and candidates and drive them out of the electoral system. Some of these elements have been created intentionally to impede extremist political parties. In addition, the major parties have chosen to exclude extremists who attempted to participate in major parties' nomination processes. These exclusion decisions have been upheld by federal courts, closing the major avenue of participation for these extremists.[12] Thus, the American electoral system imposes an implicit banning regime which blocks extremist representation and leaves extremists outside of the major decision-making bodies of the nation.

This Article introduces in Part II the party banning phenomenon and its international manifestations. In Part III, it discusses the limitations imposed in the United States on extremist speech outside the electoral arena. Part IV discusses the structural characteristics of the American electoral system and the extent to which they limit the participation of extremist parties. Part V explains to what extent these structural barriers were adopted intentionally to curb extremism. Part VI discusses how major parties exclude extremists seeking to operate within their ranks and to what extent courts protect these exclusion decisions. Finally, Part VII concludes with a discussion of the various implications of this de facto exclusion of extremists from the American electoral system. It compares the American approach to extremism in the electoral arena with the

11. In this respect, my argument makes use of recent scholarship which argues that the electoral arena is distinct from the general free speech world. *See, e.g.*, C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 25–33 (1998); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1763–66 (1999); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1899–22 (1999).

12. *See infra* Part VI.B.

approach adopted in other democracies, and then reflects upon the lessons that can be drawn from this account for relevant issues in American electoral law.

II. BACKGROUND

Historically, the question of extremist participation in the electoral arena received significant worldwide attention in the 1940s and 1950s in the context of the post-war fear of the return of Fascism and Nazism and the growing fear of Communism. However, lately, the party-banning instrument has received renewed attention. This is largely due to the resurgence of radical right movements in Western Europe, the emergence of ethnic and religious fundamentalist political parties in the Middle East and Europe and the worldwide "War Against Terror."[13] In recent years, racist and xenophobic parties in Belgium, Germany, the Netherlands, and Israel were the focus of restrictive proceedings. In 2003, the Spanish Supreme Court banned the *Batasuna* party, claimed to be the political wing of the E.T.A.—the Basque separatist terrorist organization.[14] In the same year, the European Court of Human Rights upheld the Turkish ban of the Islamic Welfare Party (*Refah Partisi*), holding that its Islamic agenda goes against fundamental democratic principles.[15] Moreover, the new democratization process in the Middle East has forced some of the countries in that region to deal with strong Islamic fundamentalist parties that combine electoral participation with a radical Islamic agenda and frequent use of violence. Notable examples can be found in Gaza (Hamas), Lebanon (Hezbollah), and Iraq (some of the Shiite parties, like Moktada al-Sadr's movement).[16] These developments in Europe and

13. *See* Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT'L J. CONST. L. 488, 491 (2006) ("Despite its historical pedigree, questions relating to the nature and scope of militant democracy have acquired greater political and legal salience in recent years. No doubt, the rejuvenation of militant democracy is partly a response to the profoundly destabilizing potential of new forms of terrorism and religious fundamentalism.").

14. *See* Víctor Ferreres Comella, *The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna*, *in* MILITANT DEMOCRACY 133, 133–36 (András Sajó ed., Eleven Int'l Publ'g 2004).

15. Refah Partisi (The Welfare Party) v. Turkey, 2003-II Eur. Ct. H.R. 267.

16. *See* Noah Feldman, *Ballots and Bullets*, N.Y. TIMES, July 30, 2006, § 6 (Magazine), at 9.

the Middle East have led to renewed academic interest in the possibility of restricting extremist political parties.[17]

Traditionally, the discussion of restrictions on political parties tended to highlight the libertarian ethos of the American free speech jurisprudence, and to stress the American rejection of any limitations upon radical speakers. A significant example is Fox and Nolte's seminal article which discusses the banning of political parties in a comparative perspective. Fox and Nolte characterize the United States as a *procedural* democracy—which effectively does not limit extremism in the electoral arena. They regard countries like Germany, however, as a *substantive* democracy because Germany limits extremist parties in the electoral system.[18]

It appears that this approach has been affected by the understandable, but misguided, tendency to lump together restrictions upon extremist political speech and restrictions upon extremist electoral participation.[19] Initially, this tendency seems reasonable given the natural connection between freedom of speech in the political arena at-large and the right to electoral participation.[20] However, despite this obvious connection between

17. *See, e.g.*, Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1406 (2007); Nancy L. Rosenblum, *Banning Parties: Religious and Ethnic Partisanship in Multicultural Democracies*, 1 LAW & ETHICS HUM. RTS. 17 (2007).

18. *See* Fox & Nolte, *supra* note 2, at 37. It should be noted that Fox and Nolte label the United States as a "militant procedural democracy" because of the limitations imposed on the Communists during the 1950s, but it is clear from their description that today it would be considered a "tolerant procedural democracy." As they explain, "[t]he United States, with little tradition of a fascist or monarchical right or a truly revolutionary left, generally adheres to a procedural tolerance confident in its ability to diffuse extremist threats through open debate." *Id*.

19. *Id*. at 26; *see also* Stephen G. Breyer, *Symposium on Terrorism, Globalization and the Rule of Law: An Introduction*, 27 CARDOZO L. REV. 1981, 1985 (2006) ("The experience of totalitarianism, however, has made certain societies more risk averse. One consequence of this phenomenon is the constitutionalizing of 'militant democracy' in countries such as Germany. Unlike the United States, where almost all political speech receives strong constitutional protection, the German Basic Law allows the banning of political parties that advocate totalitarianism or racial hatred."). For further discussion, see Issacharoff, *supra* note 17, at 1418 ("A great deal of the doctrinal work under the First Amendment's treatment of political speech stems from the specific question that is typically presented in American courts: whether the speech in question is sufficiently inciteful of criminal conduct to sustain a criminal prosecution.").

20. On the most basic level, it is reasonable to assume that one of the main aims of political speech is to convince people to support a certain idea and as a result to advance this idea through the political process. Similarly, it seems futile to allow a political party to compete in an election if it has no access to the marketplace of ideas. Meaningful electoral participation

extremist speech in the "marketplace of ideas" and extremist participation in the electoral arena, the United States, like other countries, does in fact treat the general free speech domain differently than the electoral domain. This different treatment manifests itself prominently in the context of the present discussion—limitations upon extremist political parties. If we examine the electoral system as a distinct domain, we will reach a surprising conclusion, namely, that the American electoral system is in certain respects even more restrictive towards extremists than other liberal democracies.[21] While the description of this restrictive regime will be the focus of this paper, the Article will briefly describe the truly libertarian approach controlling extremist speech outside of the electoral arena. This account will serve to highlight the dramatic differences between these two domains.

III. EXTREMIST SPEECH OUTSIDE OF THE ELECTORAL SYSTEM

The controlling principle guiding the limitation of extremist political speech in the United States evolved from the original "clear and present danger" test introduced initially by Justices Holmes and Brandeis in the early decades of the twentieth century.[22] This test was adopted in its present form in 1969,[23] and today it is considered the accepted framework for evaluating restrictions upon free speech. Yet, it was only gradually accepted by the Supreme Court and the legal community.[24]

During the 1940s and 1950s, as a result of the heightened tensions of the Cold War, Congress adopted several legislative acts that considerably limited extremist free speech. The most significant was the Smith Act of 1940 which prohibited the knowing, or willful

is impossible if the candidate cannot present its agenda to the public in media appearances, speeches, newspaper articles, or other modes of expression.

21. For a similar argument concerning the structural response to extremist parties in the American electoral arena, see Issacharoff, *supra* note 17, at 1418–20.

22. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create *a clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." (emphasis added)); Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

23. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

24. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119–236 (1988).

advocacy or teaching, of the duty, necessity, desirability, or propriety of overthrowing the United States Government by force or violence.[25] Despite the restrictive nature of this statute, in *Dennis v. United States*[26] the Supreme Court upheld the Act's constitutionality and sustained the conviction of the leaders of the Communist Party of America for violations of the Smith Act. In its decision, the Court applied a considerably weakened version of the "clear and present danger" test. Indeed, the Court adopted the Second Circuit's formula which allowed a conviction even if the danger is not imminent when "'the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[27]

Despite this initial rejection of the Holmes-Brandies formula, the libertarian version of the "clear and present danger" test gradually won the day as the "Red Scare" waned. In *Yates v. United States*[28] the Court held that a speaker cannot be convicted for his speech if it consists of mere "advocacy and teaching of forcible overthrow [of the government] as an abstract principle," even if the intent of a speaker was to promote violence.[29] Then in *Brandenburg v. Ohio*,[30] a case involving the conviction of a leader of a Ku Klux Klan group in Ohio, the Court held that a state may only prohibit advocacy of unlawful conduct if the advocacy "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[31] This formulation of the test requires proof of both the subjective intention of the speaker to produce imminent lawless action and an objective likelihood that this action is indeed imminent. Later decisions further narrowed the definition of the "imminence" requirement.[32]

25. Formally called the Alien Registration Act, ch. 439, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (2000)). *See* KALVEN, *supra* note 24, at 191.

26. 341 U.S. 494 (1951).

27. *Id.* at 510 (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

28. 354 U.S. 298 (1957).

29. *Id.* at 318–19.

30. 395 U.S. 444 (1969).

31. *Id.* at 447.

32. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (holding that advocacy of violence "weeks or months" down the road did not satisfy the *Brandenburg* exception); Hess v. Indiana, 414 U.S. 105, 108 (1973) ("[A]dvocacy of illegal action at some indefinite future time" is not considered "imminent.").

This very libertarian formula was often trumpeted as a reflection of the American "exceptionalist approach" to political speech. It is indeed very protective of extremist speech and differs considerably from the approach adopted by other liberal democracies, such as Germany or Canada, especially when it comes to extremist racist and hate speech.[33] As this Article will demonstrate, however, the tendency to focus exclusively on the *Brandenburg* test is misleading and partial. To gain true insight about the barriers facing extremists in the American electoral arena, we must proceed to examine it as a distinct domain.

IV. EXTREMISM IN THE ELECTORAL ARENA

A. The Electoral System

The first major barrier facing extremists in the American electoral arena is the electoral system itself. The American electoral system on the federal and state levels has been mainly characterized by single-member districts and a plurality or first-past-the-post (FPTP) electoral system.[34] In an FPTP system, the candidate who receives the most votes in the voting district is considered the winner and becomes the district's representative. The other "losing" candidates are not entitled to any representation, and the votes the losing candidates receive are in effect "wasted." An FPTP system is generally used for elections in the United Kingdom, Canada, India (for the lower house), and other Commonwealth countries.[35] It seems to be losing some of its appeal in recent years as new democracies in Eastern Europe, Latin America, and other parts of

33. *See* sources cited *supra* note 5; *see also* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1542–44, 1548–54 (2003); Schauer, *supra* note 2, at 36–38.

34. On the state and local level other electoral systems are also employed. For example, several states use either multimember districts or a mixture of single-member and multimember districts for State House elections (e.g. Arizona, Maryland, New Hampshire, North Dakota, South Dakota, Vermont, and West Virginia). *See* David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 148 (2006). Some municipalities use an at-large voting system in which the entire town or city is considered one district and all the candidates run against each other. *See* DOUGLAS J. AMY, BEHIND THE BALLOT BOX: A CITIZEN'S GUIDE TO VOTING SYSTEMS 56 (Prager Pub. 2000). In the past, several cities have also experimented with proportional representation. *See infra* Part V.B.

35. *See* Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L. POL. SCI. REV. 297, 299–301 (1997).

the world tend to adopt "proportional representation" (PR) systems or "mixed" electoral systems which combine elements from plurality systems with elements from proportional systems.[36]

The nature of the electoral system has an enormous effect upon the political landscape, especially upon the number of political parties and their characteristics. The first significant effect of an FPTP system is its tendency to favor a two-party electoral system.[37] This tendency is widely considered a "sociological law" which has been referred to as "Duverger's Law."[38] In addition, where a two-party system prevails, it typically leads to a centralized ideological spectrum, which is oriented toward the median voter.[39] Since each of

36. *Id.* at 298.

37. MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE 217 (Malcolm Anderson trans., 1954); *see also* Howard A. Scarrow, *Duverger's Law, Fusion, and the Decline of American "Third" Parties*, 39 POL. RES. Q. 634, 642 (1986).

38. Duverger's Law is explained by a combination of mechanical and psychological factors. The *mechanical* factor is the actual "'under-representation' of the third, i.e. the weakest party, its percentage of seats being inferior to its percentage of the poll." DUVERGER, *supra* note 37, at 224. For instance, a minor party which consistently receives 15% of the vote in the various electoral districts, would typically receive 15% of the seats in a PR system, but it would achieve no representation in the single-member FPTP system because it would never be the "winner" in the district. According to Duverger's law, this mechanical component is further reinforced by a *psychological* factor which is based on the expected tendency of a rational voter to vote for one of two alternatives that have a real chance of winning the single seat representing the particular district. *See id.* at 224–26. Others have added a further, elite-based explanation, for the perpetuation of the two major parties, arguing that a rational politician will seek to enter a party in which he has long-term career prospects and only the major parties offer that advantage. *See* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 57 (1995). William Riker suggested two exceptions to "Duverger's Law" which include countries in which "(1) third parties nationally are continually one of two parties locally, and (2) one party among several is almost always the Condorcet winner in elections." *See* William Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753, 761 (1982). The first exception refers to cases in which the support of the emerging third party is concentrated in a specific region of the country, sufficiently so, that it can emerge as the winner in certain electoral districts in that particular region. A typical example of this phenomenon can be found in Canada. *Id.* at 301. The second exception was originally focused on India, in which one party—the Congress—remained in power for a long period of time. *Id.* at 760–61.

39. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 114–25 (1957); E.E. SCHATTSCHNEIDER, PARTY GOVERNMENT 85 (1942) ("The second effect of the two-party system is the fact that it produces moderate parties."); 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, 348; Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM.

the two major parties knows that it increases its chances of winning by appealing to the other major party's voters, both major parties tend to present a centrist agenda that is acceptable to the moderates of the competing party and independents. Thus, instead of emphasizing the differences between the two parties, there is a natural incentive for both parties to blur their differences and present agendas that are not far from the centrist views of the median voter.[40] This gravitation toward the center is somewhat moderated by the need of the major party candidates to appeal to the party activists who typically do not hold "median" positions. These activists exert considerable influence in the party's nomination process. In addition, they may choose to abandon the party in the general election if it completely loses its identity and moves too much to the center.[41] Yet, despite the influence of party activists, most political scientists still hold the view that the effect of party activists remains limited and that the structural constraints of the two-party system will still severely penalize a party that strays too much from the center in a general election.[42]

& MARY L. REV. 1939, 1997 (2003); Nancy L. Rosenblum, *"Extremism" and Anti-Extremism in American Party Politics*, 12 J. CONTEMP. LEGAL ISSUES 843, 860 (2002).

40. For a detailed explanation of this tendency, see Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 674–75 (1998).

41. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 72 (1970) ("[I]n a two-party system a party will not necessarily behave as the Hotelling-Downs vote-maximizer because those 'who have nowhere else to go' are not powerless but influential. . . . The mobilization of the indifferent voters and the winning over of the undecided ones was seen to depend to a considerable extent on the enthusiasm which each of the parties can inspire among activist party workers and volunteers. Since the activists are far from being middle-of-the-roaders, their enthusiasm can be dampened by a party's moving to an excessively middle-of-the-road position."); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 306–07 (2001) ("To focus exclusively on the contest for the median voter therefore misses much of the critical competitive dynamic of American politics. First, to run for office a candidate must prevail in the party nominating process, where the power of the activist wing is intensified. But even after nomination, an exclusive focus on appealing to the median voter also misses the dramatic effects that a mobilized activist base can have in expanding the pool of potential voters for a party's candidate. With voter turnout hovering around the fifty percent mark, activist-fueled get-out-the-vote drives may prove as effective in pulling out a close election as concerted appeals to the center.").

42. Rosenblum, *supra* note 39, at 869 ("Summarizing the four theses explored in this section: The forces for party convergence at the center are strong. The forces for polarization and targeting are contingent; that is, they are strategic and variable rather than enduring structural elements of party identity."); *see also id.* at 864 ("As a rule, political scientists accept

Furthermore, because only broad-based parties have a real chance of winning elections, the FPTP system also dictates the evolution of the major parties into broad-based coalitions of interests and political forces.[43] A single-issue party or a party representing a specific sector of the electorate will usually not attract enough voters to win. The theory behind this approach is sometimes called the "big tent" approach of the major parties. Under the "big tent" approach, electoral parties cannot wait to form coalitions until after the elections. Instead, these coalitions tend to form before the elections when various interest groups and social forces battle for influence within the major parties.[44] This structure serves as an additional force pushing the electoral system toward moderation because the various factions coalescing to form a major party have to accommodate each other to cooperate within one major party.[45] This contributes to the development of major parties into open and opportunistic parties, which are ideologically diffuse.[46]

As a result of the tendency of the major parties to occupy the center of the political arena, extremist voters who do not feel represented in the major parties are typically forced to form a minor/third party.[47] While the center is the battleground between

the persistent and stable institutional and attitudinal forces for convergence and centrism in the American party system.").

43. *See* ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 455 (1967) ("To win national elections, even to win influence over national policies, every group must participate somehow in the politics of coalition building."); JOHN F. BIBBY & L. SANDY MAISEL, TWO PARTIES—OR MORE? THE AMERICAN PARTY SYSTEM 61 (2d ed. 2003) ("[T]he single-member system brings with it incentives toward the creation of two broadly based parties that are capable of winning district-level pluralities and majorities in the legislative chamber.").

44. *See* SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES 65 (2000); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 108–09 (2004).

45. LARRY J. SABATO, THE PARTY'S JUST BEGUN: SHAPING POLITICAL PARTIES FOR AMERICA'S FUTURE 12 (1988) ("The party tames its own extreme elements by pulling them toward an ideological center in order to attract a majority of votes on election day.").

46. LIPSET & MARKS, *supra* note 44, at 65.

47. *See* Rosenblum, *supra* note 39, at 851. Indeed, as various political scientists have noted, American third parties almost never campaign from the center. *See* ALEXANDER M. BICKEL, REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM 79–80 (1971), *quoted in* Anderson v. Celebreezze, 460 U.S. 780, 794 n.17 (1983) ("Again and again, minor parties have led from a flank, while the major parties still followed opinion down the middle. In time, the middle has moved, and one of the major parties or both occupy the ground reconnoitered by the minor party . . . ."); Seymour Martin Lipset, *What Are Parties For?*, 7 J. DEMOCRACY 169, 174 (1996).

the two major parties, the minor parties typically campaign "from the flank," trying to draw support from the more committed and extremist voters within each of the two major parties.[48] Although it is impossible to claim that all minor parties are relatively extreme,[49] it seems fair to say that the reverse is true, namely, that all extremist parties will begin their life as minor parties.[50] Yet, even if these minor parties succeed in attracting the extremist voters who are unsatisfied with the major parties, their chances of success in gaining representation are very slim due to the FPTP system. Indeed, the FPTP system creates an effective lockup preventing extremist representation in the elected organs of government. On the one hand, the system tends to create a two-party system that gravitates toward the center, while at the same time, it practically blocks challenges from minor parties who represent extremist voters who feel discontent with the centrist views of the major parties.[51]

To summarize, two major conclusions can be drawn from the analysis of the American electoral system. First, the FPTP system tends to under-represent and effectively block representation of segments of the electorate which are not comfortable with the centrist agenda of the two major parties.[52] Second, the electoral landscape created by the FPTP system results in a close association between minor parties and extremist parties. That is, typically, a

48. In fact, as Pippa Norris has recently argued, even third-party candidates that appear to be centrists like Ross Perot are no exception to this general rule. *See* PIPPA NORRIS, RADICAL RIGHT: VOTERS AND PARTIES IN THE ELECTORAL MARKET 239 (2005). Norris argued that Perot tended to emphasize populist, antiestablishment themes that were similar (although obviously not identical) to those traditionally advanced by European radical right parties, especially his anti-NAFTA focus, which "tapped into fears of 'foreigners' stripping away American jobs" and his anti-government themes. *Id.*

49. For example, the Libertarian Party cannot be considered an extremist party. Similarly, John Anderson, the independent presidential candidate in the 1980 elections, was considered a centrist.

50. Theoretically, the extremists could be a silent majority not adequately represented or acknowledged in the existing political arena, but this appears to be a rare and unusual occurrence. However, in certain cases even if the extremists are *in fact* a minority, they may choose to present themselves as a hidden majority that is not adequately mobilized. *See* Rosenblum, *supra* note 39, at 852 ("[N]on-centrist groups have been known to claim to represent a hidden or silent or moral majority, waiting to be mobilized. Consider this manifesto by a leader of the American Militia Organization: 'Have you noticed that people like us are no longer the fanatics; the extremists? Men listen now when we speak. All but fools know we're in a desperate crises [sic] and they're listening for solutions.'").

51. *See* Issacharoff, *supra* note 17, at 1419.

52. Norris, *supra* note 35, at 305.

minor party will hold views that are more extreme than the views of the two major parties.

Of course, the single-member-district FPTP system is far from being the only possible electoral system. In fact, it is not even a constitutional requirement.[53] In essence, it reflects a conscious institutional decision to prefer certain democratic values and reject others. As Justice Breyer explained in *Vieth v. Jubelirer*, "single-member-district systems and more-directly-representational systems reflect different conclusions about the proper balance of different elements of a workable democratic government."[54] For example, where states have chosen to employ multi-member electoral districts (which by their nature are more representational) the political landscape has changed considerably. Indeed, recent research comparing the multi-member electoral districts of the Arizona House of Representatives with the single-member districts of the Arizona Senate, showed substantial differences both in the extremism of the elected officials and in their actual legislative patterns.[55] Unsurprisingly, the multiple-member district representatives were more extreme in their views and more ideological in their voting patterns compared to state senators elected from the same districts but in a single-member system.[56]

Even more substantial are the differences between an FPTP system and its major rival—the system of proportional representation (PR), which is especially widespread among democracies in Europe. In a PR system, representation of the entire electorate or of a certain constituency is divided among the parties in proportion to the number of votes cast for party lists.[57] As a result, even a minor party that does not stand a chance of gaining a majority will still be represented in the legislature according to its comparative power within the electorate. Accordingly, a PR system offers a much more realistic chance for extremist parties to gain representation in

53. *See* 2 U.S.C. § 2(c) (2000) (requiring that members of Congress be elected from single-member districts).

54. Vieth v. Jubelirer, 541 U.S. 267, 358 (2004) (Breyer, J., dissenting).

55. Lilliard E. Richardson, Jr., Brian E. Russell & Christopher A. Cooper, *Legislative Representation in a Single-Member Versus Multiple-Member District System: The Arizona State Legislature*, 57 POL. RES. Q. 337, 343 (June 2004).

56. *Id.* at 338–40. According to the research, this difference was evident despite the fact that both senators and representatives represent the exact same geographical districts, have the same age limits, residency requirements, and length of terms.

57. *See* Norris, *supra* note 35, at 303.

parliament. Unlike the FPTP system, in a PR system an extremist party does not need to emerge as a winner in a certain district in order to gain representation. Instead, it is enough that the extremist party gathers a proportion of the electorate that is equal to the proportional power of one parliament member.[58] Moreover, because minor party members in a PR system do not need to confront or accommodate others with divergent views within the party, there is a good chance that their positions will further tilt towards the extremes.[59]

Indeed, extreme parties have proven to have greater representation in PR systems than in FPTP systems. A comparative study that examined the success of radical right parties in thirty-nine countries found that while radical right parties did not receive a smaller share of the popular vote in majoritarian systems in comparison to PR systems,[60] "radical right parties were more than twice as successful in gaining seats in parliament under a PR system as under majoritarian systems."[61] "Before-and-after" studies, comparing the results of extremist parties before and after a change to a PR system, yielded the same result.[62] Extremist parties that had practically no representation in parliament under an FPTP system gained significant representation when the system moved to PR.[63] A

58. Many countries that adopt a proportional representation electoral system also require a minimum threshold of votes as a condition for representation in parliament. For instance, in Germany a party that receives less than five percent of the vote is not entitled to *any* seats in parliament. *See* AREND LIJPHART, ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945–1990, at 11–12, 22 (Oxford Univ. Press 1994) (explaining the nature of such thresholds and listing the thresholds for different countries).

59. *See* John F. Bibby, *In Defense of the Two-Party System*, *in* MULTIPARTY POLITICS IN AMERICA: PROSPECTS AND PERFORMANCE 45, 49–50 (Paul S. Herrnson & John C. Green ed., 2d ed. 2002); Pildes, *supra* note 44, at 110 (explaining that the minor party members "might miss out on the dampening effect of heterogeneous debate, leading to the confirmation and exacerbation of extreme views").

60. *See* NORRIS, *supra* note 48, at 109–14. This finding defied expectations of strategic voting and the "wasted vote" assumption. Norris provided two possible explanations: first, it is possible that due to the significant ideological distance between the views of radical right voters and the positions adopted by the major parties, neither of the parties is considered worthy to "earn" their vote. Second, this may be a result of the fact that voters for radical right parties vote as an "expressive" or "symbolic" act and therefore are less concerned about the practical implications of this vote.

61. *See* NORRIS, *supra* note 48, at 114.

62. *Id*. at 107.

63. *Id*. In France, for example, the extreme right party Front National failed to win any seats in the 1981 parliamentary elections held under a second-ballot majoritarian system, yet

party's share of seats is obviously important because it determines the power, legitimacy, status, and resources that flow from elected office.[64]

Yet, despite the significant difficulty the FPTP system poses for minor (and extremist) parties, such parties were considered serious contenders in the political arena throughout most of the nineteenth century.[65] While two major parties dominated the electoral arena, minor parties were considered serious contenders in the political arena. In certain cases, they succeeded in electing their own candidates to public offices, and in other cases, they agreed to support a major party's candidate in return for various concessions, a practice that is known as "fusion." Naturally, these parties presented ideological diversity beyond the two major parties.[66]

B. State Electoral Laws

The introduction of state ballot access laws further curtailed the limited representation granted to minor and extremist parties in the American electoral system. These laws were the product of extensive reforms centered on the adoption of the Australian government-printed ballot.[67] This change opened the door for imposing additional limitations upon minor parties in the first decades of the twentieth century.

The power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives" is granted to the

suddenly gained thirty-five seats under the PR system in 1986 only to plummet to one seat in 1988 after PR was repealed.

64. *Id.* at 108.

65. Following the 1896 elections, minor parties held twelve seats in the Senate (out of ninety) and twenty-seven seats in the U.S. House of Representatives (out of 357). *See* U.S. Senate, Party Division in the Senate, 1789–Present, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm; Office of the Clerk: U.S. House of Representatives, Party Divisions of the House of Representative (1789 to Present), http://clerk.house.gov/art_history/house_history/partyDiv.html.

66. *See, e.g.*, STEVEN J. ROSENSTONE ET AL., THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE 78–80 (1984) (explaining that minor parties of that period resembled major parties: they ran candidates for various offices, held conventions, and took stands on a wide range of issues. In addition, they managed to survive beyond one electoral cycle); Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288–89 (1980) (explaining that fusion "helped maintain a significant third party tradition by guaranteeing that dissenters' votes could be more than symbolic protest, that their leaders could gain office, and that their demands might be heard").

67. *See* ROSENSTONE ET AL., *supra* note 66, at 19–20.

states in the Constitution.[68] The states also have complete control over the election process for state offices.[69] Although this power is subject to congressional oversight and other constitutional limitations, most significantly the First Amendment and the Equal Protection Clause, the states still enjoy wide latitude in regulating various aspects of state electoral campaigns.[70] And indeed, with the introduction of state-printed ballots, the states made full use of their authority to erect an extensive regulatory framework that effectively wiped out minor and extremist parties from the American electoral scene.

1. Ballot access laws

Typically, a state's ballot access statute specifies that parties that receive a certain number of votes, or a certain percentage in previous elections, will be automatically placed on the ballot. However, most independent candidates and minor parties do not obtain the required percentage of votes necessary to be listed on the ballot. Therefore, to be listed on the ballot, these independent and minor party candidates are required to file a ballot access petition, which contains a requisite number of signatures of registered voters in the state.[71] The number of signatures needed varies from state to state and from position to position and is usually a percentage of the total number of votes cast in the last general election or a percentage of the registered voters in the state.[72] In total, to place an independent presidential candidate on the ballot in all fifty states requires more than 800,000 signatures.

68. U.S. CONST. art. I, § 4, cl. 1; *see* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1989).

69. *See Tashjian*, 479 U.S. at 217.

70. *See* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1282 (2005).

71. *See* ROSENSTONE ET AL., *supra* note 66, at 19–25; Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. LEGIS. 167, 174–77 (1991).

72. For example, to get a presidential candidate on the 2004 ballot required 153,035 signatures in California (1% of the registered voters), 58,842 signatures in North Carolina (2% of the total votes in the last gubernatorial elections), twenty-five in Tennessee, and no signatures at all in states such as Colorado and Louisiana (only a $500 fee). *See* Richard Winger, *How Many Parties Ought to Be on the Ballot?: An Analysis of Nader v. Keith*, 5 ELECTION L.J. 170, 196 (2006) (providing a chart with historical details regarding the ballot access requirements in the fifty states). In each case Winger lists the *minimal ballot access requirement*. In some states, the easiest route is appearing as an independent candidate while in others as a party candidate.

To place a party's presidential candidate on the ballot in all fifty states requires even more signatures and requires registration of tens of thousands of voters as party members.[73]

In addition to substantive signature requirements, many states add additional procedural hurdles, such as relatively brief time periods for gathering the signatures[74] and early deadlines for completing the signature petition.[75] Furthermore, each state has a different set of procedural requirements concerning the eligible signatories, the personal details each signatory has to provide, the identity of the petition circulators, and various other technical matters.[76] Finally, as recently recognized by Judge Posner in *Nader v. Keith*,[77] the ballot access petition is often subject to a burdensome validation procedure that is aimed at verifying that all signatures are authentic and comply with the complex state regulations.[78] When states institute rigorous validation procedures, the actual number of signatures required may be much larger than the formal number stated in the statute, as candidates are forced to submit additional signatures to hedge against the risk that some will be invalidated.[79] As ballot access requirements become more technical and cumbersome and validation proceedings more unforgiving, it becomes much harder for a candidate to know in advance how many additional signatures are needed.[80] For example, in the *Keith* case, approximately one-third of Nader's signatures were invalidated.[81]

73. For a detailed chart of 2004 ballot access requirements see Richard Winger, 2004 Petitioning for President, *Ballot Access News* (September 1, 2004), http://www.ballot-access.org/2004/0901.html#11. *See generally* E. JOSHUA ROSENKRANZ, VOTER CHOICE '96: A 50-STATE REPORT CARD ON THE PRESIDENTIAL ELECTIONS (Brennan Center 1996).

74. For instance, Minnesota required the petition to be circulated within a two-week period, while California required a twenty-four day period. *See* Smith, *supra* note 71, at 177 n.53; Winger, *supra* note 72, at 176.

75. For instance, some states required the petition to be filed by June of an election year (Arizona, Colorado, Illinois, Indiana, and North Carolina). *See* Winger, *supra* note 72, at 192 (containing a chart presenting the evolution of the petition deadlines in the fifty states).

76. For examples of the various procedural requirements, see generally Mark R. Brown, *Policing Ballot Access: Lessons from Nader's 2004 Run for President*, 35 CAP. U. L. REV. 163, 178–216 (2006). For a general survey of these burdensome requirements, see Smith, *supra* note 71, at 176–77.

77. 385 F.3d 729, 735 (7th Cir. 2004).

78. *See* Robert Yablon, *Validation Procedures and the Burden of Ballot Access Regulations*, 115 YALE L.J. 1833, 1835–38 (2006).

79. *Id*. at 1835–36; *see also* NORRIS, *supra* note 48, at 90.

80. Yablon, *supra* note 78, at 1837.

81. *Nader*, 385 F.3d at 734.

The Supreme Court has generally afforded wide latitude to the states in devising ballot access laws.[82] The Court has provided that states may require candidates to demonstrate "a significant modicum of support" before allowing them access to the ballot.[83] For example, the Supreme Court has upheld a Georgia ballot access law that required independent candidates to obtain signatures from five percent of registered voters to qualify for the ballot.[84] It has also upheld various procedural requirements relating to the signature-petition process, such as the disqualification of voters who had voted in a party primary from signing a ballot access petition for another party, a requirement that all signatures be notarized, and a limitation of the signature-gathering period to fifty-five days.[85]

Nevertheless, in certain cases, when the ballot access laws were deemed particularly burdensome, the Court has intervened. For example, the Court has held that an Ohio ballot access law was unconstitutional because it required third parties to obtain signatures totaling fifteen percent of the number of ballots cast in the last gubernatorial election.[86] This provision made it "virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties."[87] The Court has also struck down a ballot access law that required the ballot access petition to be filed by March of an election year, before the state primary, and almost eight months before the general election.[88]

2. Anti-fusion laws

State anti-fusion laws impose another notable barrier upon independent candidates and minor parties. Fusion candidates are candidates who become the nominee of two parties, usually a major party and a minor party. Fusion ballots, which allow multiple listings

82. *See generally* Evseev, *supra* note 70, at 1287–95; Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 424–38 (2005).

83. Jenness v. Fortson, 403 U.S. 431, 442 (1971); *see* Richard Winger, *The Supreme Court and the Burial of Ballot Access: A Critical Review of* Jenness v. Fortson, 1 ELECTION L.J. 235 (2002) (criticizing the *Jenness* decision and the wide latitude that is afforded to states in devising ballot access laws); *see also* Issacharoff & Pildes, *supra* note 40, at 683–87.

84. *Jenness*, 403 U.S. at 438.

85. Am. Party of Tex. v. White, 415 U.S. 767, 786 (1974).

86. Williams v. Rhodes, 393 U.S. 23, 25 (1968).

87. *Id.*

88. Anderson v. Celebrezze, 460 U.S. 780, 806 (1983).

of candidates or separate listings of parties on the ballot, are the most effective form of fusion.[89]

The ability to nominate a fusion candidate is an important means by which a minor party can gain political power. The significance of fusion for minor parties is two-fold. First, it allows a minor party that supports a major party candidate to give some indication as to its true force in the ballot.[90] When the votes are counted, the minor party can demonstrate its relative power by showing how many voters voted for the candidate on its "line."[91] This power may allow the minor party to attain a stronger bargaining position in future electoral campaigns when it demands concessions from a major party candidate in exchange for its support.[92] Second, fusion enables serious minor parties to survive across elections by obtaining sufficient votes to assure automatic ballot access in the next electoral campaign. Hence, the fusion candidacy allows the minor party to overcome the significant hurdle of attaining sufficient signatures to be included on the ballot—a task that a minor party normally faces in every electoral campaign.[93]

The importance of fusion ballots for the survival and success of minor parties led the two major parties to adopt restrictive measures to eliminate this phenomenon. In the last two decades of the nineteenth century and early twentieth century, after the Australian government-issued ballot was introduced, states quickly outlawed fusion candidates.[94] Although the major parties portrayed these anti-fusion laws as a necessary means to prevent voter confusion and electoral fraud,[95] the laws were generally perceived, and sometimes explicitly presented, as means to weaken minor parties.[96] Currently fusion is legal in only a few states. All other states have adopted some

89. *See generally* Argersinger, *supra* note 66; Scarrow, *supra* note 37.

90. Scarrow, *supra* note 37, at 637.

91. *Id*.

92. *Id*. at 637.

93. Pildes, *supra* note 44, at 118.

94. Scarrow, *supra* note 37, at 637–38.

95. *Id*. at 639.

96. Argersinger, *supra* note 66, at 303 ("As the attorney general of one state noted, the antifusion law should have been renamed 'an act to keep the Populists in the middle of the road'. . . . By preventing effective fusion, antifusion laws also brought an end . . . to the importance and even existence of significant third parties.").

form of anti-fusion law.[97] New York, however, marks an interesting exception as the New York Court of Appeals held in 1911 that anti-fusion laws were unconstitutional, and fusion candidates have been common.[98] As a result, minor parties continue to play a significant role in New York politics: three minor parties have official party status in New York,[99] and their support proved crucial in various electoral campaigns on the federal and state level.[100]

3. Resulting effect

The combined effect of these numerous ballot access regulations has been devastating for minor and extremist parties. For example, in Georgia, due to ballot access requirements, no minor party candidate has made it to the ballot for the House of Representatives since 1942.[101] Similarly, since 1964, no independent candidate for the House of Representatives has achieved ballot listing in North Carolina or South Carolina.[102] Indeed, in some cases, the ballot access regulations may deter a party or a candidate from even attempting to be included on the ballot.[103] But even if it does not operate as a deterrent, the ballot access regulations significantly drain the already limited resources of minor party candidates. For instance, in the 1980 presidential election, third-party candidate John Anderson had to spend more than half of his campaign budget just getting on the ballot on all fifty states.[104] In many cases, even relatively successful minor-party candidates fail to overcome these burdensome requirements. For example, in 2004, presidential candidate Ralph Nader did not qualify for the ballot in states containing half of the electorate. Furthermore, even if the minor party meets these onerous requirements, it may have to repeat the

97. *See* Elizabeth Garrett, *Book Review: Thus Always Two Tyrants?*, 2 ELECTION L.J. 285, 294 (2003).

98. *See* Elissa Berger, *A Party That Won't Spoil*, 70 BROOK. L. REV. 1381, 1391 (2005); Scarrow, *supra* note 37, at 639.

99. Namely, the Independence party, Conservative party, and Working Families party.

100. Berger, *supra* note 98, at 1391–92.

101. *See* Winger, *supra* note 72, at 184.

102. *See* Hall, *supra* note 82, at 439.

103. NORRIS, *supra* note 48, at 90; ROSENKRANZ, *supra* note 73, at 12.

104. ROSENSTONE ET AL., *supra* note 66, at 24; Winger, *supra* note 72, at 184 ("Furthermore, if ballot access laws were lenient, the amount of money available to the Libertarian Party (that now must be spent on expensive paid petition drives) would be used instead for campaign advertising.").

process again in the next election cycle if its candidate fails to achieve the certain percentage of the vote that grants automatic inclusion on the ballot in the next election.[105]

For minor parties, there is a lot to be gained by mere inclusion on the ballot, even if minor parties' chances of actually winning an election under an FPTP system are quite slim. As various scholars have noted, under an FPTP system, the main function of minor parties is to act as a check upon the major parties by exposing them to competitive pressures.[106] First, the minor parties allow voters to express their disapproval with a major party, even if voters are not willing to vote for their main competitor—the other major party.[107] Moreover, the minor party may introduce different viewpoints and policy innovations that are absent from the centralized ideological map that is created by the two major parties.[108] Even if the minor party only poses a threat of being a "spoiler," the leverage it gains from this position may force the major party to make policy (or other) concessions to the minor party in order to draw voters back.[109] The absence of minor parties on the ballot obviously removes this competitive pressure.

Interestingly, as is the case with the FPTP system, the onerous ballot access requirements facing a minor party in the United States are not a constitutional requirement or a logical necessity. Admittedly, some ballot access requirements are necessary and serve legitimate interests, such as maintaining order, avoiding voter confusion and deception, preventing frivolous candidates from over-crowding the ballot, and blocking "vanity" candidates.[110] However, these purposes could be achieved with much less demanding requirements, both in terms of number of signatures and complexity

105. *See* Gary D. Allison, *Protecting Our Nation's Political Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 313 (2005).

106. Issacharoff & Pildes, *supra* note 40, at 680.

107. *See* ROSENSTONE ET AL., *supra* note 66, at 5–6.

108. *Id*. at 8.

109. *See* James Gray Pope, *Fusion,* Timmons v. Twin Cities Area New Party*, and the Future of Third Parties in the United States*, 50 RUTGERS L. REV. 473, 491–504 (1998) (demonstrating the role played by minor parties in an FPTP system through the example of New York State which has several successful minor parties).

110. Jenness v. Fortson, 403 U.S. 431, 442 (1971); Winger, *supra* note 72, at 182 n.85 (explaining that "vanity candidates" are candidates who place "his or her name on a ballot even though the individual has the backing of no group, and lacks name-recognition or resources to sell any causes or ideas he or she may espouse").

of regulations.[111] Indeed, the ballot access barrier in the United States is significantly higher than any other liberal democracy. In comparison, Great Britain requires each candidate for the House of Commons to submit ten signatures and pay a filing fee of £500 to get on the ballot. Canada requires a candidate for parliament to submit 100 signatures and a deposit of C$1000. Austria and Belgium require 200–500 signatures per electoral district.[112]

The combination of an FPTP system and stringent ballot access regulations has resulted in a radical decline in the power of minor parties in the United States. It seems safe to say that minor parties have been practically eliminated from the political arena in the United States.[113] In light of the previous conclusions regarding the strong correlation between minor parties and extremism, it is clear that the elimination of minor parties also means that extremist parties have in effect been eliminated from the electoral arena.[114] Indeed, as opposed to other countries, the American electoral system does not have a social-democratic party, a green party, a religious party or a radical right-wing party. Instead, the electoral landscape consists of two relatively moderate major parties that reflect a broad-based ideological agenda.[115] The American electoral arena is effectively closed to extremists or even to more moderate parties that do not accept the ideological consensus of the two major parties.

The preceding account gives rise to two obvious responses. First, one could argue that the structural features of the electoral system that limit extremists are not intentional, but merely incidental effects of achieving other goals. In this respect the limitations could be treated like other indirect burdens upon free speech that do not warrant special attention, like "environmental and minimum wage laws that raise the price of newspapers, thus dampening public

111. Winger, *supra* note 72, at 182–83 (arguing that a 5000 signature requirement is sufficient to prevent over-crowding of the ballot without excessively burdening minor party candidates).

112. *See, e.g.*, NORRIS, *supra* note 48, at 90; Winger, *supra* note 72, at 179.

113. JAMIN B. RASKIN, OVERRULING DEMOCRACY—THE SUPREME COURT VS. THE AMERICAN PEOPLE 101 (2003); Scarrow, *supra* note 37, at 644; Pildes, *supra* note 44, at 119.

114. *See, e.g.*, NORRIS, *supra* note 48, at 94 ("Restrictions range from cumbersome and onerous administrative requirements for third parties to register and obtain ballot access in the United States to constitutional bans on extremist parties and legal regulations covering hate crimes found in some Western European states.").

115. *See supra* text accompanying notes 39–46.

debate."[116] Second, one might argue that in fact, the electoral system is not closed to extremists at all. The system merely blocks extremists from operating within independent parties, and instead, it channels extremists to operate within one of the major parties.[117]

Both of these responses warrant discussion. To begin, Part V will address the first response and demonstrate that, to a considerable extent, the previously discussed structural barriers were intentionally introduced to combat extremism. Part VI will examine the validity of the second response and show how the major parties limit extremists seeking to operate within their ranks, and close the only effective avenue for extremist participation and representation in the electoral system.

V. INTENTIONAL USE OF STRUCTURAL FEATURES

In recent years, the United States Supreme Court has repeatedly acknowledged and endorsed the two-party system. The Court's most explicit acknowledgment came in a decision concerning a challenge to an anti-fusion statute adopted in Minnesota. In *Timmons v. Twin Cities*,[118] the Court rejected the challenge and held that the statute was constitutional. More importantly, however, the Court held, for the first time explicitly, that to protect political stability, a state can pass electoral regulations that "may, in practice, favor the traditional two-party system"[119] without offending the First Amendment. The Court had expressed the same attitude more cautiously in previous decisions.[120]

In endorsing the two-party system, the Court did not explicitly acknowledge the effect this system has upon extremist parties; but rather, it emphasized other benefits of the system. Chief Justice Rehnquist explained in *Timmons* that the two-party system "temper[s] the destabilizing effects of party splintering and excessive

116. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105 (1987); *see* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1178 (1996).

117. *See infra* Part VI.A.

118. 520 U.S. 351 (1997).

119. *See id.* at 367.

120. Rutan v. Republican Party of Ill., 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) ("The stabilizing effects of such a [two-party] system are obvious."); Davis v. Bandemer, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) ("[The two-party system] has contributed enormously to sound and effective government.").

factionalism."[121] In *Davis v. Bandemer*, Justice O'Connor emphasized that the two-party system contributes "to sound and effective government."[122] Similarly, Justice Breyer explained that the FPTP system "diminish[es] the need for coalition governments. And that fact makes it easier for voters to identify which party is responsible for government decision-making (and which rascals to throw out), while simultaneously providing greater legislative stability."[123]

Nowhere can we find in these statements an acknowledgement of the effect the two-party system has upon extremists or upon the ideological landscape. Although it appears that coded terms like "stability" or "factionalism" reflect hostility towards outliers and extremists, there is no direct reference to this result. In fact, it appears that the only explicit admission of the ideological effect this electoral structure has upon extremists can be found in Judge Posner's opinion in *Nader v. Keith*.[124] There, Judge Posner admitted that "[a] multiplication of parties would make our politics more ideological by reducing the influence of the median voter (who in a two-party system determines the outcome of most elections), and this could be a very bad thing."[125]

Thus, according to the account presented so far, it seems fair to say that even if the Court is aware of the effect of the electoral system upon extremists, its assumption is that this effect was not intentional. The focus has been upon maintaining stability; accountability and effective government and the elimination of extremist representation was merely an incidental effect of achieving these other goals. Yet, even if this account represents the current understanding of the various barriers facing extremists, it simply does not conform to historical reality. In fact, when ballot access requirements were introduced for the first time in the late 1880s with the adoption of the Australian government-printed ballot, the initial requirements were relatively minimal.[126] The stringent

121. *Timmons*, 520 U.S. at 367.

122. Davis v. Bandemer, 478 U.S. at 144–45 (O'Connor, J., concurring).

123. Vieth v. Jubelirer, 541 U.S. 267, 357 (2004) (Breyer, J., dissenting); *see also* Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 818 (2001); Issacharoff & Pildes, *supra* note 40, at 678.

124. 385 F.3d 729 (7th Cir. 2004).

125. *Id.* at 733.

126. *See* ROSENSTONE ET AL., *supra* note 66, at 19–20.

requirements were introduced only later; and it is quite apparent that one of the main reasons for their adoption was the threat of extremist parties, primarily the Communist Party.

A. Ballot Access Laws

The first major wave of ballot access laws that imposed significant substantive requirements upon minor parties arose in the late 1910s and 1920s. This wave was primarily motivated by the "red scare" that followed World War I and by the relative success of Roosevelt's Progressive Party[127] in 1912.[128] By the mid-1920s, state ballot access laws were already considered a burden upon minor and extremist parties.[129] However, a more significant surge in restrictive ballot access requirements occurred during the 1930s and 1940s as fear of Communism continued to intensify.[130] There is little doubt that the growth of the Communist Party—an extremist party that was seen as a threat to the democratic regime—was a major impetus behind adopting such a restrictive regime.[131] In many cases, the ballot access requirements were restrictive enough to effectively ban the Communist Party (and other extremist parties and candidates). In addition, in states where the Communist Party succeeded in gathering the required number of signatures, substantial efforts were made to disqualify a sufficient number of signatures so that their

127. Roosevelt's Progressive Party was obviously not considered an extremist party.

128. *See* Brian L. Porto, *The Constitution and the Ballot Box: Supreme Court Jurisprudence and Ballot Access for Independent Candidates*, 7 BYU J. PUB. L. 281, 287–88 (1993) ("State legislatures, frightened by Roosevelt's strong showing and by the post-World War I stirrings of the Communist Party, enacted new, or fortified existing ballot access laws during the late 1910's and early 1920's."); *see also* Hall, *supra* note 82, at 418.

129. *See* Chris Hocker, *Legal Barriers to Third Parties*, 10 N.Y.U. REV. L. & SOC. CHANGE 125, 126 (1980–1981); Smith, *supra* note 71, at 174.

130. *See* RASKIN, *supra* note 113, at 101; Kevin Cofsky, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 360 n.22 (1996) ("Modern ballot access restrictions are commonly viewed as having developed as a response to the success of the Progressive Party and the Socialist Party in the 1912 elections and fear of the Communist Party in the 1930s and 1940s."); Porto, *supra* note 128, at 288; Smith, *supra* note 71, at 174.

131. *See* RASKIN, *supra* note 113, at 101; Porto, *supra* note 128, at 287–288 ("In the 1930's and 1940's, states enacted a second set of restrictive ballot access statutes, some of which explicitly banned the Communist Party. Others stopped at making ballot access more difficult for Communist and other non-traditional party and independent candidates by requiring large numbers of signatures on nominating petitions."); Winger, *supra* note 83, at 237.

petition would be rejected altogether. Indeed, accounts written at the time note specifically that

> state action to prevent infiltration of Communists into vital positions has been exercised primarily through control of the ballot. Inability to satisfy petition requirements for a place on the ballot or to poll a sufficient number of votes to qualify automatically for successive elections keeps the Communist Party off the ballot in a number of jurisdictions.[132]

As another commentator noted, "[T]he method commonly resorted to [to keep the party off the ballots] prior to World War II was the indirect attack aimed at nomination petitions circulated by the party."[133] By the elections of 1936, these efforts achieved relative success, leaving the Communist Party off the ballot in fifteen states.[134] In the elections of 1940, efforts to keep the Communist Party off the ballot through stringent ballot access requirements continued. In four states (New York, New Hampshire, Maryland, and West Virginia), the Communist Party was banned from the ballot even though it achieved the necessary signatures because the signatures were discovered to be fraudulently acquired.[135]

Three examples of states that adopted stringent ballot access laws emphasize this intentional targeting of the Communist Party. Indeed, in all of these states stringent ballot access laws came as an obvious response to the success of the Communist Party or candidates associated with communism. The most notable example occurred in Illinois where the state legislature's hostility towards the Communist Party led to a reform of the ballot access requirements in two stages. In 1931, the state legislature raised the petition signature requirement for statewide office from 1000 to 25,000 signatures.

132. Note, *Control of Communist Activities*, 1 STAN. L. REV. 85, 90 (1948).

133. Note, *Restraints on American Communist Activities*, 96 U. PA. L. REV. 381, 388 (1948); *see also* Hugh A. Bone, *Small Political Parties: Casualties of War?*, 32 NAT'L MUN. REV. 524, 525 (1943) ("[E]ven before the outbreak of war in 1939, the American public was becoming increasingly suspicious of alien influences, 'isms,' and fifth column activity. There has been a tendency to associate subversive influences with minor political groups and this in turn has led to agitation to keep their names off the ballot."); Note, *The Legal Status of the Communist Party*, 34 VA. L. REV. 450, 450 (1948) ("[T]he states have aimed the brunt of their anti-Communist legislation at keeping the Party off the ballot.").

134. Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 86 n.2 (1937). Similar results were observed in the 1940 presidential elections. *See* Harry F. Ward, *The Communist Party and the Ballot*, 1 BILL RTS. REV. 286, 287 (1940–1941).

135. Note, *The Legal Status of the Communist Party*, *supra* note 133, at 451.

Despite this dramatic reform, the Communist Party succeeded in gaining ballot access in the following year. Determined to limit Communist Party participation, the Illinois legislature in 1935 added a requirement that 200 signatures must be collected from each of the fifty counties.[136] This requirement was especially damaging to the Communist Party as its base of support was concentrated in two counties (Cook, which included the city of Chicago, and Peoria), and it had much less support in the rural counties of Illinois.[137] The Communist Party attacked the constitutionality of this restrictive ballot access statute, but the Court of Appeals for the Seventh Circuit rejected the Communist Party's petition and upheld the statute.[138] The effect of this change was devastating upon the party and led to its exclusion from the ballot in the 1936 elections and to the disappearance of the Communist Party from the political landscape of Illinois for many years.[139]

In Florida, after the Communist Party received around 1.5% of the vote in the 1928 Presidential elections, a new ballot access statute was adopted in 1931 that severely limited the ability of minor parties to gain ballot access.[140] The Communist Party failed in its attempt to challenge the amendment in court.[141] As a result, the Communist Party did not qualify and was not included on the ballot in the 1932 Presidential elections.

Finally, in 1947, the Ohio state legislature amended its election code to require a political party that wished to present a presidential candidate to submit a petition including signatories that equal fifteen

136. I wish to thank ballot access expert Richard Winger for providing me with this chronology. E-mail from Richard Winger to author (Mar. 24, 2008) (on file with author).

137. Bone, *supra* note 133, at 525 (explaining that both in 1938 and 1940 the Communists gathered the sufficient number of signatures but did not achieve the required distribution of signatures).

138. Blackman v. Stone, 101 F.2d 500, 503–04 (7th Cir. 1939). The constitutionality of this statute was also later upheld by the Supreme Court in *MacDougall v. Green*, 335 U.S. 281, 287 (1948). Only thirty years later, in *Moore v. Ogilvie*, 394 U.S. 814, 817–19 (1969), was it finally invalidated.

139. ROSENKRANZ, *supra* note 73, at 14.

140. DAVID REYNOLDS, DEMOCRACY UNBOUND: PROGRESSIVE CHALLENGES TO THE TWO PARTY SYSTEM 278 (1997); Comment, *Legal Obstacles to Minority Party Success*, 57 YALE L.J. 1276, 1282 (1948); *see also* Winger, *supra* note 73, at 194–95 (utilizing a chart to document the evolution of signature requirements in the fifty states, which states that the signature requirement in Florida was zero in 1928 and 28,767 in 1932).

141. *See* State ex rel. Barnett v. Gray, 144 So. 349, 353–54 (Fla. 1932).

percent of the last gubernatorial vote.[142] This meant a party had to submit over 400,000 signatures to gain access to the ballot.[143] The main motivation for this amendment was to block Henry Wallace, a former vice president and the Progressive Party candidate.[144] Wallace was subject to special hostility because of the support and endorsement he received from the Communist Party and because of allegations (some of them true) that Communists were strongly involved in his campaign.[145] Although Wallace managed to circumvent this amendment in the 1948 elections,[146] the "loophole" he used was sealed and no third-party succeeded in gaining access to the Ohio presidential ballot until 1968, when the Supreme Court ruled that the restrictive ballot access law was unconstitutional.[147]

B. First-Past-the-Post

In contrast to the ballot access requirements, the FPTP system in the United States was not specifically designed to limit extremist parties. In adopting the FPTP system, the founding fathers were not focused at all on creating a two-party system or on limiting extremist parties.[148] In fact, no deliberative decision was made to choose FPTP over a PR electoral system. At the time, the concept of a PR electoral structure had not yet been conceived, and in effect the FPTP was the only system with which the designers were familiar.[149] However, this viewpoint neutrality changed in the twentieth century when Americans grew familiar with the PR electoral system. Starting in

142. Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?,* 45 CLEV. ST. L. REV. 87, 91–92 (1997). Another, less significant, target of this amendment was the Socialist Labor Party, an extremist party that made a surprising showing in the 1946 mid-term elections. *Id.* at 90–91.

143. Winger, *supra* note 83, at 195 (charting the evolution of signature requirements in the fifty states).

144. Winger, *supra* note 142, at 91–92.

145. KARL M. SCHMIDT, HENRY A. WALLACE: QUIXOTIC CRUSADE 1948, 252–80, 259 (1960) ("But while these may have been the facts . . . they were ultimately far less important than the public image . . . . And in 1948, 51 percent of the American public . . . 'agreed that' the Wallace third party was Communist-dominated.").

146. Winger, *supra* note 142, at 92.

147. Williams v. Rhodes, 393 U.S. 23, 34–35 (1968); s*ee* Winger, *supra* note 83, at 237 ("During the mid-1960s, the U.S. Supreme Court began taking an activist role in election law.").

148. Issacharoff & Pildes, *supra* note 40, at 676–78.

149. *See id.* at 677 (explaining that Belgium became the first country to adopt PR in 1899).

1915 and intensifying later in the 1930s and 1940s, the Progressive Movement led an effort for electoral reform and especially for adopting some version of PR.[150] Their aim was to fight corruption and limit the power of local party bosses.[151] At the movement's height, two dozen American city councils used a form of PR called single transferable vote (STV),[152] including New York City, Cleveland, Cincinnati, and smaller cities mainly in New York, Ohio, and Massachusetts.[153] In some cities, like most of the cities in Ohio, the PR system did not create a multi-party system; but in more diverse cities, like New York, the change did in fact transform the electoral landscape.[154] For instance, in New York the PR system enabled three new minor parties to gain significant representation on the city council: the American Labor Party, the Fusion Party, and the Communist Party.[155]

This conversion to a PR system was short-lived. The major parties fought hard to repeal the PR system and return to the previous FPTP system; by the late 1950s, the PR system practically disappeared from the municipal landscape.[156] Importantly, at least in New York, this brief episode brought to light an explicit intention to adopt the FPTP system as a means to block participation of extremist parties, most significantly the Communist Party. Indeed, historical accounts of the repeal of PR in New York City in 1947 repeatedly state that the relative success of the Communist Party under the PR system was the main reason for the return to the FPTP system.[157] The campaign to repeal the PR system in New York City openly described the PR system as "an un-American practice which has

150. Douglas J. Amy, *A Brief History of Proportional Representation in the United States*, http://www.mtholyoke.edu/acad/polit/damy/articles/Brief%20History%20of%20PR.htm (last visited Nov. 6, 2008).

151. *Id.*

152. For an explanation of the STV system see Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 435–41 (1995).

153. Amy, *supra* note 150.

154. *Id.*

155. Belle Zeller & Hugh A. Bone, *The Repeal of P.R. in New York City—Ten Years in Retrospect*, 42 AM. POL. SCI. REV. 1127, 1132 (1948).

156. The only jurisdictions in America still employing STV are Cambridge, Massachusetts and the New York City community school board system. *See* Briffault, *supra* note 152, at 435 n.61.

157. Zeller & Bone, *supra* note 155, at 1133–34; Robert J. Kolesar, *Communism, Race, and the Defeat of Proportional Representation in Cold War America*, www.mtholyoke.edu/acad/polit/damy/articles/kolesar.htm.

helped the cause of communism." It further explained that the return to FPTP was necessary to block Communist representation.[158] And as expected, the return to FPTP in 1947 not only succeeded in eliminating the Communist Party from the city council, but completely eradicated all minor-party representation.[159]

C. Conclusion

It is clear that not all of the barriers facing extremists in the electoral arena were intentionally targeted at extremist participation. Indeed, although this Part has highlighted the intentional aspect of several of these restrictions, it would obviously be misleading to describe all limitations upon minor parties as an indirect effort to suppress extremism. Nonetheless, the account presented so far is still important for two main reasons. First, it demonstrates that the use of seemingly neutral electoral regulations to battle specific extremist threats is not merely a theoretical-academic exercise but rather a practical matter. These mechanisms actually work, and legislators across the United States have used them effectively and consciously against extremist parties.

Second, and more importantly, as I will further detail below,[160] this historical account should lead to added awareness in current discussion of electoral regulations. As Justice Stevens explained in his dissent in *Timmons*, "[a]lthough the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage . . . this history does provide some indication of the kind of burden *the States themselves* believed they were imposing on the smaller parties' effective association."[161] But before examining the practical implications of this account, this Article will examine a second, even more important response, to the claims presented thus far.

158. Kolesar, *supra* note 157. The Communists were represented on the city council initially by one councilmember (in 1941), but two years later they succeeded in electing another Communist to the city council, and thus held two out of seventeen council members. *See* Zeller & Bone, *supra* note 155, at 1132.

159. *See* Kolesar, *supra* note 157.

160. *See infra* Part VII.C.

161. Timmons v. Twin Cities, 520 U.S. 351, 378 n.6 (1997) (Stevens, J., dissenting) (emphasis added).

VI. EXCLUSION OF EXTREMISTS FROM MAJOR PARTIES

The best response to the claim that the American electoral system is closed to extremist participation focuses on the alternative avenue open to any minor party candidate (including extremists)—competition within a major party. This Part will first explain the nature of American major parties and the extent to which they offer an avenue of participation and representation for various factions and interest groups. Thereafter, it will proceed to show that the opportunity to operate within the major party is not open to all factions. Specifically, this Part will examine cases in which the major parties excluded extremist candidates from participation in the party's nomination process. It will then attempt to categorize what types of extremists are particularly targeted for exclusion from major parties. The Part will close with an assessment of the overall effect of the series of barriers that face extremists within the electoral arena.

A. The "Big Tent" Party

While the American electoral arena is generally hostile toward minor parties, it is commonly assumed that the major parties are quite open to various factions that wish to participate in the electoral competition within the major party.[162] In fact, the supporters of the existing two-party system claim that the channeling of different groups into the two major parties is one of the major advantages of the American electoral system.[163] This channeling forces the various factions to form coalitions and compromises before the elections; it

162. *See* LEON D. EPSTEIN, POLITICAL PARTIES IN THE AMERICAN MOLD 244 (1986) ("[T]he direct-primary laws of the several states provide unusual opportunities for insurgents to win major-party nominations and thereby the valuable state-conferred labels accompanying those nominations. Challengers outside the ranks of an established party leadership and organization are thus encouraged to seek intraparty electoral routes to power . . . ."); BIBBY & MAISEL, *supra* note 43, at 58 ("The pervasive use of the direct primary system in all of the states has had the effect of channeling dissent into the two major parties.").

163. RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 174–75 (2003) ("Even though ideological parties in a multiparty system may reappear as factions within parties in a two-parties system, their strength will be diluted because a faction in one party cannot credibly threaten to form a governing coalition with a faction of another party. Each party must select a platform and candidates that appeal to the swing voters, and thus must curb its ideological extremes."); Steven G. Calabresi, *Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51, 78 (2001) ("Forcing the extreme right or left to submerge itself in and be tamed by one of two centrist parties is important to preventing a re-emergence of the political dynamics of the 1920's and 1930's . . . .").

"moderates the course of party action" and encourages "the tendency . . . to avoid extreme policies."[164] This tendency is a direct result of the process of coalition building within the major parties. First, the various factions coalescing to form a major party have to accommodate each other and moderate their positions in order to cooperate within one major party.[165] In addition, as the party still has to appeal to the median voter, it cannot present an extremist face. It has to rein in its "radical" elements and agree to a relatively centrist position.[166] Some proponents of this approach even argue that "a system that channels its choices into two pluralistic catch-all parties is just as democratic as one with multiple minor parties, and it is no less respectful of free choice."[167]

According to this view, an environmentalist group that wishes to influence the electoral arena should operate as a lobby or interest group, probably within the Democratic Party, rather than running separately like the German "Green Party." As a result, the other factions of the party (for instance trade unions) will moderate the group's more extreme positions regarding the environment, but the environmental group will still influence and shape the position presented by the Democratic Party as a whole. Similarly, a Christian religious faction that seeks to participate in the electoral arena, rather than running as a separate party (like the Jewish National Religious Party in Israel) will join the Republican Party and operate as an organized bloc within that party. It will influence the party's agenda, but it will have to compromise somewhat with other factions in the party that are more liberal regarding religious issues (for instance, libertarians).

Of course, this system of representation is far from flawless. A major party that is a result of compromises between various groups will typically reflect a mish-mash of factions and ideologies. It will

164. SCHATTSCHNEIDER, *supra* note 39, at 85.

165. *Id.* ("To make extreme concessions to one interest at the expense of the others is likely to be fatal to the alignment of interests that make up the constituency of a major party. The process moderates the course of party action.").

166. SABATO, *supra* note 45, at 12 ("The party tames its own extreme elements by pulling them toward an ideological center in order to attract a majority of votes on election day.").

167. Bruce E. Cain, *An Ethical Path to Reform: Just Elections Considered*, 4 ELECTION L.J. 134, 137 (2005).

probably not reflect the "pure" political views of any of its voters.[168] The extremist voters in particular may compromise more of their views within the coalition building process than other factions in the party. These extremists may feel that they are not adequately represented by the major party they have joined.

In any case, it is clear that this mechanism provides an alternative only for factions and candidates that are allowed to operate freely within the major party. If the major party's organization imposes restrictive rules that prevent segments of the party electorate from placing their candidate on the primary ballot or from participating in electing the party's candidates, these excluded factions are effectively blocked. They are prevented from running within a separate minor party and are excluded from participating in the electoral process within the major party. And, indeed, recent years have witnessed precisely this development. Major parties have used the power granted to them as an expressive association to exclude extremists explicitly on the basis of their viewpoint.

B. Exclusion of Extremists from Major Parties

Since 1992, the two major parties excluded three candidates—two of them presidential candidates—from party nomination processes, on the basis of their extremist viewpoint: (1) David Duke by the Republican Party in Georgia, Florida, and Rhode Island[169] in 1992; (2) Lyndon LaRouche by the Democratic Party in 1996, 2000 and 2004; and (3) Frazier Miller by the Democratic Party in Missouri in 2006.[170] Thus far, all cases dealing with these exclusions have been decided in District Courts and the Federal Courts of Appeals. The Supreme Court has not directly weighed in on the matter.

168. *See* Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court's Fusion Decision*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 149, 164–65 (David K. Ryden ed., 2d ed. 2002) (describing the tendency of multi-party electoral systems to yield significantly greater voter turnout and explaining that increased turnout occurs because "it is much easier for voters to find a candidate or party that actually reflects their particular political views").

169. The attempt to exclude David Duke from the Rhode Island primary ballot failed. *See infra* text accompanying note 191.

170. Frazier Miller was a white supremacist from Missouri who was denied access to the Democratic primary ballot for the office of U.S. Representative for Missouri's Seventh District.

1. David Duke

David Duke, a member of the Ku Klux Klan from Louisiana, first ran for office as a candidate in the Democratic Party. He failed to get elected as a Democratic candidate for the Louisiana Senate (in 1975 and 1979) and failed in the 1988 Democratic presidential primaries. After his 1988 primary failure, he ran as the Populist Party candidate for President in 1988.[171] After the election, Duke switched to the Republican Party, and in 1989 he was elected to the Louisiana state legislature as a Republican.[172] One year later, Duke ran for the U.S. Senate as a Republican. Fear of a Duke victory led the other Republican candidate in Louisiana's open primary to withdraw from the race and transfer his support to the Democratic incumbent, J. Bennett Johnston.[173] Although Johnston won re-election, Duke obtained forty-four percent of the vote.[174] In 1991, Duke ran again as a Republican candidate for Louisiana Governor. In the open primary, Duke finished second with thirty-two percent of the vote. He lost in the runoff, but gained a substantial following with thirty-nine percent of the vote.[175]

In 1992, when Duke participated in the Republican presidential primaries, the state parties of Georgia, Florida, and Rhode Island attempted to exclude his name from the primary ballot on the basis of his extremist viewpoint. Ultimately Duke was excluded in Georgia and Florida and included on the ballot in Rhode Island. This section will provide a detailed account of the cases arising out of the Georgia exclusion as they dealt more directly and extensively with the issue of viewpoint-based exclusion. Thereafter, the section will briefly discuss the Florida and Rhode Island cases.[176]

The Georgia Republican Party attempted to block Duke's participation on the basis of a state statute that permitted the State Candidate Selection Committee to remove a candidate from the primary ballot if all Committee members of the same political party

171. *Independents Get Handful of Votes*, N.Y. TIMES, Nov. 22, 1988, at B6.

172. *Election's Weight*, N.Y. TIMES, Feb. 26, 1989, at E7.

173. Peter Applebome, *Republican Quits Louisiana Race in Effort to Defeat Ex-Klansman*, N.Y. TIMES, Oct. 5, 1990, at A1.

174. *The 1990 Elections: State by State; South*, N.Y. TIMES, Nov. 8, 1990, at B8.

175. Peter Applebome, *Blacks and Affluent Whites Give Edwards Victory*, N.Y. TIMES, Nov. 18, 1991, at A1.

176. *See infra* text accompanying notes 191–97.

as the candidate voted for the removal. Since all three Republican Committee members voted to remove Duke from the ballot (and later denied his appeal for reconsideration), his name was dropped from the primary ballot.[177] Duke challenged the Committee's decision in federal court resulting in a series of cases that the Eleventh Circuit ultimately resolved. In the two most significant cases, *Duke v. Cleland*[178] and *Duke v. Massey*,[179] two different Eleventh Circuit panels *rejected* Duke's challenges to the Republican Party's refusal to include him on Georgia's primary ballot.[180]

In *Cleland*, the court considered Duke's motion for a preliminary injunction. The Eleventh Circuit made it clear that Duke did not have a right to associate with an "unwilling partner," the Republican Party.[181] The court also held that the Republican Party had a right to "'identify the people who constitute the association, and to limit the association to those people only.'"[182]

Later, in *Massey*, the Eleventh Circuit made a decision on the merits. The court again upheld the Republican Party's action, despite an earlier decision holding that the Georgia law constituted state action. Applying the two-pronged framework provided by the Supreme Court in *Burdick v. Takushi*[183] and *Anderson v.*

177. For a detailed account of these events see *Duke v. Massey*, 87 F.3d 1226, 1228–29 (11th Cir. 1996). In Georgia, a candidate who wants to be on the primary ballot has to be approved by the Candidate Selection Committee. There is no petition drive alternative like in Rhode Island. *See infra* note 197.

178. 954 F.2d 1526 (11th Cir. 1992).

179. 87 F.3d 1226 (11th Cir. 1996).

180. In *Duke v. Cleland*, 5 F.3d 1399 (11th Cir. 1993), another case involving the same dispute, the court rejected the defendant's initial motion to dismiss Duke's claim for failure to state a claim. In its decision the court held that Duke's exclusion constituted "state action." *Id.* at 1403.

181. *Cleland*, 954 F.2d at 1530.

182. *Id.* at 1531 (quoting Democratic Party v. Wisconsin, 450 U.S. 107, 108 (1981)).

183. 504 U.S. 428, 434 (1992) ("A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule . . . . Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. . . . But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." (quotations omitted)).

Celebrezze,[184] the *Massey* court first weighed the burden imposed upon the rights of Duke and his supporters.[185] The court determined that they were not "heavily burdened" because Duke did not "have a First Amendment right to express his beliefs as a presidential candidate for the Republican Party."[186] According to the court, Duke's supporters did not have a right to associate with him as a Republican Party candidate, and they "were not foreclosed from supporting him as an independent candidate, or as a third-party candidate in the general election."[187]

The court then examined the interests of the Republican Party and the State in excluding Duke. As to the Republican Party, the court held that "[t]he Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs."[188] As a corollary to the Republican Party's right, the court held that the state has "a compelling interest in protecting political parties' right to define their membership."[189] Accordingly, it ruled that the compelling interests of the Republican Party and the state trump the burden upon the First Amendment rights of Duke and his supporters. As a result, the court approved Duke's exclusion from Georgia's Republican Party primary ballot.[190]

In addition to Georgia, Duke was also excluded from the primary ballot in Florida and Rhode Island. Duke challenged the Rhode Island exclusion in court and won. The court issued a preliminary injunction, and he was included on the primary ballot.[191] Duke also challenged his exclusion from the Florida primary ballot, but the District Court ruled against him, and he remained off the ballot.[192] In the subsequent appeal, the Eleventh Circuit agreed to

184. 460 U.S. 780, 789 (1983).

185. Duke v. Massey, 87 F.3d 1226, 1231–32 (11th Cir. 1996).

186. *Id*. at 1234.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id*. at 1235.

191. Duke v. Connell, 790 F. Supp. 50, 54–55 (D.R.I. 1992) (holding that the statute determining inclusion on the ballot was unconstitutionally vague "because it provide[d] absolutely no standards for the State Party Chairman to follow").

192. Duke v. Smith, 784 F. Supp. 865, 872 (S.D. Fla. 1992). The Florida Republican and Democratic Party excluded four candidates, including David Duke and Lyndon LaRouche

consider the case despite its mootness and ruled in favor of Duke.[193] The court held that the state statute endowed the presidential primary selection committee in Florida with "unfettered discretion" in the reconsideration process of excluded candidates.[194]

Although the Rhode Island and Florida cases appear to cut against *Cleland* and *Massey*, their significance should not be overstated for two reasons. First, the courts' main focus in the Rhode Island and Florida cases was upon the party leadership's level of discretion, rather than on questions of viewpoint discrimination and ideological litmus tests. Thus, the courts in these cases did not engage in a substantial analysis and balance between the right of the party to define itself and the First Amendment rights of the candidates and their supporters.[195] Second, in both cases the courts were very careful to limit the scope of their rulings. In the Florida case, the court was not willing to invalidate the exclusion decision itself and limited its ruling to the reconsideration process.[196] In the Rhode Island case, the court warned that it would not intervene in favor of excluded candidates in the future because, according to Rhode Island law, a candidate could gain access to the primary ballot through a signature petition, thus bypassing the party leadership.[197]

from participation in the Florida primary. Yet only Duke was explicitly excluded because of his viewpoint. *Id.* at 867.

193. Duke v. Smith, 13 F.3d 388, 392 & n.7 (11th Cir. 1994).

194. *Id.* at 395.

195. Despite the different nature of the analysis in these cases, they too seem to reflect the inherent difficulty in dealing with these kinds of cases, which go to the heart of the party's right to decide who will represent it. *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L. J. 2181, 2198 (2001) ("It is difficult to disentangle this notion of unfettered discretion from the idea of an ideological litmus test.").

196. *Smith*, 13 F.3d at 391 n.3.

197. Duke v. Connell, 790 F. Supp. 50, 56 (D.R.I. 1992). In the case of Duke, the court was willing to intervene as an exceptional measure because the decision not to include him on the ballot came relatively late in the process, and he did not have sufficient time to collect the necessary signatures. *Id.* at 52. A similar line of cases involved "media recognition statutes" that allowed party leadership to exempt certain primary candidates from filing petitions if they were "generally recognized in the news media." These cases were typically resolved in favor of the party since the candidates that were not exempted were still entitled to file a signature petition to get on the primary ballot. *See*, *e.g.*, LaRouche v. Kezer, 990 F.2d 36, 41 (2d Cir. 1993); Kay v. Austin, 621 F.2d 809, 811–12 (6th Cir. 1980); LaRouche v. Sheehan, 591 F. Supp. 917, 919 (D. Md. 1984).

2. Lyndon LaRouche

Another important decision involved the exclusion of Lyndon LaRouche's delegates from the Democratic convention. Lyndon LaRouche is a controversial political figure who presented views that have been regarded as racist and even Fascist.[198] He first tried to enter politics through the U.S. Labor Party in the 1974 mid-term elections and the 1976 presidential elections, but he was generally unsuccessful, as his party was unable to appear on most state ballots.[199] After his initial failure as a third-party candidate, LaRouche and his supporters tried to get elected through the Democratic Party. They had some minor successes. In 1986, for instance, Janice Hart and Mark J. Fairchild, candidates backed by LaRouche, won the Democratic Primary for Illinois Secretary of State and Lieutenant Governor.[200] LaRouche himself has participated in all the Democratic presidential primaries since 1980 with little electoral success.

In the 1996 campaign, however, the Democratic National Committee (DNC) decided to battle LaRouche's nomination. To keep LaRouche off the ballot, the DNC made use of Rule 11(K) of its Delegate Selection Rules for the 1996 Democratic National Convention (adopted on March 12, 1994) which explicitly stated that a Democratic candidate must

> as determined by the Chairman of the Democratic National Committee, have established a bona fide record of public service, accomplishment, public writings and/or public statements affirmatively demonstrating that he or she has the interests, welfare and success of the Democratic Party of the United States at heart and will participate in the Convention in good faith.[201]

198. DENNIS KING, LYNDON LAROUCHE AND THE NEW AMERICAN FASCISM 53 (1989) ("Such appears to be LaRouche's program for a fascist state: dictatorship by the party elite, a purge of the 'Zionists,' suppression of all opposition, brainwashing-style pressure on those who refuse to internalize the party elite's ideology, denial of citizenship to subhumans, and revisions in the criminal code to make it all 'legal.'").

199. *Id.* at 86.

200. *Id.* at 103–11. After the LaRouche-backed candidates' nominations, the Democratic candidate for Governor refused to run on the same ticket and decided instead to run as a candidate of the Illinois Solidarity Party, enjoying the support of the state Democratic Party. Ultimately, the Republican slate won the general elections. *Id.* at 111.

201. LaRouche v. Fowler, 152 F.3d 974, 975–76 (D.C. Cir. 1998) (quoting the rule and explaining that the rule was reaffirmed in January 1995 when the DNC adopted the "Call to the 1996 Democratic National Convention" which included a similar provision in Article VI).

Under this rule the DNC issued a letter to state Democratic Party organizations declaring that LaRouche is not a "bona fide Democrat" and therefore not a qualified candidate for nomination as President.[202] The DNC's letter explained that this determination is based upon LaRouche's "expressed political beliefs, including beliefs which are explicitly racist and anti-Semitic, and otherwise utterly contrary to the fundamental beliefs . . . of the Democratic Party and . . . on his past activities including exploitation of and defrauding contributors and voters."[203] Although LaRouche was not universally excluded from primary ballots, the delegates LaRouche won in Virginia and Louisiana were excluded from the 1996 Democratic convention, and the party effectively blocked LaRouche and his supporters from participation in the Texas caucuses, Arizona primaries, and District of Columbia caucuses.[204] LaRouche challenged these actions in federal court, but the District Court for the District of Columbia dismissed his claim and the Court of Appeals for the D.C. Circuit affirmed the dismissal.[205]

In its careful analysis of the interests at hand, the Circuit Court's main concern was to determine the level of scrutiny that should be applied to the case. First, it suggested that even if it were to apply the *Burdick* analysis, which controls state regulation of the electoral process, the overall burden imposed on LaRouche by the state "may not have been severe enough to require strict scrutiny."[206] The court explained that "LaRouche's adherents still retained the right to express their political views by supporting other Democratic nominees, even if they could not nominate LaRouche. And LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate."[207] Furthermore, the court explained that it did not believe that the *Burdick* test applies at all to intra-party disputes because in such cases "the First Amendment weighs on both sides of the balance," as

202. *Id*. at 976.

203. *Id*.

204. *Id*. at 976–77.

205. *Id*. While the Court of Appeals affirmed the district court's decision concerning the constitutional claims, it remanded LaRouche's claim under the Voting Rights Act for procedural reasons. On remand the district court rejected LaRouche's claim under the Voting Rights Act. LaRouche v. Fowler, 77 F. Supp. 2d 80, 82 (D.D.C. 1999).

206. *Fowler*, 152 F.3d at 994.

207. *Id*. at 993–94.

opposed to most other electoral cases where the First Amendment weighs on only one side.[208] Finally, the court rejected the claim that strict scrutiny should apply because the Democratic Party's action constituted viewpoint discrimination.[209] In fact, the court reasoned that "it is the *sine qua non* of a political party that it represent a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint."[210] Therefore, "[u]nlike a state, which is largely barred from making such decisions, a political party . . . *must* choose a political viewpoint."[211]

After determining that a strict scrutiny analysis is not warranted and after rejecting the applicability of the *Burdick* analysis, the court proceeded to resolve the matter under a very lenient test introduced in a previous D.C. Circuit case.[212] Under this test, it was relatively easy for the court to rule in favor of the Democratic Party and hold that at a party convention "the associational rights of the Democratic National Party are at their zenith" and that "[t]he Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself."[213] The court also made it clear that "the Party's First Amendment rights extend not only to defining itself, but also to determining how to define itself."[214] Hence, the court rejected LaRouche's claim that the manner in which the party chose to "define itself" (a decision made by the DNC Chairman) was "unfair."[215]

Despite the *Fowler* decision, LaRouche participated in the Democratic Party primary process in the 2000 and 2004 presidential elections. In both cases the DNC announced that his delegates would be barred from the Democratic convention.[216] As a result, in

208. *Id*. at 994.

209. *Id*. at 995.

210. *Id*.

211. *Id*.

212. Ripon Soc'y. v. Nat'l Republican Party, 525 F.2d 567, 586–87 (D.C. Cir. 1975) (determining that a "representational scheme" is constitutional if it "rationally advance[s] some legitimate interest of the party in winning elections or otherwise achieving its political goals").

213. *Fowler*, 152 F.3d at 996.

214. *Id*. at 997.

215. *Id*.

216. B. Drummond Ayres, Jr., *Political Briefing: A Spot for LaRouche? No Way, Party Says*, N.Y. TIMES, June 11, 2000, *available at* http://query.nytimes.com/gst/fullpage.html?res=9A06EFD7163EF932A25755C0A9669C8B63; Richard Winger,

2000, even though LaRouche received twenty-two percent of the primary vote in Arkansas, he was not granted any delegates to the convention.[217] Probably in light of the *Fowler* decision, LaRouche did not challenge the DNC's decision in court. In 2004 he received only negligible support and was not entitled to any delegates.[218]

3. Frazier Glenn Miller

Most recently, the Democratic Party excluded Frazier Glenn Miller, a candidate for Missouri's Seventh District congressional seat from the party's primary.[219] The actual details of this case are somewhat less clear than those involving Duke or LaRouche because the District Court for the Western District of Missouri rendered the only judicial consideration, and the court mainly grounded its decision in procedure. In his complaint, Miller alleged that the Democratic Party refused to accept his required filing fee, effectively eliminating his candidacy.[220] Miller claimed that the refusal to include him on the primary ballot was due to the party's decision "to exclude people who express pro-White racial viewpoints."[221] And indeed, a spokesperson for the Missouri Democratic Party confirmed that the party "rejects Miller's racist views" and stated that "[t]he Democratic Party is certainly a big-tent party, but that does not include white supremacists."[222]

The District Court dismissed Miller's suit for failure to state a claim.[223] The court held that Missouri's Secretary of State was not the proper defendant and that such a claim should have been advanced against the Democratic Party itself.[224] The court also determined that the Secretary of State enjoyed qualified immunity in the case because the conduct at question did not "'violate clearly

Democratic Presidential Primary, *Ballot Access News* (Mar. 1, 2004), http://www.ballot-access.org/2004/0301.html#13.

217. Ayres, *supra* note 216.

218. Winger, *supra* note 216.

219. Miller v. Carnahan, 2006 U.S. Dist. LEXIS 34909, *1–*2 (W.D. Mo. May 31, 2006). I wish to thank Richard Winger for bringing this case to my attention.

220. *Id*. at *5.

221. *Id*. at *5.

222. *See* Press Release from James Goodwin, Green County Missouri Democrats, *Democrats Won't Allow 'Pro-White' Candidate*, Mar. 12, 2006, *available at* http://www.greenecountydemocrats.org/story/2006/3/12/74442/7989.

223. *Miller*, 2006 U.S. Dist. LEXIS 34909 at *7.

224. *Id*. at *6–7.

established statutory or constitutional rights of which a reasonable person would have known.'"[225] In its analysis of the qualified immunity issue, the court emphasized that there is no authority supporting the conclusion that "a political party can not refuse membership to persons who do not share its ideology."[226] Although the court was somewhat inaccurate in its statement—this case involved a refusal of candidacy rather than membership—it appears that its conclusion is consistent with the previous exclusion cases. As in *Duke* or *LaRouche*, the *Miller* court had no difficulty in finding that a major party was entitled to exclude a candidate from participating in the party's nomination process on the basis of their viewpoint. Moreover, as in the previous exclusion cases, the court noted that Miller was not denied a "right to the ballot" because he could run as an independent candidate.[227] Thus, he was merely denied the right to the ballot of a specific party.[228] After the dismissal of his claim, Miller apparently did not further pursue the matter and was simply left off the primary ballot.

C. What Type of Extremists Are Excluded?

So far, this Article has used the term "extremists" rather broadly, without distinguishing between different types of extremism. However, upon closer examination it is evident that the extremists that are excluded from major parties share certain common characteristics. Specifically, all these extremists are not merely "relatively" extreme (in comparison to the median voter). Instead they are known for their explicitly illiberal, racist, and/or anti-Semitic views. In her discussion of extremism in American politics, Nancy Rosenblum offers a helpful analytical framework for categorizing and distinguishing between these different types of extremism.[229] Rosenblum distinguishes between two analytical accounts of extremism within the American political landscape: spatial extremism and typological extremism.[230]

225. *Id.* at *4 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
226. *Id.* at *6.
227. *Id.* at *6.
228. *Id.*
229. *See generally* Rosenblum, *supra* note 39, at 849–56.
230. *Id.* at 851–52.

In Rosenblum's terms, "spatial extremism" refers to a "relative political positioning."[231] Typically, this political topography implies the existence of a center that is dominant and extremes that are weaker and numerically few.[232] Because of its relative nature, the spatial model is not static. The center may move, and accordingly the spatial extremist may also shift and change her position.[233] On the other hand, according to Rosenblum, "typological extremism" is not based on the degree of divergence from the center, but rather on a "wholesale reaction and rejection" of the "consensus values and practices" of American political thought.[234] Since, according to Rosenblum, the central consensus of American politics can be defined broadly as "liberalism," extremism in a typological sense can be described as "antiliberalism." Accordingly, an "antiliberal" view is characterized by a rejection of core liberal values such as "personal security, impartiality, individual liberty, and democracy" and opposition to liberal practices such as "religious toleration, freedom of discussion, . . . free elections, . . . and more."[235] Among the groups or parties that answer to this "antiliberal" typological definition, Rosenblum identifies the Ku Klux Klan, various neo-Nazi parties, the Communist Party of the United States (CPUSA), and various separatist and rejectionist groups operating in the United States.[236]

Perhaps it is not surprising that, like the ballot access laws adopted in the 1930s and 1940s, the viewpoint-based exclusion decisions focus upon typologically extreme candidates rather than upon spatially extreme candidates. First, it is likely that typologically extreme candidates can cause severe damage to the major party regardless of their success. Their mere participation in the primaries or in the national convention will inevitably draw media attention and will harm the electorate's image of the party. Hence, the major

231. *Id.* at 849.

232. *Id.* at 850–52.

233. *Id.* at 851. Rosenblum mentions antidiscrimination policy or abortion rights as examples of political issues that reveal the moving center in American politics.

234. *Id.* at 852.

235. *Id.* at 853–54.

236. *Id.* at 855. It should be noted that this definition of "typological extremist" parties is very similar to the definition offered by the German Constitutional Court when it determined which parties are subject to the Constitutional-mandated banning regime. *See* Judith Wise, Comment, *Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party*, 5 U. CHI. L. SCH. ROUNDTABLE 301, 311 (1998).

party has a clear incentive to disassociate itself from such extremists and actually show its disdain for their views.[237] Moreover, it appears that, particularly with typological extremists, a decision to exclude a candidate would enjoy wide-range support and be considered legitimate and justified. Rarely will major parties achieve such a broad consensus concerning a decision to exclude factions which are not typologically extreme. Lastly, according to a comparative study conducted by Pippa Norris focusing on radical right parties, typologically extreme voters do not usually vote for more moderate right-wing parties even if the typologically extreme party they support has no chance of success.[238] Accordingly, it appears that as opposed to other factions of the electorate, embracing these extremists within the major party does not correlate to an electoral gain for the major party. Even if such a typological extremist participates in the major party's nomination process (and loses), it is likely that her supporters will not vote for the major party in the general elections.[239]

Admittedly, the hostile attitude of the party establishment towards extremist candidates may be applied in certain cases towards "maverick" candidates that merely oppose the establishment candidate. Such candidates often encounter serious obstacles when trying to get on the primary ballot. This was especially apparent in recent years with Republican primary candidates Steven Forbes (1996 presidential election) and John McCain (2000 presidential election).[240] Similarly, in a few recent cases, parties excluded certain candidates from primary participation on the basis of their alleged "disloyalty" to the party.[241] However, these cases appear not to

237. Bennett J. Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238, 1278 (1994) ("Abuses such as this are more likely to be directed toward minor candidates like Duke since there is little chance of popular outcry if they are improperly excluded.").

238. NORRIS, *supra* note 48, at 113.

239. A possible explanation is that for typological extremists the major parties are just too far away ideologically to be considered as a serious alternative. *See id*.

240. *See* Rockefeller v. Powers, 917 F. Supp. 155, 156–57 (E.D.N.Y. 1996), *aff'd*, 78 F.3d 44, 45 (2d Cir. 1996); Molinari v. Powers, 82 F. Supp. 2d 57, 62–65 (E.D.N.Y. 2000); Persily, *supra* note 195, at 2199–206.

241. *See* Swanson v. Pitt, 330 F. Supp. 2d 1269, 1275–76 (M.D. Ala. 2004) ("[A] political party also has a First Amendment right to freedom of association. . . . This associational right is broad enough to include a party's decision to exclude people *who have not been loyal to the party*." (emphasis added) (citation omitted)); Ala. Republican Party v. McGinley, 893 So.2d 337, 349–50 (Ala. 2004) ("McGinley's comments plainly and

involve an objection to the candidate's extremist viewpoint but rather involve a regular intra-party power play (the first line of cases) or an objection to a candidate switching parties to get elected (the second line of cases). Thus, although the jurisprudence on this matter is still equivocal, it does appear that viewpoint-based exclusion is indeed a threat typically facing typological extremist candidates.

D. Conclusion: The American Banning System

Finally, it is time to take stock of the combined effect of the various barriers facing extremists in the American electoral system. On the one hand, the electoral system and strict ballot access rules severely limit the ability of extremist candidates to run on a separate platform as a minor party candidate. Hence, they are channeled to run through one of the major parties.[242] On the other hand, when a typologically extremist candidate such as Duke, LaRouche, or Miller seeks election within the major party, she is excluded from the ballot or the national convention; when she protests, the party maintains that her rights have not been violated because she can always run as a minor party candidate. As the court explained in *Duke v. Massey*, "[n]othing precludes these voters from supporting Duke as an independent candidate or a third-party candidate in the general election."[243] Likewise, in *LaRouche v. Fowler*, "LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate."[244] But indeed, in light of the preceding discussion, it is obvious that these extremist prescriptions are actually ineffective and illusory. To demonstrate this point, when Duke was excluded from the Georgia Republican primary in 1992, only four candidates qualified for the Georgia

unambiguously crossed the line between criticism of an individual and criticism of the party as a whole. *She endorsed the Constitution Party* and urged Republicans to exhibit 'tough love' toward their party." (emphasis added)); Dow v. Alabama Democratic Party, 897 So.2d 1035, 1037 (Ala. 2004) (disqualifying candidate Dow from participating in the Democratic primary for district court judge because she had sought the office of circuit judge as a Republican in 1998 and 2000); *see also* Kucinich v. Tex. Democratic Party, 530 F. Supp. 2d 879, 888 (W.D. Tex. 2008) (ruling against Democratic Presidential candidate Dennis Kucinich and affirming the right of the Texas Democratic Party to deny access to the presidential primary ballot to a candidate who refuses to pledge to support the party's nominee in the general election).

242. *See supra* Part VI.A.

243. Duke v. Massey, 87 F.3d 1226, 1233 n.7 (11th Cir. 1996).

244. LaRouche v. Fowler, 152 F.3d 974, 993–94 (D.C. Cir. 1998).

general elections ballot (Bill Clinton, George Bush, the independent billionaire candidate Ross Perot, and the Libertarian candidate). Similarly, in 2006, when Miller was excluded from the Democratic congressional primary, only three candidates made it to the general elections ballot (the Republican candidate, the Democratic candidate, and the Libertarian candidate). Unsurprisingly, the winner of the general election in all instances was one of the major party candidates.

The picture is now clear: as a result of this complex set of barriers, a system that claims to be open to all viewpoints effectively bars extremists, and particularly typological extremists, from the electoral system. Extremists cannot gain representation through a minor party and are also subject to the threat of exclusion from the major parties. Despite the claim of "American exceptionalism" and the emphasis upon the special protection granted to dissenters within First Amendment doctrine, the electoral system in practice is closed to typological extremists and employs a de facto banning regime to drive them out of the electoral system. In light of this new perspective, it appears worthwhile to compare the American de facto banning regime and de jure banning regimes in other democratic countries, like Germany, which explicitly authorize the banning of certain extremist parties. It is also worth exploring the possible implications this conclusion has upon American electoral law itself.

However, before examining the implications that arise from the preceding analysis, there are two possible reservations worth consideration concerning the severity of the American de facto banning regime.

First, it is clear that the limitations placed upon extremists in the American system are not absolute. At least in theory, the extremists may gain sufficient strength among the electorate, allowing them to overcome the barriers that limit participation. Thus, they may succeed in being included on the ballot, and perhaps, if they have a distinct geographical stronghold, their candidate may even get elected in certain districts even under the FPTP system. Furthermore, as there is generally no limitation upon becoming a party member (and thus vote in a party primary),[245] an extremist

245. The only limitation states may impose upon members concerns the waiting period before new party members can vote in a party primary. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 596 (2000) (Stevens, J., dissenting) ("In the real world, however, anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most)

group may infiltrate a major party and gain enough strength within the party so that it will be hard to ignore. In addition, if the extremists are strong enough, they may be considered an "attractive electoral prize" so that the major parties will have an incentive not to exclude them, or at least they will have to balance their "negative" effect with their possible "positive" electoral value. However, these reservations do not change the conclusion of this Article's analysis.

To begin with, even if extremist parties may overcome the mentioned barriers on the condition that they gather enough strength and support, it is difficult to ignore the fact that, to a large extent, the existing barriers make it much harder for these parties to gain this support. In many cases, inclusion on the ballot, getting minor representation in parliament, or even participating in the primaries or a national convention are a means to gain power, legitimacy, status, and resources.[246] If an extremist group has to evolve into a major political player outside of the electoral arena, it will likely fail. And in any case, at least David Duke and his supporters were not an insignificant political force. The willingness to exclude him from a primary ballot shows that even if an extremist gains strength it may not be enough to convince a major party to accept her into the party. Furthermore, even in democracies that employ a formal banning regime, the extremist minor parties are typically banned rather than the major parties. In fact, certain scholars refer to this problem as a paradox that undermines the legitimacy of a formal party-banning regime altogether.[247] Therefore, the fact that the limitations imposed by the American system are focused on minor parties does not mark a fundamental difference compared to formal banning regimes.

A second criticism relates to the prevalence of the phenomenon highlighted here. Indeed, there may be cases apart from David Duke, Lyndon LaRouche, or Frazier Miller in which major parties allowed typological extremists to present their candidacy or participate in the

by registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to 'associate' with an unwelcome new member.").

246. NORRIS, *supra* note 48, at 114.

247. According to their argument, there is no point in banning a party when it is weak and does not pose a serious threat. On the other hand, it is impossible to ban a party when it is a strong player in the electoral arena. *See* Günter Frankenberg, *The Learning Sovereign*, *in* MILITANT DEMOCRACY 113, 125 (András Sajó ed., 2004).

national convention. One well-known example is the case of Tom Metzger, who in 1980 won the Democratic Party's nomination for U.S. House of Representative from the San Diego area although he was a Grand Dragon of the Ku Klux Klan.[248] Moreover, in the case of Duke, many states granted him access to the ballot, yet he failed in gaining substantial support.[249] Nevertheless, the emergence of the option to effectively exclude an extremist candidate from the primary ballot and the emergence of a comprehensive barrier, as was employed in the case of LaRouche, is significant and worthy of analysis.

Indeed, following the D.C. Circuit's decision in 1998, the Democratic Party proceeded to exclude LaRouche again both in 2000 and 2004, and he did not attempt to challenge these exclusions in court. This means that at least LaRouche is operating under the assumption that this limitation is absolute and neither a unique nor unusual occurrence. The same conclusion could also be drawn from the straightforward manner in which the *Miller* court dismissed Miller's claim concerning his exclusion from the primary ballot. Additionally, it is useful to note that even in countries with a formal banning regime, like Germany, very few parties are actually banned. In many cases, despite its availability, this harsh measure is not employed against existing extremist parties.[250] Thus, the fact that the American de facto banning regime is not absolute and is not employed against all extremists does not in itself disprove its existence.

VII. IMPLICATIONS

The preceding discussion has focused on portraying the substantial barriers facing extremists in the American electoral arena. This part proceeds to examine the implications of this descriptive

248. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 217 n.4 (1989). After Metzger won the Democratic primaries he was disavowed by the Democratic Party and lost in a landslide to the Republican candidate in the general election. In 1992 Metzger ran again unsuccessfully in California's Democratic primary for U.S. Senate. *See* Anti-Defamation League, *Extremism in America*, Tom Metzger, http://www.adl.org/learn/ext_us (follow "individuals" hyperlink; then follow "Tom Metzger" hyperlink) (last visited Nov. 6, 2008).

249. Duke v. Massey, 87 F.3d 1226, 1228 n.1 (11th Cir. 1996).

250. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 224 (2d ed. 1997).

account. First, if the American de facto banning regime and the formal banning regimes of other democracies can be viewed as alternative means to combat extremism, it is worthwhile to compare these regimes to discover their relative strengths and weaknesses. In addition, this Part will examine the conclusions that can be derived from this account concerning American electoral law.

A. Comparison Between the American Banning Regime and Formal Banning Regimes

There are obviously many differences between the American de facto banning regime and the formal banning regimes that exist in other democracies. This section highlights five major points of comparison, focusing particularly upon the formal banning regimes in three liberal democracies: Germany, Spain, and Israel.

The most significant difference between the two systems is also the most obvious: in countries that employ a formal banning regime, the regime is explicit, its existence is not disputed, and it is usually authorized by a specific constitutional provision. Conversely, in the United States there is no similar explicit limitation upon the electoral arena. The First Amendment is absolute in its formulation, and the conventional wisdom is that there are no viewpoint limitations upon extremist parties or candidates. Thus, the implicit limitations described above are subtle, informal, and in most respects, unacknowledged.

The effects of this major difference are twofold: on the one hand, the American system is much less focused on the educational value of labeling certain views as illegitimate, but on the other hand, the American system prevents open discussion about the merits and dangers of limiting extremist participation in the electoral arena. First, according to public perception, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[251] As a result, the "chilling" of extremist speech, which may be a negative cost of an explicit banning regime, is much less likely to occur in the United States. In the United States, at least from an educational perspective, "extremes are not . . . understood as the peripheral cost of an inevitably imperfect world, in which no one can be trusted to draw the proper lines properly,

251. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1942).

but rather as integral to the central functions of the principle of free speech."[252] This serves to enhance public discussion and allows even extremist speakers to develop their views without constant fear of sanction.

However, it is precisely this aspect of the American political landscape that prevents an open and honest discussion on the merits and dangers of limiting extremism in the electoral arena.[253] By avoiding the issue, focusing on the theoretical possibility of an extremist party succeeding on its own, and highlighting the formal freedom that exists even for extremists, an important debate is stifled. As opposed to Germany, for example, which has struggled for decades with the issue of limitations upon extremist speech, the United States has taken the issue off the table due to complacency and unawareness. Yet, this lack of discussion does not cause these extremists to disappear. There is always a danger that frustrated extremists, who feel shunned from the electoral arena, will decide to act illegally and to use violence to make themselves heard. An open discussion concerning these limitations would allow us to take into account the dangers and the benefits that stem from the current state of affairs. It could help us make sure that we are drawing the line in the proper place.

A second point of related comparison is the distinction between the limitations placed upon the electoral arena and limitations imposed upon free speech in the general "marketplace of ideas."[254] As explained above,[255] in pointing to the existence of a de facto banning regime in the electoral arena, this Article does not deny the extraordinary freedom granted in the United States to extremist speech outside the electoral arena. Thus, while the electoral arena is, in practice, quite restrictive towards extremists, the general free speech arena operates under the *Brandenburg* rule, which states that any extremist speech is permissible unless it "is directed to inciting or producing imminent lawless action and is likely to incite or produce

252. BOLLINGER, *supra* note 4, at 133.

253. *See* Dan Gordon, *Limits on Extremist Political Parties: A Comparison of Israeli Jurisprudence with that of the United States and West Germany*, 10 HASTINGS INT'L & COMP. L. REV. 347, 395 (1987) (concluding that a system that explicitly bans extremist parties is "more honest, and therefore perhaps more educational, about why certain parties are blocked from entering the legislature").

254. Issacharoff, *supra* note 17, at 1458.

255. *See supra* Part III.

such action."[256] In contrast, in Germany, for example, limitations upon extremist speech in the electoral arena are also applied in the general "marketplace of ideas" context.[257] Thus, the German Criminal Code prohibits the dissemination of propaganda that supports the ideas of unconstitutional parties and also prohibits the use of insignias of these same parties.[258]

It should be observed, however, that this distinction between limitations imposed upon the electoral arena and those imposed upon general free speech is not unique to the United States. For example, Spain also takes a more restrictive approach to the electoral arena than to the general free speech context. According to Article 9 of Spain's new Political Parties Law ("Parties Law"),[259] the state can ban a party if it repeatedly "encourages or legitimizes violence as a method to achieve political ends," even if its speech does not constitute *direct* incitement. In contrast, according to the Spanish Criminal Code, the state can only punish mere advocacy of illegal activity (including violence) when the speech "directly incites the commission of a crime."[260] Similarly, the Parties Law allows the government to ban a party for expressing tacit support for terrorism on a repeated basis; however, under the criminal code, it is only a crime to explicitly praise terrorism.[261]

A third distinction between the American de facto banning regime and a formal banning regime concerns the identity of the discretionary body making the banning decisions. Typically, countries that impose a formal banning regime include the general authority to ban certain parties in the Constitution, and the highest

256. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added).

257. Similarly, the formula that encompasses the banning of political parties appears in similar form in other portions of the Basic Law as well. For instance, Article 9(2) of the Basic Law includes a similar provision allowing for the banning of associations opposed to the free democratic order; Article 5(2) contains a provision declaring that free speech (and other rights) may be limited by "the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor." *See* CURRIE, *supra* note 10, at 177–78.

258. David A. Jacobs, *The Ban of Neo-Nazi Music: Germany Takes on the Neo-Nazis*, 34 HARV. INT'L L.J. 563, 570 (1993).

259. Article 9(2)(b) of *Ley Organica de Partidos Politicos* 154 (B.O.E. 2002), *translated in* Comella, *supra* note 14, at 143.

260. Comella, *supra* note 14, at 139.

261. *See id.* at 139–40. Comella has strongly criticized the banning statute as overbroad, particularly its use of general and open-ended terms that could theoretically apply to a wide range of parties. *Id.* at 141–46.

court makes specific banning decisions.[262] For example, the German Constitution explicitly declares that any decision concerning the constitutionality of a political party is solely in the hands of the Federal Constitutional Court.[263] Similarly, in Spain, Article 10(4) of the Parties Law specifically notes that all banning decisions shall be made solely by a *sala especial* (special chamber) of the Supreme Court.[264] These provisions, and other similar provisions in other countries, reflect the sensitivity and democratic severity in which other countries approach a party-banning decision. These provisions also reflect an understanding that it is much safer to let the courts make banning decisions. This is especially true in light of the electoral implications of a banning decision and the danger of self-serving motivations that might affect a political body making a banning decision.

In the American electoral system, while the limitations upon minor parties do not explicitly reflect any discretionary action, the exclusion of extremist candidates and their representatives from the major party's nomination process is left in the hands of party officials. For example, the decision to exclude David Duke from the Georgia primary ballot was made by the Georgia Republican Party Chairperson, Georgia's Senate Minority Leader, and Georgia's House Minority Leader. Similarly, in the case of Lyndon LaRouche, the Democratic National Committee Chairperson chose to exclude the candidate from the ballot. Leaving such a decision in the hands of party officials, who are legitimately affected by political considerations, is problematic when the actual effect of the decision is the total exclusion of typological extremists from the electoral arena. This point will be further elaborated below.[265]

The fourth distinction[266] concerns the ability of large extremist parties to succeed in the electoral arena. In the United States there is no formal restrictive regime imposed upon extremist parties; therefore, if an extremist party gained sufficient strength it could

262. *See* Issacharoff, *supra* note 17, at 1453–57.

263. *See* Grundgesetz [GG] [Basic Law], Article 21(2), *translated in* KOMMERS, *supra* note 250, at 511 ("The Federal Constitutional Court shall decide on the question of unconstitutionality.").

264. *See* Leslie Turano, *Spain: Banning Political Parties as a Response to Basque Terrorism*, 1 INT. J. CONST. L. 730, 734 (2003).

265. *See infra* text accompanying notes 322–24.

266. *See supra* text accompanying notes 245–47.

theoretically compete and win despite the structural limitations imposed upon minor parties. Additionally, if an extremist faction within a major party is powerful enough, it may be too large for the party to ignore, and its representatives would probably be included in the nomination process. In contrast, in formal banning regimes, an extremist party will be banned regardless of its actual support if its agenda and actions fall within the definitions of the banning statute.

While this constitutes a real difference between the two systems; it appears to be merely a theoretical difference with no practical significance. The ability of an extremist party in the United States to gain power outside of the electoral arena is practically non-existent. For the last 150 years, no new party has consistently succeeded in the American electoral arena, and there is no reason to suspect that this will change. Furthermore, it is not clear whether, even in an explicit banning regime, major parties will be banned. In fact, it appears that the main thrust in explicit banning regimes is towards curbing minor parties' success before they become major parties. It is highly doubtful that a democracy can really ban an extremist party if this party enjoys the support of a substantial part of the electorate.[267]

Finally, a fifth distinction is the identity of the extremist parties or candidates that are banned in the two systems. In explicit banning regimes this is relatively clear as the nature of the banned parties is defined by the banning statute and by later court decisions. For instance, in Germany, Article 21(2) of the Basic Law holds that "[p]arties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic order or to endanger the existence of the Federal Republic of Germany are unconstitutional."[268] Similarly, in Spain, Article 9(2) allows parties to be banned when they repeatedly and systematically exhibit behavior (a) violating fundamental rights by promoting, justifying, or excusing attacks on the life or dignity of the person "or the exclusion or persecution of an individual based on his ideology, religion,

267. An interesting exception can be found in Turkey where the government banned the Islamic Welfare Party (*Refah Partisi*), despite the fact that it was the largest party in the Turkish parliament. The European Court of Human Rights subsequently approved this ban. *See* Issacharoff, *supra* note 17, at 1443–46.

268. Grundgesetz [GG] [Basic Law], Article 21(2) (Germany), *translated in* KOMMERS, *supra* note 250, at 218.

[beliefs,] nationality, race, sex, or sexual orientation";[269] (b) encouraging or legitimizing violence as a means to achieve political ends or as a means to undermine the conditions that make political pluralism possible; or (c) assisting and giving political support to terrorist organizations with the aim of subverting the constitutional order.[270] In Israel, Section 7A of the Basic Law, the Knesset authorizes the banning of a party that rejects "the existence of the State of Israel as a Jewish and democratic state," if its actions or platform consist of "incitement to racism," or if the party supports an "armed struggle . . . against the State of Israel."[271]

Conversely, in the United States there is no formal and explicit banning regime, and there is also no clear definition of which parties or candidates are limited. The structural limitations and state ballot access laws impose a universal limiting effect on all parties that do not enjoy a certain degree of support. As previously discussed, these barriers typically apply to a wide range of parties including parties that are merely unpopular regardless of their viewpoint. The additional leg of the banning regime—the exclusion from the major party's nomination process—has been directly applied to candidates who were perceived as extremists by the leadership of the Democratic and Republican parties. In the case of David Duke, his writings and his association with the Ku Klux Klan made it relatively easier to identify his views as anti-liberal, racist, white separatist, and anti-Semite.[272] Similarly, Frazier Miller held, by his own admission,

269. Katherine A. Sawyer, *Rejection of Weimarian Politics or Betrayal of Democracy?: Spain's Proscription of Batasuna Under the European Convention on Human Rights*, 52 AM. U. L. REV. 1531, 1546 n.83 (2003).

270. Article 9(2) of the *Ley Organica de Partidos Politicos* (B.O.E. 2002, 154), *translated in* Turano, *supra* note 264, at 733; *see also* Comella, *supra* note 14, at 142.

271. *See* Basic Law: The Knesset § 7A (Isr.), *translated in* ISRAEL'S WRITTEN CONSTITUTION (5th ed. 2006). It is worth noting that the Israeli Supreme Court interpreted this provision very narrowly, especially the clause dealing with the negation of Israel as a "Jewish state." Thus, despite several petitions concerning parties which allegedly negated the "Jewish" nature of the state, no such party has been banned under this clause. In fact, the only parties that have been banned under Article 7A have been the racist anti-Arab party (Kach) and its offshoots. For the most recent ruling see AB 11280/02 The Central Election Committee for the Sixteenth Knesset v. Tibi [2003] IsrSC 57(4) 1, ¶ 6. For previous rulings of the Israeli Supreme Court on these matters, see Raphael Cohen-Almagor, *Disqualification of Political Parties in Israel: 1988–1996*, 11 EMORY INT'L L. REV. 67 (1997).

272. *See, e.g.*, Anti-Defamation League, Extremism in America, David Duke, http://www.adl.org/learn/ext_us (follow "individuals" hyperlink; then follow "David Duke" hyperlink) (last visited Nov. 6, 2008); *see also* Duke v. Massey, 87 F.3d 1226, 1232 n.6 (11th Cir. 1996).

"pro-White racial viewpoints."[273] These viewpoints made it easier to identify him as a white supremacist, and label his views as racist and anti-liberal.[274] Lyndon LaRouche presents a more problematic example as his views are more confused and ambiguous. In fact, LaRouche himself denies the DNC's claims[275] that he holds racist and anti-Semite views, and there are those who think of him as an odd conspiracy-theorist rather than a Fascist or racist.[276] In a media appearance a few years ago, LaRouche presented a very clear view against anti-Semitism and Holocaust denial.[277] This ambiguity in LaRouche's views could save him from banning under formal banning regimes which typically demand an unequivocal showing as to the unconstitutional nature of the banned party (or candidate).[278] Therefore, LaRouche's exclusion reveals the problematic consequences that may arise as a result of the lack of clear standards and explicit definitions in the American de facto banning regime.[279]

B. Examining the Exclusion of Extremists from Major Parties

So far the Supreme Court has not ruled on a case that involves viewpoint-based exclusion from a party's nominating process. Nevertheless, it appears that the court decisions in *Cleland*, *Massey*, *Fowler*, and *Miller*, which allowed the exclusion of typological extremist candidates from major parties' nomination processes, are in

273. Miller v. Carnahan, 2006 U.S. Dist. LEXIS 34909, at *5 (W.D. Mo. May 31, 2006).

274. *See* Press Release from James Goodwin, Green County Missouri Democrats, *supra* note 222.

275. See *supra* note 203 and accompanying text.

276. George Johnson, *A Menace or Just a Crank?*, N.Y. TIMES, June 18, 1989, at A7.

277. Lyndon LaRouche, *Film Review: Mel Gibson's "The Passion of the Christ"*, NEW CITIZEN, April 2004, at 7, *available at* http://www.cecaust.com.au/pubs/pdfs/passion.pdf.

278. For example, the Israeli Supreme Court made it clear that a ban may be justified only if the prohibited aims of the party are dominant and central in its agenda, these aims are substantial and serious in their magnitude, and the evidence is "convincing, clear and unequivocal." *See* AB 11280/02 Central Election Committee for the Sixteenth Knesset v. Tibi [2003] IsrSC 57(4) 1, ¶ 6.

279. It could be argued that this is actually an advantage of the American system. That is, it leads to the exclusion of typological extremists even if they try to conceal their views and thus would not be banned under a formal banning regime. However, this argument is not convincing for two main reasons. First, even in formal banning regimes courts do not have to accept the extremists' statements at face value, and they may inquire as to their real views and intentions. Second, the advantage of a formal court analysis is that it prevents mere "witch hunts" of candidates, which may be excluded from the party not because of their extremism but because of their unpopularity or even quirkiness.

line with the recent trend in Supreme Court jurisprudence concerning intra-party disputes.

In general, party nomination processes involve a complex balancing of rights. The complexity arises primarily from the "hybrid" nature of major parties.[280] On one hand, a political party is a form of private association that is formed to advance the First Amendment right of association of its members and to win governmental office. Like other voluntary organizations, the political party has a right and reasonable expectation to control its membership and leadership selection process. On the other hand, as opposed to other voluntary organizations, major parties are both heavily regulated by state laws and enjoy significant state-conferred benefits. For instance, state laws specify the criteria for party membership, determine the primary election procedures, and grant a preferred status on the ballot to the major parties.[281] Furthermore, within the FPTP system the major parties enjoy de facto control of the electoral arena, and other parties have virtually no chance to compete. In these respects, the parties operate in a very different setting than other private associations that generally operate freely alongside each other in civil society.

Moreover, as is clear from *Duke* and *LaRouche*, party nomination conflicts uniquely involve situations in which the "First Amendment weighs on both sides of the balance."[282] While general ballot access questions typically weigh the First Amendment rights of the voters against the interests of the state in regulation of the ballot, primary nomination disputes involve the balancing of the First Amendment right of participation or representation of party members and candidates against the First Amendment right of association of the party itself—its right to define itself, protect its autonomy, and determine its own path.[283]

280. For a general discussion of the matter see, for example, Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 754–66 (2001).

281. *Id.*; *see* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1118–21 (2d ed. 1988).

282. LaRouche v. Fowler, 152 F.3d 974, 994 (D.C. Cir. 1998).

283. For a detailed account of these complexities see, for example, Hasen, *supra*, note 123, at 826–27 (recognizing that "party organizations should have First Amendment rights of speech and association when they are conducting their own internal affairs."); Persily, *supra* note 195; David Schleicher, *"Politics As Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 164–68 (2006).

In the past, courts have resolved this tension by ruling against the major parties. Particularly in the White Primary Cases,[284] the Supreme Court emphasized that certain party actions, such as running a primary election, should be considered state action if they are an integral part of the electoral machinery. Therefore, these actions are subject to the Equal Protection Clause and to the Fifteenth Amendment. Accordingly, political parties could not exclude African-Americans from participation in primaries. These cases were unique, however, in two main respects. First, and most importantly, the White Primary Cases involved blatant racial discrimination rather than mere intra-party feud or a "normal" case of viewpoint discrimination. Second, these cases concerned states that the Democratic Party effectively controlled; hence, the Democratic primary winner was also the winner in general elections.[285]

In recent years, the pendulum has swung the other way. The Court has placed more emphasis on the rights of the parties themselves, particularly the party's right to control its ideological message and nomination process without state intrusion.[286] This approach was most prominently manifested in three Supreme Court decisions: *Tashjian v. Republican Party of Connecticut*,[287] *California Democratic Party v. Jones*,[288] and *Eu v. San Francisco County Democratic Committee*.[289]

In *Tashjian v. Republican Party of Connecticut*,[290] the Court ruled in favor of the Republican Party and struck down a

284. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). For a detailed discussion of these cases, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 103–17 (2d ed. 2002).

285. Issacharoff & Pildes, *supra* note 40, at 652–60.

286. *See* Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 111 (1996); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 180–81 (2005); Schleicher, *supra* note 283, at 205–06. For various justifications for this approach, see Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 806–10 (2001). For criticism of the jurisprudential tendency to protect party autonomy, see Hasen, *supra* note 123, at 826–37.

287. 479 U.S. 208, 213–17 (1986).

288. 530 U.S. 567, 581–82 (2000).

289. 489 U.S. 214, 223–25 (1989).

290. 479 U.S. 208, 229 (1986).

Connecticut law that mandated a closed primary. The Court made it clear that the party had a right to define who may vote in its primaries. The Court also held that a statute forcing a party to close its primary "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action."[291]

More recently, in *California Democratic Party v. Jones*,[292] the situation was reversed, but the Court's position was the same. *Jones* involved a "blanket primary" law that California voters adopted as a ballot initiative. It would have allowed any voter, regardless of party affiliation, to vote in any party's primary. The parties objected to opening their primaries and the Court invalidated the law. The Court held that

> [i]n no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.[293]

These Supreme Court decisions lend support to the holdings in *Massey*, *Fowler*, and *Miller*. In fact, it may appear that the Court's explicit statement in *Jones*, concerning the "right to exclude," settles these cases. But the picture is more complex, as *Jones* did not involve a party's decision to exclude certain candidates or even party members. Instead, *Jones* involved the exclusion of independents and members of other parties from a party's primary process. Thus, *Jones* presented an easier case for the Court because it suggested an easy alternative for those excluded. As Justice Scalia explained, "[t]he voter who feels himself disenfranchised should simply join the party."[294] Regardless of this alternative's sufficiency, it is clear that it

291. *Id.* at 216.

292. 530 U.S. 567, 569–70, 586 (2000).

293. *Id.* at 575 (emphasis added). The Court reached a different result in *Clingman v. Beaver*, 544 U.S. 581 (2005); however, as various commentators have noted, it seems that the result in that case was affected by the fact the "party autonomy" claim was made by a minor party (Libertarian Party) and involved issues that do not confront major parties. For further analysis see Evseev, *supra* note 70, at 1300–02; Allison, *supra* note 105, at 337–40.

294. *Jones*, 530 U.S. at 584. For criticism of this view see Magarian, *supra* note 39, at 2015–16.

was not available to Duke, LaRouche, or Miller because they had already chosen to join a major party and participate in its nominating process.

The Court's decision in *Eu v. San Francisco County Democratic Committee* appears more relevant to cases of viewpoint exclusion from major parties.[295] In *Eu* the Court invalidated a California law that prohibited official governing bodies of political parties from endorsing or opposing candidates in primary elections. The Court held the law to be unconstitutional because "[b]arring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association," and the state failed to present a compelling interest justifying such infringement.[296] The *Eu* decision is particularly relevant to the issue at hand because it dealt specifically with the party's right to influence the nomination process on the candidate level rather than on the membership or electorate level.

Furthermore, while *Tashjian* and *Jones* concerned general policy decisions that merely had an indirect effect on the ideological cohesiveness of the party, the *Eu* decision directly dealt with questions of ideology. The Court in *Eu* emphasized the importance of allowing party governing bodies to state "whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought."[297] The Court also explained that freedom of association means that "a political party has a right to 'identify the people who constitute the association'"[298] and "to select a 'standard bearer who best represents the party's ideologies and preferences.'"[299] In fact, the Court specifically mentioned that it was important to offer the party a chance to oppose certain candidates in order to prevent "a candidate with views antithetical to those of her party . . . to win its primary."[300] Notably, the Court mentioned in this context the example of Tom Metzger, who in 1980 won the Democratic Party's

295. Eu v. San Francisco County Democratic Committee, 489 U.S. 214 (1989).

296. *Id.* at 224.

297. *Id.* at 223.

298. *Id.* at 224 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986)).

299. *Id.* (Tamm, J., concurring) (quoting Ripon Soc'y, Inc. v. Nat'l Republican Party, 525 F.2d 567, 601 (1975)).

300. *Id.* at 217.

nomination for U.S. House of Representatives from the San Diego area even though he was a Grand Dragon of the Ku Klux Klan "and held views antithetical to those of the Democratic Party."[301] Thus, *Eu* appears to offer significant support to the position of the courts in the *Duke-LaRouche-Miller* cases.

Further support for this position can be found in the recent case of *New York State Board of Elections v. Lopez Torres*,[302] which involved a challenge to a state law requiring that parties elect their nominees for state judgeships by a convention composed of delegates elected by party members. The plaintiffs claimed that the convention system violated the First Amendment rights of challengers running against candidates favored by the party establishment. The Court rejected the plaintiffs' claims and offered a narrow interpretation of the rights of party members within the party nomination process. The Court held that as long as the party members were not excluded from voting in the delegate primary, there was no constitutional difficulty with the fact that the party leadership effectively determines the nominees.[303] The decision underscored the Court's tendency to grant party leadership wide latitude in determining the method for selecting the party candidates and its reluctance to support claims of insurgents (like Duke, LaRouche, or Miller).

Finally, it seems that cases like LaRouche's—involving exclusion from the national convention (rather than the primary ballot)—gain additional support from cases in which the Court granted special protection to major party decisions in the context of a national convention. The conflict typically arises in these circumstances when a state law, or the specific primary regulations adopted by the state party, conflict with the rules of the national party. As a result, the national party refuses to recognize the delegates or primary process conducted in a specific state.[304] In two leading precedents on the

301. *Id.* at 217 n.4.

302. 128 S. Ct. 791, 798–800 (2008).

303. *Id.* at 798–99.

304. A recent example of this kind of conflict can be found in the recent 2008 Presidential campaign with the decision of the DNC to strip delegates from any state party that would unilaterally set its primaries before February fifth. As a result, Florida and Michigan who ignored the DNC's decision were initially expected to lose their representation at the national convention, though ultimately, as a result of a compromise, this decision was not implemented.

matter, *Cousins v. Wigoda*[305] and *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*,[306] the Court sided with the national parties and held that the national parties' decisions are entitled to special protection "in the context of the selection of delegates to the National Party Convention."[307] This approach may also extend to cases involving ideological exclusion from the national convention—like the case of LaRouche—even though the nature of the dispute and the identity of the disputing parties are obviously different.[308]

Despite these strong indications supporting the right of parties to exclude extremists, there are strong arguments for a different conclusion. Some of these arguments are directly related to the de facto banning regime underlined in this Article.

The major difference between the exclusion cases and the aforementioned "party autonomy" cases is that exclusion cases do not merely involve the party's right to endorse or oppose a particular candidate, or the party's right to choose a nomination process that makes it harder for insurgent candidates to win. Instead, they involve the right to categorically exclude a candidate from the primary ballot or the national convention. Such exclusion means that the candidate and her supporters are completely banned from the party's electoral competition and cannot even have a say in the formulation of the party's agenda. In that respect, the effect of these cases is more far-reaching than what the Court allowed in *Eu* or *Jones*. Indeed, as the dissenting judge in *Duke v. Cleland*[309] opined, the Court's decision in *Eu* could actually be interpreted as *going against* the exclusion of Duke. The dissenting judge believed that the Court's decision in *Eu* "identifies party campaigning as the means by which a party asserts its First Amendment associational right to select its standard bearer," and "thus recognized by implication that candidates deemed by the Party leadership to be inappropriate standard bearers should be

305. 419 U.S. 477, 491 (1975).

306. 450 U.S. 107, 126 (1981).

307. *Cousins*, 419 U.S. at 491.

308. *See* Persily, *supra* note 195, at 2217–18 ("Courts have rightly recognized the national party's plenary authority to decide the qualifications of delegates and whether to seat them. . . . The party convention represents the purest expression of the 'party as organization.'").

309. 954 F.2d 1526, 1538 (11th Cir. 1992) (Kravitch, J., dissenting) (commenting on the first proceeding involving Duke's exclusion from the Georgia ballot (preliminary injunction)).

permitted to participate, even if unsuccessfully, in the primary process itself."[310]

Furthermore, as the dissenting judge pointed out, even if the party leadership has the prerogative to determine the course of the party, or to express its endorsement or objection to certain candidates, it ultimately cannot perpetuate its power by preventing a free electoral battle between the various factions of the party members.[311] In that respect these cases reveal the complexity in identifying who exactly is "the party." Is a party comprised of the primary voters themselves (the party in-the-electorate), or rather the party organization and leadership?[312] If we allow the party leadership to determine who can participate in the nominating process, we are accepting a certain level of paternalism: the leadership decides on behalf of the members which candidates are "best for the party" rather than allowing the members to make this determination through their voting.[313] Although the Court emphasized in *Lopez Torres* that the party is allowed to select candidates through a convention,[314] once it chose an open and democratic nomination process, it is much more problematic to interfere with the fairness

310. *Id.*

311. In certain respects, this situation could be compared to a tender offer in the corporate setting. In such circumstances, the board may express *its view* regarding a tender offer, but ultimately the shareholders have to decide whether they will accept the offer.

312. The familiar classification scheme addressing this question was suggested by V.O. Key which separated the party into three groups, or levels: (1) the party-in-the-electorate, comprised of ordinary party members, (2) the party-in-government, which consists of all elected and appointed officials affiliated with the party, and (3) the party organization, which includes all those who serve on party committees or perform other organizational tasks intended to enhance the party's electoral success. *See* V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 163–65 (5th ed. 1964).

313. Persily, *supra* note 195, at 2186 ("Of course, the paternalism inherent in this position is obvious: The party organization is trying to protect the party-in-the-electorate from itself."). Interestingly, the court in *Massey* did not ignore this problematic aspect of the decision as it found it necessary to explain that the leadership's decision is, in effect, *authorized* by the members because "[a]lthough the Committee's decision to exclude a candidate from the presidential primary ballot is unreviewable by the entire membership of the party, these committee members are leaders in the Republican Party and are ultimately held accountable for their decisions by the membership of the Republican Party." Duke v. Massey, 87 F.3d 1226, 1234 (11th Cir. 1996). However, it is not clear whether this logical structure can hold, and whether the general accountability of the party leadership would be deemed sufficient to support an exclusion which could affect the election of the leadership itself.

314. N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 799 (2008).

and equality of opportunity that is inherent in such a process.[315] Thus, "[i]f the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles."[316]

Moreover, the de facto banning regime described in this Article also has direct implications on the resolution of these cases. As Justice O'Connor explained in her concurring opinion in *Clingman v. Beaver*,[317] when courts assess regulatory burdens on associational rights, they should engage in a "realistic assessment" and an "examination of the cumulative effects of the State's overall scheme."[318] Justice Kennedy also endorsed this approach in his concurring opinion in *Lopez Torres*.[319] Indeed, one of the central components of the court's analysis in *Duke* and *LaRouche* (also mentioned in *Miller*) was the fact that both candidates had the option of running as an independent or third-party candidate.[320] In

315. *See* Republican Party of Minn. v. White, 536 U.S. 765, 787–88 (2002); *see also* Christopher S. Elmendorf, *N.Y. State Bd. of Elections v. Torres: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?*, 6 ELECTION L.J. 399, 403–04 (2007) (suggesting a model he refers to as "An Election Is An Election," which is based on the principle that "the right to vote bears on candidate nomination proceedings at electoral junctures in the nomination process, but not otherwise").

316. *White*, 536 U.S. at 788 (quoting Renne v. Geary, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

317. 544 U.S. 581 (2005) (O'Connor, J., concurring).

318. *Id.* at 599.

319. 128 S. Ct. at 802 (Kennedy, J., concurring) ("Were the state-mandated-and-designed nominating convention the sole means to attain access to the general election ballot there would be considerable force, in my view, to respondents' contention that the First Amendment prohibits the State from requiring a delegate selection mechanism with the rigidities and difficulties attendant upon this one . . . . [T]here is a dynamic relationship between, in this case, the convention system and the petition process; higher burdens at one stage are mitigated by lower burdens at the other."). This approach was also advocated by Nathaniel Persily who explained that "[t]o find unconstitutional infringements on the right to vote and implicitly on the right to run for office, *courts must take a holistic approach to the interaction of the primary and general election ballots.*" Persily, *supra* note 195, at 2214 (emphasis added). It should be noted that Persily suggests distinguishing between "Duke" cases and "LaRouche" cases. In regard to the *Duke* line of cases (exclusion from the primary ballot), Persily believes that excluding candidates is constitutional if the criteria are established *in advance* and the primary is not the only effective means of gaining representation. *Id.* at 2212–13. As to the *LaRouche* case, Persily believes that the court got it right, because he supports granting wide discretion to the National Party in the context of a national convention. *Id.* at 2219–21.

320. Duke v. Massey, 87 F.3d 1226, 1233 n.7 (11th Cir. 1996) ("Nothing precludes these voters from supporting Duke as an independent candidate or a third-party candidate in

both cases, this assumption was crucial to the "burden" analysis because it allowed the courts to conclude (in both cases) that the candidates (and their supporters) were not "heavily burdened" when their respective parties chose to exclude them from the party. This analysis, however, does not properly account for the characteristics of the American electoral system and the significant hurdles that face extremist parties within the electoral arena. Under these circumstances the only effective form of participation for extremist candidates and their supporters is within the ambit of a major party.[321] Hence, if the major party excludes the candidate (and her supporters) from its nominating process, the candidate is banned altogether from the electoral arena. This is definitely not a light burden, but rather quite a heavy one.

An additional burden upon the excluded candidate is the symbolic effect of an exclusion decision. In light of the central role of the two major parties in the American system and the general understanding of their diffuse and catch-all nature, it is clear that a viewpoint-based exclusion by a major party may be perceived as similar to the decision of a state authority. Thus, it will probably label the typological extremist candidate excluded (and her supporters) as "beyond the pale," or an illegitimate candidate that does not even have a place within the "big tent" offered by the major party. This obviously burdens the extremist candidate, her supporters, and the viewpoints she represents.

A final problematic aspect of the exclusion decisions is the "unfettered discretion" that is left in the hands of party leaders. Such wide discretion is open to considerable risks of partisan manipulation and unregulated decision-making, regardless of its ideological implications.[322] When typological extremists are involved, this

the general election."); LaRouche v. Fowler, 152 F.3d 974, 993–94 (D.C. Cir. 1998) ("LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate.").

321. It is worth noting in this respect, that according to Court doctrine, even when the restrictions are content-neutral and regulate merely "time, place, and manner" they receive lenient scrutiny *only if they leave open adequate alternative channels of communication. See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

322. Persily, *supra* note 195, at 2212 ("Granting to party leaders or the state the power to erect ad hoc primary ballot access rules at any point during the campaign effectively translates into an absolute right to exclude candidates based on the whim of party leaders."); *see also* Matelson, *supra* note 237, at 1276–79. *But see* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669–71, 682–83 (1998) (allowing precisely this kind of open-ended discretion in excluding candidates from televised debates).

problem is even more acute because the result of exclusion from a major party is an effective ban from the electoral arena. Therefore, an exclusion decision puts enormous responsibility in the hands of mere party officials. In comparison, in countries that impose a formal banning regime, the decision to exclude is typically granted to the highest court, such as the Constitutional Court[323] or Supreme Court.[324] Although the situation is quite different in the American system, as the decision is made by the party rather than the state, this comparative perspective does serve to highlight the gravity of the decision and the high level of scrutiny that is required.

In sum, in deciding cases involving viewpoint-based exclusion, the Court should acknowledge the de facto banning regime that is created by the combination of the structural features of the FPTP system, state laws, and the party's exclusion decisions. The existence of such a regime does not necessarily lead to a categorical rejection of all ideological exclusions by a major party because, as the courts have clarified, "the First Amendment weighs on both sides of the balance."[325] However, this analysis should affect the Court's assessment of the burden imposed on the excluded candidate (and her supporters). The "heavy burden" imposed upon the extremist candidates should trigger a higher degree of scrutiny and a requirement of "narrowly drawn" regulations by the party.[326] One possible implication of such a heightened level of scrutiny could be to require the party to explain why merely endorsing certain candidates and disavowing others is not the "least restrictive means" of furthering the party's goal of "defining itself."[327] A possible alternative, along the lines suggested by Nathaniel Persily, would

323. For example, that is the case in Germany. *See* Grundgesetz [GG] [Basic Law] art. 21(2) *translated in* KOMMERS, *supra* note 250, at 511 ("The Federal Constitutional Court shall decide on the question of unconstitutionality.").

324. For a discussion of Spain, see Comella, *supra* note 14, at 149 (explaining that the banning of parties is decided by a Special Chamber (*Sala Especial*) of the Supreme Court).

325. LaRouche v. Fowler, 152 F.3d 974, 994 (D.C. Cir. 1998); *see also* Issacharoff, *supra* note 17, at 1460–62.

326. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

327. *See supra* text accompanying notes 309–11 (dissenting judge in *Duke v. Cleland*).

allow the party to exclude a candidate only if it specifies, in advance, narrowly drawn criteria for exclusion which are not oriented toward a specific candidate.[328] Whatever specific solution is adopted, it has to take into account the nature of the characteristics of the American electoral system and the considerable barriers facing extremists within the system.

C. Ballot Access Laws Targeting Minor Parties

As described above, some of the major barriers limiting the success of extremist parties are state laws that impose stringent ballot access requirements and anti-fusion laws.[329] This Article does not intend to add to the voluminous literature generally discussing the adequacy and justifications for the ballot access requirements the various states impose.[330] However, it is worthwhile to devote some attention to the intentional nature of some of the ballot access laws described in this Article. As the historical accounts presented earlier illustrate, ballot access requirements were not merely neutral instruments that had an incidental effect of curbing extremism, but rather, in many cases, an intentional instrument in the battle against typologically extreme parties, especially the Communist Party.[331] This historical record should serve as a warning and lead courts to carefully examine new ballot access regulations in order to discover the real intentions underlying such legislation rather than accepting at face value the purposes mentioned by the legislatures themselves. As this section explains, according to Supreme Court jurisprudence, regulations that are purposefully aimed at specific parties and candidates should be subject to strict scrutiny.

It is unsettled whether legislators' illicit motives are relevant to First Amendment analysis. Although the leading case of *United States v. O'Brien*[332] appeared to be determinative in holding "that

328. Persily, *supra* note 195, at 2212–13.

329. *See supra* Part IV.B.

330. *See, e.g.*, RASKIN, *supra* note 113, at 99–116; Black, *supra* note 286, at 112–60; Hall, *supra* note 82, at 409–24; Winger, *supra* note 72.

331. *See supra* Part V.A.

332. United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 292 (2000) (holding that the Court will not strike down a facially neutral statute simply because of an alleged illicit motive).

this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive," there are several recent authorities ruling otherwise. In *Ward v. Rock Against Racism*,[333] the Court emphasized that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Similarly, in *Bartnicki v. Vopper*, the Court explained that "[i]n determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation."[334] Some commentators have also noted that regardless of the way the judicial tests are conceived, the ultimate goal of First Amendment analysis is to flush out regulations that are based on illicit motivations.[335]

In the ballot access context, the focus upon improper purpose seems to be even more central to the constitutional analysis. Although the Court has not reached a final conclusion on these matters, commentators have noted that the Court may be willing to invalidate regulations whose sole (or predominant) purpose is self-entrenchment.[336] The main reason for this approach is that in the

333. 491 U.S. 781, 791 (1989).

334. Bartnicki v. Vopper, 532 U.S. 514, 526 (2001); *see also* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 812 (1985) (explaining that the state may not enact regulations that are "in fact based on the desire to suppress a particular point of view"). On the murky state of the law regarding this matter, see John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1130–33 (2005) ("The Supreme Court has given conflicting guidance on the relevance of legislative motive in measuring content discrimination."). For the problems inherent in a purpose analysis, see Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 78–79 (2003).

335. Lillian BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1281 (2005) ("[M]uch First Amendment doctrine could be explained as an effort to invalidate laws and official actions that betrayed a high risk of having been motivated by the desire to punish unpopular points of view, to control or manipulate public debate, or to shield incumbent officeholders from criticism or challenge."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 441–42 (1996) (explaining that much of First Amendment doctrine is aimed at identifying hostility to a speaker's viewpoint beneath the neutral façade of the statute: "hostility [to a speaker's viewpoint], sympathy [for the majority viewpoint], or self-interest [of government actors]").

336. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997) ("The Supreme Court on several occasions has explicitly acknowledged that ballot access restrictions warrant close judicial scrutiny because of the potential they create for incumbent self-dealing."); Pildes, *supra* note 44, at 76–78 ("The intriguing general issue such examples raise is whether laws whose sole or predominant

context of ballot access regulation there is a particularly strong incentive for the two major parties controlling the legislature to insulate themselves from electoral threats by adopting neutrally worded legislation that is justified as serving "stability" or preventing "voter confusion."[337] Although the *Timmons* decision may constitute a step away from this direction,[338] it still appears to enjoy support among electoral law commentators and may not have disappeared from Court doctrine.[339] In any case, even if there are doubts about whether a generalized self-entrenchment purpose alone is sufficient for a declaration of unconstitutionality, it seems reasonable to assume that the willingness of the Court to apply strict scrutiny would and should be even stronger when the motivation for the electoral law is hostility toward a specific candidate or party.

Indeed, in Court decisions considering the constitutionality of various electoral laws, the Court has emphasized the alleged neutral and nondiscriminatory basis for these laws. In a decision upholding a Hawaii ban on write-in candidates, the Court explained that "we have repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls."[340] Similarly, in *Timmons*, the Court made it clear that a state's "'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'"[341] Since the Court also held in *Timmons* that it is constitutional to pass "electoral regulations that may, in practice, favor the traditional two-party system,"[342] it seems likely that the Court interprets "neutrality" to actually mean: no viewpoint discriminatory purpose. In other words, states may adopt laws that make it harder for minor parties in general

purpose is political self-entrenchment, of incumbents or parties, should be unconstitutional in principle. That issue, not yet fully developed, lies beneath the surface of many constitutional conflicts in this field.").

337. *See supra* text accompanying note 95 and notes 121–123.

338. Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731, 736 (1998) ("Indeed, the Court's decisions on issues such as partisan gerrymandering, ballot access, term limits for congressional candidates, and campaign finance manifest the Court's weakening commitment to an antientrenchment principle.").

339. *See, e.g.*, Klarman, *supra* note 336, at 551–53; Pildes, *supra* note 44, at 76. *But see* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 894–95 (2006).

340. Burdick v. Takushi, 504 U.S. 428, 438 (1992).

341. Timmons v. Twin Cities, 520 U.S. 351, 358 (1997) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).

342. *Id.* at 367.

to succeed, but they may not target specific parties or viewpoints. Consequently, it appears that when an electoral regulation is aimed at a particular party or viewpoint, it will not be upheld.[343]

The interpretation suggested here appears to gain particular support from two relatively recent Court decisions that highlighted the significance of viewpoint-discriminatory purposes in the context of facially neutral regulations. In *Jones*, the decision concerning the California blanket primary, the Court noted that the statute at issue was intentionally aimed at promoting "centrist" candidates. The Court held that such a purpose "is hardly a compelling state interest, *if indeed it is even a legitimate one*."[344] Although the *Jones* case involved a primary law that allegedly interfered with the ideological freedom of the parties, rather than the electoral arena as a whole, it does seem to reflect the same general sentiment. Indeed, the case implies that electoral regulations may indirectly affect the ideological nature of the electoral arena, as most electoral regulations necessarily do,[345] but they cannot purposefully aim to shape the ideological map of the electoral arena or intentionally target specific viewpoints.

A similar conclusion can be drawn from *Arkansas Educational Television Commission v. Forbes*.[346] The *Forbes* case involved the exclusion of Ralph Forbes—an independent candidate for Congress—from a televised debate. Forbes claimed that his First Amendment rights were violated, but the Court rejected his claim and held that since Forbes "had generated no appreciable public interest . . . . [h]is own objective lack of support, not his platform, was the criterion [for exclusion]."[347] According to the Court in *Forbes*, an exclusion that is based upon the unpopularity or lack of "viability" of a candidate is constitutional and is not considered viewpoint discriminatory, even though, as various commentators have noted, it has a clear viewpoint discriminatory effect.[348]

343. This statement could also be interpreted as referring to a requirement for mere *facial neutrality*, but I do not think that this narrow reading is required, especially in light of the other cases mentioned below.

344. Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000) ("[A]ssuring a range of candidates who are all more 'centrist' . . . is hardly a compelling state interest, if indeed it is even a legitimate one.") (emphasis added); *see* Pildes, *supra* note 44, at 108–09.

345. Pildes, *supra* note 44, at 110–11.

346. 523 U.S. 666 (1998).

347. *Id*. at 682–83.

348. Lack of popularity or viability can serve as quite an accurate proxy for extremists and non-mainstream viewpoints. *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem*

However, as the Court emphasized, a viewpoint-discriminatory intent is not allowed: "The government can restrict access to a nonpublic forum 'as long as the restrictions are reasonable and [are] *not an effort to suppress expression merely because public officials oppose the speaker's view*.'"[349]

Admittedly, when dealing with a facially neutral electoral regulation, it may be quite difficult to identify a regulation that is aimed at a particular candidate or party,[350] but it is not impossible. A regulation's legislative history and timing may be most helpful in "smoking out" regulations aimed at a particular party or candidate.[351] For example, many of the ballot access regulations aimed at the Communist Party could be identified as such because they were adopted following a major surge in the success of the party in a previous electoral cycle.[352] It should be further noted that there may be a theoretical distinction between specific regulations aimed at a party or candidate because of a particular viewpoint, and regulation aimed at a party merely because it poses an electoral threat. It appears, however, that this distinction is insignificant and the two categories seem to collapse into one another. When legislators adopt a stringent ballot access measure to stop a particular candidate or

of Freedom of Speech: Problems in the Supreme Court's Application, 74 S. CAL. L. REV. 49, 57 (2000) ("The Court's conclusion that the government's decision was viewpoint neutral was essential to the result. But what causes a candidate to be from a minor, rather than a major, party? The answer, of course, is that a minor party candidate's views are favored by a much smaller percentage of the population than those of a major party candidate. From this perspective, choosing whom to include in a debate based on whether they are from a minor or a major party is all about viewpoint."); *see also* Schauer & Pildes, *supra* note 11, at 1804 n.5.

349. *Forbes*, 523 U.S. at 677–78 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 800 (1985)) (emphasis added).

350. *See* Hasen, *supra* note 339, at 858–70.

351. *See* Klarman, *supra* note 336, at 535–36 ("First, the timing of a particular restriction's enactment may assist in gauging the legislature's dominant motivation. The onerous restriction invalidated in Williams v. Rhodes, for example, was erected by the Ohio legislature suspiciously soon after Henry Wallace's third party candidacy in 1948 had captured one percent of that state's presidential vote (far more than President Truman's margin of victory in the state). Second, the relative stringency of the ballot access requirement should speak volumes as to the legislature's motivation. Hefty past performance and petition signature requirements—such as the condition in Williams that a third party have won ten percent of the vote at the last presidential election to gain ballot access—are difficult to understand in any terms other than entrenchment.")

352. *See supra* Part V.

party, it does not seem to matter whether they oppose her views or are concerned about the electoral threat she poses.[353]

In sum, according to existing doctrine (properly construed), when ballot access regulations are intentionally aimed at a certain candidate or party, they should be subject to strict scrutiny even if they are facially neutral. Specifically, the courts should carefully scrutinize the new regulations to make sure they are not used to target specific viewpoints or parties in an effort to banish them from the electoral arena. To be sure, this Article does not claim that the regulations aimed at the Communist Party should be invalidated today, sixty or seventy years after they have been enacted. The specific ballot access regulations targeting the Communist Party have been typically modified and amended several times since the 1930s and 1940s and have not maintained their original form.[354] But, in light of historical experience, courts should be particularly careful when examining new electoral regulations. Attempts to use ballot access laws to block specific parties did not end with the Communists and still exist today.[355] In such cases, if the apparent purpose of the law is to block a certain candidate or party, the courts should subject the regulation to strict scrutiny, mainly "to determine whether there is a sufficiently close fit between the law and the asserted compelling interest it serves; if not, then it is a fair inference that the law's principal purpose is the illegitimate one of frustrating the exercise of a right."[356]

VIII. CONCLUSION

Democracies have debated for decades what level of tolerance should be exhibited toward the intolerant. It has commonly been

353. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 250–51 (1983).

354. It should be noted that in *Hunter v. Underwood*, 471 U.S. 222, 232–33 (1985), the Court struck down a voting restriction that was eighty years old on a showing that its purpose and impact was to burden minorities. However, in that case, it was noted that the discriminatory impact continues to this day. This is probably not the case with the regulations that were adopted against the Communist Party.

355. *See* Winger, *supra* note 83, at 247. According to Winger, in North Carolina, after the Socialist Workers Party qualified for the ballot in 1980, the legislature more than quadrupled the number of required petition signatures. Similarly, Alabama tripled signature requirements in 1995 following the Patriot Party's nomination of a candidate who had lost in the Democratic primary. *Id.*

356. Dorf, *supra* note 116, at 1235.

assumed that the United States differs fundamentally from other liberal democracies in its approach toward forces of intolerance. As this Article demonstrates, however, the reality is much murkier than this conventional wisdom. Although American extremists may enjoy great freedom in expressing their ideas, they face almost insurmountable barriers when they try to translate these ideas into political action through the electoral arena. Perhaps this is inevitable. Ultimately, the lesson may be that every democracy, whatever its free speech ethos, has to develop defense mechanisms that protect it from forces of anti-liberalism and intolerance. These mechanisms may be explicit and direct or implicit and unacknowledged. Whatever the case, the existence of these barriers should be recognized and their justifications and effects should be examined. Only when we are truly aware of the nature of these limitations can we avoid their misuse and over-reaching and ensure that we are drawing the restrictive line in the proper place.