NOTES

FOR ASSOCIATION'S SAKE: JUSTIFICATIONS FOR STATE REGULATION OF POLITICAL PARTY NOMINATING SYSTEMS

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ABSTRACT

Political parties—particularly the Republican and Democratic Parties—have central roles in the state and federal electoral systems. Voters are intimately familiar with the party-centered primary and caucus systems that states use to nominate candidates for political office. Justified or not, the integral role of political parties in these contests allows the parties to function as gatekeepers for the general election ballot. States generally govern the mechanisms by which parties nominate their candidates for these offices. According to the Supreme Court, the state's ability to require these procedures is "too plain for argument." But what if the procedure dictated by the state conflicts with the desires of one or both of the political parties? To what extent must a regulation infringe a party's associational rights before the state has crossed the line?

This Note suggests that the Court's acceptance of the "too plain for argument" dicta of American Party of Texas v. White *inadequately constrains states' abilities to regulate party nominating contests. The associational rights framework applied by the Court in cases like* California Democratic Party v. Jones *additionally fails to articulate what it is about parties' First Amendment rights that prohibit a state from acting. This Note argues that some combination of the democratic value of voters' right to participate in the nomination process and states' right to control access to the ballot, serves as a more appropriate framework for addressing these concerns. Such analysis provides the states with a reasoned approach to regulate their election systems and places constitutional analysis in line with political realities.*

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INTRODUCTION

As soon as voting started in the 2020 contest for the Democratic Party's presidential nomination, issues tallying votes in the Iowa and Nevada Democratic Caucuses amplified calls from prominent members of the Party to end the use of caucuses in favor of state-run primaries.[1] At the same time, several state Republican Party committees were foregoing presidential nomination contests entirely because of the incumbency of President Donald Trump.[2]

Several states provide central roles for political parties in determining whether and how to nominate their candidates for national political office.[3] Some even allow for parties to overlook voters altogether when nominating candidates for state and local offices.[4] A Democratic Party effort to convert caucuses to primaries would require turning over the electoral apparatus in traditional caucus states, such as Iowa, from state party organizations to state governments.[5] It

[1] Reid J. Epstein, *Reid Calls for Nevada to Switch to Primary*, N.Y. TIMES, Feb. 24, 2020, at A12. For an argument that caucuses are substantially more undemocratic than primary elections, see Sean J. Wright, *Time to End Presidential Caucuses*, 85 FORDHAM L. REV. 1127, 1132-39 (2016) (arguing that caucuses disenfranchise voters, further partisan gridlock, and are difficult to administer).

[2] Among them were South Carolina and Nevada, two critical early voting states. *See* Annie Karni & Maggie Haberman, *G.O.P. in Four States May Cancel Primaries, a Blow to Trump Challengers*, N.Y. TIMES, Sept. 7, 2019, at A17. The South Carolina Republican Party claimed that it saved taxpayers over $1.2 million by cancelling the primary because the outcome was inevitable. Jamie Lovegrove, *SC Republicans Vote to Forgo 2020 GOP Presidential Primary, Setting Up Trump Renomination*, POST & COURIER: PALMETTO POL. (Feb. 18, 2020), https://www.postandcourier.com/politics/sc-republicans-vote-to-forgo-gop-presidential-primary-setting-up/article_96d05722-d0d6-11e9-9771-6ba2d039a3e4.html [https://perma.cc/7FLB-34LJ].

[3] *See, e.g.*, KAN. STAT. ANN. § 25-4501a (2020) (giving recognized parties right to determine procedures for presidential nominations); S.C. CODE ANN. § 7-11-20 (2019) (giving parties option of whether to hold preference primary).

[4] *See, e.g.*, ALA. CODE. § 17-13-42 (2020) (allowing political parties to forego primary elections and have their governing boards determine primary election results). As one of the more extreme examples, a recently invalidated Virginia statute allowed incumbent general assembly members to choose their own method of renomination. *See* Jeffrey R. Adams & Lucas I. Pangle, *The Downfall of "Incumbent Protection": Case Study and Implications*, 54 U. RICH. L. REV. 243, 245-52 (2019).

[5] In addition to Iowa and Nevada, North Dakota and Wyoming are the only states that opted to use a caucus for the 2020 Democratic Primary. American Samoa, Guam, and the U.S. Virgin Islands also use caucuses to choose their delegate allocation for the Democratic National Convention. *See* Maria Cramer, *Where Caucuses Are Still the Path for Democracy*, N.Y. TIMES, Feb. 5, 2020, at A21. However, the North Dakota caucus was a "firehouse" caucus, operating more like a party-run (as opposed to state-run) primary election. *Id.* The Wyoming caucus was conducted entirely by mail in order to protect voters from the COVID-19 pandemic, which affected the latter half of the Democratic nominating contest. *See 2020 Presidential Preference Caucus*, WYO. DEMOCRATIC PARTY, https://www.wyodems.org

should therefore come as no surprise that powerful political parties are resistant to state efforts to take control over their nomination processes.

A major party's nominee is important because of the near-universal rule that the major parties automatically have their presidential candidates listed on the general election ballot in all fifty states.[6] This automatic ballot access extends beyond the national parties' nominees for president and generally applies to candidates for all statewide and local partisan elections.[7] Because major parties' nominees are automatically listed on the general election ballot, the parties' nomination processes serve as a gatekeeping mechanism by deciding the pool of candidates that voters will ultimately choose from. For some races, the nomination process acts as the functional equivalent of the general election—done without the full electorate's participation. With both major parties bracing for political realignment, control of nominating contests could determine whether insurgent wings or party establishment lead the parties.[8] Unsurprisingly, this fact alone creates an election law question that is as political as it is legal.

The Supreme Court, in oft-repeated dicta, has recognized that it is "too plain for argument" that a state may require a primary election.[9] However, the Court has never expanded on this assertion or provided the legal framework for its validity. Rather, the Court has recognized the competing First Amendment interest of political parties in conducting their own nominations—all the while repeatedly affirming the state's ability to require a primary election in the first place.[10]

With respect to challenges against state-prescribed nominating procedures brought by political parties, the Court has never fully answered whether a state-imposed primary election necessarily overcomes the parties' First Amendment

/2020caucus [https://perma.cc/SV57-CHEF] (last visited Dec. 28, 2020).

[6] *See generally* NAT'L ASS'N OF SEC'YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL BALLOT ACCESS FOR THE GENERAL ELECTION (2020). This Note uses "major parties" to refer to the Republican and Democratic Parties. This allows for a discussion that does not take into account thresholds for ballot qualification for other parties ("minor parties"), which vary by state.

[7] *See, e.g.*, ALA. CODE. §§ 17-6-22, -13-40. This Note uses "ballot access" to mean a state's process for determining which candidates to list on the general election ballot. Where laws or discussion relate to access to the primary election ballot, it will be specifically noted.

[8] *See, e.g.*, Astead W. Herndon, *Footholds for the Progressive Movement*, N.Y. TIMES, Aug. 6, 2020, at A16; Richard Luscombe, *After Trump: First Shots Fired in Battle for Republican Party's Future*, GUARDIAN (Nov. 7, 2020, 1:18 PM), https://www.theguardian.com/us-news/2020/nov/07/republican-party-future-trump-defeat-analysis [https://perma.cc/VM29-TBKF].

[9] Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974).

[10] *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 572-73 (2000) ("What we have not held . . . is that the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely.").

rights in all circumstances.[11] Because the Court has consistently glossed over this threshold inquiry, several questions remain unanswered. If states may require political parties to hold primary elections, what does that mean for the political parties' right to associate with members in the manner of the parties' choosing? If states can restrict a party's associational right to choose its own candidates, what prevents states from restricting the candidates that can appear on the primary election ballot?[12] The answers to these questions carry grave implications for the parties: Who may participate in (and who may be excluded from) the nomination of a party's candidates for office?

Commentators consistently criticize the Supreme Court's associational rights approach toward political parties.[13] This criticism amplified in the wake of the Court's 2000 decision in *California Democratic Party v. Jones*,[14] in which the Court invalidated a popular ballot measure that redesigned California's primary election system, instead favoring the right of the state's political parties to (or not to) associate.[15] As is discussed in more detail in Parts I and II, *Jones* called into question the constitutionality of primary election laws in several states. Political parties are still litigating this issue, attempting to capitalize on this uncertainty and regain control of the nominating process.[16] The holding in *Jones* clearly made it more difficult for courts to evaluate the constitutionality of primary election regulations, in part because the *Jones* Court's analysis glossed over the proper basis for allowing states to mandate primaries in the first place.[17]

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[11] *See* Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 121 (1984).

[12] In the cases surrounding President Trump's income tax returns, the Supreme Court of California avoided this question on state law grounds by ruling that California's Presidential Tax Transparency and Accountability Act was not an appropriate precondition to *presidential* primary ballot access. Patterson v. Padilla, 451 P.3d 1171, 1189-92 (Cal. 2019). In federal litigation challenging the California statute, the U.S. District Court for the Eastern District of California granted a preliminary injunction in favor of the President—citing the Qualifications Clause of Article II of the U.S. Constitution and the First Amendment rights of political parties as grounds for doing so. *See* Griffin v. Padilla, 417 F. Supp. 3d 1291, 1301-02 (E.D. Cal. 2019). Because this rationale only applies to presidential elections, it does not address states controlling primary ballot access in elections for state or local office.

[13] *See, e.g.*, Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 101-30 (2004).

[14] 530 U.S. 567 (2000).

[15] *Id.* at 572-77; *see also, e.g.*, Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 826-32 (2001); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 285-98 (2001); Pildes, *supra* note 13, at 101-30. *Jones* is discussed in detail, *infra* Section I.B.

[16] *See, e.g.*, Ariz. Libertarian Party v. Hobbs, 925 F.3d 1085, 1094-95 (9th Cir. 2019); Utah Republican Party v. Cox, 892 F.3d 1066, 1077-83 (10th Cir. 2018).

[17] *See Jones*, 530 U.S. at 572.

This Note addresses the question of why a state may require a political party to hold a primary election in light of the seemingly contradictory analysis in *Jones* and its progeny. Part I discusses the history of the political association doctrine and the state regulation of political parties. It explores the Court's First Amendment jurisprudence on this subject, as well as the unique *White Primary Cases*. Part II discusses recent jurisprudence on this subject in the context of the historical analysis. Section II.A analyzes the Tenth Circuit's recent decision in *Utah Republican Party v. Cox*,[18] in which the court was forced to confront the very question that is the focus of this Note. Section II.B explores the implications of *Cox*—specifically, whether requiring a party to hold a primary election against its will is consistent with *Jones* and to what extent, if any, this action is an infringement on the party's associational rights. Finally, Part III suggests that states and parties may justify particular nominating systems by arguing that regulations are based on a legitimate interest in expanding voter participation combined with the state's ability to regulate the general election ballot. This Note suggests that where automatic ballot access is granted to political parties, the parties should be treated as state actors and the primary elections should be treated as merely the state's mechanism to ensure voter enfranchisement. Where the democratic process is furthered by enhanced voter participation, the state is then in the best position to override the parties' First Amendment rights and require a nomination system different from that preferred by the party.

I. THE CONSTITUTIONAL RIGHTS OF POLITICAL PARTIES

Political parties occupy a unique position under the U.S. Constitution. In most modern cases, parties are treated as associations, deserving of the same First Amendment protections as other interest groups. In only a very small subset of cases have parties been considered state actors, warranting regulation under the Fourteenth and Fifteenth Amendments.[19] The courts' nebulous conception of political parties has created inconsistent constitutional jurisprudence related to party operations, the rights of parties, and the rights of their membership and the voters that support them.[20]

This Part proceeds as follows: Section I.A discusses the historical origins of the constitutional regulation of elections and the emergence of political parties in the United States. Section I.B analyzes challenges to state regulations of primary election systems. It traces the development of the law in this area beginning with the historical *White Primary Cases* and continuing through

[18] 892 F.3d 1066 (10th Cir. 2018).

[19] *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 663-65 (1944).

[20] *See* Wayne Batchis, *The Political Party System as a Public Forum: The Incoherence of Parties as Free Speech Associations and a Proposed Correction*, 52 U. MICH. J.L. REFORM 437, 445-53 (2019); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 782-85 (2000).

modern-day challenges to state-run primary systems.[21] In summary, this Part demonstrates how Supreme Court jurisprudence on this subject fails to provide states and political parties with a clear statement of what First Amendment rights belong to political parties, what rights belong to the voters, and what courts should do when those rights diverge.

A. *The Historical Underpinnings of Political Party Regulation*

This Section explores the historical origins of political parties in the United States. In particular, it addresses the transformation from the early days of the Republic—when parties were seen as an evil to avoid—to the present-day political system that is dominated by parties. This Section demonstrates that as parties gain a larger role in government, the intersection between the government and the associational rights of parties becomes less clear.

While the Constitution is silent on the subject of political parties, it was understood at the founding that their existence was inevitable.[22] James Madison acknowledged the likely emergence of political parties:

> Complaints are everywhere heard from our most considerate and virtuous citizens . . . that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided . . . [according to] the superior force of an interested and overbearing majority. However anxiously we may wish that these complaints had no foundation, . . . known facts will not permit us to deny that they are in some degree true.[23]

Madison devoted *Federalist No. 10* to discussing the effects of factions and demonstrating the impossibility of eliminating their causes.[24] However, the framing generation relied on norms and public appeals to reject factionalism rather than establishing constitutional safeguards.[25] The Founders' reluctance to accept that nationwide factionalism was imminent in their constitutional republic—and, perhaps, naivete as to the extent and cause of factionalism—led these same Founders to acquiesce in and even promote the formation of

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[21] *See generally* Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Classic, 313 U.S. 299 (1941); Terry v. Adams, 345 U.S. 461 (1953).

[22] *See* THE FEDERALIST NO. 10, at 42 (James Madison) (George W. Carey & James McClellan eds., Gideon ed. 2001).

[23] *Id.*

[24] *See id.*

[25] *See* President George Washington, Farewell Address (Sept. 19, 1796) (transcript available in the Avalon Project at Yale Law School) ("And there being constant danger of excess [from parties], the effort ought to be by force of public opinion, to mitigate and assuage it.").

"parties."[26] For decades after the election of President Thomas Jefferson, national elections were largely fought among members of the Democratic-Republican Party and, as such, represented a campaign among members of the same Party, albeit different factions, rather than candidates of different parties with significant ideological divisions.[27] But the divisions within the Democratic-Republican Party prevented the establishment of a national party organization during the early nineteenth century.[28]

The hesitation to form a national party apparatus was relatively short-lived. Indeed, once Martin Van Buren solidified political party formation under the Jacksonian-populist umbrella, the departure from the founding generation's relatively tempered approach to factionalism was complete.[29] During this time, party leadership nominated candidates at the relevant subdivision of government without popular input from voters until the general election.[30] It was the electorate's participation in this process that was significant to the development of primary elections and the integration of parties directly into the electoral system.[31]

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[26] *See* Letter from Alexander Hamilton to Edward Carrington (May 26, 1792), *in* 11 THE PAPERS OF ALEXANDER HAMILTON, FEBRUARY 1792–JUNE 1792, at 426, 426-45 (Harold C. Syrett ed., 1966); *see also* THE FEDERALIST NO. 10, *supra* note 22, at 48 ("The influence of factious leaders may kindle a flame *within their particular states*, but will be *unable to spread a general conflagration through the other states* . . . ." (emphases added)). *But see* THE FEDERALIST NO. 1, *supra* note 22, at 2 (Alexander Hamilton) ("[N]othing could be more ill judged than that intolerant spirit, which has, at all times, characterized political parties.").

[27] That is not to say that the ideological divisions among the members of the Democratic-Republican Party were not significant. In fact, the political necessity of the time practically required serious candidates to be members of the Democratic-Republican Party. However, needing that designation did not mean that the candidates embraced the formation of a political party. *See* DANIEL PEART, ERA OF EXPERIMENTATION: AMERICAN POLITICAL PRACTICES IN THE EARLY REPUBLIC 108-120 (Jan Ellen Lewis, Peter S. Onuf & Andrew O'Shaughnessy eds., 2014).

[28] *Id.* at 127-37 (describing Martin Van Buren's initial backing of William H. Crawford over eventual Party standard-bearer Andrew Jackson).

[29] *See id.* at 137-38, 146; *see also* GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780S-1830S, at 218-21 (2019) (discussing Van Buren's belief in party and "state's rights" as motivating principles for organization). For a description of Van Buren's efforts to construct a national party, see DONALD B. COLE, MARTIN VAN BUREN AND THE AMERICAN POLITICAL SYSTEM 101-41 (1984).

[30] *See* PEART, *supra* note 27, at 26-34; John F. Reynolds, *The Origins of the Direct Primary*, *in* ROUTLEDGE HANDBOOK OF PRIMARY ELECTIONS 39, 39 (Robert G. Boatright ed., 2018).

[31] *See* Alan Ware, *What Is, and What Is Not, a Primary Election?*, *in* ROUTLEDGE HANDBOOK OF PRIMARY ELECTIONS, *supra* note 30, at 17, 18-19.

The necessity of primary elections was as tied to ballot access in the 1880s as it is today. With the invention and widespread use of the Australian ballot[32] and the subsequent decline of the old system of party-generated tickets, it became essential for party organizers to ensure that their preferred candidates were nominated for placement on the ballot.[33] The issue of defining the "party" during this period was controversial because the decentralization of political parties and lack of memberships meant that it was difficult to regulate who was voting in a party's primaries.[34] While the parties' preferred system was a "closed" primary, which allowed only self-identified party members in the electorate to vote, some states used variations of this system to determine their nominees for the general election. Still, it was ultimately the state—not the party—that determined the type of primary and who was allowed to vote.[35]

During the Progressive Era, parties recognized a significant benefit of government-administered primary elections. In particular, a state-administered primary offered both near-automatic ballot access for parties' candidates and a simplified selection system that theoretically unified their rank-and-file members behind the nominee.[36] This transition furthered the departure from the days of Madison and Hamilton and turned the electoral system into one that embraced—rather than eschewed—factionalism.

The upshot of state governments' embracing parties via electoral systems is that the government institutions reflected the political parties' increased influence. Today, political parties serve parliamentary organizational functions in forty-nine state legislatures and the U.S. Congress.[37] Seven states hold partisan elections for judges.[38] So, as the parties became the government and vice versa, to what extent could each exert power over the other?

B. *Party Challenges to State Regulation*

While the Constitution is silent on the position of political parties, it grants the states the right to determine the time, place, and manner for conducting

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[32] The Australian ballot is a ballot that lists all of the candidates running for office and their party affiliations in one place. Replacing the old party tickets, the Australian ballot allowed voters to split the ticket between members of different parties and to vote in secret. 1 ROBERT NORTH ROBERTS, SCOTT JOHN HAMMOND & VALERIE A. SULFARO, PRESIDENTIAL CAMPAIGNS, SLOGANS, ISSUES, AND PLATFORMS 35 (2012).

[33] *See* Ware, *supra* note 31, at 18.

[34] *See id.* at 26.

[35] *See generally* Reynolds, *supra* note 30, at 45-54.

[36] *See id.* at 51.

[37] Nebraska has a unicameral and (officially) nonpartisan legislature. *See* NEB. REV. STAT. § 32-609 (2020).

[38] *Judicial Selection: Significant Figures*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/NX5A-U2TU].

elections.[39] Section I.A described the formative years of political parties and how their influence over governments has increased nationwide. This Section explores the resulting tension between the benefits that parties have received from their positions of power and the associational control that parties surrender because of their democratic functions. Beginning with a discussion of the *White Primary Cases*, this Section uses challenges to state election law to discuss when state regulations may cross constitutional lines. It concludes that the constitutional jurisprudence in this area is unclear and does little to solve the tug-of-war between political parties and the states that control their nominating contests.

Challenges to a state's role in the nominating process generally arise from a tension between political parties' First Amendment rights and state regulations that restrict parties' role in the process. Sometimes, these cases arise when party rules desire to include or exclude voters, but state law provides for the opposite. The earliest cases over primary elections, however, involved a coordinated effort between the party organization and the state to exclude voters on the basis of race.

1. Early Challenges to State Primary Regulations: The Equal Protection Clause

The Supreme Court recognized the importance of the nomination process in *Nixon v. Herndon*,[40] the first of the *White Primary Cases*. There, a Texas statute prohibited Black voters from participating in the Democratic primary.[41] The Court easily determined that the state violated the Fourteenth Amendment's Equal Protection Clause because it denied the franchise on the basis of race.[42] By doing so, it necessarily equated primary elections with general elections insofar as the state's responsibility was concerned. Subsequent rulings in the other *White Primary Cases* were when the Court first confronted the extent of a state (and the federal) government's regulatory power over partisan primary elections.

The Texas state legislature responded to the Court's use of the Fourteenth Amendment state action doctrine in *Herndon* by delegating qualifications for party membership to the individual parties. Justice Cardozo's majority opinion in *Nixon v. Condon*[43] explicitly declined to decide whether to recognize political

[39] U.S. CONST. art. I, § 4; *id.* art. II, § 1. Article II, Section 1 specifically grants Congress the power to determine the time of the election for the Electoral College, but the determination on the manner of selection still resides with the state legislatures. *Id.* art II, § 1.

[40] 273 U.S. 536, 540 (1927) ("If the [state's] conduct was a wrong to the plaintiff the same reasons that allow a recovery for denying the plaintiff a vote at a final election allow it for denying a vote at the primary election that may determine the final result.").

[41] *See id.*

[42] *Id.* at 540-41.

[43] 286 U.S. 73 (1932).

parties as "voluntary associations" under Texas law.[44] Instead, when the Court invalidated the Texas statute in *Condon*, its finding of state action rested on the state's *express* delegation of membership criteria to the party.[45]

In the wake of *Condon*, the Texas Democratic Party, through its statewide convention, decreed that membership in the Party would be limited to White people.[46] Because the Supreme Court did not take up the issue of whether the Texas Democratic Party was a voluntary association,[47] the Texas Supreme Court upheld the exclusion of potential Black voters from the Democratic primary on the conclusion that it was a voluntary association.[48] When the question reached the Supreme Court in *Grovey v. Townsend*,[49] the Justices interpreted Justice Cardozo's express/implied delegation distinction literally in determining that there was no state action.[50] For nine years, *Grovey* stood for the proposition that actions of a political party, absent an express delegation of authority from the state, were not state action under the Fourteenth Amendment.[51] Political parties were considered wholly independent entities whenever they acted on authority that need not have been delegated to them by the state—including the power to define their membership.[52] The Court in *Grovey* expressly declined to find that the state regulation of primary elections gave the state any responsibility for the Party's racist activity.[53]

The Court's decision in *United States v. Classic*[54] called *Grovey* into question, holding that constitutional protections on the right to vote attached when nominations effectively decided the general election.[55] If Congress could

[44] *Id.* at 73. If the Court had concluded that the Democratic Party was a voluntary association, it would then have had to confront the question of whether that designation gave the Party the right to determine its own membership.

[45] *Id.* at 89.

[46] The text of the resolution was: "Be it resolved, that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the state shall be eligible to membership in the Democratic party and as such entitled to participate in its deliberations." Grovey v. Townsend, 295 U.S. 45, 47 (1935), *overruled by* Smith v. Allwright, 321 U.S. 649 (1944).

[47] *See supra* note 44 and accompanying text.

[48] *See* Bell v. Hill, 74 S.W.2d 113, 120-21 (Tex. 1934).

[49] 295 U.S. 45 (1935), *overruled by Smith*, 321 U.S. at 649.

[50] *See id.* at 53; Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 59 (2001).

[51] *Grovey*, 295 U.S. at 55.

[52] The Court in *Grovey* also relied on the Texas Constitution to reach this proposition. *See id.* at 50-53.

[53] *See id.* at 53-54; *see also* Klarman, *supra* note 50, at 59.

[54] 313 U.S. 299 (1941).

[55] *Id.* at 314 ("Interference with the right to vote in the Congressional primary in the Second Congressional District for the choice of Democratic candidate for Congress is thus,

regulate participation in primary elections when such elections were an "integral part of the election machinery," what gave the parties a free pass?[56] Critically, it was ballot access that allowed the Court to reach a different decision in *Classic* than it did in *Grovey*.[57] However, this seemingly insignificant distinction did not last long. The Supreme Court soon overruled *Grovey* in *Smith v. Allwright*,[58] determining that parties were, in fact, acting as the state by determining voter qualifications for their primary elections.[59] The Court extended this logic further in its ruling in *Terry v. Adams*[60] to include organizations, such as the Jaybirds, that were effectively acting for the Party.[61]

The Court's reasoning in *Smith* and *Terry* sheds light on the question of why a state may require a primary election, although neither case answered the question directly. The Court rested its holdings not on the regulatory environment in Texas but on the political realities of the time.[62] This demonstrates that the Court recognized that there are situations in which parties are not entitled to extensive First Amendment protections at all because they are not acting as independent associations.[63]

The Supreme Court decided the *White Primary Cases* three years before it expressly recognized the right of association as fundamental.[64] The right to associate is derivative of the freedoms of speech and assembly; therefore, it protects the right to associate for political purposes—i.e., as parties.[65] As a result, any state action that infringes on an association exercising its First

as a matter of law and in fact, an interference with the effective choice of the voters at the only stage of the election procedure when their choice is of significance . . . .").

[56] *Id.* at 318.

[57] *See id.* at 313. However, despite *Grovey*'s clear relevance, the Court in *Classic* completely ignored the case. *See* Klarman, *supra* note 50, at 61.

[58] 321 U.S. 649 (1944).

[59] *Id.* at 664-65.

[60] 345 U.S. 461 (1953).

[61] *Id.* at 469-70.

[62] *See id.* at 469 (holding that Jaybird Primary was the "only effective part" of Texas electoral process).

[63] *See* Michael R. Dimino, Sr., *It's My Party and I'll Do What I Want To: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST AMEND. L. REV. 65, 87-89 (2013) (arguing that this is true for *Terry*, in which the Jaybird primary was the only election in the county with practical significance, but not for *Smith*, in which the parties' "public function" created mutually beneficial relationship with the state). Wayne Batchis identifies this proposition from the *White Primary Cases* as the first time that the Court acknowledged that political parties were entitled to constitutional rights at all. *See* Batchis, *supra* note 20, at 440.

[64] *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).

[65] *See id.*

Amendment rights is subject to strict scrutiny.[66] Subsequent litigation brought by political parties required the Court to define the intersection of this right and the states' constitutional responsibilities to run elections.

2. First Amendment Protections for Political Associations

Section I.B.1 discussed challenges brought by voters against state-regulated primary election laws. While the Supreme Court resolved these challenges using the constitutional principles of voting rights and equal protection, courts today analyze challenges brought by political parties almost exclusively under the First Amendment. This Section analyzes cases involving political parties' associational rights. It concludes that the Supreme Court has yet to provide a coherent principle for why states may regulate political party primaries in a manner consistent with the First Amendment. This void has led to a predominantly political battle that simultaneously over- and underregulates political parties.[67]

The first such challenge to state regulation of a political party's primary occurred when minor political parties challenged Texas's ballot-access scheme in *American Party of Texas v. White*.[68] The Supreme Court had no trouble concluding that the state's requirement that a political party demonstrate 1% support from the electorate via precinct conventions in order to be on the ballot did not infringe on the parties' First Amendment right to associate because the state had a compelling interest in an orderly election.[69] The Court's opinion provided that

> [i]t is too plain for argument, *and it is not contested here*, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election *by primary election or by party convention*. Neither can we take seriously the suggestion . . . that the State has invidiously discriminated against the

[66] *See id.* As the case involved the state of Alabama, the Supreme Court also incorporated this right through the Due Process Clause of the Fourteenth Amendment. *Id.* at 460.

[67] For a discussion of this issue, see *infra* Part II.

[68] 415 U.S. 767 (1974).

[69] *Id.* at 780 (citing Storer v. Brown, 415 U.S. 724, 729-33 (1974)). *Storer* was decided on the same day as *White*—March 26, 1974. There the Supreme Court held that a "disaffiliation" provision of the California election code, which required that independent candidates be unaffiliated from political parties for a year before the primary, did not unconstitutionally burden potential independent candidates who desired to retain their affiliation with their former parties. *Storer*, 415 U.S. at 733. The Court reached this decision because of the state's compelling interest in restricting the number of candidates who appear on the ballot. *Id.* at 736; *see also* Jenness v. Fortson, 403 U.S. 431, 442 (1971); Williams v. Rhodes, 393 U.S. 23, 32 (1968).

> smaller parties by insisting that their nominations be by convention, rather than by primary election.[70]

This oft-cited quotation, which emerged from a challenge to a state's ballot access laws, demonstrates the unbreakable link between the regulation of political party nominations and ballot access.[71] But, although the Court seemingly endorsed states requiring party primaries, *White* does not describe the extent to which the states have the authority to regulate those activities because the Court had no reason to address the issue.

The first modern example of a case involving a political party challenge to state primary election law arose in *Tashjian v. Republican Party of Connecticut*.[72] Connecticut law provided for a closed primary, permitting only registered party members to vote in the primary matching their party affiliation.[73] Contrary to state law, the Connecticut Republican Party adopted a rule that allowed unaffiliated voters to participate in its primary.[74] Republican members of the state legislature proposed an amendment to the law that would have brought the party rule to accord. But the legislature, under Democratic Party control, defeated the measure along party lines, leaving in place the conflict between state law and internal party rules.[75] Left with no other option, the Republican Party challenged the law as an infringement of its right to associate.

In siding with the Connecticut Republican Party and holding that the statute unconstitutionally infringed on the Party's right to associate with any voters it wanted, Justice Marshall, writing for a 5-4 majority,[76] dismissed the state's proffered rationales for the law.[77] Critically, in order for a candidate to access

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[70] *Am. Party of Tex.*, 415 U.S. at 781 (emphases added) (citation omitted).

[71] *See generally, e.g.*, Bullock v. Carter, 405 U.S. 134, 140-47 (1972) (allowing equal protection challenge to large filing fees for primary election ballot because fee amount was excessive and arbitrary).

[72] 479 U.S. 208, 210-11 (1986).

[73] *Id.* at 210-11, 220.

[74] *Id.* Tellingly, Justice Marshall describes the Connecticut GOP's rationale for changing the participation criteria—there were more unaffiliated voters than registered Republicans in the state at the time of the change. *Id.* at 212 n.3. This created the inverse situation than was present in the *White Primary Cases*, as here the Party was attempting to be more inclusive than the state. *See* Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 770-72 (2001).

[75] *Tashjian*, 479 U.S. at 212-13.

[76] Justice Stevens dissented on the issue of the Qualifications Clause and did not address the First Amendment issue. *See id.* at 230-34 (Stevens, J., dissenting).

[77] The State advanced four arguments in support of its statute: (1) the addition of new voters to the Republican primary would be too expensive for the state, (2) the law prevented "raiding" of the primary by independent voters, (3) a closed primary prevented "voter confusion" in the general election by ensuring candidates are aligned with the Party platform,

the Republican primary ballot in Connecticut, they first needed to obtain at least 20% of the vote at the Party's convention—which only Party members attended.[78] The majority found that this convention requirement sufficiently protected the rights of the Party members who wished not to associate and held that the statute unconstitutionally infringed on the rights of the Party to freely associate with unaffiliated voters.[79]

For Justice Scalia, dissenting along with two other Justices, "[t]he Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, form[ed] no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster."[80] His dissent characterized the formation of the right of association at the moment of voter *registration*, rather than electoral participation. To Justice Scalia, the purpose of a primary election was to protect the Republicans in the electorate—the rank-and-file membership—from decisions by the Party organization that dilute their influence.[81] Justice Scalia's dissent made the only reference in the case to the state's ability to regulate a primary election in the first place. Citing *American Party of Texas*, his reasoning would hold that it is the province of the state "to protect the Party against the Party itself."[82]

The point of attachment of the right to association is important because even to Justice Marshall and the majority, "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[83] But Justice Marshall's opinion never addressed why Connecticut's requirement to hold a primary in the first place is not such an interference. Justice Scalia, meanwhile, addressed the potential infringement of associational rights that comes from holding a primary election, but he would have found this infringement justified because he did not think it was the state's place to ensure that the Party puts forward the most agreeable candidate for the general election.[84]

Commentators have suggested that the scrutiny applied in *Tashjian* was warranted because of the improper exercise of state control that the Democratic

and (4) the closed primary protected "the integrity of the two-party system." *Id.* at 217-24 (majority opinion).

[78] *See id.* at 211.

[79] *See id.* at 220-22, 225.

[80] *Id.* at 235 (Scalia, J., dissenting).

[81] *See id.* at 236-37.

[82] *Id.* at 237 (citing Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974)). The "protect the Party" language does not appear in *White*. Justice Scalia was criticizing the majority's characterization of the State's justification. *Cf. id.* at 224 (majority opinion).

[83] *Id.* at 215 (alteration in original) (quoting Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981)).

[84] *See id.* at 235-36 (Scalia, J., dissenting).

majority in the legislature asserted over the Republican minority.[85] Although the majority opinion never references this as a justification, it does provide some clarity to Justice Marshall's forceful dismissal of the state's asserted rationales. But, even accepting this justification as plausible, Justice Marshall's reasoning does not address to what extent the state may permissibly exercise authority over political parties.

The Court was confronted with this question in *Eu v. San Francisco County Democratic Central Committee*.[86] In *Eu*, California state political parties challenged state regulations that prohibited political parties from endorsing candidates during the primary process and, generally, the state regulation of the internal affairs of the parties themselves.[87] Justice Marshall's opinion for a unanimous Court held that "[b]arring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association."[88] It found no compelling interest in the speech restriction and invalidated the statute.[89]

As for the regulation on parties' internal affairs, Justice Marshall had the opportunity to expand on the *Tashjian* distinction in holding that the burdens imposed by the state infringed on the parties' First Amendment associational rights.[90] Indeed, his opinion found that the associational burden that California placed on its political parties was even greater than the one imposed on the Republican Party in *Tashjian* because the restrictions at issue were preventing party membership from associating among *other members* in the manner of their choosing.[91] Thus, he concluded, "a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary *to ensure an election that is orderly and fair*."[92]

Justice Stevens, concurring, signaled that, although California's proffered means of ensuring "stable government"[93] and "democratic management of the political party's internal affairs"[94] were impermissible in this case, the Court's opinion failed to adequately explain the line between permissible and impermissible regulation.[95] He accused the Court of performing a "result

[85] *See* Hasen, *supra* note 15, at 835-36; Pildes, *supra* note 13, at 102 n.298.

[86] 489 U.S. 214, 216 (1989).

[87] *Id.* at 219. The regulations on the internal affairs of the party included composition of the central committee, term limitations, and maximum dues, to name a few. *Id.* at 218-19.

[88] *Id.* at 224.

[89] *Id.* at 228-29.

[90] *See id.* at 229-30 (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 235-36 (1986) (Scalia, J., dissenting)).

[91] *Id.* at 230-31.

[92] *Id.* at 233 (emphasis added).

[93] *Id.* at 227.

[94] *Id.* at 232 (quoting Brief for Appellants 43, *Eu*, 489 U.S. 214 (No. 87-1269)).

[95] *See id.* at 233-34 (Stevens, J., concurring).

oriented" analysis but ultimately concluded that the Court reached the correct result and thus joined the opinion.[96]

While *Tashjian* and *Eu* draw an internal/external distinction for permissible state regulation, the decisions fail to adequately define the boundary. The next Section addresses the Court's responses that exemplify this distinction.

3. The Extent of Permissible State Regulation: *Timmons* and *Jones*

Justice Steven's foreshadowing would come to fruition when the Supreme Court in *Timmons v. Twin Cities Area New Party*[97] distinguished *Tashjian* and *Eu* by holding that a party's nomination of "fusion" candidates did not involve the internal affairs of the party.[98] The controversy in *Timmons* arose when the New Party attempted to nominate a candidate—with that candidate's consent—who was already affiliated with and had accepted a nomination from the Minnesota Democratic-Farmer-Labor Party ("DFL").[99] To the Supreme Court, it was simply a question of how the candidate's name was printed on the ballot because the Party was still free to endorse any candidate whether or not they would appear on the ballot under the Party's banner.[100]

In accepting the state's antifusion ban, the Court equated the right to endorse with the right to nominate—a proposition that it explicitly rejected four years later in *California Democratic Party v. Jones*.[101] Justice Stevens, this time in dissent, seized on this apparent disregard for the reality of the two-party system.[102] Here, Justice Stevens accused the Court of drawing a formalistic distinction between speech and ballot speech.[103] To him, the fusion ban was the equivalent of a state regulation restricting the ability of the *parties* to associate

[96] *Id.* at 234 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 189 (1979) (Blackmun, J., concurring)).

[97] 520 U.S. 351 (1997).

[98] *Id.* at 360.

[99] *Id.* at 354. This case is a landmark for another recurring theme in this Note—ballot access. The New Party's attempt to share in the nomination of a very popular incumbent with the already popular DFL (the U.S. Democratic Party's Minnesota affiliate) was a bid to increase its own popularity for the purpose of achieving and maintaining automatic ballot access in future elections. *See* LISA JANE DISCH, THE TYRANNY OF THE TWO-PARTY SYSTEM 26-32 (Robert Y. Shapiro ed., 2002). For a discussion of fusion laws, see generally Peter H. Argersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287 (1980); and Note, *Fusion Candidacies, Disaggregation, and Freedom of Association*, 109 HARV. L. REV. 1302 (1996).

[100] *See Timmons*, 520 U.S. at 360.

[101] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 580 (2000) (citing *Eu*, 489 U.S. at 228 n.18). For a discussion of *Jones*, see *infra* notes 106-15 and accompanying text.

[102] *See Timmons*, 520 U.S. at 372-73 (Stevens, J., dissenting); *see also Eu*, 489 U.S. at 228 n.18 ("There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or labor union.").

[103] *See Timmons*, 520 U.S. at 373 (Stevens, J., dissenting).

with one another.[104] Finally, he rejected out of hand concerns regarding the preservation of the "stability" of the electoral system—meaning the *two-party* electoral system—which was the very premise that the *Timmons* majority used to defeat the New Party's claim.[105] Acknowledging that fusion risks the stability of the two-party system suggests that it was the two-party system, rather than associational rights, that drove the outcome in *Timmons*. Thus, the prohibitive nature of Minnesota's antifusion regulation can be read to permit states to regulate only minor parties' associational rights in this manner.

Just three years later, the Court would clarify that it had indeed adopted the position that major parties enjoy protected associational rights that are denied to minor parties.[106] In 1996, California voters approved a ballot initiative that altered the state's traditional closed primary format.[107] The new law required candidates to be nominated through a "blanket primary,"[108] meaning a primary in which all candidates of all parties appear on a single primary ballot. Then, voters, regardless of affiliation, vote for the candidate of their choice. The candidates receiving the most votes from each party are placed on the general election ballot.[109] The parties challenged the blanket primary as an infringement on their right to exclude members not affiliated with their respective parties.

In deciding this challenge in *Jones*, the Supreme Court embraced the idea that the parties had the right to select their own candidates for election but reaffirmed the "special place the First Amendment reserves for . . . the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[110]

Justice Scalia's majority opinion reasserted the confusing dicta from *American Party of Texas* that it is "too plain for argument" that a state has the right to impose nomination by primary, but he never addressed the foundation of this authority.[111] Thus, the Court again failed to justify the fundamental assumption that California made in its regulation of primary elections—that it can require one in the first place.

What constitutional difference does it make that California imposed an open "blanket" primary rather than a closed partisan one? According to the majority, the determinative fact is whether candidates are listed along with party

[104] *See id.* at 374.

[105] *Id.* at 377-79. Justice Souter joined Justice Stevens on all but this third point. *Id.* at 382-84 (Souter, J., dissenting).

[106] *See* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1297 (2005).

[107] Cal. Democratic Party v. Jones, 530 U.S. 567, 570 (2000).

[108] *Id.*

[109] *Id.*

[110] *Id.* at 575 (second alteration in original) (quoting Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989)).

[111] *Id.* at 572 (quoting Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974)).

designation on the primary and general election ballots.[112] By so assuming, Justice Scalia ignored his own position in *Tashjian*, as well as the holdings there and in *Eu*,[113] that it is essential for parties to choose their own nominees in order to realize their primary purpose.[114]

4. The Current State of the Law: *Clingman* and *Lopez-Torres*

One notable consistency between *Jones*, *Eu*, and *Tashjian* appeared to be the steadfast commitment to preserving the parties' rights to govern their "internal affairs."[115] But this congruence was short-lived after the Court declined to extend *Tashjian* to situations in which a party desired to allow voters affiliated with other parties to participate in its primary election.

Justice Thomas's plurality opinion in *Clingman v. Beaver*[116] adopted a voter-centric view of associational rights—the position advocated by Justice Scalia in his *Tashjian* dissent.[117] The challenge arose when the Oklahoma Libertarian Party amended its bylaws to allow Independents (who were allowed to participate under state law) and members of other parties (who were prohibited) to participate in its primary elections.[118] In deciding the Party's challenge to the administration of the Oklahoma election law, the Supreme Court necessarily confronted the nature of the right that required the result in *Tashjian*.

According to Justice Thomas, "[t]he first and most important" way that the Connecticut statute in *Tashjian* burdened associational freedoms "was that it required Independent voters to affiliate publicly with a party to vote in its primary."[119] In contrast, the voters targeted by the Oklahoma Libertarian Party had already affiliated with other parties. Therefore, Justice Thomas found that

[112] *See id.* at 585 ("[The state of California] could protect [their asserted interests and the First Amendment rights of the parties] by resorting to a *nonpartisan* blanket primary.").

[113] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986) (describing nomination as "crucial juncture" that allows parties to translate their principles into "concerted action, and hence to political power"); *Eu*, 489 U.S. at 224-27; *cf. Tashjian*, 479 U.S. at 237 (Scalia, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot."). The Court later accepted Justice Scalia's prescription in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), discussed *infra* notes 230-35.

[114] For a discussion of the soundness of the nonpartisan blanket primary, see generally William B. Jackson, Note, *A Blanket Too Short and Too Narrow: California's Nonpartisan Blanket Primary*, 23 STAN. L. & POL'Y REV. 535 (2012); John R. Labbé, Comment, *Louisiana's Blanket Primary After* California Democratic Party v. Jones, 96 NW. U. L. REV. 721, 723 (2002). For an analysis of Justice Steven's dissent in *Jones*, see *infra* Section III.A.

[115] *Eu*, 489 U.S. at 233; *accord Jones*, 530 U.S. at 575-76.

[116] 544 U.S. 581 (2005).

[117] *Compare id.* at 593, *with Tashjian*, 479 U.S. at 235-36 (Scalia, J., dissenting).

[118] *Clingman*, 544 U.S. at 585.

[119] *Id.* at 592.

the Party's associational rights were unaffected by Oklahoma's closed primary.[120] This reasoning seems to suggest that primary elections in which independents are excluded (true "closed primaries") are facially unconstitutional because of the infringement on the independent voter's right to participate, regardless of the parties' desires to exclude these voters from their nominating process. The Court did not go so far.

The *Clingman* plurality based its analysis on the apparent "commitment" demonstrated when a voter affiliates with a party.[121] The Court noted that the state has good reason to regulate this commitment without burdening voters by unduly restricting their ability to change affiliation.[122] Justice Thomas's opinion indicated that the Oklahoma law protects parties from "expending precious resources to turn out party members who may have decided to cast their votes elsewhere."[123]

But what is the difference to the Democratic Party, for instance, between a voter who decided to stay home versus one who cast a ballot in the Libertarian primary? In either case, the voter is absent from the Democratic primary. The plurality assumed that this voter *would have participated* in the Democratic primary if not for the fact that, in this particular election, they found the Libertarian candidates more appealing.[124]

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[120] *Id.*

[121] *Id.* at 595.

[122] *Id.* (espousing that a change would make "registered party affiliations significantly less meaningful").

[123] *Id.* at 596.

[124] Justice O'Connor, concurring, disagreed with the central assumption on which Justice Thomas relied: which associational rights are at issue. *See id.* at 600 (O'Connor, J., concurring in part and concurring in the judgment). She emphasized that the associational right of a voter participating in a primary is not minimal, as the plurality suggested. *Id.* But, even applying a slightly enhanced scrutiny of the state's infringement on voters' rights, Justice O'Connor found herself "substantially in accord" with the plurality's reasoning on the constitutional validity of the Oklahoma statute. *Id.* at 602. To explain how, she acknowledged (as Justice Thomas's opinion did not) that since *Tashjian*, the Court has adopted a more "flexible" standard of review, known as the *Anderson-Burdick* balancing test. *Id.* at 605. The "flexible standard" is the application of the balancing framework applied by the Supreme Court to analyze state restrictions on elections generally. *Id.* at 602. In the case of a primary election requirement, the Court weighs the infringement on a party's First Amendment rights with the state's legitimate interest in the regulation of an orderly election. *See generally* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Burdick v. Takushi, 504 U.S. 428 (1992). While the *Anderson* portion of the test was used by Justice Marshall in *Tashjian*, *Burdick* was not decided until six years later. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14 (1986).

Justice Stevens, dissenting, again accused the Court of indulging in "result oriented" analysis.[125] When he first raised this concern, concurring in *Eu*, Justice Stevens did not apply additional analysis to describe his agreement with the majority.[126] He did not resist the temptation to provide his alternative framework while dissenting in *Jones* or *Clingman*.

The central theme to Justice Stevens's analysis in both *Jones* and *Clingman* was the separation between the operation of political parties and the operation of the state. On the one hand, a political party has a First Amendment right to organize and freely "define its own mission."[127] On the other, it is a "quintessential attribute of sovereignty" for a state to determine how officials are to be elected.[128] While the Court continues to merge the two and determine the validity of a state's restrictions flexibly, Justice Stevens sees a simple solution that separates these two interests—elections belong to the state and party activity belongs to the party.[129] To Justice Stevens, this "obvious mismatch" between constitutional rights and arbitrary state regulations creates "unprincipled distinctions among various primary configurations."[130] Therefore, when the values of the state and the party align, as they did in *Clingman*, rather than preferring one over the other, the default should be a decision that favors the foundation of free and fair elections—voter participation.[131]

The Court was presented with another opportunity to resolve the conflicting interpretations of *Tashjian* in *New York State Board of Elections v. Lopez Torres*,[132] in which unsuccessful judicial candidates challenged New York's nominating system.[133] New York law prescribed a convention system as the process for nominating partisan candidates for judicial office. When Margarita López Torres was defeated in her reelection bid for the civil court of King's County, she claimed that her refusal to conduct "patronage hires" resulted in her

[125] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 234 (1989) (Stevens, J., concurring) (quoting Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 189 (1979) (Blackmun, J., concurring)).

[126] *See id.* at 233-34.

[127] *Clingman*, 544 U.S. at 608 (Stevens, J., dissenting).

[128] Cal. Democratic Party v. Jones, 530 U.S. 567, 590 (2000) (Stevens, J., dissenting).

[129] *Id.* at 595.

[130] *Id.* at 597.

[131] *See Clingman*, 544 U.S. at 609 (Stevens, J., dissenting). Justice O'Connor's recognition of the actual interests of voters (to vote for the candidate of their choice) reinforces rather than contradicts this reasoning. *Compare id.* at 602 (O'Connor, J., concurring in part and concurring in the judgment) ("I question whether judicial inquiry into the genuineness . . . of a given voter's association with a given party is a fruitful way to approach constitutional challenges to regulations . . . ."), *with id.* at 612 (Stevens, J., dissenting) ("[C]itizens stand in the same relation *to the State* regardless of the political party to which they belong." (emphasis added)).

[132] 552 U.S. 196 (2008).

[133] *Id.* at 197-202.

losing favor with the Democratic Party.[134] López Torres and the other plaintiffs, including voters, sought a declaration that the convention nominating system violated the First Amendment rights of candidates and voters to associate with the Democratic Party and sought an injunction requiring the use of a direct primary.[135]

Justice Scalia, writing for the majority, announced definitively that "[a] political party has a First Amendment right to . . . choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."[136] However, according to Justice Scalia, "[t]hese rights are *circumscribed* . . . when the State gives the party a role in the election process," such as providing for automatic ballot access for certain party's candidates.[137]

While the Court could have rested its holding on this ground, Justice Scalia's opinion proceeded to hold that the plaintiffs were incapable of asserting the right to associate with the Party.[138] The Court's opinion relies not on *Jones* or *Tashjian* but on *Jenness v. Fortson*[139] and a line of cases involving challenges to state ballot-access schemes. The Court denied López Torres relief because it found that no constitutional right to a "fair shot" at a party's nomination exists.[140] Thus, although Justice Scalia began his opinion expressing strong support for a rationale behind state regulation of partisan primary elections, it seems that his reasoning in the introduction may exist only as dicta.[141]

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In *Lopez Torres*, Justice Scalia was careful to note that the major political parties joined with the state in defending the convention nominating system.[142] If either major party had desired a change in the state law, would this have made a difference? With that question in mind, even despite Justice Scalia's dicta, it seems that after *Lopez Torres* and *Clingman*, the ambiguity in *Tashjian*'s wake remains. It is still unclear which associational rights states may regulate and which belong exclusively to the party.[143] This is the fundamental state of First

[134] *Id.* at 201-02.

[135] *Id.*

[136] *Id.* at 202.

[137] *Id.* at 203 (emphasis added).

[138] *Id.* at 207 (deeming the assertion that "party loyalty in New York's judicial districts renders the general-election ballot 'uncompetitive'" to be "a novel and implausible reading of the First Amendment").

[139] 403 U.S. 431 (1971).

[140] *Lopez Torres*, 552 U.S. at 205.

[141] *See id.* at 210 (Kennedy, J., concurring in the judgment).

[142] *See id.* at 203 (majority opinion).

[143] *See* David A. Chase, Note, Clingman v. Beaver*: Shifting Power from the Parties to the States*, 40 U.C. DAVIS L. REV. 1935, 1950-52 (2007); Jessica C. Furst, Comment, *Election*

Amendment law and primary elections that set the stage for *Utah Republican Party v. Cox*.

II. WHOSE FIRST AMENDMENT RIGHTS?

A. *The Tenth Circuit's Answer:* Utah Republican Party v. Cox

1. Facts: A Party-Run Caucus Becomes a State-Run Primary

Prior to 2014, the Utah Republican Party conducted its nominations for state and federal offices through a Party-run caucus.[144] Rank-and-file Party members elected delegates at a precinct caucus (depending on the office), and these delegates nominated candidates for all partisan offices at a statewide convention. If no candidate received over 60% of the vote at the convention, then the top two candidates from the caucus proceeded to a primary election.[145]

A group known as "Count My Vote" lobbied state representatives for a more inclusive nomination system—specifically, a direct primary process.[146] The result was a "compromise" that allowed the Utah Republican Party to nominate its candidates via convention but permitted outside challenger candidates to achieve access to the primary ballot through a write-on initiative.[147]

The legislation designated two potential methods for nominating candidates for partisan office.[148] The law required that all political parties conduct direct primary elections but allowed a Qualified Political Party ("QPP") to choose to use a convention process to nominate candidates so long as it allowed potential candidates to achieve primary ballot access by nominating petition as well.[149] This essentially created a two-step process whereby a QPP's chosen candidate received an automatic spot on the primary ballot, and outside challenger candidates could petition to be listed there as well. Thus, in the event that a challenger candidate received primary ballot access, the party's nominee would not be chosen until after a primary election was held, despite the convention results. Meanwhile, a Registered Political Party ("RPP") was allowed only a

Law: "Three's a Crowd": Supreme Court Protection for the Two-Party System, 58 FLA. L. REV. 921, 931-33 (2006).

[144] *See* Utah Republican Party v. Cox, 892 F.3d 1066, 1072-73 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1290 (2019).

[145] *See id.*; *see also* UTAH REPUBLICAN PARTY, UTAH REPUBLICAN PARTY CONSTITUTION art. XII, §§ 2-7, at 8-11 (2017), https://utgop.org/wp-content/uploads/2019/06/2017-UTGOP-Constitution-as-amended-5-20-2017-ls.pdf [https://perma.cc/MSR5-MGM6].

[146] *See Cox*, 892 F.3d at 1083 n.15; *see also Why Change Utah's Election System?*, COUNT MY VOTE UTAH, http://www.countmyvoteutah.org/facts [https://perma.cc/D72C-RMJ4] (last visited Dec. 28, 2020).

[147] *See Cox*, 892 F.3d at 1083 n.15.

[148] *See* UTAH CODE ANN. §§ 20A-9-401 to -411 (West 2020).

[149] *See id.* §§ 20A-9-407 to -408 (describing mechanisms for each path to nomination).

primary election to nominate candidates, with access to the primary ballot achieved through nominating petition.[150] Because RPPs and QPPs are the only parties that receive a designation on the state ballots, a direct primary is a practical requirement. There is no mechanism in the law for nominating candidates exclusively through a convention process.

The Utah Republican Party's bylaws were (and still are) in direct conflict with a direct primary procedure for candidate nomination, giving rise to a lawsuit seeking an injunction under the Party's First Amendment right of association.[151] Initially, the Party challenged only a provision in the law that required it to allow unaffiliated voters to participate in a primary election.[152] The Party took the position that, by the nature of the statute, the QPP—not the candidate—determined the mechanism for nomination. That is, Section 20A-9-101-12(c), referred to as the "either-or-both provision," applied to the Party's bylaws and not to individual candidate choice.[153]

The U.S. District Court for the District of Utah found that requiring the Utah GOP to hold an open primary against its will violated its First Amendment right of association under *Jones* and *Clingman* and granted the Party's motion for summary judgment.[154] Maintaining the view that the "either-or-both provision" gave the choice of nomination method to the QPP and not individual candidates, the Utah Republican Party expressed to the Lieutenant Governor of Utah its

[150] *See id.* § 20A-9-403(3). Technically, a QPP is an RPP that declared its intention to nominate candidates via both a direct primary election and a convention system. *See id.* § 20A-9-101(12).

[151] The Utah Republican Party has continued to resist the regulation of its candidate selection process. It has amended both its constitution and bylaws since the Tenth Circuit's decision and denial of certiorari by the Supreme Court, but both documents still reflect the conflicting party policies. *See Utah Election Officials Say They Will Ignore Illegal GOP Bylaw*, UTAHPOLICY.COM (Dec. 22, 2019) [hereinafter *Utah Election Officials*], https://utahpolicy.com/index.php/features/today-at-utah-policy/22513-utah-election-officials-say-they-will-ignore-illegal-gop-bylaw [https://perma.cc/2CC9-55MQ].

[152] *See* Utah Republican Party v. Herbert, 144 F. Supp. 3d 1263, 1271 (D. Utah 2015).

[153] In relevant part,

> "Qualified political party" means a registered political party that: . . .
>
> (c) permits a member of the registered political party to seek the registered political party's nomination for any elective office by the member choosing to seek the nomination by *either or both of the following methods*:
>
> (i) seeking the nomination through the registered political party's convention process, in accordance with the [provisions governing the convention process]; or
>
> (ii) seeking the nomination by collecting signatures, in accordance with [the provisions governing the signature gathering process] . . . .

UTAH CODE ANN. § 20A-9-101(12) (emphasis added).

[154] *See Herbert*, 144 F. Supp. 3d at 1278-80.

intention to continue nominations exclusively by convention.[155] The Lieutenant Governor disagreed, giving rise to a second lawsuit.[156]

The district court certified the state law argument to the Utah Supreme Court, which held that the Lieutenant Governor's interpretation—that the member be allowed to choose the path to nomination—was correct.[157] Because it lost on the interpretation question, as the lawsuit progressed to the district court and ultimately to the Tenth Circuit, the Utah Republican Party's only remedy would be a holding that the law violated its First Amendment right to associate.

The district court granted summary judgment for the state, the Party appealed, and the Tenth Circuit was confronted with the issue of a state imposing a direct primary nomination requirement on a political party without its consent.[158]

2. The Majority Opinion and "Clearly Established Dicta"

The Tenth Circuit majority began its opinion by weighing the burdens of the either-or-both provision against the state's interest in conducting an orderly election.[159] In evaluating the burden on the Utah Republican Party, the two-judge majority acknowledged that the Party's bylaws required a different method of nomination.[160] But the majority ultimately determined that "the Supreme Court has recognized that when political parties become involved in a state-administered primary election, the state acquires a legitimate interest in regulating the manner in which that election unfolds."[161] The court adopted the position that states generally have a "manifest interest" in elections that supersede a political party's associational interest.[162] The majority explicitly followed Justice Scalia's interpretation in *Lopez Torres* that, by providing the party with automatic ballot access, the state has explicit authority to regulate the

[155] *See* Utah Republican Party v. Cox, 892 F.3d 1066, 1074 (10th Cir. 2018). The Lieutenant Governor of Utah manages the state's electoral system.

[156] *See id.* Both the Lieutenant Governor of Utah and a majority of the Utah legislature were members of the Republican Party.

[157] Utah Republican Party v. Cox, 373 P.3d 1286, 1287-88 (Utah 2016). Notably, the Utah Supreme Court declined to apply the doctrine of constitutional avoidance in its decision, both because it doubted the legitimacy of the Utah GOP's claim and because the statute was so plainly written that it could not be subjected to alternate interpretation. *Id.* at 1288.

[158] The Utah Democratic Party intervened as a plaintiff in the lawsuit because of its aligned First Amendment interest in maintaining control over its internal affairs. *See Cox*, 892 F.3d at 1074. It also challenged the legality of the Utah GOP's bylaws in light of the statute and, after the district court's judgment, the ability of a court to invalidate a political party's bylaws. *See id.* at 1074-75.

[159] *See id.* at 1076-78. This was an application of the *Anderson-Burdick* balancing test. For a discussion of the standard, see *supra* note 124 and accompanying text.

[160] *See id.* at 1077.

[161] *Id.* at 1077-78.

[162] *Id.* at 1078.

method of candidate nomination.[163] As reinforcement of its position that the state's purview over elections gives it the right to regulate the primary, the majority discussed the *White Primary Cases*.[164]

The court purported to restrict its consideration of the *White Primary Cases* to the indication that "a party's external activities in selecting candidates for public office must necessarily be subject to greater state involvement and scrutiny than its wholly internal machinations."[165] There is novelty, however, in the court's position because this was the first time that a court recognized the nomination of candidates as anything but a wholly *internal* activity. A similar premise—that the state may regulate primary elections because of its power to regulate general elections—was explicitly rejected in *Jones*.[166]

To be sure, the majority found support for its assertion in dicta from *Lopez Torres* and *Jones*. In holding that the state may require a party to hold a primary election, the court explicitly relied on this "clearly established dicta" and cites multiple circuits that similarly affirmed this principle.[167]

The majority stated that "this case is not . . . about who the candidates are, but rather who the deciders are."[168] Therefore, regulation of elections would be "toothless" if a party as an entity (and by extension the party bosses) was the correct frame of reference for associational rights.[169] Instead, the court opted to view the right to associate more broadly by construing that right to protect the rank-and-file members of the party-in-the-electorate from the party itself. Because the statute seeks to enable these voters to participate, it enhances, rather than infringes upon, the associational interests of the "party."

The majority dismissed any concerns of "forced association," thereby cabining the holding in *Jones*.[170] Because of the earlier *Herbert* decision, the court recognized that there is no potential for unaffiliated voters to impact the outcome of the primary election, and thus, nominees will be determined exclusively by members of the Republican Party.

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[163] *See id.* (citing N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 202-03 (2008)).

[164] *See id.* at 1078-79 (first citing Terry v. Adams, 345 U.S. 461, 469-70 (1953); and then citing Smith v. Allwright, 321 U.S. 649, 663-64 (1944)).

[165] *Id.* at 1079 (emphasis omitted).

[166] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 572-73 (2000) ("What we have not held, however, is that the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely.").

[167] *Cox*, 892 F.3d at 1079-80. *But see Lopez Torres*, 552 U.S. at 202 ("A political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform.").

[168] *Cox*, 892 F.3d at 1080.

[169] *Id.* at 1082 (citing *Lopez Torres*, 552 U.S. at 205).

[170] *Id.* at 1083 (quoting *Jones*, 530 U.S. at 581).

Adopting a slightly more relaxed interpretation of *Clingman*, the court held that the state's desire to "further[] the important Utah interests of managing elections in a controlled manner, increasing voter participation, and increasing access to the ballot" was sufficient to justify requiring a primary election and exerted only a "minimal" burden on the Party.[171] The court acknowledged that protecting the nomination stage is vital in an era when there is a lack of competition in the general election.[172] This recognition of the supremacy of voters' interest in constitutional democracy is significant because if the "right of the people to cast a meaningful ballot" is truly the "backbone of our constitutional scheme," then it would appear that state regulation of elections can reach far more broadly than merely requiring a primary election.[173] The Tenth Circuit did not go so far in *Cox*, but it may have opened the door for such a finding in the future.

3. The Dissent: Substantive Change Masquerading as Procedural Reform

In his concurrence with the denial of rehearing en banc, Chief Judge Tymkovich suggested that the issues raised by the majority's opinion "deserve the Supreme Court's attention."[174] As evidenced by his dissent to the original panel decision, to Chief Judge Tymkovich, the either-or-both provision is a *substantive* alteration of the political party nomination "masquerading" as procedural reform.[175] He would have held that the provision is effectively "a sort of state-created majority veto over the candidates a party selects through its carefully crafted convention process."[176] He goes on to characterize the process of selecting leadership as substantive change because the decision of who may participate in an election inherently changes the type of candidates that are nominated as a result.[177] In *Jones*, the Supreme Court found this asserted

[171] *Id.* at 1083-84 (internal quotations omitted). In addition to citing Justice Thomas's opinion in *Clingman*, the Tenth Circuit used the Supreme Court's approval of voter identification laws to describe the state interest in regulating elections generally. *See id.* at 1084 (citing, *inter alia*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 191 (2008)).

[172] *Id.* at 1084-85.

[173] *Id.* at 1084; *accord* Frances R. Hill, *Putting Voters First: An Essay on the Jurisprudence of Citizen Sovereignty in Federal Election Law*, 60 U. MIAMI L. REV. 155, 183 (2006) ("[A] significant part of the process of putting voters first is ensuring that ostensibly representative organizations such as civic associations and political parties themselves provide broad scope for participation and themselves provide for representation and accountability.").

[174] *Cox*, 892 F.3d at 1071 (Tymkovich, C.J., concurring in denial of rehearing en banc).

[175] *Id.* at 1095. (Tymkovich, C.J., concurring in part and dissenting in part). The Chief Judge concurred in a separate issue involving the signature provision of the law but dissented from the majority's holding that the either-or-both provision did not violate the Constitution. *Id.*

[176] *Id.* at 1101.

[177] *See id.* at 1102.

rationale—to moderate the candidates put forward to the general election—as insufficiently compelling to justify altering the primary election scheme.[178]

The dissent further asserted that a requirement that "insurgent" candidates be allowed to challenge the Party's preference invites party infighting.[179] Accordingly, this negates the purpose of conducting a primary election in the first place.[180] By requiring the input of "marginally" associated persons—registered Republican voters who would not otherwise participate in caucuses—the state required the Party to associate with individuals who do not have the Party's interests at heart.[181]

The dissent dismissed the idea that the association is the sum of its individual parts, instead adopting the idea that the party is an entity all to itself.[182] To the Chief Judge, it was the *internal* processes, not the external as the majority asserts, that the either-or-both provision restricted.[183] What is inescapable from this conclusion is that the rationale of the majority and dissent differ only because of one central assumption: who makes up the party.[184]

For Chief Judge Tymkovich, the mechanism by which rank-and-file party members could achieve their voice in the nomination process is through participation in the local party caucuses.[185] He argued that protecting the party process is the same as affirmatively protecting the rights of the party members.[186] Disputing the majority's interpretation of *Clingman*, the dissent found no authority for permissible regulation of the mere "scope" of a party's

[178] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000) (discussing the constitutionality of state interest to produce nominees "other than those the parties would choose if left to their own devices").

[179] *See Cox*, 892 F.3d at 1102 (Tymkovich, C.J., concurring in part and dissenting in part).

[180] *See id.*; *see also Jones*, 530 U.S. at 582.

[181] *See Cox*, 892 F.3d at 1103 (Tymkovich, C.J., concurring in part and dissenting in part).

[182] *See id.* ("[W]hen an association grows large, the risk the association's central message will be lost amidst a sea of nominal members grows too . . . ."); *see also* Persily & Cain, *supra* note 20, at 783-85.

[183] *See Cox*, 892 F.3d at 1103-04 (Tymkovich, C.J., concurring in part and dissenting in part).

[184] For additional discussion of how this dichotomy plays in *Cox* and a more in-depth discussion of the legal trouble in defining political parties, see generally MaKade Claypool, Comment, *It's Whose Party? Accurately Defining Political Parties in First Amendment Cases*, 2019 BYU L. REV. 1333.

[185] *See Cox*, 892 F.3d at 1109 n.25 (Tymkovich, C.J., concurring in part and dissenting in part).

[186] *See id.* at 1105 n.14. His point has since been elevated. The Party has attempted to alter its conflicting bylaw several times since the holding in *Cox* only to have the measure defeated time and time again. *See Utah Election Officials*, *supra* note 151.

primary.[187] Naturally then, the dissent would hold that the burden on the party was a severe one.[188]

What of the majority's finding of a legitimate state interest? The Chief Judge found no basis for the state's "buzz-words," like "democracy," to survive strict scrutiny.[189] For him, dismissing the state interest was easy because "Utah has not claimed that elections were conducted in an 'uncontrolled manner' before [the challenged statute was passed] . . . [n]or has it explained why the law increases the 'controlled manner' of elections now."[190] His dissent found that *Jones* is in direct conflict with the *Cox* majority's finding of a legitimate state interest in increasing voter participation.[191]

Chief Judge Tymkovich would have invalidated the either-or-both provision and concluded that it was not mandatory that the Utah GOP, or any other party, conduct primary elections against its wishes.[192] Perhaps his greatest contribution to the theoretical law, however, was not his interpretation but his discussion of the continuing validity of the "clearly established dicta" upon which the majority relied.

B. *Squaring* Cox *and* Jones*: The Trouble with "Clearly Established Dicta"*

The oft-quoted dicta from *American Party of Texas* was written in the context of a challenge by minor parties seeking access to the state's general election ballot.[193] The plain language of the quote is ambiguous as to whether a state may require a primary or merely allocate only one ballot position per party. Additionally, because such a finding was unnecessary and uncontested in *White*, the Court had no reason to evaluate the validity of this conclusion.[194] Nevertheless, Justice White's dicta has survived and finds its place within nearly every case in which a court considers the validity of primary election regulations.

The repeated dicta placed the Tenth Circuit in a predicament during its consideration of *Cox*, as the judges may have felt precedentially bound to follow

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[187] *Cox*, 892 F.3d at 1106 (Tymkovich, C.J., concurring in part and dissenting in part) ("[N]othing in *Clingman's* holding suggests the State has carte blanche authority to reshape a Party's nomination procedures.").

[188] *See id.* at 1107.

[189] *Id.*

[190] *Id.*

[191] *See id.* at 1108-09; *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

[192] *See Cox*, 892 F.3d at 1110 (Tymkovich, C.J., concurring in part and dissenting in part).

[193] *See supra* note 70 and accompanying text.

[194] In fact, Texas law allowed minor parties to conduct either a primary or a general election. The law was changed prior to the Supreme Court addressing the issue such that the minor parties were restricted to nominating candidates only by convention. *See* Am. Party of Tex. v. White, 415 U.S. 767, 796 n.1 (1974) (Douglas, J., dissenting in part).

it.[195] As discussed in Section II.A.2, the *Cox* majority gave an explicit rationale for its finding, despite its reliance on dicta as a precedent. As such, it gave certainty to the states in its circuit that the Supreme Court otherwise denied. By embracing the party-in-the-electorate view—or what Persily and Cain call the "Progressive Paradigm"[196]—the Tenth Circuit centered state regulation of elections on the associational interests of voters, rather than on the party.[197] Prior circuit court decisions have failed to analyze the burden on associational rights to the extent that the Tenth Circuit did in *Cox*.[198]

The *Cox* majority held that the direct primary requirement placed no associational burden on parties once the unaffiliated voter provision was severed in the prior litigation.[199] To someone like Chief Judge Tymkovich, this associational burden is blatantly obvious—new voters that otherwise would not have participated are selecting candidates, and this would not be so if the "party" were to have its way.[200] Arguably, then, the Supreme Court's reasoning in *Jones* is more aligned with the dissent in *Cox*. If, like the majority in *Cox*, the *Jones* Court had viewed the blanket primary only from the standpoint of the voter, it would have found the blanket primary a valid exercise of state authority because it allowed more voters to participate in the nomination of candidates.[201]

As Chief Judge Tymkovich pointed out, the mandatory primary system functionally changes *who* is choosing that nominee. Because that change is made without the consent of the party, it runs counter to the First Amendment principles articulated in *Jones* and *Tashjian*—at least when viewed with the party as an associational entity to itself.[202]

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[195] *See Cox*, 892 F.3d at 1079.

[196] Persily & Cain, *supra* note 20, at 785-87.

[197] *Cox*, 892 F.3d at 1080-83.

[198] *See* Alaskan Independence Party v. Alaska, 545 F.3d 1173, 1180 (9th Cir. 2008) (holding that state's interest in preventing "fraud and corruption" survived strict scrutiny against assumed burden on party's associational rights); Cool Moose Party v. Rhode Island, 183 F.3d 80, 82-84 (1st Cir. 1999) (evaluating challenge to mandatory primary on equal protection grounds); Lightfoot v. Eu, 964 F.2d 865, 872-73 (9th Cir. 1992) (holding that state's interest in "enhancing the democratic character" of elections was sufficient to satisfy strict scrutiny).

[199] *See Cox*, 892 F.3d at 1083.

[200] *See id.* at 1102 (Tymkovich, C.J., concurring in part and dissenting in part).

[201] *See* Issacharoff, *supra* note 15, at 285-93 (describing how the entity associational rights framework applied in *Jones* fails to account for its holding).

[202] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 583-84 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986) ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization."); *see also Cox*, 892 F.3d at 1101 (Tymkovich, C.J., concurring in part and dissenting in part) (criticizing the law's propensity to transform the Utah Republican Party "from a tight-knit community that chooses candidates deliberatively to a loosely affiliated collection of individuals who cast votes on a Tuesday in June").

The Tenth Circuit, however, held that the burden on the Party was minimal because it relied on the associational rights of voters. By upholding the mandatory primary statute as constitutional, the Tenth Circuit, relying on *Clingman*, concluded that it needed only to determine whether the state had an "important regulatory interest."[203] But the minimal interest that justified lesser scrutiny to the Oklahoma law at issue in *Clingman* was based on the ability of voters to affiliate with the Libertarian Party.[204] In *Cox*, nothing was stopping voters in Utah from registering as Republicans and participating in the local caucus system used to elect delegates to the convention.[205] Indeed, if anything, all that the Utah Republican Party asked of its members was dedicated participation such that their association with the Party was "meaningful," rather than pure form.[206] Therefore, more than simply taking away parties' ability to choose their own nomination method, Utah effectively deprived them of the right to exclude from their processes members that they felt were unmotivated by their cause. If true, this significantly alters the First Amendment rights of political parties and is potentially dangerous.[207]

The *Cox* majority's response to the fact that the change is substantive? Good.[208] Far from ignoring the substantive change brought about by a mandatory direct primary, as the dissent suggested, the majority embraced and applauded this change.[209] The majority alluded to the Utah GOP's ability to muster membership of over 600,000 but seemed uncomfortable with the Party dictating to these rank-and-file voters which candidates to support on the ballot.

Here, the Tenth Circuit relied on *Lopez Torres* to support the proposition that the First Amendment may permit states to reduce the influence of party bosses. But this reliance is misplaced. The Supreme Court's decision in *Lopez Torres* provided a modest discussion of a state's ability to regulate "party bosses" but focused primarily on the fact that fairness (i.e., the democratic process) is not a "manageable constitutional question for judges," and it went on to affirm that "[p]arty conventions, with their attendant 'smoke-filled rooms' and domination by party leaders, have long been an accepted manner of selecting party candidates."[210] So, while the majority may find support for giving deference to

[203] Clingman v. Beaver, 544 U.S. 581, 593 (2005); *see also Cox*, 892 F.3d at 1083.

[204] *See Clingman*, 544 U.S. at 592-93.

[205] *See Cox*, 892 F.3d at 1109 (Tymkovich, C.J., concurring in part and dissenting in part).

[206] *See Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting).

[207] *See* Persily & Cain, *supra* note 20, at 787 (describing potential issues with legal system favoring weak parties).

[208] *See Cox*, 892 F.3d at 1080.

[209] *See id.* at 1082 ("[I]f the [Utah Republican Party] wants to open its doors to roughly 600,000 people across the state of Utah, the associational rights *of the party* are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership.").

[210] N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 206 (2008).

the legislature from *Lopez Torres*, it could not have found precedent giving rise to a state's ability to control how a party substantively regulates its membership. Therefore, it must be that the majority intended to recognize the state's paternalistic responsibilities to ensure that party members are not duped by their leadership into supporting candidates that do not serve the best interest of the rank-and-file members.[211]

The Supreme Court has rejected such paternalism and attempts at "moderating" the candidates chosen through the nomination process as insufficient to overcome the First Amendment interests of a party.[212] In some sense, mandating a primary election for the sake of moderating the candidates to benefit voters defeats the purpose of political parties entirely. While this may seem a desirable outcome to some,[213] complete deference to legislatures renders the First Amendment right to associate meaningless when it comes to political parties. This is especially true in cases like *Tashjian*, where one-party dominated state legislatures prescribe state election law to entrench their party in power under the guise of "election integrity" or protecting the party from the party itself.[214] Thus, it is clear that the Constitution demands some logical restriction on the state's ability to regulate party nominating procedures. The next Part suggests a possible rationale that can fill the void in jurisprudence on this question.

III. POTENTIAL LIMITS ON STATE REGULATION OF PARTY NOMINATIONS AND STATE ACTION

On the one hand, looking to voters' rights to solve these issues seems to be an obvious place to start. After all, ensuring the right to cast a vote is a constitutional prerogative of the courts.[215] When states use political parties to conduct elections, such as by designating partisan affiliation on the ballot, political parties may be state actors. Therefore, a regulation that ensures an equal right to

[211] *See* Persily & Cain, *supra* note 20, at 802-04. Persily and Cain argue that such paternalism—regulating the party for the party's own sake—is an illegitimate use of state regulatory power. *Id.*; *see also* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223-24 (1989) (describing paternalistic approach as suspect).

[212] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 580-81 (2000); *Eu*, 489 U.S. at 227-28. Such a rejection was even more potent in *Jones*, where the voters approved the blanket primary through popular referendum.

[213] *See* Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CALIF. L. REV. 69, 76-81 (2012).

[214] Some have suggested that this is a result of inconsistent or highly deferential Supreme Court jurisprudence on democracy more generally. *E.g.*, Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 594-600 (2015).

[215] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 665-66 (1966).

participate seems commensurate with the Fourteenth and Fifteenth Amendments.[216]

On the other hand, however, situations will arise in which the associational rights of political parties do not implicate the right to vote at all.[217] Nor does voter participation answer the narrower question of why a primary election is required.[218] In these situations, it is necessary to look to the state's asserted interest in regulating ballot access as the constitutional limitation on its power to dictate political parties' nomination system.

A. *Voter Participation and Equal Protection*

Justice Stevens's dissent in *Jones* championed a theory that judicial intervention was precluded when a state attempts to involve more voters in its state-funded electoral process. Joined only by Justice Ginsberg, his dissent asserted that "[t]he reason a State may impose this significant restriction"—a mandatory primary election—"on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action."[219] Justice Stevens's formulation of the right considered primary elections separately from other functions of political parties, such as endorsements. Citing the *White Primary Cases*, Justice Stevens melds the primary election and the general, asserting that both are fundamental to the election system and, thus, should be analyzed as state action.[220] Once the state opens up its electoral apparatus to involve more voters, "it is acting not as a foe of the First Amendment but as a friend and ally."[221]

Some commentators have adopted this formulation in its entirety, seeing all primary elections as state action allowing the state to freely regulate without violating the associational rights of political parties.[222] Others have argued that

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[216] *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 665-66 (1944).

[217] *See* Ariz. Libertarian Party v. Hobbs, 925 F.3d 1085, 1091-95 (9th Cir. 2019) (performing associational rights analysis in context of primary-ballot-access scheme requiring minor party candidates to obtain signatures from unaffiliated voters).

[218] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000) (describing increasing voter participation as "hardly a compelling state interest").

[219] *Id.* at 594 (Stevens, J., dissenting).

[220] *Id.* at 594-95.

[221] *Id.* at 596.

[222] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 5 (1st Vintage Books ed. 2006); Jeremy Gruber, Michael A. Hardy & Harry Kresky, *Let All Voters Vote: Independents and the Expansion of Voting Rights in the United States*, 35 TOURO L. REV. 649, 694-97 (2019).

this theory only works in certain instances, such as in a functional one-party system where the primary election is the "dispositive election."[223]

This theory does not address when a state may act to regulate its primary election, however. It only addresses the permissibility of judicial intervention to strike down such regulations. Supporting the state's idea of expanding the franchise in primary elections to more voters, then, serves as a "one-way ratchet" of sorts.[224] But it is not without its exceptions, *Jones* and *Clingman* among them.

In some sense, taking the position that the state may act to expand voter participation to the detriment of the party's First Amendment right to exclude nonmembers from its nomination process is consistent with *Jones* and *Clingman*. Such a position also seemingly resolves the apparent inconsistency between *Clingman* and *Tashjian*. While the unaffiliated voters at issue in *Tashjian* would have been otherwise precluded from participating in Connecticut's primary election, Oklahoma's prohibition on affiliated voter's participation in another party's primary did not preclude these voters from participation. What remains, however, is a question: Why was the Republican Party in *Tashjian* able to seek an intervention? If extragovernmental entities can sue for an injunction, that would suggest that the upshot of *Tashjian* is that open primaries are constitutionally required.

Similar logic appears in Justice Scalia's opinion for the Court in *Jones*, in which he suggested that the state has no compelling interest in furthering voter participation.[225] However, Justice Scalia merely balanced this concern with that of the Party, indicating that this may not have been "strict scrutiny" at all.[226] Indeed, he explicitly favored a "*nonpartisan* blanket primary."[227] Justice Scalia's preference for this system was clear because the burdens on parties—at least as far as state action is concerned—are entirely removed. "Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association."[228] Quite directly, Justice Scalia prescribed that states conduct two rounds of elections and let the parties figure out how to back their preferred candidates. That California could (and now does) require a nonpartisan blanket primary is indicative that it

[223] Alexander Macheras, *Participation in Primary Elections and the Dispositive Election Test*, 25 B.U. PUB. INT. L.J. 399, 417-18 (2016); *see also* Burdick v. Takushi, 504 U.S. 428, 443-50 (1992) (Kennedy, J., dissenting) (explaining functional one-party system in Hawaii).

[224] *See generally* Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451 (2019).

[225] *Jones*, 530 U.S. at 583-84 ("The voter's desire to participate does not become more weighty simply because the State supports it.").

[226] *See id.* at 584 ("That may put [the voter] to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.").

[227] *Id.* at 585.

[228] *Id.* at 586.

is indeed "too plain for argument" that the state may require a primary election, so long as it does not restrict the freedom of association of the parties.[229]

The Court later accepted Justice Scalia's prescription in *Washington State Grange v. Washington State Republican Party*,[230] when it was forced to decide whether a "top-two" blanket primary system was constitutional after *Jones*.[231] Interestingly, Justice Scalia dissented from Justice Thomas's opinion for a five-justice majority, which held that Washington's modifications to the system rejected in *Jones* brought the blanket primary in accord with the First Amendment.[232] Because the Court concluded that the nonpartisan blanket primary was not an infringement on the Republican Party's First Amendment rights, it reached the question of the validity of the state's asserted interest.[233]

If the constitutionality of state-required primary elections was in doubt before *Washington State Grange*, it was certainly resolved afterward.[234] The holding, read broadly, allows states to regulate the partisan democratic process in the interest of promoting "responsive and accountable democratic governance."[235] Under this model, states are permitted to open their primaries to otherwise unaffiliated voters.[236]

The logical connection that allows a party to open its primary in this manner, absent state legislative or executive action, seems to be that the parties are state actors under the meaning of the Fourteenth and Fifteenth Amendments.[237] Both the Tenth Circuit majority in *Cox*[238] and Justice Scalia in *Jones*[239] came to this conclusion. It is Justice Scalia's opinion in *Jones* that limits the extent of a "state action" theory for political parties. Although his opinion expressly refutes the idea that political parties are state actors in all circumstances, *Jones* at least

[229] *See id.* at 572 (quoting Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974)).

[230] 552 U.S. 442 (2008).

[231] *Id.* at 452.

[232] *See id.* at 453; *id.* at 462-71 (Scalia, J., dissenting).

[233] *Id.* at 458 (majority opinion). Justice Scalia dissented because the blanket primary in Washington still listed the party designations of the candidates participating in the election. *Id.* at 465-66 (Scalia, J., dissenting). But Justice Thomas and the majority placed faith in voters to understand that such "preference" designations do not indicate partisan endorsement. *Id.* at 454-55 (majority opinion). Therefore, the parties' associational rights were not infringed merely by listing the designation on the ballot.

[234] *See* Erik S. Jaffe, *It's My Party—Or Is It? First Amendment Problems Arising from the Mixed Role of Political Parties in Elections*, 2008 CATO SUP. CT. REV. 105, 125-26.

[235] Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225, 1250 (2018).

[236] *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 220-21 (1986).

[237] *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2187-92 (2001).

[238] *See* Utah Republican Party v. Cox, 892 F.3d 1066, 1078-79 (10th Cir. 2018).

[239] Cal. Democratic Party v. Jones, 530 U.S. 567, 573 n.5 (2000).

recognized a "desire" for voters to participate in a partisan primary.[240] Despite this possible thread, the state action theory of political parties clearly has a logical conclusion. To the extent that the courts consider the roles of political parties in elections, they must take into account whether the action reaches the level of the Texas Democratic Party in the *White Primary Cases*. The simplest way for the courts to determine the party's involvement in the electoral system must be the relationship between the nomination and a candidate's space on the general election ballot.

B. *Ballot-Access Framework*

The state's interest in regulating political parties in the primary election is closely related to its ability to ensure that those candidates appearing on the general election ballot have substantial public support. The nature of the first-past-the-post electoral systems employed in most states leads to the rational voter choosing the "lesser of two evils" to avoid wasting her vote.[241] In these systems, the primary election is the functional equivalent of the first round of the general election—albeit with a more limited pool of voters participating in the choice of the nominee. In states like California or Louisiana, the primary election is actually the first round of the general election. They employ a nonpartisan "top-two" primary system whereby the primary election is not divided by party and the top-two vote getters—if no candidate receives a true majority—proceed to the general election regardless of party affiliation.[242]

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[240] *Id.*

[241] This phenomenon leads to what is known as "Duverger's Law," which predicts the emergence of a two-party system in these environments. *See generally* MAURICE DUVERGER, POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE (Barbara North & Robert North trans., 3d ed. 1964). The rise in consideration of ranked choice voting in some states, and its use in statewide elections in Maine, would reduce this dilemma for voters. *See* ME. STAT. tit 21-a, § 1 (2020). However, the assumption that the parties are in a unique position with respect to the First Amendment depends largely on the fact that the states condition ballot access on a party's previous success in the general election, and thus it remains unchanged in the face of alternative voting methods that still contain some ballot access restrictions. *See* Jaffe, *supra* note 234, at 121-23.

[242] *See, e.g.*, CAL. ELEC. CODE § 8141.5 (West 2020). Rather than return to traditional partisan primaries, California's response to *Jones* was to create this top-two system. In a true "Louisiana Primary" system, what is referred to as the "primary election" is actually the general election and the "general election" is simply a runoff if no candidate receives a majority. *See* LA. STAT. ANN. § 18:511 (2020). Most recently, this system gained attention and criticism, because it resulted in two runoffs for U.S. Senate seats in Georgia, which also uses the Louisiana format. GA. CODE ANN. § 21-2-501 (2020); Jerusalem Demsas, *Why Georgia Has Runoff Elections*, VOX (Nov. 6, 2020, 3:40 PM), https://www.vox.com/21551855/georgia-ossoff-perdue-loeffler-warnock-runoff-election-2020-results (noting racist origins of Georgia election law).

The Tenth Circuit's decision in *Cox* took that obvious assertion and extended the power granted to the state. In *Cox*, Utah created the primary election that it sought to regulate, whereas in the other cases, the states sought to regulate primary elections that were already occurring with the consent (fictional or otherwise) of the political parties.[243] Thus, *Cox* is unique because the state was regulating activity that it created out of whole cloth—an authority that was implicitly granted by the Supreme Court but the scope of which was never defined.[244]

The state is seemingly permitted to create this activity because it has the authority to regulate the mechanisms by which individual candidates access state-funded general election ballots.[245] In this context, a primary election for candidates whose parties qualify for automatic ballot access is the equivalent of requiring a signature campaign for an independent candidate or candidate of a party without ballot access. Here, the state has given the party the right to have its name printed on the general election ballot, and in return, it asks that the party's candidate demonstrate a "significant modicum of support" prior to printing the candidate's name on the ballot.[246] The Court's support for the nonpartisan blanket primary is illustrative because such a system denies automatic ballot access to the parties and instead conditions that access on a demonstration of support at the ballot box. In other words, the nonpartisan blanket primary regime protects the same constitutional values of associational rights without establishing the political parties as state actors.

The ballot-access framework and the state's determination of an adequate "modicum of support" is the mechanism by which courts should view requirements like Utah's in the future because it recognizes that the purpose of primary elections is not to conduct "ballot speech" but rather to ensure the orderly conduct of elections.[247] Under a ballot-access framework, parties are free to endorse candidates,[248] exclude or permit unaffiliated voters from participation in internal affairs such as committee elections,[249] and perform traditional partisan functions such as developing an issue platform. The ability of the party to perform these functions is an important constitutional constraint on any regime because of the First Amendment implications of infringing on the party's

[243] *Compare Cox*, 892 F.3d at 1073 (discussing Utah legislature's passage of law creating two types of political party), *with* Tashjian v. Republican Party of Conn., 479 U.S. 208, 211-12 (1986) (explaining adoption of state Party rule allowing Independents to vote in Party primaries).

[244] *See Cox*, 892 F.3d at 1079.

[245] *See* Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[246] *Id.*

[247] *See* Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 723-27 (2016).

[248] *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989).

[249] *See* Clingman v. Beaver, 544 U.S. 581, 591-93 (2005); Tashjian v. Republican Party of Conn., 479 U.S. 208, 220-22 (1986).

ability to serve as an independent entity. What the Supreme Court has recognized, and what a ballot-access framework endorses, is that, where election for public office is concerned, the right of the state supersedes the rights of political parties insofar as the state intends to restrict the number of candidates on its general election ballots.[250]

The ballot-access framework is not perfect. As many have pointed out, it seems, to a large extent, that these types of regulations seek to entrench the two-party system.[251] Additionally, courts have no more competence in deciding the validity of ballot access restrictions than they do in evaluating how states regulate unaffiliated voters' access to primary elections.[252] Furthermore, the problem of unconstitutional conditions is a necessary force with which to be reckoned.[253]

As to the entrenchment of the two-party system, the Supreme Court has repeatedly affirmed that a state's commitment to such a system is constitutionally permissible.[254] Therefore, any objection on this basis is purely a policy concern and does not rise to the level of constitutional analysis.

With respect to concerns of judicial competence, when courts recognize a state's ability to regulate primary elections, they are merely deriving this function from the state's legitimate exercise of its power to control ballot access. Under this framework, the only intrusion necessary for the courts is to assert their constitutional authority to enforce the First and Fourteenth Amendments. Viewing the conduct of a primary election as a preliminary activity to the general election rather than an expression of the party will avoids the First Amendment issue entirely. This is because the state has turned the political party into a state

[250] The application of this principle to presidential-preference primaries requires different analysis. In the context of a presidential primary, a state-run primary election assists the party in selecting delegates to a partisan convention. The party's official endorsement comes not from the outcome of the primary election but from the later national convention. Because of the uniqueness of this process, the states have less rights to dictate the method of nomination to the state party apparatus, although the national party may alter the state's influence in the process as a result. *See* Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 126 (1981). Should the national party require a state party to conduct a primary election and the state legislature refuse to oblige—the hypothetical case in Iowa or Nevada in 2024—this theory will be tested.

[251] *See* Evseev, *supra* note 106, at 1288-92; Donald E. Daybell, Note, *Guarding the Treehouse: Are States "Qualified" to Restrict Ballot Access in Federal Elections?*, 80 B.U. L. REV. 289, 297-300 (2000).

[252] *See* Issacharoff, *supra* note 15, at 311-12.

[253] *See* Utah Republican Party v. Cox, 892 F.3d 1066, 1106 (10th Cir. 2018) (Tymkovich, C.J., concurring in part and dissenting in part); Dimino, *supra* note 63, at 67-68.

[254] *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997) ("[T]he States' interest permits them to enact reasonable election regulations that may, in practice, favor the traditional two-party system . . . .").

actor by granting them automatic ballot access.[255] They have become the gatekeepers of the general election ballot—their activities can be regulated under the same framework as the *White Primary Cases*.[256] Although distinct from the exclusion in the *White Primary Cases* insofar as it was not a racially motivated harm that was obviously unconstitutional for both moral and normative reasons, the Republican Party of Utah's historical exclusion of members from participation in its nominating contest is similar to that exclusion in important ways.[257] Once the Republican Party accepted the state benefit of ballot access and voter registration, it acquiesced to the state's regulation of the activities that involved those benefits.[258]

Some have argued that this point should be viewed through the lens of the state conditioning a benefit on a party forfeiting its constitutional rights.[259] But what if the state is creating a benefit that is entirely separate from a party's First Amendment interest? A party certainly lacks any constitutional right to list a candidate on any election ballot.[260] It similarly lacks the right to restrictively condition its membership on unconstitutional grounds.[261] The idea that the party's nominee is deserving of state support also ignores the plight of third parties that constantly battle to receive ballot access.[262]

The *Jones* Court acknowledged that partisan endorsements—i.e., unofficial support—are insufficient to satisfy the Party's First Amendment rights.[263] But that holding was in the context of the Party's rights during a *partisan* process. The Constitution is not offended by the inability of a party to have its candidate's

[255] Professor Batchis argues that reasonable, viewpoint-neutral regulations could always be applied to political parties under the First Amendment public forum doctrine. *See* Batchis, *supra* note 20, *passim*. This Note does not go quite so far, instead focusing only on the state's regulation of primary elections as a specific instance of state action as it relates to voters. A separate piece could expand on this position and answer the question of whether automatic ballot access qualifies major parties as state actors in all circumstances.

[256] *See* Dimino, *supra* note 63, at 81-82; *cf.* Cal. Democratic Party v. Jones, 530 U.S. 567, 573 (2000) (describing holding in *White Primary Cases* as "when a State prescribes an election process that gives a special role to political parties, . . . the parties' discriminatory action becomes state action").

[257] *See Cox*, 892 F.3d at 1079.

[258] *See id.* at 1079 n.6; *see also* Dimino, *supra* note 63, at 101-03; Issacharoff, *supra* note 15, at 280.

[259] *See* Dimino, *supra* note 63, at 101-20.

[260] *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008).

[261] *See* Smith v. Allwright, 321 U.S. 649, 663-66 (1944).

[262] *See* Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[263] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 580 (2000) (citing Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228 n.18 (1989)).

affiliation printed on the ballot. The Constitution is offended, however, if such an endorsement is implied without that party's consent.[264]

Therefore, the permissibility of state-imposed restrictions on a political party is largely contingent on the extent to which the state attempts to regulate the party's speech. Because the Constitution gives states the right to regulate general elections, to the extent that political parties are inevitable in the American political system, it follows logically that orderly elections are necessary to ensure popular support of the eventual victor. So long as such action does not impose on the ability of the parties to perform their traditional functions, the state's legitimate interest in regulating the ballot serves as the primary justification for its ability to regulate primary elections.

CONCLUSION

Regardless of whether political parties were inevitable in the United States, their existence today is clear and pervasive. With the increasing institutionalization of political parties, the conduct of elections has become a battleground for associational rights disputes. When the Supreme Court has weighed in, it has conducted reviews that gloss over the threshold question of why states may regulate partisan nominating competitions in the first place. This omission leaves courts like the Tenth Circuit in the precarious position of following dicta without a rationale. While it seems apparent that states may prescribe particular methods of nomination to political parties, the absence of a clear justifying principle means that states are unsure about the extent to which they may regulate these contests.

This Note suggests that states and political parties may justify or challenge regulations on political nominating contests in one of two ways. First, parties or states may seek to expand voter participation by opening primary elections to otherwise disenfranchised voters. Alternatively, states may seek to dictate the method of nomination as a means of allowing a party access to the general election ballot. Though the Supreme Court has never explicitly endorsed either of these methods, it seems that these interests at least warrant a lesser degree of scrutiny. In either case, the constitutionality of any potential infringement on the political parties seems to turn on whether the parties are acting for the state in nominating their candidates. Viewing parties in this light recognizes their institutional prominence and brings the Constitution in line with the reality of politics.

[264] *See Jones*, 530 U.S. at 581-82 (discussing trouble of "forced association" as constitutional evil in partisan blanket primary); *see also Wash. State Grange*, 552 U.S. at 453 (implying that, without state-run partisan nominating procedures, parties are free to "nominate candidates by whatever mechanism they choose").