

THE HYDRAULICS AND POLITICS OF PARTY REGULATION: A SUPRALEGAL THEORY OF POLITICAL PARTIES

Michael S. Kang*

Swept up in the growing “constitutionalization” of the law of democracy, political parties today are the centerpieces of American law and politics. However, even sophisticated legal scholars adhere to a formalistic view of political parties as discrete, legally defined entities. This article topples this conventional view of political parties. Drawing from recent research in political science, this article presents a more realistic deconstruction of political parties and how they operate in American democracy. The article argues that “parties” are merely a colloquial shorthand for bundles of political relationships, constituting fluid, informal arrangements that defy and transcend legal definition. Parties, as such, are fundamentally political, rather than legal, creatures that represent pragmatic, interactive responses to law, regulation, and political circumstances. Their supralegal character massively complicates party regulation and reform, as party leaders can avoid regulation by adapting their informal arrangements. Party regulation, in turn, too often springs from efforts by party actors to skew the terms of political competition that govern themselves and their rivals, both within and outside their party. A supralegal theory of political parties thus recognizes that party reforms are more likely to advance the narrow political aims of advantaging certain factions than they are to achieve the broader reform goals deployed to justify regulation. This fact demands judicial skepticism about party regulation and the promised benefits of party reforms.

I. INTRODUCTION

Never before have political parties received such sustained attention from courts, commentators, and legislators. In recent years, the Supreme Court has decided important cases dictating the proper role of political parties in all facets of American politics.¹ This development has forced the legal scholarship, in response, to debate the proper legal

* Assistant Professor, Emory University School of Law. Many thanks for extensive comments from Robert Ahdieh, Barry Burden, Guy Charles, Julie Cho, Paul Frymer, Beth Garrett, Heather Gerken, Dan Ho, Eli Kay-Oliphant, Doug Lichtman, Dan Lowenstein, Greg Magarian, Bill Marshall, John Nagle, Richard Pildes, Eric Talley, and Dennis Thompson.

¹ See, e.g., Clingman v. Beaver, cert. granted, 125 S.Ct. 27, 2004 WL 2069717 (Sept. 28, 2004) (No. 04-37); McConnell v. Federal Election Comm’n, 124 S.Ct. 619 (2003); Georgia v. Ashcroft, 123 S.Ct. 2498 (2003); Federal Election Comm’n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001); California Democratic Party v. Jones, 530 U.S. 567 (2000); Colorado Republican Fed. Campaign Comm. v. Federal Election Comm’n, 518 U.S. 604 (1996).

characterization of political parties in the wake of the various decisions covering the spectrum of political activity.² The growing “constitutionalization” of the law of democracy promises to keep the status of political parties squarely before the courts in the years to come.³

This article challenges the fundamental assumption underlying every judicial decision addressing political parties. The assumption is that parties matter as legal creatures and exist in the way that an individual or a corporation possesses a legal identity, persona, and interests. The conventional approach in law, as a result, addresses political parties as discrete entities comprising the legally identifiable actors within the official party apparatus, such as officeholders, party committees, and official party organizations.

Drawing upon political science, the article demonstrates that this fundamental assumption is wrong. The article argues that, for purposes of understanding how political parties interact with the law, parties are best understood in political terms, in “supralegal” terms transcending their legal structure and identity. The term “party” is a colloquial shorthand to describe the bundle of informal relationships that a much broader political coalition can be said to encompass. The political party is best understood as a loose collection of political relationships, some legal and some nonlegal, among a diverse set of actors and institutions, all of whom perform important work in furtherance of a common general agenda.

This article thus proposes a new conception of the political party, moving away

² See, e.g., Symposium: Law and Political Parties, 100 Colum. L. Rev. 593-899 (2000); Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 Wm. & Mary L. Rev. 1939 (2003); Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95; Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002); Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750 (2001).

³ Richard H. Pildes, The Supreme Court, 2004 Term – Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28 (2005).

from the formalistic notion of parties as legally defined entities, to a more robust, more realistic supralegal model of parties and how they function in practice. All types of private actors, who may or may not possess legally cognizable connections to the official party apparatus, are important members of the party coalition, including unions, interest groups, think tanks, and other politically active groups. These political leaders organize and operate through the official party structure only when it serves their overlapping interests.

This new supralegal framework for understanding political parties reveals that party regulation often conceives of parties in terms that are either too narrow or too broad. First, an unduly narrow focus on the political party as consisting of its legally identifiable actors obscures the “hydraulics of party regulation.”⁴ Party regulation, designed to influence the practice of politics more broadly, restricts only a fraction of the resources, opportunities, and activity at the disposal of the party. When law prevents leaders from pursuing their interests through the legal apparatus of the political party, they divert their strategic activity into less public, less regulated channels. Like water, the party seeks a hydraulic return to its own level of influence, finding gaps and openings in the regulatory edifice whether they exist in the public or private domain. Party regulation may influence the way that parties operate, shifting them from first-best to second-best strategies, but it does so at social cost by driving important party activity into less public and less transparent venues.

Second, there is a significant risk of conceptualizing political parties too broadly. Political parties are defined by a fundamental internal tension that brings together individual leaders for common goals, at the same time that each leader competes for relative influence within the party coalition. There is constant intraparty competition to control the direction

⁴ For a related concept, see Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705 (1999). For criticism of Issacharoff and Karlan, see section III.B.1.

of the party coalition. When party regulation succeeds, as it does on occasion, it is too often results from the “politics of party regulation,” essentially political disputes among intraparty rivals.⁵ Party regulation, when enacted, influences the means through which the party works, and by doing so, it shifts the balance of power within and among party leaderships. In other words, party regulation, and subsequent litigation over it, usually stems from efforts by party actors to defeat their political rivals. Party reforms are more likely to achieve these narrow political objectives than larger reform goals.

This new supralegal conception of political parties provides a new lens for viewing and making sense of the Supreme Court’s decisions on party regulation. It counsels courts to be highly skeptical about promised reform benefits as they navigate the hydraulics and politics of party regulation. A proper understanding of parties illuminates party-related cases as exercises in political management of the myriad relationships that parties comprise. Contrary to the legal commentary, I argue that a set of Court decisions striking down regulation of party primary elections were correctly decided, if not correctly reasoned. I show that such judicial skepticism about party regulation produces a counterintuitive but healthy effect of encouraging political resolution of intraparty disagreements.

In Part II, I set forth the conventional legal understandings of political parties and party regulation. In Part III, I challenge those understandings as fundamentally problematic. I first explain the risk of conceptualizing the party too narrowly. Courts and commentators fail to recognize the hydraulics of party regulation. The hydraulics of party regulation posit that party leaders, when they are unified, can frustrate party reform.

⁵ Party leaders exert enormous influence in determining what party regulation is enacted by the state because party leaders “routinely, pervasively, and legitimately exercise their influence from within government.” Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 *Tex. L. Rev.* 1741, 1758 (1993).

I then explain the opposite risk of conceptualizing the party too broadly. Viewing the party as a unified coalition overlooks the politics of party regulation—vital intraparty conflict that often motivates party regulation and party-related litigation. The politics of party regulation reveal reform as part of ongoing political rivalry among party leaders. I introduce Court decisions addressing state regulation of party primaries and demonstrate how they resulted from intraparty competition.

In Part IV, I argue that a supralegal understanding of parties justifies judicial skepticism about party regulation, specifically regulation of party internal affairs, structure, and decisionmaking. I explain that courts in party regulation cases are managing the political dynamics among interested political actors, rather than acting upon a unitary political party. Judicial skepticism about party regulation is more likely to encourage political resolution of partisan disputes, and it is more effective in achieving this goal than judicial abstention.

To close, I demonstrate how the Court's handling of the party primary cases can be understood afresh as successful political management. The Court rehabilitated the relationships at the heart of those cases, notwithstanding the fact that its express rationales and the scholarly response overlooked these benefits.

II. POLITICAL REFORM AND THE APPEAL OF PARTY REGULATION

It is no mystery why political reform so often resorts to the regulation of political parties. Parties are a pervasive feature of American politics, involved in virtually every aspect of government.⁶ They recruit candidates, operate campaigns, and mobilize voters.

⁶ See Richard H. Pildes, The Supreme Court, 2004 Term – Foreword: The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 101 (2005) (referring to parties as “the central institutional form through which mass participation in politics is organized and rationalized”).

They develop political strategy, bring together likeminded politicians, and coordinate policymaking across different branches and levels of government. All fifty sitting governors are either Republicans or Democrats, and nearly every elected federal official is affiliated with one of the major parties.⁷

Nonetheless, Americans have always harbored ambivalence about political parties.⁸ On one hand, parties mediate the potential chaos of mass politics and provide organization for both politicians and voters. Morris Fiorina declares that parties are the only means by which to attribute “responsibility to government decision making.”⁹ On the other hand, reformers fear excessive control by party insiders and worry that elections will become “sham competitions while the true kingmakers decided the winner behind closed doors in the prototypical smoke-filled room.”¹⁰ As Stephen Gottlieb explains, reformers “have presupposed that the parties, when stronger, ignore their constituents, become far too self-protective, avoid issues in pursuit of victory, and hide private manipulations that serve the party professionals at the expense of the electorate.”¹¹

⁷ See Jonathan R. Macey, The Role of the Democratic and Republican Parties as Organizers of Shadow Interest Groups, 89 Mich. L. Rev. 1, 8 (1990) (contending that “party membership remains a sine qua non for becoming elected to political office in the United States”); John F. Bibby & Thomas M. Holbrook, Parties and Elections, in Politics in the American States: A Comparative Analysis 66, 67 (Virginia Gray et al. eds., 7th ed. 1999) (reporting that since 1950, only five people were elected governor as independents or minor party candidates, and in 1998, only twenty state legislators out of 7375 (.003 percent) were not Republicans or Democrats).

⁸ See Frank J. Sorauf, Extra-Legal Political Parties in Wisconsin, 48 Am. Pol. Sci. Rev. 692, 692 (1954) (“American political parties have long been the victims of a peculiarly ambivalent public attitude—an attitude which on the one hand views them as perverters of the democratic spirit while on the other hand it gives them a vital role in the democratic process.”).

⁹ Morris Fiorina, Retrospective Voting in American National Elections 202 (1981); see also Walter Dean Burnham, Critical Elections and the Mainsprings of American Politics 133 (1971) (“The only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party.”).

¹⁰ Nathaniel Persily & Bruce E. Cain, The Legal Status of Political Parties: A Reassessment of Competing Paradigms, 100 Colum. L. Rev. 775, 786 (2000); see also Leon D. Epstein, Political Parties in the American Mold 158-74 (1986) (describing historical distrust of political parties).

¹¹ Stephen E. Gottlieb, Election Reform and Democratic Objectives—Match or Mismatch, 9 Yale L. & Pol’y Rev. 205, 215-16 (1991); see also Harvey C. Mansfield, Jr., Political Parties and American Constitutionalism, in American Political Parties and Constitutional Politics 1, 1-12 (Peter W. Schramm & Bradford P. Wilson eds., 1993) (discussing the tradition of American ambivalence toward political parties).

As a consequence, reformers regularly seek democratizing legislation that would shift control of party affairs from party leaders to the voters.¹² Leon Epstein likened parties to public utilities in the sense that parties are agencies “performing a service in which the public has a special interest sufficient to justify governmental regulatory control.”¹³ State regulation attempts to influence the character and operation of political parties in a way that helps produce a healthy democratic process. The goal is to reinforce democratic interests like political participation, an informed electorate, and most prominently, democratic responsiveness and popular input into party business.¹⁴

A recent well-known example is the California blanket primary, enacted by popular approval of Proposition 198 before being struck down by the Supreme Court in California Democratic Party v. Jones. Before Proposition 198, California conducted closed primaries in which only registered members of a party could vote in that party’s primary. Proposition 198 replaced closed primaries with a single blanket primary in which voters, regardless of party registration, could vote in different party primary races for different offices all on a single ballot.¹⁵ In short, Proposition 198 opened every party’s nomination process, on an office-by-office basis, to anyone who wished to cast a vote.

Proposition 198 represented a classic example of party regulation justified as an

¹² Richard H. Pildes, Constitutionalizing Democratic Politics, in A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy 155, 161 (Ronald Dworkin ed., 2001).

¹³ Leon D. Epstein, Political Parties in the American Mold 157 (1986).

¹⁴ See Nancy L. Rosenblum, Primus Inter Pares: Political Parties and Civil Society, 75 Chi.-Kent L. Rev. 493, 509 (2000); see also Daniel Hays Lowenstein & Richard L. Hasen, Election Law: Cases and Materials 431 (2001) (explaining that “the history of American political parties has been to give voters more, not less direct control over party candidates and positions”); John F. Bibby, State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization, in The Parties Respond: Changes in American Parties and Campaigns 23, 25 (L. Sandy Maisel ed., 1998) (noting that “the net effect of state laws has been to mold state parties into quasi-public agencies and to limit party leaders’ flexibility in devising strategies to achieve organizational goals”); William P. Marshall, The Last Best Chance for Campaign Finance Reform, 94 Nw. L. Rev. 335 (2000) (describing an “overwhelming trend in American campaign reform . . . towards democratization”).

¹⁵ For example, if she wishes, a voter could vote in the Democratic primary for governor, then vote in the Republican primary for Secretary of State, and so forth.

attempt to shape the character of politics for the better by democratizing the way that the parties conduct their affairs. Supporters framed the blanket primary as a reform measure to increase competition and democratic responsiveness while reducing the influence of insiders and special interest groups. The district court in the litigation over Proposition 198 characterized the blanket primary as a legitimate “experiment in democratic government,” continuing the pattern of “change and adaptation as the States have responded to the play of different political forces and circumstances.”¹⁶ The court upheld the blanket primary based squarely on the rightful discretion of state government to regulate and restrict political parties in the pursuit of stronger, healthier democratic politics.¹⁷

The overarching rationale for party regulation, as it was for Proposition 198, is a public spirited appeal to positive reform of the political process. The premise is that the parties are so pervasively involved in politics, and so influential, that regulating how parties operate will, in turn, change the way that politics are conducted. If the state requires the parties to adopt more open procedures of candidate selection, then the democratic process will become more open and democratic, almost by definition.¹⁸ The goal is to reform politics by reforming the main political actors—the major parties.¹⁹

¹⁶ California Democratic Party v. Jones, 984 F. Supp 1288, 1303 (E.D. Cal. 1997), *aff’d*, 169 F.3d 646 (9th Cir. 1999), *rev’d*, 530 U.S. 567 (2000).

¹⁷ See also O’Callaghan v. State of Alaska, 914 P.2d 1250, 1261-63 (Alaska 1996) (upholding the Alaska blanket primary based on similar state interests).

¹⁸ However, in reaching its decision, the district court professed its agnosticism about “whether a blanket primary is a good idea.” Jones, 984 F. Supp at 1303. The court explained that the blanket primary might prove itself a bad idea, and in such case “the people of the State presumably will act to reform the system in the future as they have in the past.” Id.

¹⁹ The particular regulatory focus on the Republicans and Democrats, the two major parties, stems from their dominant institutional advantage within the American electoral system. American elections overwhelmingly employ a single-member district, first-past-the-post methodology under which the candidate who garners a plurality of votes wins the election. Duverger’s Law, a staple proposition of political science, avers that the single-member district, first-past-the-post regime gravitates toward a two-party system. The goal of achieving a winning plurality encourages both voters and candidates to push one of the top two contestants to victory, rather than try to help the third-place contestant leapfrog from third to first. See William H. Riker, The Two-Party System and Duverger’s Law: An Essay on the History of Political Science, 76 *Am. Pol. Sci. Rev.* 753 (1982) (assessing Duverger’s Law and describing the related literature); Maurice Duverger, Political Parties 217 (1954) (introducing Duverger’s Law). The American system rewards a third party nothing for its effort when it collects

Reformers and legal scholars also contend that the parties cannot extend “a full-throated demand for autonomy from state regulation” because such a claim would be “compromised by the fact that the present party system is so fundamentally the product of a heavily regulated electoral arena.”²⁰ The parties, they claim, are necessarily a construct of the electoral regime.²¹ If the necessary creation of an election system helps produce the parties as they are, reform can be directed toward modifying the election system and further regulating the parties for the better. Reformers can use the law to democratize the parties in ways that best serve public goals.

As a result, the dominant trend among legal scholars commenting on election law is away from traditional rights-based approaches, toward a “programmatic, functional approach” to legal regulation.²² Under this approach, courts should regulate the institutional arrangements of politics with a normative focus directed at what “best help[s] realize the appropriate systemic aims of elections.”²³ For instance, they ought to uphold state regulation that helps reinforce partisan competition and therefore promotes responsive representation.²⁴ Conversely, courts should strike down regulation that entrenches the

a sub-plurality of the vote. Members of the third party are better off joining with one of the top two parties to defeat the other. The consensus view is thus that the major parties enjoy an entrenched position because institutional incentives encourage candidates and voters to join one of the major parties rather than challenge them from outside. See more on Duverger’s Law at footnote 129.

²⁰ Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 278 (2001).

²¹ See Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 278-79 (2001) (arguing that “the development of the major political parties as the central political actors of our electoral system is, in large part, a by-product of the structures of the electoral system makes quite suspect claims of formal independence from state oversight”).

²² Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 276 (2001); see also Samuel Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593, 615 (2002).

²³ Richard H. Pildes, The Theory of Political Competition, 85 Va. L. Rev. 1605, 1623 (1999); see also Pamela S. Karlan, Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore, 79 N.C. L. Rev. 1345, 1346 (2001).

²⁴ See, e.g., Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643, 649 (1998) (“[W]e propose that a self-conscious judiciary should destabilize political lockups in order to protect the competitive vitality of the electoral process and facilitate more

avored position of the major parties and incumbents. By regulating the structural conditions of the democratic process, courts can ensure that “central democratic values, such as responsiveness of policy to citizen values and effective citizen voice and participation, are best realized in mass democracies.”²⁵

Legal scholars thus disapproved when the Court struck down the blanket primary in California Democratic Party v. Jones.²⁶ They pointed out that California voters enacted the blanket primary by direct democracy and forced the parties to open up their candidate selection process. The blanket primary was “a rebellion of the electorate against the claims rights of the party institutional apparatus and the party-in-government [i.e., government officials] to condition the terms under which the party presents itself to voters.”²⁷ It was consistent with the prominent reform goal of locating party decisionmaking with the party voters, as opposed to the party leadership.

Legal scholars seek to develop legal theories of the political party that enlist the party as a vehicle to promote structural ends. Gregory Magarian advocates for a First Amendment theory that would allow substantial regulation of the major parties and protect minor parties with the goal of facilitating a participatory democracy, heightening competition, and invigorating political debate.²⁸ Surveying a broad swath of party-related cases, Magarian concludes that the Court has been excessively solicitous of the major parties’ rights and thus suppressed political vitality in American politics by insulating them

responsive representation.”).

²⁵ Richard H. Pildes, The Theory of Political Competition, 85 Va. L. Rev. 1605, 1611 (1999).

²⁶ See, e.g., Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 Wm. & Mary L. Rev. 1939 (2003); Richard L. Hasen, Do the Parties or the People Own the Electoral Process?, 149 U. Pa. L. Rev. 815 (2001).

²⁷ Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 279 (2001).

²⁸ Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 Wm. & Mary L. Rev. 1939 (2003).

from competition. Likewise, Samuel Issacharoff and Richard Pildes argue that courts ought to serve as watchdogs against the major parties and strike down moves to lock themselves into power.²⁹ Nathaniel Persily favors a functional theory of political parties that would grant parties wider legal autonomy to encourage their functions as vehicles for competition and representation.³⁰

In sum, legal scholars and reformers generally agree that law is a useful and effective means of reforming the political process for the better. The prevailing wisdom, as Persily concludes, is that courts “ought to be quite activist in striking down barriers to competition between the two parties, but quite docile when it comes to scrutinizing state laws that rein in the parties’ autonomy.”³¹ Legal scholars and reformers hope that reform measures, such as the blanket primary, will increase the democratic responsiveness of the parties by shifting influence away from the leadership and toward the electorate.

III. A SUPRALEGAL THEORY OF POLITICAL PARTIES

A. Parties Outside the Law

The problem with the foregoing understanding of political parties and their regulation is that it mistakes parties to be discrete, identifiable entities that can be defined by law. The conventional view fails entirely to understand that parties are foremost supralegal creatures that defy and transcend legal and regulatory definition.

In functional practice, the heart of a political party is a set of shared political goals that bring together a large constellation of actors and institutions in roughly common cause.

²⁹ Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998).

³⁰ Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750 (2001).

³¹ Id. at 752.

A political party is a common enterprise in which the constituents benefit from coordination and intend to collaborate. Politically motivated actors elect to cooperate with one another in the service of overlapping interests, which may be ideological, personal, financial, or otherwise. A political party in a full sense is best understood as the collection of political relationships that bind together this loose party alliance.

The constellation of party actors extends far beyond the legal apparatus of the party. Although parties are in one sense highly regulated, legally defined entities,³² the law captures only a small portion of the activity and people referenced when we refer colloquially to a “political party.” Beyond a party’s nominees or titular officials (such as the party chairman, spokespeople, and employees), the party comprises all types of actors and institutions, many of which bear no formal relationship with the official party structure. The supralegal party is a teeming, polyarchic aggregation of politically interested constituents, not a tangible organization with a unitary personality and identity. The kaleidoscopic mass of political activists, volunteers, financial contributors, interest groups, PACs, lawyers, consultants, journalists, and intellectuals who perform important work aligned with the party’s collective agenda are not necessarily bound formally to or paid by the official party.

One of the principal goals of a party is to elect party nominees into government office, but it is not the singular goal of a political party, nor even a defining goal of many party constituents. Many party actors may prioritize narrower policy aims, or conversely a broader ideological crusade, that detracts from the goal of electing party nominees in the next election. Other party actors may support the party simply to advance financial or

³² See, e.g., Paul Allen Beck, *Party Politics in America* 66-69 (8th ed. 1997); John F. Bibby, *State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization*, in *The Parties Respond* at 23, 24-25.

personal interests by influencing policymaking and winning access to government officials. Even citizens who devote minimal resources to politics may understand and see themselves as important practicing constituents of their party if they vote consistently for their party or otherwise self-identify as party members. A political party encompasses a wide variety of party actors who bring with them a diversity of motivations and interests, but find it worthwhile to work together, or at least in parallel, in furtherance of overlapping political goals.

In other words, a “political party” is foremost a useful shorthand for this type of informal coalition, rather than a tangible organization or a collective membership group.³³ When we make reference to political parties, we most often mean to refer to a larger concept above and beyond a party’s nominees and official organization. We mean the “party” to signify more generally a larger, decentralized group of actors bound less by formal ties to the party than by informal relationships that bring them together for common political goals. The fact that these relationships are informal, and contributions often private or conducted independently of the official party structure, does not make them any less politically meaningful.

In other words, the political party cannot be understood simply as a discrete, identifiable entity. The party may manifest itself in various legal forms, for instance a party committee, a party convention, or in the person of a party candidate. However, it is impossible to say that any single legal entity, or collection of legal entities, sufficiently

³³ See, e.g., Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741, 1759 (1993) (musing that a party is “a set of patterns of activity, together with the perceptions, interpretations, emotions, and expectations that people have regarding those patterns”); Paul Herrnsen, State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization, in The Parties Respond 50, 62 (describing the “symbiotic relationships” among the party organizations, political consultants, PACs, and interest groups and citing the “revolving door” that activists frequently traverse between these entities).

represents all the myriad constituents of a party. The minimum of formalized relationships binding together the mass of the party makes it difficult to regulate or define these party actors through legal language. At the party's heart, there is simply nothing to regulate except a large variegated group of roughly likeminded individuals who act at times in concert and at times in conflict with one another.

The legal organizational form of the party merely represents the legal face that certain party actors choose to adopt when beneficial. The party's legal apparatus is incidental to the broader fundamental activity of political leaders trying to achieve political goals, whether through the party's legal apparatus or outside it. The legal apparatus is what John Aldrich refers to as an "endogenous institution," shaped by party actors as they see fit.³⁴ When circumstances change, as they do all the time, party actors simply re-shape the organizational forms, rules, and strategies of their party in response to legal and political demands as they arise.³⁵ Legal regulation defines the political party in static legal language that cannot keep pace with the ever-changing forms and practices of what we regard substantively as a "political party."

To complicate matters further, just as it is difficult for the law to track the legal apparatus of the party, it can be similarly difficult to identify the underlying political dynamics driving the legal apparatus of the party. Complicating our understanding of political parties is the fact that parties are characterized by internal diversity as well as a limited degree of general cooperation. This diversity among party constituents produces as

³⁴ John H. Aldrich, Why Parties? The Origins and Transformation of Political Parties in America 4 (1995) ("These politicians do not have partisan goals per se. Rather, they have more fundamental goals, and the party is only the instrument for achieving them.").

³⁵ Morris Fiorina, Parties and Partisanship: A 40-Year Retrospective, 24 *Pol. Behavior* 93, 103 (2002) (describing parties as malleable entities that party leaders "invent and reinvent to solve problems that face them at particular times in history"); see also Paul Frymer & Albert Yoon, Political Parties, Representation, and Federal Safeguards, 96 *Nw. U. L. Rev.* 977, 981 (2002) ("Parties, like most political institutions are highly malleable organizations filled with goal-oriented actors who respond to historically specific political contexts.").

much intraparty friction as intraparty cohesion. While party actors may agree in certain broad respects, they may disagree on many others and disagree on even many more specifics. As a result, individual party actors compete constantly to advance their particular political agenda against other political actors with different agendas, within their own party as well as in opposing parties. The fraternal competition within a party among rival factions is equally significant and often as fierce as interparty competition.³⁶

Members of a party share some common goals, but parties are not ideologically or politically monolithic. A political party embodies an enduring alliance among leaders possessed of overlapping preferences who see mutual benefit in sticking together on a wide range of issues inside of, and even outside of, their overlapping consensus. The party solves collective action problems and induces stability by allowing leaders to agree in advance to work together, even when their preferences diverge in a particular instance. However, it is important to realize that parties are defined by just enough, but not more, ideological similarity among members such that an alliance is useful.³⁷

Although the purpose of the party arrangement is to coordinate party members in common cause, party leaders compete among themselves to push coordination of the party toward positions that coincide with their respective preferences. Leaders within the same party disagree, often quite deeply, about issues large and small, and they compete internally to direct their party toward their particular interests. Intraparty competition mirrors

³⁶ See David R. Mayhew, America's Congress: Actions in the Public Sphere, James Madison Through Newt Gingrich (2000) (citing intraparty and interbranch rivalry as more important sources of political activity than interparty competition); Eric Schickler, Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress (2001) (explaining that institutional development in Congress resulted not only from partisan competition, but equally from intraparty competition for greater influence among intraparty subgroups).

³⁷ According to the theory of the minimum winning coalition, parties seek to form the smallest coalition necessary to control the government. See, e.g., Thomas Christiano, The Rule of the Many: Fundamental Issues in Democratic Theory 236 (1996); Charles Lindblom, Politics and Markets: The World's Political-Economic Systems (1977).

interparty competition, as individual leaders try to impose regulations and procedures on their own party that will favor their agenda over those of others. In the following sections, I explain how these different types of competition and coordination among party leaders complicate our understanding of political parties.

B. The Overnarrow Party and the Hydraulics of Party Regulation

Parties defy legal definition in multiple directions. In this section, I argue that it is easy to define a political party in an overly narrow fashion that ignores vital segments and dynamics of the party effort. This mistake obscures what I call the “hydraulics of party regulation.”

1. Hydraulics: The Theory

The major political parties have displayed remarkable capacity for adaptation to changing political circumstances. Throughout the twentieth century, parties have found new ways to accomplish their goals when old ways of achieving those goals have been cut off. Although reformers attempted periodically to affect the way that parties operate, political parties each time recovered to re-assert control over their affairs. Frank Sorauf once explained that “with almost chameleon-like ability, parties adapt themselves to new external regulation or internal pressure.”³⁸ As a consequence, the parties of the 1960s and the parties of today “have something in common, but the structures and functions of the organizations are different.”³⁹

³⁸ Frank J. Sorauf, Extra-Legal Political Parties in Wisconsin, 48 Am. Pol. Sci. Rev. 692, 704 (1954).

³⁹ Morris Fiorina, Parties and Partisanship: A 40-Year Retrospective, 24 Pol. Behavior 93, 103-04 (2002); see also Larry D. Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215, 282 (2000) (“No one doubts that party politics has changed a lot during the past century”); John F. Bibby, State Party Organizations: Coping and Adapting to Candidate-Centered Politics and

Parties have been adaptable to changing circumstances because there is a mismatch between the “party” that reformers intend to regulate and the “party” to which legal regulation attaches. Regulation of political parties deploys legal language to target and influence political activity. Reformers can change the law where it intersects with party activity, such as the rules affecting ballot access, holding primary elections, and other formal affairs. Regulation thus attaches to the legal apparatuses of the parties, where the parties manifest themselves through legally defined entities.

However, behind the party’s legal entities stands the larger, supralegal party coalition—the true party that reformers intended to restrict. The party comprises a loosely connected network of political actors—some of whom are party officials and most of whom are not, some of whom are professionals and many of whom are not—that performs important work in furtherance of the party agenda. Much of what is legally regarded as official party activity can be instead accomplished informally outside the ambit of election law by these unofficial actors and institutions who are allied with the party, but not legally connected to the party’s legal apparatus.

When the party’s legal apparatus is frustrated by party regulation, the party can shift its efforts away from the official apparatus and divert its strategic activity into less public, less regulated settings through these private channels available to it. When reform restricts what party leaders can accomplish via party business, they step back and try to accomplish the same objectives through informal, private activity. As a result, the effect of legal regulations that restrict what party leaders can accomplish through the official party structure is to push strategic behavior back a level, out of the party’s legal apparatus and

Nationalization, in *The Parties Respond* 23, 23-49 (describing major changes to state party organizations since the 1960s); Paul S. Herrnson, *National Party Organizations at the Century’s End*, in *The Parties Respond* 50, 50-82 (describing major changes to national party organizations since the 1960s).

further into the private unregulated realm. The legal apparatus of the parties, however important, are merely tools of political leadership whose legal forms can be abandoned whenever they become unprofitable for party leaders.

Drawing a connection across legal domains, the problem of avoidance here is analogous to the familiar problem of tax avoidance in corporate law. Because tax rules typically impose liability based on the legal form of the transaction and entities involved, instead of the economic substance, tax lawyers are often able to manipulate legal structures to avoid taxation without changing the economics of the transaction.⁴⁰ Changing the form of the transaction or transacting entities does not necessarily affect the fundamental economics—each party still can get what it wanted from the deal—but the transaction will be structured in whatever way their tax burden is lowest. The legal form bears no necessary relationship to the substantive fundamentals of those transactions.⁴¹ As a result, regulation articulated on the basis of legal forms may struggle to influence substantive economic behavior, except certainly to encourage avoidant conduct.⁴² Just so, the realities of party regulation face the same problem.

Political leaders in most instances can engage in meaningful political activity outside of the party structure. It would be difficult for General Motors to avoid regulation by shedding its corporate form and doing business by alternative means, but political leaders suffer little trouble rallying elite support, building coalitions, organizing campaign efforts,

⁴⁰ See David A. Weisbach, Formalism in the Tax Law, 66 U. Chi. L. Rev. 860, 885 (1999); see also Ronald J. Gilson & David M. Schizer, Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock, 116 Harv. L. Rev. 874, 891 (2003) (explaining that tax lawyers can exploit formal definitions for different forms of income and “game these lines to achieve a kind of tax alchemy—transmuting compensatory return into investment return”).

⁴¹ See David A. Weisbach, Formalism in the Tax Law, 66 U. Chi. L. Rev. 860, 869 (1999); David A. Weisbach, Line Drawing, Doctrine, and Efficiency in the Tax Law, 84 Cornell L. Rev. 1627, 1639 (1999).

⁴² For a great example from criminal law, see Dan M. Kahan, Ignorance of the Law Is an Excuse—But Only for the Virtuous, 96 Mich. L. Rev. 127, 137-40 (1997).

or helping to raise funds without being officially affiliated with party affairs. A classic example is Frank Sorauf's study of "extra-legal political parties" in Wisconsin.⁴³ During the first half of the twentieth century, Wisconsin law restricted the electioneering, organizational structure, and campaign finance activity of the official party structures. Major party leaders responded by abandoning the official party and working through "voluntary committees" legally separate from the official party apparatus defined by statute. As nominally private associations, the committees were not subject to Wisconsin's regulations on parties. The statewide voluntary committee for each party became "in effect *the party*," which carried on the basic functions of raising funds, campaigning, and seeking office.⁴⁴ Leaders act through a political party because it offers a certain package of costs and benefits. When regulation significantly raises the cost of acting via the party structure, leaders seek alternate means of doing business at lower cost.

I argue that there exists a hydraulics of party regulation.⁴⁵ Like water, the party leadership seeks a return to its level of influence, finding gaps and openings in the regulatory edifice whether they exist in the public or private domain. The hydraulics of party regulation signal that party leaders, when they are unified, may circumvent party reform that tries to restrict what they want to accomplish. When the law interferes with the operation of a political party and prevents leaders from pursuing their interests through their party, reform shifts leaders away from the party and directs their strategic behavior into less public, less regulated directions.

Legal constriction of what leaders can do officially through the party vehicle causes

⁴³ Frank J. Sorauf, Extra-Legal Political Parties in Wisconsin, 48 Am. Pol. Sci. Rev. 692 (1954).

⁴⁴ Frank J. Sorauf, Extra-Legal Political Parties in Wisconsin, 48 Am. Pol. Sci. Rev. 692, 694 (1954).

⁴⁵ This phrase is borrowed from Samuel Issacharoff & Pamela S. Karlan, The Hydraulics of Campaign Finance Reform, 77 Tex. L. Rev. 1705 (1999). For criticism of Issacharoff and Karlan, see section III.B.

leaders to step back and devise new, more private, means for accomplishing the same. Political leaders seek to influence and control politics under any regime. The main effect of regulation may be only to push political maneuvering by leaders out from under the party auspices and into the less regulated private arena. Consequently, the hydraulics of party regulation often lead not to changed outcomes, but similar outcomes by different means, perhaps outside the party aegis.

Samuel Issacharoff and Pamela Karlan once described a ubiquitous dynamic of campaign finance reform, which they termed the hydraulics of campaign finance.⁴⁶ Attempts to limit campaign funding in one respect promptly re-directs money into new, equally effective alternative channels. Limiting contributions leads not to a reduction in total campaign spending, but instead shifts funds from contributions to the unregulated opportunities of independent expenditures.

However, Issacharoff and Karlan completely failed to recognize that the hydraulics of campaign finance are most often just a subset category of the hydraulics of party regulation. Restrictions on party-related campaign finance induces leaders and financiers to conduct their financial transactions through independent expenditures nominally separate from the party legal structure. Legal obstacles encourage political leaders to find new, more effective private means of effectuating the results that they achieved previously through their party. The real hydraulics problem is more profound and rises above the fungibility of money or the particulars of campaign finance.

The same skepticism that now surrounds campaign finance reform ought to be applied to party regulation. In light of the hydraulics of campaign finance reform, even

⁴⁶ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 Tex. L. Rev. 1705 (1999); see also *Buckley v. Valeo*, 424 U.S. 1, 26 n.26 (1976) (foreseeing the same).

reform-minded legal scholars have resigned themselves to pessimism about the potential of regulatory reform to insulate politics from money. Some sympathetic scholars have surrendered the notion of campaign finance restrictions in favor of disclosure oriented approaches that attempt to channel money rather than limit its flow. However, this skepticism about reform has not yet extended to the notion of party regulation more generally.

Just as for campaign finance reform, effective reform may be possible through party regulation, but it is likewise difficult and problematic. Reform attempts may be frustrated and lead ultimately to unanticipated results contrary to the original reformist goals. For a chance at success, party regulation would require continuing intrusions further and further into the private realm to chase down party-relevant behavior, as political leaders recede from the public arena to escape regulation. And unlike many other regulatory settings, expansion of regulation to cover private political activity raises First Amendment considerations that may limit how successfully regulation can adapt.

2. Hydraulics in Action

A prominent example of how party reform can be subverted by clever leadership is the McGovern-Fraser reforms. Before McGovern-Fraser, both major parties chose their presidential nominee basically by convention. Local party leaders selected and controlled convention delegates, and selection of a presidential nominee occurred only after negotiation and bargaining by party bosses—mythic smoke-filled backroom dealmaking.⁴⁷ Before

⁴⁷ See, e.g., Larry M. Bartels, Presidential Primaries and the Dynamics of Public Choice 16 (1988) (“The basic mechanism by which party leaders attempted to achieve their goals was face-to-face political bargaining, with each other and with the candidates.”); Austin Ranney, The Political Parties: Reform and Decline, in The New American Political System 236 (Anthony King ed., 1978); Nelson W. Polsby, Consequences of Party Reform 9-16 (1983).

McGovern-Fraser, “parties as institutions—that is, state party organizations and major governmental officeholders elected under the party label—had a major, even decisive, role in determining who would receive the party’s nomination for president.”⁴⁸

The McGovern-Fraser reforms represented “an explicit rejection of the claim that nominations are the business of party leaders.”⁴⁹ The Democratic Party’s Commission on Party Structure and Delegate Selection, chaired by George McGovern and Donald Fraser, and better known as the McGovern-Fraser Commission, recommended a number of alterations to presidential nomination process. Their ultimate effect was a shift in both major parties from leader-dominated conventions for selecting presidential nominees, to direct primary elections, with the explicit goal of opening nominations to the party membership.⁵⁰ As Richard Hasen summarizes, McGovern-Fraser “moved power to choose the major parties’ nominees from the hands of local bosses into the hands of the party-affiliated voters, the party-in-the-electorate.”⁵¹ Since McGovern-Fraser, the presidential candidate for each party has won the nomination by winning primary contests state-by-state.

Stripping direct control of nominations from the party leaders was much criticized and lamented by commentators. Austin Ranney protested that, after McGovern-Fraser, “[t]he party organizations simply are not actors in presidential politics. Indeed, they are little more than custodians of the party-label prize which goes to the winning candidate

⁴⁸ Michael G. Hagen & William G. Mayer, The Modern Politics of Presidential Selection: How Changing the Rules Really Did Change the Game, in Pursuit of the White House 2000: How We Choose Our Presidential Nominees 1, 9 (William G. Mayer ed., 2000).

⁴⁹ Larry M. Bartels, Presidential Primaries and the Dynamics of Public Choice 20 (1988); see also Nelson W. Polsby, Consequences of Party Reform 34-36 (1983) (describing the McGovern-Fraser recommendations and their implementation); Daniel Hays Lowenstein, American Political Parties, in Developments in American Politics 63, 73-80 (Gillian Peele et al. eds., 1992) (same).

⁵⁰ Although the McGovern-Fraser recommendations were originally enacted as internal Democratic party rules, Democrats in state governments quickly codified the open selection requirements into state law, applicable not just to Democrats but to the Republican party as well.

⁵¹ Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition, 1997 Sup. Ct. Rev. 331, 353 (1997).

organization.”⁵² Similarly, Michael Hagen and William Mayer concluded that in the new system, “[t]he party organization and the party in government were almost entirely stripped of any significant voice in the decision.”⁵³ They feared that McGovern-Fraser bypassed the party leadership and turned the nomination process over wholesale to an uninformed, easily misled electorate.

Legal scholars for too long have commented on the supposed decline of parties in the aftermath of McGovern-Fraser and likeminded reforms. They remain unaware of how political scientists in current research widely proclaim a renaissance of political party strength. Party loyalty in Congress and in the electorate appears to exercise a stronger influence on voting than ever before measured. Despite all the early concerns about McGovern-Fraser, party leaders have responded to the reform challenge and quietly re-established control over presidential nominations.

Although McGovern-Fraser stripped party leaders of their formal authority to appoint the nominees directly, party leaders have developed an indirect and informal means of influencing who wins the primaries. Party leaders now run an “Invisible Primary” among themselves, before the actual primaries take place,⁵⁴ During the Invisible Primary, party leaders signal each other through a sequence of pre-primary endorsements and informally coordinate among themselves. A relatively small identifiable group of political insiders—“a stable pool of elites that exists independent of any candidate organization”⁵⁵—announce endorsements early in the election cycle, always before the first primaries, and eventually

⁵² Austin Ranney, The Political Parties: Reform and Decline, in The New American Political System 239 (Anthony King ed., 1978).

⁵³ Michael G. Hagen & William G. Mayer, The Modern Politics of Presidential Selection: How Changing the Rules Really Did Change the Game, in Pursuit of the White House 1, 33.

⁵⁴ See Marty Cohen, David Karol, Hans Noel, & John Zaller, Beating Reform: The Resurgence of Parties in Presidential Nominations, 1980 to 2000.

⁵⁵ Marty Cohen et al., Beating Reform, at 42.

determine a favorite.

Once a favorite emerges, party leaders channel decisive resources and support to the favored nominee for the upcoming primary elections. This frontrunner absorbs the majority support of a relatively small pool of “central fundraisers” and regular contributors who reliably back the insiders’ favorite.⁵⁶ As one political reporter describes the Invisible Primary, “In this campaign before the campaign, the index is not a ballot count but money raised, would-be staffers secured, and speeches delivered in places such as Iowa and New Hampshire, which formally launch the nomination process 18 months from now.”⁵⁷ John Zaller and his colleagues found that the candidate who emerged with a clear lead in pre-primary endorsements from party leaders later became the party’s nominee in eight of nine contested nominations since 1980.⁵⁸ In short, during the Invisible Primary, the candidates compete before the primaries for the support of party leaders who control the decisive campaign financing and services necessary beforehand to win the primary elections.

Candidates without the backing of party leadership struggle to compete because they lack the resources for the intense primary campaign. Despite Pat Buchanan’s early success in 1996, winning the Louisiana and New Hampshire Republican primaries, his candidacy never threatened to claim the nomination because he was without the money, organization,

⁵⁶ See Clifford W. Brown, Jr., Lynda W. Powell, & Clyde Wilcox, Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns 30-49 (1995) (identifying a small pool of contributors and solicitors behind each party’s candidates).

⁵⁷ Glen Johnson, Democrats Eye Early Advantage for '04 Primary, *Bos. Globe*, July 14, 2002, at A1.

⁵⁸ See Cohen et al., Beating Reform; see also David Dodenhoff & Ken Goldstein, Resources, Racehorses, and Rules: Nominations in the 1990s, in The Parties Respond 170, 195 (noting that the candidate with the requisite campaign resources is “the one who has won the invisible primary and, not coincidentally, has won his party’s nomination”); Andrew Mollison, Want to Run for President? You May Need \$22 Million in '99 to Have a Chance of Winning in 2000, Candidates Must Dig Up a Fortune Early in the Fund-raising Game, *Atl. Const.*, Dec. 27, 1998, at 12A (reporting that the candidate who raised the most early money captured the party nomination in every election since 1976, when campaign finance disclosure was first required).

and support from Republican insiders.⁵⁹ Similarly, in 2000, Republican maverick John McCain encountered a similar “firewall” of opposition after early success in the Republican primaries. According to opinion polls, McCain was the general public’s most popular candidate, the Republican with the best chance of winning the general election.⁶⁰ However, Republican leaders rallied almost unanimously behind Invisible Primary winner George W. Bush, lifting Bush to victory over McCain.⁶¹ The 2004 Democratic primaries presented a more complicated picture, but with similar end results. Howard Dean led in the polls leading up to the primary elections, despite having limited support from the party leadership, but the party quickly closed ranks behind initial favorite John Kerry. Dean won only one primary, in his home state of Vermont, only after he withdrew from the race.

Many commentators have characterized this new means of politics as “candidate-centered,” as opposed to the “party-centered” politics of the convention era, but the same actors are working to achieve similar goals as before. Party leaders regrouped from the loss of direct control of nominations through official party conventions and found a new, less formal way of influencing outcomes. Political actors within the party now act outside of official party caucuses, conventions, and organizations, and now work directly for particular

⁵⁹ See, e.g., David Dodenhoff & Ken Goldstein, Resources, Racehorses, and Rules: Nominations in the 1990s, in The Parties Respond 170, 197 (“Buchanan simply could not be all of the places he needed to be, raise all of the money he needed to raise, and build the kind of organization he needed to build quickly enough to overcome [Bob] Dole’s initial advantages.”).

⁶⁰ See Dana Mackenzie, May the Best Man Lose, 21 Discover 84 (2000) (citing survey results showing that McCain would have beaten Gore and Bush in pairwise matchups and under a Borda count); William Crotty, The Presidential Primaries: Triumph of the Frontrunners, in America’s Choice 2000 103 (William Crotty ed., 2001) (citing multiple polls after the New Hampshire primary finding McCain to be the best-liked candidate overall).

⁶¹ Republican interest groups, such as Americans for Tax Reform and the National Right to Life Committee, campaigned vigorously and effectively against McCain as well. See, e.g., John B. Judis, The Conservative Campaign to Derail the Arizona Senator, Am. Prospect, Mar. 13, 2000, at 15 (“In Washington almost every conservative organization and Republican politician is out to get McCain.”). As McCain colorfully put it, “I’m just like Luke Skywalker trying to get out of the Death Star. They’re shooting at me from everywhere. Everybody’s against me. Governor Engler, Governor Bush, all the governors, all the senators.” R.G. Ratcliffe et al., Republicans Duel in Michigan, Hou. Chron., Feb. 22, 2000, at A1.

candidates, campaigns, and specific causes. McGovern-Fraser certainly changed the means by which these party actors exercise influence, and thereby shifted power among them, but it did not effectuate a major shift in power from these party leaders as a class to the electorate in the way that reformers hoped and critics feared.⁶²

The effect of McGovern-Fraser was to push back strategic action by leaders into a more private realm in which party leaders act not officially as party representatives bargaining at a convention, but as interdependent activists each trying to influence the party's ultimate selection of a nominee. Interest groups, financial contributors, and party politicians have always successfully advanced their favored candidates and influenced nominations, before McGovern-Fraser and since.

3. Hydraulics and the Limitations of Party Regulation

The lesson for courts and reformers is that legal regulation will be unlikely to dampen the collective influence of a unified party leadership. When regulation increases the control that party leaders as a group will be able to exercise, leaders will happily accede to the boost in their influence over party affairs. When regulation aims to reduce the control of party leaders, party leaders will quickly switch from old methods to new ones. The

⁶²Of course, presidential candidates today are unlike yesterday's candidates in important respects. Bill Clinton probably would not have nominated as a presidential candidate in 1952. But it is careless to assume that these differences are attributable, in whole or even in substantial part, to the fact that candidates are nominated by direct primaries rather than convention. Massive sociopolitical changes during the last fifty years dwarf the effect of changes in election law. Most prominently, the introduction and overwhelming pervasiveness of television changed the way that candidates appeal to voters, get nominated, win elections, and conduct themselves once in office. Indeed, the shift in politics from local face-to-face, grass-roots activity to nationalized remote relationships conducted via television did more to influence election law than the other way around. The overwhelming importance of television in how voters learn about politics and evaluate candidates made it self-beneficial for the parties to adopt direct primaries. In other words, the adoption of primary elections would not have occurred but for the recognized need within the parties that direct primaries were necessary to find and nominate the right candidates for the new age of television and media politics. The change in election law more likely reflected changed incentives from the new landscape of American politics, instead of changing those incentives and the landscape itself.

hydraulics of party regulation tend to re-direct collective leadership influence from one form to another, rather than reduce it in the aggregate.

The political relationships binding together party leaders are informal, not legal, and they continue to work together even when the law restricts the official party. Institutional reforms may not lead to the desired results because they leave unchanged the fundamental interests that leaders possess to strategize within the new institutional framework and skew outcomes in their favor. Indeed, the very popularity of, and perceived need for, the blanket primary in Proposition 198 reflected frustration with the failure of the McGovern-Fraser Commission's recommendations to open the party's nomination procedures.

Just as re-direction of campaign financing from one form into another can be salutary,⁶³ party regulation that pushes political activity in different directions also can be beneficial. Reform forces leaders to adjust time-tested strategies and adapt to new institutional settings. Party regulation may make it more difficult to accomplish certain ends, or tip the balance between competing factions. Reform can force leaders to shift from the most cost-effective methods, at least by some accounting, to a new equilibrium. By so doing, party regulation might in certain instances serve expressive goals or empower particular groups and leaders rather than others, consistent with normative ends. My goal for now is simply to introduce a realistic skepticism about the potential of party regulation, and court decisions regarding party regulation, to generate the anticipated benefits that reformers and legal scholars covet.

⁶³ See Michael S. Kang, Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus", 50 UCLA L. Rev. 1141, 1182-87 (2003) (arguing that regulation of direct democracy ought to channel campaign spending from major financiers into the form of independent expenditures, rather than contributions, to achieve optimal public disclosure); Kathleen M. Sullivan, Against Campaign Finance Reform, 1998 Utah L. Rev. 311, 325-26 (arguing that regulation of candidate elections ought to channel campaign financing into the form of contributions to candidates, rather than independent expenditures, to promote public accountability by elected officials).

Structural approaches to election law overstate how well party regulation can condition strategic behavior by political leaders. Whatever benefits that flow from party regulation, if they result at all after the hydraulics process unfolds, are likely to be less significant than optimists expect. Moreover, the effects of regulation will be unpredictable *ex ante*, given the dynamism of the hydraulics process. Regulation can force changes in the way that politics are conducted, but the degree to which reform “works” depends more on the ingenuity of the political leaders targeted by reform than the legal design of reform. Leaders of the major parties are smart, motivated, and resourceful enough to minimize the effects of stringent regulation and find new ways to perform old tricks. Legal scholarship that seeks to justify party regulation and advocate structural approaches to election law must carefully take into account the hydraulics phenomenon and argue its case in context-specific terms, rather than assume that party regulation leads cleanly to its intended results.

If nothing else, the major changes in the practices of the political parties in the wake of the Bipartisan Campaign Reform Act (BCRA) demonstrates how political actors can quickly adapt to, and flourish in spite of, substantial reform efforts. The immediate response to BCRA, particularly from the Democratic Party, was to build a “shadow party” of private 527 and 501(c) organizations.⁶⁴ These organizations were created, funded, and often led by individuals previously associated with the official party, and this shadow party undertook an impressive array of basic operations previously assumed by the official party structure. These groups raised money, ran advertisements, organized volunteer networks, and

⁶⁴ See, e.g., Aaron Bernstein, Paula Dwyer, & Lorraine Woellert, Inside the Dems’ Shadow Party, *Bus. Week*, March 22, 2004, at 105; Thomas B. Edsall, Money, Votes Pursued for Democrats, *Wash. Post*, Dec. 7, 2003, at A08; Glen Johnson, Campaign Finance Changes Spur New Kind of Attack Ads, *Bos. Globe*, Dec. 20, 2003. A related development was the creation of Air America Radio, a liberal-leaning radio network with informal connections with the Democratic Party. Media outlets with meaningful, but nominally informal relationships with political parties raise related regulatory and constitutional issues as well. See Richard H. Hasen, Campaign Finance Laws and the Rupert Murdoch Problem, 77 *Tex. L. Rev.* 1627 (1999).

registered voters just as the official party might have, before BCRA. Nonetheless, the shadow party stood legally independent of the official party for the purpose of avoiding BCRA. What is more, the official parties managed to raise more in hard money than ever and gathered record amounts in total fundraising, despite the new restrictions imposed by BCRA.⁶⁵

Finally, party regulation entails important costs that have been heretofore neglected, the most important of which may be transparency. During the hydraulics process, strategic behavior is pushed deeper into the quiet background of politics where it become more difficult for the public to monitor how important political questions are resolved. As leadership maneuvering retreats from the public domain to the private, accountability and public awareness decrease even further. And as regulation expands to cover this type of private political activity, the shadow of the First Amendment stands a backstop. While some scholars argue that the First Amendment ought to be relaxed to allow stricter regulation in the context of campaigns and elections, free expression concerns still must be weighed against the expected benefits. Pushing back the boundary between private and regulable activity in this context entails potential costs, as regulation encroaches further into the private domain.

The Supreme Court, in McConnell v. FEC, expressed awareness of the challenge presented by regulatory avoidance but exhibited less sensitivity about its intractability.⁶⁶ The Court repeatedly upheld provisions of BCRA under the interest of forestalling circumvention of other campaign finance restrictions. However, the Court may need to

⁶⁵ See Anthony Corrado, Party Fundraising Success Continues Through Mid-Year, Brookings Institution Study, Aug. 2, 2004, available at http://www.brook.edu/views/papers/corrado/20040802_paper.pdf.

⁶⁶ 124 S.Ct. 619 (2003).

reach quite far to reach avoidant behavior, because the party actors are willing and able to retreat as far as necessary into the private domain, daring open regulation of campaign speech proximate to an election. The post-BCRA experience demonstrates the malleability of party operations, as party actors adapted not only their fundraising apparatus to new law, but wholly re-organized the way that they conducted the entire range of their political activity in furtherance of the party effort.

The national party committees against whom BCRA was aimed have flourished despite the new restrictions, while less wealthy, less sophisticated political actors are comparatively disadvantaged by the increased costs of regulatory compliance.⁶⁷ The national party committees, helped by higher contribution limits, raised unprecedented amounts of federal money to compensate for the loss of soft money contributions under BCRA. Although the costs of compliance with federal and state campaign finance laws increases with regulatory complexity and scope, the national committees and similarly well-financed organizations absorb the new costs with relative ease. Groups with fewer resources—for instance, minor parties, independent candidates, and unaffiliated advocacy groups—are less able to afford the new costs of disclosure, monitoring, legal advice, and strategy that flow from BCRA and continuing regulatory developments. As regulation expands further, the net effect is to push the political discourse further into the hands of a relative few with the necessary expertise and finances to participate.

C. *The Overbroad Party: Competition Within and Across Party Lines*

Just as it is easy to conceptualize political parties too narrowly, it is equally

⁶⁷ See Bradley Smith, *Faulty Assumption and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049 (1996) (arguing that campaign finance reform advantages incumbents who can better bear the increased costs of compliance).

problematic to conceptualize parties too broadly. When we see parties as broad monolithic coalitions of like-minded activists, we miss the diversity and intraparty competition inherent in major party politics. Indeed, intraparty competition itself is frequently the source of party regulation. Moreover, despite the hydraulics phenomenon, party regulation has important effects on party activity because party leaders not only fail to stand unified against it, but often advocate for it. In this section, I explain those “politics of party regulation.”

Party regulation is enacted when one set of party leaders codifies into state law its preferred institutional arrangements, and litigation over party regulation arises when rival party leaders respond by challenging it in court. The hydraulics of party regulation reveal reform for what it often is—politically motivated modification of the legal landscape to the advantage of certain party actors and to the disadvantage of others.

In this section, I introduce a trio of Supreme Court cases addressing state regulation of party primaries. I explain the politics of party regulation underlying each case and show how conflict among party actors motivated the enactment of regulation and the ensuing litigation over it. Although the hydraulics of party regulation demonstrate the danger in underestimating the breadth and cohesion of political parties, this section argues that overestimating party unity entails the risk of missing the politics underlying party-related litigation.

1. The Politics of Party Regulation: The Theory

The hydraulics of party regulation suggest that regulation typically fails to reduce the influence of party leaders as a group, but nonetheless, it regularly succeeds in shifting relative influence from one group of party leaders to another. In fact, while regulation may be framed as an attempt to achieve the former, the latter is more usually what regulation was

intended to do. Against rivals in their own party and against partisan opponents, leaders try to use legal regulation to grant advantages to those with their comparative strengths and impose disadvantages on others. Each individual leader and her closest allies strive to create a regulatory environment that benefits them and injures their opponents.

For instance, although Proposition 198 was presented as party regulation designed to open up the party's decisionmaking and democratize the political process, its passage was possible only because of the wherewithal of one particular party leadership faction, Rep. Tom Campbell and his supporters. Advocates of a blanket primary in California tried and failed earlier to collect enough signatures to get an initiative on the ballot. However, Campbell's defeat to conservative Bruce Herschensohn in a Republican Senate primary motivated Campbell and his well-funded supporters to place the blanket primary on the ballot and win its passage in a 1996 referendum.

The Campbell faction calculated that a blanket primary, with its moderating effect on the primary contest, would optimize his chances, as a centrist, to survive the Republican primary for Senate and reach the general election.⁶⁸ Moreover, Campbell and his supporters realized that while many leaders of both major parties would oppose a blanket primary, voters might support a blanket primary in a statewide vote. They successfully used the initiative process where they were likely to win and bypassed the legislative arena where they were likely to lose. Campbell explained frankly that Proposition 198 gave him "the best chance [he's] got to win a primary."⁶⁹

⁶⁸ See Bill Ainsworth, Ganging Up on Prop 198: Democrats and Republicans Are Presenting a United Front Against the Open-Primary Ballot Measure, *The Recorder*, Mar. 18, 1996, at 1 (describing Campbell's political motivations for placing Proposition 198 on the California ballot); Brian J. Gaines & Wendy K. Tam Cho, Crossover Voting Before the Blanket: Primaries Versus Parties in California History, in Voting at the Political Fault Line: California's Experiment with the Blanket Primary 12, 30 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002).

⁶⁹ Martin Kasindorf, Candidate Tests the System He Built: California GOP Moderate Sees "Blanket" Primary as Best Shot at Senate, *USA Today*, Mar. 6, 2000, at 12A.

Although legal scholars characterize Proposition 198 as a victory of the party electorate over the party leadership, Proposition 198 was actually a fight between competing Republican leadership groups. Issacharoff characterizes Proposition 198 as “the revenge of the median voter (or the party-in-the-electorate) upon the party-in-government and the party apparatus.”⁷⁰ Similarly, Pildes claimed that “it was the voters who imposed this primary system *over* the objection of the political parties.”⁷¹ However, it was not the case that the party constituency decided for itself to rise up and enact what it wanted by direct democracy.

Without the strategic calculations of Campbell’s supporters, the blanket primary would not have been born, regardless of the electorate’s preferences. The benefit to centrist voters from the blanket primary was a byproduct of the main goal of benefitting centrist candidates advantaged by crossover voting in primary elections.⁷² Indeed, the other major party leaders who filed briefs in support of the blanket primary, once Proposition 198 reached the Supreme Court, were centrist groups like the Hispanic Republican Caucus and centrist politicians like Governor Gray Davis and Senators John McCain and William Brock who shared similar political interests as Tom Campbell.⁷³ True, Campbell’s maneuvers were

⁷⁰ Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 281 (2001).

⁷¹ Richard H. Pildes, Constitutionalizing Democratic Politics, in A Badly Flawed Election: Debating Bush v. Gore, the Supreme Court, and American Democracy 155, 168 (Ronald Dworkin ed., 2001).

⁷² The general expectation is that an influx of independent centrist voters into the primary electorate ought to result in more ideologically moderate candidates. See Barry C. Burden, The Polarizing Effects of Congressional Primaries, in Congressional Primaries and the Politics of Representation 95 (Peter F. Galderisi et al. eds., 2001); Elisabeth R. Gerber & Rebecca B. Morton, Primary Election Systems and Representation, 14 J. L. Econ. & Org. 304 (1998). However, opening the primary may lead to less change than expected, or no change at all, if party leaders still want to nominate the same types of candidates as were nominated under closed procedures and if party leaders can figure out ways to grant counterprevailing advantages to those candidates under the open primary. Indeed, disagreement exists among political scientists about whether open primaries actually produce more centrism. Compare David C. King, Party Competition and Polarization in American Politics (paper presented at the annual meetings of the Midwest Pol. Sci. Ass’n, Chicago, 1998), with Burden, Polarizing Effects; Gerber & Morton, 14 J. L. Econ. & Org. 304.

⁷³ See Nathaniel Persily, The Blanket Primary in the Courts: The Precedent and Implications of California Democratic Party v. Jones, in Voting at the Political Fault Line 303, 321.

a minor victory for the electorate in the sense that its preferences were temporarily ratified. However, the voters had a say only because its preferences coincided with Campbell's and only at the precise moment when it served his strategic interests.⁷⁴ This sort of thin victory, at Campbell's behest and command, illustrates how activating the party electorate through direct democracy may serve as only a contingent and provisional means to a strategic end, rather than a meaningful commitment to an open process.

Leaders have access to the levers of state government, and they wield them to gain advantage over rival leaders. As many commentators have noted, that the "state" in party regulation cases is not an independent decisionmaker acting upon the party.⁷⁵ The "state" in these cases is merely one party element, and the "party" is merely another element among several within the same party or another party with different interests. One political faction exploits the political and legal attractiveness of reform to seize political advantage for itself. When Tom Campbell advocated for Proposition 198, he used the language of reform, participation, and responsiveness. He may have sincerely believed his reform rhetoric, but he did not advocate regulatory change until he calculated a political benefit. Similarly, current California Governor Arnold Schwarzenegger is campaigning for legislation or a ballot initiative to entrust legislative redistricting to a nonpartisan commission.⁷⁶ Schwarzenegger may believe that the commission is a solution for problems with partisan

⁷⁴ See Bruce E. Cain, Party Autonomy and Two-Party Electoral Competition, 149 U. Pa. L. Rev. 793, 800 (2001) (characterizing Proposition 198 as "an attempt by one faction of the Republican Party to use state law to gain advantage over another faction").

⁷⁵ See Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741, 1757 (1993) ("[U]nlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government."); Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750, 752 (2001) ("The state' is rarely, if ever, a neutral, nonpartisan lawgiver that enacts unbiased rules of party membership."); Richard H. Pildes, The Theory of Political Competition, 85 Va. L. Rev. 1605, 1610 (1999); ("States with one dominant party have often adopted rules . . . that in purpose and effect enshrine or accentuate that party's dominance.").

⁷⁶ See Nancy Vogel, Looking to Design a Fairer Map, L.A. Times, Feb. 13, 2005; Peter Nicholas, GOP Fears a Redistricting Backfire, L.A. Times, Feb. 8, 2005

gerrymandering, but his principal hope is that the commission will produce a more centrist legislature more amenable to his centrist agenda. Rarely will political leaders fight politically and legally for reforms that would injure them politically, relative to their rivals.

Armed with an understanding of the politics of party regulation, courts should recognize that party regulation usually coincides with an attempt by one leadership group to gain advantage over others, inside or outside the party, regardless of any public justification. What is really transpiring when party regulation lands in court is a dispute among competing leadership groups, whether inside a party or across party lines. One group successfully exercised an advantage in state lawmaking to codify an institutional regime that benefits it, over the countervailing efforts of other groups to defeat it. If courts are to address party regulation with reference to its potential structural effects, they must attend closely to the outcomes that these politically motivated engineers of party regulation expect, hope, and fear these regulatory adjustments will produce. The litigants' political motivations are relevant because no one knows better than them what the structural effects of party regulation are likely to be.

It is not difficult for each litigant in a party regulation case to conjure up a colorable claim that its position is the normatively or structurally correct one, just as every litigant in Jones was able to do. Political actors wield virtually every aspect of election law as weapons against one another—campaign finance law, Shaw v. Reno, ethics inquiries, ballot access regulation, the Voting Rights Act, direct democracy, legislative redistricting, and most prominently here, party regulation. In every case, each side musters fair sounding justifications for the regulatory regime that favors it.⁷⁷ The political party serves multiple

⁷⁷ See John Ferejohn, Judicializing Politics, Politicizing Law, 65 L. & Contemp. Problems 41, 63 (2002) (“When courts can make politically consequential and more-or-less final decisions, anyone with an interest in those decisions has reason to try to frame those interests in the form of persuasive legal arguments.”).

purposes for many different actors in numerous different contexts such that many competing actors can simultaneously stake legitimate claim to represent the party's best interests in some capacity.⁷⁸ Litigants are talking about the First Amendment and democracy, but they are fighting over which side will win the regulatory regime that better serves its interests.

This is not to say that reform goals can never be advanced through party regulation and that all party regulation amounts to nothing more than political manipulation. However, the legal and democratic principles at stake tend, in light of the politics of party regulation, to be overblown in these cases and the political dynamics tend to be overlooked. Competing party factions present their conflicting claims to the court, which is expected to decide party cases on the basis of reform principles that are not driving the dispute.

2. The Politics of Party Regulation: The Party Primary Cases as an Example

In this section, I demonstrate how intraparty conflict plays out in party-related cases before the Supreme Court. I address three Supreme Court cases addressing the most prominent form of party regulation: state-imposed rules governing primary elections of party candidates for public office—what the Court regards as the “basic function” of political parties.⁷⁹ I focus on Democratic Party v. Wisconsin ex rel. La Follette;⁸⁰ California Democratic Party v. Jones;⁸¹ and Tashjian v. Republican Party of Connecticut.⁸²

⁷⁸ See Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741, 1786 (1993) (arguing that judicial intervention “should not have as its purpose the strengthening of ‘the party’”).

⁷⁹ Kusper v. Pontikes, 414 U.S. 51, 58 (1973); see also Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 216 (1986) (describing the party primary as “the crucial juncture at which the appeal to common principles may be translated into concerted action”).

⁸⁰ 450 U.S. 107 (1981).

⁸¹ 530 U.S. 567 (2000).

⁸² 479 U.S. 208 (1986).

a. Description of the Cases

In Democratic Party v. Wisconsin ex rel. La Follette,⁸³ the Court addressed whether state law overrides the national party's internal rules and forces the national party to recognize state delegates selected in violation of national party procedure. The national Democratic party rules required that state party organizations choose their delegates to the national party convention by selection procedures that restricted participation exclusively to Democratic party members, such as a closed primary or caucus.⁸⁴ In other words, the national party demanded that its state party subunits conduct candidate selection by means of a closed process that excluded non-Democrats.

However, Wisconsin law contradicted national party rules and required party primaries to be open, permitting nonmembers to vote in the Democratic presidential primary.⁸⁵ What is more, the state of Wisconsin proudly boasted a longstanding Progressive tradition of open primaries that the state Democratic party of Wisconsin was loath to abandon. Although Wisconsin Democrats controlled state government, they refused to amend state law and continued to decide party nominations by open primary.⁸⁶ After nearly a decade of stubborn resistance, the state of Wisconsin sought injunctive relief against the national party. After Wisconsin state courts upheld the open primary law, the national party

⁸³ 450 U.S. 107 (1981).

⁸⁴ Rule 2A of the 1976 Democratic convention rules stipulated that "[s]tate parties must take all feasible steps to restrict participation in the delegate selection process to Democratic voters only." See Gary D. Wekkin, Democrat Versus Democrat: The National Party's Campaign to Close the Wisconsin Primary 29 (1984). The national party's convention rules commanded flatly that "[p]articipation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded." Wisconsin ex rel. La Follette v. Democratic Party of the United States, 287 N.W.2d 519, 524-25 (Wis. 1980).

⁸⁵ Technically, voters in the primary election did not vote directly for state delegates to the national party convention. Instead, delegates were chosen by the state party organization, but they were bound by Wisconsin law to vote at the national convention in accordance with the primary election results.

⁸⁶ Rather than comply outright, the state party avoided obvious conflict with the national party rules by selecting party delegates by closed caucus. However, state law still bound the delegates to vote in accordance with the results of the open primary. See Wisconsin ex rel. La Follette v. Democratic Party of the United States, 287 N.W.2d 519, 523-34 (Wis. 1980).

appealed to the United States Supreme Court.

In La Follette, the Court reversed and held that the national party's First Amendment rights protected the freedom to exclude nonmembers from the party primary. The Court sided squarely with the national party, explaining that freedom of association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."⁸⁷ By requiring that delegates be selected by a closed primary, the national party simply exercised its right not to associate with nonmembers of the party, at least for purposes of candidate nominations. The Court explained that "inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party's essential functions—and that political parties may accordingly protect themselves."⁸⁸

For this reason, the state of Wisconsin could not force the unwilling national party to seat delegates who were bound by state law to vote in accordance with the open primary results. The national party was not obligated to accept the open primary and was free to insist upon closed procedures consistent with national party policy. La Follette thus established the party members' associational rights to exclude nonmembers from the core party activity of candidate selection, even with state law to the contrary.

The Court revisited the conflict between state law and party rights in California Democratic Party v. Jones.⁸⁹ The Court addressed California's blanket primary, which as discussed above, was approved as a ballot initiative by 60 percent of the electorate. However, most leaders in both major parties opposed the blanket primary. The chairmen of the California Republican and Democratic parties listed themselves in the official ballot

⁸⁷ Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981).

⁸⁸ Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981).

⁸⁹ 530 U.S. 567 (2000).

pamphlet as opponents of Proposition 198's passage.⁹⁰ They contended that Democrats choosing the Republican nominee, or vice versa, was like "letting UCLA's football team choose USC's head coach." After Proposition 198 won enactment, the major parties filed suit to enjoin the blanket primary, claiming that the forced inclusion of nonmembers in their party primaries violated their associational rights.

Faithful to La Follette, the Court in Jones again upheld the party's right to exclude nonmembers from its primary and be free from state interference. For purposes of the associational rights analysis, the blanket primary differed little from an open primary in La Follette because it likewise "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival."⁹¹ A blanket primary threatens to saddle the party with "an unwanted, and possibly antithetical" candidate who could severely transform, or even destroy, the party's message and mission.⁹² Together, La Follette and Jones appeared to reject state imposed participation of nonmembers in party primaries when the party wishes to keep its primaries closed to outsiders.

La Follette and Jones bracket a third party primary case—Tashjian v. Republican Party of Connecticut.⁹³ In La Follette and Jones, political parties opposed state attempts to open their primaries to nonmembers. By contrast, the Connecticut Republican Party in Tashjian wanted to open its primaries to nonmembers in derogation of a state law requiring

⁹⁰ See Brian J. Gaines & Wendy K. Tam Cho, Crossover Voting Before the Blanket: Primaries Versus Parties in California History, in Voting at the Political Fault Line 12, 30. In fact, state Democrats openly characterized their opposition to Proposition 198 as a "joint campaign" with Republicans. See Steven A. Capps & Carla Marinucci, State Voters to Decide on Cross-Party Balloting: Prop. 198 Would Allow Dems to Vote for GOP and Vice Versa but Party Leaders Fight It, S.F. Exam'r, Mar. 18, 1996, at A-2.

⁹¹ California Democratic Party v. Jones, 530 U.S. 567, 577 (2000).

⁹² California Democratic Party v. Jones, 530 U.S. 567, 579 (2000).

⁹³ 479 U.S. 208 (1986).

their primaries to be closed. Connecticut law at the time required both major parties to limit the franchise for their primary elections to registered party members.⁹⁴

Indeed, although the Court took little notice of the fact, Connecticut law gave party leaders tighter control over nomination procedures than any other state. State law entrusted nominations to state party conventions, organized and attended by party officials from local and state committees. This closed process frequently obviated any need to hold a primary election for most offices.⁹⁵ One pair of scholars explained as a consequence that “Connecticut can stake legitimate claim to being the ‘political parties state.’”⁹⁶ Connecticut was the last state to adopt a direct primary, and its restrictive nomination procedures reflected, according to one observer, “the unwillingness of party professionals to open the nominating process to the rank and file party members.”⁹⁷

However, in 1983, the Connecticut Republican party began to consider opening its primary to independent voters. Frustrated with Democratic control of the state legislature and almost every statewide office, the Connecticut G.O.P. amended its rules to permit independent voters to vote in the primary. Republicans in state government tried likewise to amend Connecticut law to allow parties to open their primaries,⁹⁸ but the Democrats in state government thwarted any changes. Flummoxed, the Republicans brought suit to challenge the state prohibition on opening their primary to independents. Tashjian thus presented the opposite situation from La Follette and Jones—here the party wanted to open

⁹⁴ See Republican Party of Connecticut v. Tashjian, 599 F. Supp. 1228, 1230 (D. Conn. 1984) (describing Conn. Gen. Stat. § 9-431).

⁹⁵ Under this regime, 80 percent of Connecticut state legislators in 1986 won office simply by winning the convention endorsement, without facing a challenge primary. See Gary L. Rose, Connecticut Politics at the Crossroads 44 (1992). Unsurprisingly, a 60-percent majority of the incumbent legislators favored keeping the candidate-selection system as it was, and only 24 percent wanted to change the system. See id. at 45-46.

⁹⁶ Clyde D. McKee, Jr. & Paul Petterson, Connecticut: Party Politics as a Steady Habit, in Parties & Politics in the New England States 113, 131 (Jerome M. Mileur ed., 1997).

⁹⁷ Gary L. Rose, Connecticut Politics at the Crossroads 7-11 (1992).

⁹⁸ See Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 269-70 (2d Cir. 1985).

its primary, and state law required the primary to be closed.

In Tashjian, the Court decided in favor of the Republicans and declared unconstitutional the state law barring an open primary. As in La Follette and Jones, the Court held that a state law regarding whom the party includes in its primary franchise impermissibly intruded on the party's associational rights. However, in allowing a party to open itself to outsiders, Tashjian's description of the party's associational rights shifted importantly from La Follette and Jones.

Remember that La Follette and Jones emphasized the party membership's right to protect itself from the distorting influence of nonmembers who do not share the party's philosophical commitments. Faithful to this interest, the state of Connecticut justified its closed-primary law as "the ideological guarantor of the Republican Party's candidates."⁹⁹ The state claimed that the closed-primary requirement forced the party to protect its ideological commitments from exactly the distorting influence feared by the Court in La Follette and Jones.

Nonetheless, the Court in Tashjian held that the party was entitled, if it so wished, to invite nonmembers into its affairs and assume precisely this risk of a distorting influence by nonmembers. Any limitation on the group of registered voters whom the party may invite to participate in selecting candidates also "limits the Party's associational opportunities at the critical juncture at which the appeal to common principles may be translated into concerted action."¹⁰⁰ Thus, the Court arguably interpreted the same associational rights as in La Follette and Jones to reach an opposite result. In La Follette and Jones, the Court based its associational rights analysis on the right of the party members

⁹⁹ Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 220 (1986).

¹⁰⁰ Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 216 (1986).

to protect their ideological integrity from the diluting input of outsiders. In Tashjian, the Court upheld the party members' right to include outsiders in participation in the primary, even if those outsiders dilute the party.

The end result of the party primary cases is what has been called a doctrinal regime of "party autonomy"¹⁰¹ in which the party is free to open or close the primary as it wishes. The Court established a party's right "to be independent of state intrusion" in this decision.¹⁰²

b. Understanding the Party Primary Cases as Intraparty Competition

It is important to realize that party autonomy is complicated in the party primary cases because in all three cases, substantial elements of the relevant party stood on opposite sides of the question in the case.¹⁰³ Competition within the party for control of the party's

¹⁰¹ See Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750 (2001) (describing the primary cases as establishing party autonomy).

¹⁰² Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274, 274-75 (2001).

¹⁰³ In the party primary cases, the Court's decisions run toward inclusion and exclusion of nonmembers in ways that defied the preferences of the party electorate. If one researches public opinion of the party membership in each case, as I have and describe below, the outcomes in these cases ended up in each instance overriding the party voters' preferences. Party voter support for an open primary was strongest in Jones, a case in which the Court prohibited it. Close to 60 percent of Californians had voted in favor of the blanket primary, including 61 percent of Democrats and 57 percent of Republicans. See California Democratic Party v. Jones, 984 F.Supp. 1288, 1291 (E.D. Cal. 1997), aff'd, 169 F.3d 646 (9th Cir. 1999), rev'd, 530 U.S. 567 (2000).

Conversely, membership support for a closed primary was weakest in La Follette, a case in which the Court effectively mandated it. Wisconsin boasted a storied and popular tradition of open primaries that the state party strove to preserve, in contravention of the national party's policy. Surveys conducted in 1980, as the La Follette litigation began, reported that an overwhelming majority of Wisconsin residents opposed closing the presidential primary. One Milwaukee Sentinel survey, for example, found that voters favored retention of the open primary by a margin of 90 to 6 percent. See Gary D. Wekkin, Democrat Versus Democrat: The National Party's Campaign to Close the Wisconsin Primary 52-53 (1984). The Wisconsin press mirrored the public's hostility to a closed primary. Wisconsin newspapers published more editorials opposed to the closed primary than in favor by a twelve-to-one margin. Id. at 56-58.

In Tashjian, the picture of the party membership's preferences is less clear, but it is unlikely that the party voters favored inclusion of independents in the primary. The G.O.P. break from the Connecticut tradition of tight party control was the brainchild of Senator Lowell Weicker, a maverick unpopular among the Republican leadership but popular among independent and Democratic voters. Gary Rose, a scholar of Connecticut politics, notes that Weicker orchestrated the movement to open Republican primaries to independents and observes that "most Republicans at the time were not very enthusiastic about the prospect of Independents voting in their primaries." E-mail from Gary L. Rose, Professor of Political Science, Sacred Heart University, to the author (Mar. 11, 2003). As Justice Scalia's dissent recognized, in the end, the decision to open the Republican primary

direction was central to understanding the politics underlying the cases and how the Court's decisions helped resolve the political disputes at the heart of each case.

The complication in the party primary cases, and virtually all litigation involving political parties, is that it is far from clear who deserves claim to the party leadership. A supralegal theory of political parties understands parties as manifold entities that comprise different factions of leaders with overlapping but distinguishable, and sometimes conflicting, interests. It is not obvious which party faction, among several that disagree, ought to be deemed the legitimate party leadership regarding a particular question. The party primary cases revolve around the extension of this ordinary political rivalry to attempts to trump opposing factions by use of state and constitutional law. The party primary cases, like almost all party-related cases, demand serious consideration of the underlying politics that brought the litigants to court, particularly if the decision in the case is to depend on the structural result of a decision either way.

These cases, almost by definition, featured one partisan group's successful use of state law either to impose regulatory change or thwart it, followed by another group's legal challenge bringing the political dispute to court. In La Follette, the national Democratic party pressured the state Democratic party to close Wisconsin's open primary. The state party fiercely resisted any change for years and used the Wisconsin state law as a barrier blocking the national party's demand.¹⁰⁴ Likewise, as discussed above, Jones arose out of intraparty rivalry, this time inside the California Republican party. Tom Campbell's group

"was not made by democratic ballot, but by the Party's state convention." Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 236 (1986) (Scalia, J., dissenting). What is more, shortly before Weicker's defection and the party's victory in Tashjian, even the state Republican convention re-instituted the closed primary.

¹⁰⁴ Wisconsin leaders went as far as to threaten the removal of a state party chairman who was insufficiently hostile to the national party. See Gary D. Weckin, Democrat Versus Democrat: The National Party's Campaign to Close the Wisconsin Primary 140-54 (1984).

bypassed fellow Republicans in state government and enacted the blanket primary over their heads via direct democracy. Republican leaders, in turn, challenged the blanket primary in court. Political rivalry spilled over into the invocation of state law and then finally to constitutional litigation in the federal courts.

Tashjian likewise involved political rivalry, but it is distinct from La Follette and Jones because it addressed what was primarily an interparty dispute between Republicans and Democrats, rather than an internal dispute within either party. Unlike La Follette and Jones, there were not leaders from the same party filing briefs on both sides of the case. At the time of litigation, Connecticut Republicans stood united in their demand for an open primary. The Court recognized that the “state” in Tashjian was for all purposes simply the Connecticut Democrats, “one political party transiently enjoying majority power,” who purposely frustrated their Republican opponents’ attempts to modify the G.O.P. primary.¹⁰⁵ The Court, applying the doctrine of party autonomy, intervened to prevent an obviously partisan misuse of state power by Democrats in the pursuit of interparty advantage.

Thus, the critical difference among the three cases was the degree to which the relevant party leadership was divided or unified regarding whether to open or close the primary. When the party leadership was unified in Tashjian, the Court’s decision gave the party what it wanted. However, in La Follette and Jones, a single political party’s leadership was itself fiercely divided into two opposed camps, one favoring open primaries and the other favoring closed ones. Of course, it would be constitutionally permissible for a unified party as a whole to open the primary when acting under consensus, as the Connecticut

¹⁰⁵ Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 224 (1986); Guy Charles describes Tashjian as a case in which “the state sought to determine political outcomes, as opposed to allowing the political market to dictate political outcomes.” Guy-Uriel Charles, Racial Identity, Electoral Structures, and the First Amendment Right of Association, 91 Cal. L. Rev. 1209, 1254 (2003).

Republicans did in Tashjian, despite whatever threat to the party's ideological integrity. Moreover, the problem in La Follette and Jones was not that the membership disagreed with the leadership on whether to open the party's primaries. The Court defied the membership's preferences in each case.¹⁰⁶ Instead, the problem in La Follette and Jones was that *a single party's leadership* was strongly divided on whether the party should hold open primaries. Understanding parties as supralegal, diverse, and polyarchic creatures is fundamental to recognizing the crux of the dispute as the vicious conflict within the party's own leadership.

The conventional approach to parties often overlooks intraparty conflict like that in La Follette and Jones. A supralegal analysis of intraparty conflict clashes with the traditional framework of the political party routinely relied upon by legal commentators¹⁰⁷—V.O. Key's famous tripartite disaggregation of the party.¹⁰⁸ First, the “party-in-government” describes party politicians in government office who carry the party label. Second, the “party organization” describes the professional party activists who perform the party-building, fundraising, and campaigning functions in service of party candidates. Third, the “party-in-the-electorate” describes voters who identify with a party and whose votes (and opinions) are guided by the party label. The first two groups together constitute the “party leadership,” the political professionals who operate the party's affairs, as distinguished from the rank-and-file “party membership” of the party-in-the-electorate. The legal commentary, when it considers the issue, typically frames the intraparty struggle for party control as occurring between this party leadership against the party membership.

¹⁰⁶ See note 103.

¹⁰⁷ See, e.g., Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95; Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 89 Geo. L. J. 2181 (2001); Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741 (1993).

¹⁰⁸ V.O. Key, Jr., Politics, Parties and Pressure Groups 163-65 (1964).

This framework makes it difficult to recognize that intraparty competition occurs in a relevant way only within and among the party leadership. Political leaders within the party plot the important political moves and strategies that characterize the party primary cases. It is political leaders, like Tom Campbell in Jones or the Wisconsin Democratic leadership in La Follette, who calculate the best ways to use state law to entrench their preferred institutional arrangements. They have both the means and incentives to use state law to their advantage. The party-in-the-electorate is simply not an affirmative actor in intraparty disputes. It plays a role only insofar as a political leader finds it to her advantage to bring its influence into play. Certainly, party leaders are sensitive to voter preferences. But, as E.E. Schattschneider explained, the people are a sovereign that “can speak only when spoken to,” and “whose vocabulary is limited to two words, ‘Yes’ and ‘No.’”¹⁰⁹ Leaders make these important choices that structure the individual choices of individual citizens. In the intraparty disputes that arrive before the Court, it is conflict among the leadership that matters, not conflict between the leadership as a whole and the membership.

I argue that, inside the party leadership, it is rarely the case that intraparty disputes divide the leadership along a neat fault line between Key’s party organization and party-in-government the way that legal scholars routinely depict it. Instead, these disputes incorporate elements of each on both sides of the conflict. Both sides include likeminded leaders from the party organization and party-in-government, cooperating together against their fraternal rivals. For example, the Campbell faction comprised a few government officials and candidates and the activists aligned with them, against other Republican leaders both in office and the party organization. Similarly, La Follette featured a quasi-federalism

¹⁰⁹ E.E. Schattschneider, Party Government 52 (1942); see also V.O. Key, Jr., Politics, Parties, and Pressure Groups 247 (1942) (noting that “a mass of people cannot act as a unit; a small inner circle has to narrow the choices for public office and to formulate questions of public policy”).

case in which the national Democratic party clashed with the state Democratic party, with each group including a cross-section of government officials, party activists, and other party actors.¹¹⁰ These cases defy an easy categorization as intraparty conflict pitting the party-in-government, party organization, and party-in-the-electorate against one another, each a homogeneous, undifferentiated, and cohesive monolith, each autonomous from the others. Party regulation cases typically feature political disputes, bringing together likeminded members of each party segment in common cause,¹¹¹ rather than institutional disputes that split the party along functional divisions like those in Key's trichotomy.

The party primary cases were driven by this intraparty conflict, featuring competition among the leadership most prominently in La Follette and Jones. A supralegal view of parties enables us to see that, just as the party coalition can bond together and coordinate action when necessary, the party coalition is sufficiently loose and variegated that it divides on important decisions about the party's direction in ways that frequently spill over into constitutional litigation. Parties are not passively acted upon by party regulation; in fact, party elements typically act through regulation to achieve their own ends.

IV. A SUPRALEGAL THEORY OF POLITICAL PARTIES

I have argued that legal treatment of the political party is at once too narrow and too broad. When we view the party too narrowly, with a legal focus on the official apparatus of the party, we fail to recognize that the essence of the party effort—the political relationships underlying the party effort—transcend the party's legal forms and manifest

¹¹⁰ See Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 NYU L. Rev. 750, 771 (2002) (referring to the “federalism spin” of La Follette).

¹¹¹ For a popular account of strident intraparty division along ideological lines, see Thomas Frank, What's the Matter with Kansas? (2004) (describing a split between factions of the Kansas Republican party).

themselves in the private domain as necessary, sheltered from regulation. However, when we overestimate the degree of political cohesion within the party effort, we fail to recognize how party actors often disagree and work against one another for relative influence.

In section IV.A. below, I explain a supralegal approach to political parties. I argue that courts should adopt a skeptical approach to party regulation, specifically regulation of party internal affairs. First, regulation of party internal affairs is highly vulnerable to hydraulic avoidance by political actors. Such regulation attempts to control or prevent coordination among leaders who have great incentive and means to devise alternate means for continuing to work together. The regulatory problem, then, is that they may achieve the same ends through different means, perhaps at higher cost, but do so in ways that are less public, less accountable, and less transparent.

Second, when party regulation is effective, it frequently springs from attempts by politically motivated actors who seek to alter the terms of political competition that govern themselves and their opponents, both within and outside their party. Party regulation biases interparty competition, but it also skews intraparty competition and cooperation in equally important ways, however overlooked by courts and legal scholars. Rather than reform, the goal of these politically motivated actors is to exploit access to government power and apply external regulation to tilt interparty and intraparty competition in their favor. Putative reform of party internal affairs are more likely to achieve these narrow political aims of advantaging certain factions than they are to achieve the broader reform goals deployed to justify regulation.

In section IV.B., I demonstrate the virtues of a supralegal approach to political parties by analyzing the party primary cases in an entirely new way. I explain how understanding parties as bundles of political relationships helps to illuminate the party

primary cases. Against the legal commentary,¹¹² I argue that the party primary cases were decided correctly. The Court's decisions had the healthy effect of managing how party actors resolve political disagreements in exactly the way that one might hope.

A. *The Need for Judicial Skepticism about Party Regulation*

Courts and legal commentators turned their focus to political parties in an effort to become less formalistic and more attentive to the political reality that parties are important institutions.¹¹³ However, in doing so, commentators have forgotten what parties are—a collection of cooperative relationships among political leaders in furtherance of a common agenda. Regulation and litigation involving political parties are attempts to re-structure the environment in which these various political relationships play out. We should recognize that party regulation and litigation are exercises in political management of these relationships, and more like regulating a family than a corporation.

A supralegal theory of parties identifies parties as diverse aggregations of political actors that variously both work together and oppose one another. The implications and considerations of party regulation varies depending on which relationships are being affected and in what fashion, because parties fail as the single unit of analysis. Sometimes the invoked “party” is a broad coalition in which leaders cooperate with one another to defeat unwanted regulation of their common mission. However, party actors also often divide and wield party regulation as a weapon against rivals within and outside their party. In other words, a supralegal theory of parties conceptualizes the law regulating political

¹¹² See Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95; Richard Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695 (2001); Richard L. Hasen, Do the Parties of the People Own the Electoral Process?, 149 U. Pa. L. Rev. 815 (2001).

¹¹³ See, e.g., Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95, 95 (observing that legal scholars increasingly understand the constructive role of political parties).

parties as essentially regulations of how various political relationships, different in different contexts, can be carried out legally. Regulating parties is the equivalent of regulating political leaders in their political coordination with one another, formal and informal in myriad circumstances.

First, courts should adopt a categorical approach to party regulation, choosing either to uphold all party regulation or strike down all party regulation. Courts are often confused by the politics of party-related cases and struggle to understand the relevant political dynamics at play.¹¹⁴ A chorus of commentators have argued that courts have performed poorly in making case-by-case judgments about American politics, and it is difficult to imagine significant improvement.¹¹⁵ However, during the age of constitutionalization of democratic politics, courts cannot avoid party-related cases altogether.¹¹⁶ Even abstention as a strategy requires courts to analyze the politics at hand and execute an effective decision

¹¹⁴ Courts and commentators often speak past one another, referring to different things as the “party,” even within a particular case, because the term is so flexible and indefinite. For instance, it was Justice Scalia’s unspoken assumption about what actually constituted the “party” of constitutional interest in the party primary cases that produced his own seeming inconsistency in these cases. Justice Scalia switched from the dissent in Tashjian to majority in Jones, though both cases held in favor of party autonomy. Justice Scalia appeared to believe that party associational rights protect the party’s base constituency—the subgroup of hard-core ideologues among the party voters, regardless of what the party leadership otherwise identifies as the best interest of the party. He protested that the blanket primary was intended to force party candidates to “curry favor with persons whose views are more ‘centrist’ than those of the party base.” California Democratic Party v. Jones, 530 U.S. 567, 581 (2000). Even though a majority of party-registered voters favored the blanket primary, Justice Scalia insisted in Jones that the blanket primary “adulterate[s]” the party in diluting the voting control exercised by the core ideological base among the party voters. Id. at 581-82.

Justice Scalia dissented in Tashjian by the same logic. He would have upheld the state-mandated closed primary because the format forces the party leadership to bow to the views of the real “party”—the party’s core voters. Justice Scalia explained that “the State has the right to protect the Party against the Party itself,” the Party in the first reference being the party’s core voters and the Party in the second reference being the party’s leadership and centrist party voters who might stray from the base’s ideological commitments. Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 237 (1986) (Scalia, J., dissenting) (quotation marks omitted). Justice Scalia viewed the party’s core voters as the true “party” in the party primary cases and sought to defend them from everyone else in the party. Some commentators questioned Justice Scalia’s consistency across the two cases because his private conception of the party’s true identity was not explicit. Justice Scalia appeared inconsistent across cases only because his own functional definition of a political party was implicit and unfamiliar to most observers.

¹¹⁵ See, e.g., Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95; Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 Const. Comment. 295 (2000).

¹¹⁶ See Guy-Uriel Charles, Constitutional Pluralism and Democratic Politics: Reflections on the Interpretative Approach of Baker v. Carr, 80 N.C. L. Rev. 1103 (2002).

not to decide and to retain the status quo.¹¹⁷ A case-by-case judicial approach to party regulation would require courts to choose among different party regulations and decide winners and losers in intraparty and interparty competition. Any such nuanced approach with respect to party regulation forces courts to make difficult normative judgments about the political process for which they lack legitimacy and to make difficult empirical judgments about political dynamics that they are not well-prepared to identify. A categorical approach, if engineered properly, permits courts to apply rule-based doctrine that achieves structurally sound outcomes, but avoids undue dependence on judicial analysis of the details of the supralegal party and party regulation in each case.

Second, instead of upholding all party regulation, courts ought to scrutinize closely and ultimately strike down party regulation that attempts to dictate the internal affairs of political parties, their leadership structure and decisionmaking in particular. Such lawmaking, like regulation of the primary franchise and the political party's organizational hierarchy, is extensive and attempts "to mold state parties into quasi-public agencies and to limit party leaders' flexibility in devising strategies to achieve organizational goals."¹¹⁸ The underlying purpose is to control coordination and competition among party leaders who already possess terrific incentives to reach agreement among themselves on their own. Lawmaking in these areas thus intervenes and tries to disrupt the political dynamics that would drive party leaders to informal accommodation.

Regulation of party internal affairs is most likely to fall prey to the hydraulics of party regulation. When external regulation forces party leaders toward undesirable

¹¹⁷ For criticism of abstention as an approach to political party cases, see section IV.B.

¹¹⁸ John F. Bibby, *State Party Organizations: Coping and Adapting to Candidate-Centered Politics and Nationalization*, in *The Parties Respond: Changes in American Parties and Campaigns* 23, 25 (L. Sandy Maisel ed., 1998)

outcomes in these areas, party leaders will unify in opposition and avoid regulation through hydraulic strategems. While regulation may influence how the party conducts its business, it does so in a limited way as it encourages the party simply to achieve the same ends through different means outside of its legal apparatus. Even as regulation forces changes in party activity, it also comes with a cost. Political activity emigrates from the public sphere of the political party's legal structure to the less regulated, private sphere where accountability and transparency are far less.

When regulation of party internal affairs is most effective, it all too often was sponsored by the party in power to the competitive disadvantage of its opponents. In these cases, like Tashjian, party regulation tends to favor, and thus insulate, the majority party by tilting the terms of partisan competition in the majority's direction. The majority party can leverage its control of government to secure its place in power.¹¹⁹ Of course, not all party regulation is so obviously motivated by partisan purposes as in Tashjian, nor so clearly unfair and damaging to partisan competition. But the significant risk of such a scenario as the prelude to party regulation justifies judicial skepticism. The potential consequence of insulating the majority party in power is highly costly, and by definition, unlikely to self-correct through the political process.

Third, judicial skepticism remains warranted in other instances as well. Party regulation just as often results when one intraparty faction enacts advantageous legal parameters that advance that faction over other intraparty rivals. In these cases, the major consideration is not partisan fairness—instead, regulation is being wielded as a weapon in

¹¹⁹ This is, of course, a dominant concern throughout election law. See, e.g., Richard Pildes, A Theory of Political Competition, 85 Va. L. Rev. 1627 (1999); Samuel Issacharoff & Richard Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998); Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 Geo. L. J. 491 (1997).

intraparty politics. Competing party leaders have engaged in strategic behavior to apply external regulation to win intraparty disputes over the party's internal affairs and decisionmaking. Ironically, these instances are when regulation is most likely to influence party affairs, although only until disadvantaged party actors countermobilize in what promises to be an ongoing hydraulic exchange. Regulation here becomes destabilizing and both triggers and facilitates a spiral of responses in which party actors use lawmaking to outmaneuver and overpower their rivals.

Fourth, courts should be generally suspicious of reform interests advanced to justify any form of party regulation. Recall that reform goals are likely to be substantially undermined by the hydraulics of party regulation. No one should know better than these party actors of what they expect party regulation to accomplish in their quest for advantage, and no one should know better than they about the hydraulics of party regulation. Political disputes over party regulation are always cloaked in the language of constitutional law and democratic theory when they land in court. But whatever the stated reform rationales, party regulation is likely to be motivated by partisan goals, not reform ones.¹²⁰ When partisan goals dictate a change in policy, party regulation will so be reversed later on. In other words, party regulation is as often an obstacle or opponent of reform as an ally.

Party actors seek not to reform the other party, or their own, but to place heavier costs on their opponents' optimal ways of doing business. In other words, lawmakers care little about democratizing political parties in the abstract. Lawmakers care little if their opponents band together supralegally and the hydraulics of party regulation take effect. Assuming the hydraulic process occurs successfully, their opponents may manage to

¹²⁰ Cf. Lilian BeVier, *McConnell v. FEC: Not Senator Buckley's First Amendment*, 3 Election L. J. 127, 142-45 (2004) (criticizing BCRA as a veiled attempt to insulate incumbent officials from accountability).

reinstate previous outcomes by resorting to new tactics. However, the hydraulic process is likely to force those opponents to discard their first-best method of operation for less efficient ones, even if they arrive at similar end results. If correctly calculated, those opponents will be forced to spend more resources for the same payoff. As a consequence, a likely outcome of reform regulation in these cases is that (i) regulation will be successful in achieving the political purposes of disadvantaging opponents; but (ii) regulation will be much less successful in achieving the reform purposes allegedly underlying the effort in the first place.

Once we view parties essentially as bundles of myriad relationships, the structural concern is how best to manage these relationships toward a healthy balance of cooperation and competition. As I have explained, party conflict spreads beyond political accommodation when one faction enlists state law in the form of regulation to trump its rivals. Those rivals then return fire by petitioning the courts for a different form of legal trump to override the original legislative victory.¹²¹ Judicial decisions are best seen as but one step in a continuing series of attempts by one faction to gain advantage over another. Judicial solicitude toward party regulation encourages this cycle, motivating party actors to seek victory via state law trumps through the legislature in the first place and then motivating their rivals to reverse those victories in the courthouse.

Judicial skepticism about party regulation wards off these spirals and forces political rivals to negotiate a political compromise, rather than trying to trump one another through state law. In this way, courts can help provide a framework for the lasting resolution of the underlying political dispute. Once we view parties in terms of the constant tension inherent

¹²¹ See, e.g., Gregory A. Caldeira & John R. Wright, Organized Interest and Agenda Setting in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 1109 (1988) (describing how groups use litigation as a strategy for achieving policy goals outside the legislative process).

in their constituent political relationships, we can understand how the main goal of courts is to help manage competition among party actors and stave off spiraling rivalries, rather than trying vainly to impose a final settlement on party factions that will never stick. Skepticism toward party regulation is more likely to produce a general equilibrium settlement of conflict, achieving new structural benefits of stability and party cohesion, and less likely to produce unstable partial equilibrium settlements that will be quickly undone in the statehouse or after another trip to court.

In the following section, grounded in the supralegal theory of political parties, I offer an alternate construction of the primary cases. I disregard the Court's express rationales and contend that the Court's actual resolution of the party primary cases could be understood as acting on a clear understanding of the underlying politics and the relevant political relationships. Under this alternative approach, the question in the party primary cases could be re-framed to show how party autonomy helps induce a final resolution of the intraparty leadership disputes occurring in the cases, rather than provide the next step in a continuing sequence of moves.

I explain how the Court's decisions in the party primary cases, effectively, albeit unintentionally, helped determine how political leaders would decide the fate of their party—collectively in internal party negotiations, rather than in a courtroom or state legislature, through political consensus rather than through a legal trump. In cases featuring party conflict, losing litigants are likely to continue maneuvering in the statehouse or the courtroom in perpetuation of the ongoing dispute.

B. Re-thinking the Party Primary Cases Through a Supralegal Lens

Once we view party cases in terms of political conflict and cooperation among different factions of party actors, the Court's doctrine of party autonomy in the party primary cases can be re-framed as an implicit choice in favor of political resolution of intraparty disagreements. The outcomes of the decisions, if not their reasoning, were focused on the proper relationships motivating the disputes at heart of each case.

As a practical matter, courts face a decision in party cases about how party actors, when they disagree, will decide among themselves important choices regarding the party's message, internal procedures, ideological agenda, and political strategy. Courts choose the forum in which party leaders will compete with one another, but ultimately decide for themselves, the party's collective direction. The Court's decisions had the healthy effect of managing how intraparty disputants carry out their disagreements in exactly the way that one might hope if the Court was trying to manage intraparty competition. In sum, the Court could be seen as seeing clearly the leadership relationships in these cases and focusing on setting up a framework for healthy conflict resolution, rather than fixating on the "party" as a single entity to be acted upon.

As I have explained, a party is a common enterprise in which the constituent factions benefit from coordination and intend to collaborate, but each faction also wants the party's collective effort to move closer to its individual preference. Parties are characterized by this drive toward cooperation, tempered by factionalization. Unlike a corporation, a party in practice consists of diverse, loosely affiliated actors whom the titular leadership and official organization cannot command by fiat.¹²² A party cannot resolve its disputes by

¹²² Former Speaker of the House Jim Wright once complained that party leaders "don't have punishments and rewards that we can hold in some cookie jar somewhere." U.S. House Committee on House Administration, History of the United States House of Representatives, 1789-1994 142 (1994). Compared to

coercing acquiescence on any side of an intraparty dispute. Instead, intraparty factions try to reach a political accommodation that satisfies their interests and allows them to cooperate as a party.

However, when the party is subject to state law commands, each intraparty faction has individual incentive to use the coercive force of state law to dictate cooperation on their terms from intraparty rivals. Party actors seek to terminate difficult intraparty disputes by using state regulation of the party to force their fraternal rivals to acquiesce.

The effect of the Court's decisions, whether or not the Court intended it, was to force the opposing intraparty factions once again to engage one another politically.¹²³ The Court struck the state laws and thereby removed the possibility of a state law trump in these intraparty fights.¹²⁴ This party autonomy from state regulation meant that the party was left to govern itself extralegally in the fluid, polyarchic realm of party politics. Party leaders must once again deal with one another politically, despite their differences, and develop a consensus that the party leaders can collectively accept. In La Follette, when one party faction disagreed with the rest of the party regarding party policy, the Court directed the dissenting group to address its arguments to the rest of the party, "not to the judiciary."¹²⁵

The party primary cases reinforced party cohesion and stability by refusing to grant victory to any single party faction through judicial decision or state law. Party leaders are

other developed democracies, the American electoral system grants fewer powers of control to party leaders, most prominently the ability to exclude disloyal officeholders from the ballot. See Bruce Cain, John Ferejohn, & Morris Fiorina, The Personal Vote: Constituency Service and Electoral Independence 87 (1987); Gary Cox, The Efficient Secret: The Cabinet and the Development of Political Parties in Victorian England (1987).

¹²³ The Court may have been sensitive to the complex political situation presented in La Follette, as Daniel Lowenstein has commented. See Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 Tex. L. Rev. 1741 (1993). For criticism of Lowenstein's approach to party regulation cases, see Part IV.B, *infra* pp. 59-61.

¹²⁴ Cf. Samuel Issacharoff & Richard H. Pildes, Politics as Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998) (arguing that incumbents lock up government control by amending the electoral rules to their party's advantage).

¹²⁵ Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 n.27 (1981).

held together by common goals and strategic interests, and likewise they must resolve their disagreements consistent with their common goals and interests if the party is to remain cohesive going forward. In addition, the doctrine of party autonomy also insulated other parties and permitted each party to control its affairs, rather than stand subject to the state law commands of whatever party controls state government. The Court's decisions thus encouraged, perhaps forced, all party leaders to cooperate through consensus instead of seeking unequivocal victory through the brute force of law.¹²⁶

Focused on the party as the unit of analysis, it is unsurprising that legal scholars have failed to recognize fully how party regulation is so frequently the product of intraparty leadership competition. They have focused primarily on interparty competition as the predominant political dynamic in party cases and have hoped to leverage interparty competition as a means of drawing out a healthy, responsive democratic politics.¹²⁷ By

¹²⁶ As a result, it is misleading to conceptualize party regulation cases as choosing between different theories of representation and politics embodied by different regulatory regimes. Bruce Cain argues that courts should not intervene in party cases because they risk “lock[ing] in a particular theory of representation or institutional design.” Bruce E. Cain, Party Autonomy and Two-Party Electoral Competition, 149 U. Pa. L. Rev. 793, 813 (2001). For instance, Cain claims that upholding the blanket primary would have locked in a theory of “representational hypercentrism.” *Id.* Similarly, Elizabeth Garrett argues that “the choice presented by political party cases is between judicial entrenchment of a contested view of democracy versus legislative entrenchment of a different view.” Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 Sup. Ct. Rev. 95, 135.

Garrett and Cain may be correct as far as they go, but both miss how courts might approach party cases instead as a choice between different ways that the party can resolve its disputes. Garrett, for example, criticizes Jones for constitutionally locking out the possibility of a blanket primary format. Of course, striking down the state-imposed blanket primary is, for the moment, a choice against a blanket primary. But Jones went no further than prohibiting a blanket primary when imposed by state law over opposed party leaders' objections. The Court was not necessarily choosing against the theory of politics embodied by the blanket primary. A blanket primary sanctioned by a united party leadership would be a different matter, as Tashjian shows. The Court's decisions instead had the effect of rejecting only the process by which certain party leaders managed to prevail, namely, by resort to state law over a divided party.

¹²⁷ Contrary to the legal scholarship, the main problem with entrenched duopoly is that it stifles intraparty competition, not interparty competition. Legal scholars might be correct that Duverger's Law precludes consistent national success for a third party, but Duverger's Law does not preclude the possibility that an individual candidate, either an independent or minor-party nominee, can defeat the major party candidates in a given election. The logic of Duverger's Law, that votes for a third-place contestant ought instead to supply the winning margin for one of the top two finishers, does not dictate that the major parties will necessarily be the top two finishers in every election, particularly not when there is a strong candidate from outside the major parties also in the running.

In other words, what matters for Duverger's Law in a particular election is the candidate's relative ranking within that election, not the overall national prestige of the candidate's party. If a strong candidate

contrast, legal scholars have generally neglected intraparty competition and underestimated its intensity and importance. Parties hardly represent monolithic political interests and are instead provisional coalitions among leaders who share some common goals but also possess conflicting interests that help drive the politics of party regulation.

In the party primary cases, the Court strayed from the prescription of the two lonely legal scholars who have considered intraparty conflict in party cases. Daniel Lowenstein argues that courts should not intervene in internal party disputes because neither the party organization nor the party-in-government has stronger claim to speak for the party. “The only way to discern the true voice of ‘the party’ is to permit the political process to work itself out and then to examine the results.”¹²⁸ Elizabeth Garrett likewise reasons that “courts should decline to referee an internal dispute” because “[n]o segment of the party is powerless in such a dispute.”¹²⁹ She argues that party elements are capable of fending for themselves and competing on equal footing to enact law that reflects their preferences. The party-in-government controls legislative power, but the party organization controls internal party policy and important resources necessary for the election of the party-in-government, while the party-in-the-electorate wields influence in its voting power and direct democracy.

decided to run against both major parties as a third-party nominee, strategic voting under Duverger’s Law would not necessarily injure him, and in fact, might even help him. If John McCain ran in 2000 as a third-party candidate, strategic voters might choose between McCain and the stronger of Bush or Gore, rather than waste their votes on the third-place candidate. Indeed, Teddy Roosevelt finished second in his 1912 presidential run as the Bull Moose party’s nominee, ahead of incumbent Republican president Howard Taft, in what was “a battle only between Roosevelt and [Democrat Woodrow] Wilson.” Steven J. Rosenstone, Roy L. Behr, & Edward H. Lazarus, *Third Parties in America: Citizen Response to Major Party Failure* 86 (1995).

“Intraparty” competition is simply a shorthand for serious competition among serious politicians. Serious politicians tend to reside almost exclusively within the major parties, and they compete with each other both inside of and across party lines. Regulation that frustrates politicians’ ability to jump to another party is to limit the scope of competition among serious politicians. Competition among them that might spill over from intraparty competition to new interparty competition is prevented. Party regulation seals up competition within and between the major parties, preserving their centrality, and it does so by blocking opportunities for political action that at least some major-party politicians, namely those who lose intraparty struggles, would like to preserve.

¹²⁸ Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 *Tex. L. Rev.* 1741, 1783 (1993).

¹²⁹ Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 *Sup. Ct. Rev.* 95, 137.

Both Lowenstein and Garrett advise the Court to abstain from almost any intraparty dispute because intraparty disputants are equally influential in party affairs and can settle their disagreement without help.

Lowenstein and Garrett rely on a mistaken premise that judicial abstention creates a neutral and level playing field on which intraparty disputants can best reach political accommodation. To the contrary, judicial abstention itself is not neutral.¹³⁰ It creates advantages and disadvantages—namely, by letting party regulation stand, abstention empowers those who can exercise state law as a legal trump in intraparty disputes. It therefore advantages leaders who have closer access to legislative power and gives them incentive to exercise such trumps over their opponents, rather than seek informal political agreement. Competing disputants will engage ongoing hydraulic maneuvers as they pursue and fend off party regulation in an attempt to overpower each other through the force of law. As a result, judicial abstention is likely to encourage intraparty division and discourage political agreement. Lowenstein and Garrett argue that judicial abstention pushes party actors to engage in accommodating give-and-take, but judicial abstention, by letting state regulation stand, actually tends to preempt political accommodation.

Indeed, to the degree that any political faction succeeds in using state regulation to defeat its intraparty rivals, the effect is to push those rivals out of the party as the party ceases to serve their interests. It would be reasonable for courts adjudicating such intraparty leadership divisions over party affairs to require informal accommodation among important party leaders, who would be forced to shape the party in ways that serve their common

¹³⁰ See, e.g., Martha A. Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1130, 1131 (1974); cf. Lani Guinier, (E)racing Democracy: The Voting Rights Cases, 108 Harv. L. Rev. 109, 121-25 (1994) (arguing that judicial nonintervention itself constitutes a value-laden substantive decision on the merits).

interests. Under this view, internal resolution of intraparty disputes could be seen as more likely to result in lasting, mutually beneficial accommodation than the continued temptation of, and appeal to, state law trumps.

Party autonomy also yields political accommodation through a simple rule for courts to apply. Party autonomy in these cases, and judicial skepticism about party regulation in general, works through the familiar doctrine of associational rights, without requiring the Court to grapple with the complex politics of each case. Party autonomy does not require an exemption of political parties as a special category of expressive association entitled to a special presumption of judicial abstention. In contrast, an abstention approach requires a potentially vexing determination of whether a particular case is a “political party case” in which the structure and regulation of political parties is central, rather than a case dealing with associational rights for which traditional doctrine would instead apply.¹³¹ More important, Garrett’s abstention proposal requires courts to differentiate between party regulation that constitutes fair politics, for which courts would abstain, and party regulation that constitutes legislative entrenchment in a way that reinstates a need for judicial intervention.¹³² Party autonomy, though not without complication, is a simpler approach that requires less of courts. In the party primary cases, associational rights serve as a familiar doctrinal approach that courts could apply in a routine fashion, with the interest in fostering internal conflict resolution automatically impounded within it.

Indeed, the Court followed an analogous doctrinal strategy with respect to other types of expressive associations. In Boy Scouts of America v. Dale,¹³³ the Court ruled that the Boy Scouts could expel a scoutmaster on the basis of his homosexuality. The Boy

¹³¹ Garrett, 2002 Sup. Ct. Rev. at 143-48.

¹³² Id. at 148-52.

¹³³ 530 U.S. 640 (2000).

Scouts claimed that it was part of its core expression that “homosexual conduct is not morally straight.”¹³⁴ Dale’s continuing service as a scoutmaster in the Boy Scouts would contradict that core message “because his presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”¹³⁵ What is noteworthy for our purposes is that the Court deferred to the Boy Scouts official leadership in determining what constituted the Boy Scouts core expressive mission. Despite ambiguous evidence on the point, the Court accepted without scrutiny the titular leadership’s assertion that opposition to homosexuality was central to the Scouts’ philosophy.¹³⁶ The Court reasoned that “it is not the role of the courts to reject a group’s expressed values.”¹³⁷ In short, even if members of the group disagree, “[t]he Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes.”¹³⁸

The Court’s deference to the organization’s official position forces the Boy Scout members to resolve their disagreements internally. Members of the Boy Scouts may disagree with the official position taken by Boy Scout officials and accepted at face value by the Court. However, the Court’s deference to the Scouts official position meant that dissenters within the Boy Scouts would need to work within the organization to change its policy. The Court would provide dissenters no help from outside. The Dale decision can be read, not as empowering expressive associations to exclude outsiders at will, but as

¹³⁴ Boy Scouts of America v. Dale, 530 U.S. 640, 651 (2000) (quoting the Boy Scouts brief and the Scout Oath and Law). Dale was announced three days after Jones.

¹³⁵ Boy Scouts of America v. Dale, 530 U.S. 640, 653 (2000).

¹³⁶ See Daniel A. Farber, Speaking in the First Person Plural: Expressive Associations and the First Amendment, 85 Minn. L. Rev. 1483, 1494-97 (2001).

¹³⁷ Boy Scouts of America v. Dale, 530 U.S. 640, 651 (2000).

¹³⁸ Id. at 655.

requiring intraorganizational resolution of internal disputes as the means by which the group determines organization policy, including whether to exclude outsiders at all.¹³⁹

However, the Court's treatment of political parties would be necessarily different than for other types of expressive associations, because political parties are at their heart informal coalitions rather than formal organizations. As I explained when describing the hydraulics of party regulation, political parties are best understood, not as limited to an official party organization or its nominees, but instead as a larger supralegal network of roughly likeminded political elites who pursue overlapping goals through the party's collective agenda. The party is best characterized as an informal alliance among diverse political actors not necessarily tied to the official party structure.

Even if the Court wished simply to endorse the leadership's position within the party, there was not a monolithic leadership that the Court could identify. Nor was there a single procedure for the party leaders to decide internally how to resolve party disagreements, unlike the Boy Scouts or the Rotary Club. In Jones, Campbell's use of the ballot measure process went outside the party apparatus, but he still represented an important leadership faction within his party and it was legitimate for him to use the process to win his preferred party procedures. In party cases, the Court is asked to weigh competing leadership claims for control in the absence of a clear leadership position to endorse. Rather than choose among the claims, the Court could be understood to have done the next best thing by punting the questions back to the political arena for party leaders to resolve informally.

¹³⁹ See Steffen N. Johnson, Expressive Association and Organizational Autonomy, 85 Minn. L. Rev. 1639 (2002); Roderick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 144 (2003).

This interpretation contradicts the standard reading of the party primary cases as simply upholding a party's collective right to exclude its dissenting members. For example, Michael Paulsen argues that "[t]he freedom of expressive association entails the right to control membership in order to control message, and this entails, under [La Follette], a right to exclude not only competing messages but competing members who might seek, over time, to alter the expressive content of the group."¹⁴⁰ However, my interpretation of the party primary cases is that the central intraparty disagreement was among party leaders, without materially involving the rank-and-file members. Just as in Dale, the Court decided the party primary cases "without any consideration of the views or rights of the members."¹⁴¹ Under Paulsen's reading, the party primary cases must hinge on whether party leaders can exclude other party leaders who disagree. I contend that the Court was not picking sides in an intraparty dispute. Instead, the Court prescribed the process by which party leaders should resolve their internal disputes.

A doctrine of party autonomy from state regulation, the opposite of judicial abstention, induces political solutions. Leaders within the same party are pushed to find agreement, rather than trying perpetually to codify their side of a disagreement into state law by different means. The debate about the party regulation cases is seen most clearly when framed as a discussion about how best to force intraparty disputes to be resolved politically, outside the courtroom.¹⁴²

¹⁴⁰ Michael Stokes Paulsen, Scouts, Families, and Schools, 85 Minn. L. Rev. 1917, 1932 (2001).

¹⁴¹ Erwin Chemerinsky & Catherine Fisk, The Expressive Interest of Associations, 9 Wm. & Mary Bill Rts. J. 595, 609 (2001).

¹⁴² Along parallel lines, David Barron argues that the Court's "localism" decisions, which struck down state law dictates over local affairs, may be read as reifying a role for local government as a locus of deliberation on certain types of public questions. See David J. Barron, The Promise of Cooley's City: Traces of Local Constitutionalism, 147 U. Pa. L. Rev. 487 (1999).

Viewing the party primary cases in this light would be impossible without looking past the party as the relevant actor in question and understanding parties as diffuse aggregations of numerous diverse factions that bind together and oppose one another in turns. Discarding the party as the critical unit of analysis enables a more accurate, politically realistic perspective on the structural considerations in play. Looking past the party offers the most constructive re-interpretation of the Court's handling of the party primary cases and best accomplishes the structural aim of forcing party actors to resolve conflicts politically.

V. CONCLUSION

I have presented a new supralegal conception of political parties as diffuse collections of political relationships, different sets of which are implicated in different settings and different cases. Political parties are flexible alliances among political leaders who work together at times and against each other at times. This approach breaks sharply from the traditional focus on the party as a legal entity regulated by the state and from the usual regulatory emphasis on the legal apparatus of political parties.

This basic shift in the way we think about political parties is the main contribution of the article, one whose importance should grow as courts and lawmakers continue to expand regulation of democratic politics. In this article, I have applied a supralegal approach to advocate skepticism about regulation of party internal affairs. First, the fluid structure of political coalitions undergirding parties suggests that regulatory efforts often will fail as party leaders find ways to shift to less public, and less transparent, methods of achieving coordination and cooperation. Second, to the degree that party regulation succeeds, it too often results from the efforts of party leaders to bias the rules of political

competition against their rivals. Party reform is more likely to achieve these self-interested strategic aims than it is to achieve the broader reform goals deployed to justify regulation. Judicial skepticism denies political actors the use of state law and litigation as cudgels against one another in essentially political disputes.

This article also represents a first step in a larger project of reconceptualizing the political party throughout the study and practice of election law. Richard Pildes explains in the most recent Harvard Law Review Foreword that the Supreme Court has adopted the central role in structuring American democracy.¹⁴³ Political parties are central pieces in the Court's structural challenge, and a supralegal approach to parties carries consequences for nearly every question that the Court faces in this vein. An immediate example is the complication that a supralegal approach to recent developments in campaign finance reform. A supralegal approach suggests that parties extend far beyond their legal apparatuses as party actors act together far beyond those bounds in response to regulation. The "shadow party" of independent organizations is part and parcel of the political party, just as it always has been. However, a supralegal approach also counsels that campaign finance regulation may be doomed to failure as a reform effort. We must consider the politics of campaign finance reform and how party leaders use it to advance their interests in political competition. This article lays a foundation for such an analysis in campaign finance regulation and throughout election law.

¹⁴³ See Richard H. Pildes, The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28, 34 (2004).