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# The Political Party System as a Public Forum: The Incoherence of Parties as Free Speech Associations and a Proposed Correction

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# THE POLITICAL PARTY SYSTEM AS A PUBLIC FORUM: THE INCOHERENCE OF PARTIES AS FREE SPEECH ASSOCIATIONS AND A PROPOSED CORRECTION

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ABSTRACT

*The Supreme Court's jurisprudence addressing the associational rights of political parties is both highly consequential and deeply inconsistent. It dates back at least as far as the Court's White Primary decisions more than a half-century ago. In recent decades, the Court has imposed an arguably ad hoc formula, striking down regulations on political parties on First Amendment grounds in some cases, while upholding them in others. From a jurisprudential perspective, critics might point to insufficiently principled distinctions between these cases. From a normative perspective, the very expansion of First Amendment rights to political parties, like the parallel extension to corporations in Citizens United, is ripe for scrutiny. It relies on a questionable underlying premise: political parties, as entities, should be entitled to constitutional rights comparable to those afforded to individuals. As a consequence, this Article argues entities the Framers would have viewed as dangerous factions are empowered, and individuals—the literal targets of the First Amendment's protection—are disempowered. This Article offers and explores a doctrinal alternative as a corrective: the American political party system should be treated as a limited public forum, subject to the Court's well-established public forum doctrine.*

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## INTRODUCTION

Categories matter in First Amendment jurisprudence. The freedom of speech and its derivative rights[1] work as a remarkably powerful immunity from ordinary law. Cabining and defining this immunity categorically serve to promote clarity and certainty that First Amendment freedoms will be there as a reliable shield even when deeply unpopular, and these refinements also provide the flexibility to give sufficient weight to non-expressive interests when appropriate. Categories can refer to discrete kinds of content deemed to receive less than full First Amendment protections, such as true threats, child pornography, and libel. Categories are also used to differentiate kinds of speakers—a government employee versus a private employee, an individual human being versus an associational entity comprising multiple human beings, the government versus a private corporation. Finally, categories are used to distinguish various platforms for expression, whether differentiating a public forum, such as a public park, versus a private forum, such as the inside of a private home, or a privately-owned public place, such as a shopping mall versus a limited public forum controlled by government that serves a narrow constituency, such as a system for registering and funding student organizations at a public university. All of these First Amendment categories have critical constitutional implications. Yet, no category is hermetically sealed. Categories are powerful First Amendment tools, but they are often blurry on the edges. And when categories overlap with one another, when case law pertaining to a specific First Amendment category is underdeveloped, when an inappropriate category is used, or when an appropriate categorization regime is ignored, courts may be forced to rely on ad hoc balancing rather than consistent rules for resolving cases. While perhaps reasonable for the case at hand, such ad hoc decision making risks muddying the waters and degrading the overarching system of principled categorization.

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1. This Article focuses primarily on the derivative right of freedom of association, but other rights derived from the free speech clause—though not textually guaranteed—might be said to include symbolic expression, financial expenditures or contributions utilized for expression, and litigation, among others. *See, e.g.*, Whitney v. California, 274 U.S. 357, 372 (1927) (freedom of association); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (freedom of association); Texas v. Johnson, 491 U.S. 397 (1989) (symbolic expression); Buckley v. Valeo, 424 U.S. 1 (1976) (financial expenditures); NAACP v. Button, 371 U.S. 415 (1963) (litigation).

This Article argues that political parties have yet to find a suitable categorical home—and that such a home may be found in the limited public forum. Supreme Court decisions addressing political parties have failed to settle on a coherent approach. In some contexts, parties have been treated as creatures of government,[2] and in others as almost entirely private.[3] At one time, the Court focused primarily on the equal protection implications of differential regulatory treatment of parties, but later it shifted its focus to a First Amendment analysis.[4] Over time, the Court has seemed to settle into the idea that political parties should be treated as expressive associations for First Amendment purposes.[5] But this approach has garnered significant criticism and has had inconsistent and regrettable consequences.[6] It is a doctrinal choice that has put courts in a role that they are not equipped to fulfill: parsing the merits of particular structural regulations governing the American electoral process and weighing these merits against the ostensible "associational" interests of the party.

By design, the Framers left us vast choice when it comes to determining optimal electoral procedure. There are no easy answers. Policy choices over the fine-grained details of electoral procedure remain deeply contested by political scientists and theorists and are arguably not appropriate for judicial resolution. States may experiment with different approaches: open or closed primaries, fusion or single party candidates, caucus or primary. For every choice, there are consequences. I will not assert that such choices should be immune to the Constitution, only that the Court's choice to categorize political parties as expressive associations was the wrong way to go about constitutionalizing political parties. In this Article, I propose an alternative First Amendment approach. The American political party system should be understood as a limited public forum. Public forum doctrine provides a better framework for constitutionalizing the political party system. Viewing the system as a public forum acknowledges the extent to which parties are inextri-

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2. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 663 (1944); *see also* Terry v. Adams, 345 U.S. 461, 481–84 (1953) (Clark, J., concurring) (stating that primary elections could be subjected to the amendments to the Constitution as "part of the state's electoral machinery").

3. *See, e.g.*, Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

4. JAMES A. GARDNER & GUY-URIEL CHARLES, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 467 (2012).

5. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

6. *See, e.g.*, Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1742 (1993).

cably integrated into the American system of representative government, while at the same time respecting the crucial traditional role they play in disseminating and facilitating vigorous free speech.

The Supreme Court's First Amendment jurisprudence that addresses the associational rights of political parties is consequential, deeply inconsistent, and, to a wide range of scholars and jurists, troublingly flawed.[7] It dates back at least as far as the Court's White Primary decisions more than a half-century ago, which refused to respect the autonomy of racially exclusionary political parties in the American South.[8] The cases were widely celebrated as a critical step in the civil rights struggle of African Americans. Less acknowledged was their questionable underlying premise: that political parties, as entities, should be entitled to constitutional rights comparable to those afforded to individuals. The holdings purported to represent a simple concession, that associational constitutional rights must sometimes yield to other conflicting constitutional commands—here, equality—because for some purposes, a private political party takes on the role of a governmental actor.[9] Over time, case-by-case challenges exposed fundamental tensions between individual rights and associational rights, and between private party speech and government speech.

In recent decades, the Court has had many opportunities to impose its concededly ad hoc formula[10] for affording First Amendment rights to political parties, striking down regulations on parties in some cases, while upholding them in others. From a jurisprudential perspective, critics might point to insufficiently principled distinctions between many of these cases; to highlight just one example, the Court struck down a state law prohibiting independents from voting in major party primaries,[11] but later upheld a law prohibiting major party members from voting in third-

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7. *See, e.g.*, Michael R. Dimino, *It's My Party and I'll Do What I Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST AMEND. L. REV. 65, 92–99 (2013); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process,* 2002 SUP. CT. REV. 95 (2002); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 775–77 (2000); Lowenstein, *supra* note 6, at 1741–42.

8. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

9. *Terry*, 345 U.S. at 481–84 (Clark, J., concurring); *Smith,* 321 U.S. at 663 (Black, J., plurality).

10. The Court has repeatedly explained that there is no "litmus-paper test" in this area of constitutional law. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.").

11. Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).

party primaries.[12] And from a normative perspective, there is much more to question than alleged inconsistency. The very expansion of First Amendment rights to political parties, like the parallel extension to corporations in *Citizens United*, is ripe for scrutiny. The result of this jurisprudence has been an electoral system that, while intended by the Framers to be guided by the states, is stymied by case law affording constitutional primacy to political parties. As a consequence, this Article argues, entities that the Framers would have viewed as dangerous factions are empowered, and individuals—the literal targets of the First Amendment's protection—are disempowered. However, there are many reasons to doubt that political parties fit within this paradigm, even if one accepts the premise that associations should be treated as individuals for First Amendment purposes, which is a relevant principle in many areas of First Amendment jurisprudence. In a two-party system, political parties are simply not analogous to organizations such as the Boy Scouts, the Jaycees, or Citizens United, which are associations that have triggered the Court's expressive association analysis. Indeed, this Article argues that viewing them as such is inconsistent with another emerging First Amendment principle: the government speech doctrine.

The American party system is a hybrid. As an essentially public institution serving America's democratic process, the government should have ample room to regulate and structure the party system to serve the general welfare, as well as to ensure that representative democracy works and works well. At the same time, it would ignore reality to deny that political parties have a significant private component that is analogous, in some respects, to the private individuals who fill public parks and utilize them for their own non-government-affiliated speech. Governmental regulatory power over parties thus must also face significant First Amendment boundaries—limits that would not apply if political parties were characterized as purely governmental entities. A doctrinal middle ground, in other words, is needed. The public forum doctrine, as this Article shows, strikes just such a balance. Although this doctrine may have begun as a narrow instrument addressing a small subset of government-controlled geographic spaces, the concept of the *limited* public forum has evolved to encompass a broad range of expressive venues. These include intangible venues—such as a system of regis-

12. Clingman v. Beaver, 544 U.S. 581 (2005).

tered student organizations at a state university[13]—that are strikingly analogous to the American two-party system. The limited public forum framework is an excellent fit for the hybrid nature of the political party system.

This Article begins by briefly considering why we have the political party system that we do in America. Next, it examines the history of the Supreme Court's evolving political party jurisprudence, which is followed by an analysis and critique of two possible doctrinal roads the Court might have, and in some cases did, traverse—the notion that when parties speak it is, in fact, the government speaking, and, in contrast, the view that political parties should be treated as private, rights-bearing associational entities largely independent of the state. This Article then introduces and defends a new middle-ground paradigm: the American political party system should instead be understood as a public forum for First Amendment purposes. This is followed by an exploration of how political parties might fit within the existing public forum doctrinal framework. The Article concludes that the political party system should be categorized as a limited public forum.

## I. WHY POLITICAL PARTIES

America's Framers established a framework for a republican system of government in which ideally wise representatives would be chosen—often indirectly—by the people. Famously, however, they left out many of the details. Political parties are not mentioned in the Constitution, and there is, in fact, much evidence that the Framers held them in low esteem.[14] To America's Founding Fathers, parties were vehicles for self-interest that inhibited the promotion of the common good.[15] George Washington, in his 1796 Farewell Address, spoke of the "baneful effects of the spirit of party," emphasizing that the

> "spirit of party . . . enfeeble[s] public administration . . . agitates the community with ill-founded jealousies and false alarms; kindles the animosity of one part against another; foments occasional riot and insurrection[; and] opens the

13. *See* Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 680–85 (2010).

14. L. SANDY MAISEL & MARK D. BREWER, PARTIES AND ELECTIONS IN AMERICA: THE ELECTORAL PROCESS 9, 22 (Niels Aaboe et al. eds., 6th ed. 2012).

15. GARDNER & CHARLES, *supra* note 4, at 450–51.

> door to foreign influence and corruption, which find a facilitated access to the government itself through the channels of party passion."[16]

Even with the early success of the Jeffersonian-Republican Party in beating back the Federalists, both Jefferson and Madison hoped that eventually their own party's influence would dissipate, "restoring the nonpartisan character of the Constitution."[17] Nevertheless, Madison viewed political parties as "unavoidable evils in a free society, forces to be condemned, yet patiently endured."[18]

Today, Americans take the two-party system for granted. However, suppose we momentarily forget those attributes of the political process that have emerged and evolved over more than two centuries since the ratification of the United States Constitution. With the Framers' minimal blueprint in mind, what choices might we make? How should we fill in the unanswered details? How should we go about choosing representatives? With staggering diversity, a vast range of interests and perspectives, and perhaps most troublingly, a tendency by much of the population to be only superficially engaged in the policy debates and personal assessments involved in making such choices,[19] answering these questions might appear daunting.

Suppose we choose a political party system as the primary method of organizing this overwhelming task. Considering the challenge, this may make intuitive sense. Admittedly, a system in which two dominant and fiercely competitive teams take a central role—consolidating ideology, personality and organization—may prove imperfect. However, there is much to be said for such a system. The parties provide heuristics to voters, an important and practical shortcut for deciding which candidates to support.[20] With only two major parties, there is bound to be quite a lot of diversity within each party; at the same time, they are also likely to be broadly distinguishable on ideological grounds.[21] Thus the implications of a candidate's party affiliation become comprehensible to even the

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16. George Washington, President of the United States, Farewell Address to the People of the United States (Sept. 19, 1796) *in* S. DOC. NO. 106-21, at 16–17 (2000).

17. SIDNEY M. MILKIS, POLITICAL PARTIES AND CONSTITUTIONAL GOVERNMENT: REMAKING AMERICAN DEMOCRACY 22 (Michael Nelson ed., 1999).

18. GARDNER & CHARLES, *supra* note 4, at 451.

19. CHRISTOPHER H. ACHEN & LARRY BARTELS, DEMOCRACY FOR REALISTS 9-12 (2017).

20. See Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, 349–50 (1997).

21. GARDNER & CHARLES, *supra* note 4, at 459–60.

relatively disengaged citizen. Parties provide a centralized organizational structure to represent and advocate for this massive amalgamation of ideas, positions, and personalities. The parties help voters narrow down the list of candidates from which they choose. This function helps ensure that the set of choices voters confront is not too long and that voters do not simply disengage from the democratic process because it is intolerably overwhelming. At the same time, in representing such a broad swath of the population, political parties must remain responsive to the world around them. According to Professor Richard Hasen, "as an encompassing coalition, [a party] is able to accommodate a large number of diverse groups and viewpoints, giving each group a stake in the outcome of the election."[22] They are stable, yet flexible and changeable.

Thus, if we were to accept the principle that a two-party system would be an effective way to structure a representative democracy, the next natural question is: How would *this* work? How are parties to function? To what extent should they be incorporated into the very operations of government, including in presidential elections, in Congress, and in America's vast bureaucracy? How are they to choose their standard bearers? How are they to be structured to best achieve their ends—which, ultimately, are the ends of our democracy itself—of a vital government that is sustainable, efficient, reflective of the people it represents yet sufficiently respectful of their diversity, and perpetually open to debate, reinvention, discovery, and improvement.

The reality of political parties is, or course, not hypothetical. We have lived with a system in which two political parties are an integral part—if not *the* integral part—of America's democratic process for more than 150 years.[23] Yet, we still have trouble identifying just what political parties *are*. Political parties are confounding. They *affect* the government, *are* the government, and *are controlled by* the government, and all of these attributes are true in different ways and, to a varying extent, at different times. Political scientists have long agreed that political parties are in fact best understood not as one thing at all, but at least three things: an organization made up of activists and leaders, a group of elected and appointed officials

22. Hasen, *supra* note 20, at 347.

23. Scholars generally trace the emergence of the modern two-party system to the Jacksonian era of the 1830s. *See, e.g.*, MILKIS, *supra* note 17, at 22–34. To explain the continued durability of the two-party system in the United States, political scientists point to the prevalence of winner-take-all representation. This may be contrasted with the proportional representation that results in multiparty systems in many other parts of the world. *See* GARDNER & CHARLES, *supra* note 4, at 31.

who form parts of the government and act under the party banner, and individual citizens and voters who affiliate with the party.[24] Parties are fluid and rigid, combative and conciliatory, diverse but unified. They are ubiquitous, yet hard to know. In short, it can be difficult to wrap one's head around the nature of the political party.

It thus may be tempting to simplify the American political party, to seek to boil it down to its essence. And one might imagine this essence to be a simple group of people who band together to have their voices heard and advocate for a particular set of policies for the greater (or self-serving) good. With this conception in mind, it might make intuitive sense to afford such groups the negative rights—the freedoms *from* government interference—provided to individuals by the Constitution. But this definition, while appealing in its simplicity, will not do. This is not to say that it does not have its proponents. However, the institutional enormity, organizational complexity, and multiplicity of roles that the two parties play in American society make such a reductive definition profoundly unsatisfying or, at best, staggeringly insufficient. Furthermore, under this conceptualization, the questions above about how we should structure a two-party system potentially become moot, because they are not *our* (meaning our government's) questions to answer. Thus, on one hand, a romanticized vision of political parties may emphasize their private nature, portraying them as civic-minded organizations made up of average Americans simply seeking to have a political voice. On the other hand, the two-party system is quite reasonably understood as an essential building block of our electoral and democratic structure, one that should be self-consciously utilized, designed, and redesigned to make American democracy work as well as it can. In many respects, these conceptualizations are in direct tension with one another.

## II. THE SUPREME COURT'S APPROACH TO 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 *Newberry v. United States*, a Senate candidate seeking his party's

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24. MARJORIE RANDON HERSHEY, PARTY POLITICS IN AMERICA 8 (Eric Stano et al. eds., 14th ed. 2011); *see also* GARDNER & CHARLES, *supra* note 4, at 459.

nomination had exceeded the amount of primary campaign spending allowed under federal law.[25] Article I, Section 4 of the Constitution gives the federal government authority to "make or alter such [r]egulations" with regard to the "[t]imes, [p]laces and [m]anner of holding [e]lections" for members of Congress.[26] However, when confronted with the question in *Newberry* of whether such power extends to the regulation of party primaries, the Supreme Court said it did not.[27] One might characterize Justice McReynolds's opinion as a simple exercise in originalism. Since political party primaries were "unknown" at the time the original constitutional was drafted, McReynolds reasoned that the power to regulate primaries should not be understood to be part of the government's power.[28] He then went on to adopt the conception of party behavior that recalls the simple (or arguably simplistic) model discussed above, describing party primaries as "merely methods by which party adherents agree upon candidates whom they intend to offer and support."[29] 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. Allowing the government to interfere with the internal processes of private political parties would "infringe upon liberties reserved to the people."[30] Despite the crucial role political parties play in Article I, Section 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."[31] After all, the Court reasoned, "[m]any things are prerequisites to elections."[32]

The Court itself 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

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25. Newberry v. United States, 256 U.S. 232, 244–46 (1921).
26. U.S. CONST. art. I, §4, cl. 1.
27. *Newberry*, 256 U.S. at 233–34.
28. *Id.* at 250.
29. *Id.*
30. *Id.* at 258.
31. *Id.* at 257.
32. *Id.*

of orderly and successful accomplishment without the former."[33] Pitney questioned, "[w]hy 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."[34] In other words, 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 the federal government regulatory authority through the Commerce Clause under the rationale that manufacturing and mining may result in commerce but are not themselves commerce.[35] 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.[36] As with the Court's restrictive Commerce Clause jurisprudence, it would not take long for the Court's perspective to change. But, unfortunately, as this Article demonstrates, change would not mean clarity on the constitutional status of political parties.

In *United States v. Classic,* the Court did away with the formalistic rule in *Newberry* 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 question was whether the power granted to regulate elections by Article I, Section 4 of the Constitution extended to this issue.[37] In this 1941 opinion, Justice Stone unequivocally rejected not merely the formalism of *Newberry,* but its originalism as well. To Stone, it was largely irrelevant that those drafting Section 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."[38] Stone pointed out the perverse implications of reading the Constitution to allow for the regulation of a general election, but not the

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33. *Id.* at 282.
34. *Id.* at 279.
35. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight Co., 156 U.S. 1 (1895).
36. *Newberry*, 256 U.S. at 257 ("Without agriculture, manufacture, mining, etc., commerce could not exist, but this fact does not suffice to subject them to control of Congress.").
37. United States v. Classic, 313 U.S. 299, 307 (1941).
38. *Id.* at 316.

primary leading up to that election, when the latter election simply ratifies the decision of primary voters.[39] Indeed, it is quite common in areas of the country where a single party is dominant for a general election to feel like, and effectively be, a mere formality.[40] In such jurisdictions, the winner of the dominant party primary is virtually guaranteed 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 Article I, Section 4 power, because the true electoral contest—the one that matters—is the primary.

At this stage, the Court was contemplating the simple question of whether the federal government's constitutional power over elections is broad enough to encompass party primaries. Concern over party autonomy, in which the party itself is a rights-bearing actor, had not yet entered the picture. 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.[41] 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).[42] The party primary had thus become a part of "an election" within the meaning of Article I, Section 4.

However, from this point, the complexities only grow. 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. The next question is how the party and its activities are 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 private behavior. The

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39. *Id.* at 319–20.

40. *Increasing Turnout in Determinative Primaries*, PLURIBUS PROJECT, http://pluribusproject.org/representation/echelon-insights (last visited January 8, 2019).

41. *Classic*, 313 U.S. at 311.

42. *Id.* at 316–17.

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 essential part—if not *the* essential part—of a 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. And when the state is the actor at issue, the rules change. Regulation of the action may move from optional-statutory to 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,[43] and, as this Article shall discuss, it may not be disallowed by 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 it was designed such that its meaning could not be changed without a supermajority through the amendment process or through a rare shift in Court sentiment. This seemingly undemocratic choice was justified by the need to place affirmative limits on a uniquely powerful institution, 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 thus long suggested that private actors and entities

43. *Id.* at 320.

are quite simply not subject to the rigid mandates that the Constitution imposes on the government. For undesirable behavior by non-governmental actors, the use of statutory law offers a more flexible remedy.

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. The Party argued that the Constitution did not speak to the—albeit racist—associational choices of a private, voluntary organization. The Party could exclude those with whom it chose not to associate.[44] There was no 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.[45] Indeed, the Court did precisely this in the 1927 case *Nixon v. Herndon*, where the state of Texas explicitly stipulated that Black people were ineligible to vote in Democratic primaries.[46] 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.[47] 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.[48]

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. Townshend*, 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

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44. Smith v. Allwright, 321 U.S. 649, 657 (1944).

45. 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.

46. Nixon v. Herndon, 273 U.S. 536, 540 (1927).

47. Nixon v. Condon, 286 U.S. 73, 82 (1932).

48. *Id.* at 84.

convention rather than by an executive committee designated by Texas law.[49] In *Smith*, the Court overruled *Grovey*.[50] 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.[51] 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.[52] 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."[53]

On its face, this logic appears quite unassailable. As the Court points 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."[54] The challenge, however, is identifying the boundaries of this principle. To be effective, government policy must be responsive to the world, regardless of whether governmental actors have the goal of subverting or promoting constitutional goals such as equality. It is quite natural for law to go beyond merely adapting to a changing social reality and to incorporate changed reality into new laws to effectuate its ends. Social institutions, such as 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

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49. Grovey v. Townsend, 295 U.S. 45, 54 (1935).
50. Smith v. Allwright, 321 U.S. 649, 666 (1944).
51. *Id.* at 663–64.
52. *See id.* at 663.
53. *Id.*
54. *Id.* at 664.

"private" nature of political parties would grow troublingly impotent in fulfilling its basic constitutional responsibilities.

This principle reached what could perhaps be said to be its zenith almost a decade later in *Terry v. Adams*, when the Court struck down on constitutional grounds the exclusionary practices of what appeared to be a purely private organization. A whites-only organization that ran its own Democratic pre-primary elections was thoroughly independent of government regulation by design. 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."[55] 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.[56] The informal but consistent impact of this unofficial, association-controlled pre-primary process, which was not state-sanctioned, was that the Jaybird Association-endorsed candidate went on to claim victory in every Democratic primary for countywide office for more than a half century.[57] The Jaybird-endorsed candidates filed for the subsequent Democratic primary, which they invariably won with complete independence; the fact that they were the Jaybird endorsee was transmitted to the public only through private means.[58] 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."[59]

Minton, however, was a lonely voice. He was the only dissenter on a Court that now rejected formalism in favor of a realistic acknowledgement 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."[60] The Jaybirds was a political party, even if it failed to identify itself as

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55. Terry v. Adams, 345 U.S. 461, 463 (1953).
56. *Id.* at 464.
57. *Id.* at 472.
58. *Id.* at 471.
59. *Id.* at 485–86 (Minton, J., dissenting).
60. *Id.* at 469 (majority opinion).

one, and its primaries had "become an integral part, indeed the only effective part, of the elective process."[61] 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, which 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.

## III. POLITICAL PARTIES AS GOVERNMENT SPEECH?

If political parties are to be treated as instrumentalities of the state, the constitutional implications would not appear to be limited to negative restraints on party behavior flowing from the state action doctrine. If a political party is effectively a governmental actor, then, in other important respects, the Constitution would *not* apply. Specifically, the Constitution does not generally protect the government from itself. So, while the government may not conduct a search without probable cause, it may be as unreasonable as it sees fit when it is searching its own property. Although it may not have the power to deprive individuals of their right to keep and bear arms, it may choose to dramatically reduce its own armaments. In other words, if political parties *are* government, government regulation cannot be said to infringe on *their* rights. In the sphere of free expression, this has become known as the Government Speech Doctrine. The government may generally choose to speak, not to speak, or to convey only select messages and not others, without infringing on the First Amendment.[62]

Admittedly, the government speech doctrine is a relatively new one or, at least, newly articulated. Scholars have acknowledged that it is a doctrine that "remains in transition," one in which there is still a significant lack of clarity.[63] Nonetheless, in recent cases, the Supreme Court has made significant strides toward intelligibility. As Helen Norton explains, this solved a longstanding problem.[64] Lower courts simply did not have the doctrinal vocabulary to deal

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61. *Id.*
62. *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005).
63. Helen Norton, *Government Speech in Transition,* 57 S.D. L. REV. 421, 426 (2012).
64. *Id.* at 421–22.

with free speech claims challenging expressive choices by government. Surprisingly, it was not until the middle of the last decade that the Court clearly acknowledged the seemingly commonsense notion that "[n]ot only must the government speak if it is to govern, its speech is often quite valuable to the public."[65] In 2009, the Supreme Court confronted a challenge by a relatively obscure religious group that sought to place a permanent monument in a public park. Although another monument of the Ten Commandments had been previously accepted and installed by the city, the Court was clear that the private group had no First Amendment claim to require the city to accept the display.[66] The Court reasoned that the choice to install an expressive work of art in a city park is government speech.[67] Succinctly asserting what has come to be known as the government speech doctrine, Justice Alito explained that "[t]he Free Speech Clause restricts government regulation of private speech; it does not regulate government speech."[68]

As discussed above, *Smith* and *Terry* suggest that political parties are, at least in certain respects, to be treated as state actors due to their government-like electoral functions. Thus, taking the logic of these cases one step further, one might conclude that not only may governmental bodies freely regulate political parties, they may do so in a manner that, if imposed on private parties, would violate the Constitution. But this cannot be right. Under this logic, Watergate would not have been a scandal at all. Search and seizure of the Democratic National Headquarters by operatives of a Republican president would have merely evidenced the government searching its own offices—if a crime at all, it would not have constituted a constitutional infringement. Why does this not sit well? Because, of course, while the political parties in America may in many respects play roles that are integral to the functioning of the government, they are vehicles for competing visions of the social good. They are in perpetual tension not only with each other, but with their own members and potential supporters who seek to alter or strengthen aspects of their official and unofficial platform. It would be difficult to accept the notion that when one of the two major political parties controls the government, the other major party may also, at the same time, be considered "the government." It might be tantalizingly attractive for a Democratic president to

65. *Id.* at 421.
66. Pleasant Grove v. Summum, 555 U.S. 460, 464 (2009).
67. *Id.* at 464.
68. *Id.* at 467.

sign an executive order demanding that the Republican National Committee refrain from any expressive activity challenging the wisdom of his administration's policy objectives and calling this choice not to speak "government speech." However, this would seem, for obvious reasons, profoundly antithetical to the robust debate that is part and parcel of our democratic system. It is perhaps equally dubious—and alarming—to imagine a president censoring the expression of that segment of his own party that is critical of his choices.

Political scientists have long understood the inherent complexity of political parties. They are many things at once: the party organization, including the "party leaders and the activists who work for party causes and candidates;" the party in government, comprised of those who hold office under the party banner; and the party in the electorate, citizens who affiliate with the party.[69] Should the party organization, which might make rules that effectively deprive individuals of their ability to participate in the democratic process, receive the same constitutional status as a group of party-affiliated citizens who come together to discuss and formulate their ideas, as in the White Primaries? How about a party operative who is appointed to a government commission and must, by law, be a member of one or the other major political party? We need not only ask whether the government may constitutionally regulate a political party, but whether one part of a party may silence or regulate another part of the same party.

A constitutional middle ground between political parties as government actors and political parties as purely private associations appears to be necessary. Over many years of seemingly inconsistent decisions on the status of political parties, one could argue that this is ultimately what the Court has delivered. There are many good reasons, as seen in the White Primary Cases, to hold political parties accountable for constitutional violations as if they were state actors. These are instances in which government regulation of a party appears effectively indistinguishable from a government's regulation of itself and it should be treated that way for constitutional purposes. Yet, there are other circumstances where a degree of autonomy is essential if a party is going to fulfill its core democratic functions, both as a vessel of ideas and a forum for the contestation of ideas. This need for autonomy might seem to call out for constitutional protection *for the party itself*. Just what doctrinal

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69. HERSHEY, *supra* note 24, at 8.

rule will adequately account for the complex, confounding, *sui generis* nature of political parties in America? What form should this middle ground take? Thus far, the in-between constitutional status for political parties has been achieved through a diverse array of decisions, each responsive to the facts at hand, but cumulatively lacking in coherence.[70]

Many would agree that constitutional principles should not be applied ad hoc. Yet, political parties and their activities intersect with the Constitution in a variety of possible ways. As difficult as the task may be, courts should ideally strive to devise a set of doctrinal rules that is responsive to the complex and changeable nature of political parties in America, yet also provides a needed degree of clarity and predictability. The remainder of this Article will focus on, critique, and offer a suggestion to correct one choice made by the Court: the decision to treat political parties as rights-bearing entities under the First Amendment's freedom of association.

## IV. POLITICAL PARTIES AND THE FREEDOM OF THE ASSOCIATION

The command that "Congress make no law . . . abridging the freedom of speech"[71] 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 ideas, thus concluding that this right is likewise deserving of First Amendment protection.[72] Over time, however, the association has itself morphed into a First Amendment rights-bearing entity.[73] Critics point out that this doctrinal transformation quietly occurred with distressingly little attention to potential internal dissention and the complex individual dynamics that exist within an organization.[74] As an implied right derived from the First Amendment's freedom of speech, the freedom of *the* association

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70. *See* discussion *infra* notes 112-16 and accompanying text.

71. U.S. CONST. amend. I.

72. *See* Whitney v. California, 274 U.S. 357 (1927) (implicitly accepting, for the first time, the view that "association" is to be included alongside the textual First Amendment protections of "speech" and "assembly"); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (firmly and explicitly establishing that freedom of association is protected by the First Amendment).

73. *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).

74. *See id.* at 18–25.

has had a significant impact on the structure of electoral contests in America, but it is troublingly under-theorized. The Supreme Court's *Citizens United* decision, in which the freedom of speech, by way of financial expenditures, was guaranteed to corporate entities, brought to the fore the inherent challenges and contradictions involved in affording expressive rights to collective bodies.[75] However, largely missing from the vigorous debate over the concept of "corporate speech" has been a line of decisions affording a similar set of guarantees to another category of collective body: political parties.

Early decisions on political parties made allusions to the need for party autonomy and independence. In 1931, Justice Cardozo referred to "the exercise of inherent powers of the party by the act of its proper officers."[76] 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, the Texas Supreme Court argued that, in reference to the Democratic Party, "[w]ithout the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery."[77] The court relied primarily on the Texas Constitution for direct support, but it also referred tangentially to the First Amendment. However, in *Smith v. Allwright*, the U.S. Supreme Court cited and rejected the Texas Supreme Court's reasoning; the Court mentioned only the state court's reliance on the Texas State Constitution, not an implicit freedom of association ostensibly emanating from the First Amendment.[78] 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 parties."[79] Seemingly acknowledging the flip-side of the equation, Clark suggested that "[c]ertainly a large area of freedom permits peaceable assembly and concerted private action for political purposes to be exercised separately by white and colored citizens

75. Citizens United v. FEC, 558 U.S. 310 (2010).
76. Nixon v. Condon, 286 U.S. 73, 86 (1932).
77. Bell v. Hill, 123 Tex. 531, 546 (Tex. 1934).
78. Smith v. Allwright, 321 U.S. 649, 654–57 (1944).
79. Terry v. Adams, 345 U.S. 461, 482 (1953).

alike."[80] 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: While political parties were seemingly state actors in certain contexts, as demonstrated by the White Primary Cases, they were simultaneously 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.

The first step is a principle that dates 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, even though the word "association" is nowhere to be found in the amendment.[81] By the late 1950s, the Court would explicitly strike down a law that interfered with an individual's right to associate.[82] The context of *NAACP v. Alabama ex rel. Patterson* was case-specific: a civil rights era decision addressing an Alabama law that required public disclosure of the state membership lists, including the NAACP, an organization at the center of the civil rights storm.[83] 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.[84] Nevertheless, 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.[85] Indeed, First Amendment scholar John Inazu observed that there was significant internal discord among the members of the Court as to

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80. *Id.*
81. Whitney v. California, 274 U.S. 357 (1927).
82. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).
83. *Id.* at 451–54.
84. *Id.* at 462.
85. *Id.* at 460.

whether and to what extent the decision should be doctrinally rooted in the First Amendment at all.[86] Over time, however, this freedom of association expanded 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 the implicit freedom of association in the First Amendment.[87]

The second step toward broad First Amendment-based autonomy for political parties, however, required adding another link to the proverbial logic chain of expressive freedom—a chain that seemed to be getting further and further in proximity from the explicit free speech guarantee laid out in the First Amendment. That is, to the extent that the association or political party is regulated *at all* by the government, the individual's right to join with *that* group may be said to be hindered, as the law might require the group to alter its fundamental nature. In the 1975 decision *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."[88] It then went on to argue that "[any] interference with the freedom of the party is simultaneously an interference with the freedom of its adherents."[89]

To the extent that political parties *are* the state, this principle is oxymoronic. If they are creatures of the state, political parties are products of law. Law thus could not be said to interfere with an entity that would not exist but for the law. 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. Nonetheless, there is a fundamental tension between, on one hand, the conclusion that parties are to be treated for some purposes as state actors subject to constitutional constraints and, on the other hand, private associations that are entitled to constitutional protection *from* government.

It is possible to critique 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

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86. John D. Inazu, *The Strange Origins of the Constitutional Right of Association,* 77 TENN. L. REV. 485, 514–16 (2010).

87. Cousins v. Wigoda, 419 U.S. 477, 487 (1975).

88. *Id.*

89. *Id.* at 487–88 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

members. As discussed previously, political parties are multifaceted organizations with a multiplicity of roles and inherent—but variable—internecine tensions. As Michael Kang argues, they "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."[90] Some may see regulations as "an interference" with the party, but others may find that they bolster the "freedom 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. In other words, 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 tilted the scales with precisely this assumption, and, at the same time, gave itself a profound new role as the arbiter of quality election policy. It is a role that the Court is arguably ill-equipped to fill. After *Cousins,* it was 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. The majority in *Cousins* adopted 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 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.[91] 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.[92] This time, the law required that

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90. Michael S. Kang, *The Hydraulics of Politics of Party Regulation*, 91 IOWA L. REV. 131, 134 (2005).

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

92. Democratic Party of the U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981).

the state's delegates to the national convention be bound to the candidate who was victorious in the state's open primary.[93] This selection through an open primary process—in other words, one that was open to non-party voters—violated the Democratic Party's rules.[94] The party argued that allowing non-party participation would dilute the voting strength of members of the Democratic Party.[95] The Court devoted a good deal of the opinion to outlining the reasons for such a rule, even citing political science literature that supported the national party's decision to institute it.[96] The state had its own reasons for its law, specifically "preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters."[97] The Court was not convinced that the State's argument was a compelling one. 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."[98] The Court declared the law to be an unconstitutional intrusion into associational freedom.[99]

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."[100] How could it make such a claim when its opinion seemed to do precisely that, by weighing the respective substantive arguments of the Party and the State and then deciding which perspective was more convincing? The only palatable 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."[101] This dramatic assertion was a far cry from the middle-ground approach it seemed to take in earlier cases, which acknowledged political parties as quasi-state actors. Indeed, the Court backed away quite dramatically from prior decisions in which it readily admitted the sometimes almost-inseparable relationship between party primaries and the

93. *Id.* at 111–12.
94. *Id.* at 110–12.
95. *Id.* at 116–17.
96. *Id.* at 118–20.
97. *Id.* at 124–25.
98. *Id.* at 125–26.
99. *Id.*
100. *Id.* at 123.
101. *Id.* at 123–24.

electoral process. In a sharply worded footnote, the Court rejected the State's claim of authority over the electoral process under Article II, Section 1, clause 2 of the Constitution, which provides that the state is to determine how electors for president are to be chosen. Devoid of the nuance in *Classic* and the White Primary Cases,[102] 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."[103]

Three dissenters took a similar approach, thus 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"[104] and acknowledged how the open primary, by eliminating "potential pressures from political organizations on voters to affiliate" serves this end.[105] 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.[106] In engaging in these debates with a fined toothed comb and constitutionalizing their conclusions, the Court had clearly jumped head first into the political thicket.

There are strong arguments that the Supreme Court's freedom of association jurisprudence, broadly construed, is deeply problematic.[107] The Founders framed the First Amendment in human terms. What began as an individual First Amendment right to join with a group for expressive purposes, which was derived from that individual's explicit right to speak in the First Amendment, over time became a right possessed by the association itself. If this association is a legal entity, contradictions and tensions between the individual's expressive freedom and the association's purported freedom become increasingly apparent. Justice Scalia, who was in the majority in the controversial *Citizens United* decision that af-

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102. *See, e.g.*, *id.* at 134 n.9 (Powell, J., dissenting) (acknowledging this nuance).
103. *Id.* at 125 n.31 (majority opinion).
104. *Id.* at 135 (Powell, J., dissenting).
105. *Id.* at 136 n.13.
106. *Id.* at 136 n.12.
107. *See* Batchis, *supra* note 73.

forded corporations (a kind of association) a free speech right to spend unlimited sums on political "speech," has acknowledged "that when the Framers 'constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.'"[108] Scalia's justification for expanding this right beyond the individual was the seemingly intuitive assumption that an "individual person's right to speak, includes the right to speak *in association with other individual persons*."[109] However, individual speech and associational speech are fundamentally different and often irreconcilable.

As a collective, each association has its own distinctive procedure and method for determining who gets to do "the speaking" for the association and what is to be said. Some associations may be highly democratic and make majoritarian decisions, and some may use ownership share as a metric for determining influence. Others may rely on strong leaders and backroom deals to determine the content of official associational speech. Large numbers of association members may disagree vehemently with many of the speech choices made by the powers that be within the association. Attaching a constitutional status to such "speech" has the perverse effect of endowing an idiosyncratic internal structure, responsible for churning out authorized associational speech, with the blessing and protection of the highest law in the land. At the same time, it potentially sidelines the individuals who were the intended beneficiaries of the First Amendment.[110]

Such concerns are particularly germane to political parties. As mentioned earlier, the very extent to which political parties are independent non-governmental associations is itself questionable. As Elizabeth Garrett explains, "[t]he major parties make up government and provide a structure to mediate among citizens, interest groups, and government officials."[111] However, the critique of the characterization of political parties as rights-bearing associations runs much deeper than this. The very nature of party membership is up for debate. The two major political parties are vast and diverse organizations that have each recently comprised around twenty-five to forty percent of the American voting population.[112]

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108. Citizens United v. FEC, 558 U.S. 310, 391 (2010) (Scalia, J., concurring).
109. *Id.* at 392.
110. *See* Batchis, *supra* note 73, at 35–39.
111. Garrett, supra note 7, at 111.
112. *See Party Affiliation*, GALLUP, http://www.gallup.com/poll/15370/party-affiliation.aspx (last visited Oct. 27, 2018).

While it is common to think of party membership as constituting those registered with a particular party, members may instead be defined as all voters for a party's candidate (whether registered or not), party leaders, party activists, officeholders, office seekers, interest groups, or all of the above. Garrett argues that

> the ease in which courts and others refer to political parties as "membership organizations" masks the difficulties involved in figuring out whether there are any individuals or groups that are properly characterized as "members" in the usual sense of that word. Political parties are aggregations of many kinds of interests, some individual and many collective.[113]

In short, there are compelling reasons to doubt that the major parties should be treated as one speaker with one voice for First Amendment purposes because they represent such enormous swaths of the American electorate and are comprised of individuals and groups with an almost unfathomable range of interests, attitudes, experiences, and perspectives.

Nevertheless, over the three and a half decades following *Democratic Party v. Wisconsin,* the Court would maintain a case-by-case approach to the freedom of association of political parties. The cumulative results are messy and incoherent, with members of the Court readily admitting that balancing the "two vital interests" of associational freedom and "fair and effective" participation "does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case."[114] As explored in later sections of this Article, a majority of the Court has broken in different directions in different cases. At times, it has struck down regulations on political parties as unacceptably intrusive into their associational rights—for example, invalidating laws that prohibit party endorsements in primaries,[115] laws that do not allow independents to vote in a party's primaries against that party's wishes,[116] and laws mandating a blanket primary.[117] At other times, it has upheld laws regulating political parties—for example, a law institut-

113. Garrett, *supra* note 7, at 109.
114. Tashjian v. Republican Party of Conn., 479 U.S. 208, 234 (1986) (Scalia, J., dissenting).
115. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 214–16 (1989).
116. *Tashjian*, 479 U.S. at 210–11.
117. Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

ing a top-two primary in which the top two candidates, regardless of party, confront each other in the general election[118] and a law establishing semi-closed primaries, which preclude parties from opening their primaries to members of other parties.[119] In all of these cases, there were strong dissents by justices whose ad hoc balance would have resulted in a different outcome, belying any optimism that consistent and predicable principles might ultimately emerge from this body of jurisprudence. Numerous scholars have roundly criticized the Court for its approach and inconsistency on political parties.[120]

## V. A NEW PARADIGM: THE POLITICAL PARTY AS PUBLIC FORUM

What if political parties were not treated as rights bearing entities at all? Pioneering election law scholar Daniel Lowenstein has argued that accepting the theory that political parties are entitled to associational rights was an "unwelcome step" by the Supreme Court.[121] To Lowenstein, "the major parties constitute the government, and when constitutional challenges are presented in the name of these parties, the parties are complaining about something they have done to themselves."[122] These words, however, were written in 1993, well before the government speech doctrine was articulated by the Court. As alluded to earlier, the prospect of treating parties *as government*, as well as the subsequent application of the government speech doctrine, would be intolerable. The temptation by the party in power to systematically rid the parties of all inter- or intraparty dissent would be unlimited, effectively killing one of the most critical functions of parties as vehicle for debate. Yet, we might readily agree with Lowenstein that the "conventional First Amendment framework simply does not fit the major political parties, their relationship with the government that they structure, or the claims pressed in the name of their freedom of association."[123]

I propose, however, that there is an alternative available, a doctrine that provides a surprisingly good fit for the peculiar institu-

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118. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458–59 (2008).
119. Clingman v. Beaver, 544 U.S. 581, 598 (2005).
120. *See, e.g.*, Dimino, *supra* note 7, at 92–100; Garrett, *supra* note 7, at 95–96; Persily & Cain, *supra* note 7, at, 775–79; Lowenstein, supra note 6, at, 1741–43.
121. Lowenstein, *supra* note 6, at 1742.
122. *Id.* at 1758.
123. *Id.* at 1791.

tion that is the political party. Ever since Justice Owen Roberts, in 1939, penned his famous dictum in *Hague v. CIO*, the public forum doctrine has come to stand for the idea that government is not limited to one of two roles, of speaker or speech regulator. In some contexts, government must act as a *speech facilitator*. Why? Because government monopolizes the public realm. Thus, on one hand, the Court has come to acknowledge that a big part of governing involves government speech by selectively choosing which ideas to convey and promote. On the other hand, it involves maintaining a public sphere in which free expression must be unimpeded without selective interference. The quintessential example is the public park. Streets and parks, Justice Roberts famously explained,

> have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[124]

This perspective represented a dramatic jurisprudential shift from what had effectively been a "government speech" approach—well before this conceptualization became an identifiable doctrinal category. Prior to *Hague*, the government was treated like any private deed holder, with complete power to allow or disallow particular speech on its property, regardless of the public nature of the space.[125]

The public forum doctrine, however, rejected this broad, unrestrained conception of governmental power in which the First Amendment would present no obstacle to government censorship in critical settings where the public traditionally has made its voice heard. In the years following *Hague*, the idea of the public forum—venues that are constitutionally protected for broad and diverse expressive freedom yet simultaneously government controlled—would expand well-beyond the public park. The public forum category would grow to apply to more than just property-based venues for expression. Thus, an interschool mail system that is open to the public might be considered to be a public forum,[126] as well as a school district's properties that are made available outside of

124. Hague v. CIO, 307 U.S. 496, 515 (1939).
125. *See* Davis v. Massachusetts, 167 U.S. 43 (1897).
126. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

school hours for social and civic uses,[127] and even a student organization fund at a public law school.[128]

It is important to note that the Court has never required complete immunity from regulation simply by virtue of identifying a venue as a public forum. Far from it. As we shall see, the Court has drawn categorical distinctions between different types of public fora and afforded them differing levels of constitutional immunity. Roberts himself acknowledged in *Hague* that even in a quintessential public forum, expressive rights are "not absolute."[129] They may be "regulated" but not "abridged or denied."[130] It does not require great mental acuity to understand why Roberts would provide such a caveat. Public fora are, by definition, creatures of the government. Indeed, they are largely *creations* of the government. A public park could not exist as a public park, unless sufficient government regulation could ensure that it is at least minimally identifiable, functional, clean, and well-maintained. Most such regulations are bound to have an impact on expression—even if it is just on the margins. Laws maintaining order and cleanliness or determining the location or presence of trees, signage, fountains or concrete public squares may affect if and how private expression is conveyed in the park. Yet, few would argue that the First Amendment precludes the government from making such fundamental regulatory interventions. Indeed, most would likely agree that it is a critical responsibility of government to make such regulatory choices with regard to the public realm.

As discussed, the political party system in America is in many ways a constitutional conundrum. And the notion of a public forum was itself a riddle that took the Court a long time to reconcile. Upon reflection, this problem and solution are just waiting to be united. The political party system has a surprising amount in common with a public park or other public fora. As essential and fundamental elements of our electoral system political parties are invariably subject to significant government regulation, both for practical reasons, such as incorporating party elections into the mechanics of the state-run voting apparatus, and normative reasons, such as structuring the electoral process to maximize its core democratic attributes. For good or ill, the two major political par-

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127. Lamb's Chapel v. Cent. Moriches Union Free Sch. Dist., 508 U.S. 384, 396–97 (1993).
128. Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 698 (2010).
129. *Hague*, 307 U.S. at 516.
130. *Id.*

ties are incorporated into the very architecture of American government, from the leadership hierarchy in Congress to the composition of independent agencies such as the Securities and Exchange Commission. At the same time, political parties are among the most important vehicles by which individuals join together to disseminate, generate, and contest political ideas. To most scholars and jurists, political speech pertaining to public issues lies at the very heart of the First Amendment.[131] Like other public fora, the political party system both *is* government and *must be free from* government. It is precisely this type of paradox that the public forum doctrine was designed to accommodate.

## VI. THE MECHANICS OF PUBLIC FORA

The Court has over time articulated a number of types of public fora. The public forum concept originated as a reference to public places such as "streets and parks," which by long-standing tradition were used for assembly, debate, and general expressive activity.[132] These quintessential public fora were eventually joined by another category of public forum: the designated forum, or those that were open by the government to the public by choice or designation. In all of these public fora, "the government may not prohibit all communicative activity"[133] but "[r]easonable time, place, and manner regulations are permissible, and content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[134] However, the Court has most recently designated a third category of public forum, which is "created for a limited purpose such as use by certain groups."[135] In a "limited public forum," the First Amendment constraints on government regulation, while still significant, are somewhat more permissive. Restrictions on speech or barriers to access must simply "be reasonable and viewpoint neutral."[136] This Part argues that political parties have the attributes of a limited public forum.

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131. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52 (2011); N.Y. Times v. United States, 403 U.S. 713, 717–24 (1971) (Black, J., concurring); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15–16, 24–27 (1948).
132. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
133. *Id. at 45.*
134. *Id.* at 46.
135. *Id.* at 46 n.7.
136. Christian Legal Soc'y Chapter v. Martinez, 561 U.S. 661, 679 (2010).

It seems relatively clear that political parties would not qualify as quintessential public fora, such as a public sidewalk or park. The Court has not been willing to expand traditional public forum category beyond public thoroughfares and parks. Thus, if the public forum doctrine were applied to the political party system, courts would have to determine whether political parties should be classified as either designated public fora with greater First Amendment immunity from expression-related regulation, or as limited public fora with a somewhat lesser protected status. In *Christian Legal Society v. Martinez*, the Court concluded that a public-university-sponsored system of official recognition for student groups was a limited public forum.[137] In a brief footnote, it explained that all parties agreed on the system's categorization as a limited public forum, which was defined as when "governmental entities [open] property 'limited to use by certain groups or dedicated solely to the discussion of certain subjects.'"[138] The public law school at issue required that student organizations, in order to receive official status, abide by a nondiscrimination policy-interpreted to mandate that such groups "accept-all-comers."[139] For the Christian Legal Society (CLS), this meant that it was faced with a choice: either change its policy and no longer deny membership to openly gay students or forgo registered student organization (RSO) status.[140]

The analogy to American political parties is hard to ignore. In countless ways, the government officially sponsors a two-party system, which, even more so than in the case of official student groups at a public university, serves an essential function that furthers and is incorporated into the institution's central mission of representative government. Comparable to the "benefits [that] attend this school-approved status" as an RSO at a public law school, the two major political parties are afforded significant governmentally-endowed benefits that attach to their official status—including, of course, being integrated into the very structure of American democracy and voting procedure. Just like a potential-RSO, as associations of ideologically, culturally, and socially united individuals, political parties are free to exist without the benefits that accompany official status. In the case of a political party, if it chose not to comply with applicable government regulations, it would simply be denied benefits that accompany activity in the

137. *Id.* at 679 n.12.
138. *Id.* at 679 n.11.
139. *Id.* at 668.
140. *Id.* at 669.

public forum, including access to government-administered ballots and designated party-based bureaucratic posts. The association could continue to exist in a different form; instead of a political party, it would simply be identified as an interest group. Finally, there is the accept-all-comers non-discrimination requirement that any group that meets certain baseline criteria must be permitted to be a part of the expressive forum. To qualify as an official RSO, a group had to be a noncommercial organization comprised of only students at the institution, but it must have nevertheless been open to all students. This is analogous to the American two-party system in that any American eligible to vote may generally become a member of either party simply by registering with that party. The Court has prohibited the discriminatory denial of such open membership.[141]

Perhaps the most significant distinguishing attribute of the RSO system—when contrasted with the reigning First Amendment paradigm applicable to America's political party system—is that, while the *Martinez* Court readily accepted the claim that *both* expressive association *and* the public forum doctrine were at play, courts have only applied the former to political parties. The Supreme Court has failed to entertain the notion that the party system is, in fact, a type of public forum. Granted, *Martinez* might be understood as addressing two discrete First Amendment questions: first, the ability to utilize a public forum without discrimination based on belief; and second, the ability of an expressive association to control its message through control over its membership. However, *Martinez* is an excellent illustration of how distinctions between expressive association analysis and public forum analysis invariably break down. The Court ultimately acknowledged this convergence in *Martinez*. At first take, in both the RSO and political party contexts, it is possible to see two separable and isolatable units of First Amendment analysis: first, the Christian Legal Society and Political Party as independent expressive associations with their own rights; and second, the government-established, -owned, or -controlled package of benefits or property that is the public forum. However, when the Christian association in *Martinez* requested that the Court "engage each line of cases independently," the Court said no. In the Court's view, because the two arguments effectively "merge[, . . .] limited-public forum precedents supply the appro-

141. Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

priate framework for assessing both CLS's speech and association rights."[142]

The argument for such a merger is even stronger in the political party context, which suggests that it is the public forum doctrine, and not expressive association, that should govern any First Amendment issues. Once political parties accept the benefits of political party status, they become a part of the political party system, as it is a limited public forum designed for democracy-facilitating purposes. As such, under public forum principles, they may be regulated within certain bounds. Likewise, the Christian Legal Society, once it became a part of the RSO system, may be recognized as both a participant in and part of the limited public forum. It became an organization that may be regulated within First Amendment limits, such that it serves the narrow set of interests and needs of the public institution. "[W]ithout controversy," the organization may be limited by regulation to "comprising only students" as members,[143] just as the Republican Party may presumably be prohibited by law from allowing seven-year-old political aficionados from registering as party members. Outside of this limited public forum context, a private expressive association has significant constitutional freedom to define or limit its own membership however it sees fit.[144] However, in the context of a merger between expressive association and limited public forum, it becomes impossible to truly disaggregate the association from the forum. As the Court explains, "the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums—the State may 'reserv[e] [them] for certain groups.'"[145] Reserving public fora for certain groups and purposes *must,* as a corollary, involve defining with those groups and purposes with some specificity. Defining these groups and purposes *must* mean establishing who is in and who is out through a regulatory regime. As long as this is achieved in a reasonable and viewpoint-neutral way, the limited public forum doctrine suggests that such regulations are consistent with the First Amendment.

The Court employs a carrot versus stick metaphor to justify greater First Amendment lenience. Such lenience might arguably

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142. *Martinez*, 561 U.S. at 680.
143. *Id.* at 681.
144. *See* Boy Scouts of America v. Dale, 530 U.S. 640 (2000).
145. *Martinez*, 561 U.S. at 681 (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).

apply to all instances in which expressive association rights are claimed in the context of a limited public forum. The Court explains: "In diverse contexts, our decisions have distinguished between policies that require action and those that withhold benefits. . . . Application of the less restrictive limited-public-forum analysis better accounts for the fact that [the public institution], through its RSO program, is dangling the carrot of subsidy, not wielding the stick of prohibition."[146] A similar conclusion can be drawn with regard to parties since no interest group is compelled to become a political party, even though becoming one entitles that association to the vast benefit of participating in and becoming an official part of the formal structure of American democracy." The party system is arguably one hundred percent carrot, justifying the government's ability to impose reasonable viewpoint-neutral regulations without violating the First Amendment.[147]

In instances when public universities engaged in viewpoint discrimination against student groups, the Court concluded that the institution's actions were unconstitutional, which is consistent with the limited public forum doctrine.[148] Throughout these cases, the Court has shown sensitivity to the judiciary's lack of experience in the educational field and the need for judicial restraint, humility, and deference. "Cognizant that judges lack on-the-ground expertise and experience of school administrators[,] . . . we have cautioned courts in various contexts to resist 'substitut[ing] their own notions of sound educational policy for those of the school authorities which they review.'"[149] With such striking parallels to the political party system and the efforts of states and localities to impose reasonable viewpoint-neutral regulations on political parties, one might question why the Court has not relied upon a similar sentiment of judicial modesty to guide its political party jurisprudence. As Elizabeth Garrett explains, many

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146. *Id.* at 682–83 (citation omitted).

147. One scholar has argued that because of this, political parties might be viewed under the unconstitutional conditions rubric. In other words, states may offer benefits to parties in exchange for parties voluntarily accepting a limitation on their own First Amendment rights; however, in certain circumstances, such a relinquishment of rights will constitute an unconstitutional condition. *See* Dimino, supra note 7, at 66–67.

148. *See, e.g.*, Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Widmar v. Vincent, 454 U.S. 263 (1981); Healy v. James, 408 U.S. 169 (1972).

149. *Martinez*, 561 U.S. at 686 (quoting Bd. Of Educ. v. Rowley, 458 U.S. 176, 206 (1982)).

> outcomes are often consistent with plausible visions of democratic institutions. Thus, to decide political party cases, judges are very likely to rely on their own views of the best governance structures for a stable democracy. This means that one contested view of the role of political parties is . . . constitutionalized.[150]

It also means that state innovation may be stymied. As Justice Stevens once argued in dissent, "[s]tates should be free to experiment with reforms designed to make the democratic process more robust."[151]

In 2008, Justice Scalia lamented a Court decision that allowed Washington State's primary law to stand. Washington's system replaced internal party primaries with a top-two primary that included the entire field of candidates regardless of party. In Scalia's dissenting view, there was "no state interest behind this law except the Washington legislature's dislike for bright-colors partisanship, and its desire to blunt the ability of political parties with noncentrist views to endorse and advocate their own candidates."[152] Many respectable thinkers may share Scalia's apparent distaste for centrism. The virtues or vices of electoral legal structures that discourage polarization are worthy of debate. However, this does not necessarily make it a *constitutional* debate. In that case, Scalia was troubled because candidates would be able to list their preferred party on the ballot without regard to whether the party wished for them to do so. But the parallels to *Martinez* are striking. Just as the student organizations were required to accept all comers, Scalia was concerned that parties were "compelled to associate with a person whose views the group does not accept."[153] But in a limited public forum, a state is permitted to make a policy judgment that gives greater weight to a countervailing interest, one that is in some ways irreconcilable with this ostensible associational right: the expressive interest of the candidate himself to communicate *his* party preference. Under the public forum rubric, states would be free to structure election laws such that the individuals who are affected by the forum have expressive priority, rather than the parties qua parties.

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150. Garrett, *supra* note 7, at 131.
151. Cal. Democratic Party v. Jones, 530 U.S. 567, 601 (2000) (Stevens, J., dissenting).
152. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 470 (2008) (Scalia, J., dissenting).
153. *Id.* at 463.

In *Eu v. San Francisco County Democratic Central Committee,* the Court struck down provisions in the California Elections Code that dictated the term of office for party chairs, required the geographic rotation of such chairs between the northern and southern parts of the state, and prohibited party governing bodies from publicly endorsing party-primary candidates.[154] In rejecting the constitutionality of the ban on pre-primary party endorsements, the Court emphasized the right of parties "to select a standard bearer who best represents the party's ideologies and preferences."[155] It claimed that the California regulation "suffocates this right."[156] However, it is really a question of *how*, rather than *if*. The Court's current case law suggests that this choice of a standard bearer is a form of associational speech. However, there are limitless possible procedures for choosing such a standard bearer. Different procedures have differing implications for different party members, and they may very well result in different "speech." The "speech" of the association is in significant part determined by the procedures used to determine what the speech shall be. Some procedures may benefit the party elites, giving their views relatively more weight in determining what will ultimately be "spoken" by the party. Other procedures may have the opposite effect, placing a thumb on the scale for everyday rank-and-file party members.

To California legislators representing the people of the state, the best procedure for determining the party voice regarding its standard bearer was a primary vote by party members, without the influence of a pre-vote endorsement. The Court remained unconvinced, proclaiming its doubt "that the silencing of official party committees, alone among various groups interested in the outcome of a primary election, is key to protecting voters from confusion. . . . The State makes no showing, moreover, that voters are unduly influenced by party endorsements."[157] But why should the state have to convince the Court that its policy choices are optimal? Is it not the role of the state government to seek to improve upon its democratic process through trial and error, particularly where the entity being regulated has been incorporated by law into this process? By granting partial constitutional immunity to the two parties that effectively monopolize America's political system, the

154. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 216 (1989).
155. *Id.* at 224.
156. *Id.*
157. *Id.* at 228 n.18.

Court diluted a democratic check on the process by which these parties go about their democratically-essential work.

If, however, we do away with the misguided characterization of parties as rights-bearing associations and replace it with a public forum formulation, the outcome begins to look much more sensible. As *Martinez* demonstrates, opening a limited public forum invariably involves establishing reasonable standards for participation through regulation. Yet government regulation would remain constrained in important ways. The state of California could not, for example, make viewpoint-based distinctions as to what type of standard-bearers may or may not be endorsed by a political party. Because this would not be considered government speech, the State could not selectively prohibit only endorsements of racist candidates, anti-Catholic bigots, or candidates that are not members of unions.[158] It could, however, decide on reasonable rules to structure the forum so that it best achieves its public purpose.

If a state or locality opts to remove a large and obtrusive stage in the middle of a public park and replace it with a number of discrete areas in which smaller groups of people may gather and interact, few would assert that this constitutes a First Amendment violation. Landscape design necessitates choice, and a governmental authority might reasonably prefer a design that encourages a greater diversity of smaller scale expressive activity, as opposed to a design that accommodates only a single speaker who will likely dominate the entire public forum. Both are respectable choices, whether as a single stage directing all attention to one or two voices or a greater number of smaller venues encouraging a plurality of voices. The government's role under the public forum doctrine is to manage scarce public resources by making informed choices about how they should be best structured, whether that government has only two major public parks in a small city or two major political parties in a large country. The two major political parties have become a fixture of our political system, and the system has solidified over a century and a half because of a range of social forces but also, in large part, by explicit government action. The two parties are central to the functioning of American democracy. They are scarce resources, and as such, regulatory choice is a necessity.

158. *See* Police Dep't v. Mosley, 408 U.S. 92 (1972).

## VII. THE PUBLIC FORUM DOCTRINE FIT: SOME ILLUSTRATIONS

In American jurisprudence, constitutional doctrine evolves on a case-by-case basis. Like the common law system more generally, this process has many strengths. It allows constitutional change to occur incrementally, as the Court is confronted with new challenges that test the meaning of constitutional precepts in unanticipated ways. Thus, at the time of the White Primary Cases, it became clear that vital constitutional interests justified treating ostensibly independent political parties as state actors subject to the commands of the Civil War Amendments. As freedom of association evolved as a distinctive constitutional right in other contexts, however, the Court came to treat political parties in a very different manner, as independent entities that are entitled to autonomy *from* government. As discussed, these two conceptions of the political party are in clear tension with one another. When we pull back, the doctrinal "big picture" becomes messy. And indeed, perhaps it is an excellent illustration of how the natural process of case-by-case constitutional evolution, by focusing on each tree one at a time, can sometimes harvest a rather ugly forest. We end up stuck on a jurisprudential path that is not ideal; here, this course requires courts to treat political parties as two contradictory things at once.

To take one example, in the 1986 case *Tashjian v. Republican Party of Connecticut*, the Court struck down as unconstitutional Connecticut's closed primary law, under which the Republican Party would have been barred, against its wishes, from allowing independents to vote in its primary.[159] The majority effectively conceded that it faced what appeared to be two conflicting constitutional commands. It agreed that under Article I, Section 4, clause 1, "the Constitution grants the States a broad power to proscribe the 'Time, Places and Manner of holding Elections for Senators and Representatives."[160] Looking back to *Classic* and *Allwright*, the Court explained that "'[w]here the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,' the requirements of Article [I, Section 2], clause 1, and the Seventeenth Amendment apply to primaries as well as to general elections."[161] Accordingly, on one hand, given the fact that the government is responsible for establishing and regulating the ballot box (and party primary voting is a large

159. Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986).
160. *Id.* at 217.
161. *Id.* at 227.

part of this responsibility), "party action" would appear to be "state action." On the other hand, however, the Court tells us that, under the First Amendment, party members have a right to freely associate "with like-minded citizens," and that any "interference with the freedom of a party" intrudes on this individual right.[162]

There are a number of ways to manage this fundamental contradiction. One possibility is to break political parties down into discrete, bite-sized components. Case by case, particular action by political parties will be determined either to be state action subject to complete regulatory control by the government or a type of party behavior that is purely private. The former would be considered "government speech," and because the government would be speaking, the First Amendment would put no limits on the types of regulations imposed. The latter category of action, however, would receive full associational protection because it involves a private expressive entity. Such an approach would ostensibly have the benefit of clarity when it comes to constitutional results: either there exists a fully protected expressive association under the First Amendment or a government speaker that can regulate itself however it sees fit. Yet, aside from the jurisprudential whiplash that might occur from such bipolar doctrinal treatment, a court may struggle to draw the line between instances when a political party acts as the government and when the party acts as an autonomous independent association; indeed, there is little evidence that the Court has sought to use a doctrinal scalpel to dissect and categorize party attributes in this manner. There is a good reason for this, as it would be difficult, if not impossible, to do. A group of individual Republicans who get together to discuss policy ideas might claim to be in the "full associational freedom" category, but what if those individuals are members of the House Republican Caucus? Would the House of Representatives be prohibited by the First Amendment from regulating itself, from structuring congressional expression through parliamentary procedure?

In *Tashjian v. Republican Party of Connecticut,* the Court took a different approach. According to the methodology above, one might place the administration of a primary election firmly in the "state action" category. After all, elections are managed, directed, and paid for by the state government. However, instead of such a black or white "litmus-paper test," the Court articulated a rule that balanced the constitutional benefits with the constitutional burdens

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162. *Id.* at 215.

in every case. A "[c]ourt must not only determine the legitimacy and strength of each of [the state's and the political party's] interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."[163] Connecticut provided a number of reasons for why it sought to disallow independents from voting in party primaries: "ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government."[164] To the party, such a regulation burdened "the right of its members to determine for themselves with whom they will associate, as well as whose support they will seek, in their quest for political success."[165] In every case, under the rule articulated in *Tashjian*, it becomes the role of the Court to declare who wins and, in the process, to effectively decide what is, and what is not, good policy—and good for democracy. The Court's repeated rejection of a "litmus-paper test"[166] has meant that small differences in how a state chooses to regulate political parties can have profound repercussions. These repercussions are difficult to justify on consistent and principled constitutional grounds when one pulls back and looks at the broader body of political party jurisprudence.

For example, while Connecticut was denied the ability to restrict who may vote in party primaries in its state, the Court in 2005 allowed Oklahoma to impose a similar restriction.[167] The only difference was that the Oklahoma law imposed "semiclosed" rather than "closed" primaries. This meant that instead of being prohibited from allowing independents *and* members of other parties from voting in their primaries, only the latter were precluded.[168] Such a distinction might seem relatively inconsequential from the standpoint of the Constitution, but not to the Court in *Clingman v. Beaver*. Very much unlike its resolution in *Tashjian,* the Court was "persuaded that any burden Oklahoma's semiclosed primary imposes [on parties] is minor and justified by legitimate state interests."[169]

To assess the extent of a "burden," of course, there must presumably be some baseline agreement as to the nature of the interest being burdened. The members of the *Clingman* Court could

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163. *Id.* at 214.
164. *Id.* at 217.
165. *Id.* at 214.
166. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997).
167. Clingman v. Beaver, 544 U.S. 581, 584 (2005).
168. *Id.* at 587.
169. *Id.*

only muster a plurality for this part of its opinion, which further illustrates the inherent difficulty of establishing a principled doctrine of associational rights for political parties. The plurality effectively suggested that an individual has little to no associational interest in voting in another party's primary if that voter is unwilling to disassociate from his current party.[170] O'Connor and Breyer, although joining the holding, adamantly disagreed, concluding that voting in a party primary is typically the key reason individuals choose to associate with political parties in the first place. Indeed, in the realm of political parties, voting may be said to be *the* most critical *way* of associating.[171] The act of party registration may in fact be a much less significant so-called act of association.[172] To many, it may simply represent a minor bureaucratic hurdle, a prerequisite to the main associational event: voting for a particular party's candidate. In fact, to many Americans, registering with one of the major political parties may not be conceived of as association at all, but rather a simple means to an end to ensure meaningful access to democratic participation.

Furthermore, even if we assume that there is an associational interest in one's mere registration as a party member, as O'Connor most reasonably pointed out, there is little reason to conclude that associating with one group would somehow negate the concomitant interest in associating with other groups at the same time. This is particularly true in a political system with institutionalized two-party dominance, as the size and staggering diversity of the American electorate virtually ensures that few, if any, Americans will be a precise fit, ideologically and culturally, with one of the two major political camps. As O'Connor opined, "[w]e surely would not say, for instance, that a registered Republican or Democrat has no protected interest in associating with the Libertarian Party by attending meetings or making political contributions."[173] In sum, the Court is in discord, not merely over how it should balance the stated regulatory interests of the government against the burdens imposed on the political parties and voters involved, but on the very nature or existence of associational interests in the first place.

Through a long series of inconsistent decisions, the Court has ultimately framed the issue of political party regulation as a matter involving a balancing of directly conflicting constitutional interests.

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170. *Id.* at 588–89.
171. *See id.* at 598–99 (O'Connor, J., concurring).
172. *Id.* at 600–01.
173. *Id.* at 601.

The frame utilized by the Court has meant that nebulous and difficult-to-define First Amendment associational interests are repeatedly pitted against the electoral regulatory interests clearly acknowledged in Article I. The Court has forced itself into a corner, where it has no choice but to resolve complex factual and context-specific matters involving questions of political theory about which even political scientists and other experts sharply disagree.

Treating political parties as part of a public forum, however, would largely avoid this conundrum. If the political party system is reimagined as a type of public forum, the Constitution would no longer be at odds with itself. Granted, the Constitution's text does not explicitly allocate power to states and the federal government to regulate political parties in Article I, Section 2, clause 1 and Article I, Section 4, clause 1, or provide for the freedom of political parties to be free *from* government regulation as expressive associations under the First Amendment. The internal constitutional conflict that currently exists was a product of precedents that derived implicit meaning from those provisions, thus extending their coverage to political parties through such readings. Nonetheless, reframing the issue as a public forum question would not merely eliminate this constitutional contradiction; rather, it would actively promote the constitutional values in both Article I and the First Amendment. Consistent with the White Primary Cases, a law affecting the political party system would fulfill the government's explicit responsibility to "[r]egulat[e]" under Article I, Section 4, clause 1 "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[174] At the same time, as public forums, government regulations would not be permitted to "abridg[e] the freedom of speech"[175] of political parties in a viewpoint-based or unreasonable manner. A robust body of jurisprudence has developed around the public forum doctrine, which would help ensure that the government does not abuse its power to regulate these vital outlets for political and ideological contestation. Although political parties are unique and complex institutions—certainly distinct from other public fora confronted by the Court in the past—principles derived from many decades of public forum case law offer guidance as to where the boundary lies between facilitation of the electoral process and the abridgment of speech.

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174. U.S. CONST. art. I, § 4, cl. 1
175. U.S. CONST. amend. I

The endorsement ban struck down in *Eu v. San Francisco County Democratic Central Committee*, discussed above, provides an illustration. The Court's take on the California law that prohibited parties from endorsing candidates prior to a primary was far from subtle: it agreed with the Court of Appeals that the regulation constituted an "'outright ban' on political speech."[176] Such a law "patently infringes [on] the right of the party to express itself."[177] It "directly hampers the ability of a party to spread its message," is "highly paternalistic," and is "particularly egregious [in that] the State censors the political speech a political party shares with its members."[178] All of these characterizations, of course, are premised on the assumption that a political party, as an association, is an autonomous rights-bearing entity that should be treated as the equivalent of an individual who asserts his or her freedom of speech. Had the Court instead reached back to the White Primary Cases and characterized the party as a state actor, the conclusion would have been the precise opposite. As government speech, it would be well within the state's discretion to declare that parties will refrain from expressing a preference for a particular candidate prior to the actual primary vote, just as it was for the federal government to bar speech about abortion as a lawful option when spoken by health care providers whose services fall under the auspices of a government funded program.[179]

However, if instead of associational speech or government speech, the political party system in California were to be considered a limited public forum, the Court would be tasked with determining whether this prohibition on pre-primary party endorsements fits into the constitutional sweet spot: a reasonable regulation that does not abridge free speech on the basis of a speaker's viewpoint. Is this a regulation comparable to a city ordinance that limits a particular public theater's stage capacity to $x$ people? In such a case, a speaker might want to use that theater to express herself at a particular time, but she may be barred by the regulation from doing so because this would bring its occupancy to $x + 1$. A public theater can accommodate only so many people before the ability to safely and effectively use it for expression and other purposes begins to diminish appreciably.[180] Certainly, the

176. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 221 (1989).
177. *Id.*
178. *Id.* at 223–24.
179. *See* Rust v. Sullivan, 500 U.S. 173, 177–78 (1991).
180. *See* Southeastern Promotions v. Conrad, 420 U.S. 546, 554–55 (1975).

government must also determine a fair way of allocating its use, which presumes that only one theatrical production may occur at a time and that time is finite. Such regulations clearly limit expression. But as the Court has held, because a public theater is a public forum, it would not become a First Amendment abridgement unless choices are made without "procedural safeguards that reduce the danger of suppressing constitutionally protected speech."[181]

However, one might respond that a public theater is a poor analogy for a political party in that a public theater, by its nature, provides opportunity for finite expressive use and can facilitate only so many voices over the course of a year, located within a constrained space that can fit only so many listeners. However, a political party faces similar constraints. Once a party officially endorses one candidate among many in its primary, it has fundamentally altered itself as a forum. There are only two major parties, and one of two now functions differently. Like tearing out all of the seats from a public theater to facilitate its use as a mosh pit, the nature of the forum is transformed. Just as that theater without seats will be less useful as an opera house and more appropriate for rock concerts, that political party with an official endorsement will presumably serve less effectively as an open forum for broadly and evenhandedly weighing the merits of candidates within a certain ideological range, and it will perhaps function more effectively as an organization advocating a narrower vision, less amenable to a wide range of viewpoints. It cannot be both of these things at once. Under the public forum doctrine, a government's choice to adopt one structure over the other would likely not in itself present a First Amendment issue, as long as it is procedurally fair and not a form of viewpoint-based discrimination. The Court has famously held that a constitutional violation occurred where a city, without such procedures, denied a production company the opportunity to use a public theater to perform the controversial musical *Hair*.[182]

If political parties were treated as public forums, the Court in *Eu* would not have been in the awkward position of playing political scientist. Granted, utilizing the public forum doctrine comes with its own set of challenges. Over time, courts would flesh out the distinctions between permissible regulations on political parties, those that are reasonable and non-viewpoint based according to the limited public forum test, and regulations that violate this rule. How-

181. *Id.* at 555–59.
182. *See id.* at 562.

ever, courts are arguably much better equipped to make First Amendment distinctions, such as whether speech regulation is viewpoint-based or content-based and whether such regulation is minimally "reasonable," than they are to make fine-grained policy assessments of the merits or demerits of a wide range of highly-debatable electoral policies implemented by states and the federal government.

With the limited public forum framework, the Court would not have been tasked with determining whether or not California correctly asserted that promoting "stable government and protecting voters from confusion and undue influence" constituted a "compelling government interest"[183] that justified a ban on pre-primary party endorsements. Instead, the Court would have considered how this prohibition fit with the purpose and traditional use of the public forum. Like a board's decision to reject a production of *Hair* at a municipal theater, it is possible that a prohibition on endorsements might be characterized as a prior restraint.[184] However, if the party system is understood as a *limited* public forum and the restriction is applied using a fair and non-discriminatory procedure that is applied in the same manner to all major parties, it would likely pass constitutional muster. Unlike with a government speech regime, the state could not simply pick and choose which endorsements to allow or disallow in order to promote particular ideological or policy objectives. And unlike the associational speech framework, a political party made up of millions of diverse individuals would not be reified and treated as if it had a single First Amendment voice. Instead, political parties would receive First Amendment treatment sensitive to their status as hybrid entities that are neither fully governmental nor solely private.

## CONCLUSION

Election law structures the process by which diverse ideas compete in America's democratic marketplace. The First Amendment's guarantee of free speech is clearly relevant to this endeavor, and it should not be ignored as state and federal governments regulate America's electoral system. The free exchange of ideas allows for the drawing of ideological contrasts and for translating these dif-

183. *Eu*, 489 U.S. at 226.
184. *Southeastern Promotions*, 420 U.S. at 554.

ferences into competitive electoral contests with tangible consequences, as elected leaders implement particular policy choices and decisively reject others. Yet, there is a vast array of ways to structure the electoral process in America. It is critical that the First Amendment is not used to unreasonably impede the important work election law plays in keeping representative government strong. The First Amendment should allow for innovative and diverse approaches to election administration, tailored to a variety of needs and concerns, by a variety of jurisdictions. Yes, vigorous and expansive First Amendment doctrine can enlarge and strengthen the opportunities for democratic participation. Less often acknowledged, however, is the fact that similarly vigorous and expansive First Amendment doctrine may have the very opposite outcome if improperly applied.

Outside of broad constitutional parameters, the Founding generation did not dictate the fine-grained details of how America's electoral system should operate. They embedded flexibility into election law by explicitly *not* constitutionalizing core issues—commanding, for example, that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, *shall be* prescribed in each State by the Legislature thereof."[185] America's electoral process has taken shape over two centuries through conscious choice, trial and error, evolving social norms, inertia, and a combination of many other factors. When the Court adopts the constitutional view that political parties should be treated as rights-bearing expressive associations, it risks rigidifying structural components of American election law that should remain flexible. At the same time, because the Court is not blind to the reality that political parties are intimately intertwined with government, attempts at consistent and principled doctrinal categorization have inevitably devolved into an unsatisfying and unpredictable form of ad hoc balancing. Such jurisprudence denies governments the freedom to innovate and adapt that the Framers built into the American electoral system. It also instills great uncertainty into governmental efforts to improve upon election law. When political parties are perceived as expressive associations, it becomes the role of the Court, which is made up of justices with a range of views on the democratic "good," to declare just what kind of party system is optimal. Not only does this take the choice of election law procedure out of the hands of the people's democratically elected leaders, and instead

185. U.S. CONST. art. I, § 4, cl. 1 (emphasis added).

put those decisions in the hands of unelected judges, many would agree that judges are simply ill-equipped to fulfill this role.

There is a better way. The ad hoc expressive association analysis the Court currently uses to test the constitutional soundness of political party regulations should be replaced by a public forum analysis. The public forum doctrine better accommodates the conundrum of political parties. Major political parties are both critical vehicles for private speech and creatures of government. Governments could subject the political party system to reasonable, viewpoint-neutral regulations, without fear that a court's ad hoc balance will result in invalidation. At the same time, political parties' First Amendment right to retain their ideological commitments, without fear of viewpoint discrimination, would be preserved. As the Founding Fathers certainly understood, democracy demands freedom, but such freedom must be structured by rules. Freedom without rules would result in anarchy; rules without freedom, tyranny. The public forum doctrine provides the right balance.