Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case

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The Supreme Court has said that there is a constitutional right of association.¹ Such a right must be most significant in the political area.² Yet regulation of political parties has proceeded to such an extent that it is difficult to identify the sphere protected by that right.³ The selection and apportionment of delegates to political meetings appear to be protected, yet Congress and the states are permitted to strip political meetings of most of their functions through finance laws and primaries.⁴ The Court's attention has generally been focused on the justification for regulation rather than on the

⁴ Compare Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981) (open primary law improperly conflicted with party rules); Williams v. Rhodes, 393 U.S. 23 (1968) (Ohio's requirement for creating and filling numerous party offices and structures violates first amendment rights) with Marchioro v. Chaney, 442 U.S. 191 (1979) (statutory definition of a party committee constitutional since no political functions were assigned by statute, implying, perhaps, a protected sphere). A large number of the states have adopted statutes patterned after the Federal Election Campaign Act. See American Law Division of the Congressional Research Service, Analysis of Federal and State Campaign Finance Law-Summaries (1976).
functions and needs of the parties.\(^5\) That approach has left little more than a shell of the traditional parties. Stripped of their ability to select or advocate their nominees,\(^6\) the parties have been largely limited to formal functions and assistance to candidates in general election campaigns.

Judicial acceptance of legislative regulation of the parties contrasts sharply with criticism by political scientists.\(^7\) Such a difference of view might seem insignificant as a legal matter were it not for the fact that dismantling institutions protected by the first amendment requires the strongest justification.\(^8\) The complaints of our colleagues in political science not only undermine the justification for regulation but underscore the constitutional significance of parties. Such complaints cannot be lightly cast aside. Indeed, both Congress and the parties are taking those complaints quite seriously. Opposition to the Federal Election Commission (FEC) and efforts to abolish it stalled congressional authorization of the FEC's budget and resulted in the appointment of a committee to study the FEC.\(^9\) During the past summer, the Democratic Party adopted a revised set of delegate selection rules that reduce the role of the primaries in the selection process.\(^10\)

This paper develops a coherent theory of the right of association. To focus the discussion this paper concentrates on the primary election laws, both because the major decisions have been made in that context and because the mindsets developed in that area have blurred understanding the many conflicts between election law and the Constitution. Use of the primary system has spread because it seems to make politics accountable to the ordinary citizen.\(^11\) But


\(^6\) For example, N.Y. Elec. Law § 6-104 (McKinney 1978) provides for a convention but submits the nomination to a primary while N.Y. Elec. Law § 2-126 (McKinney 1978) prohibits spending on behalf of candidates during the primary campaign. Such spending is plainly essential to effective speech. See Buckley v. Valeo, 424 U.S. 1, 15-19 (1976).


\(^8\) See Buckley v. Valeo, 424 U.S. 1, 25 (1976).


\(^11\) Thelen, \textit{Two Traditions of Progressive Reform, Political Parties, and American Democracy}, in \textit{The American Constitutional System Under Strong and Weak Parties},
there has always been criticism that the resulting American political system does not place politics in responsible hands. Those critics question the wresting of party power from the political professionals. But the point developed below will differ from both the populist support of primaries and the elitist effort to narrow popular participation. This paper demonstrates that the primary system is not democratic, and that its undemocratic aspects reflect a failure to implement the first amendment properly. For the people to exercise their vote in an effective way, it is necessary that they have the benefit of such organization of the electoral process that would yield manageable, meaningful choices. In a fragmented system, even well informed voters can have little idea of what they are voting for and of what the consequences of their vote may be. Similarly, election victors in such a system may take refuge among a multitude of issues to vitiate any mandate.

The problems of political chaos suggest that we have ignored the first amendment's teaching that the right of association must be protected. Can we, however, accept that teaching without inviting the return of those political abuses which had long been the scourge of American politics? Under a system of relatively unregulated organization, would not abuse of power replace political chaos as the major problem?

To answer these questions this paper will develop a model that emphasizes choice among existing organizations and entry of new ones. To maximize public control of government and minimize the aggregation of power over the voters, the paper will urge that it is preferable to allow all organizations access to equivalent resources on equitable terms so that reasonable entry and competition are possible, rather than to restrain and rechannel the exercise of first amendment rights. Voters must be permitted to organize, as long as organization does not prevent counter-organization.

supra note 7, at 37.
13. Learned Hand once wrote in The Spirit of Liberty 93 (1952) that the vote was one of the most unimportant events of his life; cf. A. Ranney, Curing the Mischief of Faction 128 (1975) (the most important criteria for voters is their preference for a particular party).
This paper fashions a coherent theory of the rights of organizations out of these concepts. Part I identifies the values courts have found in political association and seeks to explain the limits of their view. Part II explores the protected functions of political association. Part III examines the corruption rationale that has been used to override associational choice, and Part IV explores the effect of election law on the expressive functions of parties.

Several conclusions appear justified on the basis of this analysis. First, aspects of the primary process which provide a counting mechanism must be separated from those which suppress organized expression. The combination of restrictions on convening and campaigning in the primary do not appear consistent with the right of association because they effectively silence the parties, and because they do not operate neutrally among contending groups and ideological positions. Second, the major constitutional check on the abuses of political associations is the right to associate in opposition. Restraints on parties that frustrate organized opposition, aggravate the disadvantages of minor parties, or prevent organized intraparty opposition are impossible to justify. Third, and more generally, the right of association cannot be understood without a searching analysis of the functions political associations are designed to perform.

I. BACKGROUND OF THE PROBLEM

A. Parties in the Eighteenth Century

The First Congress wrote the right of assembly alongside the rights of petition and expression in the first amendment. Both the language and the history of the amendment suggest that a right of association was intended. The Constitution, as it emerged in 1787, included numerous provisions designed to protect political opposition. Political organizations were well developed, and both caucuses and party conventions had been held before the drafting of the first

18. See infra text accompanying notes 278-79, 300.
20. See U.S. Const. art. I, § 6, cl. 1 (speech or debate clause); id. at § 9, cl. 3 & § 10, cl. 1 (attainder, ex post facto laws); id. at art. III, § 3, cl. 1 (regulating punishment of treason).
amendment. Likewise, Madison, Jefferson, and Hamilton immediately set about to organize what were soon to become two national parties.

Despite this history of support for parties, a good deal of ambivalence remained in attitudes toward association. Opposition was strongly expressed but rebutted in the context of the formation of the Order of the Cincinnatti and the Whiskey Rebellion. This hostility culminated in the Alien and Sedition Acts. But Madison and Jefferson largely settled the issue of the right of association in the Virginia and Kentucky "Resolutions and the Election of
Not long thereafter, the two-party system became accepted dogma at the highest levels of American statecraft.

### B. Treatment of Parties in State Courts

The historical recognition of the importance of political parties has led one notewriter to comment that "[t]he preferred position of political parties in the law was so firmly established by the end of the nineteenth century that state attempts to establish a mandatory party structure or an open nominating procedure were regularly struck down as invasions of the party's right to regulate its internal affairs." Thus, in *Stephenson v. Boards of Election Commissioners*, the Michigan court cautioned against state regulation of the parties, fearing that it might hamper the repudiation of corruption and fraud. In California, primary laws were invalidated as constituting special legislation in *Marsh v. Hanley*, as unconstitutionally defining voter eligibility in *Spier v. Baker*, and, in *Britton v. Board of Election Commissioners*, as effectively destroying parties by allowing members of one party to vote in the primary of the other.

The courts in that period, however, did not entirely avoid the resolution of political controversies. Courts were inevitably drawn in where competing factions each claimed the right to use the party label on the primary or general election ballot. By simply printing all the claimed nominations on the ballot, many courts tried to force the parties to settle their own disputes. In another large group of cases, the courts enforced party rules concerning qualifications to sit as a member of a party convention.

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30. See generally J. Ceaser, *supra* note 7, at 123.
32. 118 Mich. 396, 400-01, 76 N.W. 914, 915 (1898).
33. 111 Cal. 368, 43 P. 975 (1896).
34. 120 Cal. 370, 52 P. 659 (1898).
35. 129 Cal. 337, 61 P. 1115 (1900).
37. E.g., Beck v. Board of Election Comm'rs, 103 Mich. 192, 61 N.W. 346 (1894);
Resistance to intrusion in the internal affairs of political parties, though, was by no means as universal as the above notewriter's comments suggest; indeed, there were three sources of interference. One group of courts viewed intervention as improper only in the absence of "statutory regulations" or "fraud or oppression." Others resolved controversies in accord with statutory schemes that may have required no more than that party nominations be printed, rationalizing their intrusion due to the need to prevent fraud from affecting the administration of these statutes. A third source of intrusion was accomplished over the judges' heads: Some state constitutions actually required a primary.

No federal constitutional issue was implicated in these early cases. This period was decades before the United States Supreme Court wrote any teeth into the first amendment. State constitutional provisions guaranteeing the right to speak, assemble, and petition, however, were ubiquitous, and the import of parties was common coin. In Ex parte Wilson, Judge Furman wrote: "These wicked machinations [of secret combines of wealth] cannot be defeated by independent individual efforts. . . . [T]he people must organize into political parties." The majority in State ex rel. Mc-


38. See Note, supra note 31, at 153.

39. See Ferguson v. Montgomery, 148 Ark. 83, 229 S.W. 30 (1921); People ex rel. Eaton v. District Court, 18 Colo. 26, 31 P. 339 (1892); Phillips v. Gallagher, 73 Minn. 528, 76 N.W. 285 (1898).

40. See Williams v. Lewis, 6 Idaho 184, 54 P. 619 (1898), overruled on other grounds in Stein v. Morrison, 91 Idaho 426, 75 P. 246 (1904); State ex rel. Garn v. Board of Election Comm'rs, 167 Ind. 276, 78 N.E. 1016 (1906); State ex rel. Wolfe v. Falley, 9 N.D. 950, 83 N.W. 860 (1900).

41. E.g., CAL. Const. art. II, § 2 1/2, construed in Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181, 188 (1909); OKLA. Const. art. III, § 5, construed in Ex parte Wilson, 7 Okla. Crim. 610, 125 P. 739 (1912).


44. See, e.g., Britton v. Board of Election Comm'rs, 129 Cal. 337, 342-44, 61 P. 1115, 1117-18 (1900) (rights of parties fundamental and essential among the rights reserved to the people).

45. 7 Okla. Crim. 610, 125 P. 739 (1912).

46. Id. at 631, 125 P. at 748 (Furman, J., concurring).
Grael v. Phelps considered parties fundamental to our form of government, while Judge Timlin, in a dissenting opinion, tied their importance "to the full and effective exercise of political power by the people" in a "populous republic." Several courts quoted at length from James Bryce's *The American Commonwealth* on the way Americans carry out their political functions through the medium of parties.

The courts did not find it difficult, however, to deny any conflict between primary laws and the rights guaranteed by state constitutional provisions. In *Riter v. Douglass*, the Nevada Supreme Court stated that "instead of attempting to destroy [parties, the primary law] simply regulated the means by which the efforts of political parties should be directed." The court concluded that the legislation increased the power of the people to govern their parties. This approach was most notable in cases where provisions defining membership in the parties for the purpose of voting in the primaries were challenged. The courts consistently responded that those requirements were designed to preserve the integrity of the parties.

Since the courts denied that great damage was being done, it was rarely noticed that some statutes effectively were silencing the parties. One court distinguished and another struck down statutes which prevented the parties from meeting, proposing a candidate in

47. 144 Wis. 1, 16, 128 N.W. 1041, 1046-47 (1910) (quoting Britton v. Board of Election Comm'n, 129 Cal. 337, 61 P. 1115 (1900)).
48. *Id.* at 34, 128 N.W. at 1054.
49. *E.g.*, Riter v. Douglass, 32 Nev. 400, 422, 109 P. 444, 450 (1910); State ex rel. Webber v. Felton, 77 Ohio St. 554, 84 N.E. 85, 87 (1908).
50. 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 636, 638 (1889).
51. 32 Nev. 400, 109 P. 444 (1910).
52. *Id.* at 418, 109 P. at 449. *See also* State ex rel. Labauve v. Michel, 121 La. 374, 390-93, 46 So. 430, 436 (1908) (upholding as constitutional the requirement that party nomination be through direct primary). The Supreme Court of Washington similarly found no constitutional basis for the objection that the law tends to destroy political parties. State ex rel. Shepard v. Superior Court, 60 Wash. 370, 111 P. 233 (1910).
54. *See* Socialist Party v. Uhl, 155 Cal. 776, 792, 103 P. 181, 188 (1909); Rouse v. Thompson, 228 Ill. 522, 547-48, 81 N.E. 1109, 1117-18 (1907); Gardner v. Ray, 154 Ky. 509, 519, 157 S.W. 1147, 1152 (1913); Riter v. Douglass, 32 Nev. 400, 433, 109 P. 444, 454 (1910); State ex rel. Miller v. Flaherty, 23 N.D. 313, 323-29, 136 N.W. 76, 80-83 (1912); Baer v. Gore, 79 W. Va. 50, 58, 90 S.E. 530, 533 (1916). *See also* Hopper v. Stack, 69 N.J.L. 562, 56 A. 1 (1903), which upheld primary law provisions defining party membership because they merely codified existing practices.
convention, and supporting that candidate in the primary. But most attacks on the primary laws did not address the issue of the danger to parties. A number of complaints challenged the primaries for abridging the right to vote. Oblivious to the impact on parties, the courts treated their state constitutional provisions as authority for, rather than a barrier to, primary laws. In the absence of constitutional provisions defining the scope of a right to vote, courts sometimes treated voting as a mere statutory privilege. But the courts perceived no problem with direct primaries, which limited the effectiveness of party conventions, or even with nonpartisan primaries, which were designed to eliminate the parties. Indeed, some courts viewed the availability of the primary as a privilege.

Thus, the initial judicial resistance to primaries was undermined by the superficiality of the defense of parties. While asserting that parties had an important role to play, the courts failed to identify how that role was affected by the statutes under consideration. Whatever hesitancy the courts felt about involvement in the internal operation of the political parties, they clearly capitulated to turn-of-

57. For example, primary laws were challenged, inter alia, as special legislation for certain communities or associations. See Marsh v. Hanley, 111 Cal. 368, 43 P. 975 (1896); Hopper v. Stack, 69 N.J.L. 562, 56 A. 1 (1903). For violation of constitutional rules of legislative drafting, see Spier v. Baker, 120 Cal. 370, 52 P. 659 (1898).
58. Spier v. Baker, 120 Cal. 370, 371, 52 P. 659, 660 (1898); Riter v. Douglass, 32 Nev. 400, 410, 109 P. 444, 446 (1910); Ex parte Wilson, 7 Okla. Crim. 610, 615-17, 125 P. 739, 741 (1912).
60. Riter v. Douglass, 32 Nev. 400, 422, 109 P. 444, 450 (1910); Healey v. Wipf, 22 S.D. 343, 348, 117 N.W. 521, 522 (1908). This view was discussed critically in State ex rel. McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041 (1910).
61. See, e.g., Winston v. Moore, 244 Pa. 447, 91 A. 520 (1914) (upholding mandatory direct primary laws); Morrow v. Wipf, 22 S.D. 146, 115 N.W. 1121 (1908) (upholding mandatory direct primary laws).
63. See, e.g., Ladd v. Holmes, 40 Or. 167, 66 P. 714 (1901) (upholding denial of minor parties' participation in primary process). In Stevenson v. Hardin, 238 Ky. 600, 38 S.W.2d 462 (1931), plaintiffs even challenged, unsuccessfully, the constitutionality of a statute that allowed parties to nominate candidates through conventions in lieu of direct primaries. In Redfearn v. Delaware Republican State Comm., 502 F.2d 1123, 1126-27 (3d Cir. 1974), aff'd mem. on remand, 524 F.2d 1403 (3d Cir. 1975), vacated in light of subsequent legislation, 429 U.S. 809 (1976), the court of appeals characterized the direct primary as "neutral" in its effects on the associational rights of parties in reversing a lower court injunction regulating an apportionment formula for state nominating conventions.
the-century populists' efforts to purify the electoral process.\textsuperscript{64} Early in the twentieth century, the state courts permitted state primary laws to wrest control over party decisionmaking processes from the party organizations.\textsuperscript{65}

C. Rights of Parties in the Supreme Court

The United States Supreme Court has considered the rights of political parties against the background of this massive \textit{fait accompli}. Limited intrusion on parties, sanctioned by the Court in early cases, has grown into approval of regulation which sharply conflicts with the first amendment.

The Court's first involvement with parties was in a group of cases dealing with the white primaries.\textsuperscript{66} The Court ruled in these cases that it was unconstitutional for a state to exclude a racial group from voting in the primary or to authorize a private party to do the same. In \textit{Terry v. Adams},\textsuperscript{67} the Court extended this line of cases to require a political association that had been active in Texas politics for some seventy-five years, and whose choices were historically conclusive in the Democratic primary, to permit blacks to vote. The meaning of that decision has been somewhat elusive.\textsuperscript{68} One interpretation would limit the reach of \textit{Terry}'s regulation of parties to matters involving racial discrimination.\textsuperscript{69} Indeed, the \textit{Terry} opinions specifically rely on the fifteenth amendment.\textsuperscript{70} The Supreme Court, in \textit{O'Brien v. Brown},\textsuperscript{71} adhered to that approach stating, "This is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single


\textsuperscript{65} See generally C. MERRIAM & L. OVERACKER, PRIMARY ELECTIONS 60-66, 359-404 (1928) (describing the spread of primary legislation) and \textit{id}. at 108-40 (describing the judicial battle over the primary).


\textsuperscript{67} 345 U.S. 461 (1953).


\textsuperscript{70} 345 U.S. at 469-70. \textit{See also id}. at 472-73, 476 (Frankfurter, J., concurring), 482, 484 (Clark, J., concurring).

\textsuperscript{71} 409 U.S. 1 (1972).
State. Cf. Terry v. Adams . . . .” 72 This language has led some jurists to conclude that the white primary cases can not be extended beyond their racial origins. 73 But a racial interpretation of those cases is really quite unsatisfying. Are the parties prohibited from excluding blacks, but free to exclude members of ethnic or religious groups?

A right to vote in primaries, grounded either in the due process or equal protection clauses of the fourteenth amendment, would be more inclusive. But either interpretation of Terry still requires precise standards to distinguish what will constitute private action of the parties from actions that will be imputed to the government and, thus, invoke constitutional scrutiny. In Terry, Justice Black attempted to deal with that problem by focusing on the power of dominant political organizations: “The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. . . . The Jaybird primary has become an integral part, indeed the only effective part, of the elective process . . . .” 74 The more powerful the association, the more tainted the resulting state-run primary and general elections. At some point, according to this approach, the state could not recognize or reflect such biased private polls in its state-run processes. The Court, however, has not used that kind of distinction among parties in its recent decisions regarding state action. 75 A finding of state action would involve the courts deeply in the definition of proper party behavior. The Supreme Court shied away from defining proper party behavior in O'Brien v. Brown 76 and Cousins v. Wigoda, 77 cases arising out of the 1972 Democratic convention. Both cases involved chal-

72. Id. at 4 n.1 (citations omitted).
74. 345 U.S. at 469 (Black, J., joined by Douglas, Burton, JJ.). See also opinion of Justice Clark. Id. at 484 (Clark, J., concurring, joined by Vinson, C.J., Reed, Jackson, JJ.).
76. 409 U.S. 1 (1972).
77. 419 U.S. 477 (1975).
lenges to the Democratic Party's delegate selection rules, including requirements for open slate selection meetings, proportional representation (a technical term for the allocation of seats among slates pledged to different candidates in the ratio of their vote totals in each state primary), and goals or quotas for racial, ethnic, and sexual representation. Though these cases presented an opportunity to do so, the Court did not delineate the rights of political associations. In O'Brien, the Court required the litigants to present their grievances to the credentials mechanisms set up by the party, noting the imprpropriety of judicial consideration in light of the short time-scale available to the Court. In Cousins, the Court held merely that the states did not have a sufficiently compelling interest to justify the imposition of a method of selecting convention delegates on the parties. Beyond that narrow holding, the Court failed to identify a protected sphere of party activity. That failure left open the question arising from Terry, of the scope of a party's power to define its own membership.

Despite the Court's cautions in O'Brien against interference in the operations of political parties, and the limited reach of the Court's precedents, the massive fait accompli of the primary laws, together with the limited intrusions on parties in the white primary cases, gave considerable legitimacy to the idea that parties are constitutionally subject to extensive legal restraints. This idea ultimately emerged as a balancing test via Cousins and Buckley v. Valeo. In the wake of the Federal Election Campaign Act of 1971 (FECA) and the Amendments of 1974, Buckley made it clear that political associations are subject to very extensive regulation. While the Court identified the rights involved as "fundamental" and, according to its precedents, promised the "closest scrutiny . . . to avoid unnecessary abridgement of associational freedoms," it failed to adhere to that

78. See 419 U.S. at 479, 479 n.1; 409 U.S. at 2.
79. 409 U.S. at 3, 5.
84. 424 U.S. at 25.
standard. Instead, it rejected various overbreadth arguments on the basis of deference to Congress, and sustained most of the provisions of the Act on the basis of a subjective balancing test. The Court’s decision in Buckley clouds the issue of what first amendment rights are to be left for the parties.

D. The Supreme Court’s Individualist Philosophy of Politics

Much of the Court’s failure to delineate a protected sphere for the parties can be traced to the individualist way in which politics has been conceptualized. Instead of encouraging associations to serve the voters, the individualist view equalizes the personal influence of each voter as the best way to make government fair and responsive. Thus, the early cases treated the primaries as an aid to the parties—giving each member a voice. This view is analogous to the model of pure competition in classical economics.

Buckley perpetuated the idea that parties are no more than the sum of their members. At issue was the constitutionality of FECA’s several limitations on political contributions. The Court’s discussion of political contributions focused on the individual: “A contribution serves as a general expression of support. . . . The quantity of the communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.” The Court explicitly rejected, as repugnant to the first amendment, the idea of contribution limitations as a means of equalizing the voices of the wealthy with the less affluent and it expressly based its decision on the need to eliminate the appearance of corruption. Nevertheless the Court returned repeatedly to the individualist viewpoint. It expressed concern over large private contributions and a preference for

85. Id. at 27-30. Dangers of deferring to Congress are greatest in this area. See J. Ely, supra note 24, at 105-34; Blasi, supra note 2, at 529-44.
86. 424 U.S. at 19-23, 64-68, 93-97.
87. See A. Marshall, Principles Of Economics 5-10 (8th ed. 1948). By this standard, America had its golden age under British rule. See descriptions of the self-nominating and open meeting systems then in vogue in F. Dallinger, supra note 21, at 4-7; A. Ranney, supra note 13, at 62.
89. 424 U.S. at 21; see also California Medical Ass’n v. FEC, 453 U.S. 182, 196 n.16 (1981) (sustaining contribution limitations to an independent multicandidate political action committee).
90. 424 U.S. at 48-49.
91. Id. at 26-27.
soliciting smaller contributions from numerous people. At one point the Court acknowledged that a primary purpose of the statute included "restricting the voices of people and interest groups who have money to spend." And it discounted claims of inequality among candidates, parties, and political committees on the basis of its perceptions that the Act treats all contributors alike. Even the concept of improper influence is not clearly distinguishable from the individualist mode.

By contrast, the Court's dismissal of the collective issue—the impact of the limitations in aggravating overall funding imbalances among parties, candidates, and positions—is striking. The petitioners had presented evidence of the import of large contributions for popular causes and candidates throughout history, and specifically the significance of large early contributions to challengers. The Court was also well aware of the resources made available to incumbents by the government, and the significant influence these resources have on campaigns. Yet, despite the impact of the contribution limitations in aggravating these imbalances, the Court found "no such evidence" and "little indication" that contribution limitations would prejudice challengers in their contests with incumbents. It reached a similar conclusion regarding third parties while candidly admitting that "the absence of experience under the Act prevents us from evaluating this assertion." Thus, the Court was prepared to take a substantial risk of collective inequality to satisfy a desire for individual fairness.

In accepting public funding provisions which denied aid to some third parties, the Court again stressed an individual model of politics: "[T]he denial of public financing to some Presidential candidates
is not restrictive of voters' rights and less restrictive of candidates' rights than ballot access laws." Reducing the rights of parties to the rights of individuals—voters and candidates—the Court treated all aggregate problems as a mere derivative of individual contribution decisions. The issue of the treatment of parties, then, was foreclosed by the Court's initial conclusion that the individual was fairly treated. Similarly, to reach its conclusion that voters are unaffected, the Court must have assumed that small parties, as measured by the prior election, benefit by their preclusion from public funding, or that the collective issue was irrelevant. Though there is some language to the effect that the Court thought third parties better off without public funding, this rationale is hard to accept at face value since granting public financing would not preclude a party's option to reject the dollars.

Buckley clearly demonstrates the Court's individualist view of political parties and nothing the Court has said since suggests a revision in that approach. In First National Bank v. Belotti, the Court held that corporations could not be precluded from making either contributions or expenditures to advocate their views on ballot measures. No change in the analysis of association seems to have been intended. Building on Belotti in Citizens Against Rent Control v. City of Berkeley, the Court distinguished limitations on contributions to candidates, which it had approved in Buckley, from limitations on independent expenditures and contributions to causes other than candidates, such as advocating views on ballot measures, which it now invalidated. Supporting that decision, the Court emphasized the absence of a threat of corruption in the ballot issue situation as opposed to the candidate contribution situation. It also specifically discussed the right of association, arguing that associa-

102. Id. at 94.
103. Id. at 94-95.
104. Id. at 94.
110. Id. at 437-38.
tion enhances effective advocacy of points of view. What it appears to have had in mind in this analysis was a matter of simple addition: More money makes a louder splash. The Court then proceeded to analogize an association’s first amendment rights to those of an individual. There is no sense either in Belotti or in Berkeley of the uniqueness of associated efforts; associations are simply larger. Perhaps this was all the analysis that was necessary to decide these cases. Still, the protection of associational activities in Belotti and Berkeley signals no change in the Court’s failure to appreciate the ways in which an association functions as anything more than the sum of its members’ efforts—the very failure underlying Buckley’s ratification of the contribution rules.

The Court’s individualist perspective is evidenced further in California Medical Association v. FEC, in which it upheld FECA provisions that operated to limit the Association’s contributions to its segregated fund more narrowly than corporate or union contributions to their funds are limited. Still failing to appreciate the distinctive collective roles involved, the Court held, in the context of its discussion of the equal protection claim, that the treatment of associations was at least as good as the treatment of corporations and unions because of the freedom of the medical association to solicit from the general public and the ability of the association to make limited contributions and unlimited expenditures on political campaigns, rights denied to the corporations and unions. The Court saw no issue in the different forms to which the two groups were confined, measuring the statute by the degree of burden rather than the shaping of political expression.

The Court was unable to reach a consensus on the first amendment issue. Its dispute, however, was unrelated to the functions of association. The plurality saw only “‘speech by proxy’” in the fund and concluded it was “not the sort of political advocacy . . . entitled to full first amendment protection.” But the only thing at stake for the plurality was “the first amendment rights of a contributor,” obscuring entirely the impact of the associated form on the speech.

111. Id. at 436.
112. Id. at 437.
114. Id. at 200-01.
115. Id. at 201.
116. Id. at 196.
117. Id. at 197.
Justice Blackmun, concurring, differed with the plurality over the standard of review of contributions, but his view of the importance of contributions and their right to protection was based on the individualist analysis of pooling and amplifying the resources of each separate voter.118 The dissenters objected only to the jurisdictional decision.119 Thus, California Medical Association v. FEC must be read as a reaffirmation of the one-dimensional, sum-of-its-parts view of political association. It focused only on the speech rights of the contributor, rather than on the unique functions and the rights of the recipient associations.120

Election and campaign statutes generally follow this individualist model. Barriers to individual entry in primary campaigns are rel-

118. Id. at 203 (Blackmun, J., concurring).
119. Id. at 204, 205-09 (Stewart, J., dissenting, joined by Burger, C.J., Powell, Rehnquist, J.J.). Of the dissenters, all but Chief Justice Burger had joined in the Court's approval of contribution limitations in Buckley, 424 U.S. at 5, 290.
120. This individualist view has also affected such decisions as Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), upholding the fairness doctrine. Under the fairness doctrine, the FCC reviewed the even-handedness of the broadcast treatment of controversial issues. A corporate approach would have deferred to the importance of the broadcasters' role in steering public discussion and in protecting the public against the government, of which the FCC is a part. Had it taken that kind of corporate approach, it would have treated regulation by a government agency as the greater evil. Instead, it ignored these aggregate issues, concluding:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensor.

Id. at 390 (citations omitted).

The Court appeared to have rejected the individualist model in other first amendment decisions involving freedom of the press. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). Both of these cases are premised on the institutional risks to the press; this change in approach is developed at length in Bezanson, The New Free Press Guarantee, 63 VA. L. REV. 731 (1977). But the philosophy of those cases has not yet reached those areas of the political sphere where they might conflict with and be used to invalidate legislation, as in the primary or campaign finance areas. A more recent attempt to reverse this individualistic focus was laid in the area of presidential funding. The Republican National Committee sued to eliminate the restrictions on contributions to publicly funded presidential campaigns. They argued that the restrictions limited the proper role of the parties in the campaign and put challengers at a disadvantage as well. Plaintiffs' Brief, Republican Nat'l Comm. v. FEC, 616 F.2d 1 (2d Cir. 1980), at 23-29, 42-45. Public funding, however, has very different consequences than limitations on fundraising; depending on the level of funding and the formula for allowing it, public funding can neutralize some of the inequality among contending campaigns. See generally G. Jacobson, supra note 7. The 1980 election made clear that challengers can do quite well on that level. Thus presidential campaign funding may not have posed the most serious problems with the individual perspective. In any event, the Supreme Court affirmed the lower court's denial of relief, 445 U.S. 955 (1980), and denied certiorari, 445 U.S. 965 (1980).
atatively low.\textsuperscript{121} Organizations often are prohibited from spending funds on behalf of a candidate in the primary,\textsuperscript{122} are bound by primary election results,\textsuperscript{123} and are required to report their expenditures in the general election campaign.\textsuperscript{124} Aggregations of economic resources are restricted as a result of the new campaign finance laws\textsuperscript{128} and, in the case of presidential elections, by exclusive public funding.\textsuperscript{126}

This individualist view, however, makes the parties transparent—only their membership is visible. If the parties have a role to play in altering or illuminating the political landscape, a focus on its parts cannot suffice.

II. THE EXPRESSIVE FUNCTIONS OF PARTIES

Coexisting uneasily with the individualist focus of \textit{Buckley} and its progenitors is a corporate focus that has crept into some of the ballot access cases. In \textit{Storer v. Brown},\textsuperscript{127} the Supreme Court recognized the importance of avoiding “splintered parties and unrestrained factionalism [that might] do significant damage to the fabric of government.”\textsuperscript{128} Healthy parties and healthy factions are not necessarily contradictions as the Court implied.\textsuperscript{129} Yet, the Court in \textit{Storer} appears to have been reiterating the classic support for a party system and the unity that parties can foster.

A corporate approach also surfaced in the delegate apportionment cases. In deciding the challenges to the way that delegates were allocated to the national party conventions, the appellate courts in \textit{Ripon Society v. National Republican Party}\textsuperscript{130} and \textit{Seergy v. Kings County Republican County Committee}\textsuperscript{131} concluded that parties had a first amendment right to pursue two competing goals: to

\begin{footnotesize}
\begin{enumerate}
\item No requirement other than a filing fee and declaration of intention is required in \textsc{Del. Code Ann.} tit. 15, §§ 3103, 3106 (1981); \textsc{Minn. Stat. Ann.} §§ 204B.03, .06 (West Supp. 1982); \textsc{Tex. Elect. Code Ann.} art. 13.08, .12 (Vernon Supp. 1982-1983); \textsc{W. Va. Code} §§ 3-5-7, -8 (1979).
\item See, e.g., \textsc{N.Y. Elec. Law} § 2-126 (McKinney 1978).
\item See, e.g., \textsc{N.Y. Elec. Law} § 6-110 (McKinney 1978).
\item See, e.g., 2 \textsc{U.S.C.} § 434 (Supp. IV 1980); \textsc{N.Y. Elec. Law} § 14-102 (McKinney 1978).
\item \textsc{2 U.S.C.} § 441a (1976).
\item \textsc{26 U.S.C.} §§ 9003, 9033 (1976).
\item 415 \textsc{U.S.} 724 (1974).
\item Id. at 736.
\item \textit{See infra} text accompanying notes 252-54, 272, 300.
\item 525 \textsc{F.2d} 567 (D.C. Cir. 1975) (en bane), \textit{cert. denied}, 424 \textsc{U.S.} 933 (1976).
\item 459 \textsc{F.2d} 308 (2d Cir. 1972).
\end{enumerate}
\end{footnotesize}
win, which includes building, organizing, reflecting, encouraging, and rewarding party sentiment and to exercise ideological choice, which affects chances for success and reflects the parties' raison d'etre. Identification of the legitimate objectives of political parties was crucial to these appellate courts in deciding whether to let the parties alone in structuring representation at their national conventions, and to the Supreme Court in deciding how the ballot might be restricted.

Where, however, do the policies of unity, promotion, and choice that the courts identified come from? If from the first amendment, how? If they are supported by constitutional history and the views of the Framers, then Storer, Ripon, and Seergy do not make that clear. In search of justification for those policies we return to the clauses of the first amendment: speech, assembly, and petition. These are, in part, atomistic rights—everyone has them. There are three major justifications: first, because government cannot be allowed to select speakers, nominees, or election victors;132 second, because subjection to democratic decisionmaking without participation in the process is unjust;133 and third, because of the inability to predict the course and validity of ideas—from anyone's mouth may come important truths.134 Yet these are also corporate rights dominated by the rights to assemble, associate, and elect by majority vote. Looking at political organizations from a functional perspective yields a very different version of their rights and duties and a basis for evaluating the specific claims of the political organizations we call parties. The question, then, is what purpose do political organizations fulfill? For reasons that will be explored, both the competition for victory and the effort to state an ideological position are central to the functions of political organizations.

The sections that follow elaborate on party functions, basing the discussion on a structural analysis of the expression that is protected by the first amendment. The discussion also relates the descriptions of party functions employed by political scientists to those requirements of the first amendment.

134. See Canby, Programming in Response to the Community: The Broadcast Consumer and the First Amendment, 55 Tex. L. Rev. 67 (1976); Wellington, supra note 133, at 1133-36.
A. Privacy and the Creative Functions

The extent to which parties have a right to private decisionmaking is crucial in all areas: delegate selection, ballot structure, and primary laws—each of which requires a definition of party membership—and disclosure laws that reveal financial support. In addition, primary laws preclude private forms of party decisionmaking, such as selecting a nominee by a delegate convention.

The issue of privacy has been burdened with the most deeply seated ambivalence. It has been obvious to commentators that it is necessary for people to join together at some stage to advance their political goals, and that to do so effectively, they must be able to exclude others. This necessity for exclusion served as the basis for one commentator's criticism of the Democratic Party's rules for its 1972 convention:

The rules require notice and an opportunity for party members to participate in all slate-making meetings in view of the fact that the stages at which choices are drastically narrowed are at least as important as the stage at which a final selection is made. Yet if groups of like mind on any party question other than the identity of a presidential candidate are to be able to organize themselves and thus bring their views to the point of serious debate within the party, they must be able to exclude from their deliberations spoilers of unlike mind.\(^{135}\)

It is certainly valid, as well as essential, that all points of view be taken into account. Ultimately, the greatest wisdom celebrated in this culture is to listen to all sides of any issue. Thus, while allowing people to sneak off by themselves may be justified, it also seems small-minded and insidious. In short, privacy for decisionmaking bodies is not a highly respected quality. This prevailing view has been reflected in the very rules of the Democratic Party.\(^{136}\) This same ambivalence toward party privacy has been true of the courts.


They have protected parties from crossovers, but not from state definition of membership; protected associations against disclosure, but not in the context of political contributions.

Because of the equivocation that exists in this area, it is necessary to probe the underpinnings of associational privacy. This might be done through an historical or a functional analysis. The participants in the adoption of the first amendment left evidence of support for association as a tool of democracy, but left no definition of what that entailed. Historical analysis leaves us, therefore, with the task of discerning functionally how best to realize that general goal.

Underlying the need for privacy are creative and promotive functions of political associations. These functions can be understood both psychologically and logistically. Psychologically, it is difficult for people to develop their own ideas in the context of immediate criticism and argument from others; the pressure is too strong. Jury studies confirm the general findings of research in group dynamics, which reflect the power of majority opinion, although not its invariable correctness. In a not-insignificant number of cases, under the special condition of the unanimity required, the minority convinces. As that minority decreases in size, however, its ability to maintain its confidence and adhere to its position declines markedly. Mutual support is important even for juries, who have been specially chosen and prepared by the trial process. For other groups with less access to accurate, relevant, and reliable information, with nothing comparable to voir dire to contain prejudice, the opportunity for private consultation is irreplaceable. Premature exposure may be deadly.

The logistical point is equally compelling. The caliber and reliability of majority decisionmaking is affected by the resources available.

ble to the group. For resources to be available they must first be developed and organized. Presentations without planning are likely to be mere babble, useless to all sides. This, in effect, requires that people of like mind be able to communicate to develop the case they intend to present. This point should be obvious from the experience of lawyers who devote their time and team effort to develop trial and negotiation strategy, but it is lost often in the haze of democratic theory. Unless initial prejudices are to be allowed to rule decisions, privacy must be maintained to develop plans to promote an idea. It is a tenet of systems analysis that to optimize an entire system it is often necessary to suboptimize the subsystems. In precisely the same sense, to optimize the quality of decisionmaking in a democracy, it is necessary to preserve undemocratic elements in the process. The sharing of contrary ideas, however worthy an ideal, is a very inefficient process when the goal is to build and test a particular hypothesis. In fact, contrary ideas appear only as noise and act as barriers. They are not useful or fruitful at this preliminary stage in decisionmaking. Thus the functionality of privacy varies with the degree of finality of the decisionmaking process.

These considerations require that party regulation incorporate thinking space and planning/promoting space—that they sanctify meaningful territory for the privacy of association. At some level, the law must recognize the right to exclude. At the level of organizations less inclusive than the two national parties, considerations of privacy for refinement of ideas are plainly appropriate. It does not necessarily follow that the law must recognize such a right at state or national party levels, or at the party level at all. Parties, it could be argued, are not the places where ideas are developed and need such care; the substance of many platform planks is no doubt conceived elsewhere. The policies of privacy seem to have a much murkier relationship to those political gargantua we call parties, where the activity is more in the nature of compromise and dilution, rather than creation of ideas. Even ideas about how to reconcile different interests and needs, however, require considerable creativity. Some ideas can only be developed at a party level. Moreover, the difficulty of line-drawing between entities suggests that the large associations be treated in the same manner as


144. But see 2 U.S.C. § 431(4) (Supp. IV 1980) (subjecting both small and large political committees to the reporting and disclosure provisions).
the small ones. Thus, the opportunity for private decisionmaking meetings remains significant at the party level.

B. **Aggregation**

A number of cases involving access to a place on the printed ballot\textsuperscript{146} focus on the need to bring the ballot down to a manageable size. The courts treat it as a compelling interest. Both conventions and primaries would satisfy that objective; but they would do so differently.

To understand the problem of making elections manageable, it is necessary first to explore constitutional history. The relevant history here is in the context of article II rather than the first amendment. As a rationale for the electoral college, this history does not present a specific intent which is binding in the context of the first amendment. Nevertheless the functions outlined by the founding generation in the context of presidential selection are central to the debate which must be carried out under the auspices of the first amendment.

Professor Ceaser\textsuperscript{146} suggests that the founding generation had five objectives when they instituted the electoral college as the process for selecting the president. The first was the control of ambition. The members of the Convention feared demagogues who would tout their own virtues. Knowing the limitations of public debate they sought to supplement it with a well-refined selection process. Second, they hoped to promote leadership. An election in the House of Representations or the selection of a president who did not have the support of a majority would substantially weaken the capacity of the holder of the office. Third, they sought the selection of a man of ability. They expected the electoral college to select what they called "continental characters" of which the nation had an ample supply at the close of the Revolution. They were overconfident in expecting, however, that the supply of such preeminent men would continue through other periods of history, and thus avoid the selection of relatively unpopular or little known presidents. Fourth, they sought to secure the legitimacy of succession to the presidency. And, finally, they sought a process which would facilitate choice and change of national policy. Again, they were overconfident that a popular will could be expressed in the selection of men on the basis of reputation

\textsuperscript{146} J. Ceaser, supra note 7, at 83-87.
without an election contest. The Constitution envisioned that those five functions would be performed for presidential elections by electors selected in reasonably small geographic areas so that they would be known to the people and could, in turn, make an appropriate selection for the presidency.

Assembling the support of a majority is crucial to providing the leadership, legitimacy, and public choice the founding generation sought. This is more difficult where the electorate is presented with a choice among candidates who represent only a minority of the electorate, or even more extreme, who are chosen by pluralities among such minorities. Thus one crucial function related to the election is to provide a way for various groups and candidates to coalesce and to compromise or bargain among themselves until choices emerge that more broadly reflect the electorate at large. Moreover, the difficulty of debating all issues which public officers might have to consider in the context of an election campaign requires some method to “refine and enlarge the public views,” as Madison put it.

The draftsmen of the Constitution in fact considered the type of electoral system modern legislation creates and they rejected it. They did not want a system based on individual candidate appeals to the public. Reputations should be “continental” to avoid factional or geographic candidates. They sought a way of aggregating preferences rather than dividing the nation. Yet without strong parties, starting a campaign must be based on joining many diverse organizations, such as single-issue or nonpartisan civic groups, as well as on webs of personal contacts. Without a unified organization among the different groups, the process of sharing and passing information becomes quite unreliable, and undermines clear communication to the general public. A great deal is left to the media plus “coffees” and handshakes. This results in overload—the public alone cannot handle the

147. Note that these goals are partly encompassed in the descriptive categories used by political scientists to articulate the methods in which parties function. See J. Kirkpatrick, supra note 7, at 5.

148. U.S. Const. art. II, § 1, cls. 1, 2, 3.

149. The Constitution required that in an election where a single candidate does not win the support of a majority of electors, the House of Representatives selects the president. U.S. Const. art. II, § 1, cls. 1, 2. This procedure was instituted, at the risk of compromising the independence of the executive, to prevent the election of a minority president. See J. Cesar, supra note 7, at 64-65.

whole political job. Similarly, long ballots and extensive primaries present more for resolution than the public, unaided, can handle, and provide no remedy for the fragmentation of perspectives presented to the public.\textsuperscript{151} Thus, disaggregation of the public complicates the performance of the other functions identified above—selection of dedicated and able leaders.

The parties’ contribution to the aggregation of public views might be trivial for first amendment purposes if their roles were as fungible as the Court believes contributions to be.\textsuperscript{152} But if parties perform a distinctive aggregative function, then the sacrifice of first amendment values may be much more significant.

Jefferson perceived both the risk that a nonpartisan system would favor the wealthy and notorious and the need for parties to incorporate the interests of others.\textsuperscript{153} Van Buren drove this point home several years later in urging a two-party system.\textsuperscript{154} He recognized that the public’s electoral task was too complex without parties, and saw that the advantage which the nonpartisan or one-party system provided to the old Federalists was a direct result of this overload. Shortly before his death, he posed the question of why the caucus system had been so much more important to the success of the Democrats than of the Federalists and provided this strikingly modern answer:

\begin{quote}
Constructed principally of a network of special interests,—almost all of them looking to Government for encouragement of some sort,—the feelings and opinions of its members spontaneously point in the same direction, and when those interests are thought in danger, or new inducements are held out for their advancement, notice of the apprehended assault or promised encouragement is circulated through their ranks with a facility always supplied by the sharpened wit of cupidty.\textsuperscript{155}
\end{quote}

Jefferson and Van Buren realized that the parties give a voice to those parts of the population which would be poorly represented in a nonpartisan or one-party system by aggregating the needs, views, and perspectives of those who would otherwise be isolated or

\textsuperscript{151} See F. Dallinger, supra note 21, at 148-49 (urging short ballots).
\textsuperscript{152} See supra text accompanying notes 88-89.
\textsuperscript{153} See J. Caesar, supra note 7, at 106-07.
\textsuperscript{154} See id. at 126, 131-32.
\textsuperscript{155} Martin Van Buren, Inquiry into the Origin and Course of Political Parties in the United States 6, 226 (1867).
unrepresented. Van Buren had the vision to see that the survival of opposing parties was essential to his democratic purposes. A single party would degenerate into an aristocratic, nonpartisan system. To this, Van Buren added a concern for controlling the ambition of public men. Political associations can address those concerns by conducting a more searching examination of a candidate's record than the public is capable of doing, and by giving a more organized presentation of the issues than the candidates could give individually. It is true that such organizations suffer from myopias of their own—preferring traditional formulas over new ideas. The major parties have adapted well to, but seldom kindled, political changes. Indeed, keeping contests within mainstream traditions has been their strength. Conversely, the strength of third parties has been the reasonably well-orchestrated challenge of new ideas. For major and minor parties alike, however, there are economies of scale in combined presentations driving home consistent approaches.

Thus, parties aggregate the needs of their members in two different ways: They permit the give and take necessary for the emergence of a common approach, and they support a more effective presentation of that common view.

That parties can do those jobs does not establish that the first amendment guarantees them that right. And that the Convention had several functions in mind for the electoral college to which the parties have fallen heir does not establish that they retain a constitutional right to exercise those functions. There may be ways to aggregate the diverse needs of the public without the mediation of political associations. But there is no good way to discuss such issues without a right to associate. Primary laws provide a counting mechanism, but also create a discussion format in which candidates present the issues individually. Analytically, the distinction between the

156. The ability of parties to give voice to working-class Americans has made reform partly a matter of class as well as a matter of honesty. Thus, even Tammany Hall, which became a symbol of machine politics at its worst, was formed to destroy what were considered aristocratic Hamiltonian notions which seemed to threaten genuine democracy. See E. Costikyan, Behind Closed Doors 22 (1966). See also Schumach, Book Finds "Boss" Tweed a Much Maligned Character, N.Y. Times, Oct. 17, 1976, § 1, at 1, col. 2.
157. See J. Ceaser, supra note 7, at 135-36.
158. The transition of power to the parties was the result of the manipulations of Hamilton and Madison. See Cunningham, supra note 22, at 241; J. Charles, supra note 22, at 84. Several later presidents, notably Jefferson and Van Buren, gave the party system its permanent shape and its ideological underpinnings. J. Ceaser, supra note 7, at 88-169.

http://scholarlycommons.law.hofstra.edu/hlr/vol11/iss1/4
counting mechanism and the discussion format is important. In devising nomination and counting mechanisms we are under no injunction from the Constitution except those surrounding the right to vote. The objectives that the founders incorporated into their plan, as outlined by Caesar, may be persuasive but they have not bound us. In our handling of political discussion and association, however, they did bind us in 1791. The people have the constitutional right to express their views on political questions, including the competence and appropriateness of candidates, and association is necessary to that end. Associations, in turn, affect substantially the mix of views of the public. Government has no right to alter or deflect that mix in the teeth of the first amendment.

C. Choice Among Candidates and Control of Incentives

In addition to informing public discussion, the parties also have served the public as objects of reliance. The conventions are crucial to the issue of public reliance. Without conventions people may rely on a party label or selection at a primary, but not on the benefits gained from a decisionmaking body that meets, discusses, and hammers out a common plan. Cousins v. Wigoda, showing some respect for the convention, and Buckley v. Valeo, presiding over the diminution of the party's role in the campaign through a complex set of financial provisions, reflect the Supreme Court's ambivalence with respect to the party's role as an organized entity in which the people may place their trust. Again, to satisfy the purposes of the first amendment, it is necessary to explore both history and function.

The constitutional draftsmen went to considerable lengths to control the behavior and incentives of lawmakers. Although it is rea-

159. This distinction parallels the distinction in Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981), between the right of the state to provide procedure and its right to enforce that procedure on the party when it conflicts with party rules.

160. See C. Black, Structure and Relationship in Constitutional Law 41-51 (1969), who argues that freedom of speech on national issues is protected against state infringement as a logical derivative of our federal form of government and, therefore, is logically and philosophically antecedent to the first amendment. This reasoning can be extended to associational rights as well, as a derivative of democratic government, and an argument can be made that the Constitution's provisions on elections are designed to protect these rights.

161. I have argued elsewhere that government has the duty to choose only those means of involvement in the electoral process which proportionally reflect the various ideological perspectives current among the electorate. Gottlieb, supra note 132, at 224-25.


reasonable to suppose that the prospect of being defeated in office will create a substantial incentive for public officers to conform their behavior to the best interests of the public, or at least to what the public perceives to be its best interests, the draftsmen of the Constitution went considerably further. Treating the electorate as an unwieldy mechanism, they wrote a number of prohibitions into the main body of the document even before the debate over the addition of the Bill of Rights.\textsuperscript{164} They expected some restraint because the legislators themselves would have to endure the full effect of the legislation they passed.\textsuperscript{165} And they plainly expected checks and balances to come not only from the structure of the Constitution they were creating but from the federal system on which it was superimposed.

Similarly, they did not assume that democratic elections would automatically result in the selection of the most qualified personnel. They arranged to have senators selected by state legislatures.\textsuperscript{166} As discussed above,\textsuperscript{167} they expected the electoral college to control ambition, promote leadership, and select men of ability. By such devices, the Constitution's architects designed a mandate to "refine and enlarge" the public views.\textsuperscript{168} They recognized that some means of focusing the energies and incentives of candidates on the long-run needs of the country are quite necessary.

Political parties ultimately came to play a part both in choosing and controlling leaders. It seems unlikely that the founders envisioned parties as agents, relied upon by the public to choose, rather than as speakers who were welcome only to argue. As the parties developed, however, voters in large numbers came to rely on the parties' choices.\textsuperscript{169} In general elections few exercise independent judgment beyond the most highly publicized races. The further one moves down the ballot, the more difficult it is for voters to make selections without reliance on the party label. One can argue that the parties should be further excluded from the ballot and a role in selection. But it is hard to envision politics without someone playing that role—without parties, one can expect that someone else will

\textsuperscript{164} See, e.g., U.S. Const. art. I, § 9; I. Brant, supra note 27, at 11-22.
\textsuperscript{166} U.S. Const. art. I, § 3, cl. 1.
\textsuperscript{167} See supra text accompanying notes 146-48.
\textsuperscript{168} The Federalist No. 10, at 81-82 (J. Madison) (C. Rossiter ed. 1961).
perform that job.

The same caveat that held for aggregative functions\textsuperscript{170} applies here: The functions of control of incentives and selection of able leaders may be performed in some way other than through parties, but the discussion which is essential to them cannot be denied to political association. That may include discussion of whether there is an agent in the body politic which is capable of assisting in those functions and in whom the public’s confidence can justly be placed. Moreover discussion of choice and direction cannot, in harmony with freedom of expression, be regulated in ways which do not accurately reflect the strengths of various ideological perspectives current among the electorate.\textsuperscript{171} As long as the people’s ability to choose is respected, however, and as long as people are permitted to associate and organize themselves as they find best facilitates the political expression of their concerns, it is not constitutionally necessary to give the parties a formal place in the proceedings. It may turn out that the parties in fact are effective and appropriate mechanisms for the formal election process. That is partly a prudential issue to be informed by our understanding of their effects, and partly a constitutional issue governed by the right to vote\textsuperscript{172} and is not an issue to be controlled by our understanding of the first amendment. It should be clear, however, that the rights of public discussion and association and the objectives of a responsible selection system may support rather than conflict with each other.

D. Delegation

Functions like controlling the incentives of public officers can only be acceptable if the political organization is structured as a delegate assembly, that is, that the public willingly delegates decisionmaking authority to it. Without a grant of public confidence, interposition of the party between the electorate and the government can only be seen as illegitimate.

In this respect, political parties are fundamentally different from other nongovernmental institutions which specialize in expres-

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\textsuperscript{170} See supra text accompanying notes 158-61.
\textsuperscript{171} While reasonable territorial, as opposed to proportional, schemes are certainly acceptable, perhaps preferable for general elections, the requirement of a decent reflection of public sentiment, see supra note 161, does limit the range of appropriate systems in the sphere of discussion. For descriptions of the range of territorial and proportional formulas, see D. Rae, \textit{The Political Consequences of Electoral Laws} (rev. ed. 1971).
\textsuperscript{172} See generally infra notes 180-85 and accompanying text.
\end{flushleft}
sion and persuasion and therefore require the protections of the first amendment. Pressure groups are by definition minority organizations. Media are not majoritarian—although mass media appeal to large numbers, they necessarily explore issues before the public can reach conclusions. The smaller journals and periodicals deliberately explore specialized audiences. To hold them responsible for pleasing the electorate would be to reduce their freedom. Parties are different; we do hold them responsible. We may need to hold them responsible.

The ability and propriety of the parties functioning as delegates of the public depends, in turn, on the reasonableness of the opportunity of the public to shift its allegiance from old to new parties, or on the ability of the public to control the party itself. The latter has significant consequences. State courts have intervened vigorously in pursuit of public control of parties, finding the function of internal democracy most congenial.

Although primaries and proportional representation for convention delegates may promote maximum membership representation, federal courts have shown sensitivity to the existence of competing values, identified in the cases as ideological and tactical goals, but both paralleling the functions identified above. As the Court recognized in Cousins v. Wigoda, the party's composition and its public stance may be inseparable and the party may have to define one in order to define the other.

These functions of the political parties are required for the benefit of the general public in order that it may select more wisely at the general election. That public requires both the parties' pursuit of victory and pursuit of ideological purity. It requires that the party create, refine, and promote ideas as well as aggregate the different perspectives of large segments of the population, monitor the activities of public office holders, and represent the public to achieve what the public finds difficult to accomplish directly. This view of the functions of the political parties is in some ways analogous to the idea that free speech rests on the public's right to know—parties exist and have rights because the people need them. It does not fol-

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174. See supra text accompanying notes 51-63. This approach invites major conflicts between the parties' requirements for privacy and their delegate functions.

175. See supra notes 76-80, 130-31 and accompanying text.

176. 419 U.S. at 489-90.

low, however, from the realization that the public's needs justify freedom that the public's needs can be turned into a principle of regulation. Just as the public's right to know would be compromised by any system which allowed the public to censor information in advance, so is the public's need for assistance in the election process compromised by insisting on majoritarianism at every stage in the process.

The sections that follow explore major areas of regulation of political parties, and consider the relationship of the functions we have identified to the regulation undertaken.

III. CORRUPTION

The Court in *Buckley v. Valeo*\(^{178}\) relied on a rationale of preventing corruption or the appearance of corruption.\(^{179}\) This rationale may properly be based on the right to vote. The Constitution nowhere mentions a general right to vote. It provides a specific right to vote for senators,\(^{180}\) it assumes suffrage in providing for states to determine the manner of elections,\(^{181}\) and it requires equality.\(^{182}\) Presumably the guarantee of republican government\(^{183}\) guarantees some right to vote for state office. However created, the right to vote has long been treated as inherent in democratic government,\(^{184}\) and the Court concluded a century ago that the government has an inherent right to protect it.\(^{185}\)

Corruption disturbs the equality of the vote and infringes on the effectiveness of the ballot. While the basic political struggle is ideological and the public stands to gain or lose based upon policies which affect the electorate generally, the possibility of special advan-

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179. *Id.* at 25.
181. *Id.* at art. I, § 2, cl. 1, § 4, cl. 1.
182. *Id.* at amends. XIV, XV, XIX, XXIV, XXVI. The language of the ninth amendment is easily broad enough to encompass a similar requirement.
183. *Id.* at art. IV, § 4.
tages for individuals or groups is always present. These advantages undermine popular control of the political process, and cheapen democratic government. This problem has led the courts to accept restrictions on political parties. The Supreme Court took a rather extreme position when it offered to justify legislation on the basis of the "appearance of corruption," but the reality of corruption is bad enough. To come to grips with this rationale for regulation, we must spend some time probing the disease.

There are considerable opportunities for individual advantages in politics which compete with the advantages available from public spirit. The potential of bribery, intimidation, patronage, or other individualistic favors promises substantial individual rewards. The overall group impact is plainly less significant to many of the people who have such personal opportunities; and those larger interests, if they are considered, are discounted by the difficulty of making much of a difference. It is to the public's advantage to become well aware of these side deals and to try to prevent them to obtain a truer reflection among lawmakers of the public's policy choices and presumably overall social benefits which far exceed relatively trivial insider's profits. Without incurring public wrath, however, it is to the advantage of candidates and organizations to make whatever deals will strengthen their own political chances. The existence of political parties magnifies the impact of this kind of politics because it simplifies passing on an inheritance. Personal political organizations are often limited by the cult of their leader, whereas institutionalized structures can continue indefinitely.

Corruption, however, cannot be given unlimited weight. One must weigh the added benefits against the costs of eliminating the last vestige of corruption. As in the Red scare cases, it is destructive and improper to weigh a feared evil in its entirety against only specific injuries to free speech. Those simply are not compa-

187. The nature of the temptation for corruption is perhaps best illustrated in game theory by the mixed strategy games, in which substantial general benefits from cooperation conflict with even larger individual payoffs from antisocial behavior. See T. Schelling, The Strategy of Conflict 213-14 (1960).
188. Contrast this with the founders' hope that legislators would have a community of interests with their constituents. See The Federalist, supra note 165.
189. See Banfield, Corruption as a Feature of Governmental Organization, 18 J. L. & Econ. 587, 588-91 (1975).
190. E.g., American Communications Ass'n v. Douds, 339 U.S. 382 (1950).
rable weights in the scales. It adds insult to injury to focus on the appearance of corruption\textsuperscript{192}—are we to be governed by rumor, mob psychology and common errors? Surely the first amendment must be worth more than that.

The crucial problem is that a number of approaches to the problems of corruption and personal influence have been tried without success. This failure is crucial because under any theory of the first amendment, the problems of unrestrained partisan organization can undermine democratic governments. Perhaps, as we will explore in the next section, the most effective method was the original one.

IV. ELECTION LAWS AND THE EXPRESSIVE FUNCTION OF POLITICAL ORGANIZATION

Before turning to conventions and to the primary laws which largely eliminated them, the succeeding sections will develop the major historic alternatives. The objective in these preliminary sections is to lay a groundwork for considering both persisting problems of corruption which have led courts to accept limitations on the right of association, and less restrictive means of eliminating them against which primary election laws must be measured.

A. The First Hundred Years—The Checks-and-Balances Approach

The convention delegates in 1787 were well aware of the ways in which partisanship could undermine democracy\textsuperscript{193} and they adopted a strategy—the creation of competing sources of power. They enshrined the theory of checks and balances and the division and separation of powers in the Constitution itself. Political machines, when they have been destroyed, have often been bested either by factional splits that allowed some insurgent group to weaken the party at its center or by attacks from outside organizations uncontrollable by the machine. Reformers have included state attorneys general, U.S. Attorneys and a bar association, as in the case of the Tweed ring.\textsuperscript{194} Sometimes the challenge has been leveled by a third party such as the fusion parties in New York City.\textsuperscript{195} Assaults have

\textsuperscript{192} See Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).
come from forces in separate geographical constituencies in control, for example, of the White House or the state house, which challenged local leaders in court or in legislature, or redirected patronage to other organizations.196

As it turned out, political parties themselves became the major check and balance. It would be more than a century before a two-party system would be legally established. Until then, the vote was accomplished by means of a box into which the voter put slips of paper with names of candidates. In this system there was no issue of qualifying for the ballot or of designating positions on the ballot. The parties printed their own ballots and the voter could use that printed ballot if he chose to do so. Third parties and major parties were legally on a par and could print and supply ballots without legal restriction.

The organization of new parties played a major role in that first century.197 Jefferson and Madison used that device to oust the Federalists in 1800. Martin Van Buren built a new party around Andrew Jackson. The issue of slavery was not defined for American politics by the Democrats and the Whigs, which were the major pre-Civil War parties but were split down the middle by the issue.198 Instead, the Free Soilers and Republicans organized around this issue.199 Post-Civil War parties were much more stable,200 but the Populists had a major impact nonetheless.201

The period was not without its problems. The public visibility of the paper ballot, as voters carried it to and placed it in the ballot box, invited both bribery and intimidation. Goon squads and varieties of political fraud became major scourges of American politics. A still common, but strikingly racist, explanation of these problems links the extent of immigration both to ballot box fraud and to the rise of political machines.202 As a result, the parties remain tarred by the brush of nineteenth century ethnic politics. Evidence now shows that ballot box fraud was as prevalent in the countryside as in the cities despite marked differences in the period and heritage of their

196. See A. Steinberg, supra note 14, at 8-9, 84-85.
198. Id. at 36-38.
199. Id. at 36-38, 41.
200. Id. at 48-49.
201. Id. at 82-85. See generally M. Stedman & S. Stedman, Discontent at the Polls 12-21 (1950).
202. See F. Dallinger, supra note 21, at 96, 99; A. Ranney, supra note 13, at 156-57.
settlements. And machines like Tammany Hall dated back to the election of 1800. Indeed, conservative Whigs charged tyranny whenever an itinerant newspaper editor organized a town meeting. It is not at all easy to explain the different perceptions of the behavior of late nineteenth century parties, swelled by the great Eastern and Southern European immigrations, from the perceptions of early nineteenth century patronage, except on a class or racial basis. The dispersion of abuses in time, culture and geography weakens the link between political corruption and immigrant politics.

The open ballot, the debilitating aftermath of the Civil War and the boom-and-bust economy seem much more relevant in explaining the history of nineteenth century political abuse. In that environment, what the parties accomplished is significant, rather than how corrupt they became, as is the accuracy of the founders' faith in the advantages of a free and open political system. Also significant for our purposes is the fact that this checks-and-balances approach underscored, rather than subordinated, the political functions of the parties. The problem of corruption, however, would soon spawn considerable legal regulation in which the parties' creative, aggregative and selective functions would be subordinated to its delegate function.

B. Regulation of Party Meetings

The first stage in the regulation of political parties involved the conduct of party meetings. In some areas, nineteenth century parties supervised a balloting process among their members for delegates to caucuses or conventions. In others, open meetings of the parties' followers were held. Both systems were tarnished by physical

204. See E. Roseboom, A History of Presidential Elections 41-42 (1957); A. Steinberg, supra note 14, at 3; Cunningham, supra note 22, at 250.
205. See Yeoman's Gazette (Concord, Mass.), Mar. 11, 1837 at 3, col. 2; id., Mar. 12, 1836 at 3, col. 1; 5 Journals of Ralph Waldo Emerson 1820-1872, at 76 (E.W. Emerson & W.E. Forbes, eds. 1910) (referring to the editor of the Democratic Concord Freeman as "the dictator of our rural Jacobins").
207. See generally C. Merriam & L. Overacker, supra note 65, at 1-22 (discussing early legislative regulation of party meetings).
208. See F. Dallinger, supra note 21, at 53-56.
violence and dishonest procedures.\textsuperscript{209} The principal judicial headache in this period was the holding of rival meetings, caucuses or conventions, and the presentation of multiple tickets per party at the general elections.\textsuperscript{210} In some cases, a group or club simply met and claimed a place on the ballot.\textsuperscript{211} Judicial intervention in matters of such disharmony was not always successful.\textsuperscript{212}

Some rather basic questions of parliamentary procedures also came under early judicial scrutiny,\textsuperscript{213} including the chairman’s duty to honor calls for a ballot,\textsuperscript{214} the physical strength of keepers of the ballot box,\textsuperscript{215} problems with lock-outs,\textsuperscript{216} and problems of notice.\textsuperscript{217} Difficulties with ballots,\textsuperscript{218} notice,\textsuperscript{219} quorums,\textsuperscript{220} authority of party

\begin{itemize}
  \item \textsuperscript{209} Id. at 96-98, 121-26.
  \item \textsuperscript{210} See, e.g., McDonald v. Hinton, 114 Cal. 484, 46 P. 870 (1896); People ex rel. Eaton v. District Court, 18 Colo. 26, 31 P. 339 (1892); Sims v. Daniels, 57 Kan. 352, 46 P. 952 (1896); Shields v. Jacob, 88 Mich. 164, 50 N.W. 105 (1891); Manston v. McIntosh, 58 Minn. 525, 60 N.W. 672 (1894); State ex rel. O’Malley v. Le Sueur, 103 Minn. 253, 15 S.W. 539 (1891); State ex rel. Pigott v. Benton, 13 Mont. 306, 34 P. 301 (1893); Phelps v. Piper, 48 Neb. 724, 67 N.W. 755 (1896); State ex rel. Sturdevant v. Allen, 43 Neb. 651, 62 N.W. 35 (1895); In re Redmond, 5 Misc. 369, 25 N.Y.S. 381 (Sup. Ct. 1893); State ex rel. Bloomfield v. Weir, 5 Wash. 82, 31 P. 417 (1892); Mareum v. Ballot Comm’rs, 42 W. Va. 263, 26 S.E. 281 (1896).
  \item \textsuperscript{211} E.g., Fields v. Osborne, 60 Conn. 544, 21 A. 1070 (1891); State ex rel. Russell v. Tooker, 18 Mont. 540, 46 P. 530 (1896).
  \item \textsuperscript{212} In re Pollard, 25 N.Y.S. 385 (Sup. Ct. 1893).
  \item \textsuperscript{213} See Beck v. Board of Election Comm’rs, 103 Mich. 192, 61 N.W. 346 (1894) (rejecting a challenge to a proxy and holding invalid an election by lot in case of a tie); Phillips v. Gallagher, 73 Minn. 528, 76 N.W. 285 (1898) (allowing convention to proceed with second ballot); Manston v. McIntosh, 58 Minn. 525, 60 N.W. 672 (1894) (allowing for “mass convention” with direct voting instead of delegate procedure). See generally McDonald v. Hinton, 114 Cal. 484, 487-90, 46 P. 870, 871-72 (1896) (Garouette, J., dissenting) (describing the problems courts confront when they attempt to resolve parliamentary issues).
  \item \textsuperscript{214} In re Broat, 6 Misc. 445, 542-53, 27 N.Y.S. 176, 181 (Sup. Ct. 1894).
  \item \textsuperscript{215} Id. at 454-55, 27 N.Y.S. at 182.
  \item \textsuperscript{216} In re Woodworth, 16 N.Y.S. 147, 150 (Sup. Ct. 1891), appeal dismissed, 19 N.Y.S. 525 (Sup. Ct. 1892).
  \item \textsuperscript{217} E.g., State ex rel. Russell v. Tooker, 18 Mont. 540, 46 P. 530 (1896); State ex rel. Metcalf v. Johnson, 18 Mont. 548, 46 P. 533 (1896); In re Woodworth, 16 N.Y.S. at 151.
  \item \textsuperscript{218} E.g., Baran v. Kelly, 119 N.J. Super. 567, 293 A.2d 189 (1972) (holding roll-call vote is appropriate means of determining whether ballot for election should be open or secret); In re Atlantic County Bd. of Elections, 117 N.J. Super. 244, 284 A.2d 368 (1971) (holding failure to count absentee vote was improper); Bontempo v. Carey, 64 N.J. Super. 51, 165 A.2d 222 (1960) (invalidating “unit rule” and proxy voting); Atkins v. Monahan, 59 A.2d 793, 398 N.Y.S.2d 456 (3d Dept 1977) (holding proxy voting invalid).
  \item \textsuperscript{219} E.g., Cousins v. Wigoda, 419 U.S. 477 (1975); Riddell v. National Democratic Party, 344 F. Supp. 908, 914 (S.D. Miss. 1972), rev’d on other grounds, 508 F.2d 770 (5th Cir. 1975); Pirtle v. Dalmasso, 240 Ark. 1029, 403 S.W.2d 740 (1966); State ex rel. Robinson v. King, 86 N.M. 231, 522 P.2d 83 (1974); Mandate for Reform, supra note 135, at 32,912, 32,917.
  \item \textsuperscript{220} E.g., State ex rel. Taylor v. County Court, 154 W. Va. 558, 177 S.E.2d 349
committees,221 and qualifications for membership,222 persist to the present
day.223

While problems with party meetings, including conventions, set
the stage for judicial intervention in party governance, the courts’
analyses generally did not reach the constitutional
issues.224 Their
approach is no longer tenable. In Cousins v. Wigoda,225 the Supreme
Court, employing a constitutional analysis, overrode state primary
laws on behalf of party rules.226 In Marchioro v. Chaney,227 the
Court implied that forms of party organization may not be pre-
scribed by state legislation with regard to political issues, as opposed

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221. E.g., O'Brien v. Fuller, 93 N.H. 321, 39 A.2d 220 (1944); Wall v. Currie, 147 Tex.
127, 213 S.W.2d 816 (1948); King County Republican Cent. Comm. v. Republican State
Comm., 79 Wash. 2d 202, 484 P.2d 387 (1971); State ex rel. Goodwin v. County Court, 147

222. E.g., Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450

223. It is interesting to compare the treatment of these issues in the political context
with their treatment in the corporate and labor contexts. In the corporate context, statutes
define membership in voting entities, i.e., classes of stock, e.g., DEL. CODE ANN. tit. 8, §
151, (1974); set the conditions of exclusion from the voting entity, e.g., id. § 213; regulate
the weight of each vote, e.g., id. § 212; regulate the form of ballot, e.g., id. § 211(e); regulate
coalitions among voters via proxies, e.g., id. § 212(e); specify the rules for contesting election
results, e.g., id. §§ 225-227; require meetings with adequate notice, e.g., id. §§ 211, 222; allow
for stockholder inspection of corporate documents, e.g., id. § 220; and require filing of registra-
tion statements for additional disclosure, e.g., 15 U.S.C. §§ 77f, 77g, 77j, 77aa (1976).

The union context is similar. Membership is regulated by determination of the bargaining
unit. 29 U.S.C. § 159(b) (1976). Equality of voting power for members of the voting units is
required. Id. § 411(a)(1). Meetings, notice, rules of exclusion, and rules about candidacy are
also covered. Id. § 481(e). Finally the labor laws include considerable regulation of disclosure
to union members of information relevant to the campaigns. Id. §§ 414, 431(c), 481(c).

It is not clear that these rules work well in either context. In the corporate world, contests
for power are kept to a minimum, partly by the impact of the rules; proxy fights are extremely
expensive, rarely undertaken and only occasionally successful. Surely not all of the disadvan-
tages can be laid to these rules. The dispersion of voters and the apathy of the voting population
have much to do with the problem. See A. BERLE & G. MEANS, THE MODERN CORPO-
RATION AND PRIVATE PROPERTY 66-111, 244-52 (rev. ed. 1968); A. BERLE, JR., POWER
WITHOUT PROPERTY 105 (1959). However, regulation in the corporate area has some tremen-
dous advantages. The body of electors is quite clearly defined, and their interests may be fairly
gleaned from the contractual conditions of their stock.

Similarly in the union context, challenges to leadership are rare, seldom successful, often
dangerous and certainly expensive. The changes in the laws requiring stricter disclosure may
be helping challengers somewhat. But the overall picture of union management is not that of
an informed electorate and vigorous democracy. See generally S. LIPSET, M. TROW & J.
COLEMAN, UNION DEMOCRACY 201-390 (1956).

224. See cases cited supra notes 39-40.


226. Id. at 490-91.

to ministerial or administrative ones. Although the Court left room for compelling interests to outweigh the rights of political parties, it left uncertain what sort of regulation would satisfy the criterion by best purifying the political processes.

The constitutional problems posed by regulation of party meetings are rendered all the more intractable by the troublesome relationship between the remedies employed and the underlying goal of controlling corruption. Rules about openness or secrecy of meetings are problematic. Secrecy permits meetings to hide objectives and relationships. The Democratic Party rules that were the source of the litigation in Cousins v. Wigoda, would have made that much more difficult. Open meetings, however, are vulnerable to takeovers. To protect themselves against “swamping” by well-organized and not necessarily representative newcomers, clubs need minimum participational rules which the courts have elsewhere limited. To protect themselves against violence, clubs need privacy and a share of power. Rules requiring notice for meetings are problematic for the same reason. Notice rules are essential in well-functioning democratic groups, but may be counterproductive when the group is under considerable stress—knowledge is power both in the hands of the good guys and the bad guys. Whether that problem is avoided by substituting direct nominating primaries for meetings will be considered in the succeeding section. It does not follow, however, from the disruptive forces which beset associational meetings, that either primaries or open meetings will be improvements over whatever structure the associations choose.

Cousins offers a nice example of the competing functions served by meetings and primaries, and the difficulty of improving the purity or responsiveness of parties through either meetings or primaries. Cousins ruled in favor of delegates who had been selected at meetings, rather than primaries. Cousins did not do this by elevating notice and open meetings above primaries. The decision was based, instead, on deference to the party’s decisionmaking machinery and the

228. Id. at 197-99.
229. 419 U.S. at 479 n.l.
232. For a profitable comparison, note the experience of the grape strikers who were victims of repeated violence. See N.Y. Times, Aug. 20, 1973, at 10, col. 4 (Chavez starting a fast to affirm non-violence); id., Aug. 17, 1973, at 19, col. 3 (Chavez picked shot to death); id., Aug. 9, 1973, at 34 (Editorial).
party’s right to define and promote its public position.\textsuperscript{233} Facing the party, in turn, was a choice among dramatically different systems of nomination.

If it could be determined \textit{a priori} where the interests of a representative party lie, legal regulation to secure that objective would be unobjectionable. The problem is that the parties and their publics won’t lie still. To determine where the interests of a representative party lie, it is necessary to determine some facts and to choose between delegate and creative roles. The credentials committee hearing officer’s report in Cousins\textsuperscript{234} details slate-making by the regular party committees essentially in private, which contravened the rules. Moreover, the delegates ultimately selected in the primary did not meet the requirements for demographic dispersion set by the national commission and ratified by the 1972 convention\textsuperscript{235}—i.e., they did not mirror the population of Chicago in their composition with respect to race, age and sex. But unanswered by the report is the question of representation—the party’s delegate function. Why did the Daley faction \textit{win} the Illinois delegates in the primary? Was it because the voters wanted Daley’s men? If so, the new party rules frustrated them. Was it because Daley exercised corrupt control over the city of Chicago, squelching powerful potential opposition and building an organization out of ill-gotten gains? There was some evidence of the continued existence and vitality of a patronage system involving most of those who participated on party committees.\textsuperscript{236} And there was some evidence and discussion of electioneering activities on the day of the primary. Or were the people of Chicago merely apathetic, allowing a machine to continue its rule? Then perhaps the new rules were a savior.

Why, however, should the focus be specifically on the people of Chicago? Why aren’t the delegates from other parts of the country entitled to declare that they want to define a Democratic Party free of deals with Daley because that is a political decision the rest of the country wants? Would clearer notice merely have allowed an entrenched organization to take advantage of its terms against unorganized opposition? Thus the rules questions were entangled with the question of the party’s ability to decide whether it wanted to shape its agenda and policies with the Daley forces or without them.

\begin{itemize}
\item \textsuperscript{233} 419 U.S. at 489-91.
\item \textsuperscript{234}  App. C to Petition for Certiorari, Cousins v. Wigoda, 419 U.S. 477 (1975).
\item \textsuperscript{235}  419 U.S. at 479 n.1.
\item \textsuperscript{236}  \textit{See} Elrod v. Burns, 427 U.S. 347, 353-73 (1976).
\end{itemize}
Some mechanism for dealing with that question is critical in the performance of the creative and promotive functions of parties.

Such a decision by a membership organization, however, could only be justified by a delegation from the membership pursuant to fair democratic procedures. The delegate functions of political parties are poorly served if the membership cannot work its will. The organizations that now conduct primary campaigns are not membership organizations. Perhaps party supporters are entitled to endorse a nonmembership structure. They are certainly entitled, however, to create a structure which is democratically accountable to them and in doing so, to the protection of law to effectuate that purpose. That in turn justifies requiring that parties adopt either a delegate or direct primary or an open meeting process that reasonably guarantees accountability of the leadership to the members. It was that choice which the Democratic Party tried to strengthen in the rules adopted for the 1972 Convention but which has been undermined by the subsequent rigidification in state primary laws.237

C. Primaries

1. The Expressive Functions.—The major changes in the structure of political relationships date from about the turn of the century. On the one hand, with the change to unified printed ballots the states largely eliminated third parties through ballot access requirements. On the other hand, through the primaries they largely dismantled the major parties.238 William Crotty239 and others argue in their favor that primaries encourage political participation by newly mobilized groups. The primaries also have other consequences, however. We are used to thinking of the primaries, as a single integrated system. Yet many changes of the laws have been involved in their formation. Among those changes, public supervision of the balloting process alone may have worked a significant improvement in the operation of political organization, particularly at the local level.240

238. V.O. Key, Jr., supra note 7, at 169-96 (1956). Contemporary opposition to direct primaries focused on problems of cost, demagoguery, burdens on conscientious voters, minority control, and resulting perceived problems of quality and accountability. For a compendium of views for and against direct primaries shortly after the great wave of legislation, see Is the Direct Primary System Sound?, 5 CONG. DIG. 265-80, 282-84 (1926); The Injury of the Direct Primary System, MANUFACTURERS RECORD, July 8, 1926, at 55-56.
239. Crotty, supra note 237, at 17-19.
240. See generally C. Merriam & L. Overacker, supra note 65, at 23-30. Compare J.
The primary laws, however, took a number of additional steps.

There are four aspects of the way the primaries have been structured that affect party functions. Originally primaries were optional. Among the first accompaniments of the change to a mandatory primary were regulations concerning the definition of party officers and the selection of convention delegates. These were designed to give the membership some control over the party machinery. To the extent that the party is a membership organization, this is arguably in aid of the party rather than in derogation of it. Most importantly, it helped eliminate the enormous confusion which resulted when competing party factions held conventions and claimed the party label on the ballot.

A second early aspect of legal regulation of parties was to define party membership without regard to party bylaws or decisions. The purpose of "the scheme is to permit the voters to construct the organization from the bottom upwards, instead of permitting leaders

HARRIS, Election Administration in the United States 15-17, 150-54, 315-22 (1934 & photo. reprint 1966) (describing abuses before the bulk of election law reform) with Converse, supra note 14 (calculating the impact of the changes in election law on voting patterns). Disputes among party factions pose special problems that are not always satisfactorily handled. See State ex rel. Ward v. Board of Supervisors of Elections, 186 La. 949, 173 So. 726 (1937) (entitling factions to participate in selection of poll watchers); Note, Election Administration in New York City: Pruning the Political Thicket, 84 YALE L.J. 61 (1974).


242. 1898 N.Y. Laws ch. 179 § 9(1). This statute was a step in the trend toward a general requirement of primaries. Although the laws of 1898 mandated that committeemen be elected through primaries, election of delegates still took place at conventions, and primaries remained optional for the nomination of candidates. See id. § 4(1), (2). Ultimately, this trend resulted in mandatory primaries for candidate nomination as well. N.Y. ELEC. LAW § 6-160 (McKinney 1978). See also People ex rel. Coffey v. Democratic Gen. Comm., 164 N.Y. 335, 441-43, 58 N.E. 124, 125-26 (1900) (requiring party officers to be elected at primaries).

243. 1911 N.Y. Laws ch. 891, § 37.

244. The recent demand that the delegates be selected in close proximity to the primaries or conventions tends to place the party organization, whose officers are often selected by the convention, in the hands of the candidates whose campaigns are in full swing, rather than the reverse. See generally Mandate for Reform, supra note 135; but see Delegate Selection Rules for the 1980 Democratic National Convention, Rules 2, 3, 10 and 17 (1978). This change, however, was initiated by party rules, and one cannot object, on associational freedom grounds, to their right to make that choice.

245. See supra text accompanying notes 210-23.

to construct it from the top downwards.” The definition of those entitled to vote in party primaries also may have helped to reduce corruption by reducing the power of party leaders. This legal definition of membership, however, is a mixed blessing. For the party may have an interest in defining qualifications for membership in order to clarify its public stance, or indeed to give it a chance to formulate one. Thus creative and promotive functions are compromised by mandatory open membership. Counting mechanisms such as run-offs and petition requirements could be instituted without reference to a membership organization to achieve many of the objectives of primaries. The problem created by the definition rules is not that they create access to an election mechanism but that they are used to take over specific political associations. These difficulties are justified in part, however, by the parties’ delegate role and mitigated, at least in the case of the major parties, by the improbability that, left to their own devices, they would impose any qualifications for membership beyond the registration system.

A third major and somewhat later development in the primary laws was the shift to the direct selection of the candidates and the elimination of conventions. More is at stake than the values of


avoiding factionalism articulated in *Storer v. Brown*, or victory, as articulated in *Ripon Society v. National Republican Party* and *Seergy v. Kings County Republican County Committee.* The issue is the party's ability to define a common viewpoint. The result of the direct primary nomination has been to diminish substantially the aggregative functions of parties. Conventions permit blending and compromising that primaries, even with run-offs, do not, because they leave out the common second choice of mutually antagonistic blocks of voters. This is particularly true of primaries in which several candidates compete. To deal with the divisive implications of primaries, some states, like California and Wisconsin, have turned to unofficial conventions. But in others, primaries continue to divide the parties.

It is plain that the primary system aggregates public views quite

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imperfectly. It pyramids power on the shoulders of small minorities of the electorate by encouraging candidates to take their case directly to the voters. Candidates closely allied in ideological position thus split the electorate among them and leave the field to a candidate who may be truly acceptable to only a small percentage of the voters.\(^2\)

The job of identifying candidates most acceptable to a majority of the parties' members could be performed via devices other than conventions. Such alternatives might allow voters, for example, to express preferences, second choices, etc.\(^2\) This, however, would accomplish nothing more than what the parties have already done by convention.

Disaggregation is a problem on another level as well. It is difficult to go into any primary articulating more than a few positions on salient issues and it is difficult to compromise, aggregate, or otherwise take account of unarticulated issues or competing blocks of voters. Conventions allow considerably more diversity and provide a forum for reconciling those differences.

In addition to bypassing the parties as the engine of aggregating member preferences, the selection of candidates at primaries also undermines the creative and promotive functions of the parties because they entirely bypass the members and officers whose commitment is to a common and cooperative strategy.\(^2\) Unable to get together to work out and express a common judgment about the association's proper standard-bearer and strategy without creating a new organi-

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*254. See generally V.O. Key, Jr., *supra* note 7, at 133-68. The importance of conventions to party unity is underscored by New York's experience with its challenge primary, N.Y. ELEC. LAW § 6-104(2) (McKinney 1978), which allows relatively unified third parties to avoid the primary process and play an unusually vigorous part in state politics. See D. Mazmanian, *supra* note 197, at 115-32.

255. See C. Merriam & L. Overacker, *supra* note 65, at 83-85. Several states have tried preferential voting systems, *id.*, but most of the systems dropped the low candidates, which probably does not perform the coalition building function we have been discussing as well as do systems which add votes at different ranks until a majority is satisfied. See Gottlieb, *supra* note 132, at 246-47.

256. See J. Kirkpatrick, *supra* note 7, at 5-8. Compare the founders' concern with demagoguery, *supra* text accompanying notes 146-47, with William Guthrie's concern early this century:

In my judgment, the primary system tends to promote the nomination of self-advertisers, demagogues and wire-pullers by irresponsible minorities, groups, factions, cabals or secret societies, generally composed of persons acting mostly in the dark and dominated and controlled by leaders who cannot be held to any accountability, however much they may prostitute the political power they exercise.

zation to replace the one taken over by state law, the membership is denied not only its power to nominate but its freedom to associate in aid of speech: This interference with the expressive functions of parties might seem mitigated in such contests as those for statewide office in New York, which place the primary after a convention and make entry into the primary dependent on significant support in the convention, except for the fact that New York also prohibits party expenditures in support of a candidate in the primary. This prohibition of expression is the fourth aspect of primaries that infringes on associational freedom. Prior to a nominating convention, the use of party resources to support any faction in its bid for delegates is inconsistent with a democratically run organization. After, or in the absence of a nominating convention, however, prohibiting the use of party resources effectively silences the party. 

_Buckley v. Valeo_ struck expenditure limits in another context, finding that they struck too deeply at the ability of various groups to participate in the campaign process. Here the primary laws act to cut off entirely the expression of a point of view. Under any theory of the first amendment this is the most precious speech—political speech focused on who should and who should not hold office. Moreover, these efforts to suppress it are neutral neither among incumbents and their challengers, nor among various competing factions. The incumbents often reap the advantage of a disor-

257. N.Y. ELEC. LAW § 6-104(1), (2) (McKinney 1978).

259. For other types of limitations dealing with political advertising, see AMERICAN LAW DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, ANALYSIS OF FEDERAL AND STATE CAMPAIGN FINANCE LAW QUICK-REFERENCE CHARTS 56-73 (1976).
261. See generally Blasi, supra note 2.
262. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 12-1 to -20 (1978)
oganized opposition. Competing groups are treated unequally, insofar as parties which pursue a broad spectrum of political concerns are subordinated to special purpose groups and individual candidates seeking good avenues to publicity. Moreover, the lack of a party format means that there are few economies of scale in the presentation of public issues. Candidates develop positions individually, with relatively restricted resources, and with little responsibility for national priorities. No theory of the first amendment tolerates such intrusions, even for more compelling purposes and effective means than the courts have accepted here. To expose the restrictions on speech inherent in the process is to pose the most fundamental challenge to the legitimacy of primary laws.

This, of course, is not the understanding the courts have given to the primary issue. For the courts which have dealt with the constitutionality of primaries, the party was the people and the idea that they had anything to say before the primary was not a concept the courts entertained. If anything those courts saw party officers in opposition to the “true” party. Thus, their explanation that the primary aided the party. But that is to say that the courts substituted ballots and levers for associated expression. The functions of organization in aid of speech—campaigning—were totally ignored in favor of a relatively romantic notion of automatic unmediated expression of popular will.

Together, the selection of officers and candidates, definition of membership, and prohibition of support, leave the party as a formal shell, perpetuating historic loyalties but staffed by people whose only unified outlet is through behind-the-scenes influence. There are, of course, other reasons for the decline of parties. But the primaries are the essential link that has turned modern American political cam-

(constitutional dimensions of the neutrality of laws affecting first amendment rights).


264. Much of this individual development of issues is presented to the public through the medium of direct mail, in which there is no public debate, but only a brief one-sided presentation. Impoverishing the discussion of public issues allows for the generation of political power by means of slogans, personal favors with the bureaucracy, or loyalties based on group identification. See generally M. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (1977).

265. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970); Bezanson, supra note 120. See supra notes 2, 161, 262.

266. See Riter v. Douglass, 32 Nev. 400, 420-21, 109 P. 444, 449 (1910); cases cited supra note 54.
campaigns largely into media events. Political scientists have urged structural support for, or reinforcement of, political parties, either through the channeling of funds or other benefits. But it is no more appropriate under the first amendment to favor political parties over other political actors. It is for the people, not the government, to place their confidence in whatever type of association, if any, they choose to support.

Having disenfranchised the party machinery itself through the primary laws, we have not succeeded in replacing that large umbrella party machinery with any significant subordinate form of political organization. The primaries have been more congenial to forms of individual personal political organization than to institutionalized and continuing political organizations. Few states provide a place on the primary ballot for the identification of slates by their sponsoring organization. This may be either a cause or an effect of weak subordinate political organizations. It also suggests that the primary system may have struck deeper at the heart of the associational process than the registration of preferences. For if subordinate political organizations are not themselves viable, very significant damage has been done to the entire structure of the creative and promotive functions of the political parties.

267. See J. Kirkpatrick, supra note 7, at 20-22.


269. "[T]he censorial power is in the people over the Government, and not in the Government over the people." 3 Annals of Cong. 933, 934 (1794) (statement of Mr. Madison).


271. See V.O. Key, Jr., supra note 7, at 169-96 (1956).


2. The Question of Countervailing Interests.—If, however, parties can aggravate political corruption, and if primary laws minimize that difficulty, the reigning approach to constitutional law requires that we balance benefits and burdens in some form.\textsuperscript{274} That requires a look at the evidence. Conventions can contribute to the problems of corruption by aggravating the entrenchment of power in several different ways. First, by centralizing party machinery and giving it some power over the individual candidates, the party becomes a possible focus for loyalties engendered through patronage, which are then transferred from administration to administration and from candidate to candidate over long periods of time. Second, the smaller the entity the easier it is to control. Delegates to conventions can be swayed for a variety of private and personal reasons. We envision democracy as best reflected in the town meeting, but the town meeting creates relatively easy targets for manipulation or intimidation. This risk probably varies inversely with the size of the community. A citywide convention would probably be immune to threats that might interfere with a convention of smaller districts within the city. This is a feature of the greater checks and balances available in a larger area and the risk of a relatively homogeneous and quiescent local population in some small districts.

Third, conventions and other meeting systems created the difficult problems of counting ballots in the midst of masses of people—though honest convention ballots have seemed an attainable objective in the twentieth century. Conventions may be more vulnerable to relatively subtle modern forms of corruption (graft, bribery of elected officials) than primaries would be, though conventions may have been no more subject to older, rougher forms of political abuse (violence, bribery of those involved at the polls) than primaries were.\textsuperscript{275}

We must distinguish, however, between control mechanisms that restrict first amendment rights and control mechanisms that do not. Remember that primary laws do several different things—particularly, they restrict speech and provide a counting mechanism. It is undoubtedly true that, divorced from a right to ballot position, the party could use a convention and a subsequent right to speak on behalf of its nominees to compel some loyalty. That loyalty in turn can be used to shore up a corrupt regime. Nevertheless,

\textsuperscript{274} See supra text accompanying notes 84-86.
we rarely permit the suppression of speech because of its possible abuse.\textsuperscript{276} We, therefore, ought to seek justifications for primaries which are unrelated to the control of expression.

The primary performs a role with respect to the parties which is unrelated to expression by deflating the power that goes with automatic ballot status. While major party candidates automatically appear on the ballot, petitions with a set number of signatures are generally required for third party and independent candidates.\textsuperscript{277} The more difficult it is for competing parties and candidates to gain ballot status, the more the major parties control the choices available to the voters at the general election. This is particularly important in the one-party states—states in which one party has been so dominant that its candidates receive no serious challenge in the general election. Limiting the statutory advantage of automatic ballot access could be accomplished without any of the attendant prohibitions on conventions, advocacy during the primary campaign, or even the appropriation of the party name at the primary. The petition route could be made less onerous for third parties and independents, or similar requirements could be imposed on the major parties. No doubt other types of initial qualifying procedures could be developed for similar purposes.

The legal advantages of the major parties also become less defensible to the extent that their leaders are permitted to function independently of internal membership control. Control over the selection process of the major parties could be accomplished by means of a delegate primary.

Any such system would screen access to the ballot. Any such system would simultaneously preserve ballot access for other groups, permit meaningful popular control, and reduce corruption of political machines without the suppression of the current law. Most of the benefits which the primaries have bestowed would be preserved by these limited intrusions.

It is not at all clear, however, what role the primaries have played in reducing the self-entrenchment of elected officials. First,

\begin{itemize}
\item \textsuperscript{276} See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 575 (1980) (Blackmun, J., concurring); \textit{id.} at 581-83 (Stevens, J., concurring) (arguing that advocacy of disfavored activity is not proper ground of suppression; the separate opinions objected to the Court’s conclusion that commercial speech could be subjected to narrowly drawn restrictions based on their expected results); Consolidated Edison Co. v. Public Serv. Comm’n, 447 U.S. 530 (1980) (prohibiting abridgement of company’s bill inserts based on their content).
\end{itemize}
some of the benefits of the primary laws may flow merely from the change in the counting mechanism, from party to public supervision of the ballot. The number and identity of people willing to put some effort into the purity of the process is crucial to the control of corruption, and the shift to public supervision may have taken advantage of that. Second, historically, the period of reform which gave birth to the primaries also gave birth to a number of other changes, most notably the secret ballot. Moreover, the various state legislatures considerably complicated the outcome by taking the same opportunity to strike back at the third party movements that had been pester ing them. This was done by elevating the hurdles that parties and candidates had to surmount to have their names printed on the ballot.278 In response to these enactments, the Supreme Court has distinguished between laws that permit independent and presumably

278. Much of this legislation was in place by the early 1920's, though a second wave of restrictive legislation ambushed Henry Wallace and the Progressives in 1948. See D. Mazmanian, supra note 197, at 90-94. Methods of exclusion included early filing deadlines, increases in the number of signatures on petitions required to put independent candidates on the ballot, disqualification of previously affiliated voters from signing petitions, increases in the number of votes at prior elections required to put a party on the ballot and, in some states, the absence of any mechanism for new parties to gain access to the ballot. Id. See, e.g., People ex rel. Breckton v. Board of Election Comm'rs, 221 Ill. 9, 77 N.E. 321 (1906), overruled on other grounds in People ex rel. Lindstrand v. Emmerson, 333 Ill. 606, 165 N.E. 217 (1929). Though some states retained relatively low ballot access percentages, see, e.g., 1893 Mass. Acts ch. 417, § 75 (party qualifies for ballot if it received 3% of total gubernatorial vote at preceding election), the number of different devices by which parties were excluded, compounded by the impact of the direct primary and the effect of exclusion in sister states took their toll. Even where access was accomplished, as strong a candidate as Robert La Follette in 1924 was unable to appear nationally under a single party banner. D. Mazmanian, supra note 197, at 92.

The new statutes made it even more difficult for weakened parties to regain their strength. Few third party candidates have appeared on the ballot since 1920 except in presidential elections. See generally CONGRESSIONAL QUARTERLY, INC., GUIDE TO U. S. ELECTIONS 176, 397-437 (R. Diamond ed. 1976); P. David, Party Strength in the United States: 1872-1970, at 32, 34, 45-46 (1972). David demonstrates a marked decline in third party strength beginning around 1920 (though the actual effects on state and local elections have been somewhat masked by a composite index which incorporated the large vote for La Follette in the 1924 presidential election), and continuing into the 1960's. Id.

Ballot access provisions were not the only factors in the decline of third parties. The shift from nominating conventions to direct nominating primaries may itself have been a major barrier for small parties. See Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181 (1909), in which the plaintiff third party sought to elect convention delegates rather than have the candidates designated at a primary, as required by law. The Socialists helped to destroy themselves with a series of factional splits, J. Weinstein, The Decline of Socialism in America 1912-25, at vii-x, 192-204 (1967), and a series of post-war Red scares helped to bury them, see F. Allen, Only Yesterday 38-62 (1964); Farmer-labor parties confronted changing agricultural conditions, M. Stedman & S. Stedman, supra note 201, at 79, 81, 84, 90.
third party candidates to qualify with some regularity, and those that do not.\textsuperscript{279} This legislation has had three consequences. First, while the parties were being "purified," their principal competitors were being eliminated. Second, that result, in turn, may have helped the political machines to persist. Third, that, in turn, obscured the impact that the new secret ballot and registration laws might have had, in combination with the earlier checks-and-balances or open-competition approach.

Perhaps the most significant fact obscuring the role of primaries in reducing the self-entrenchment of elected officials is that this wave of reform legislation preceded by several decades the demise of most of the notorious political machines. That denouement awaited the 1950's in many parts of the country. Thus, it is possible that primaries have been credited with influence that is properly attributed to other changes in society. The impact of the secret ballot in making bribery and intimidation more difficult, and of New Deal welfare legislation in leaving people less vulnerable to party handouts, combined with the impact of two World Wars and a great depression on social awareness, may have been substantially or entirely responsible for diminishing the power of political machines.

Conversely, where entrenchment does continue, it appears to be based on a continuation of patronage and a misuse of the bureaucracy.\textsuperscript{280} Those factors appear to have more to do with political entrenchment than party structure as demonstrated by powerful personal organizations like the Long machine.\textsuperscript{281} Thus, though association and the misuse of the machinery of government could be, they are not necessarily related. Indeed, the ability of a political association to make its point publicly through proper channels may limit its ability or tendency to employ corrupt means of self-perpetuation—the two may be inversely related since the restrictions on speech and conventions throttle both opposition and incumbent parties.\textsuperscript{282}


\textsuperscript{281} See generally T. Williams, Huey Long 753-59 (1969).

\textsuperscript{282} The utility of enabling the people to make an informed choice was demonstrated by the decrease in cigarette sales that occurred when both cigarette advertising and anti-smoking commercials appeared on television. The cigarette industry responded by lobbying successfully for congressional suspension of cigarette commercials. Upon the discontinuance of the public debate, the sale of cigarettes again began to rise. See Capital Broadcasting Co. v. Mitchell,
In general, a large number of people depend on a small number to organize their activities. The secret ballot protected individual autonomy by separating information regarding the vote of each person from information regarding the total vote, at the cost, however, of creating dependence on a rather smaller number of people who have access to the voting machines themselves. For the same reasons primaries are limited as devices for eliminating corruption by the possibilities of rigging elections: intimidation, violence and bribery remain possible. Honest primaries depend on a rather smaller number of crucial people, particularly poll-watchers and judges.\textsuperscript{288} Poll-watchers, however, have been physically ejected for questioning events.\textsuperscript{284} Primaries, moreover, duplicate many of the problems faced by meetings.\textsuperscript{288}

Thus, identification of the effects of primaries on the prevalence of corruption is made difficult by the combination of those problems peculiar to primaries, those which it shares with meeting systems, and the effects of many other statutory changes, including the secret ballot, the voting machine, registration laws, and changes in civil service, public contract and welfare laws.\textsuperscript{286} More difficult, perhaps, but more important is to separate the different ways in which the primary may have had that effect: through public supervision of the ballot, through the definition of party membership, and through the elimination of conventions.

Moreover, improvement has only been partial. Problems have persisted despite checks and balances, secret ballots and primaries. Given the frustration of these efforts at reform developed over two centuries, Congress has continued to devise new strategies to deal

\textsuperscript{283} See State ex rel. Ward v. Board of Supervisors of Elections, 186 La. 949, 173 So. 726 (1937) (entitling factions to participate in selection of poll watchers); Note, supra note 240, at 70-72.

\textsuperscript{284} See A. Steinberg, supra note 14, at 32; F. Robinson, supra note 280, at 153-64, 232.

\textsuperscript{285} Questions of open or secret balloting arise in both the meeting and primary contexts. Problems with qualifications for election at meetings are similar to those that arise with ballot access requirements, and credentials disputes are paralleled by the right to vote challenges. Questions of proxy and weighted voting at meetings are mirrored by absentee ballot and apportionment issues in the primary context. Notice has also been implicated in the primary process when polling places have been changed. See Charbonnet v. Braden, 358 So.2d 360 (La. 1978), aff'd, 442 U.S. 914 (1979). Although primaries eliminated difficulties with block voting, quorums, committee authority, and rule changes that arose in the meeting context, they have also created new areas for dispute, such as ballot position or write-in voting.

\textsuperscript{286} See J. Harris, supra note 240; Converse, supra note 14.
with the popular hunger for purified government, adding to earlier statutes aimed at reducing bribery, coercion and extortion. The Hatch Act prohibits government employee participation in politics as a way of protecting them from the importunities of colleagues and superiors and as a means of minimizing the impact of patronage on the public election campaigns. These statutory decisions have been underscored by the Supreme Court in Elrod v. Burns and Branti v. Finkel, a pair of decisions in which the Court found a violation of individual rights of conscience and association where government employees were dismissed solely for partisan political reasons, with a relatively narrow exception for positions involving a great deal of personal and political trust and confidence between subordinate and superior. The protections written by Congress did not suffice. The failure of these efforts is crucial because it set the stage for later legal changes and because it illustrates the trade-offs that are inherent in this field. Manifestly, however, these problems relate to facets of the political system which are independent of primaries.

V. CONCLUSION

Political scientists have long debated whether the current disorganized state of American political parties reflects the “genius” of our system or whether we ought to create unified parties on a British model. It should be clear that the American party system has undergone enormous changes since Van Buren set the two-party system on its course. Those changes reflect less an impermeable American psyche with regard to parties than they do vast changes in the legislation under which the parties operate. Within limits, therefore, we

293. Compare AMERICAN POLITICAL SCIENCE ASS’N, COMMITTEE ON POLITICAL PARTIES, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM (1951) (urging disciplined parties on a British model) with E. GRIFFITH & F. VALEO, CONGRESS: ITS CONTEMPORARY ROLE 157 (1975), C. ROSSITER, PARTIES AND POLITICS IN AMERICA 182 (1971), and Turner, Responsible Parties: A Dissent from the Floor, 45 AM. POL. SCI. REV. 143, 143-52 (1951) (taking a more decentralized view of the political system).
can have whatever kind of party system we prefer.

First, with the possible exception of relatively small communities, conventions have a place. The analysis of the functions of the right of association developed above,\(^{294}\) suggests that the first amendment is not and ought not to be neutral among available alternatives. This is not a matter merely of incidental restrictions on speech. Instead restrictions involved in the primary laws go to the very heart of speech by association. If party power can be controlled without destroying the valuable functions parties can perform, that should be our choice. Although it is consistent with those functions to provide the membership of the parties with a method of control over the party machinery itself, the parties ought to be able to choose either to nominate candidates at conventions or to elect delegates at primaries.

Second, given the importance of the functions parties can perform, only the most compelling purposes can justify intrusion, and even then, only to the extent necessary to satisfy the purpose. Indeed a firm exclusion against legislation which biases the content of political debate might be applied appropriately here.\(^{295}\) Third, in the face of those conclusions, with the caveat noted above regarding small communities, it is difficult to make the case that the primary laws are responsible for controlling corruption or have significantly contributed to that goal.

Fourth, less restrictive means do appear viable. Indeed a satisfactory solution to the problem of political association is more likely to be built on the founders' strategy of checks and balances than one of restraint. It is plainly improper to justify the regulation of the major parties on the ground that there are serious abuses in the wake of the deliberate downgrading of the rights of the minor parties. They have, as the Court has recognized, an important role to play.\(^{296}\) Easing ballot access,\(^{297}\) including the third parties in cam-

\(^{294}\) Supra text accompanying notes 127-77.

\(^{295}\) See L. Tribe, supra note 262, § 12-2, at 582-84.

\(^{296}\) "There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Williams v. Rhodes, 393 U.S. 23, 32 (1968). See also Buckley v. Valeo, 424 U.S. 1, 71, 97 (1976); Lubin v. Panish, 415 U.S. 709, 716 (1974).

campaign presentations such as the televised debates,\(^{298}\) reducing the discrimination in campaign funding,\(^{299}\) or otherwise providing them with resources to make a true challenge to the major party candidates deserve more serious consideration.

If there is a need to put extra weapons in the hands of the party membership, competing parties and factions can have greater opportunities to vie for power without eliminating the ability of the parties to meet and promote candidates. For example, the names and emblems of subordinate political organizations that offer slates of candidates, such as the Regular or East Whatchamacallit Democratic Club, could be placed on delegate primary ballots as is done for parties at the general elections;\(^{300}\) the neutrality of election boards among party factions competing in such primaries can be protected.\(^{301}\) Such devices would offer voters a choice among associations rather than deny them the services that political associations can perform.

Urging recognition for competing intraparty clubs may seem more "reform" minded than urging a role for conventions. The clubs do not benefit, however, from public defection from disorganized parties.\(^{302}\) It is, moreover, no easier to play a constructive role in a direct nominating primary (which requires total victory) than in a delegate primary (which requires only a share of success). Indeed it is easier to play the spoiler in a direct primary election. To avoid that, groups must meet and negotiate a common strategy somewhere in the process. Finally, there is no evidence that primaries or conventions are more hospitable to the growth of reform-minded clubs. New York's clubs overthrew Tammany Hall before the primary law was modified to thwart the convention. Changed attitudes after World War II and the impetus of the Stevenson campaign have


\(^{300}\) See statutes cited *supra* note 272. Where conventions are authorized, limitation of the number of delegates per district may be an important supplement to provision for the identification of slates in aid of improved voter selection. See W. Moscow, *The Last of the Big Time Bosses* 120-21 (1971) (reducing the number of delegates required prior to DeSapio's ascension, apparently for the purpose of democratizing the party). See also N.Y. Elec. Law § 2-102(1) (McKinney 1978).

\(^{301}\) See *supra* note 240.

\(^{302}\) The extent of that defection is discussed in N. Nie, S. Verba & J. Petrock, *supra* note 169.
seemed better explanations for the growth of the reform movement.\textsuperscript{303}

We certainly cannot ignore the strong populist desire to exert control over the parties as well as the general elections. But the parties can be permitted to select delegate primaries and those can be strengthened. No doubt other features of the campaign process might be strengthened, perhaps by providing a between-elections and during-elections role to parties through media reform and tax credits. These are paths of a model of the first amendment right of association which emphasizes concepts of public choice and associational access and entry. It should replace one which puts the government in the role of restricting and channeling our thoughts.

Some political scientists draw very grave conclusions from the dismantling of parties.\textsuperscript{304} It is possible to imagine another outcome, one which conforms closely to the distinction made here between speech and formal functions. James Banner has argued that the parties could resuscitate themselves by offering services to their membership.\textsuperscript{306} This may be unlikely because the candidates who now control the parties often have little desire to strengthen the organization. Banner, however, points in the right direction, to the ideological organizations on the horizon, e.g., the American Conservative Union, though organization on the left has lagged behind that on the right.\textsuperscript{306} It is possible that such groups will develop a large membership base, make nominations in fact and offer them to the voters in the manner that parties did before party nominations were incorporated on printed ballots—as suggestions. But if that happens will we make the same mistake and try to dismantle that opportunity to coalesce as well? Or is the need for parties felt strongly enough to challenge and survive our attempt to suppress it? It is an important ques-

\textsuperscript{303} See J. Wilson, supra note 270, at 52-58. There exists at least a perception that World War II veterans refused to go along with the machinery of the two major political parties and that the old machines declined because of that change in attitudes as well as the New Deal welfare programs and general economic prosperity. See H. Caudill, The Watches of the Night 217-18 (1976); H. Penniman, Sait's American Parties and Elections 338-41 (5th ed. 1952).

\textsuperscript{304} "Without limiting the president's claim to full personal popular authority, which results in large measure from the way in which he is selected, we should not be too surprised by the eventual recurrence of imperial tendencies in our highest office." J. Ceaser, supra note 7, at 339. See also J. Kirkpatrick, supra note 7, at 15, 20-24.

\textsuperscript{305} Banner, supra note 273.

\textsuperscript{306} The emergence of such groups, however, has been relatively sluggish. For some of the few successful examples, see F. Carney, supra note 17; J. Wilson, supra note 270, at 96-125; and Sorauf, supra note 253, at 695-99 (1954).
tion, for the existence of a loyal opposition is closely associated with the existence of competing political parties. 307

307. J. Kirkpatrick, supra note 7, at 18.