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INTRODUCTION

American political parties have always occupied a gray area of constitutional law because of their dual public-private nature.[1] At times, political parties undertake activities that make them look very much like parts of the government. At other times they behave more like private organizations. The courts have long recognized the dual nature of political parties in this country but have never provided a coherent framework to distinguish when parties are to be treated as "public" entities and when they are to be deemed "private" ones. When parties are treated as primarily public entities, they are often subjected to the same constitutional standards that the courts have traditionally imposed on the "State." When parties are seen as undertaking "private" activities, they have often been afforded greater freedom in their actions. As the role of political parties has grown over the years, this question has become increasingly difficult to answer.

This Article will attempt to offer a partial resolution of this public-private entity problem in American constitutional law. My framework represents an explicit effort to find a compromise between two sets of competing political values in this area. To

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[1] Not present in the Constitution nor at the founding, political parties were the subject of much early derision and suspicion. *See* THE FEDERALIST NOS. 10, 47, 48 (James Madison); George Washington's Farewell Address, *reprinted in* GEORGE WASHINGTON: A COLLECTION 512-27 (W.B. Allen ed., 1988).

date, there has been only limited and periodic discussion of this dilemma in Supreme Court opinions and even less discussion by lower federal courts. Thus, while it is clear that the courts recognize this problem, there has been no serious effort to resolve it through the development of a coherent set of guidelines. This Article fills this void by setting forth a more complete set of review guidelines that build upon past judicial consideration of these issues, while reconciling the opposing political ideals inherent in this area. In proposing this new set of review standards for legislation impacting parties, I am assuming to some degree the desirability of maintaining the present two-party system. Of course, the viability and desirability of American political parties have been hotly debated issues for some time.[2]

Because the Constitution does not mention political parties, they developed outside the law in the early decades of the Republic.[3] Most of the major developments in the history of our political parties took place with little, if any, judicial involvement. Thus, the emergence of our two modern political parties, national nominating conventions, and the establishment of national committees all took place without significant judicial participation. Political parties were unregulated private entities until the states began legislating reforms in the 1860s. The earliest state legislation dealt with such internal party matters as qualifications for membership, notice requirements for meetings, and bans on bribery at party caucuses.[4]

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[2] *See, e.g.*, JOHN J. COLEMAN, PARTY DECLINE IN AMERICA: POLICY, POLITICS, AND THE FISCAL STATE (1996); WILLIAM CROTTY, AMERICAN PARTIES IN DECLINE (2d ed. 1984); XANDRA KAYDEN & EDDIE MAHE, JR., THE PARTY GOES ON: THE PERSISTENCE OF THE TWO-PARTY SYSTEM IN THE UNITED STATES (1985); L. SANDY MAISEL, THE PARTIES RESPOND (2d ed. 1990); KELLY D. PATTERSON, POLITICAL PARTIES AND THE MAINTENANCE OF LIBERAL DEMOCRACY (1996); MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1988 (1990). *See also* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 14-17 (1995) (discussing whether the strength of political parties has increased since the 1960s).

[3] *See generally* WILLIAM NISBET CHAMBERS, POLITICAL PARTIES IN A NEW NATION (1963); AUSTIN RANNEY, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 58-100 (1975).

[4] CHARLES E. MERRIAM, PRIMARY ELECTIONS 9-17 (1908); RANNEY, *supra*

Towards the end of the nineteenth century, as parties became more visible in American politics through the operation of primaries, urban machines, and political advertising, there were greater calls for their regulation. This regulation most often took the form of state legislation aimed at "reforming" party behavior.[5] As more states began adopting the Australian ballot at the turn of the century, parties gradually came to be regarded as partly "public" entities. This trend toward state regulation of parties continued as the states began legislating on matters of *internal* party governance. With the adoption of the direct primary by many states in the early 1900s, state legislative control expanded in both scope and variety. Today most states regulate both the internal mechanisms and electoral behavior of parties operating within their borders.[6]

The growth of state laws regulating political parties provided many avenues for potential judicial involvement in party affairs. State efforts to control internal party committee composition and structure raised important and difficult questions of First Amendment free association rights. Moreover, state regulation of parties' electoral behavior implicate the fundamental constitutional rights of voting and participation in politics.

I. THE COMPETING VALUES

While not formally one of the national political institutions, political parties today are nonetheless major players in both national and state politics. They have long provided what may be considered quasi-governmental services, including candidate

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note 3, at 79-81. *See also* PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 66-72 (8th ed. 1997) (providing the range of modern state regulation of political parties).

[5] RICHARD HOFSTADTER, THE AGE OF REFORM 3-22 (1955).

[6] BECK, *supra* note 4, at 66-72; Timothy Conlan et al., *State Parties in the 1980s*, 10 INTERGOVERNMENTAL PERSPECTIVE 6 (1984). National legislation regulating political parties did not appear until the enactment of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-455 (1994)), amended by Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1272 (1974) (codified as amended at 26 U.S.C. §§ 9031-9042 (1994)).

recruitment, the operation of political campaigns, and the supervision of the voting process. As with the federal bureaucracy, political parties are important extra-constitutional political institutions that have been essentially grafted onto our separation of powers system.[7] The ambiguity surrounding the proper institutional role that parties should conceptually play in American politics has posed vexing problems for the courts in balancing party independence with government supervision.

In order to ascertain the role that political parties should play within our political system, it is useful to see them as informal parts of the larger system of separation of powers.[8] If parties are seen as part of this larger system, then it follows that they are entitled to a certain amount of judicial protection to ensure their integrity and independence. Under this interpretation, the courts should bear some responsibility for preserving the separateness of political parties in the same way as the judiciary ensures that the powers of the formal branches of the government do not unduly infringe upon one another. If parties are seen as performing some governmental functions, then it follows that they should be entitled to some independence in the conduct of these functions. If parties are to check government power, then some of their activities must lie beyond direct government control.

The level of independence granted to parties should vary depending on the *type* of party activity under consideration. In its more "private" functions, such as selection of party leaders, the

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[7] LEON D. EPSTEIN, POLITICAL PARTIES IN WESTERN DEMOCRACIES 340-42 (1967). *See also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-18, at 1076-80 (2d ed. 1988) (discussing the competing interests of democratic theory in state regulation of parties).

[8] Theodore J. Lowi, *Party, Policy, and the Constitution in America*, *in* THE AMERICAN PARTY SYSTEMS 238-76 (2d ed. 1975). Lowi discusses the contribution of party development in the United States to the revival of the separation of powers from about the time of Andrew Jackson, which gave him and succeeding presidents a power base independent of the Congress. *Id.* at 246-48. Thus, parties can be seen as a part of the larger separation of powers system, or they can be seen through their activities as contributors to the reinforcement of the formal separation of powers among the national political institutions. *Id.* at 253-54. In either case, party independence is an important component in the preservation of the separation of powers.

parties should retain maximum independence from government regulation, including judicial oversight. When parties perform their more "public" functions, such as the operation of election campaigns and actual governance, they should be subject to much closer judicial scrutiny and held to higher constitutional standards. In this way, the states and courts will be able to foster the democratic ideals of electoral competitiveness and participation while preserving some degree of party independence. The goal is a balance between these two sets of fundamental American political ideals.

In conceptualizing parties within our separation of powers system, they can be compared most closely with the independence that we afford to the courts themselves. Judicial independence has long been regarded as one of the strengths of our democratic system by providing an independent force to adjudge the behavior of the more overtly political parts of the government. Similarly, political parties can be seen as checks on the power of government through their independent influence over various phases of the electoral and governing processes.

Another way to conceive of the role of parties within our political system is to consider them as an independent, nongovernmental force such as the mass media. Like the press, political parties perform a sort of independent analysis and critique of government officials and their policies. It can be argued that, as we cherish an independent and vigorous press, so too should we value independent political parties. A guarantee of party independence ensures that the incumbent regime cannot control fully the nomination and electoral processes. The preservation of vigorous and independent parties also buttresses the likelihood that there will be some organized opposition to any incumbent government.

Portions of the foregoing theoretical considerations have occasionally appeared in both Supreme Court opinions and those of lower federal courts. These considerations have provided some theoretical moorings for judges attempting to interpret when and how statutory and constitutional doctrines should apply to parties in this country. Thus, when the courts have been confronted with various state legislative attempts to regulate political parties, they have frequently considered the broader theoretical role(s) that parties play in our political system. Similar considerations have

arisen when the courts have considered the application of various constitutional doctrines to parties and their activities.

II. A FRAMEWORK FOR RECONCILING PARTY INDEPENDENCE AND DEMOCRATIC IDEALS

In the 1960s, two leading students of American political parties conceptualized our parties as being composed of three parts: the "party organization" encompassing the party's active members; the "party-in-the-electorate" composed of the party's rank-and-file membership; and the "party-in-government" made up of the party's elected and appointed officeholders.[9]

It is possible to organize past federal court opinions dealing with political parties into three classes paralleling this trichotomy. The first includes those decisions which have dealt with what is arguably the most "private" side of party behavior: party decisions as to membership, internal party structure, and selection of party leaders. These are matters which primarily concern party activists and are vital to the preservation of party independence.

A second set of federal court opinions has dealt with the conduct of political parties in elections. This set represents the largest number of cases and involves judicial interpretation of a wide range of state laws regulating various aspects of the electoral process. The study of these cases is useful because they provide a glimpse into *how much* state regulation of parties is permissible in the name of the public interest. Here, as in other areas dealing with political parties, the courts have often been forced to consider the virtues of maintaining independent political parties while simultaneously subjecting them to some degree of public supervision when they perform important governmental functions.[10]

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[9] V.O. KEY, JR., POLITICS, PARTIES, AND PRESSURE GROUPS 211-12 (5th ed. 1964); FRANK J. SORAUF, PARTY POLITICS IN AMERICA 197 (1968). *See also* ALDRICH, *supra* note 2, at 7, 12-14.

[10] In most instances, these cases construe state laws that were ostensibly enacted to further some public policy in the electoral realm. However, since political parties are often major players in the enactment of such legislation, these state regulations are often highly politicized efforts by one or both parties in a state to gain some electoral advantage over each other or over third parties

A third set of court opinions deal with political parties while "in-government." Of course, American political parties never match their European counterparts in their ability to move into government and rule, but the winners in most American elections are nonetheless partisans who frequently attempt to execute policies favorable to their own party from their position as public office-holders. The major area of judicial concern here has been with political party patronage, where the victorious party attempts to seize government jobs, contracts, and other benefits for its members. As office-holders and governors, parties are clearly performing "public" functions and should be subject to considerably higher regulatory and constitutional standards of behavior.

The advantage of this trichotomy of federal court opinions is that it helps reorganize past court decisions in conjunction with the policy reasons for treating parties differently on the basis of the activity they are undertaking. Thus the greatest governmental regulation, and judicial scrutiny, is reserved for those party functions which are the most "public" in nature. This scheme also provides a clearer boundary delimiting those party activities that are essential to the continued independence of parties.

III. EMERGING CONSTITUTIONAL STANDARDS

The emerging constitutional standards in this area have grown out of a tension between the two polar positions on the issue of state regulation of political parties.[11] On the one hand, political parties have traditionally contended that they are "voluntary organizations" entitled to virtually absolute First Amendment protection in the exercise of their rights of free association and free expression. The typical counter-argument of the states seeking to regulate their parties is that they are public entities which must be regulated in the public interest. Some of the typical "public interests" asserted by the states in these cases include a desire to ensure that the parties' internal governance processes are

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and independent candidates.

[11] *See, e.g.*, San Francisco County Democratic Cent. Comm. v. Eu, 792 F.2d 802, 804-07 (9th Cir. 1986), *aff'd*, 489 U.S. 214 (1989).

democratic, to avoid voter confusion, to ensure party committees are broadly representative, to foster internal party "harmony," and generally to protect the integrity of the electoral process.[12]

Both federal and state courts have struggled to find the best way to apply First Amendment freedoms to these situations. In some cases, it appears that there are two competing sets of free association rights. Party insiders, or "activists," usually claim their right to associate (or not to associate) freely for political purposes with whom they choose. Those persons outside the party, or its governance structure, frequently assert a need to associate with an established political party as one of the few avenues to genuine political participation at the state and local levels.

In the period before the enactment of comprehensive state legislative schemes regulating political parties, most judges tended to view internal party disputes as involving "political" as opposed to "legal" rights and usually refused to find jurisdiction.[13] Throughout the nineteenth century the Supreme Court stayed clear of most electoral disputes through invocation of the political question doctrine.[14] When the states first began regulating parties in the late nineteenth century with the introduction of the direct primary, the courts were generally reluctant to become involved. At the turn of the century, as the states began to enact regulatory schemes, the courts were more likely to find jurisdiction and consider the merits of these claims.[15] Many early courts took the traditional position that the parties were indeed like political clubs and beyond state regulation. In its 1935 decision in *Grovey v.*

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[12] *Id.* at 814.

[13] *See, e.g.*, People *ex rel.* Eaton v. District Court., 31 P. 339 (Colo. 1892); Stephenson v. Board of Election Comm'rs, 76 N.W. 914 (Mich. 1898); People *ex rel.* Simpson v. Board of Police Comm'rs, 31 N.Y.S. 112 (Sup. Ct. 1894). *See also* RANNEY, *supra* note 3, at 78-82 (discussing the growth of state regulation in this area); Annotation, Determination of Controversies Within Political Party, 20 A.L.R. 1035, 1036-41 (1922).

[14] *See, e.g.*, Kies v. Lowery, 199 U.S. 233, 239 (1905); Forsyth v. Hammond, 166 U.S. 506, 519 (1897); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1874).

[15] *See, e.g.*, Baker v. Board of Election Comm'rs, 68 N.W. 752 (Mich. 1896); *In re* Woodworth, 16 N.Y.S. 147 (Sup. Ct. 1891); State *ex rel.* Cook v. Houser, 100 N.W. 964 (Wisc. 1904).

Townsend,[16] the Supreme Court upheld the exclusion of blacks from a party primary, despite a state law, finding that political parties were "voluntary political association[s]," which "arise from the exercise of the free will and liberty of the citizens composing them."[17] This decision marked a brief high-water mark in the Court's refusal to apply the First Amendment freedoms to the activities of political parties. Nine years later, the Court struck down the Texas White Primary in the landmark decision *Smith v. Allwright*.[18]

Reform efforts in the states to purify politics and political parties soon spread beyond the direct primary. By the 1920s most states had at least begun the process of enacting complex and detailed statutory guidelines for their political parties. These guidelines included specification of the size, composition, responsibilities, and even the meeting times and places for state and local party committees.[19] In 1958, the incorporation of freedom of association into the Fourteenth Amendment provided the federal courts with a new tool to adjudicate state laws affecting political parties.[20] As the volume of cases increased in the 1970s, the Supreme Court held in *Storer v. Brown* that states would be required to show a "compelling interest" before burdening the First Amendment rights of political parties or their members.[21]

In recent years, federal case law has been a confused jumble of ad hoc decisions as the courts struggled with a wide range of circumstances and statutory schemes. There have been many instances where federal courts have upheld various state efforts to regulate political parties.[22] Similarly, there have been many

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[16] 295 U.S. 45 (1935).

[17] *Id.* at 52 (citing Bell v. Hill, 74 S.W.2d 113 (Tex. 1934)).

[18] 321 U.S. 649 (1944). *See also* Terry v. Adams, 345 U.S. 461 (1953).

[19] RANNEY, *supra* note 3, at 18.

[20] NAACP v. Alabama, 357 U.S. 449, 460 (1958).

[21] 415 U.S. 724, 729-30 (1974).

[22] *See, e.g.*, Marchioro v. Chaney, 442 U.S. 191, 199 (1979) (upholding a state law requiring a party's state committees to have two representatives from each county); *Storer*, 415 U.S. at 735-36 (finding valid as a compelling governmental interest, California's "sore loser" provision, which required that to run as an independent candidate one must be non-affiliated with a party for one year); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973) (upholding New York's

instances where the courts have invalidated state efforts to regulate party structure or behavior.[23] The courts have offered very little unified guidance for reconciling these decisions. In the 1980s, the courts continued to expand First Amendment freedoms while the states increased their regulatory efforts. This situation created something of a collision.[24] There appears to be no obvious logic by which these cases spanning the last two decades can be reconciled. The variety of statutes involved, and range of possible

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delayed enrollment scheme barring voters from participating in a primary election unless registered with the party prior to last general election); Jenness v. Fortson, 403 U.S. 431, 442 (1971) (upholding a Georgia statute requiring candidates who failed to win a party nomination to collect signatures of five percent of voters to get on ballot); Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn. 1976) (recognizing that a state has a legitimate interest in upholding the integrity of the electoral process, including the preservation of identifiable interest groups).

[23] Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 187 (1979) (stating that an Illinois law requiring 25,000 signatures for new parties and independents violated the Equal Protection Clause); Cousins v. Wigoda, 419 U.S. 477, 495 (1975) (concluding that a state interest in controlling the seating of state delegates to national party convention was not compelling); Abrams v. Reno, 452 F. Supp. 1166, 1170 (S.D. Fla. 1978) (striking Florida's statutory ban on pre-primary endorsements by party leaders as a substantial burden on First Amendment rights).

[24] *See, e.g.*, Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) (declaring the California election code's provisions barring endorsement of primary candidates by a party's governing body to be a violation of First and Fourteenth Amendment rights as an infringement on the party's freedom of association); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding Connecticut's closed primary statute unconstitutional as violative of a political party's First and Fourteenth Amendment rights by restricting the party's political association with other candidates); Anderson v. Celebrezze, 460 U.S. 780 (1983) (holding an Ohio statute unconstitutional that required independent candidates for the presidency to submit a statement of candidacy and nominating petition in March to qualify for a general election petition ballot in November); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) (invalidating on First and Fourteenth Amendment grounds an Ohio statute that required minor political parties to disclose their contributors and each recipient of disbursed funds); Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107 (1981) (upholding Wisconsin's open primary law because the state had a substantial interest in how elections are conducted and stating that the National Democratic Party delegates are not required under party rules to vote in accordance with the Wisconsin open primary).

state interests implicated, has made it highly unlikely that the courts will be able to distill any firm rules of law in this area.

The trichotomy described above can help to bring some order to these precedents as well as provide a firmer theoretical basis for treating various state regulatory schemes differently. If state laws can be categorized on the basis of what aspect of party behavior they regulate, then the courts can deliver more uniform, and more theoretically defensible, decisions in the application of First Amendment freedoms to political parties.

IV. FIRST AMENDMENT RIGHTS AND "INTERNAL" PARTY ACTIVITIES

This Part refines and expands the constitutional standards that courts should apply in cases involving matters "internal" to political parties.[25] It is in the conduct of their own affairs that political parties are best able to assert their rights of free association and thus claim a broad exemption from government regulation.[26]

The central problem is how to maximize party independence in internal matters without sacrificing other key political ideals, such as broad participation in these vital political organizations. It is quite difficult to identify precisely which party functions are "internal." This dilemma can be solved in part by delimiting the range of "internal" party activities as narrowly and specifically as possible. In this Article, this term refers to the selection and composition of party leadership, decisions relating to party structure and party membership, and national delegate selection. Any party activities relating to the conduct of elections, either primary or general, will not be considered "internal" matters.[27] Such a

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[25] Modern judges have usually used the term "internal" to denote those party functions least susceptible to state regulation. However, some judges have labelled this set of functions "political."

[26] *See* Virginia E. Sloan, *Judicial Intervention in Political Party Disputes*, 22 UCLA L. REV. 622 (1975) (providing an overview of the judicial role in this area).

[27] But elections of party executive committee members and other internal party officials will be considered "internal" even if these elections are sometimes

definition reduces the possibility of giving any judicial protection to partisan actions aimed at excluding individuals on other than ideological grounds.

Government regulation of "internal" party matters has arisen in a limited number of circumstances. The most common scenario has been where a political party has sought to exclude certain persons, or groups of persons, from participating in party governance committees or leadership positions. In other cases, this issue has been presented through challenges to state legislation that attempt to regulate some aspect of internal party structure or operations.[28] There is also a second set of cases that have dealt with those situations when a *state* regulatory law has conflicted with a *national* party rule.[29] A third general situation in this area arises when party organs or leaders seek to endorse one candidate in the party primary. Each of these scenarios has produced case law which can form the base or starting point for the development of more complete judicial standards.

A. Regulation of Parties' Internal Structure and Leadership

Since the early years of this century, the states have resorted to a wide range of statutory schemes to control the structure and behavior of their state party organizations and leaders.[30] While

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denoted as "primaries."

[28] *See, e.g.*, Marchioro v. Chaney, 442 U.S. 191 (1979) (holding that a Washington statute requiring each major political party to have a state committee consisting of two persons from each county was not violative of party members' freedom of association).

[29] *See, e.g.*, *LaFollette*, 450 U.S. at 126 (holding that members of National Democratic Party were not bound by Wisconsin's state primary election results, which were reached in a manner contrary to National Party rules); O'Brien v. Brown, 409 U.S. 1 (1972); Ray v. Blair, 343 U.S. 214 (1952) (concluding that an Alabama statute authorizing the Democratic National Party to choose its nominees for elector in a party primary and to fix candidate qualifications was constitutional).

[30] *See, e.g.*, CAL. ELEC. CODE §§ 5000-8944 (West 1996) (providing rules for the creation and organization of political parties, voting and elections); FLA. STAT. ch. 103 (1998) (providing guidelines for the regulation of presidential electors, political parties, executive committees and members); N.Y. ELEC. LAW

varying in the degree of flexibility accorded to their parties, these statutory schemes typically mandate a federated layering of party committees, culminating in a state party committee.[31] Many states also regulate such party matters as the size of the party committees,[32] gender representation on party committees,[33] the

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Art. 2 (McKinney 1998) (providing guidelines for the creation and organization of state and county committees and for election nominations, voting and fundraising). *See also* BECK, *supra* note 4, at 66-72.

[31] *See, e.g.*, CAL. ELEC. CODE §§ 7150-7882 (West 1996) (providing guidelines for the creation of state and local committees); FLA. STAT. ANN. § 103.091 (West 1998) (providing rules for the creation of state and county executive committees); N.Y. ELEC. LAW §§ 2-102, 2-104 (McKinney 1998) (providing rules for the creation of state committees and guidance for the creation of county committees).

[32] *See, e.g.*, CAL. ELEC. CODE § 7150 (setting forth the membership of the state central committee); CAL. ELEC. CODE § 7200 (providing an election procedure for county committees in counties with fewer than five assembly districts); CAL. ELEC. CODE § 7201 (establishing membership and voter qualifications for Democratic Party, for counties of the fifth class, to include central committee election by assembly districts and by consent of six members from each elected assembly who have status as a county resident); CAL. ELEC. CODE § 7202 (stating that counties containing more than four or less then twenty assembly districts shall elect a county central committee from assembly districts consisting of six members elected from each assembly district); CAL. ELEC. CODE § 7203 (establishing composition of county central committees in counties containing more than twenty assembly districts); CAL. ELEC. CODE § 7204 (providing for twelve members in city and county central committees elected from assembly districts 12 and 13); CAL. ELEC. CODE § 7205 (stating qualifications for district representation including, but not limited to, residency requirements, and reapportionment of central county committee every ten years); CAL. ELEC. CODE §§ 7400, 7401, 7402 (providing rules for counties with less than five assembly districts, for counties with five to nineteen assembly districts, for counties with twenty or more assembly districts); FLA. STAT. ANN. § 103.091(1) (providing that each political party of the state shall be represented by a state executive committee and providing rules for such committee); N.Y. ELEC. LAW § 2-102 (providing rules for the creation of the state committees); N.Y. ELEC. LAW § 2-104 (providing rules for the creation of county committees).

[33] *See, e.g.*, CAL. ELEC. CODE §§ 7156, 7157(b) (providing gender representation requirements for membership in committees); FLA. STAT. ANN. § 103.091(1) (stating that each county executive committee shall consist of at least two members, a man and a woman, from each precinct); N.Y. ELEC. LAW §§ 2-102(4), 2-104(2) (providing that the committee, state or local, may provide

frequency of committee elections and meetings,[34] the rules governing party committees,[35] the removal and replacement of committee members,[36] the selection of state party delegates to national conventions,[37] and party finances.[38]

Given this panoply of well-established state laws regulating internal party matters, it would appear that state party structure, and much of their internal operations, are firmly under state regulatory control. There was limited federal judicial activity touching internal party matters for the first half of the twentieth century.[39] However, in the mid-1960s courts began to apply the First Amendment freedom of association to political parties and their members.[40] It

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for equal representation of sexes).

[34] *See, e.g.*, CAL. ELEC. CODE § 7160 (providing guidelines for the election of members to the state central committee); N.Y. ELEC. LAW §§ 2-106(2) (McKinney 1998) (requiring that members of state committees be elected biennially).

[35] *See, e.g.*, CAL. ELEC. CODE §§ 7198, 7241 (providing parliamentary procedure); FLA. STAT. ANN. § 103.121 (West 1998) (providing powers and duties of executive committees); N.Y. ELEC. LAW §§ 2-112, 2-114 (McKinney 1998) (providing committee rules).

[36] *See, e.g.*, CAL. ELEC. CODE §§ 7156-7169 (West 1996) (providing for committee appointments and elections); FLA. STAT. ANN. §§ 103.131, 103.141, 103.151 (West 1998) (providing for removal of committee members); N.Y. ELEC. LAW §§ 2-116, 2-118 (McKinney 1998) (providing for committee member removal and filling of vacancies).

[37] *See, e.g.*, CAL. ELEC. CODE §§ 6000-6954 (West 1996); FLA. STAT. ANN. § 103.101 (West 1998) (providing presidential preference primary procedures); N.Y. ELEC. LAW § 2-122 (McKinney 1998) (providing procedure for election of delegates to the national party convention).

[38] *See, e.g.*, FLA. STAT. ANN. § 103.121 (West 1998) (providing committee members with the power to raise and expend party funds); N.Y. ELEC. LAW § 2-126 (McKinney 1998) (providing restrictions on expenditures of party funds).

[39] Most cases during this period that concerned parties dealt with race discrimination by parties. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[40] One of the earliest cases to grapple with the public-private entity problem in the area of internal party functions was *Bentman v. Seventh Ward Democratic Executive Committee* which held, *inter alia*, that judicial intervention in internal party affairs "must be limited to controversies" that bear a "[d]irect and [s]ubstantial relationship" to the party's "[p]ublic functions." 218 A.2d 261, 266

was at this time that at least some federal judges began to note the distinction between party elections that elected representatives to government positions and those that elected individuals to run the party itself.[41] This distinction is important in that it implicitly recognized that some party elections are of greater public concern than others. While this distinction has not been elaborated on by the courts, it is important to our efforts to assign varying standards of review to different party functions. By 1968 the Supreme Court had stated unequivocally that the First Amendment freedom of association extended to political parties.[42]

In succeeding years, a few federal decisions showed a heightened willingness to employ free association principles to strike state efforts to regulate the internal functions of political parties. One of the most thorough discussions came from the Court of Appeals for the Third Circuit in the 1974 decision of *Redfearn v. Delaware Republican State Committee*, in which voters challenged a party's electoral scheme for choosing delegates to the state party convention that weighed some districts disproportionally.[43] While conceding that the party's state convention implicated "state action" under the Fourteenth Amendment, the court refused to strike the party's "internal rules," as this would have been an intrusion on the party's right of free association.[44] A few other courts at that time also recognized the existence of a zone of private party conduct where state regulations and judicial power should not ordinarily interfere.[45]

(Pa. 1966).

[41] *See, e.g.*, Lynch v. Torquato, 343 F.2d 370, 372 (3d Cir. 1965) (recognizing that the Equal Protection Clause protects citizens in their choice of "elected representatives in the conduct of government, not in the internal management of a political party").

[42] Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

[43] 502 F.2d 1123 (3d Cir. 1974).

[44] *Id.* at 1127-28.

[45] McMenamin v. Philadelphia County Democratic Executive Comm., 405 F. Supp. 998, 1001 (E.D. Pa. 1975) (refusing involvement in an internal party dispute over selection of a ward leader absent any racial, geographic or fraudulent aspect); Fahey v. Darigan, 405 F. Supp. 1386, 1394-95 (D. R.I. 1975) (striking a state law seeking to regulate the selection and size of local party ward committees as a violation of First Amendment free association right); Fox v.

In 1979, the Supreme Court entered this debate with its landmark decision in *Marchioro v. Chaney*.[46] This case involved a challenge to a state law requiring each of the state's major political parties to maintain state committees composed of two persons from each county. The Court found that these restrictions on the parties did not violate the parties' First Amendment freedom of association because the "purely internal party activities" undertaken by these committees were duties delegated to it by the party's own state convention rather than mandated by the challenged statute.[47] However, in reaching this decision, the Supreme Court apparently adopted the appellants' list of what constituted party activities.[48] More importantly, the Court recognized that state regulation of party activities that relate to the electoral process is different from and implicates a greater state interest than regulation of party committees in the performance of their internal tasks.[49] Subsequent decisions have also applied the *Storer* compelling interest test to a variety of internal functions.[50]

Tucker, 320 A.2d 919 (Pa. Commw. Ct. 1974) (refusing to force party to comply with its own affirmative action plan).

[46] 442 U.S. 191 (1979).

[47] *Id.* at 197.

[48] *Id.* at 193, 197-98.

[49] Activities that were recognized as relating to the electoral process included: filling of vacancies on the party ticket, providing for the nomination of presidential electors, and the calling of statewide conventions. Party activities deemed "internal" included: party policy-making, directing the party administrative apparatus, raising and distributing funds to party candidates, conducting workshops on campaign procedures and organization, and influencing public policy and public officials. *Id.*

[50] *See, e.g.*, Heitmanis v. Austin, 899 F.2d 521, 529 (6th Cir. 1990) (holding a Michigan law granting state legislators ex officio delegate status at party's national convention a violation of the state party's First Amendment right of free association); Banchy v. Republican Party of Hamilton County, 898 F.2d 1192, 1193 (6th Cir. 1990) (affirming that the refusal of party chair to allow newly-elected precinct leaders to participate in election of ward chairmen did not involve state action); *Fahey*, 405 F. Supp. at 1396 (D.R.I. 1975) (striking a state law attempting to increase the size of city ward committees as not furthering a compelling state interest); Louisiana Republican Party v. Foster, 674 So. 2d 225, 226 (La. 1996) (holding that a state law providing a method for electing members to party's state central committee violated free association rights); Gosz

A major watershed in this area came in the mid-1980s in extended litigation involving challenges to California's elaborate election code.[51] The opinions generated by this case provide one of the most thorough discussions of the public-private entity problem of placing American political parties under the First Amendment. The litigation culminated in the Supreme Court's decision in *Eu v. San Francisco County Democratic Central Committee*,[52] in which the Court struck California's election laws as unconstitutional burdens on that state's political parties and their members' First Amendment rights without serving a compelling state interest.[53] In a strongly-worded opinion, the Court in *Eu* struck California's statutes regulating the organization and composition of the party's governing bodies, limitations on the terms of office for state central committee chairs, and the requirement that these chairs rotate between regions of the state.[54] Building on its recent decision in *Tashjian v. Republican Party of Connecticut*, which struck a Connecticut law mandating that parties could hold only closed primary elections,[55] the Court in *Eu* noted that even stronger associational rights were at stake because California had tried to regulate the ability of party members to associate among themselves instead of with nonparty members.[56] The Court also distinguished *Eu* on the basis that the statute regulated party leaders, and therefore did not directly implicate strong state interests in the electoral process.[57] The Court found that the state had no compelling interest in regulating the democratic management of the parties' internal affairs. In fact, the Court found that such state regulation could actually *hamper* the parties in the conduct of their external responsibilities to ensure orderly

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v. Quattrocchi, 448 A.2d 135, 140 (R.I. 1982) (upholding state law modifying the process for filling the state's 100 party committee districts because reapportionment was found to be a compelling interest).

[51] San Francisco County Democratic Cent. Comm. v. Eu, 792 F.2d 802 (9th Cir. 1986), *aff'd*, 489 U.S. 214 (1989).

[52] 489 U.S. 214 (1989).

[53] *Id.* at 233.

[54] *Id.*

[55] 479 U.S. 208, 210-11 (1986).

[56] 489 U.S. at 230-31.

[57] *Id.* at 231-32.

and fair elections.[58] The *Eu* decision did not result in wholesale attacks on existing state laws regulating political parties and most state regulatory schemes remain in effect.[59]

This review of the case law relating to state regulation of internal party matters shows that the federal courts are still developing standards to deal with these situations. The *Eu* decision was a major contribution in the effort to clarify these standards by identifying some specific party functions as sufficiently "internal" to warrant application of the compelling state interest test. This decision comports well with my trichotomous model by moving towards a doctrine whereby specific party operations are recognized as vital to the maintenance of vigorous political parties and are therefore beyond state regulation absent a demonstration of compelling state interest.

B. State Laws versus National Party Rules

A fairly distinct line of cases has considered the problems that arise when state legislation comes into conflict with the national party rules. In some ways, this line of cases is similar to those previously discussed: it involves state efforts to regulate an "internal" operation of the parties. However, in these cases the regulation affects the relationship *between* the state's parties and their national party organizations.[60]

The issue of state regulations conflicting with national party rules has arisen almost exclusively in the context of delegate selection at the state level for national party conventions. The first major case in this area was the 1972 decision of *O'Brien v. Brown*, where the Supreme Court refused to settle a dispute involving Illinois delegates to the National Democratic Convention.[61] The

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[58] *Id.* at 232.

[59] *See* Louisiana Republican Party v. Foster, 674 So. 2d 225, 228-29 (La. 1996) (striking amendments to a state statute that provided a method for electing members to the state's central committees).

[60] Whether strictly "internal" or not, these cases have for years been regarded as raising First Amendment free association issues. *See* Cousins v. Wigoda, 419 U.S. 477, 488 (1975).

[61] 409 U.S. 1 (1972) (per curiam).

Court essentially avoided ruling in this case by pointing to the fact that the Convention would be meeting in only days and that the delegate dispute could be settled there. Five Justices in *O'Brien* indicated that this was something of a political matter that the courts had traditionally avoided.[62] The Court squarely faced this issue three years later in *Cousins v. Wigoda*, in which it decided that national party rules prevail over contrary state laws.[63] In *Cousins*, the Court was not convinced that state regulation of the delegate selection process implicated compelling state interests.[64] Instead, the Justices stressed the importance of free association for political parties.[65]

The *Cousins* decision appeared to settle this question for some years.[66] Occasionally, however, a federal judge questioned whether *Cousins* meant that any national party rules necessarily prevail over state law.[67] The most recent federal decisions in this area have struck state laws attempting to regulate selection of party delegates to national conventions unless there is a clear conflict with national party rules.[68]

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[62] *Id.* at 4-5.

[63] 419 U.S. 477 (1975).

[64] *Id.* at 489-91.

[65] *Id.* at 478-88.

[66] *See, e.g.*, Democratic Party of United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 124-26 (1981) (upholding power of a national party to refuse to seat delegates chosen under the state law of which the party disapproved); Ripon Soc'y v. National Republican Party, 525 F.2d 567 (D.C. Cir. 1975) (en banc), *cert. denied*, 424 U.S. 922 (1976) (holding that national party's delegate allocation formula need not conform strictly to Equal Protection requirements); Ferency v. Austin, 493 F. Supp. 683, 691, 697-99 (W.D. Mich. 1980) (holding that a state cannot control the selection of national party delegates because a party primary is not an "election" under state law); Fallon v. State Bd. of Elections of New York, 408 F. Supp. 636 (S.D.N.Y. 1976) (upholding state law regulating ballot preferences of delegates because national party rules deferred to states on that matter); Totten v. State Bd. of Elections, 403 N.E.2d 225, 228-29 (Ill. 1980) (recognizing that parties have certain rights of free association though these may be limited by state law).

[67] *See, e.g.*, Montano v. Lefkowitz, 575 F.2d 378, 384 (2d Cir. 1978); *Fallon*, 408 F. Supp. at 638 n.3.

[68] Rockefeller v. Powers, 74 F.3d 1367, 1374-75 (2d Cir. 1995); Heitmanis v. Austin, 899 F.2d 521, 529 (6th Cir. 1990).

Given the Court's decision in *Cousins*, this corner of state regulation of political parties appears to be fairly well-settled. While recognizing the existence of some state interests in these situations, the federal courts have come down almost uniformly on the side of the national party rules. Part of the courts' rationale in these cases stems from a deference to the *national* party organizations or at least a sense that individual states should not hamper the national party organizations. My trichotomous scheme makes no distinction between the "internal" concerns of *state* parties as opposed to their *national* brethren. On a theoretical basis, it seems that the desire to preserve the private side of state and local party activity should be sufficient, in itself, to keep state regulation out of the delegate selection process. However, as the previous section showed, the states have regularly been more successful at securing judicial sanction to regulate internal matters of their own state party organizations.

C. State Laws Regulating Party Endorsements

States have long regulated the ability of their state party committees to give public endorsements to candidates running in the parties' primary elections.[69] This topic closely touches the internal decision-making process of political parties in what is arguably their most important function: the nomination of candidates for public office. While it could easily be argued that primary endorsements by parties implicate the electoral process, and thus important state interests, this Article will treat the matter as one internal to political parties.[70]

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[69] Party endorsements are either indicated on the primary ballot, most commonly by location of the candidate's name, or are expressed "off-ballot" by party officials. Some states have tried to ban primary endorsements outright while others have sought to limit when and how party committees may render their endorsements.

[70] Most courts seem to agree that this is largely an internal party matter. *See, e.g.*, Abrams v. Reno, 452 F. Supp. 1166, 1170 (S.D. Fla. 1978); Fahey v. Darigan, 405 F. Supp. 1386, 1393 (D.R.I. 1975); Gosz v. Quattrocchi, 448 A.2d 135, 137 (R.I. 1982).

These cases usually raise issues of free speech and equal protection as well as free association. The free speech claims arise from situations where a state tries to limit sharply or bar entirely endorsements by party officials or committees. Some courts have construed these as prior restraints and thus usually strike them as unconstitutional.[71] The Equal Protection issue is less clear. Most courts appear to treat the endorsement process as a private party matter that does not implicate the "state action" required for application of Fourteenth Amendment equal protection.[72]

Only a few cases, beginning in the mid-1960s, have dealt directly with primary endorsements by parties. Most of these cases have upheld the ability of political parties to render such endorsements, often on the basis that this party activity is *not* an integral part of the election scheme.[73] At least one other court has rejected state efforts to regulate primary endorsements as unconstitutional prior restraints on First Amendment free expression.[74] In those few instances where such state laws have been upheld, court have usually required a showing of compelling state interest.[75]

The most extended and definitive discussion of this issue came from the Supreme Court in its 1989 landmark decision in *Eu v. San Francisco County Democratic Central Committee*.[76] The *Eu* Court struck California's ban on party endorsements as violative of free speech because it inhibited the ability of parties to communicate recommendations to their members as to which candidates best represented the parties' ideology.[77] Applying strict scrutiny to the California law, the Court found that the asserted state interests of "party stability" and prevention of "voter confusion" were not

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[71] *See, e.g., Abrams*, 452 F. Supp. at 1170.

[72] *See, e.g., Gosz*, 448 A.2d at 137-38; Gallant v. LaFrance, 222 A.2d 567, 570 (R.I. 1966).

[73] *Fahey*, 405 F. Supp. at 1391; *Gallant*, 222 A.2d at 570.

[74] *Abrams*, 452 F. Supp. at 1171-72.

[75] *See, e.g., Gosz*, 448 A.2d at 137-38 (holding that the strict scrutiny standard should be applied to the legislative modification of existing district committees, and this legislative intrusion was justified by a compelling state interest—the reapportionment of the General Assembly).

[76] 498 U.S. 214, 222-29 (1989).

[77] *Id.* at 223.

sufficiently compelling to justify their burden on free association.[78] In fact, the Court concluded that a party primary was an "ideal forum" for the resolution of intra-party disputes.[79]

As the reviewed case law indicates, the courts have made some progress in establishing general guidelines for the most commonly occurring fact situations in this area. But an explicit linking of these isolated lines of cases to one another under a common rationale is necessary. This can be done by grouping these decisions together under the rubric of their common element, namely the implication of the party's internal structure or decision-making processes.

Under my tripartite model, this area of party life should be accorded the greatest leeway by the states. The courts should bolster and preserve this party independence through application of the most demanding constitutional hurdles. Most case law touching on internal party structure, regulation of party delegate selection, or primary endorsements has favored party independence by upholding its First Amendment rights. This judicial tendency needs to be reiterated more firmly and state regulation of parties steered to other aspects of party behavior. The courts must identify the regulation of internal party matters as a class that raises important First Amendment rights and triggers rigorous constitutional standards such as the compelling interest test.

V. ADJUDICATION OF THE ELECTORAL ACTIVITIES OF PARTIES

This Part will review and extrapolate from those federal court decisions that have adjudicated party activities relating to the electoral process. State regulatory efforts in this area are distinct from those discussed in the preceding section that attempted to regulate the internal activities of parties. The admixture of state and party interests in this second set of cases is qualitatively different from the first and more complex. The interests of the state in regulating parties' (public) electoral activities are much greater than in the regulation of their internal (private) operations. The courts

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[78] *Id.* at 227-28.

[79] *Id.* at 227 (quoting Storer v. Brown, 415 U.S. 724, 735 (1974)).

have recognized important, sometimes even compelling, state interests in regulating election-related functions of their parties. Some of the state interests asserted over the years have included integrity of the electoral process,[80] maintenance of the two-party system,[81] avoidance of voter confusion,[82] prevention of intra-party friction,[83] maintenance of political stability,[84] and preservation of the fair ballot access for candidates and political parties.[85]

In the substantial body of case law on this topic, the courts have struggled to balance these state interests in the administration of the electoral process with the First Amendment rights of political parties and their members.[86] It is now well-established that state regulation of elections can impinge First Amendment rights of free association.[87] However, the precise extent to which states may regulate parties' electoral activities without violating these rights remains particularly vague.

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[80] *See, e.g.*, Kusper v. Pontikes, 414 U.S. 51, 59-60 (1973) (recognizing that a state may have a legitimate interest in curtailing raiding—the "practice whereby voters in sympathy with one party vote in another's primary in order to distort that primary's results").

[81] *See, e.g.*, Tashjian v. Republican Party of Conn., 479 U.S. 208, 222-25 (1986).

[82] *See, e.g.*, Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 226 (1989); *Tashjian*, 479 U.S. at 220-22; Anderson v. Celebrezze, 460 U.S. 780, 796 (1983); Bullock v. Carter, 405 U.S. 134, 145 (1972).

[83] *See, e.g.*, *Eu*, 489 U.S. at 227-28; *Tashjian*, 479 U.S. at 224; Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 124 (1981).

[84] *See, e.g.*, *Eu*, 489 U.S. at 226; Storer v. Brown, 415 U.S. 724, 736 (1974).

[85] *See, e.g.*, *Storer*, 415 U.S. at 733; *Bullock*, 405 U.S. at 145.

[86] Marchioro v. Chaney, 442 U.S. 191 (1979); Kusper v. Pontikes, 414 U.S. 51, 57 (1973) (recognizing that "in exercising their [States] powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections"); *Bullock*, 405 U.S. at 135; Dunn v. Blumstein, 405 U.S. 330, 345 (1972); Kramer v. Union Sch. Dist., 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965). Of course, the Constitution entrusts most of the administration of the electoral process to the states. U.S. CONST. art. I, § 2, art. II, § 1. *See also Kusper*, 414 U.S. at 57.

[87] *Kusper*, 414 U.S. at 57 (citing Williams v. Rhodes, 393 U.S. 23, 30 (1968)).

In recent years, courts have struck down a wide range of state laws regulating electoral matters because of the burden they placed on parties' First Amendment rights. Some of the situations where state laws have been struck include statutes requiring that parties hold only closed primaries,[88] barring voters from participating in a primary if they had voted in another party's primary in the preceding 23 months,[89] requiring new parties to gather 25,000 signatures to get on the ballot,[90] and requiring parties to hold and fund primary elections.[91] However, the courts have upheld many electoral regulations as well, including laws requiring a one-year non-affiliation requirement for candidates intending to run as independents,[92] specifying ballot access requirements,[93] and specifying voter qualifications.[94]

The courts have tended to focus narrowly on the facts of each case in this area without much success in creating workable standards for this class of litigation. Given the great variety of circumstances in which election laws can affect the associational rights of parties, it is not surprising that the courts have not been able to develop more satisfying standards. In most cases it is simply a matter of the degree of infringement on First Amendment rights. The Supreme Court has struck those state laws that present a "significant encroachment" on associational rights,[95] or when the legislation "unnecessarily burden[s] or restrict[s] [a] constitutionally protected liberty."[96] But there is little more in the way of judicial guidance here.

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[88] *Tashjian*, 479 U.S. at 208.

[89] *Kusper*, 414 U.S. at 68-69.

[90] Norman v. Reed, 502 U.S. 279, 295-96 (1992).

[91] Republican Party of Ark. v. Faulkner County, 49 F.3d 1289 (8th Cir. 1995).

[92] *See, e.g.*, Colorado Libertarian Party v. Secretary of State, 817 P.2d 998 (Colo. 1991).

[93] McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215 (4th Cir. 1995).

[94] *See, e.g.*, Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976).

[95] Kusper v. Pontikes, 414 U.S. 51, 58 (1973) (citing Bates v. Little Rock, 361 U.S. 516, 523 (1960)); NAACP v. Alabama, 357 U.S. at 462 (1958).

[96] *Kusper*, 414 U.S. at 59; (citing Dunn v. Blumstein, 405 U.S. 330, 343 (1972)).

As many states have expanded their regulation of the electoral process, the question of balancing these laws with the First Amendment rights of parties has become more pressing. While party claims to independence and privacy are on weaker foundations, my trichotomous formula calls for some balancing of the public and private interests even here. At a minimum, the courts should establish more precise guidelines to preserve a balance among the competing interests in this area of the law.

The remainder of this section draws several distinctions that will help establish a bright line boundary between the interests of the states and the political parties in electoral activities. These refinements should help both courts and state legislatures more easily identify where state interests end and party rights begin. This, in turn, should help preserve the delicate balance in this area. These distinctions grow out of existing case law, but have never been made explicit nor linked to one another in a coherent scheme to balance the competing political interests.

The first of these distinctions draws upon the existence of two electoral phases in most American elections: the primary (party) elections and the general election. A second and related recommendation concerns the much-litigated issue of ballot access. Finally, court opinions construing the rights of third or minor political parties will be drawn upon for further lessons.

A. General Elections versus Primary Elections

One of the most obvious places to draw a relatively clear line in state regulation of party behavior is between the primary election and general election phases. Although both are parts of the larger selection process, the primary phase can certainly be seen as implicating greater party interests of association and free speech than the general election process, since it is essentially an intra-party affair. Under my trichotomous formula set forth above, it would be expected that state regulation of primary elections would have to pass a slightly higher judicial standard than state regulation of general elections.

Surprisingly, few federal courts have made much of the distinction between primary and general elections, or given much

consideration to developing separate standards for each phase.[97] One reason for this may be that most electoral disputes involve only one phase or the other, eliminating the need to compare standards between the two stages. Another reason may simply be the early history of federal adjudication of party primaries. Most of these early cases were aimed at striking racially exclusive practices in some party primaries.[98] These decisions have tended to emphasize the view that primaries were simply part of the larger electoral process and thus subject to state regulation and federal constitutional standards. Substantial case law exists to support the position that the two electoral phases be treated similarly on the belief that both implicate state action.[99]

Most judges have tended to recognize the traditional state interests raised in cases regulating the electoral process without regard to whether a primary or general election was involved.[100] One of the rare exceptions came in the 1983 Supreme Court decision in *Anderson v. Celebrezze*,[101] where the Court struck down Ohio's early filing deadline as a violation of the voting and associational rights of supporters of an independent presidential candidate. For the majority, Justice Stevens made reference to the existence of a different set of state interests necessary to justify regulation of party primaries as opposed to general elections.[102] In dissent, Justice Rehnquist charged that the majority was making this distinction simply to avoid certain precedents.[103] Whatever

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[97] Originally, the Supreme Court refused to consider the primary phase as a part of the electoral process. Newberry v. United States, 256 U.S. 232, 250 (1921).

[98] *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1952); Smith v. Allwright, 321 U.S. 649 (1944).

[99] *See* Moore v. Ogilvie, 394 U.S. 814, 818 (1969); Gray v. Sanders, 372 U.S. 368, 374-75 (1963); United States v. Classic, 313 U.S. 299, 316-19 (1941); *Nader*, 417 F. Supp. at 842.

[100] *See, e.g.*, American Constitutional Law Found. v. Meyer, 120 F.3d 1092, 1097 (10th Cir. 1997).

[101] 460 U.S. 780 (1983).

[102] *Id.* at 788 n.9, 802 n.29.

[103] *Id.* at 817-18 (Rehnquist, J. dissenting). In particular, Justice Rehnquist referred to the Court's decision in *Storer v. Brown*, which upheld a state law imposing an even earlier filing deadline than at issue in *Anderson*, finding that

the motivation, this minor dispute is one of the rare instances in which some members of the Supreme Court recognized a distinction in the constitutional treatment that should be accorded primary and general election stages.

However, the sharpest Supreme Court discussion of the possibility that the nomination process should be treated differently arose in the context of the applicability of the Voting Rights Act of 1965[104] to party nominating conventions. In its 1996 decision in *Morse v. Republican Party of Virginia*,[105] a bare majority ruled that the preclearance provision in section 5 of the 1965 Act[106] applied to an effort by a state party to charge a "registration fee" for participation in its nominating convention. In three dissenting opinions,[107] the conservative wing of the Court argued that parties are not "political subdivisions" of the state to which section 5 preclearance applies.[108] The Court continued by saying that the parties are not "state actors,"[109] a primary registration fee is not "voting" for section 5 preclearance purposes,[110] and that a blanket application of section 5 preclearance to nominating processes would force the parties to preclear all of their internal procedures.[111] In a concurrence by Justice Breyer,[112] three members of the Court's majority in *Morse* believed that section 5 preclearance was only applicable to "certain activities of political parties, such as nominating activities."[113] Despite the ruling in *Morse*, it

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it was supported by a compelling state interest in political "stability." 415 U.S. 724, 736 (1974).

[104] Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1973-1975 (1994)).

[105] 517 U.S. 186 (1996).

[106] 42 U.S.C. § 1973c.

[107] 517 U.S. 186, 241-47 (1996) (Scalia, J., dissenting); *id.* at 247-52 (Kennedy, J., dissenting); *id.* at 253-91 (Thomas, J., dissenting).

[108] *Id.* at 252-76 (Thomas, J., dissenting).

[109] *Id.* at 248-51 (Kennedy, J., dissenting).

[110] *Id.* at 276-80 (Thomas, J., dissenting).

[111] *Id.* at 244 (Scalia, J., dissenting).

[112] *Id.* at 235-45 (Breyer, J., concurring).

[113] *Id.* at 238 (Breyer, J., concurring). Justice Breyer lists a number of party activities that appear to lie beyond section 5 preclearance: adoption of party resolutions and platforms; rules governing internal party operations; changes in

does appear from the five opinions in that case that at least seven members of the present court continue to have serious reservations regarding the encroachment of federal regulations on party activity in light of the important First Amendment rights involved.[114]

An explicit distinction should be drawn and maintained between the two phases of the election cycle. Such a distinction grows easily from the trichotomous model set forth earlier and would establish a sharper delimitation of both party independence and government regulatory interests. This would help stabilize the First Amendment rights of parties and their members while preserving a major role for government regulation to prevent party abuse of their electoral responsibilities.

The distinction between the nomination and general election phases could be strengthened if the Court required a somewhat higher standard than that applied to state laws that regulate the nomination process. Unless racial discrimination was alleged, the burden of proof should fall initially on the government in those cases where it seeks to regulate parties in carrying out their nominating function. State legislation regulating party primaries or conventions would thus have to be supported by a showing of a "substantial state interest." In contrast, state regulation of the general election phase would be presumed constitutional, with the burden of proof falling on the challengers to show an "arbitrary and capricious" government action.

This proposed tightening of the standards would enhance the distinction between these two electoral phases, one essentially an *intra*-party affair, the other a public, *inter*-party dispute. This approach has the advantage of being theoretically justifiable in that it helps balance the competing political values in this area of the law. It would also be workable in practice in that it is based on two relatively identifiable and distinct processes. This would also likely produce more uniform and predictable court decisions in this field. In fact, there is probably no easier place to identify where

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recruitment of party members; and conduct of political campaigns. *See also* Presley v. Etowah County Comm'n, 502 U.S. 491, 502-03 (1992).

[114] The seven are Chief Justices Rehnquist, and Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer.

individual rights of First Amendment association end and government or public interests in a fair and open political system begin.

The current state of the case law is simply too uncertain—in large part because of the courts' unwillingness to clearly separate the two electoral phases from one another. Recent case law seldom makes an explicit distinction between the two stages, inviting continued growth of state regulatory power with no clear stopping point. Given the special problems and history of racial exclusion in partisan affairs, it will probably prove necessary to continue to permit greater government supervision of even the primary phase when racial discrimination is alleged. To this end, the *Morse* decision extending section 5 preclearance to certain party nominating actions might prove wise. However, in those cases not involving race, a return to the pre-1940s position that primaries and general elections be treated differently would enhance predictability and further a balance between the competing values.

B. State Laws Regulating Ballot Access for Third Parties

Most states have a statutory scheme that regulates their electoral processes by controlling access to their election ballot. These statutes typically include various requirements that parties or candidates must fulfill in order to secure a place on an election ballot. Some of the most common of these are filing fees,[115] disaffiliation requirements for independent candidates,[116] signature requirements,[117] and minimal prior electoral support.[118] The enacting state typically justifies such regulations on grounds of protecting the "integrity" of the party system,[119] fostering the

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[115] *See, e.g.*, CAL. ELEC. CODE § 8103 (West 1996); FLA. STAT. ANN. § 99.061 (West Supp. 1998).

[116] *See, e.g.*, CAL. ELEC. CODE § 8301 (West 1996).

[117] *See, e.g.*, CAL. ELEC. CODE § 8400 (West 1996); FLA. STAT. ANN. §§ 99.0955, 99.096 (West Supp. 1998); N.Y. ELEC. LAW §§ 6-136, 6-142 (McKinney 1998).

[118] *See, e.g.*, CAL. ELEC. CODE § 5100 (West 1996); FLA. STAT. ANN. § 99.0955(2) (West Supp. 1998); N.Y. ELEC. LAW § 6-142 (McKinney 1998).

[119] *See* Storer v. Brown, 415 U.S. 724, 733 (1974) (citing Jenness v. Fortson, 403 U.S. 431, 442 (1971)); American Party of Tex. v. White, 415 U.S. 767, 786 (1974); Thournir v. Meyer, 909 F.2d 408, 411 (10th Cir. 1990).

efficient processing of petitions,[120] preventing "laundry lists" of candidates,[121] minimizing voter confusion,[122] discouraging frivolous candidates who are not serious,[123] and promoting fair, honest and orderly elections.[124]

These state regulatory efforts tend to fall disproportionately on "minor" or third political parties, and on independent candidates.[125] But these state electoral schemes also affect the major parties indirectly in that they structure the competitiveness of the electoral terrain. Ballot access legislation often determines the number and strength of competing parties and independent candidates in a state's political life. Constitutional challenges to such state laws have proven somewhat revealing of judicial attitudes on the relative importance of party independence and the need for state regulation of parties.

There is a substantial body of federal case law dealing with state efforts to control access to election ballots. Generally, the courts have judged these statutes by assessing whether they impermissibly burden First Amendment rights of free speech or association, or whether they violate the Equal Protection Clause by discriminating against minor parties.[126] It appears settled that the right of candidates to participate in primaries is not fundamental

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[120] *See* Tarpley v. Salerno, 803 F.2d 57, 60 (2d Cir. 1986).

[121] Variously referred to as causing fragmentation of the ballot or "ballot flooding." *See* Thournir v. Meyer, 708 F. Supp. 1183 (D. Colo. 1989), *aff'd*, 909 F.2d 408 (10th Cir. 1990); Consumer Party v. Davis, 633 F. Supp. 877, 887 (E.D. Pa. 1986).

[122] *See* Lubin v. Panish, 415 U.S. 709, 712 (1974); Bullock v. Carter, 405 U.S. 134, 144-45 (1972).

[123] *See, e.g., Storer*, 415 U.S. at 735.

[124] *See* Libertarian Party of Okla. v. Oklahoma State Election Bd., 593 F. Supp. 118, 121 (D. Okla. 1984).

[125] *See* Lee Epstein and Charles Hadley, *On the Treatment of Political Parties in the U.S. Supreme Court, 1900-1986*, 52 J. OF POLS. 413-32 (1990); Bradley Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 167-217 (1991). Often, the two major parties enjoy a statutorily privileged position on state ballots. In some states, several parties are given a privileged ballot position by statute. *See, e.g.*, CAL. ELEC. CODE §§ 7050-7881 (West 1996).

[126] *See, e.g., Consumer Party*, 633 F. Supp. at 885.

like the right to vote.[127] An occasional judge has called for the creation of an "exception" for third parties which would make it easier for them to challenge state ballot access laws.[128] However, the Supreme Court in the landmark *Buckley v. Valeo* decision was unwilling to create a "blanket exemption" for third political parties, although the Court indicated that greater flexibility should be accorded third parties seeking to prove injury from state ballot regulations.[129]

Over the years, the courts have resorted to a variety of review standards for judging state ballot access regulations.[130] The Supreme Court's 1983 decision in *Anderson v. Celebrezze* set forth a "balancing test" that runs from strict scrutiny to rational basis analysis.[131] Under the *Anderson* test, strict scrutiny is applied only if it is first determined that protected rights are "severely burdened;" otherwise the magnitude of the burden on the minor party is balanced against the asserted interests of the state.[132] Subsequent handling by courts of ballot access disputes have tried to

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[127] American Party of Tex. v. White, 415 U.S. 767, 781 (1974); *Bullock*, 405 U.S. at 142-43; Thournir v. Meyer, 909 F.2d 408, 412 (10th Cir. 1990); City of Akron v. Beil, 660 F.2d 166, 169 (6th Cir. 1981).

[128] *See, e.g.*, Buckley v. Valeo, 519 F.2d 821, 907-12 (D.C. Cir. 1975) (Bazelon, C.J., concurring in part and dissenting in part), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

[129] 424 U.S. 1, 74 (1976).

[130] *Compare, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (applying strict scrutiny); Storer v. Brown, 415 U.S. 724 (1974) (same); Williams v. Rhodes, 393 U.S. 23 (1968) (same), *with* Jenness v. Fortson, 403 U.S. 431 (1971) (favoring rational relationship test), *and with* American Party of Tex. v. White, 415 U.S. 767 (1974) (applying a mix of strict and minimal scrutiny). *See* Clements v. Fashing, 457 U.S. 957, 965-66 (1982) (limiting strict scrutiny to ballot access laws based on wealth). *See also Consumer Party*, 633 F. Supp. at 885 n.9; Colorado Libertarian Party v. Secretary of State, 817 P.2d 998, 1001-02 (Colo. 1991); TRIBE, *supra* note 7, § 13-20.

[131] 460 U.S. 780, 787-90 (1983). This test is applicable to both First Amendment and Equal Protection challenges to ballot access legislation.

[132] *Id.* at 789. The Supreme Court has since restated this strict scrutiny test. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 433-34 (1992); Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14 (1986).

apply this test and to answer *when* each part of this test is applicable.[133] In so doing, federal courts have identified a variety of state laws that "severely burden" First Amendment rights and thus have subjected them to strict scrutiny.[134] Other state laws have been found to impose only "reasonable, non-discriminatory" burdens on First Amendment rights and thus need only be supported by important regulatory interests of the state.[135] The two most recent Supreme Court cases on ballot access have restated the two-tier *Anderson* test for judging state ballot access laws.[136]

State regulation of parties' electoral behavior generally falls within the middle tier of my three-way division where the interests of the parties and those of the state are both substantial. This situation appears to indicate that some form of balancing test would be most appropriate. However, state ballot access laws are somewhat unusual in that they typically fall most heavily on third

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[133] *See, e.g., Burdick*, 504 U.S. at 432-440; Norman v. Reed, 502 U.S. 279, 288-90 (1992); McLaughlin v. North Carolina Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995); Fulani v. Krivanek, 973 F.2d 1539, 1542-44 (11th Cir. 1992); *Colorado Libertarian Party*, 817 P.2d at 1001-02.

[134] *See, e.g., Norman*, 502 U.S. at 288-90 (finding state law requiring new party to gather 25,000 signatures violative of the First Amendment under a strict scrutiny analysis); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 95-98 (1982) (declaring California statute requiring independent candidates to be politically disaffiliated for one year prior to primary election constitutional because it reflected a compelling state interest protecting the electoral process); Workers World Party v. Vigil-Giron, 693 F. Supp. 989, 994-97 (D.N.M. 1988) (holding state law requiring party membership of all signatories to party ballot access petition violative of First Amendment).

[135] *See, e.g., McLaughlin*, 65 F.3d at 1221-26 (upholding state law requiring petitions with 2% of voters' signatures for a party to secure ballot access after balancing state and party interests); Lightfoot v. Eu, 964 F.2d 865, 868-69 (9th Cir. 1992) (upholding state law requiring parties to nominate candidates by direct primary and to show support before appearing on general election ballot applying strict scrutiny); Libertarian Party of Fla. v. Smith, 687 So. 2d 1292, 1295 (Fla. 1996) (upholding a statutory ban on fee rebates for minor parties because it furthered state interests by preventing factionalism and discouraging third parties); *Colorado Libertarian Party*, 817 P.2d at 1001-05 (holding that state's 12-month unaffiliation requirement did not violate third party's rights of free association).

[136] *Burdick*, 504 U.S. at 433-34; *Norman*, 502 U.S. at 288-90.

political parties. This situation might be solved by applying the balancing portion of the *Anderson* test to ballot access laws which do not fall disproportionately on third parties, while reserving strict scrutiny analysis for regulations that disadvantage third parties. This would allow the courts to continue to balance state interests and party First Amendment rights, but to hold discriminatory regulations to strict scrutiny under the Equal Protection Clause. Thus, the choice of the proper constitutional test should turn on whether the case involved First Amendment rights or equal protection concerns, rather than on whether the regulation "severely burdened" ballot access as in *Anderson* and its progeny.

This approach would not only produce clearer application of constitutional standards, but would also preserve a more appropriate balance between state and party interests. An additional benefit would be to accord greater protection to third parties in our system. A number of federal courts have recognized the significance that third parties play in our democracy.[137] Adoption of my standard would further this political ideal. Though the two major parties deserve some protection from excessive electoral regulations, their claim is not nearly as compelling as that of minor political parties.

VI. ADJUDICATION OF PARTY ACTIONS IN GOVERNMENT

Although American parties are seldom seen as "entering" government in the same sense as their European counterparts, their elected officials usually continue to act as partisans once they are in office. This final Part will review and extrapolate the judicial application of constitutional standards to the actions of political

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[137] *See, e.g.*, *Brown*, 459 U.S. at 92-93 (holding that Ohio's disclosure requirements could not constitutionally be applied to the Socialist Workers Party, a minor political party); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185-86 (1979) (holding Illinois Election Code requiring new political parties to obtain more than 25,000 signatures in Chicago unconstitutional); Ripon Soc'y v. National Republican Party, 525 F.2d 567, 584 (D.C. Cir. 1975). *Cf.* Buckley v. Valeo, 519 F.2d 821, 907-12 (D.C. Cir. 1975) (Bazelon, C.J., concurring in part and dissenting in part) (disagreeing with the majority's conclusion that applying disclosure requirements to minor parties does not violate the constitution), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

parties once they have won public office. The major area of Supreme Court activity here has been in the adjudication of various patronage activities of parties, particularly the efforts by newly-elected officials to replace non-partisans with their fellow partisans in appointed government positions. The other major area of attention has been to those instances where parties, through their elected members, engage in the partisan gerrymandering of electoral districts.

In terms of my tripartite model, once a party has moved "into government" it must necessarily surrender much of the private side of its existence. Indeed, once the party—or its partisans—are in power they *are* the government from which other parties need protection. As part of the governmental apparatus, the incumbent party no longer needs protection from government intervention. Instead, it is other political parties and non-partisans who may need judicial protection from the party in power. Therefore, in contrast to the regulation of party internal organization or party behavior in the electoral arena, party actions in government should receive the least constitutional protection. Put in terms of my trichotomy, the incumbent party officials represent almost none of the *private* side of parties. Concurrently, the *public* interest in regulating partisan activity is clearly great given the policy-making power of the incumbent party through its partisans.[138]

A. Partisan Gerrymandering

Comparatively few modern federal cases have dealt directly with partisan gerrymandering by the party in power. Most cases involving legislative gerrymandering by state legislatures have been

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[138] In terms of the constitutional rights, there is also an important distinction between political parties based on whether they are in or out of power. In those cases dealing with parties out of office, the constitutional focus has frequently been on the rights of the party and its members to associate with whom they please and to exclude those with whom they do not wish to associate for political reasons. But, when dealing with parties in government, the courts have often emphasized the individual rights of those government officials who choose *not* to associate with the reigning party.

based on racial motives rather than partisan ones.[139] The Supreme Court has been increasingly intolerant of racial motivations in this area and has erected stiff constitutional standards to deal with such cases under the Equal Protection Clause.[140] However, where party politics rather than race is the motivation the courts have often been reluctant to become involved.[141]

For years the Court refused to become directly involved in cases of political or partisan gerrymandering as long as the districts drawn were "equipopulous."[142] For some time, the Court treated this as another topic which was too "political" for adjudication. For instance, in its 1973 decision in *Gaffney v. Cummings*, the Court upheld a blatantly partisan gerrymander of Connecticut's legislative districts, noting that "[p]olitics and political considerations are inseparable from districting and apportionment."[143]

The major Supreme Court landmark in the area of political gerrymandering since *Gaffney* is the Court's 1986 decision in *Davis*

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[139] Major gerrymandering cases involving race, including those seeking to create majority-minority electoral districts, include: *United States v. Hays*, 515 U.S. 737 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993); *Voinovich v. Quilter*, 507 U.S. 146 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966); *Fortson v. Dorsey*, 379 U.S. 433 (1965) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

[140] The most recent cases on the use of race to draw congressional district lines are *Miller v. Johnson*, 515 U.S. 900 (1995) and *Shaw v. Reno*, 509 U.S. 630 (1993). *See also* Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541 (1994).

[141] *See* Davis v. Bandemer, 478 U.S. 109, 120-21 (1986) (holding that partisan gerrymandering cases are justiciable under the Equal Protection Clause provided that a prima facie case is made by a strong representation of discriminatory vote dilution).

[142] John P. Ludington, Annotation, *Constitutionality of State Legislative Apportionment—Supreme Court Cases*, 77 L. Ed. 2d 1496, 1514 (1985) (defining "equipopulous gerrymandering" as "districting that satisfies the one person-one vote requirement yet is discriminating toward an identifiable group of voters" (citing Richard L. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1996 ARIZ. ST. L.J. 277, 278)).

[143] 412 U.S. 735, 753 (1973).

v. Bandemer.[144] In this case, the Court split badly and was able to produce only a plurality decision. Nonetheless, six members of the Court agreed that partisan gerrymandering was a justiciable matter and not barred by the political question doctrine.[145] However, the Court found that in order to succeed on an Equal Protection claim, the plaintiff will have to prove *both* intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.[146] Furthermore, plaintiffs in such cases are required to show that the alleged partisan gerrymander will consistently degrade their voters' (or group's) electoral strength in the political process as a whole and that they will have no hope of doing better in future elections.[147] Thus, though justiciable, instances of political gerrymandering carry a very heavy burden of proof.

Although the *Bandemer* case was based on an Equal Protection analysis, it does offer some indication that at least three members of the Court were concerned with preserving some degree of independence for the party system in this area. For instance, in Justice O'Connor's concurrence favoring judicial non-intervention in cases of political gerrymandering, she stated:

> Racial gerrymandering should remain justiciable, for the harms it engenders run counter to the central thrust of the Fourteenth Amendment. But no such justification can be given for judicial intervention on behalf of mainstream political parties, and the risks such intervention poses to our political institutions are unacceptable. 'Political affiliation is a keystone of the political trade. Race, ideally, is not.'[148]

Although in *Bandemer*, the Court did not address First Amendment issues, these arguments have been dealt with by other lower federal courts. The leading case is a 1988 California district

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[144] 478 U.S. 109 (1986).

[145] *Id.* at 118-27.

[146] *Id.* at 127.

[147] *Id.* at 139, 141.

[148] *Id.* at 160-61 (O'Connor, J., concurring) (quoting United Jewish Orgs. v. Carey, 430 U.S. 144, 171 n.1 (1977) (Brennan, J., concurring)).

court opinion, *Badham v. Eu.*[149] The *Badham* court dismissed a political party's First Amendment challenge to California's redistricting law, finding that the party was not precluded from fielding candidates under the scheme.[150] The court unsympathetically noted that "[t]he First Amendment guarantees the right to participate in the political process; it does not guarantee political success."[151] To succeed on such a First Amendment claim, a party will have to show *how* the redistricting plan penalized their exercise of First Amendment rights. A handful of other lower federal courts have also dealt with partisan gerrymandering and have followed the *Bandemer* precedent, whether basing their decisions on the First Amendment or on the Equal Protection Clause.[152]

The Supreme Court's decisions in this area erect substantial litigation barriers for plaintiffs seeking to challenge partisan gerrymandering. These decisions appear to be based on the practical difficulties inherent in proving such discrimination as well as the Court's history of staying clear of these very political disputes. However, my tripartite model dictates that the party in power should receive little judicial protection on the basis of preserving party integrity or independence. Thus, the burden currently placed on plaintiffs in partisan gerrymandering cases should be eased.

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[149] 694 F. Supp. 664 (N.D. Cal. 1988).

[150] *Id.*

[151] *Id.* at 675.

[152] *See, e.g.*, LaPorte County Republican Cent. Comm. v. Board of Comm'rs, 43 F.3d 1126 (7th Cir. 1994) (holding that redistricting challenge did not state a cause of action under the Equal Protection Clause); Republican Party of N.C. v. Hunt, 841 F. Supp. 722, 732 (E.D.N.C. 1994) (dismissing Equal Protection claim); Holloway v. Hechler, 817 F. Supp. 617, 628-29 (S.D. W. Va. 1992) (dismissing First Amendment reapportionment challenge) (citing Republican Party of Va. v. Wilder, 774 F. Supp. 400, 404 (W.D. Va. 1991) (holding that Equal Protection cause of action requires both intentional discrimination and actual discriminatory effect; Badham v. Eu, 694 F. Supp. 664 (N.D. Cal. 1988))).

B. Political Patronage

The other major incumbent party activity to come under judicial scrutiny has been political patronage, including the hiring, firing, and harassment of governmental employees on the basis of their party affiliation. Political patronage is nearly as old as the party system itself in the United States.[153] In most cases, it is more clearly a *party* activity than partisan gerrymandering. It may also be more easily justified as a "necessary" party activity than partisan gerrymandering.

The Supreme Court did not directly consider the constitutionality of various patronage actions of political parties until *Elrod v. Burns* in 1976.[154] In that case, the Court found that the partisan discharge of a county employee by a newly-elected local official was an unconstitutional violation of First Amendment free association. Four years later, the Court revisited the constitutionality of various patronage activities in *Branti v. Finkel* and expanded the class of public employees enjoying First Amendment protection.[155] And in 1990, the Court handed down its latest major patronage decision, *Rutan v. Republican Party of Illinois*, which restricted patronage activities through still further expansion of the First Amendment free association rights of non-party government workers.[156] Although these cases extended First Amendment protection to public employees, they also acknowledged that there exists a class of high-level public employees who are "policymakers" with duties that make party affiliation and loyalty appropriate

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[153] Elrod v. Burns, 427 U.S. 347, 353-54 (1976); Branti v. Finkel, 445 U.S. 507, 522 n.1 (1980) (Powell, J., dissenting); MARTIN TOLCHIN & SUSAN TOLCHIN, TO THE VICTOR 3-26 (1971).

[154] 427 U.S. 347 (1976).

[155] 445 U.S. 507 (1980).

[156] 497 U.S. 62 (1990). *Rutan* extended the *Elrod-Branti* rule to adverse patronage actions short of outright dismissal, including decisions as to promotion, transfer, recall after layoff, and hiring of low-level public employees on party affiliation and support. *Id.* at 69-79. *See* Robert C. Wigton, *The Supreme Court and Political Patronage: The* Rutan *Decision in Context*, 2 GEO. MASON U. CIV. RTS. L.J. 273 (1992) (providing a full description of the Court's patronage decisions).

employment considerations.[157] Since this time, lower federal courts have struggled to define which public employees are "policymakers" deserving of less First Amendment protection.[158]

Political patronage, like partisan gerrymandering, falls squarely into the third tier of my tripartite model as an activity undertaken by incumbent parties. Accordingly, the interests and rights of the parties should be at their relative lowest ebb when undertaking such patronage actions. The party in power is in need of little protection from the "State" in order to preserve its independence. Thus, cases presenting First Amendment claims against political patronage actions should give maximum presumption to the First Amendment claimant. In terms of constitutional law, the burden should shift early to the party to demonstrate the reasons for undertaking the challenged patronage actions.[159]

Current judicial doctrine requires that the government show a compelling interest before subjecting "non-policymakers" to partisan decisions.[160] This position comports well with my model

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[157] *Rutan*, 497 U.S. at 71 n.5; *Elrod*, 427 U.S. at 367; *Branti*, 445 U.S. at 517-18.

[158] *See, e.g.*, Kaluczky v. City of White Plains, 57 F.3d 202, 208 (2d Cir. 1995); Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994); Peters v. Delaware River Port Auth., 16 F.3d 1346, 1353-59 (3d Cir. 1994); Regan v. Boogertman, 984 F.2d 577, 579-80 (2d Cir. 1993); Zold v. Township of Mantua, 935 F.2d 633, 635 (3d Cir. 1991); Affrunti v. Zwirn, 892 F. Supp. 451, 456-60 (E.D.N.Y. 1995). The determination as to which employees are "policymakers" or "confidential" employees is based on the nature of the functions that employee performs. *See Elrod*, 427 U.S. at 367-68; Waskovich v. Morgano, 2 F.3d 1292, 1297 (3d Cir. 1993); *Zold*, 935 F.2d at 635. In particular, the courts have asked whether the individual had meaningful input into decisionmaking over the nature and scope of major government programs. *See* Brown v. Trench, 787 F.2d 167, 169-70 (3d Cir. 1986); Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981).

[159] In these cases, the courts have typically required that the plaintiff-employee carry the burden of proof that his or her First Amendment rights have been infringed by the government employer on the basis of political affiliation. However, the government body must carry the burden to demonstrate that the employee falls within the "policymaking" exception. *See Branti*, 445 U.S. at 518; *Elrod*, 427 U.S. at 368 (requiring the government to show an "overriding interest" to secure the "policymaker" exception); Peters v. Delaware River Port Auth., 16 F.3d 1346, 1353 (3d Cir. 1994).

[160] *See, e.g.*, *Elrod*, 427 U.S. at 360.

which calls for minimal protection for party activities undertaken while they are "in government." However, the effort by the federal judiciary to create an exception to this rule for high-level "policy-makers" complicates the matter. The rationale for exempting this class of employees appears to be to ensure loyalty among high-level, policy-making government workers.[161] This is certainly an important ideal in a democracy and may be sufficient reason to curb this class of employees' protection from partisan actions. However, it is significant that the majority of the Court in *Rutan* expressly rejected various party-preservation reasons asserted by the dissenters.[162] Thus the majority does not consider the exception to be something required to strengthen or maintain political parties.

CONCLUSIONS AND SYNTHESIS

It would appear from this survey of major cases that the courts have regularly drawn some distinctions between the private and public sides of American political parties. However, these efforts to delineate the two sides of political parties have usually been piecemeal and divorced from the larger theoretical concerns in this area. In the course of this Article, I have extrapolated from existing case law in order to sharpen the applicable standards, while trying to preserve a balance between the competing political values. I have identified those areas where the interests in maintaining the integrity and independence of political parties is greatest and juxtaposed the more demanding constitutional standards for adjudication of these state regulations.

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[161] *Rutan*, 497 U.S. at 74 ("A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing high-level employees on the basis of their political views.").

[162] *Id.* at 74-75. Among the benefits of patronage cited by the *Rutan* dissenters were promotion of stability in the political system, broadening the base of political participation at the local level, facilitation of the integration of weak societal groups into the political system, enhancement of party discipline and thus responsive government, limitations on "political fragmentation," preservation of the two-party system, and general strengthening of the parties. *See id.* at 104-08 (Scalia, J., dissenting); *Branti*, 445 U.S. at 527-32 (Powell, J., dissenting); *Elrod*, 427 U.S. at 379, 382-85 (Powell, J., dissenting).

My efforts to establish clearer guidelines for application of constitutional standards have been guided by the major fact distinctions that have been made in these cases. In this way, I have been able to compartmentalize certain fact scenarios and assign each an appropriate standard of review based on the relative interests of the regulating state and political party.

In Table One on page 453, I have attempted to merge the judicial standards with each of the major activities undertaken by modern American political parties. As this Table indicates, there has been a sliding scale of judicial approaches to the adjudication of party activities. The courts have seldom, if ever, attempted to draw the lines clearly among party functions for purposes of constitutional analysis. However, they have recognized that not all party activities should be treated the same but should be judged by varying standards depending on the nature of the activity itself. In Table One, I have extrapolated from the Court's case law to date in a effort to compose a more complete scheme for the balancing of the competing interests in this area.

The sliding review scale set forth in this Table applies most clearly to the two major political parties. When minor or third parties are involved, the courts have often given a different weighting to asserted state interests.

The table's top tier includes those party activities most commonly seen as "private" or internal to parties. Those party actions which are the most "private" in nature, and therefore which arguably deserve the greatest protection from government, often require that the state demonstrate a very high ("compelling") interest to have its regulation upheld. This is usually further reinforced by the imposition of the initial burden of proof on the state when it attempts to regulate what we have deemed "internal" party activities.

The party functions listed closer to the bottom of Table One include those which are most generally regarded as more "public" in nature. In adjudicating these matters, courts should place the initial burden of proof on the political party so as to ease the plaintiff's burden in challenging such party actions. In these decisions, claims of party independence have usually been insufficient to shield the party from judicial intervention.

The electoral activities of parties occupying the middle rung of Table One have been the most vexing for the courts. There is still much that is unsettled in this area aside from those cases involving the disenfranchisement of black voters. There is some case law that supports the disparate treatment of the two phases of the electoral process, giving the parties a bit more leeway in the conduct of party primaries. Thus, I have split the two phases of the electoral process here and offer slightly different tests for each.

This review of the case law shows that the Supreme Court has been sensitive to the need to balance public regulation of parties with the desire to preserve some degree of party independence. This sensitivity has been reflected in the decisions of many judges, but has resulted in an incomplete framework for reconciling the competing interests. Nonetheless, the decisions in this area have laid bare the major factors that the courts consider important for balancing public regulation of parties with party independence. It seems certain that additional line-drawing by the courts, particularly with regard to the parties' purely electoral functions, will be necessary to complete the analytical scheme in this area of constitutional law.

Table 1: Summary of Judicial Review of Political Party Activities: Resolving the Public-Private Entity Problem

Political Party Function	*Court's Review Standard and considerations*	*Burden of Proof*
Internal Party Activities[163]	A "compelling government interest" must be shown to justify regulation of these party activities	State
Electoral Functions Nomination Phase	National party rules vs. state regulations; conduct of party in campaign; whether discrimination by party is "invidious";[164] state must show that its regulations are not "invidious"	Depends on the form of discrimination
General Election Phase	Courts usually presume State Action for XIV Amendment Equal Protection	Party
Activities of the Party-in-Government Partisan Gerrymander Political Patronage	Court's primary concerns in these case are rights of free association and voting	Party

[163] "Internal party activities" refers to matters concerning the structure of state and local party units, the composition of party committees, and internal party financial matters. It also includes party rules regulating the selection of state and local delegates to national conventions, but not those relating to candidate access to the primary ballot.

[164] "Invidious discrimination" for Fourteenth Amendment purposes has been defined by the Court in a number of leading opinions. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).