2

The Supreme Court's Approach to Political Parties

2.1 THE BASELINE: GOVERNMENT POWER TO REGULATE POLITICAL PARTIES

The Supreme Court has struggled mightily to determine how political parties should be treated from a constitutional perspective, but it initially took the position that they were private entities beyond the control of the federal government. In the 1921 case of *Newberry* v. *United States*, a Senate candidate seeking his party's nomination had exceeded the amount of primary campaign spending allowed under federal law.[1] Art. I, §4 of the Constitution gives the federal government authority to "make or alter such Regulations" with regard to the "Times, Places and Manner of holding Elections" for members of Congress.[2] However, when confronted with the question in *Newberry* of whether such power extends to the regulation of party primaries, the Supreme Court said no.[3]

One might characterize Justice McReynolds' opinion in *Newberry* as a simple exercise in originalism. Since political party primaries were "unknown" at the time the original Constitution was drafted, McReynolds reasoned that the power to regulate primaries should not be understood to be part of the government's power.[4] He then went on to adopt the conception of party behavior that recalls the simple (or arguably, simplistic) model of a private political club, describing party primaries as "merely methods by which party adherents agree upon candidates whom they intend to offer and support."[5] Parties, in other words, are just voluntary organizations, and primaries are events in which those people, of their own free will, simply get together and choose someone to best represent and act upon their views.

[1] Newberry v. United States, 256 U.S. 232, 244–46 (1921).
[2] U.S. Const. art. I, § 4, cl. 1.
[3] *Newberry*, *supra* note 1, at 233–34.
[4] *Id.* at 250.
[5] *Id.*

https://doi.org/10.1017/9781009091909.004 Published online by Cambridge University Press

Allowing the government to interfere with the internal processes of private political parties would "infringe upon liberties reserved to the people."[6] Despite the crucial role political parties play in Art. I, §4 elections, the majority in *Newberry* chose formalism over realism: "If it be practically true that under present conditions a designated party candidate is necessary for an election – a preliminary thereto – nevertheless his selection is in no real sense part of the manner of holding the election."[7] After all, the Court reasoned, "[m]any things are prerequisites to elections."[8]

The Court, however, was not unified in its reasoning. In concurrence, Justice Pitney sharply questioned the logic of excluding primaries from the government's constitutional power to regulate elections when they have "no reason for existence, no function to perform, except as a preparation for the [general election]; and the latter has been found by experience in many States impossible of orderly and successful accomplishment without the former."[9] Pitney queried, "Why should 'the manner of holding elections' be so narrowly construed? An election is the choosing of a person by vote to fill a public office. In the nature of things it is a complex process, involving some examination of the qualifications of those from whom the choice is to be made."[10]

There was reason to doubt the durability of the Court's extremely formalistic perspective. We might note that this was the same Court that would repeatedly deny regulatory Commerce Clause authority to the federal government under the rationale that manufacturing and mining are *not themselves* commerce despite the fact that they may *result* in commerce.[11] The *Newberry* Court drew on the logic of this now-discredited line of cases as analogous support for rejecting regulatory authority over political party primaries.[12] As with the Court's restrictive Commerce Clause jurisprudence, it would not take long for the Court's approach to change. But unfortunately, as we shall see, change would not mean clarity on the constitutional status of political parties.

In *United States* v. *Classic*, the Court did away with the *Newberry* rule and concluded that the federal government's criminal laws may be used to ensure that voters in primary elections have their votes counted. *Classic* involved the illegal alteration and falsification of ballots in a party primary, and once again the issue was whether the power granted to regulate elections by Art. I, §4 of the Constitution extends this far.[13] In this 1941 opinion, Justice Stone unequivocally rejected not

[6] *Id.* at 258.
[7] *Id.* at 257.
[8] *Id.*
[9] *Id.* at 282.
[10] *Id.* at 279.
[11] See, for example, United States v. E.C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918); Carter v. Carter Coal Co., 298 U.S. 238 (1936).
[12] *Newberry*, *supra* note 1, at 257 ("Without agriculture, manufacture, mining, etc., commerce could not exist, but this fact does not suffice to subject them to control of Congress").
[13] United States v. Classic, 313 U.S. 299, 307 (1941).

merely the formalism of *Newberry* but its originalism as well. To Stone, it was largely irrelevant that those drafting §4 did not contemplate party primaries, "[f]or in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses."[14]

Stone pointed out the perverse implications of reading the Constitution to allow for the regulation of a general election but not the primary leading up to that election, when the latter election simply ratifies the decision of primary voters.[15] Indeed, it is quite common in cities or states where a single party is dominant – or in highly gerrymandered districts in which one or the other major party is, by design, effectively guaranteed to win – for a general election to feel like a mere formality.[16] In such jurisdictions, the winner of the dominant party primary is virtually assured victory in the general election. In such a context, denying Congress the authority to regulate a party primary is arguably tantamount to a wholesale denial of its Art. I, §4 power, because the true electoral contest – the one that matters – is the primary. The *Classic* Court pointed out that the party primaries at issue were conducted at state expense and in accordance with state regulations dictating "the time, place and manner" of the elections.[17] The Court reasoned that, effectively, the state had simply turned what the Framers might have imagined as a one-step process (a general election) into one with two steps (a primary, followed by a general election).[18] The party primary has thus become a part of "an election" within the meaning of Art. I, §4.

2.2 GUARANTEES AND LIMITATIONS: CONSTITUTIONAL CONSTRAINTS ON POLITICAL PARTIES

From this point forward, however, the complexities grow. *Classic* contemplated the simple question of whether the federal government's constitutional power over elections was broad enough to encompass party primaries. Concern over party autonomy, in which the party itself is considered to be a rights-bearing actor under the Constitution, had not yet entered the picture. It is one thing to conclude that the federal government has the power to regulate a certain activity, which provides the baseline conclusion that such activity is within the government's ambit of power, it is quite another to ask whether that regulated entity is also *subject* to the constitutional constraints typically reserved for governmental actors. The next question

[14] *Id.* at 316.
[15] *Id.* at 319–20.
[16] *Increasing Turnout in Determinative Primaries*, The Pluribus Project (2016), http://pluribusproject.org/representation/echelon-insights.
[17] *Classic*, *supra* note 13, at 311.
[18] *Id.* at 316–17.

https://doi.org/10.1017/9781009091909.004 Published online by Cambridge University Press

was how the party and its activities were to be characterized for other constitutional purposes.

The intuitive understanding of a political party may be that of a voluntary association of individuals who seek to promote a particular set of interests or views. *Classic* would suggest that even if this characterization is accurate, where the primary process of that party becomes a part of the overall election process, the federal government nonetheless has the power to regulate such party primaries. In itself, there is nothing especially controversial or surprising about the general proposition that the government has the power to regulate certain private behavior. The question in *Classic* might simply be understood as whether the federal government has the power to regulate *this particular* private behavior. It is also, however, private behavior that is intimately intertwined with government behavior. Once upon a time, major parties may have begun as largely voluntary associations, but the premise of Stone's majority opinion in *Classic* is that they now function as an – if not *the* – essential part of state-run democratic election. Not only might this justify governmental regulation of party activity, but party activity might in some sense be said to *become* state activity.

When it is the state that acts, the rules change. Regulation may move from a policy intervention a government *may choose* to impose on parties (optional-statutory) to a guarantee it *must* provide (mandatory-constitutional). It might seem like quite a leap for governmental regulation of political parties to move from impermissible, to permissible, to required, all on the basis of how one characterizes that entity and its actions. However, this is the natural consequence of two foundational aspects of the American constitutional system: the limited government principle of federalism and the state action doctrine. As explained in *Classic*, to be merely *permissible*, a federal government regulation must be within the ambit of the government's constitutional power,[19] and as we shall discuss, it may additionally not be disallowed as an infringement on negative constitutional rights such as those found in the First Amendment. To be a *required* regulation – in the case of a mandatory substantive constitutional constraint – the party must be said to be engaging in state action.

As much as the principles embodied in the Constitution may reflect values that are aspirational for all of society, whether it be to freely exchange ideas, respect certain aspects of individual privacy, or ensure equal treatment, constitutional commands are generally directed at only governmental actors. The Constitution, after all, is strong medicine. The Constitution not only carved out rights or guarantees thought to be important or valuable but was also designed such that its meaning could not be changed without a supermajority through the amendment process – or through rare shifts in Court sentiment. This seemingly undemocratic choice was justified by the need to place affirmative limits on a uniquely powerful institution –

[19] *Id.* at 321.

an institution unlike any other. The government, as the Framers understood, monopolizes legitimate violence and poses distinctive and dangerous risks of abuse. The state action doctrine has long suggested that private actors and entities are quite simply not subject to the rigid mandates and prohibitions that the Constitution imposes on the government. Statutory law offers a more flexible remedy for undesirable behavior by nongovernmental actors.

This was the issue in the White Primary Cases. *Smith* v. *Allwright* was decided just three years after *Classic*. The Texas Democratic Party invited only white Texans to participate in its primary elections. It argued that as a voluntary organization, the Constitution did not speak to its private, albeit racist, choice as to with whom it wished not to associate.[20] There was little question that if the state had injected such exclusionary race-based distinctions directly into its election laws, it would have been struck down as an unconstitutional state action in violation of the Fourteenth or Fifteenth Amendments.[21] Indeed, the Court did precisely this in the 1927 case of *Nixon* v. *Herndon*, where the state of Texas explicitly stipulated that blacks were ineligible to vote in Democratic primaries.[22] Likewise, five years later in *Nixon* v. *Condon*, when Texas returned with a revised law giving the parties a general power to "prescribe the qualifications of its own members," and the Texas Democratic Party, in turn, adopted its own resolution limiting primary participation to "white democrats," the Court struck down that law as unconstitutional.[23] Because the authority for the discriminatory voting policy "originat[ed] in the mandate of the law," the lines between public and private action were blurred; the Court once again saw state action in the discriminatory policy, not the mere actions of an independent voluntary organization.[24]

However, by the time the Court confronted *Smith* v. *Allwright* in 1944, it had seemed to have backtracked or, at a minimum, to have declared that there were real limits to the principles emanating from the cases that imputed state action to political parties. In *Grovey* v. *Townsend*, a black Texan was denied an absentee ballot for a Democratic primary election on the basis of his race. The Court declined to strike down the racist policy on constitutional grounds, distinguishing the case from *Condon* by emphasizing that here the method of voting was decided at an independent party convention rather than by an executive committee designated by Texas law.[25]

[20] Smith v. Allwright, 321 U.S. 649, 657 (1944).
[21] The Fifteenth Amendment reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race." U.S. Const. amend. XV, § 2.
[22] Nixon v. Herndon, 273 U.S. 536, 540 (1927).
[23] Nixon v. Condon, 286 U.S. 73, 82 (1932).
[24] *Id.* at 84.
[25] Grovey v. Townsend, 295 U.S. 45, 54 (1935).

In *Smith*, the Court overruled *Grovey*.[26] Instead of following *Grovey*, it adopted a broad definition of state action, which included a party's decision to exclude members on the basis of their race.[27] The choice to discriminate may have been the party's, decided at a party convention, but the procedures for party primaries were subject to an extensive architecture of state regulation.[28] The *Smith* Court reasoned that the "statutory system for the selection of party nominees for inclusion on the general election ballot make the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election."[29]

On its face, this logic appears quite unassailable. As the Court pointed out, ruling otherwise would establish a very convenient loophole for governments that seek to deprive individuals of fundamental constitutional guarantees: simply cast one's "electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied."[30] The challenge, however, is identifying the boundaries of this principle.

Regardless of whether governmental actors have the goal of subverting or promoting constitutional goals, such as equality, to be effective, government policy must be responsive to the world. It is quite natural for law to go beyond mere adaption to a changing social reality and to incorporate changed reality into new laws to effectuate its ends. Social institutions like political parties and other interest groups may arise organically and voluntarily, without involvement of the government. They may expand and develop a life of their own. Government, however, responds. A changed social landscape *necessitates* greater governmental involvement if it is to merely continue fulfilling the mission that it had prior to such evolutions; in the case of the expanding and changing role of political parties, this means maintaining an optimal system of fair, democratic, and representative elections. Granted, what is "optimal" is very much a matter of debate. However, it is clear that a government that is required to be entirely passive because of the "private" nature of political parties would grow troublingly impotent in fulfilling its basic constitutional responsibilities.

The conclusion that primary election administration can be treated as a form of state action is today relatively well established. Indeed, in 1964 this principle was implicitly enshrined into the text of the Constitution itself in the Twenty-Fourth Amendment, which guarantees that "[t]he right of citizens of the United States to vote *in any primary* or other election . . . shall not be denied or abridged by the

[26] *Smith*, *supra* note 20, at 666.
[27] *Id.* at 663–64.
[28] *See id.* at 663.
[29] *Id.*
[30] *Id.* at 664 (1944).

https://doi.org/10.1017/9781009091909.004 Published online by Cambridge University Press

United States or any State by reason of failure to pay any poll tax or other tax."[31] The language of the Constitution is almost exclusively understood as being directed at action by the government – the only prominent example being the Thirteenth Amendment, which broadly commands that "[n]either slavery nor involuntary servitude . . . shall exist within the United States."[32] The unmistakable implication of the Twenty-Fourth Amendment is that a primary is a form of state action.

This manifests in the practical day-to-day operations of primary elections as well. Despite a focus on choosing a standard bearer for an ostensibly private political party, contemporary primary elections are almost always run and regulated by the states themselves. The Court has comfortably concluded that "state regulation of this preliminary phase of the election process makes it state action."[33] It held, for example, that the one-person one-vote principle derived from the Fourteenth Amendment applies not just to general elections, but to primary elections as well.[34] As Justice Douglas explained in 1963, "the right to have one's vote counted . . . must be recognized in any preliminary election that in fact determines the true weight a vote will have."[35] By working with the parties to conduct and manage the primary, a state "adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the state."[36]

This principle reached its zenith almost a decade after *Smith* in *Terry* v. *Adams*, when the Court struck down on constitutional grounds the exclusionary practices of what appeared to be a purely private organization. By design, this whites-only organization that ran its own Democratic pre-primary elections was thoroughly independent of government regulation. In fact, the Jaybird Association of Fort Bend County Texas denied that it was a political party at all, insisting that it was a mere "self-governing voluntary club."[37] With this intention to be distinct from state action, it held its primary in May, before it would have qualified for regulation under Texas law and been required to allow participation by all races.[38]

The informal but consistent impact of this unofficial, association-controlled pre-primary process, which was non-state-sanctioned, was that for more than a half century the Jaybird Association-endorsed candidate went on to claim victory in every Democratic primary for county-wide office.[39] The Jaybird-endorsed candidates filed for the subsequent Democratic primary, which they invariably won with complete independence; the fact that they were Jaybird endorsees was transmitted to the

[31] U.S. Const. amend. XXIV (emphasis added).
[32] U.S. Const. amend. XIII.
[33] Gray v. Sanders, 372 U.S. 368, 374–75 (1963).
[34] *Id.* at 368.
[35] *Id.* at 380.
[36] *Id.* at 374.
[37] Terry v. Adams, 345 U.S. 461, 463 (1953).
[38] *Id.* at 464.
[39] *Id.* at 472.

public only through private means.[40] As Justice Minton acerbically pointed out in his dissent, the "record will be searched in vain for one iota of state action sufficient to support an anemic inference that the Jaybird Association is in any way associated with or forms a part of or cooperates in any manner with the Democratic Party of the County or State, or with the State."[41]

Minton, however, was a lonely voice. He was the only dissenter on a Court that now rejected formalism in favor of a realistic acknowledgment of how private action could be used to circumvent, co-opt, and effectively nullify state action, at least in the political party context. The Court reasoned that "[t]he Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded."[42] The Jaybirds was a political party, even if it failed to identify itself as one, and its primaries had "become an integral part, indeed the only effective part, of the elective process."[43] As such, constitutional principles applied to its actions.

The broader implications of the ruling for the status of political parties were potentially profound. If an organization that does everything within its power to appear to maintain its independence and avoid political party status is nonetheless branded a state actor, it would seem clear that the Court's test is one of function over form. Political parties are state actors, and it is not because of the label, but because of their state-like function. Nonetheless, as we shall see in the following section, this principle does not apply with consistency; and when it does not apply, the rules of the game are remarkably different. Courts have concluded that in many, if not most, instances party action is indeed private. As one Texas Court put it, "[w]hile state action may exist when political parties exercise the 'traditional government function' of conducting elections, it is not true that every act of a political party is state action."[44]

2.3 A SHIELD: POLITICAL PARTIES AND CONSTITUTIONAL PROTECTION *FROM GOVERNMENT*

The command that "Congress shall make no law … abridging the freedom of speech"[45] has been interpreted to mean much more than an assurance that literal "speech" will not be restrained by the government. The Supreme Court has gradually come to acknowledge that an individual's ability to form groups and to associate with others has a close relationship with their ability to form and express

[40] *Id.* at 471.
[41] *Id.* at 485–86 (Minton, J., dissenting).
[42] *Id.* at 469 (majority opinion).
[43] *Id.*
[44] Republican Party of Texas v. Dietz, 940 S.W.2d 86, 92 (Tex. Sup. Ct. 1997).
[45] U.S. Const. amend. I.

ideas, thus concluding that this right is likewise deserving of First Amendment protection.[46] Over time, however, the association has itself morphed into a First Amendment rights-bearing entity.[47] Critics would point out that this doctrinal transformation quietly occurred with distressingly little attention paid to potential internal dissention and complex individual dynamics that exist within an organization.[48] As an implied right derived from the First Amendment's freedom of speech, the freedom of *the* association has had a significant impact on the structure of electoral contests in America, but it is troublingly under-theorized. The inherent challenges and contradictions involved in affording expressive rights to collective bodies was dramatically brought to the fore in the Supreme Court's *Citizens United* decision, in which the freedom of speech, by way of financial expenditures, was guaranteed to corporate entities.[49] However, largely missing from the vigorous debate over the concept of "corporate speech" had been a line of decisions affording a similar set of guarantees to another category of collective body: the subject of this book, political parties.

Early decisions on political parties made allusions to the need for party autonomy and independence but did not go so far as to explicitly grant constitutional rights to political parties themselves. In 1931, Justice Cardozo referred to "the exercise of inherent powers of the party by the act of its proper officers."[50] Yet, he seemed to acknowledge that such inherent powers were often the product of statutory law. There was no mention of an inherent *constitutional* right. In 1934, a Texas Court argued that, in reference to the Democratic Party, "[w]ithout the privilege of determining the power of a political association and its membership, the right to organize such an association would be a mere mockery."[51] It relied primarily on the Texas Constitution for direct support, but it also referred tangentially to the First Amendment. However, when the U.S. Supreme Court cited and rejected the Texas Court's reasoning in *Smith* v. *Allwright*, it would mention only the state court's reliance on the Texas State Constitution, not an implicit freedom of association ostensibly emanating from the First Amendment.[52]

Justice Clark's four-justice concurrence in *Terry*, while agreeing that the Jaybird Association was subject to the Fifteenth Amendment's dictates, provided a caveat: "Not every private club, association or league organized to influence public candidacies or political action must conform to the Constitution's restrictions on political

[46] *Compare* Whitney v. California, 274 U.S. 357 (1927) *with* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
[47] *See* Wayne Batchis, Citizens United *and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of the Association*, 36 N.Y.U. Rev. L. & Soc. Change 5 (2012).
[48] *See id.* at 18–25.
[49] Citizens United v. FEC, 558 U.S. 310 (2010).
[50] *Condon*, *supra* note 23, at 86 (1932).
[51] Bell v. Hill, 123 Tex. 531, 546 (1934).
[52] *Smith*, *supra* note 20, at 654–57.

parties."[53] Seemingly acknowledging the flip-side of the equation, Clark suggested that "a large area of freedom permits peaceable assembly and concerted private action for political purposes to be exercised separately by white and colored citizens alike."[54] Yet there was no explicit mention of a political party's First Amendment freedom of association.

By the 1970s, however, the Court would begin to make the legal source of political party autonomy increasingly clear, and this source was to be found in the Constitution: Political parties, while seemingly state actors in certain contexts, as demonstrated by the White Primary Cases, were at the same time entitled to protection as independent entities under the implicit associational rights of the First Amendment. Two steps were required to reach this conclusion. First, freedom of speech is interpreted to include an individual's ability to join with others. Second, any government regulation of that association is seen as an infringement on that individual's associational rights to join the association of their choice, since such regulation will to some extent alter the nature of that association.

As we shall see, this somewhat simplistic formulation leaves many questions unanswered. For example, what if constitutionalizing one of the three components of party – the *party organization* – adversely affects, also with constitutional implications, another aspect of party? What if the constitutional right of the *party organization* inhibits the freedom or equality of individual members of the *party in the electorate*? What if constitutionalized associational interests have the effect of tyrannizing a minority of party members? What if a constitutionalized party association impedes individual members' ability (or the American people more broadly) to make needed reforms to the *party in government*, arguably diluting an essential element of popular sovereignty – a government premised on self-determination?

But before delving into these concerns, let's return to the origin of the notion that associations themselves, rather than the individuals who comprise them, may be the locus of constitutional rights. The principle can be traced back at least as far as 1927, when the Court in *Whitney* v. *California* – although rejecting the defendant's claim of First Amendment protection – implicitly accepted that an individual's right to associate with others is included in the bundle of First Amendment rights the Court should recognize, even though the word "association" is nowhere to be found in the amendment.[55] By the late 1950s, the Court would, for the first time, explicitly strike down a law that interfered with an individual's First Amendment right to associate.[56]

The context of *NAACP* v. *Alabama* ex rel. *Patterson* was fact-intensive and case-specific: a civil rights era decision addressing an Alabama law that required public disclosure of membership lists, including of the NAACP, an organization at the

[53] *Terry*, *supra* note 37, at 482 (1953).
[54] *Id.*
[55] *Whitney*, *supra* note 46.
[56] NAACP, *supra* note 46.

center of the civil rights storm.[57] It was a requirement that potentially put the safety of the members and their families' in jeopardy, establishing a powerful deterrent to associate with the organization.[58] The 1958 decision was a narrow one. Although Justice Harlan's opinion for the Court articulated for the first time how the freedom to associate relates to an individual's right of expression guaranteed by the First Amendment, the opinion was narrowly tailored to address the unique facts at hand.[59] Indeed, First Amendment scholar John Inazu observed that there was significant internal discord among the members of the Court as to whether and to what extent the decision should be doctrinally rooted in the First Amendment at all.[60] Over time, however, this freedom of association would expand to apply to a wide range of contexts. By the 1970s, the freedom to join together with a major political party of one's choice, previously a right without a committed constitutional home, would be explicitly grounded in implicit freedom of association in the First Amendment.[61]

If the implicit freedom of an individual to associate with others was a reasonably close emanation from the explicit constitutional freedom of speech, broad First Amendment-based autonomy for political parties entails travel to the hazier edge of that emanation – to the very outer limits of the penumbra. The rationale may run as follows: To the extent that the association or political party is regulated *at all* by the government, the law requires the group to alter itself. It may even – in theory – be tinkering with that association's fundamental nature. The individual's constitutional right to associate with an unadulterated political party of her choice – untouched by government regulation – may thus be said to be hindered. In the 1975 decision of *Cousins* v. *Wigoda*, which addressed a conflict between a state's election laws and a national party's rules for seating delegates to its national convention, the Court was unequivocal: "The National Democratic Party and its adherents enjoy a constitutionally protected right of political association."[62] This was translated to mean that "[any] interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[63]

To the extent that political parties *are* the state, this principle is oxymoronic. If they are creatures of the state, political parties could not be said to have been interfered with by the government; they *are* the government. This is similar to the premise behind the Court's government speech doctrine, which we will discuss in greater detail later in the book. In brief, it simply stands for the intuitive proposition

[57] *Id.* at 451–54.
[58] *Id.* at 462.
[59] *Id.* at 460.
[60] John D. Inazu, *The Strange Origins of the Constitutional Right of Association*, 77 TENN L. REV. 485, 514–16 (2010).
[61] Cousins v. Wigoda, 419 U.S. 477, 487 (1975).
[62] *Id.*
[63] *Id.* at 487–88 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

that if it is the government itself that is speaking, the First Amendment does not prevent it from abridging that speech however it chooses. In political science terms, we might conceive of this as one component of party, the *party in government*, intruding upon another, the *party organization*. Intraparty tensions are common and to be expected, particularly when one adjusts one's gaze to acknowledge the nuanced tripartite portrait of political parties long advanced by political science (and studiously ignored by the Supreme Court's political parties jurisprudence).

Admittedly, as discussed above, earlier decisions such as the White Primary Cases have not gone as far as to conclude that political party action is *always* state action. Over time, the Court has effectively split the baby, viewing some behavior by political parties as state action, and most other choices as purely private. And as we shall see, in recent years, it has moved further and further away from the state action rubric. Nonetheless, there is a fundamental tension between, on one hand, the conclusion that parties are to be treated as state actors subject to constitutional constraints and, on the other hand, that they are private associations entitled to constitutional protection *from* government. Election law scholar Daniel Lowenstein argues that "the public/private distinction as applied to political parties . . . leads to perverse results, for it permits parties either to be subject to constitutional rights or to bear them, but not both (at least with respect to any given party activity)."[64] Furthermore, the *party organization* is in truth many coexisting organizations – federal, state, and local. Court intervention to defend the associational prerogatives of a national *party organization* might interfere with the freedom of state or local *party organization*s.

We might also question the assertion in *Cousins* that any regulation that impinges on the structural or procedural choices of a political party necessarily detracts from the freedom of individual members. Political parties are multifaceted organizations with a multiplicity of roles and inherent internecine tensions.[65] Imagine, for example, an elected partisan in the House of Representatives from a moderate district who seeks a promotion to the Senate, staking out a more extreme position that appeals to her more hardline state but alienating the moderate party members in her district who elected her to office. As Michael Kang argues, parties "are diverse aggregations of political actors that variously work together and oppose one another across and inside party lines . . . . [I]ndividual leaders come together for common goals but at the same time compete vigorously with one another for relative influence within the party coalition."[66] Some may see regulations on party operations as "an interference" with the party, but others may find that they bolster the "freedom

[64] Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1754 (1993).

[65] Marjorie Randon Hershey, Party Politics in America 8–9 (16th ed. 2016).

[66] Michael S. Kang, *The Hydraulics of Politics of Party Regulation*, 91 Iowa L. Rev. 131, 134 (2005).

of adherents" by establishing procedures that, for example, reduce the influence of the smoke-filled-room, boost transparency, or ensure a greater role for rank-and-file members of the party.

2.4 THE SUPREME COURT AS ELECTION LAW POLICY-MAKER

There is no reason to assume that the rules imposed by party insiders will result in greater expressive freedom than laws imposed by state legislatures intended to improve upon the democratic process. Yet, by constitutionalizing the political party as an expressive association entitled to First Amendment protection, the Court has tilted the scales with precisely this assumption, while at the same time giving itself a profound new role as the arbiter of quality election policy. After *Cousins*, it became the Court's job to assess the merits, both practical and theoretical, of regulatory attempts to improve upon or manage America's two-party system. It is a role that the Court is arguably ill-equipped to fill.

The majority in *Cousins* adopts a relatively high bar for determining whether a particular governmental "interference" with a political party is to pass constitutional muster. In the Court's view, the state government had failed to demonstrate that "protecting the integrity of its electoral process" constituted a compelling interest for enforcing election laws that would trump the party's determination of which delegates should be seated at its national convention.[67] After *Cousins*, it is up to the Court to make a case-by-case determination of whether particular election laws affecting political parties are sufficiently "compelling" to be constitutionally justified. This *Cousins* principle would prove to be enduring.

Six years later, in *Democratic Party of the United States* v. *Wisconsin* ex rel. *La Follette*, the Court once again struck down a state law that conflicted with a national party's convention rules.[68] This time, the law required that the state's delegates to the national convention be bound to the candidate who was victorious in the state's open primary.[69] This selection through an open primary process – in other words, one that was open to voting by non-party members – violated the Democratic Party's rules.[70] The party argued that allowing non-party participation would dilute the voting strength of members of the Democratic Party.[71]

The Court devoted a good deal of its opinion to outlining the reasons for such a rule, even citing political science literature that supported the national party's decision to institute it.[72] The state had its own reasons for its law, specifically "preserving the overall integrity of the electoral process, providing secrecy of the

[67] *Cousins*, *supra* note 61, at 491.
[68] Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).
[69] *Id.* at 111–12.
[70] *Id.* at 110–12.
[71] *Id.* at 116–17.
[72] *Id.* at 118–20.

ballot, increasing voter participation in primaries, and preventing harassment of voters."[73] But the Court was not convinced that the State's reasons were sufficiently compelling. It concluded that "the interests advanced by the State do not justify its substantial intrusion into the associational freedom of members of the National Party."[74] The law was declared an unconstitutional intrusion into associational freedom.[75]

Ironically, after arriving at its holding by immersing itself in the pros and cons of Wisconsin's rule, the majority waved the flag of judicial modesty, professing that it was "not for the courts to mediate the merits of this dispute."[76] How could it make such a claim when its opinion seemed to do precisely that – weighing the respective substantive arguments of the party and the State and then deciding which perspective was more convincing? The only plausible response is that the Court was now applying a presumption of unconstitutionality to regulations on parties. In other words, the default was now that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party."[77]

This assertion was a far cry from the middle-ground approach it seemed to take in earlier cases that acknowledged political parties as quasi-state actors. Indeed, the Court backed away quite dramatically from prior decisions in which it readily admitted the virtually inseparable relationship between party primaries and the electoral process. In a sharply worded footnote, the Court rejected the State's claim of authority over the electoral process under Art. II, §1, cl. 2 of the Constitution, in which the state is to determine how electors for president are to be chosen. Devoid of the nuance in *Classic* and the White Primary Cases,[78] the Court asserted that "[a]ny connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance."[79]

Three dissenters took a similar approach, willingly balancing the associational interests of the party against state electoral policy interests on a case-by-case basis, but they came to a very different conclusion. The dissenters examined Wisconsin's law in light of the State's longstanding goal to "enlarge citizen participation in the political process and to remove from the political bosses the process of selecting candidates."[80] They acknowledged how the open primary, by eliminating "potential pressures from political organizations on voters to affiliate" serves

[73] *Id.* at 124–25.
[74] *Id.* at 125–26.
[75] *Id.*
[76] *Id.* at 123.
[77] *Id.* at 123–24.
[78] See, for example, the dissent's acknowledgment of this nuance. See, for example, *Democratic Party of the U.S.*, *supra* note 68, at 134 n.9 (Powell, J., dissenting).
[79] *Id.* at 125 n.31 (majority opinion).
[80] *Id.* at 135 (Powell, J., dissenting).

this end.[81] The dissent went on to weigh the lack of evidence that party raiding – the risk that a party's opponent will abuse the open primary system to vote for the opposition party's candidate thought to be the weakest – is a problem in Wisconsin.[82]

There are clearly political scientists on both sides of this debate. Primaries and their varying forms are discussed in greater depth in Chapter 4. And as we shall see, the scholarly community has a range of views when it comes to the normative benefits of different types of primary systems. Some might be pleased with the outcome in the Wisconsin case, while others may agree with the dissenters on the merits of open primaries. However, there is arguably a more important preliminary question at stake. In engaging in these debates with a fine-toothed comb and constitutionalizing their conclusions, the Court had jumped head first into the political thicket. Is this the right approach for the Court to take? Is this a domain where the courts belong?

[81] *Id.* at 136 n.13.
[82] *Id.* at 136 n.12.

https://doi.org/10.1017/9781009091909.004 Published online by Cambridge University Press