THROWING THE PARTY

The Supreme Court's jurisprudence on political parties is rooted in an incomplete story. Parties are, like voluntary clubs, associations of individuals that are represented by a singular organization. However, as political science has long understood, they are much more than this. Parties are also the voters who choose and support their candidates, the elected officials who govern, the activists and volunteers who contribute their time and energy, and the individual and organizational donors who open their wallets. Unfortunately, the Court's framework for understanding America's two-party system has largely ignored this broader conception of political parties. The result has been a distortion of the true nature of the two-party system, and a body of deeply inconsistent and contradictory constitutional case law. From primaries to campaign finance, partisan gerrymandering to ballot access, law and politics scholar Wayne Batchis interrogates, scrutinizes, and offers a proposed solution to this problematic jurisprudence.

WAYNE BATCHIS is an associate professor of political science at the University of Delaware. He is the author of *The Right's First Amendment: The Politics of Free Speech and the Return of Conservative Libertarianism* (2016).

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Throwing the Party

HOW THE SUPREME COURT PUTS POLITICAL PARTY ORGANIZATIONS AHEAD OF VOTERS

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Preface

The U.S. Constitution makes no mention of political parties. James Madison and George Washington warned vociferously of their dangers. Nevertheless, for close to 200 years, the two-party system has been the central pillar of American politics. Today, the two major parties act as gatekeepers to democratic participation. From primary voting to parliamentary procedure in the U.S. Congress, from legislative redistricting to partisan composition requirements in administrative agencies, parties structure democracy.

As institutions, the two major parties have historically been, and remain, in a state of constant change – they adapt to the country's social and political currents while at the same time making many of the very waves that caused the currents to shift in the first place. Perhaps most importantly, parties are essential institutions for civic participation; in many elections in many small towns, cities, and states, abstaining from association with a political party means forfeiting one's democratic voice. As "private" actors, however, political parties – with only narrow exceptions – have not been subjected to the constitutional limits imposed on governments. This is because the U.S. Constitution ordinarily applies only to "state action."

Indeed, in many settings parties are not merely immune from constitutional constraints; they have successfully used the Constitution as a shield, insulating themselves from the regulatory needs of government. The Supreme Court has, in other words, selectively deregulated these regulators of American democracy. Today, there is increasing concern that these ostensibly private, constitutionally privileged associations are rewriting the rules of democracy and, in the process, contributing to rampant dysfunctionality in American government. To what extent, if at all, should political parties be sheltered by, rather than subject to, the guarantees, mandates, and limitations of the U.S. Constitution?

Political party jurisprudence is rooted in an incomplete story. Like a work of fiction, the Supreme Court's constitutional approach contains considerable elements of truth. Parties are, like voluntary clubs, associations of individuals that are

represented by a singular organization. However, as political science has long understood, they are much more than this. Parties are also the voters who choose and support their candidates; the elected officials who govern their localities, states, and nation; the activists and volunteers who contribute their time and energy; and the individual and organizational donors who open their wallets. Unfortunately, the Court's framework for understanding America's two-party system has largely ignored this broader conception of political parties. In this moment of great turmoil for American democracy, it is critical that courts get political parties right.

Constitutional law, however, develops case-by-case, seeking out neutral principles of general applicability. It relies on analogies and previously established doctrinal categories to resolve novel constitutional questions and to establish consistent methods for addressing related issues in the future. In the case of political parties, the anointed metaphor is the humble local voluntary association, the apple-pie of American institutions. So-called expressive associations have long been granted constitutional rights under the First Amendment. An expansive reading of the Constitution's freedom of association, one that encompasses a political party's expressive and associational choices, may at first glance appear consistent with longstanding First Amendment values. However, this framework for classifying the two major parties, while based upon an analogy with intuitive appeal, sidesteps the parties' inherent definitional complexity. It leaves out of the constitutional calculus much of what political science knows about these multivariate entities.

The result has been a distortion of the true nature of the two-party system, and a body of deeply inconsistent and contradictory constitutional case law that inappropriately encourages judicial intervention into a sphere the Framers explicitly delegated to state and federal legislators: election law policy. At times this legacy has imposed constitutional roadblocks to legislative changes intended to improve upon or repair faltering aspects of American democracy, such as innovative primary reforms and campaign finance regulations. At other times it has impeded the resolution of pressing potential constitutional deprivations. The Court's impoverished understanding of parties has led it to endorse the broad-based disenfranchisement of individuals who choose not to formally associate with either of the two major parties. The same faulty framework has persuaded the Court to outright refuse to remedy a practice that is otherwise acknowledged to be constitutionally and democratically problematic: aggressive partisan gerrymandering.

This book traces the Court's evolution on political parties, scrutinizing the theoretical and doctrinal origins of its current jurisprudence. At the same time, the book does not lose sight of the way the political party system has itself evolved as a part of the larger American democratic ecosystem. It closely examines the many areas in which constitutional law has touched on the political party system and offers a critical and constructive assessment of the Court's path and potential future. The book concludes by suggesting a new doctrinal direction for the Court, a

constitutional framework that better fits with the modern realities and pathologies of America's two-party system.

Part I introduces the subject, broadly reviewing the literature on political parties in the political science and legal scholarship, examining the multiple ways parties may be approached within the Supreme Court's constitutional jurisprudence, exploring the knotty questions involved in granting collective entities like political parties constitutional rights, and delving into the three aspects of party articulated by political science. Part II focuses on the issue of party primaries, laying out the evolving history of the party nomination process, the diverse array of primary procedures used, and the policy implications of these options. This is followed by an examination of the Supreme Court's uneven political primaries jurisprudence and a critical assessment of the way it has favored collective over individual rights and the two major parties over third parties.

Part III shifts its gaze to another key function of political parties, helping their candidates win by raising, spending, and contributing money. The laws regulating campaign finance are notoriously complex, and the Court's response has garnered some of its most controversial decisions. This section critically assesses an aspect of the Court's campaign finance decisions that less frequently receives attention: how political parties have fit into this jurisprudence over time. I find similar doctrinal deficiencies as in other party-related doctrinal areas; here, however, the Court's incomplete and misguided understanding of parties leads it to reject even Congress' explicit understanding – written into campaign finance legislation itself – that parties are inextricably intertwined with the candidates they seek to have elected.

The final portion of the book, Part IV, addresses and critiques the Court's shift in the 1980s from confronting many political party issues under an equal protection rubric to a First Amendment freedom of association approach. It explores an equal protection issue the Court has now definitively declined to resolve – partisan gerrymandering – and contemplates a potential judicial intervention that may prevent even states from calling a halt to such strategic line-drawing. Finally, the book concludes with a chapter outlining a proposed solution to the jurisprudential conundrum of political parties utilizing a preexisting doctrinal framework: the political party system may be understood as a limited public forum.

Acknowledgments

Parts of this book, primarily portions of Chapters 2 and 13, first appeared in my earlier work: *The Political Party System as a Public Forum: The Incoherence of Parties as Free Speech Associations and a Proposed Correction*, 52 U. MICH. J.L. REFORM 437 (2019).

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