## Contents

**Preface**  
ix  
**Acknowledgments**  
xiii  

### PART I FOUNDATIONS

1 **Introduction**  
1.1 Why Regulating Parties Matters  
1.2 A Party System in Crisis  
1.3 A Unique Challenge  
3  

2 **The Supreme Court’s Approach to Political Parties**  
2.1 The Baseline: Government Power to Regulate Political Parties  
2.2 Guarantees and Limitations: Constitutional Constraints on Political Parties  
2.3 A Shield: Political Parties and Constitutional Protection *from Government*  
2.4 The Supreme Court as Election Law Policy-Maker  
17  

3 **The Association versus the Individual**  
3.1 Constitutionalizing Associations  
3.2 The Constitutional Paradox of the Party Plural, the Party Singular, and the State  
3.3 The Challenge of Defining Party “Membership”  
3.4 The Problem of Associational Rights for Political Parties  
3.5 A Government Solution?  
3.6 The Constitution and the Three Aspects of Party  
3.7 The Party in the Electorate  
32  

v
Table of Contents

3.8 The Party Organization 56
3.9 The Party in Government 58

PART II PARTY PRIMARIES

4 Setting the Stage 63
4.1 A Brief History of Primaries 65
4.2 Party Membership and the Many Forms of Primaries 69
4.3 Three Constitutional Rubrics 77

5 Primaries and the Party in the Electorate: The Right to Vote 80
5.1 Nader v. Schaffer and the Sidelining of the Party in the Electorate 81
5.2 The Tale of Voter A and Voter B 85
5.3 Voting Rights Challenges 92

6 Double Standards: Organizations over Individuals and Major over Minor Parties 99
6.1 The Inclusive Major Party and the Closed Primary State 99
6.2 The Inclusive Third Party and the Semi-closed State 104
6.3 The Misguided Judicial Takeover of Electoral Policy 113

7 Doubling Down on the Party Organization in Service of the Major Parties 120
7.1 Standing Up to the People’s Chosen Electoral Policy 120
7.2 A Caveat for “Nonpartisan” Primaries 126

PART III THE PARTY, THE COURT, AND CAMPAIGN FINANCE LAW

8 Party Speech through Money 135
8.1 A Brief History of Campaign Finance Law 136
8.2 A Three-Tier Critique of Constitutionalized Party Campaign Finance 144

9 An Ill-Fitting Party Campaign Finance Jurisprudence 148
9.1 Parties and the Expenditure/Contribution Dichotomy 149
9.2 A “Complex Issue” 151
9.3 A Moving Target: Shifting Parties and Campaign Finance 153
9.4 Party or Government Campaign Finance? 156
9.5 Parties, Corruption, and the Soft Money Loophole 158
Contents

10 Parties and the Current Campaign Finance Landscape 169
   10.1 Justice Breyer’s Inconsistency and the Chief’s Transparency 171
   10.2 A Decline in Party Influence over Campaign Finance 175
   10.3 The Network Theory Conundrum 178
   10.4 Parties and Campaign Finance: A Muddled Jurisprudential Legacy 180

PART IV PASSÉ EQUAL PROTECTION AND A WAY FORWARD

11 Party and Equality 185
   11.1 The Ballot Access Quandary 186
   11.2 Sore Losers and the Transition from Equality to Association 190
   11.3 Freedom of Association, Spoilers, and Federalism 198

12 The Political Question: Is There Room for Equal Protection in Partisan Gerrymandering? 207
   12.1 The Court’s Reticent Gerrymandering Jurisprudence 208
   12.2 A Big Picture That Is Not Encouraging 215
   12.3 Partisanship as a Tool: Establishing Nonpartisan Redistricting Commissions 218

13 A Potential Solution: The Party System as a Public Forum 222
   13.1 Political Parties as Government Speech? 225
   13.2 A New Paradigm: The Political Party as Public Forum 228
   13.3 The Mechanics of Public Fora 231
   13.4 The Public Forum Doctrine Fit: Some Illustrations 237

14 Conclusion 244

Index 253