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THE SUPREME COURT AND THE LEGAL STATUS OF POLITICAL PARTIES

A Dissertation Presented

by

PAUL R. PETTERSON

Submitted to the Graduate School of the
University of Massachusetts Amherst in partial fulfillment
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

September 1995

Political Science

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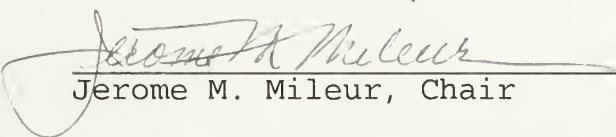
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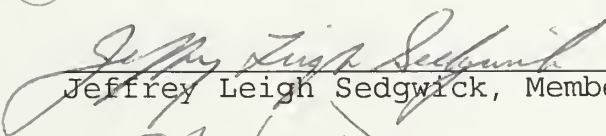
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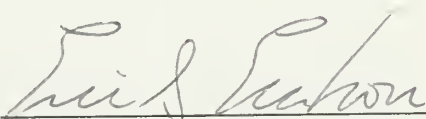
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ABSTRACT

THE SUPREME COURT AND THE LEGAL STATUS OF POLITICAL PARTIES

SEPTEMBER 1995

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American political parties, throughout their history, have functioned as central institutions of governance and democracy. While their legislative and policy making role remains vital today, their identity as a link between citizens and government has changed markedly in this century. A major reason for their shifting electoral role has been the emergence of state governments as active regulators of the political process in the Progressive Era.

Since the late 1960's, the U.S. Supreme Court has adjudicated a series of disputes involving this legalized electoral environment, becoming in the process a major interpreter of the legal status of political parties. The absence of any reference to parties in the text of the Constitution has given the justices of the Court significant authority in structuring the constitutional status of parties. The dissertation examines the ideas which have guided the exercise of that authority, and explores their implications for the American party system and American democracy.

Analysis of Court opinions involving ballot access, party organization\nomination procedures, campaign finance, and patronage reveals two opposing schools of thought among the justices of the Court. One viewpoint envisions politics as a "natural order" nurtured by wide party competition and access to the electoral arena, and perverted by many state regulations. A contrasting vision sees politics as a "constructed order" nurtured by stable party competition and best preserved by state regulation. These differing ideas of party politics are reflected in the justices' conceptions of political competition and choice, party structure and functions, judicial standards of review, and the proper role of government in the electoral process.

The political implications of these contending viewpoints extend beyond the purely judicial realm, shaping the future of the American electoral system and efforts to build stronger parties. An analysis of these schools of thought using a set of "strong party\responsible party" attributes concludes that, while the "natural order" offers parties some increase in autonomy, neither viewpoint offers a clear road to stronger parties. The quest for party renewal must ultimately be as political as it has been judicial. In addition, these opinions reflects a broader, continuing debate over whether democracy is best understood as expression (access, competition) or governance (legislative representation, stability).

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CHAPTER 1

INTRODUCTION-POLITICAL PARTIES, THE SUPREME COURT, AND THE CHARACTER OF AMERICAN POLITICS

The Legal Status of Parties: Contested Institutions

Since their inception, political parties have played an important role in American politics and government, structuring the electoral process and the legislative branch, as well as serving as a source of policy ideas and political appointees. Unlike the legislature, executive, and judiciary, however, parties were not included in the governmental design of the Constitution; they have evolved out of the pressures of politics, without any explicit constitutional guidelines or pedigree. As a result, issues of party structure and electoral procedures have elicited ongoing debate among politicians, legislators, and judges, as well as political scientists; the changing legal status of parties reflects this lack of a clear constitutional framework. This dissertation analyzes these debates about parties and the electoral process by examining the opinions of the United States Supreme Court, the most important modern interpreter of the parties' legal status.

The legal status of parties in the U.S. began in some uncertainty, as noted above, in their absence from the nation's founding document. The Constitution is silent on their role in the legal structure of the government. The absence of parties may be characterized not simply as an oversight, but as a "hostile silence", if one examines the

views of party held by many of the Constitution's authors.¹ As a result, the first parties evolved outside the constitutional structure and were, for the most part, unknown to the law until the latter part of the nineteenth century. With regard to electoral procedures, only voter registration came under the purview of state laws, and such laws were largely confined to the New England states until the second half of the nineteenth century.²

The absence of legal regulation of parties during most of the nineteenth century can be explained in part by their dominance in the political system. Joel Silbey has characterized the period from the 1830's to the 1890's as the "party era" in American politics, a time when partisan imperatives controlled and shaped political action.³ Many of the party organizations during this era were themselves dominated by small groups of individuals, who controlled

¹ On the views of parties held by the Founders, see Richard Hofstadter, The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840 (Berkeley and Los Angeles: University of California Press, 1969).

² Austin Ranney and Willmoore Kendall, Democracy And The American Party System (New York: Harcourt Brace, 1956), p. 319. For a detailed treatment of registration history through the Progressive Era, see Joseph P. Harris, Registration of Voters In The United States (Washington, DC: Brookings Institution, 1929).

³ Joel H. Silbey, "The Rise and Fall of American Political Parties, 1790-1993", in The Parties Respond: Changes In American Parties And Campaigns, 2nd ed., ed. L. Sandy Maisel (Boulder, CO: Westview Press, 1994), pp. 3-18. For a fuller presentation of this argument, see Joel H. Silbey, The American Political Nation, 1838-1893 (Stanford: Stanford University Press, 1991).

the distribution of patronage jobs and the selection of party candidates for office. Particularly after the Civil War, many of these party organizations developed into political "machines" which effectively managed the politics of their locality or state, resulting in extensive graft, vote fraud and other corrupt practices. This corruption was the subject of increasing protest in the last decades of the nineteenth century, calling the legitimacy of this party-dominated political process into question.⁴

These protests against "machine" corruption soon bore fruit; the vacuum of government oversight of parties was filled by extensive state regulation of parties and many of their electoral activities, especially during the Progressive era early in the twentieth century.⁵ Among the reforms instituted were the secret ballot, the direct primary, party organization and registration statutes, civil service reform and corrupt practices acts. These regulations occurred mainly at the state level (civil service and corrupt practices laws were enacted at the federal level) and were treated as questions of policy,

⁴ For a broad historical background on "machines" and political "bosses", see Alexander B. Callow, Jr., ed., The City Boss In America: An Interpretive Reader (New York: Oxford University Press, 1976); Silbey, Political Nation.

⁵ See in particular Leon Epstein, "Parties As Public Utilities", chap. 6 in Political Parties In The American Mold (Madison: University Of Wisconsin Press, 1986).

rather than as constitutional issues.⁶ While these regulations did not always achieve their desired effects, their lasting impact has been profound: they made governments an active and important participant in the structuring of partisan politics and the electoral process.

As with many other contentious political issues, the status of parties and electoral procedures, and the role of government in electoral and party affairs, have become judicial issues as well. Since the late 1960's, a series of U.S. Supreme Court opinions has frequently overturned, and occasionally upheld, statutes governing ballot access, party organization, primaries, and campaign finance; the practice of patronage has also been dramatically limited. Grounding their opinions in the individual rights to vote and to associate, derived from the First, Fourteenth and Fifteenth Amendments to the Constitution, the justices have carved out constitutional protection for party activities, while preserving a continuing role for government in the electoral process.

As a result of their opinions on party and electoral disputes, the justices of the Court have become major interpreters of the legal status of parties, establishing a

⁶ At this point in time, the constitutional guarantees of free speech and association in the Bill of Rights had yet to be applied to the states through "incorporation" by means of the Fourteenth Amendment. Free speech guarantees were first applied to the states in Gitlow v. New York, 268 U.S. 652 (1925), and the freedom of association was not clearly enunciated by the Supreme Court until its decision in NAACP v. Alabama, 357 U.S. 449 (1958).

significant degree of constitutional protection for party autonomy. Like the politicians, judges, and thinkers before them, however, the justices have no indisputable constitutional role for parties on which they can base their decisions. While the First and Fourteenth Amendment guarantee of associational freedom, the Fifteenth Amendment guarantee of the right to vote, and the Tenth Amendment protection of state government powers do establish significant parameters for the justices, the complexity of the resulting jurisprudence in these areas reflects the degree to which the justices shape the character of these broad guarantees in their application to specific issues. Most importantly, none of these constitutional guarantees enshrine explicit roles for parties as institutions in the political process.

Faced with statutes and constitutional provisions whose meaning is often subject to interpretation, and a lack of a clear "place" for parties in the constitutional system, the justices must rely in part on their own judgments about the structure of parties and electoral procedures in a democratic system, a reliance which subjects parties to a "continuous founding". While precedent will build up weight, it may be contested, and the continuing role of state authority over parties and elections guarantees that future legislative and judicial arguments over the nature of parties and the political process are not foreclosed.

This absence of firm constitutional guidelines on parties creates a continuing opportunity for judicial interpretation. This dissertation explores judicial interpretations of parties and the electoral process through a critical analysis of U.S. Supreme Court opinions in party and election disputes. The goal of the analysis is not to attempt causal explanations of particular decisions, on the model of judicial behavior studies, but instead to explicate the understandings of parties and the electoral process contained in the Justices' discourse, their "giving of reasons" for their decisions.⁷ In addition, judging various regulations of parties and the electoral process within the parameters of constitutional guarantees of association and voting (as well as statutory law) creates an opportunity for the justices to consider broader questions about the nature of democracy .

Supreme Court opinions are useful in understanding such debates about parties, the electoral process, and the nature of democracy because, practically, they represent the voice of a defining institution of American democracy. They are the Constitution's view of our parties and of our

⁷ For an example of judicial behavior studies, see Harold J. Spaeth and Saul Brenner, eds., Studies In U.S. Supreme Court Behavior (New York: Garland Publishing, 1990). The approach used here is derived from a broader study of liberal ideas in the Court's jurisprudence by Rogers M. Smith, Liberalism and American Constitutional Law (Cambridge: Harvard University Press, 1985). The author is indebted to the model.

electoral system as seen by the Court.⁸ The opinions are of interest because they are, as one scholar put it, "a relatively untapped mine of American political thought".⁹ In addition to majority opinions, this dissertation also focuses on dissenting and concurring opinions, despite the fact such opinions do not carry large weight in legal precedent. From an analytical standpoint, however, these "minority" opinions are particularly relevant in tracing conflicting currents of thought among the justices.

An analysis of the constitutional understandings of parties enunciated by the Supreme Court, while valuable in itself, needs to be placed in context in order to evaluate its implications for the political system as a whole. This dissertation critiques these constitutional understandings from an institutional perspective, employing a group of "strong party attributes" as evaluative criteria. These interrelated attributes, which consist of (1) the linkage of citizens and government, (2) the contesting of

⁸ The ideas are not necessarily the personal views of the justices, but their interpretation of the Constitution on the matters at hand. Justice Potter Stewart expresses this distinction in his dissent in Williams v. Rhodes, 393 U.S. 23 (1968). Stewart puts it thusly: "It is thought by a great many people that the entire electoral college system of presidential selection set up by the Constitution is an anachronism in need of major overhaul [footnote omitted]. As a citizen I happen to share that view. But this Court must follow the Constitution as it is written..." (emphasis mine). Williams, 393 U.S. at 61 (Stewart, J., dissenting).

⁹ H.L. Polhman, ed., Political Thought And The American Judiciary (Amherst: University of Massachusetts Press, 1993), p. xi.

elections, (3) the management of political conflict, and (4) the guidance of government and public policy, are derived from the literature on parties, particularly from the work of Larry Sabato and James Ceaser.¹⁰ The justices' understandings will also be evaluated in light of the "responsible party" model, a particularly important variant of the more general "strong party" model.¹¹

The remainder of this chapter explains the methodological approach and likely theoretical and practical significance of the dissertation, and concludes by reviewing the existing literature on the legal status of parties. Chapters 2-5 analyze the justices' opinions in ballot access, party organization/nominating procedures, campaign finance, and patronage cases, examining particular elements of the electoral system. The concluding chapter reviews the findings and explores their implications for the jurisprudence of the Court, the future shape of parties, and American electoral politics.

¹⁰ Larry J. Sabato, The Party's Just Begun: Shaping Political Parties For America's Future (Glenview, IL: Scott Foresman, 1988), and James Ceaser, Reforming The Reforms: A Critical Analysis Of The Presidential Selection Process (Cambridge, MA: Ballinger Publishing Co., 1982).

¹¹ The "responsible party" model has a much greater concern with the programmatic function of parties. For analyses of the multifaceted nature and active history of the "responsible party" perspective, see Austin Ranney, The Doctrine of Responsible Party Government: Its Origins and Present State (Urbana: University of Illinois Press, 1962); John Kenneth White and Jerome M. Mileur, eds., Challenges To Party Government (Carbondale: Southern Illinois University Press, 1992).

Methodology of the Study

The methodological approach employed in this dissertation is textual analysis of Supreme Court opinions and related documentary evidence in party-related cases before the Court. The analysis focuses on the justices' understandings of three important issues in the electoral process: the scope of political competition and voter choice, particularly among parties; the functions and structure of parties; and the role of government in structuring the parties and the electoral system. The analysis also examines the standards of review adopted in these cases, as the choice of a review standard can be closely related to, and strongly affect, the substantive concerns of a judicial decision. Standards of review represent the level of scrutiny that judges will employ in evaluating the constitutionality of government or private actions, and range along a spectrum, based on the level of justification required for the action at issue to be judged constitutional.

In broad terms, at one end of this spectrum is the "strict scrutiny" standard, which requires that governments show a "compelling state interest" to be at stake in the actions at issue. This standard was first clearly enunciated by the Court in NAACP v. Alabama.¹² At the

¹² NAACP, 357 U.S. 449 (1958). This standard is most consistently used by the modern Court when a "suspect classification" (such as race) is implicated in a particular statute or action; when such a classification is

other end of the spectrum is the "minimal scrutiny" standard, which requires only that government show a reasonable and legitimate purpose for its actions and statutes. Both of these standards often employ a balancing approach to adjudicate between the constitutional rights and governmental interests involved.

The standards chosen by particular justices in the cases examined here frequently reflect each justice's attitude toward government action in the electoral process. Two groupings of justices are found: (1) "natural order" justices, who are generally suspicious of government action in the electoral process, typically employ a "strict scrutiny" standard of review, and demand strong justification for government intrusions on constitutional rights; and (2) "constructed order" justices, who generally give government greater leeway in the electoral process, and usually hold governments to the milder "minimal scrutiny" standard or give their interests greater weight under the "strict scrutiny" standard. The standards used by the justices are very much intertwined with their substantive positions in this area of the law.

involved, the statute is frequently found to be "invidiously discriminatory". As the cases here will demonstrate, however, the presence of such a classification is not necessary to trigger "strict scrutiny"; other rights in a "preferred position" under the Constitution, such as First Amendment guarantees, often draw such scrutiny from the Justices. The "preferred position" of certain constitutional rights was first enunciated by Justice Harlan Fisk Stone in the famous "Footnote Four" in United States v. Carolene Products Company, 304 U.S. 144 (1938).

The issues noted above are chosen for the range of questions they raise. They encompass the major dilemmas with which the justices must wrestle and provide a wide yet focused observational guide to the territory of the Court's opinions. This analysis should clarify how the justices understand parties and the electoral process, going beyond the legal standards of "freedom of association" and "compelling state interest" to underlying policy positions and arguments.¹³

The first issue considered, the scope of political competition and voter choice, involves the nature of democracy. How far should party competition be encouraged? How much voter choice should be promoted? What is the connection, if any, between statutory structures and the scope of party competition and voter choice? These are ultimately questions about the scope of democracy.

The second issue, the functions of parties, involves the structure of electoral democracy. Who should parties represent in the political process? What viewpoints should they represent? Should democracy be within, as well as between, the parties? Should parties play an important role in nominating candidates, or in supplying government personnel? These considerations involve the role of parties

¹³ An interesting and recent example of how the Court's opinions can be fruitfully analyzed for deeper philosophical positions and arguments is Andrew Stark, "Corporate Electoral Activity, Constitutional Discourse, and Conceptions of the Individual", American Political Science Review 86 (September 1992): 626-37.

in structuring a democratic electoral process and democratic governance.

The third issue, the proper role of government in managing the electoral process, involves questions of authority and who should govern the structure of politics. Should the state have wide ranging legal authority to structure the process? Or should the state intervene only to prevent blatant discrimination? These questions embody concerns about the state's role in promoting electoral order and stability.

The final issue, the choice and application of judicial standards used to evaluate these cases, sheds light on the justices' viewpoints about the more substantive issues. What standards should the state statutes, or party challenges, have to meet? While this seems like an internal and legalistic dilemma, the choices made have a profound impact on the issues at hand, because whoever is given the heavier burden of proof (or the benefit of the doubt) by these standards is placed at a significant disadvantage (or advantage).

The broader concern driving this dissertation is that the interpretations of the justices influence the strength or weakness of parties as institutions. Efforts to strengthen political parties have been frequent and contentious in political science over the last fifty years; one need only refer to the 1950 APSA report Towards A More Responsible Two Party System, the controversy that

surrounded it, and the continuing desire of more recent scholars to "renew" political parties.¹⁴ While this "strong-party" argument is by no means the only view of parties among political scientists, it is taken as a yardstick of evaluation because it has set the terms of debate over parties and electoral politics. With the frequent laments over the current state of parties and electoral politics more generally, it is appropriate to consider how the justices' interpretations support or hinder the objective of stronger parties.¹⁵

The need for stronger political parties has been contested in both political science scholarship and practical politics for decades, yet the views of the justices on these matters have only begun to be explored in a systematic way. To understand the justices' interpretations in this wider institutional context, they are critiqued using a series of "strong party attributes"

¹⁴ American Political Science Association (APSA) Committee On Political Parties, Towards A More Responsible Two Party System (New York: Rinehart and Co., 1950). For a series of contemporary views on party government, see White and Mileur, eds., Challenges. Some notable third party efforts in this century, particularly the Progressive campaigns of 1912, 1924 and 1948, can also be characterized as efforts to build new parties in response to the perceived weaknesses of the Republican and Democratic parties.

¹⁵ Two prominent examples of this pessimistic view of parties and elections are E.J. Dionne, Why Americans Hate Politics (New York: Simon and Schuster, 1991), and Benjamin Ginsberg and Martin Shefter, Politics By Other Means: The Declining Importance Of Elections In America (New York: Basic Books, 1990).

as evaluative criteria. These attributes are derived from literature on parties, particularly the work of James Ceaser and Larry Sabato. The four attributes that concern us, and some of the questions they raise for those attempting to assess their condition, are as follows:

- I. The Linkage of Citizens and Government
 - A. How open are parties to citizen participation?
 - B. Do citizens have incentives for supporting parties?
 - C. Are parties accountable to the public?
 - D. Is the electoral process seen as legitimate?
- II. The Contesting of Elections
 - A. What choice of candidates do the parties provide?
 - B. Are parties competitive in contesting elections?
 - C. Do parties have sufficient resources to nominate candidates, place them on the ballot, and aid their campaigns financially?
- III. The Management of Political Conflict
 - A. Do the parties successfully aggregate differing political interests?
 - B. Do the parties enable needed political change?
- IV. The Guidance of Government And Public Policy
 - A. Do the parties offer policy platforms?
 - B. Are these positions promoted by the elected officeholders of the party?
 - C. Do parties staff and guide the government?

These attributes of linkage, contesting of elections, conflict management, and governance focus the dissertation's broader critique, as they cover the broad themes of democracy, stability and governing capacity that are at the heart of any effort to evaluate the existing democratic system or the parties within such a system.

The interpretations of the justices are also critiqued from the perspective of the "responsible party" model, an

important variant of the "strong party" model. Those who advocate for "responsible parties" believe that parties should take clear and differentiated policy stances, nominate candidates who share those stances, and work to enact those policies when their nominees are elected to office. In sum, they believe that the primary function of parties should be programmatic and governance-oriented, not simply electoral. As the dissertation reveals, some justices appear to share this concern with the policy function of parties.

With regard to the method of analysis, the author believes textual analysis is the most appropriate method to use, since the dissertation deals with an institutional body where words and ideas are central to its work and are its lingua franca. As Rogers M. Smith has noted,

while legal discourse is produced by distinctively socialized elites, it expresses significant strains in American political thought as a whole, if for no other reason than that judicial decision-making both reflects and structures broader political and economic activities...the behavior of political actors, and of the institutions they construct and participate in, is influenced in part by the nature and adequacy of the ideas they possess, and the basic ideas of a given period and group often have a discernible structure, which may be articulated in revealing fashion by the political writers of the day.¹⁶

The central contention of the dissertation is that the Court has experienced an ongoing internal debate about the nature and structure of electoral democracy, a debate that is driven by different understandings of the purposes of

¹⁶ Smith, Liberalism, p. 6.

parties and the electoral process. The question of what institution (parties or government) should have the authority to define the nature and structure of electoral democracy is also contested by the justices of the Court. One school of thought, which is here called the "natural order", emphasizes the importance of party competition and citizen participation, and values the programmatic function of parties, all of which are seen as natural phenomena that are only impeded by government statutes. In this view, a widely diverse, competitive multiparty system is seen as natural, an innate quality of politics that is disturbed by the artifice of statute.¹⁷ The opposing school of thought, called here the "constructed order", emphasizes the effectiveness of the major parties and values their electoral function, which government is seen as preserving by its statutory framework. In this view, the current party system is seen as the evolutionary product of the democratic political process addressing legitimate political needs, an historical construction of legislative politics that should be respected and protected.

The dissertation finds that these two "schools of thought" have been consistently championed by particular justices, and that these justices have thereby played a

¹⁷ This view is similar to James Madison's argument that competition between numerous interests is a natural part of politics, particularly in a large republic. James Madison, Essay Number 10, in Alexander Hamilton, James Madison, and John Jay, The Federalist Papers (Chicago: Encyclopedia Britannica, 1952), pp. 49-53.

major role in shaping the evolution of the Court's view in this area. It also finds that the justices are divided not only in their understanding of parties and electoral politics, but also with regard to the nature of democratic politics in a federal system. The justices' positions in the cases reflect differing visions of the nature of American federalism, the "natural order" giving more deference to national interests and the "constructed order" favoring the interests of the states. These divisions are sometimes moderated, but are consistently present in the long run. The continuation of these coherent, but frequently divergent, perspectives on the Court bespeaks continued uncertainty in the constitutional jurisprudence of parties, elections and democracy. This is not, however, uncertainty born of directionless confusion, but of clear division among the justices.¹⁸

Significance: Why Examine the Justices' Views?

The study of judicial interpretations regarding political parties and the electoral process offers theoretical and practical insights of interest to students of parties, public law, and American politics generally.

¹⁸ The distinction is an important one. Two clear perspectives implies a shifting "balance of power" between them; potential litigants, politicians, and the public can, by analyzing the justices' views, perceive with some certainty which holds the balance at a particular time. A Court without direction, on the other hand, will leave those who will be affected by its rulings wandering in the wilderness, unsure of what to expect next.

The main contribution of this dissertation lies in its exploration of how justices of the Supreme Court understand the purposes of parties and the structure of electoral politics, knowledge which will provide deeper insight into how the Court is likely to react to parties in the future (and view changes in the structure and fortunes of parties). As Lee Epstein and Charles Hadley note, "it is...an intriguing and important enterprise for us to come to understand the way our least political branch of government has treated our most political entities".¹⁹

Improving our understanding of the justices' interpretations is made more significant by the growing role and authority of the Court in this area of the law. Even though the Court has returned authority to the parties, and thus reduced state authority, it is the Court itself which has taken on the most new authority and involvement. The Court has now become a third active and important shaper of parties and the electoral process in our system, and scholarship needs to examine how the justices view these institutions. In addition, understanding the deeper arguments about the purpose of parties and their role in American governance yields a more useful and powerful understanding of the legal status of

¹⁹ Lee Epstein and Charles Hadley, "On the Treatment of Political Parties in the U.S. Supreme Court", Journal Of Politics 52 (May 1990): 414.

American parties than would a simple descriptive analysis of the Court's decisions.

This dissertation also adds another level to our understanding of the modern "administrative state" that helped to produce much of modern party regulation. Sidney Milkis argues that President Franklin Roosevelt undercut the role of parties as part of his drive to transcend politics and expand "national administrative capacities".²⁰ This type of national managerialism carries a propensity to work against the authority of state governments and to encourage the kind of conflicts witnessed in many of the parties cases. The justices' views in these cases helps us to comprehend one facet of their understanding of the "administrative state".

Finally, there are important practical insights to be drawn from this dissertation. A deeper analysis of how one major institution of American governance (parties and the electoral system) has been understood and influenced by another (the Supreme Court) is valuable in and of itself, but it also yields many collateral insights that are relevant to the practical debates over the health of political parties in the 1990's. Although party

²⁰ Sidney M. Milkis, "Programmatic Liberalism and Party Politics: The New Deal Legacy and the Doctrine of Responsible Party Government", in White and Mileur, eds., Challenges, pp. 104-132. This theme is treated more fully in Milkis, The President And The Parties: The Transformation Of The American Party System Since The New Deal (New York: Oxford University Press, 1993).

institutions have adapted to the modern realities of "candidate-centered" politics by becoming highly effective resource and service providers, their power is strongly circumscribed by the direct primary and other Progressive Era reforms that remain in place, and public attitudes toward the major parties continue to be skeptical or dismissive.²¹ The dissatisfaction with the Republicans and Democrats is most notably reflected in the number of significant third party presidential candidates in recent decades.²² This mix of successful adaptation, continued limitation, public dissatisfaction and third party challenges has provoked many of the disputes heard by the justices, and their decisions have in turn shaped the evolution of these phenomena.²³ A better understanding of the justices' views will help us to chart their current and future impact on the evolution of parties and the American electoral system.

²¹ On the successful adaptations of modern parties, see John F. Bibby, "State Party Organizations: Coping and Adapting", and Paul S. Herrnson, "The Revitalization of National Party Organizations", in Maisel, The Parties Respond, pp. 21-44 and 45-68. On the continuing legal limits facing parties and public dissatisfaction with parties, see Silbey, "Rise and Fall", 3-18.

²² George Wallace in 1968, John Anderson in 1980, and Ross Perot in 1992.

²³ The justices' decisions have been particularly important, for example, in easing the ballot access process for third party presidential candidates; see the description of the Williams and Anderson decisions in the literature review.

Literature Review

Since the late 1960's, the justices of the Court have handed down opinions in a wide range of disputes involving parties and the electoral process. They have ruled on the constitutionality of various filing fees, signature requirements, ballot access deadlines, primary voting statutes, delegate selection procedures, campaign finance regulations, and patronage practices. While most of these decisions will be examined in depth in the following chapters, a brief sketch of some of the leading opinions will help to place the literature review which follows in context, by providing a glimpse of the general direction of the majority decisions and the standards of review they employ.²⁴

One of the earliest decisions by the justices in this area was Williams v. Rhodes, decided in 1968. George Wallace's independent campaign for the presidency brought suit against Ohio's ballot access laws, claiming that the early filing requirements and the organizational requirements imposed on minor parties violated the freedom of association of his supporters. The majority of justices, employing a "strict scrutiny" standard of review, found that the Ohio regulations did infringe on the freedom of association of Wallace and his supporters (without a sufficiently compelling state interest) and invalidated the

²⁴ Synopses of other cases are provided in the literature review, as needed.

law. They made particular note of how the major parties were advantaged by such statutes.²⁵ At least at the presidential level, the justices began to open up access to the electoral arena for minor parties.

In 1975, the justices took on the question of whether Illinois could compel the national Democratic Party to seat delegates at its 1972 convention who were chosen by procedures established in Illinois law instead of those of the Democratic Party. In their Cousins v. Wigoda opinion, the majority ruled that the national Democratic Party has the right to decide how delegates to its convention are chosen, and refused to seat the delegates chosen by Illinois-specified procedures. Employing a "strict scrutiny" standard of review, the justices began to provide greater freedom for parties to structure their nomination processes.²⁶

This party freedom was strengthened in 1981 by the majority opinion in Democratic Party of the United States v. Wisconsin ex rel La Follette, usually referred to as the La Follette decision. The national Democratic Party brought suit against Wisconsin's "open primary law" in an effort to enforce Party Rule 2A, which mandated that all bound delegates to the Democratic National Convention be chosen in primaries open only to Democratic voters. The majority

²⁵ Williams, 393 U.S. 23 (1968).

²⁶ Cousins v. Wigoda, 419 U.S. 477 (1975).

ruled in favor of the Party, on the grounds that the state cannot restrict the national Party's freedom of association in the absence of a compelling state interest.²⁷ La Follette employs a "balancing of interests" standard of review that is somewhat more moderate than "strict scrutiny".

The justices revisited the issue of ballot access, in particular for third party presidential candidates, in their 1983 opinion in Anderson v. Celebrezze. The 1980 independent presidential campaign of John Anderson brought suit against Ohio's early filing deadline, on the grounds that it limited the freedom of voters to associate with Anderson. Employing a combination of "strict scrutiny" and a three part "balancing test" as a standard of review, the majority opinion invalidated the Ohio law.²⁸ Once again, the justices' ruling invalidated barriers to minor party access to the ballot.

The freedom of parties to structure their own nominating procedures was reaffirmed in the 1986 majority opinion in Tashjian v. Republican Party of Connecticut. The Connecticut Republican Party's 1984 effort to open some of its primary contests to unaffiliated voters was opposed by the State of Connecticut, which had a law mandating that all primaries be open only to registered party members. The

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

²⁸ Anderson v. Celebrezze, 460 U.S. 780 (1983).

majority of justices ruled in favor of the Republican effort, thereby overruling the state law, using a "strict scrutiny" standard of review.²⁹ While this was a closely divided decision (5-4), it reenforced the justices' direction in Cousins and La Follette.

As the above highlights suggest, the general direction of the majority of justices has been toward expanding the ability of parties to structure their own affairs, especially nominating procedures, as well as toward expanding the ability of minor party presidential candidates to have access to the ballot. While the dissertation and some of the literature reviewed below note that the justices' overall jurisprudence is more mixed in terms of its impact on parties, the general direction of the majority in recent decades has expanded the rights of major and minor parties. In so doing, the majority of their opinions have employed a combination of "strict scrutiny" and "balancing of interests" standards of review to protect party freedom of association.

Most of the scholarly literature on the legal status of parties and the Supreme Court has appeared in law reviews, and is complemented by a small but active political science literature on the topic. This literature is characterized by three major approaches which, though not mutually exclusive, have fairly distinctive concerns.

²⁹ Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

The most common approach is analysis of the legal standards and doctrines employed by the justices. A second focuses upon the legal and political impacts of the justices' decisions. The third and least common approach attempts to place the justices' decisions in larger historical or theoretical perspectives. The findings of each of these approaches are examined in turn in this section; the historical/theoretical is most relevant to the approach of this dissertation.

Legal Analysis

The major focus of scholars using the legal analysis approach to the justices' decisions is the doctrine of freedom of association as applied to parties. Their views on the use of this doctrine by the justices can be divided into three types of "responses" to the justices' jurisprudence: (1) approval with friendly proposals for modification, (2) qualified approval with some misgivings, and (3) strong disapproval. While many prod the justices on particular points, most of these scholars approve of the Court's general direction; strong dissent is in the scholarly minority.

Stephen Gottlieb offers one of the most positive views of freedom of association. Gottlieb examines the legal status of parties, including the Tashjian case and a California dispute that later reached the Court, and argues for a continued expansion of the party freedom of

association defended by the justices.³⁰ He does, however, call for the justices to shift their standard of review from "balancing of interests" to identifying the most appropriate decisionmaker, which Gottlieb sees as the critical issue in these disputes. Citing political science literature on the probable corruptions of the legislative branch, he argues that the justices provide a service by defending the party's right to decide how they should organize themselves and nominate their candidates for office.³¹ The question of who should exercise authority over party affairs is Gottlieb's central concern.

Charles Gardner Geyh, in an extensive examination of the La Follette case and its implications, also takes a positive view of the justices' decisions through La Follette. Geyh argues that La Follette cannot be understood solely in terms of the "balancing of interests" standard of review stated by the justices. Instead, the rhetoric of the opinion reflects as much concern with which "actor" (the

³⁰ The California dispute involved a challenge by major party adherents in California to state statutes specifying a detailed organizational structure for parties and their procedures, as well as a state ban on preprimary endorsements. The Supreme Court struck down all of these statutes in Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989), further reinforcing party freedom of association.

³¹ Stephen Gottlieb, "The Courts And Party Reform" (paper presented at the annual meeting of the American Political Science Association, New Orleans, LA, September 1985). The justices have yet to explicitly adopt the "most appropriate decisionmaker" standard noted here, though analysis of their opinions certainly reveals they are aware of the question.

state of Wisconsin or the national Democratic Party) is the best decision maker in the nomination process, and with national versus state interests, as it does concern for a traditional balance of interests. He argues that the Court's stated standard of review is not fully reflective of its actions, and should change.³² Both Geyh and Gottlieb appear to recognize the justices' deeper arguments over the level of authority that parties should have over their own functions.

Andrew Pierce also takes issue, in a supportive way, with the stated legal standards employed by the justices. In an examination of the justices' treatment of issues related to presidential nominations, Pierce argues that the Court should explicitly disavow the "political question" doctrine of noninterference, so as to approach party rights solely from a freedom of association perspective. He also contends, based on the opinions of the justices, that the use of the "state action" doctrine in relation to presidential nominations is no longer viable.³³ Pierce

³² Charles Gardner Geyh, "It's My Party And I'll Cry If I Want To: State Intrusions Upon The Associational Freedoms Of Political Parties - Democratic Party of the United States v. Wisconsin ex rel La Follette", Wisconsin Law Review 1983: 1 (1983), pp. 211-40.

³³ The "political question" doctrine had been used in earlier Court opinions as the main justification for letting the political process, not the Justices, decide a dispute. Decisions like Cousins departed from this doctrine by grounding noninterference in freedom of association; Pierce is simply urging that departure be made explicit. In contrast, the "state action" doctrine had justified judicial intervention in party affairs in the past, most

sees the jurisprudence in this area as a bit unclear, and he encourages the justices to adopt freedom of association as the uniform standard of decision in the future.³⁴ Though he ultimately shares Geyh and Gottlieb's concern with authority, he sees a clear use of freedom of association as the most appropriate standard for deciding questions of party and electoral affairs.

Arthur M. Weisburd reaches conclusions similar to Pierce's. In an examination of Court decisions involving nominating methods, Weisburd traces the history of the "state action" doctrine in relation to these disputes and finds that the Court's use of freedom of association has essentially negated the doctrine in relation to parties. Given that demise, freedom of association should provide parties with wide-ranging freedom in nominating methods, bringing any existing state restrictions into doubtful constitutionality.³⁵ Weisburd, Pierce, Geyh, and Gottlieb are unified in their general support for the Court's

notably in the "white primary cases" that culminated in Smith v. Allwright, 321 U.S. 649 (1944). Pierce suggests that, in light of the new freedom of association precedents, this should also be clearly disavowed. Given the importance of Smith to issues of racial bias in the electoral process, however, the doctrine is likely to be limited rather than fully disavowed.

³⁴ Andrew Pierce, "Regulating Our Mischievous Factions: Presidential Nominations And The Law", Kentucky Law Journal 78, no. 2 (1989-90), pp. 311-75.

³⁵ Arthur M. Weisburd, "Candidate Making And The Constitution: Constitutional Restraints On And Protection Of Party Nominating Methods", Southern California Law Review 57 (January 1984), pp. 213-81.

approach to party autonomy and authority over party affairs in the Cousins/LaFollette/Tashjian line of cases.

Julia Guttman is typical of the second scholarly response. While she adopts a positive view of freedom of association, she is also troubled by the Court's application of the doctrine. Focusing on decisions involving primary elections, Guttman argues that the courts have yet to articulate a unified doctrine on state regulation of primaries, and proposes the adoption of a doctrine of "collective freedom of association" to fill that gap. She argues further that the Court's current approach to deciding cases in this area, most specifically the LaFollette case, virtually guarantees that freedom of association claims will always be successful against competing claims of compelling state interests, and that the justices have taken freedom of association too far in this approach. Like the scholars in the first group, Guttman contends that the Court should clarify its standards; unlike them, she also contends that the "balance" of freedom of association has shifted too far in favor of parties.³⁶ For Guttman, states still have a role to play in exercising authority over party affairs.

Brian L. Porto similarly takes issue with the Court's application of freedom of association, specifically the

³⁶ Julia Guttman, " Primary Elections And The Collective Right Of Freedom Of Association", Yale Law Journal 94 (November 1984), pp. 117-37.

standards applied in ballot access decisions. Focusing on the ballot access cases decided since Anderson v. Celebrezze, Porto argues that the Court has been overprotective of the two party system by applying a more lenient "balancing of interests" standard to these disputes, to the detriment of third parties and independent candidates.³⁷ He argues that the Court should return to the clearer "strict scrutiny" standard it enunciated in Williams v. Rhodes, a standard that would better protect interests outside the two major parties. Porto's analysis, like Guttman's, takes issue with the application of freedom of association to parties, but Porto argues for more (rather than less) protection of parties, particularly minor parties.³⁸ Unlike the scholars above, Porto's central concern is with the ability of minor parties to compete in the political process, rather than with authority over party affairs.

In addition to nomination and ballot access cases, the justices' patronage decisions have also sparked scholarly

³⁷ As Chapter Two will discuss in detail, many of the post-Anderson decisions which Porto examines uphold state regulations and limit ballot access for minor parties and candidates. Munro v. Socialist Worker's Party, 479 U.S. 189 (1986) upholds a Washington State requirement of a 1% primary vote total for access to the general election ballot, while Burdick v. Takushi, 112 S. Ct. 2059 (1992) upholds a Hawaii ban on write-in votes.

³⁸ Brian L. Porto, "The Constitution And The Ballot Box: Supreme Court Jurisprudence And Ballot Access For Independent Candidates" (paper presented at the Annual Meeting of the Northeastern Political Science Association, Providence, Rhode Island, November 12-14, 1992).

commentary. The three majority opinions on patronage in recent decades have all been decidedly hostile to the practice. The justices have blocked patronage-based dismissals in the Cook County, Illinois Sheriff's Department; blocked similar dismissals of Assistant Public Defenders in Rockland County, New York; and prohibited the use of partisan considerations in hiring, promotion, transfer, and dismissal decisions by the state of Illinois.³⁹ Much of the literature on these decisions is uncomfortable with the way in which the justices have dismissed government arguments in their application of freedom of association and speech to patronage issues.

A brief commentary by Louis Cammarosano, for example, notes the confusion in lower court patronage decisions that followed the Elrod and Branti decisions, and argues that the Court needs to adopt a more balanced approach in dealing with patronage issues. Seeing the justices' decisions as too anti-patronage, he calls for a "structured, logical framework" that emphasizes a balancing test between First Amendment deprivations and the practical benefits of patronage. Like Porto and Guttman, Cammarosano asks the Court to adjust its applications, but his concern

³⁹ The cases noted are Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980); and Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

is with the proper role of party affiliation in staffing the government.⁴⁰

In contrast to these relatively friendly critiques, a third group of scholars explicitly disapproves of the Court's use of freedom of association on the grounds that the Court's posture regarding party and electoral issues should be one of strict noninterference, not only with the parties but also with the states. This is particularly evident with regard to patronage issues. One scholar, Martin H. Brinkley, examines the patronage decisions of the Court and lower courts and finds them to be "a morass of confusion and doubt". Brinkley asserts that the Court's recent "appropriate requirement" standard for evaluating patronage cases has only created huge uncertainty, and faults the Rutan Court in particular for consistently downplaying the importance of governmental interests. He argues for more attention to the "positive" aspects of patronage, and gives a strong defense of state interests in the political process.⁴¹ Like Cammarosano, he is concerned

⁴⁰ Louis Cammarosano, "Application Of First Amendment To Political Patronage Employment Decisions", Fordham Law Review 58 (October 1989), pp. 101-16.

⁴¹ Martin H. Brinkley, "Note: Despoiling The Spoils: Rutan v. Republican Party Of Illinois", North Carolina Law Review 69 (March 1991), pp. 719-40. The "appropriate requirement" standard asserts that partisan affiliation can be a consideration in personnel decisions only if such affiliation is an "appropriate requirement" for the position or duties in question.

with the appropriateness of partisan affiliation in government staffing.

Daniel Lowenstein is the most skeptical of the legal analysts who take issue with the Court's jurisprudence. Lowenstein takes a much more critical view of the Court's recent party jurisprudence than most other scholars, contending that the Court went too far in its Tashjian decision. Lowenstein argues at length that parties should go to the public and the political process, not the courts, to resolve their disputes. He views conflicts like those in Connecticut (Tashjian) and California (Eu) not as party versus state disputes, but as intraparty disputes. The justices of the Court, in Lowenstein's view, handled earlier cases properly, but went astray with Tashjian. While his skeptical view is not shared by most scholars, it represents an important counterpoint to their views.⁴² Lowenstein argues that questions of authority should be resolved by the political process, not the courts, and should not automatically favor the party as the best decisionmaker.

As the preceding review reflects, most "legal analysts" accept the basic notion of freedom of association, but suggest various modifications of standards and/or application. They are united, however, in their

⁴² Daniel Lowenstein, "Constitutional Rights Of Major Political Parties: A Skeptical Inquiry" (paper presented at the Annual Meeting of the American Political Science Association, Washington, D.C., 1988).

primary focus: the legal doctrines and standards involved. Many discuss the political ramifications of their arguments, particularly the question of authority over party affairs, but their analytic eye is on the law. A number of other scholars, on the other hand, pay greater attention to the impact of the Justices' decisions on parties and the political process, the large majority approaching the analysis from a "proparty" perspective close to the "natural order" school of thought.

Impact Analysis

Most students of parties who examine the justices' decisions on party and electoral issues for their practical impact on parties share a preference for building stronger political parties. As a result, they have generally applauded the decisions of the Court as an important step towards "party renewal". In their view, the increased authority and autonomy that have been granted to parties through the freedom of association doctrine will enable parties to grow stronger as institutions. While some of these analysts are very sanguine about the possibilities opened by the justices' decisions, others take a more cautious view of their impact and note the limitations imposed by the balance of power on the Court, practical politics, and public opinion.

Kay Lawson, an advocate for "party renewal", sees the Court's freedom of association decisions as having very

positive implications for parties. In an analysis of the effects of state laws on parties, Lawson argues that "litigation is slow and costly, but it is one of the most promising routes for freeing parties of excessive state regulation". She applauds the Court's decisions, especially its rejection of the "public interest" arguments offered by state governments. She contends that the Court's decisions provide parties with greater potential freedom to help themselves.⁴³

In The Party's Just Begun, Larry Sabato argues that parties can best make the decisions affecting them, and should be left to do so, as the Court (if not all the states) appears to be arguing. Sabato's key contention is identical to Lawson's: the Court decisions are an important tool for enabling party renewal.⁴⁴ In a similar vein, David E. Price argues that party regulation is only one of the reasons for party decline, but is a particularly important one because it can be reversed. He contends that the constitutional, as well as practical, case for dismantling many of these laws is strong. Price seems to share the optimism of Lawson and Sabato that parties will be more free to plot their own course because of the

⁴³ Kay Lawson, "How State Laws Undermine Parties", in A. James Reichley, ed., Elections American Style (Washington, D.C.: Brookings Institution, 1987), pp. 240-60.

⁴⁴ Sabato, The Party's Just Begun.

Court's decisions.⁴⁵ The ability of parties to have the authority to shape their own functions is a central concern of these analysts, as it is for Gottlieb and other legal analysts.

Leon Epstein, like Price, Sabato, and Lawson, focuses on the broad impact of the Court's party freedom of association jurisprudence; however, he is less sanguine than they about the expansion of that freedom and its impact on "party renewal". In an analysis of the Court's Tashjian opinion and a survey of state party officials regarding its impact, Epstein argues that the Court is reluctant to expand the reach of freedom of association past certain parameters, and that state parties have made few changes or challenges to state law as a result of Tashjian. Though he favors strong parties, Epstein is skeptical of how much the Court's decisions will accomplish to that end.⁴⁶

A number of scholars have focused specifically on the ramifications and impact of the Court's patronage decisions. Cynthia Grant Bowman, for example, examines patronage in Chicago and cites both that city's experience and other literature to dispute the claims of some scholars

⁴⁵ David E. Price, Bringing Back The Parties (Washington, D.C.: CQ Press, 1984); see in particular chap. 5, "Parties And The Law", pp. 121-44.

⁴⁶ Leon Epstein, "Will American Political Parties Be Privatized?", Journal Of Law And Politics 2 (Winter 1989), pp. 239-74.

that patronage has been a strong and positive force in politics. The heart of Bowman's argument is a critique of the concerns and arguments expressed in Justice Antonin Scalia's dissent in Rutan. She finds Scalia's contentions unfounded, arguing that many cities have learned to live with the Court's recent standards without undue hardship or confusion. While she favors the majority view of the Court, Bowman is not arguing from the "property" position of many scholars; she is more concerned with questions of government administration.⁴⁷

Historical/Theoretical Analysis

In contrast to focusing on legal standards and doctrine, or on the practical impact of the decisions, a number of scholars have attempted to place the decisions of

⁴⁷ Cynthia Grant Bowman, "We Don't Want Anybody Anybody Sent: The Death Of Patronage Hiring In Chicago", Northwestern University Law Review 86 (Fall 1991), pp. 57-95. A similar article by Susan Lorde Martin examines the ramifications of the Court's patronage decisions, but her focus is on the implications for public officials who must deal with patronage issues. After a brief history of patronage and an examination of the Elrod and Branti decisions, the heart of Martin's study is an analysis of U.S. Circuit Court decisions during the 1980's, proceeding on a circuit by circuit basis and concluding that there is division as to how the Court's decisions have been interpreted. In light of this confusion in the lower courts, she urges officials to study and document situations carefully before firing anyone for political reasons. Martin's analysis views the Court's patronage work not from a party perspective, but from the viewpoint of working administrators. Susan Lorde Martin, "A Decade Of Branti Decisions: A Government Official's Guide To Patronage Dismissals", American University Law Review 39 (Fall 1989), pp. 11-58.

the justices in broader historical and explanatory frameworks. Jerome Mileur, for example, examines the freedom of association cases in light of the broader historical evolution of the legal status of parties and reaches conclusions about its future that are similar to Leon Epstein's. Mileur's analysis focuses on cases involving party rules, ballot access, and party registration, and finds that the Court has substantially enlarged the range of self-determination for parties. However, he concludes that the decisions are mainly an open door, not a solution, to the more complex issues of building strong parties; many political and intellectual challenges remain to party building.⁴⁸

Another historical view of the Court's decisions on parties and the law, using a different methodology than Mileur, is provided by Lee Epstein and Charles Hadley. Epstein and Hadley focus on the Court's treatment of minor parties, and the Court's role more generally in supporting the party system. Using Court jurisprudence surrounding majority and minority rights, and related literature, they hypothesize that minor parties should participate more often and be more successful in litigation than major parties. They test this hypothesis by statistically analyzing ninety-seven Court cases decided between 1900 and

⁴⁸ Jerome Mileur, "Legislating Responsibility: American Political Parties and the Law", in White and Mileur, eds., Challenges, pp. 167-89.

1986 in which parties were direct litigants, using cases drawn from the LEXIS legal research network. They find minor parties to be more active, as they expected, but less successful in terms of "winning" cases than they expected; they attempt to explain this by looking to broad cycles of American politics and types of case issues, as well as eras of Court jurisprudence. After controlling for these, they do find some positive treatment by the Court for minor parties as against major parties. Beyond this finding, their broader conclusion emphasizes the complexity of factors involved in the Court-party relationship over time.⁴⁹

Leon Epstein, in addition to his analysis of Tashjian, also devotes a chapter of his text, Political Parties in the American Mold, to the evolving legal status of parties, and places that evolution in a larger historical\cultural explanatory framework. Epstein's main argument is that parties, essentially private at their birth, became de facto "public utilities" during the Progressive era; he traces this change to the presence of parties on state produced ballots and the general regulatory spirit of Progressivism that was afoot in the land at that time. Epstein then examines the content and impact of the Court decisions on parties and their "public utility" status, and concludes that parties are not likely to become fully

⁴⁹ Lee Epstein and Hadley, "Treatment of Political Parties".

deregulated in the foreseeable future, since "such a challenge would be deeply at odds with deeply institutionalized American political patterns". Epstein thus puts forth an historical\cultural framework for understanding the legal status of parties.⁵⁰ Such a framework does much to place the parameters of the debates this analysis finds among the justices of the Court.

In contrast to the works discussed above, two scholars explicitly focus their analyses on the major concern of the present study: the justices' understandings of parties and the broader structures of electoral politics. Clifton McCleskey examines the Court's decisions in ballot access, patronage, and "freedom of association" from the late 1960's to the early 1980's, with the goal of understanding the Court's views on democracy and the substantive policy effects of their decisions. McCleskey argues that, "from the viewpoint of substantive policy, judicial review has obscured more than it has clarified". He finds the Court to be very confused about democratic politics and argues that political scientists bear some responsibility for this. McCleskey's view of the Court and parties is much more negative and pessimistic than most scholars in the field, but the issues he raises are important. They help to organize this dissertation, which, by examining a more explicit set of issues involving parties and the electoral

⁵⁰ Leon Epstein, "Parties As Public Utilities".

process than McCleskey's does, hopes to shed greater light on whether his conclusions are justified.⁵¹

John Moeller is another scholar who has examined the Court's understanding of parties and democracy in its treatment of parties. Moeller analyzes the Court's decisions on conventions and primaries, ballot access, and patronage, and argues that they can only be understood "in the context of a broader discussion about democracy and politics in which the courts have engaged". Unlike McCleskey, Moeller does not find confusion on the Court in this area. Indeed, he argues that the Court's decisions are a product of three focused and contending "visions" of democratic politics: (1) "fair politics", which emphasizes access and majority rule and is disenchanted with parties; (2) "1st Amendment politics", which focuses largely on individual rights and freedom of association in making decisions in this area; and (3) "Madisonian politics", which sees American politics as open and involving a complex balance that necessitates accommodation for the rights of parties and others as well and leads to case-by-case decision-making. He finds Court decisions to entail a contentious mix of all three visions. Moeller's work tries to understand the Court's broader views of parties and democracy in a systematic manner, and the author assesses

⁵¹ Clifton McCleskey, "Parties at the Bar: Equal Protection, Freedom of Association, and the Rights of Political Organizations", Journal Of Politics 46 (May 1984), pp. 346-68.

his conclusions about the Court's views of parties and democracy in the concluding chapter.⁵²

Finally, while the literature to date on the Supreme Court's parties decisions is extensive, most of it approaches the topic with a primary focus on either the legal standards and doctrine involved or on the practical political ramifications of the decisions. A smaller number of scholars, such as Mileur, Leon Epstein, Moeller, McCleskey, and Lee Epstein\Hadley, attempt to place the Court's decisions in a larger historical or explanatory framework. This dissertation builds on the foundations of all of these approaches in order to establish a clearer picture of the Court's views on political parties and their place in the American constitutional system.

In particular, this dissertation addresses one key feature of the literature. Many of the scholars in this area have expressed the belief that the Court's standards, and\or its underlying ideas of parties and democracy, are uncertain. The questions examined in the dissertation address the substance of that position, and the dissertation finds that what is present is not so much directionless confusion, but rather a fairly clear division among the justices themselves. This division may be roughly perceived even in the varying positions in the scholarly

⁵² John Moeller, " The Federal Court's Involvement in the Reform of Political Parties", Western Political Quarterly XL (December 1987), pp. 717-34.

literature examined here. My analysis argues that this division holds both good and bad consequences for parties "at the bar" and in the polity.

CHAPTER 2

THE COURT AND BALLOT ACCESS: DEMOCRACY, AUTHORITY AND PARTY COMPETITION

Virtually all students of representative democracy acknowledge the central importance of the right to vote, but less attention is given to a critical corollary of that right: the candidates one can vote for on the ballot. The ballot choices open to voters in the United States are regulated not only by party nomination processes, but also by state statutes designed to restrict ballot access to "legitimate" candidates. The scope of party competition and voter choice, and thus the nature of American democracy, is not free and unlimited; the flexible but well-defined parameters of ballot access have been set by the states for a century.

Controls on candidate access to the ballot first arose as part of the broad effort to reform the electoral process that took place during the Progressive era. Many of these laws were designed to restrict and stifle the growing political power of third parties during this period, in particular the Socialist Party of Eugene Debs, by making it more difficult for them to place candidates before the voters. As a result, the major parties gained a significant advantage.¹

¹ It is important to note that many "reforms" of this period were used to restrict, rather than enlarge, the scope of participation and parties. The Populist\Progressive era, which saw third parties blocked from the ballot, also witnessed the effective

The impact of ballot access statutes can be even more profound for political parties than for voters. Without access to the ballot, parties cannot perform their primary function of contesting elections in order to win control of the government. Voters may have alternate choices, however biased and limited, but a party whose candidates cannot gain access to the ballot has nowhere to turn; it is likely to face political irrelevance, if not extinction.

Given their consequences for party competition and voter choice, state standards for ballot access establish significant parameters for the character of the party system and the electoral process. Consequently, the content of these standards raises theoretical and practical questions about the scope of party competition and democracy, as well as the proper scope of state authority in the electoral process. Implicitly, they also shape the nature and functions of political parties as institutions.

disenfranchisement of African-American males in the South. This was accomplished through a variety of state voting requirements which included poll taxes, grandfather clauses, and literacy tests. The most blatant collusion of the political parties in this disenfranchisement was the use of "white primaries", which restricted the right to vote in what was the critical election in many southern states. Both the right to vote and the right to run were not always enlarged during this period when rhetoric emphasized returning control of politics to "the People".

The use of "white primaries" was definitively outlawed by Smith v. Allwright. While the concerns of voting rights and minority participation are clearly related to the concerns under consideration in this dissertation, most of the decisions I examine do not extensively focus on these concerns; most of the Court discussion of these issues has occurred in voting rights and redistricting cases.

This chapter examines how the justices of the U.S. Supreme Court have handled these questions, through an analysis of their ballot access opinions.

The Supreme Court's ballot access opinions have often been contentious. At first glance, they divide into two broad groupings. One group favors challenges to ballot access statutes. In these cases, the justices have struck down Ohio's filing deadline and party requirements for minor party presidential candidates²; Texas and California filing fees for ballot placement³; differential signature requirements for local and statewide offices in Illinois⁴; another Ohio filing deadline for independent presidential candidates⁵; and an Illinois party label regulation and signature requirements.⁶

The second group of opinions is the mirror image of the first. State laws are upheld, and there is skepticism about those individuals and groups challenging state regulations. In these cases, the justices upheld a five percent signature requirement for minor parties in

² Williams, 393 U.S. 23 (1968).

³ Bullock v. Carter, 405 U.S. 134 (1972), and Lubin v. Panish, 415 U.S. 709 (1974).

⁴ Illinois State Board Of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

⁵ Anderson, 460 U.S. 780 (1983).

⁶ Norman v. Reed, 112 S. Ct. 698 (1992).

Georgia⁷; a California disaffiliation requirement⁸; Texas signature and organizational requirements⁹; a one percent primary vote requirement for the Washington general election ballot¹⁰; and a Hawaii ban on write-in votes.¹¹

It is also of note that, even though the plaintiffs in the Court's ballot access cases have been "outsiders" from the major parties, i.e. third parties, independent candidates, and/or individual voters, the issues addressed by the opinions have implications for major and minor parties alike.¹²

The divided jurisprudence in this area reflects deeper disagreements among justices regarding the competitiveness of two party systems, the importance of primaries, the purposes of parties, and the relationship of state laws to the electoral process and party system. These disagreements, moreover, reflect two fairly coherent

⁷ Jenness v. Fortson, 403 U.S. 431 (1971).

⁸ Storer v. Brown, 415 U.S. 724 (1974).

⁹ American Party of Texas v. White, 415 U.S. 767 (1974).

¹⁰ Munro, 479 U.S. 189 (1986).

¹¹ Burdick, 112 S.Ct. 2059 (1992).

¹² Unlike other areas of electoral regulation, the Democratic and Republican parties have had no desire to challenge the status quo. The reason for their acceptance of ballot access statutes can be seen in the history of such statutes, particularly their treatment of the two major parties. Ironically, the ballot access case of Williams has served as the foundation for many of the property "freedom of association" decisions that have benefitted the major parties as much as the minor parties.

perspectives on the political status quo. One is the "natural order of politics" perspective: the existing two party system is only competitive if not "monopolized", and natural political configurations are distorted by biased state laws which preserve an electoral monopoly for the two major parties and thereby stifle truly free competition.¹³ The other is the "constructed order of politics" perspective: the existing two party system is competitive unless blatant discrimination can be proven, and existing political configurations are a product of democratic processes and nondiscriminatory state laws that not only permit, but also enable, sufficient competition.¹⁴

This "natural order"\ "constructed order" division within the opinions is evident in differing positions on a variety of salient issues. The opinions "argue" over the role of third parties; the character of party membership and control; the major functions of parties; the role of primary elections; the standards of evidence and burden of proof to be used; and the character and impact of state statutes.

¹³ Majority opinions expressing this view include Williams and Anderson.

¹⁴ Majority opinions which enunciate this view include Storer and Munro.

The "Natural Order of Politics" Perspective

The schools of thought in the ballot access opinions of the justices divide on two crucial matters: the competitiveness of the current party system and the relationship of state laws to the health of party competition. The "natural order" view generally sees party competition as monopolized by the two "major" parties and views state laws as important preservers, if not creators, of this monopoly. The existing political order is, in other words, an artificial product of state laws. Justices who embrace this perspective tend to be skeptical of the competitive and ideological openness of the major parties; of the sufficiency of primaries as the major competitive arena; and of state claims regarding political stability, raiding, voter confusion, and sore losers. They tend to be more sympathetic to third parties, particularly in their role as advocates of substantive issues ignored by the major parties. They feel such parties would be more successful if their natural growth was not impeded by government statutes. In essence, this view seeks to protect democracy, i.e. open party competition, by limiting state authority over what parties and candidates may access an election ballot.

This "natural order" perspective is most consistently supported in the ballot access opinions by Justices William J. Brennan, Thurgood Marshall, and William O. Douglas. The perspective has also had limited appeal to other Justices,

such as John Paul Stevens, who have supported the perspective in some cases. This perspective, while sometimes in dissent, underlies pivotal ballot access decisions like Williams and Anderson, and represents an important voice in the continuing jurisprudence of ballot access cases.

A clear articulation of the "natural order" perspective's central assertions is found in Justice Hugo Black's 1968 opinion in Williams. George Wallace's American Independent Party and the Socialist Labor Party had brought suit against Ohio, claiming that its early filing deadline for third parties, a fifteen percent signature requirement, and other requirements of party organization denied equal protection of the laws.¹⁵ Justice Black agreed, arguing that the Ohio statutes gave the Democratic and Republican parties "a complete monopoly" in the electoral system and were likely to "stifle the growth of all new parties". The decided advantage thereby provided to established parties was viewed as "invidious discrimination".¹⁶

¹⁵ The Ohio ballot access statute requirements for qualifying as a "political party" included the creation of county and state committees and the holding of a nominating convention. Williams, 393 U.S. at 24-25. It is worthy of note that Ohio's ballot was the last of the 50 state ballots accessed by Wallace. Michael Barone, Our Country: The Shaping Of America From Roosevelt To Reagan (New York: The Free Press, 1990), p. 734, n. 9.

¹⁶ 393 U.S. at 30-34. This case demonstrates that a claim does not necessarily have to be based on race in order to find "invidious discrimination". In fact, George Wallace's candidacy was an explicit reflection of the racial animosity felt by many white voters toward

This view of an electoral system monopolized by two major parties, which uses state statutes to disadvantage third parties, is central to the "natural order" perspective's concerns about the existing political environment. The positions taken on a variety of corollary issues, which will presently be considered in detail, all derive from this picture of the current system. Scrutiny of the justices' use of scholarly quotes and citations to buttress their claim of state-produced electoral monopoly reveals that their contentions do not go unchallenged by students of parties and democracy. The major focus of this analysis is not an empirical critique of the justices' citations, however; the goal is to explicate the structure of their ideas about parties and democracy, and to consider the ramifications of these ideological structures for political parties as institutions. The content of scholarly authority cited by the justices, as well as the context of such citation, sheds light on the justices' ideology and its ramifications.

Party Competition and Choice

In Justice Black's opinion in Williams, the health of electoral competition is measured by the choices available to individual voters. Black cites the Court's opinions in Wesberry v. Sanders and Carrington v. Rash to support this

minorities, an ironic historical twist.

proposition.¹⁷ Healthy competition, however, requires more than voter choice; it is also measured by the condition of the party system, which must be "nonmonopolistic". Black writes:

Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past.¹⁸

While the need for some reasonable ballot regulation is admitted, these regulations must afford full opportunity for new parties to organize and appeal to voters. A competitive democracy on this model provides a friendly environment for third parties.

Black's Williams opinion contrasts this "model" of healthy competition with Ohio's party system and statutes. Ohio's Democratic and Republican parties are given a "decided advantage" by the state's election statutes, which are characterized as "virtually impossible" for minor parties to meet.¹⁹ State laws have essentially preserved a monopoly for the two major parties, an unacceptable and "artificial" restriction of party competition. Concurring opinions in Williams by Justices Douglas and John Marshall Harlan IV largely reinforce this position. Harlan, for

¹⁷ 323 U.S. at 31. See Wesberry v. Sanders, 376 U.S. 1 (1964), and Carrington v. Rash, 380 U.S. 89 (1965).

¹⁸ 393 U.S. at 32.

¹⁹ 393 U.S. at 24, 31.

example, sees Ohio as "denying the appellants any opportunity to participate in the procedure by which the President is selected".²⁰

An additional anti-monopoly argument is proffered by Justice Stevens in Anderson. Stevens asserts that monopoly often leads to corruption, so competition should extend beyond the two established parties to prevent such corruption. He characterizes the intent of Ohio's statute as a "desire to protect existing political parties from [such] competition".²¹ Healthy competition, in this view, involves free access by all serious parties.

One opinion which seeks to offer some documentation of this posited burden on competition is Justice Anthony Kennedy's dissent in Burdick v. Takushi, a 1992 case in which Hawaii's ban on write-in voting was unsuccessfully challenged. Kennedy argues that rather than facilitating stability and choice as the majority claimed, Hawaii's restriction actually reduces choice and compounds political division, since only one choice is available in most races.²² He emphasizes the dominance of the Democratic Party in Hawaiian politics, cites data on the number of blank ballots voted, and argues that the Court had previously recognized write-in votes as a way to mitigate

²⁰ 393 U.S. at 35-40 (Douglas, J., concurring) and 41-48 (Harlan, J., concurring); the quote is at p. 41.

²¹ 460 U.S. at 795.

²² 112 S. Ct. at 2068 (Kennedy, J., dissenting).

the restrictions of the Progressive style ballot, citing Sanner v. Patton.²³

The preoccupation of the "natural order" perspective with nonmonopolistic competition is complemented by its solicitude toward third parties, which are seen as having a unique and essential role in our political system. Douglas' Williams concurrence emphasizes the importance of third parties as channels for political dissent, referring to the Court's opinion in Sweezy v. New Hampshire.²⁴ Marshall's majority opinion in Illinois State Board of Elections v. Socialist Workers Party, a 1979 case involving a challenge to Illinois law setting petition signature requirements, emphasizes the third party function of "disseminating ideas as well as attaining political office" and stresses their important role in American political history, supporting the assertion with citations to works by Alexander Bickel, Wilfred Binkley, and E.M. Sait.²⁵ The works he cites, while supportive of his general point regarding third parties as historically important carriers of ideas, are in

²³ 112 S. Ct. at 2068-70 (Kennedy, J., dissenting). See Sanner v. Patton, 40 NE 290 (1895).

²⁴ 393 U.S. at 36, 39 (Douglas, J., concurring). The case noted by Douglas, Sweezy v. New Hampshire, 354 U.S. 234 (1957), involved a professor's refusal to answer a number of questions in a New Hampshire State Legislature investigation of subversive activities. Sweezy was one of the first cases to explicitly discuss the doctrine of freedom of association.

²⁵ 440 U.S. at 186.

some cases much less supportive of the "natural order" perspective as a whole.

Alexander Bickel's Reform And Continuity devotes a chapter to minor parties in the electoral system, and his emphasis on their historic role is congruent with Marshall's view. After reviewing third parties in American history, Bickel concludes that they are "an indispensable part of the system whose beneficent chief aim is to suppress [them]".²⁶ That Bickel agrees with those justices who see bias in the current system is evident from a statement closing his chapter: "state election statutes are shot through not only with anti-third-party provisions that are wrong on principle, but also with some which positively disserve the two-party system".²⁷ Bickel provides strong reinforcement for Marshall and the "natural order" view of the current party system.

Wilfred Binkley's work also supports Marshall's assertion about the role of third parties, but without Bickel's negative commentary on the modern system. In American Political Parties: Their Natural History, Binkley discusses the breakup of the Whig and Democratic parties in the 1840's and 1850's, and the role of many third parties in absorbing dissident elements not accommodated by the

²⁶ Alexander Bickel, Reform and Continuity: the Electoral College, the Convention, and the Party System (New York: Harper and Row, 1971), p. 80. See particularly chap. 4, "Minor Parties", pp. 79-89.

²⁷ Bickel, Reform, p. 89.

major parties. His emphasis is largely on third parties as carriers of ideas that the major parties have failed to address, but he also sees major parties naturally moving to capture third party issues that win popular support.²⁸

Third parties play an important role in raising ideas, but they have not replaced the major parties that tend to "capture" their issues.

Marshall's citation of Howard Penniman and E.M. Sait, when scrutinized in its original context, provides the least support for the "natural order" perspective on third party opportunities and state law. In Sait's American Parties And Elections, Penniman focuses on the historical role and importance of minor parties, and reviews the same history discussed by Bickel.²⁹ This generally supports Marshall's argument, but the final paragraph of Penniman's chapter, which is not quoted by Marshall, is diametrically opposed to the contention that the current party system is a distortion of the "natural order of politics". According to Penniman:

The minor parties make loud complaint over the obstacles that prevent their getting a place on the ballot. Socialists and Prohibitionists, contending that the major parties enjoy a virtual monopoly in many states, have pressed vigorously

²⁸ Wilfred Binkley, American Political Parties: Their Natural History, 3rd ed. (New York: Alfred A. Knopf, 1959), esp. chap. 8, "The Breakup of the Major Parties", pp. 181-205.

²⁹ Howard R. Penniman, Sait's American Parties and Elections, 5th ed. (New York: Appleton-Century-Crofts, Inc., 1952), esp. chap. XII, "Minor Parties", pp. 223-39.

of late for appropriate changes in the election laws. They have some grounds for dissatisfaction. It is sufficient in some states to get a mere twenty-five signatures on a petition, but in other states petitions must be signed by many thousands of voters. Perhaps it is not a mere persecution complex that suggests a conspiracy of Democrats and Republicans. Yet, in the main, the sense of grievance has no solid foundation. The Progressive Party was on the ballot in 45 states in 1948. The Socialists received votes in 33 states; and the Prohibitionists, in 20. Devotion to a cause sometimes impairs perspective. Enthusiasts fail to see that, from the public standpoint, it may be desirable to keep the ballot from being encumbered and that very few voters think otherwise. The "splinter parties" suffer as much from anemia as from the malignant designs of the major parties.³⁰

To find so cogent a statement of the naturalness of the current two party system is not surprising, but to find the work in which it appears cited in an opinion arguing against such a position is ironic. While Penniman may support the legitimate historical role of third parties,

³⁰ Penniman, Sait's American Parties, p. 239; emphases added. Penniman clearly feels that state law has not systemically disadvantaged the minor parties, a position more congruent with the "constructed order" view of party competition and state law. With regard to his assessment of how voters view ballot access issues, a number of trends in recent decades would appear to contradict Penniman's assumption: (1) the relative success of recent third party presidential candidates Wallace, Anderson, and Perot; (2) the general public dissatisfaction with the major parties, and the willingness to elect independent candidates like Governors Lowell Weicker of Connecticut, Walter Hickel of Alaska, Angus King of Maine, and independent Representative Bernard Sanders of Vermont; and (3) the passage of voter referenda questions easing ballot access requirements, such as the approval of Question 4 in Massachusetts in 1990, which reduced the number of petition signatures required for independent candidates by 75 percent. Larry Sabato, while sharing Penniman's suspicions of an unrestricted ballot, recognizes the continuing public power of this "populist" position. Sabato, The Party's Just Begun, p. 229.

his argument is antithetical to the "natural order" contention that state law, not public apathy, preserves a two-party monopoly. Nonetheless, in Illinois Board and other opinions, Marshall argues consistently against a restricted ballot; it is clear he would not accept the above portion of Penniman's analysis.

The majority opinion of Justice Stevens in Anderson continues the emphasis in Williams and Illinois on the role of third parties and cites political scientist V.O. Key, Jr., on the importance of third parties as "fertile sources of new ideas and new programs".³¹ In arguing that campaigns should not be "monopolized by the existing political parties", Key's chapter on "The Role Of Minor Parties" in his Politics, Parties And Pressure Groups reviews the same history as the scholars cited by Marshall, and generally supports Stevens' assertion; however, Key points to the direct primary and the general openness of the major parties to question whether third parties are still essential for that purpose.³² Like Penniman, Key's work is less than fully supportive of the "natural order" perspective as a whole.

Marshall's dissent in Munro v. Socialist Worker's Party, a 1986 case in which the Socialist Worker's Party

³¹ Anderson, 460 U.S. at 794.

³² V.O. Key, Jr., Politics, Parties, and Pressure Groups, 3rd ed. (New York: Thomas Y. Crowell, 1952), especially chap. 10, "The Role of Minor Parties", pp. 278-303.

unsuccessfully challenged a Washington State law requiring a one percent vote in the primary to gain access to the general election ballot, is the most recent opinion to stress the critical functions of minor parties in our polity. According to Marshall, third parties "broaden political debate, expand the range of issues with which the electorate is concerned, and influence the positions of the majority".³³ Third parties, in essence, offer alternatives that make competition in parties, candidates and ideas a reality.

The "natural order" perspective on party competition, at heart, sees two-party dominance as evidence of monopolized competition, and views restrictive state laws as a major cause of that monopoly. There is a logical sympathy for third parties: just as two party dominance indicates unhealthy monopoly, third parties are a sign of healthy competition. Analysis of the opinions also reveals that the "natural order" argument on party competition and state laws finds both supporters and skeptics among students of politics cited by the justices.

Party Structure and Functions

The ballot access opinions which express the "natural order" perspective are relatively limited in addressing issues of party structure and functions, focusing their

³³ 479 U.S. at 200 (Marshall, J., dissenting).

argument on party competition and state laws. Important attention is focused, however, on the "ideological" function of parties. While the "natural order" perspective does not dismiss the electoral function of parties, equal stress is placed on ideological and programmatic activities. In line with its views on competition and third parties, the "natural order" takes a more skeptical view of the ideological "fluidity" of the major parties.

Much of the "natural order" view of parties in the ballot access opinions must be adduced from their discussion of third parties. With regard to party membership and control, the complementary emphases on monopoly and the stifling of dissent indicates a belief that the major parties are ideologically "closed" organizations, less interested in ideas than in winning office. This is essentially an anti-establishment view combined with a "responsible parties" style critique of the major parties. Legally open, the major parties are practically restricted in terms of opportunities for alternative voices and alternative control. As a result, third parties become an essential political vehicle for alternative ideas.

The "natural order" view of party membership and functions can be further understood by examining the treatment of primary elections and party integrity issues, i.e. raiding, sore losers, and disaffiliation, in ballot

access opinions.³⁴ These reveal greater concern for maximum electoral competition both within and between parties than for party integrity or political stability.

On the question of raiding, Stevens' opinion in Anderson emphasizes that raiding is not to be confused with a protection of the existing parties from competition, or used as a "cover" for exercising monolithic control over a party's membership or ideas. While sore loser and disaffiliation concerns are legitimate, laws to enforce such concerns must be tailored to that end; party membership and control must be restricted as minimally as possible. Ohio's statute is characterized by Stevens as only a deadline, not a sore loser provision.³⁵

The "natural order" view of primary elections is congruent with its overall perspective on competition and the ideological function of parties. The primary is an important forum for competition, but does not, by itself, constitute sufficient electoral opportunity. Access to the general election ballot must also be reasonably available. Marshall's Munro dissent, for example, argues that "access

³⁴ "Raiding" involves voters crossing party lines to vote in another party's primary in order to disrupt the results, in states where "open primaries" permit such behavior. "Sore loser" provisions prohibit a candidate who has lost a party primary or nomination contest from running under another party label, or as an independent candidate, in the general election. "Disaffiliation" statutes prohibit a candidate from running as an independent if they were a member of a party within a past specified period of time.

³⁵ 460 U.S. at 801-4.

to a primary election is not...all the access that is due when minor parties are excluded entirely from the general election", and characterized the general election as "the phase of the electoral process in which policy choices are most seriously considered". Blocking minor parties from the general election is seen as a near total bar which preempts meaningful political participation on their part.³⁶

This is certainly a negative view of the "openness" of existing parties and primaries. The fact that the "natural order" perspective takes issue with the ballot access standards in Munro, where a candidate or party can gain access to the general election ballot with only one percent of the vote in a blanket primary, indicates that the justices seek a virtually unrestricted system of ballot access. Kennedy's discussion of Hawaii's ban on write-in voting in his Burdick dissent provides an example of the concerns that support this view, emphasizing that there are few independents on the ballot and that the primary in Hawaii is often decisive.³⁷

With regard to sore loser and disaffiliation statutes, and the threats of factional infighting they are designed to address, Justice Brennan's dissent in Storer best reflects the "natural order" view of such concerns. To Brennan, factional threats are more likely to occur shortly

³⁶ Munro, 479 U.S. at 202-3, 206 (Marshall, J., dissenting).

³⁷ 112 S. Ct. at 2069 (Kennedy, J., dissenting).

before the primary rather than far in advance of it, and thus California's one year disaffiliation requirement limits political opportunity unnecessarily.³⁸ Once again, the emphasis is on keeping competition and opportunity as open as possible.

The "natural order" view of parties is very much in keeping with its overall perspective on competition. Party membership and control should both be as open as possible, with maximum opportunities for other routes due to the de facto restricted nature of party organizations. The functions of parties should be ideological as well as electoral. In essence, parties should be open to, and vehicles of, a wide competition in candidates and ideas; third parties fulfill part of this function for the major parties.

The particular ballot access disputes heard by the justices have given less attention to a critical and particularly contentious electoral issue involving democratic competition and the nature of parties: the ability of racial minorities to participate in the electoral process and elect minority officeholders. Most of the disputes in this area have reached the Court as voting rights or redistricting cases, focusing less directly on ballot access per se. Nonetheless, ballot access for minority candidates is a crucial step in achieving a larger

³⁸ 415 U.S. at 761 (Brennan, J., dissenting).

role in the electoral process. The "natural order" perspective's concern with enabling dissent, new ideas, and alternative viewpoints to be expressed in the parties and offered on the ballot implicitly encompasses an argument that traditionally disadvantaged groups and their interests should not be deprived of political opportunity because of a monopolized political system.³⁹

Standards of Evidence and Burden

The "natural order" perspective's strong skepticism about the status quo of party competition is evident in their standards of evidence and burden. These opinions repeatedly offer tests to evaluate the competing claims, and consistently weigh these tests against the states. The

³⁹ This stance is reflected in the majority opinion in Thornburg v. Gingles, 478 U.S. 30 (1986). Thornburg invalidated a North Carolina districting plan that diluted African-American voting strength. Brennan's majority test for determining vote dilution focuses on "the systematic frustration or exclusion of minority groups from electoral competition". Nancy Maveety, Representation Rights And The Burger Years (Ann Arbor: University of Michigan Press, 1991), p. 122. Lani Guinier emphasizes Brennan's focus on the candidate's role as the "chosen representative of a particular racial group", as well as on protecting that group choice and "the right to elect a representative of their choice" (emphasis added). Guinier correctly notes that the current Court majority has gone in an opposite direction in Presley v. Etowah County Commission, 112 S. Ct. 820 (1992), in which newly elected African-American county commissioners were stripped of their powers by white incumbents. The Presley majority asserts that the right to vote does not include the right to govern. Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy (New York: The Free Press, 1994), pp. 13, 177-79.

centerpieces of their approach are "strict scrutiny" and "compelling state interest".

The first test is offered in Black's Williams opinion. The Court must consider "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification". Black adds that unequal burdens on minority groups can only be justified by a compelling state interest.⁴⁰ This test did not make freedom of association absolute or preclude state regulation on its face, but its result upheld the challenge to Ohio's statutes. Brennan's dissent in Storer reaffirms this strict scrutiny\compelling state interest standard, arguing that it should have been applied in that case, but was not.⁴¹

The practical import of the Williams standard is that effective voting and party competition in our democratic system cannot be infringed without compelling justification. What is meant by "compelling" is not definitively defined, but its application in Williams emphasizes what the state should not infringe, not what it

⁴⁰ This test for an Equal Protection Clause violation is enunciated at 393 U.S. 30. This reflects the concern noted earlier with the disadvantages that racial and other minorities groups can suffer under a monopolized party and political system.

⁴¹ 415 U.S. at 756 (Brennan, J., dissenting).

can protect.⁴² This approach is clearly related to the "natural order" view that the current party system is biased by state regulations.

In Illinois Board, a similar three part test is put forward by Marshall. The Court must examine the character of the classification in the law; the importance of the individual interests affected; and the state interests asserted in support of the classification. Under this test, the majority finds that the geographic classification involved in the Illinois signature requirement limits associational and voting rights without being the least restrictive means to the end of a reasonable ballot.⁴³ Marshall reiterates his support for this standard in his Munro dissent.⁴⁴

Stevens' opinion in Anderson enunciates yet another three part test to determine the appropriate parameters of freedom of association, noting there is no "litmus paper standard" for such cases. According to Stevens, the Court

must first consider the character and magnitude of the asserted injury to the rights protected by

⁴² Justice Harry Blackmun emphasizes the vague and amorphous nature of this "easy phrase" in his concurrence in Illinois State Board, 440 U.S. at 188-89 (Blackmun, J., concurring). However, like many other legal terms, its precise meaning develops from its usage in the totality of previous cases. Thus, its meaning cannot simply be drawn out of the sky, but it is open to evolution and modification in some degree. It is in this process of modification that justices have space for interpretation.

⁴³ 440 U.S. at 183-87.

⁴⁴ 479 U.S. at 201 (Marshall, J., dissenting).

the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.⁴⁵

Justice David Souter's majority opinion in Norman v. Reed, a 1992 case involving a largely successful challenge to Illinois party label and signature requirements, witnessed the most recent application of the Anderson test.⁴⁶

On their face, these tests are all silent when it comes to the particularities of evidence. In fact, the justices who reflect the "natural order" perspective have emphasized a variety of evidentiary factors, all of which share a concern for wide and minimally impeded competition between parties and ideas.

One focus of evidentiary analysis has been to examine whether similar parties are given equal treatment by the law. Souter's Norman opinion finds Illinois restrictions on the use of party names "broader than necessary to advance electoral order", and the signature requirements too onerous on a local party. In combination, they make it easier for a statewide party to gain access to the ballot than it is for a local party. Souter cites the Court's previous decision in Illinois Board to emphasize that local

⁴⁵ 460 U.S. at 789.

⁴⁶ 112 S.Ct. at 705.

ballot access standards should roughly parallel statewide standards.⁴⁷ Chief Justice Warren Burger emphasizes this same type of state\local standard disparity in overturning a Texas filing fee statute in his Bullock opinion.⁴⁸

The opinions also search for evidence of state effort to minimize the burden on the affected individuals or groups. The justices will look with great skepticism on a current statute if the state could have taken a less intrusive approach. Brennan's Storer dissent, for example, argues that California demonstrated no effort to put a lesser burden on candidates.⁴⁹ The political impact of such laws is another item of evidence the opinions have considered. Brennan's dissent in Storer stresses the "impossible burden" of having to decide on a ballot strategy 17 months before a general election, long before politics makes such a choice "sensible".⁵⁰ The state statute is seen as constricting the political landscape, and is therefore not neutral, but rather biased and discriminatory.

⁴⁷ 112 S. Ct. at 706-8.

⁴⁸ 405 U.S. at 140.

⁴⁹ 415 U.S. at 756, 761 (Brennan, J., dissenting).

⁵⁰ 415 U.S. at 758 (Brennan, J., dissenting). As cited earlier, Storer involved a California statute specifying a one year disaffiliation requirement for independent candidates; this forces the "early choice" noted by Brennan.

Evidence of possible impacts on political events is also stressed in Stevens' Anderson opinion. In evaluating Ohio's early filing deadline, Stevens cites the late launching of several third party campaigns.⁵¹ Alexander Bickel is cited to assert the likelihood that early filing deadlines may actually reduce party harmony by forcing early polarizations brought on by the deadline, and thus decrease party stability.⁵² This citation to Bickel is from Reform and Continuity, the same text cited by Marshall in Illinois State Board, and is generally supportive of Stevens's point.⁵³

Despite its skepticism about state laws, the "natural order" perspective does not give the parties a "free ride" in evaluating their cases; they, too, must meet standards. Black's Williams opinion emphasizes a party's "show of support" as a relevant criterion for evaluating an equal

⁵¹ 460 U.S. at 792.

⁵² 460 U.S. at 805.

⁵³ Bickel's viewpoint is, however, not as friendly to third parties as the "natural order" perspective. Following the ideas quoted by Stevens, Bickel states that
From the point of view of fostering the two party system this is counterproductive. It is calculated to induce third party movements, like the George Wallace party; calculated to drive people away from the coalition-building process that is the genius of the two-party system, and into a premature and more likely permanent ideological separatism, which is precisely what the two party system is intended to prevent.
Bickel, Reform, p. 88.

protection claim.⁵⁴ Burger's majority opinion in Lubin v. Panish, a 1974 case involving a successful challenge to California filing fees, also emphasizes petitions and a show of voter support as proper tests of seriousness for a candidacy.⁵⁵ Stevens affirms that states have the "undoubted right to require candidates to make a preliminary showing of substantial support" in his Anderson opinion.⁵⁶

The Role of Government

The "natural order" perspective is highly skeptical of state laws and holds them to a standard of compelling state interest. This hostility is evident in successive drafts of Black's Williams opinion. An early draft simply refers to the Ohio statutes as the state's "position" in the controversy, but a later draft characterizes them as "very restrictive election laws".⁵⁷ It is no surprise that state interests are viewed with caution and the states are forced to prove their claims. The "natural order" view of federalism, revealed most explicitly in the opinions

⁵⁴ 393 U.S. at 34.

⁵⁵ 415 U.S. at 718.

⁵⁶ 460 U.S. at 788, n. 9.

⁵⁷ This change occurred between Justice Black's October 9 and October 15, 1968 drafts of the Williams opinion, at 393 U.S. 32 of the final opinion. See Williams v. Rhodes draft opinions in Folder 17, Box 54, Thurgood Marshall Papers, Manuscripts Division, Library Of Congress.

involving ballot access for presidential candidates, also reflects a skepticism of state interests that clash with the national interests of a presidential election process.

The control of state legislatures by the major parties is one of the major reasons cited for skepticism of state intent and interests in structuring party competition and the electoral process. Stevens' Anderson opinion asserts that the domination of state legislatures by the major parties may put third party interests at a higher risk and thus justify stronger scrutiny of ballot laws.⁵⁸

Likewise, Marshall's Munro dissent argues that "major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties". Marshall even goes so far as to say that "the only purpose this statute seems narrowly tailored to advance is the impermissible one of protecting the major political parties from competition precisely when that competition would be most meaningful".⁵⁹ The obvious concern is that partisan self-interest prevails in this type of regulation.⁶⁰

⁵⁸ 460 U.S. at 793, n. 16.

⁵⁹ 479 U.S. at 201, 205 (Marshall, J., dissenting).

⁶⁰ The fact that these justices are so explicitly willing to question the motives of legislators in this area of policy reflects just how far the Court has moved since the days of the "political question" doctrine, which advocated a neutral acceptance of legislative choices involving these types of issues.

That states have a proper role in regulating elections is not in dispute. The question is what the parameters of that role are. Black's opinion in Williams emphasizes that state powers over elections are not absolute, but are instead subject to constitutional limits, such as equal protection.⁶¹ An internal memo from Justice Abe Fortas to Black makes clear his view that a state may properly impose some limitations. Justice Fortas expresses the following reservations on a draft of Black's opinion:

I'm concerned lest the opinion be taken as indicating that the State may not impose any limitations relating to a political party's securing or retaining a place on the ballot.⁶²

Along these same lines, Stevens's opinion in Anderson cites the legitimate right of states to prevent electoral distortions caused by party raiding.⁶³

The opinions favoring the "natural order" perspective consider a variety of state interests, and find most of them to be either invalid or insufficiently supported by or related to the state laws in question. These avowed interests include promotion of a two party system, desire for a majority victor, structuring the primary, and preventing voter confusion caused by a crowded ballot, all

⁶¹ 393 U.S. at 29.

⁶² Justice Abe Fortas memo to Justice Hugo Black, October 10, 1968, Folder 17, Box 54, Thurgood Marshall Papers.

⁶³ 460 U.S. at 789, n. 9.

asserted by Ohio in Williams⁶⁴; regulation of the primary ballot and financing of the primary, asserted by Texas in Bullock⁶⁵; voter education, equal treatment, and political stability, asserted by Ohio in Anderson⁶⁶; screening out frivolous candidates, asserted by Washington in Munro⁶⁷; and prevention of sore losers and raiding, asserted by Hawaii in Burdick⁶⁸. Most of these stated interests focus on order, stability, and restriction, and given the nature of the "natural order" perspective, it is not surprising to find opinions skeptical of such claims. In their view, there is already too much control by the states.

Stevens's opinion in Anderson emphasizes another aspect of the "natural order" perspective: its view of national interests and the nature of federalism. Stevens stresses the national interest in the conduct of presidential elections, and argues that Ohio as a state is restricting a national process, with possible impacts both on the voters of Ohio and the national presidential

⁶⁴ 393 U.S. at 31-33. Justice Harlan cites evidence on the last point in his concurrence, at 393 U.S. 47 (Harlan, J., concurring).

⁶⁵ 405 U.S. at 145-47.

⁶⁶ 460 U.S. at 796-805.

⁶⁷ 479 U.S. at 200 (Marshall, J., dissenting).

⁶⁸ 112 S. Ct. at 2071-72 (Kennedy, J., dissenting).

process.⁶⁹ A comparison of two earlier drafts of Anderson reveals that Stevens' assertions here were previously even stronger; in two places, the word "may" is inserted as a modifier in a discussion of effects of the Ohio statutes.⁷⁰ In his view, the Ohio law "places a significant state-imposed restriction on a nationwide electoral process".⁷¹ It is clear that this national process must be protected.

Thus, while the "natural order" has not prohibited all state regulation of parties and the electoral process, it is clearly skeptical of many state statutes and the interests asserted to support them. State governments are given the heavier burden of proof. This demanding standard grows out of the central concern of the "natural order" perspective: that competition between parties and amongst ideas has been limited by state laws that create an artificial two party electoral monopoly, restricting opportunities for voters, groups, candidates, and parties.

The "Constructed Order Of Politics" Perspective

The central idea of the "constructed order of politics" perspective is that the existing two party system

⁶⁹ 460 U.S. at 790, 795.

⁷⁰ At 460 U.S. 790, "may have" was substituted for "has" at line 3, and "may affect" for "changes" at line 9. Anderson draft opinions, March 7, 1983, and April 5, 1983, Folder 6, Box 321, Thurgood Marshall Papers.

⁷¹ 460 U.S. at 795; emphasis added.

is a legitimate historical construction of democratic political institutions (i.e. popularly elected governments). This school of thought also holds related views in harmony with this contention: that the current party system is competitive and open to hard- working third parties and independents; that parties are open, electorally-oriented organizations; and that primaries are a "winnowing device" for the general election. In addition, it asks for a high standard of evidence for discrimination claims, and a burden of proof on such claimants rather than the states; state laws are nondiscriminatory unless proven otherwise. It is essentially a positive, though not totally unquestioning, view of the political status quo and state regulation of the electoral process. Most importantly, there is much less of the skepticism shown by the "natural order" towards the motives of elected state legislators whose regulations structure parties and elections.

These views can be traced through a series of majority opinions, as well as dissenting opinions in cases where the "natural order" perspective held sway. The most consistent adherents to these views are Justices Byron White, Potter Stewart, Sandra Day O'Connor, and Chief Justice William Rehnquist. Justice White in particular is the author of majority opinions in Storer, American Party, Munro, and Burdick. They represent a strong and fairly consistent bloc for granting leeway to the states in ballot access

regulation, in marked contrast to the "natural order" perspective.

Stewart's Williams dissent probably provides the best summary of the "constructed order" perspective. He asserts the following:

As my brethren's surveys of ballot requirements in the various States suggests, the present two party system in this country is the product of social and political forces rather than of legal restrictions on minority parties. This Court has been shown neither that in States with minimal ballot restrictions third parties have flourished, nor that in States with more difficult requirements they are moribund. Mere speculation ought not to suffice to strike down a State's duly enacted laws.⁷²

Barring proof, this view will not simply assume the failure of the current system. To these justices, the status quo seems fully competitive and nondiscriminatory, and state interest and authority too legitimate to override.

Party Competition and Choice

The contention that the existing party system is democratically healthy and legitimate is, ironically, stated most explicitly in a dissenting opinion. In Williams, Stewart asserts that the current two party system is the "product of social and political forces", not laws.⁷³ For Stewart, the explanation for major party dominance in Ohio, as well as the failure of George

⁷² 393 U.S. at 60 (Stewart, J., dissenting); emphasis added.

⁷³ 393 U.S. at 60 (Stewart, J., dissenting).

Wallace's American Independent Party and the Socialist Labor Party to meet the requirements for the 1968 general election ballot, lies not in Ohio's statutory filing deadline and organizational requirements, but in the realities of Ohio politics.

Though Stewart does not cite the writings of students of parties, his assertion finds some support amongst political scientists. The work of John Fenton, for example, argues that Ohio has long been a hotly divided two party state, with job-oriented rather than issue-oriented parties.⁷⁴ Other scholars also classify Ohio as a "two party competitive" state.⁷⁵ That type of political environment would not appear to be fertile soil for a multiparty system, irrespective of state laws.

The implications of viewing the existing party and electoral system as a legitimate institutional construct are reflected in how the justices who subscribe to this view treat a variety of related issues. To begin with, competition is assumed to be open to all political forces and viewpoints unless proven otherwise. While this position is often based on the assertion that alternative parties

⁷⁴ John H. Fenton, Midwest Politics (New York: Holt, Rinehart and Winston, 1966), especially chap. 5, "Issueless Politics In Ohio".

⁷⁵ See, for example, John Bibby, Politics, Parties and Elections in America (Chicago: Nelson-Hall, 1987), p. 52, and Malcolm E. Jewell and David M. Olson, American State Political Parties and Elections (Homewood, IL: The Dorsey Press, 1982), p. 28.

can meet the requirements, there is also an assumption that two party politics is de facto evidence of competition.

White's majority opinion in American Party v. White, a 1974 case involving Texas petition and organization requirements for third parties and independent candidates, is reflective of this view of competition. White emphasizes that all parties have electoral access and opportunity through primary day under the Texas system, and that the state laws are not impossible to meet:

Hard work and sacrifice by dedicated volunteers are the lifeblood of any political organization. Constitutional adjudication and common sense are not at war with each other, and we are thus unimpressed with arguments that burdens like those imposed by Texas are too onerous, especially when two of the original party plaintiffs themselves satisfied the requirement.⁷⁶

As American Party indicates, party competition will be assumed unless clear evidence of exclusion or discrimination is offered. White uses Texas primary turnout statistics to argue there is still a large pool of potential petition signers available after a primary.⁷⁷ These statistics were cited in an evidentiary footnote that was added between the February 15 and March 4, 1974, drafts

⁷⁶ 415 U.S. at 787.

⁷⁷ 415 U.S. at 789.

of the opinion, perhaps reflecting a need for White to bolster his argument factually.⁷⁸

White's majority opinion in Storer also emphasizes this positive view of current competition by giving an alternative, retrospective view of the facts in Williams. There, he states, "the opportunity for political activity within either of two major political parties was seemingly available to all".⁷⁹

With a positive view of the existing two party system and its possibilities for competition, it is not surprising that the "constructed order" perspective appears to see no special or unique role for third parties in American politics. While the opinions of the "natural order" perspective stress the unique and important role of third parties, the justices who voice the "constructed order" perspective are virtually silent on this topic. As the previous quote from American Party indicates, these justices view the marginality of third parties as a product of lack of popular support, not discriminatory laws.

Despite this lack of sympathy for third parties, the "constructed order" perspective does not blindly dismiss all third party claims. White's opinion in Storer enunciates specific standards for evaluating the legitimacy

⁷⁸ American Party v. White, February 15 and March 4, 1974 opinion drafts, Folder 2, Box 123, Thurgood Marshall Papers.

⁷⁹ 415 U.S. at 746.

of an independent or third party candidate: seriousness, community support, and true independence. On the basis of these standards, his opinion remands to the District Court for further proceedings a challenge to California's five percent signature requirement brought by the independent presidential ticket of Gus Hall and Jarvis Tyner.⁸⁰ Chief Justice Earl Warren's Williams dissent offers a similar test for the legitimacy of third parties: a substantial showing of voter interest; interest shown before the election; and a party structure with some degree of organization.⁸¹ The last point is the most at variance with White's test. Thus, while third parties and independents have no essential role in the "constructed order of politics", those which meet certain standards should be free to participate.

The "constructed order" perspective's view of healthy competition is, in essence, a much less demanding one than that of the "natural order". Unless proven otherwise, the current two party system in most states is assumed to provide sufficient competition; two party dominance is not equated with a lack of competition, and state laws are seen as neutral toward or protective of competition. Since the two major parties are not seen to stifle competition, the

⁸⁰ 415 U.S. at 738, 746. Gus Hall and Jarvis Tyner were the Communist Party's candidates for President and Vice President, respectively, in 1972.

⁸¹ 393 U.S. at 70 (Warren, C.J., dissenting).

"constructed order" perspective is also much more indifferent to the fortunes of third parties.

Party Structure and Functions

The "constructed order" perspective's positive view of competition and indifference to third parties is complemented by a sanguine view of the openness of major party membership and control to competitive forces, and an emphasis on the electoral function of parties. To preserve this competitive order, however, the "constructed order" also seeks to protect the integrity of parties and the primary's role as a forum for final settlement of intraparty disputes. This effective system of orderly competition would be disrupted by unrestricted ballot access.

White's majority opinion in Storer offers an explicit definition of a political party, one that reflects a pragmatic view of parties. According to White, a party is an ongoing, statewide organization; its goal is to gain control of government by electing candidates; it holds primaries and conventions and writes platforms, responsibilities under state law; and has specified members who join the party.⁸²

This understanding of a party is interesting for its omissions as well as its inclusions. It holds that a

⁸² 415 U.S. at 745.

party's key function is electoral, which comports with political science definitions of party like that offered by Leon Epstein.⁸³ But omitted is any explicit mention of parties as responsible, programmatic carriers of ideas, as is the case with the "natural order" perspective and also the "responsible parties" model of party offered by a number of political scientists.⁸⁴ This electoral definition supports the perspective's positive view of the existing two party system and is largely indifferent to third parties.

Stewart's majority opinion in Jenness v. Fortson, a 1971 case involving a Georgia five percent petition signature requirement, is congruent with the Storer definition of party and addresses more explicitly the relationship of ideas to parties. Stewart argues that Georgia's overall electoral system "recognizes the potential fluidity of American political life", which seems to imply that the major parties are open to changing views and are fluid organizations in terms of ideas, membership, and control. Stewart cites the 1966 gubernatorial election and the 1968 presidential election in Georgia as proof that this openness is more than theoretical; in both, candidates

⁸³ Epstein defines parties as "any group, however loosely organized, seeking to elect governmental office holders under a given label". Leon Epstein, Political Parties In Western Democracies (New York: Praeger Publishers, 1967), p. 9.

⁸⁴ APSA, Towards A More Responsible Two Party System; White and Mileur, eds., Challenges.

gained access to the ballot by petition and carried the state.⁸⁵

It is unclear, however, precisely where these opinions stand on the question of party membership. The Storer understanding of party membership and control appears roughly congruent with the "party worker" model of party membership, in which those persons who have joined or worked for a party organization are seen as members, and in which the party organization controls the party. This contrasts with the Jenness understanding, which seems closer to the "ticket voter" model of party membership, in which anyone who votes for party candidates is seen as a member and in which the public "supporters" of a party control the party.

The difference between these two understandings of party membership is that, under the first definition, a party is a much smaller, more bounded organization. Both definitions find support in the political science literature and have long been the subject of active debate, so it is not surprising that the justices might apply both understandings.⁸⁶

Stewart's Jenness opinion also goes beyond Storer's stark, singular definition of parties to emphasize that a

⁸⁵ 403 U.S. at 439.

⁸⁶ On this controversy, see Ranney, The Doctrine Of Responsible Party Government, pp. 17-19. Ranney's work reflects the fact that this debate splits even the ranks of "responsible party" advocates.

spectrum of parties exists. Stewart argues that there are different "types" of parties, which the state may legitimately treat differently:

The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing the differences and providing different routes to the printed ballot.⁸⁷

Jenness thus embodies an understanding of parties as a heterogeneous "species" whose differences and distinctions can be legitimately considered by the states in their regulation of ballot access and other electoral matters. This understanding, as well as the understanding of the major parties as organizationally fluid, complements the description of parties put forward in Storer.

Justice Antonin Scalia's dissent in Norman offers a small addition to the preceding definitions of a party. He states that it is "reasonable to require a purported 'party'...to run candidates in all the districts that elect the multimember board governing the subdivision. Otherwise, it is less a 'party' than an election committee for one member of the board".⁸⁸ Since no other justice joined his dissent, it is unclear how much support there is for this perspective. White's Storer opinion, in contrast,

⁸⁷ 403 U.S. at 439.

⁸⁸ 112 S.Ct. at 710 (Scalia, J., dissenting).

emphasizes that states cannot force independent candidates to form a new party organization in order to obtain access to the ballot.⁸⁹ This is thus a disputed, but nonetheless important, corollary to the "constructed order" definition of a party.

The "constructed order" view of parties is therefore a heterogeneous one, though unified in its electoral and pragmatic focus. In terms of party structure, membership, and control, parties are seen as open to competition and relatively nonideological in character. Their main function is to win elections and control government. This contrasts markedly with the issue-oriented "natural order" perspective on parties.

While parties are seen as open to competition, the "constructed order" perspective also believes that parties are vulnerable to disruption, requiring state statutes to "protect" their integrity and stability and thereby preserve competition. The major concerns of the "constructed order" in this regard are raiding, sore losers, and the integrity of primary elections as a "winnowing device" for the general election ballot; these interests are given high value when asserted by state governments. All of these concerns reflect a desire to preserve the meaning of party labels and party membership from being too open and fluid.

⁸⁹ 415 U.S. at 745-46.

One method used by states to protect party integrity and prevent sore loser candidacies is the disaffiliation statute. These statutes bar independent candidacies by those who have been affiliated with a party within a specified time period before the election. White's Storer opinion upholds such a statute, viewing it as "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot". California's changing primary laws are cited as another expression of this state policy, which the opinion views as fully legitimate.⁹⁰

White's Storer opinion also emphasizes the legitimate and complementary goals of preventing raiding and prolonged intraparty disputes by using the primary as a winnowing device to promote clear struggles at the general election. To protect party integrity and clarify electoral choice, any intraparty democracy must take place at the primary stage, not thereafter. California's history of primaries is offered as evidence that the primary is an "integral part of the electoral process", a two tiered process of intraparty and then interparty struggles.⁹¹ White's earlier dissent in Williams, in a similar vein, describes the primary as an "opportunity for the presentation and

⁹⁰ 415 U.S. at 733-34.

⁹¹ 415 U.S. at 735.

winnowing out of candidates which is surely a legitimate objective of state policy".⁹²

The pivotal purpose of these types of restrictions, and of primary elections, is the preservation of a stable political system not torn by factions. In Storer, for example, White turns to James Madison to support this argument, citing the classic Federalist 10 essay on the "evils" of factions.⁹³ It is noteworthy that the supporting language of this defense of "the State's interest in the stability of its political system" was strengthened in the final draft of Storer. While his first draft characterized this state interest as permissible, White's second draft calls the interest "not only permissible but compelling".⁹⁴

Stewart's Jenness opinion highlights the winnowing function of primaries from a slightly different angle. He cites with approval Georgia's argument that the state has a proper role in "avoiding deception, confusion, and frustration of the democratic process at the general election".⁹⁵ This reflects a view that electoral confusion will result if the primary does not winnow out candidates; by preventing such confusion, the primary

⁹² 393 U.S. at 62 (White, J., dissenting).

⁹³ 415 U.S. at 735-36.

⁹⁴ See Second Storer draft, March 22, 1974, Box 122, Thurgood Marshall Papers; emphasis added.

⁹⁵ 403 U.S. at 438.

preserves effective competition. White's Munro opinion also accepts as legitimate this view of the primary as a device to simplify the general election ballot.⁹⁶

In the "constructed order" perspective, parties are both open and bounded, fluid and vulnerable. This view complements the positive view of competition in the existing two party system. As a result, state interests in protecting the integrity of parties and the electoral process are seen as highly credible, and statutes to protect the primary process and prevent sore losers and raiding are seen as fully legitimate. This view of parties is similar to the "responsible parties" view, but it lacks one crucial element: the latter's generally strong emphasis on ideology and platforms.

While these arguments of the "constructed order" perspective are strong and consistent, their assumptions are as subject to challenge as the "natural order" opinions. White's opinions, for example, accept state arguments regarding primaries and party integrity, but say nothing about the comparative factional experiences of preprimary and primary systems. As an examination of the "constructed order" views of state law will demonstrate, the arguments of state governments are given a substantial benefit of the doubt.

⁹⁶ 479 U.S. at 196.

Standards Of Evidence and Burden

The positive view of current major party competition detailed above leads, as one might expect, to a skepticism about challenges to state statutes. With respect to evidence and burden of proof, this skepticism translates into a demand for strong evidence from challengers of statutes and a placement of the burden of proof on their shoulders. This strong burden of proof on challengers is reflected consistently in the "constructed order" opinions.

The "constructed order" opinions, while not fully refuting the "compelling state interest" tests put forward by the "natural order" opinions, have applied such tests to state statutes very leniently in practice. They are consistent in calling for a lower burden on the states and for a more lenient standard based on "reasonableness". Stewart's dissent in Williams, for example, sees the proper standard as being whether a classification is "wholly irrelevant to the achievement of the State's objective".⁹⁷ Other "constructed order" opinions, such as White's in Burdick, have echoed that emphasis on "reasonableness" and relevance to legitimate state objectives.⁹⁸

The flip side of this lenient standard for the states is an insistence on strong evidence from challengers;

⁹⁷ 393 U.S. at 51 (Stewart, J., dissenting), quoting McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

⁹⁸ 112 S. Ct. at 2062-63.

discrimination must be proven. In Williams, for example, Stewart's dissent chides the majority for its lack of evidence on infringement of associational and voting rights, and dismisses the analogy with the NAACP discrimination cases drawn by Black, arguing that

There is certainly no comparable showing that Ohio's ballot requirements have any substantial impact on the attempts of political dissidents to organize effectively.⁹⁹

This perspective is thus unwilling to equate cases or assume discrimination blindly.

White's opinion in Storer captures this skepticism. He asserts that one cannot automatically invalidate all substantial restrictions; there is no bright line test, "no substitute for the hard judgments that must be made". White's opinion also suggests that this skepticism is not dogmatic; Storer's remand of the Hall\Tyner petition signature challenge underscores the fact that requirements can be unconstitutionally severe.¹⁰⁰ His majority opinion in Burdick also reaffirms that not all burdensome laws are subject to strict scrutiny.¹⁰¹

Many of the "constructed order" opinions stress a lack of proof by those challenging statutes. Rehnquist's Anderson dissent emphasizes a lack of proof in the record, and argues that "a statute 'is not to be upset upon

⁹⁹ 393 U.S. at 60 (Stewart, J., dissenting).

¹⁰⁰ 415 U.S. at 738.

¹⁰¹ 112 S. Ct. at 2063.

hypothetical and unreal possibilities, if it would be good upon the facts as they are'. He claims the record leads to a "contrary conclusion" from that of the majority.¹⁰²

The citations above indicate that restrictions will not be assumed to damage competition. This caution is reflected in doubts about some of the tests put forward by the "natural order" opinions. Justice Harry Blackmun's concurring opinion in Illinois Board, for example, takes issue with the three part test used by Marshall in the majority opinion, calling it too filled with "easy phrases", and thereby easy to misuse. He compares the application of the "compelling state interest" test to past Court use of the "substantive due process" doctrine in the economic realm.¹⁰³

This reluctance to assume a burden on competition appears to derive not only from the aforementioned sympathy to state interests, but also from skepticism of the rationale of the "natural order" jurists for their decisions. These doubts are reflected in Stewart's Williams dissent; he asserts that the majority's result seems in part to rest on "possible doubts regarding the permissibility of the legislative objective itself".¹⁰⁴ The "constructed order" does not share this suspicion of

¹⁰² 460 U.S. at 809 (Rehnquist, J., dissenting).

¹⁰³ 440 U.S. at 188-89 (Blackmun, J., concurring).

¹⁰⁴ 393 U.S. at 53 (Stewart, J., dissenting).

legislative purposes and actions, and is thus willing to hold their actions to a lesser legal standard.

If discrimination must therefore be proven, the question becomes what evidence will be sought and examined. One important factor is the comparative burden of ballot access methods. The "constructed order" opinions have found primaries, petition signatures, and conventions to be equally burdensome routes to the ballot. Stewart's opinion in Jenness asserts that obtaining signatures cannot be assumed to be more burdensome than winning a primary.¹⁰⁵ This was reemphasized by White in American Party, who cites primary turnout and Clifton McCleskey's Texas Politics on the relative burdens of petition signatures and primaries. In the same case, White is also unpersuaded that a convention is more burdensome than a primary, stating that "appellant's burden is not satisfied by mere assertions".¹⁰⁶ Rehnquist's Anderson dissent even claims that major parties bear the heavier organizational and ballot access burden.¹⁰⁷

Challengers must also show evidence of efforts to comply with existing requirements. Warren's and White's Williams dissents argue that the laws were known by the plaintiffs but no effort was made to comply, a fact they

¹⁰⁵ 403 U.S. at 434-40.

¹⁰⁶ 415 U.S. at 781, 787-90.

¹⁰⁷ 460 U.S. at 816 (Rehnquist, J., dissenting).

find to be critical.¹⁰⁸ This is echoed by White in American Party when he stresses that two minor parties were able to meet Texas requirements, while one fell far short of compliance and another made no effort to comply.¹⁰⁹

The "constructed order" perspective also considers comparative laws from other states to be relevant evidence. Stewart's Jenness opinion cites similar ballot access laws from other states in upholding Georgia's five percent signature requirement.¹¹⁰ Historical and current political experience within the state is also seen as relevant evidence, as for example White's charge to the District Court in his Storer remand of the Hall\Tyner dispute asking that court to consider the facts of California politics as evidence.¹¹¹

Another type of evidence examined by the "constructed order" opinions is the nature of the current methods. In his Munro opinion, White cites Washington's blanket primary as offering virtually guaranteed access to a statewide ballot. According to him, the requirement of a one percent vote percentage in this primary is no real burden on the

¹⁰⁸ 393 U.S. at 62 (White, J., dissenting), 65 (Warren, C.J., dissenting). Chief Justice Warren is even skeptical of the 450,000 signatures collected by George Wallace's supporters, stating correctly that they had never been verified by the state.

¹⁰⁹ 415 U.S. at 778-79.

¹¹⁰ 403 U.S. at 434.

¹¹¹ 415 U.S. at 742.

political opportunity to access the general election ballot. He also stresses that the 1977 legislation requiring this primary vote percentage did seem to be responding to increasingly cluttered ballots at that time.¹¹²

One of the more pivotal items of evidence for the "constructed order" perspective is being able to demonstrate a "show of support". Stewart's opinion in Jenness finds that Georgia's five percent signature requirement does not infringe on any associational or voting rights because it is simply demanding a reasonable show of public support for the party.¹¹³ A party must show it can attract support in the marketplace of politics. This echoes White's Storer standards for legitimate third parties and independent candidates. That opinion also emphasizes the need to show public support, a task also faced by major party candidates.¹¹⁴

Blackmun's partial concurrence in Lubin highlighted an important evidentiary corollary to the "show of support" requirement: opportunity to show such support is assumed to be unimpeded if alternative means of ballot access are provided by the states. Blackmun argues that the main problem in Lubin was a lack of alternative routes to the

¹¹² 479 U.S. at 196, 198.

¹¹³ 403 U.S. at 437-40.

¹¹⁴ 415 U.S. at 733.

ballot, and that the provision of a write-in option would alleviate the issue.¹¹⁵ This echoes Stewart's Jenness opinion, which highlights the allowance of write-in votes and independent candidates, the lenient filing deadline, and the lack of a required primary under the Georgia system as evidence that competition is not stifled.¹¹⁶

This stress on alternative means of access is echoed in all the "constructed order" opinions. White's opinion in American Party notes four methods of ballot access available to Texas candidates.¹¹⁷

Rehnquist's Anderson dissent details alternate routes to the Ohio ballot.¹¹⁸ The same standard is employed by White in Burdick: access by petition, primary, and nonpartisan ballot is available to the challengers, and therefore their ability to compete is not heavily burdened.¹¹⁹

With these standards of evidence, the burden of proof is placed on the challengers of state statutes, as the "constructed order" opinions demonstrate. White's Munro opinion, for example, argues that a "proof" of state interests has never been required, citing Storer in

¹¹⁵ 415 U.S. at 723 (Blackmun, J., concurring).

¹¹⁶ 403 U.S. at 434, 438.

¹¹⁷ 415 U.S. at 772-75.

¹¹⁸ 460 U.S. at 807 (Rehnquist, J., dissenting).

¹¹⁹ 112 S. Ct. at 2066-67.

particular: "there is no indication that we held California to the burden of demonstrating empirically the objective effects on political stability that were produced by the one-year disaffiliation requirement". Requiring such proof, according to White, would lead to "endless court battles over the sufficiency of the 'evidence'".¹²⁰ The "constructed order" perspective seems to have no such evidentiary qualms when it comes to demanding proof from challengers. In essence, the benefit of the doubt is given to the states, whose word will be taken at face value; the challengers of such laws bear the burden of proof.¹²¹

The "constructed order" perspective shows itself to be a friend of the states in its treatment of evidence and burden. While challengers can make arguments, they must show that no alternate means are available, that public support has been offered, and that the means of access are more burdensome than other means available to different parties. Given these high standards, they have a difficult task. It should thereby come as no surprise that the

¹²⁰ 479 U.S. at 194-95.

¹²¹ The employment of the "burden of proof" technique for considering these cases is an indication that the evidence is very much in dispute and/or difficult to obtain. The demand that a "burden of proof" be satisfied thus implies that assumptions and ideology will inevitably color the interpretation of contested evidence. It thus comes as no surprise that the interpretations of both perspectives being examined here contain their own particular assumptions.

"constructed order" perspective also takes a positive attitude toward the character and impact of state laws.

The Role of Government

The "constructed order" perspective, in addition to its positive view of current party competition, sees state laws as nondiscriminatory in character, with a neutral or even positive impact on competition. This view of state laws is reflected in White's Storer opinion, which cites prevention of raiding and the protection of the integrity of the electoral process as legitimate state objectives furthered by such laws.¹²² State regulations are not merely neutral to party competition, but are legitimate interventions to protect competition and the existing party system.

The "constructed order" perspective justifies its positive treatment of state authority over the ballot on constitutional, legal, and political grounds. The most important of these are the constitutional and legal justifications for state management of the electoral process. Rehnquist's dissenting opinion in Anderson argues that state authority in this area is proper, based on Article 2, Section 1 of the Constitution (the "time, place and manner" clause). He also cites the Court's decision in Macpherson v. Blacker as affirming legislative power in

¹²² 415 U.S. at 731.

this area.¹²³ Stewart's Williams dissent also frames the question of state regulation as one of constitutional power, not public policy.¹²⁴ Most recently, White's opinion in Burdick argues that "common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections", and that strict scrutiny would tie the hands of the states in this area.¹²⁵

The "constructed order" view of federalism provides another critical justification for their understanding of the proper state role in this area. This is particularly evident in the Williams dissents. Stewart refers to his reluctance to strike down Ohio's laws by saying that to do so would "require more insensitivity to constitutional principles of federalism than I possess".¹²⁶ Warren's dissent refers to "the need to promote orderly federal-state relationships" and "the legitimate demands of federalism"; he even asserts that "this Court is writing a new presidential election law for the State of Ohio". Warren also cites past Court deferments to the states in "these sensitive areas", specifically on apportionment

¹²³ 460 U.S. at 806-9 (Rehnquist, J., dissenting). See Mcpherson v. Blacker, 146 U.S. 1 (1892).

¹²⁴ 393 U.S. at 48 (Stewart, J., dissenting).

¹²⁵ 112 S. Ct. at 2062-63.

¹²⁶ 393 U.S. at 60 (Stewart, J., dissenting).

procedures.¹²⁷ It is quite clear that the "constructed order" opinions have a sure idea of the proper roles of federal and state governments in this area.

Positive treatment of state authority is also justified in "political" terms, i.e., the state interests in stability and integrity discussed earlier. White's Storer opinion accepts California's proffered interests of fairness, honesty, and order at face value.¹²⁸ His Munro opinion reinforces these justifications, contending that associational rights are not absolute and "are necessarily subject to qualification if elections are to be run fairly and effectively".¹²⁹ These interests are strongly reminiscent of Progressive justifications for electoral reform.

Other state interests accepted by the "constructed order" perspective also have a Progressive echo. White's Burdick opinion emphasizes state interests in avoiding divisive factionalism. Thus, Hawaii may try to prevent sore loser candidates and party raiding by eliminating write-ins as a method of circumventing anti-raiding laws. The legitimate intent behind these interests, according to

¹²⁷ 393 U.S. at 65-69 (Warren, C.J., dissenting). The quotes are from pages 66, 69, and 68, respectively.

¹²⁸ 415 U.S. at 730.

¹²⁹ 479 U.S. at 193.

White, is the maintenance of the "integrity of the democratic system".¹³⁰

A state government may manage the electoral process, so long as its interventions are proper. The classification of parties is one such "proper" state intervention. Stewart's Williams dissent views the majority as disputing this legitimate legislative objective, and finds it "inconceivable ... that the Constitution imposes on the States a political philosophy under which they must be satisfied to award election on the basis of a plurality rather than a majority vote".¹³¹

Stewart's Jenness opinion affirms the legitimacy of such classification, asking rhetorically if nonmajor party candidates would want to have to conduct a primary, as the major parties in Georgia are required to do.¹³²

Regarding another type of state management, White's opinion in American Party approves of the state's right to permit only one "voting act". While states can allow multiple acts, the Court cannot impose an affirmative duty to do this. White cites one Supreme Court and three lower court decisions in support of this assertion.¹³³ His Storer opinion also cites the legitimacy of this

¹³⁰ 112 S. Ct. at 2066-67.

¹³¹ 393 U.S. at 48, 53-54 (Stewart, J., dissenting).

¹³² 403 U.S. at 442.

¹³³ 415 U.S. at 785.

limitation.¹³⁴ These justifications and "approved" state actions, in sum, indicate an unwillingness on the part of these justices to intrude into state decisions, reminiscent of Warren's Williams dissent. For reasons of constitutionality, federalism, and political viewpoint, the "constructed order" opinions give the states wide leeway in managing the conduct of the party system and the electoral process.

Conclusions

As this chapter has shown, the Court's ballot access opinions, from Williams in 1968 to Burdick in 1992, can be seen not only as a shifting treatment of ballot access regulation, but as a continuing debate over the status of party competition, the current party system, and the impact of state laws on that system. One perspective sees a legitimate "constructed order of politics", while the other sees an "natural order of politics" distorted by state regulation. The Court's ballot access opinions reflect a theoretical agreement on the need for party competition and the prohibition of discrimination. They are also united in their emphasis that parties must demonstrate a "show of support" from the public. The justices appear to agree in theory on the basic nature of a party. They also agree that the state has a legitimate role to play in structuring the

¹³⁴ 415 U.S. at 741.

electoral process. Beyond these basic values, however, the justices part company on how parties and the party system operate in practice, particularly with regard to questions of democracy (party competition) and authority (the legitimacy of state laws regulating access to the ballot).

There is major disagreement between the two perspectives on a variety of issues. First, they do not agree on what constitutes healthy party competition. The "constructed order" jurists believe that the two major parties allow for sufficient competition, while the "natural order" justices believe that a system monopolized by two parties stifles full competition. As a result, those who embrace the "natural order" perspective put a special emphasis on the unique and pivotal role of third parties in promoting competition, particularly in the realm of ideas.

With regard to the functions of parties, the electoral function is not disputed. The "natural order", however, places greater and more explicit emphasis on the issue-raising function of parties than does the "constructed order". The perspective seems also to have a skeptical view of the openness of membership and control in the two major parties.

The two perspectives also take very different approaches to issues of federalism. The "constructed order" is reluctant to interfere with state judgments regarding regulation of the electoral process. Even when ruling against a state ballot access law, these justices ground

their decision on the narrowest rationale, preserving as much state freedom as possible. The "natural order", on the other hand, is much more willing to question state regulations and to hold states to a high standard of compelling interest. From these different views of federalism and the dynamics of the party system come the continuing divisions on the Court over ballot access regulation.

A number of observations are relevant to the analysis of these ballot access opinions. The opinions which contain these perspectives tend to focus on the perspective's central concerns, and give little attention to "opposing" points of view. In the "constructed order" opinions, scant attention is given to third parties, and discrimination is not focused upon. The "natural order" opinions, in contrast, are limited in their discussion of the nature of parties or the interests of the state. Each addresses a different facet of the questions considered here, and their views on other facets are more implied than explicit.

Both perspectives are also "silent", in evidentiary terms, on some of their central assertions. Their cases, in essence, are both based in part on assumptions, and neither gives a full and convincing factual defense of its positions. The nature of the judicial forum and its modes of discourse helps to explain these facts. Since much of the Court's approach is based on precedent, past arguments and positions are often repeated in a string of cases; we

have seen this in the foregoing analysis. In addition, the legal opinion is not a debate pamphlet or a treatise, though elements of both do slip into some opinions; an opinion need not cite data nor meet all possible issues, but must simply convey the legal findings of the court involved. This lack of focus on factual evidence is a result of the Supreme Court's identity as an appellate court, rather than a trial court. It may only examine the facts found at trial for their sufficiency or their connection to the proper legal doctrine to be applied in the case. As a result, assertions in opinions can seem very stark.

While these artifacts of the legal forum shape the verbal content of the opinions, they do not determine the essential positions taken. The views explored here are substantive stances, not verbal figureheads trotted out to make a foundationless decision. The opinions, despite their skeletal nature, contain very real perspectives and positions.

In terms of the justices' allegiances and voting records, there are some fairly clear divisions. One finds Justices Brennan, Marshall, and Douglas giving consistent support to the "natural order" perspective, while Justices White, Sandra Day O'Connor, Stewart, Scalia, and Rehnquist have consistently supported the "constructed order" perspective. Other Justices, such as Blackmun, Lewis Powell, Stevens, and Burger, have shifted their stances

over time, and have thereby held the balance between these two "blocs". The "constructed order" perspective is in the majority most frequently, but the "natural order" perspective continues to press its views in dissents, and has in fact won some major victories in Williams and Anderson.

There is also a more subtle division in these cases which crosscuts the division I have sketched. This is between those cases that have had a unanimous or an eight member majority opinion, versus those cases where at least two justices have dissented from the majority. Examining the cases from this perspective shows us where the "persuadable justices" have been able to bring the opposing perspectives together, and where they have landed when the two viewpoints could not be reconciled. They also reveal what the "unbending principles" of each perspective are.

In the "unanimous" column (9-0 or 8-1), we find six opinions: Jenness, Bullock, Lubin, American Party, Illinois Board, and Norman. The connecting threads in these cases appear to be the presence or absence of alternative avenues to obtain ballot access, as well as an emphasis on equal treatment for equally situated parties. In Jenness and American Party, alternative means of access were judged to be easily available, and so the Georgia and Texas signature requirements were upheld. In Bullock and Lubin, the Texas and California filing fees at issue were seen to bar all alternative means of access to the ballot, and were

therefore overturned. Illinois Board and Norman both involved Illinois statutes that imposed differential signature requirements for local and statewide ballot access that fell more heavily on local candidates. Since this was clearly unequal treatment of similar parties, the requirements were overturned.

On the substantive side, these unanimous cases reflect an agreement that similar parties must be treated alike and that multiple means of access to the ballot must be available. With regard to the justices and the two perspectives, they demonstrate that the two "blocs" are not rigidly opposed to each other; there are some areas where both perspectives can agree.

Despite this unanimity, the differences were still present even in these cases. Internal Court memos, for example, reflect that both Powell and Stewart may have had some hesitation and doubt in the Illinois Board case. Both wrote to Marshall indicating they would wait for concurrences (in Powell's case, Rehnquist's) before joining Marshall's opinion.¹³⁵ This fits both their stance as "middle figures" on these issues, as well as their general leanings toward the "constructed order" perspective.

By comparison, there were five cases in which at least two justices dissented from the majority: Williams (6-3),

¹³⁵ Justice Lewis Powell memo to Thurgood Marshall, January 4, 1979, and Potter Stewart memo to Thurgood Marshall, December 9, 1978, Folder 10, Box 228, Thurgood Marshall Papers.

Storer (6-3), Anderson (5-4), Munro (7-2), and Burdick (6-3). Of these, Williams and Anderson followed the "natural order" perspective, while Storer, Munro, and Burdick (all authored by White) followed the "constructed order" perspective. The causes of division in these cases appear to be rooted in the different views of healthy party competition elaborated in this chapter, but also in the respective facts, which point less clearly to an obvious decision than the facts of the unanimous cases. In all of these cases, the alternative means of access were more complex and restricted. The skepticism about their effectiveness was increased by the biases of the state political cultures involved, particularly the political cultures of Ohio (Williams, Anderson) and Hawaii (Burdick). The presence of six opinions in Williams (a majority opinion fully joined by one concurrence, another concurring opinion, and three dissents) is a clear example of how deeply these issues can divide the justices.¹³⁶

What differences do these contentious cases reveal? Anderson and Williams both dealt with Ohio presidential filing deadlines, which the "constructed order" saw as efficacious and the "natural order" saw as stifling. Storer dealt with a disaffiliation requirement, with the same divisions as Williams. Munro dealt with a one percent

¹³⁶ It is noteworthy that commentators have given little or no attention to the divisions in Williams, since it is a foundational case for party freedom of association jurisprudence.

primary vote requirement, and Burdick with a ban on write-in votes. The justices divided on how severely these restricted competition and how many alternate means were effectively available.

With the departure from the Court of the leading proponents of the "natural order" perspective, Justices Brennan, Douglas and Marshall, it would appear that the "constructed order" view will have greater prominence in ballot access jurisprudence, with the "natural order" opinions preserving that perspective by virtue of their precedential weight. The areas where the justices agree are likely to remain stable. The results of Norman and Burdick seem to bear out these predictions. Burdick shows the "constructed order" view in ascendance, while Norman represents the type of common ground on which the justices have met in other earlier decisions.

The justices who bear watching as to the future of this debate are the Burdick dissenters: Kennedy, Blackmun, and Stevens. The latter two have been swing votes in past cases, and the trend of the Court may be pushing them towards the Marshall\Brennan position. Kennedy is a relative newcomer to these cases. Future cases will show us how these alignments fare.

Beyond the Court, these two perspectives may be found in the literature of political science on party competition, the functions of parties, and the nature of state electoral laws. With regard to the competitiveness of

the current party system, most political scientists seem to share Penniman's assessment that third party weakness is due to politics and not laws. Most, however, do underscore the important historical role that third parties have played in the United States. With regard to the nature, membership, and functions of the major parties, most political scientists would agree that their main purpose is electoral, though this point has been debated by the proponents of "responsible parties" for many decades. The vulnerability of party membership and control to outside influences, and whether party membership should be defined as party worker or ticket voter, are as actively debated in political science as they are amongst the justices. With regard to the state role in the electoral process, most political scientists acknowledge that state management of the electoral process at some level is likely to be a permanent part of American politics. Even those who argue for the legal deregulation of parties understand and accept such a state role. In this, they appear to agree with the mainstream of thought on the Court.

The practical implications for parties and the polity in this continuing debate are important, albeit restrained by the passive nature of the Court's ability to address these issues, i.e., ballot access disputes must be brought to court and must climb the appeals ladder to the Court. The debate reveals a continuing split in the opinions, and among the justices, regarding the competitive health of the

current party system, the functions of parties, and the impact of state regulation of the ballot. Since the ballot is a tool for all parties, such continuing disagreement is not positive for either the major parties, which face uncertainty as to third party and other challenger's access to voters, or independent and third party challengers, who face uncertainty as to their ability to access the ballot. If these opinions are indicative of the Court's general viewpoints on party and electoral issues, it may not be a wise forum for those who seek stable standards for ballot access or a consistent view of the current party system.

The implications of the justices' divisions for parties and the electoral process are thus twofold. The agreements on the nature of parties and the general shape of the democratic system indicate that parties will continue to be recognized and have a basic set of rights. The more troubling implications, however, lie in the differences over the party system and state regulations. Neither side of the "argument" has formulated a sharply defined standard beyond some general phrases, and neither side has fully convinced the other or consistently dominated the Court's rulings. This means that a ballot access litigant can never be sure of the standard or result to expect from the Court, making it a risky forum for trying to open up access to the ballot, as well as for advancing the rights of third parties and independent candidates more generally. The following chapters will

indicate whether the justices have been equally divided in their views of other parts of the electoral process and the party system.

CHAPTER 3

NOMINATION METHODS, PARTY ORGANIZATION AND THE COURT

Like many other electoral activities, the organizational structures of political parties, as well as their methods for nominating candidates for office, were originally private matters managed by the parties. Early parties determined their own structure and membership without government intervention, and made nominations by caucuses or conventions of their own devising. These methods evolved through the first half of the nineteenth century.¹ State governments made their first forays into the governance of party activities following the Civil War, when a number of states enacted party primary laws. The initial impact of these interventions was minimal, as these laws were either optional or narrowly constructed and thus either integrated into party practices or avoided. Most parties continued to have full control over organization, membership, and nomination of candidates until the late 19th century.²

The widespread adoption of Australian (secret) ballot laws by state governments between 1888 and 1900 provided the legal and political impetus for wider regulation of

¹ V.O. Key, Politics, Parties, And Pressure Groups, 5th ed. (New York: Thomas Y. Crowell, 1964), pp. 371-72.

² Charles E. Merriam and Louise Overacker, Primary Elections (New York: The Macmillan Co., 1928). See also Penniman, Sait's American Parties, p. 277.

parties during the Progressive Era. The scattered and optional primary laws became more widespread and mandatory, as a number of states enacted statutes governing party organization and party registration for voters. The main justification for these direct primary and party organization statutes, voiced most consistently by Wisconsin Governor (later U.S. Senator) Robert La Follette, Sr., was to take power out of the hands of corrupt political machines and their "bosses" and return it to "the People".³

Despite some resistance by parties and a period of limited use in the presidential nominating process, primary and party organizational statutes have persisted and given the states an important role in shaping the electoral process. These statutes have also captured the imagination of a majority of the American public, to such a degree that arguments for returning control of party organizations and the nomination process to the parties are greeted with considerable skepticism. This is particularly true in the states where the Progressive tradition has its strongest roots.⁴

³ Robert M. La Follette, La Follette's Autobiography (Madison: University of Wisconsin Press, 1960). La Follette's confidence in "the people" is an ubiquitous theme in the book, but is particularly well stated on p. 96.

⁴ For recent and striking polling data on the acceptance of primaries, see Sabato, The Party's Just Begun, p. 207.

The justices of the U.S. Supreme Court, in seven major decisions since 1972, have played an important role in modifying the legal order in this area. The majority viewpoint among the justices has given parties substantially increased authority over their nominating procedures and internal party structures, while still leaving a role for some state regulation if compelling state interests in such regulation can be demonstrated. As a result, the parties have now regained a measure of their previous authority over their internal structures and decisionmaking.

The arguments and divisions among the justices in the seven cases to be examined in this chapter are similar to those in the ballot access opinions. The majority of the justices in these cases have voted to overturn state laws, arguing that they take away the freedom of association that properly belongs to the party. The justices who depart from the majority view argue that much greater deference should be accorded to state interests and to democratically enacted state laws, since the states have authority under the Constitution to manage elections as they see fit. On one side are justices who argue for party freedom, facing justices who are more sympathetic to state interests.

While there is less talk of "monopoly" in these opinions than in the ballot access decisions, the undertones of such a viewpoint are evident if one examines the question of who the justices trust to make decisions

about organization and nomination. The majority of justices put faith in the parties themselves, and doubt the intentions of the status quo state governments. The dissenting justices defer to the authority of popularly elected officeholders as a proper expression of democracy. As in the ballot access decisions, some justices trust the "constructed order", while the majority are more skeptical of its relation to the "natural order" of politics and democracy.

The "Natural Order" Viewpoint

The majority of justices in the party governance opinions take a dim view of state restrictions on party organization, party registration, and nomination procedures. The major contention of these justices is that the character of parties, and thereby the electoral process, is distorted by state-mandated structures and procedures which reduce democratic control and opportunities for choice. This structuring, a kind of "construction" of a mutant political order, is viewed as unjustified by the state interests asserted. The views of these justices on competition, parties, legal standards, and state law reflect this concern.

Party Competition and Choice

At the heart of the "natural order" perspective is a belief in the constitutional freedom of parties to choose

their own methods of governance and nomination, and a belief that such freedom is the best guarantor of full democratic competition. This is evident in Cousins v. Wigoda, the first full decision by the justices in this area.⁵ Cousins involved delegates from Illinois to the 1972 Democratic National Convention. Upholding the freedom of the convention to choose which of two sets of delegates it will seat to represent Illinois, the Cousins majority grounds their decision in the party membership's right of association guaranteed by the First and Fourteenth Amendments. Illinois statutes are viewed as constituting a "significant interference" with that freedom. According to the author of the majority opinion, Justice Brennan, competition is best structured by the parties, not state governments.⁶

The particular effects of state laws like that of Illinois on competition are also cited by Brennan. He connects the law in question to the ballot access decisions, arguing that the nomination process can restrict

⁵ Cousins, 419 U.S. 477 (1975). Cousins was preceded by O'Brien v. Brown, 409 U.S. 1 (1972), a brief per curiam decision which involved a dispute between the National Democratic Party and individuals from California and Illinois who had been chosen as delegates to the 1972 Democratic National Convention, over their delegate status. The case is important in "freedom of association" terms because it explicitly states that there is an "absence of authority ...in intervening in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates". 409 U.S. at 4.

⁶ 419 U.S. at 487-88.

voter choice as much as a restricted ballot. He cites a dissent by Justice Pitney in Newberry v. U.S. to buttress his argument for the importance of nominations for competitive choice: "the likelihood of a candidate succeeding in an election without a party nomination is practically negligible...as a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made".⁷ State laws restricting the national process of the convention ultimately damage national voter choice and thereby reduce competition.

Although the justices in Cousins do not discuss it explicitly, their decision in this Illinois dispute is also highly relevant to local voter choice and the representational concerns of minority groups. The alternate delegation seated by the 1972 Democratic Convention was led by Jesse Jackson, long a spokesman for minority concerns, and was chosen to challenge the "official" Illinois delegation. The "official" delegation effectively represented the interests of Chicago Mayor Richard Daley's political "machine", at a time when Daley's organization appeared to be increasingly unresponsive to African-

⁷ Cousins, 419 U.S. at 490, quoting Newberry v. U.S., 256 U.S. 232, 286 (1921). Newberry involved the Federal Corrupt Practices Act of 1910 and its regulations on congressional campaign spending; U.S. Senator Truman Newberry's conviction for violating these regulations was overturned by a four justice plurality that argued Congress has no power over primaries. That line of reasoning was later firmly rejected in Smith v. Allwright.

Americans and their concerns.⁸ Thus, Cousins offered "after the fact" support to the ongoing effort to open up participation in Democratic Party politics.⁹

This emphasis on protecting and expanding competition is also evident in Marshall's majority opinion in Tashjian v. Republican Party of Connecticut, which involved the Connecticut Republican Party's effort to open some of its primary elections to unaffiliated voters, a practice prohibited by the state's closed primary law. Upholding the right of the Connecticut Republicans to allow participation of these voters, Marshall states that "the Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association".¹⁰ This is clearly supportive of allowing parties to broaden their base of

⁸ Though he had initially had strong political support from the African-American wards of Chicago, a series of events--including Martin Luther King, Jr.'s open housing march in 1966--had soured the relationship between minorities and the Daley "machine". Michael B. Preston, "Political Change In The City: Black Politics In Chicago, 1871-1987", in Peter F. Nardulli, ed., Diversity, Conflict, and State Politics: Regionalism in Illinois (Urbana: University of Illinois Press, 1989), pp. 178-94.

⁹ The 1972 seating of the alternate Illinois delegation can be seen as a part of the culmination of a process that began in 1964 with the unsuccessful attempts of the Mississippi Freedom Democratic Party delegation to be seated at the Democratic National Convention. This effort helped build the momentum for the expansion of minority group participation in Democratic Party decisionmaking processes.

¹⁰ 479 U.S. at 214.

participation if they so choose, even if this overturns contrary state law.

This emphasis is strengthened by Marshall's discussion of Connecticut's claim that the Republican's plan would impose a substantial administrative burden on the state. In finding against the claim, Marshall asserts that "the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford". In drawing an analogy between keeping a third party off the ballot due to administrative cost and prohibiting unaffiliated voters in a primary, Marshall reveals a continuing concern with monopoly, as well as suspicion of state justifications for restricting the political playing field.¹¹

Participation, however, is not equated with organizational anarchy in the "natural order" perspective. Marshall's Tashjian opinion emphasizes the borders of the association, referring to the Democratic Party v. La Follette decision and its emphasis on "the freedom to identify the people who constitute the association"; a footnote also stresses that the decision applies only to unaffiliated voters, not to voters of other parties.¹² Thus, competition is not unequivocally opened across all party boundaries. Nonetheless, the principal authority for

¹¹ 479 U.S. at 218.

¹² 479 U.S. at 224-25, n. 13.

determining a party's boundaries should be the party, since "a major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities", roles which the party can best recognize.¹³

Another aspect of competition relates to a party's ability to endorse candidates for nomination; this issue is addressed in the nearly unanimous opinion in Eu v. San Francisco County Democratic Central Committee. Marshall's majority opinion cites the campaign finance case of Buckley v. Valeo for the proposition that "debate on the qualifications of candidates" is a central part of our democratic system. Debate is a form of competition, which these justices seek to protect and encourage. Nor do they limit its range: "free discussion about candidates for public office is no less critical before a primary than before a general election".¹⁴

Any effort to limit public discussion or access is regarded as highly suspect by the "natural order" perspective. In Eu, Marshall notes that "a 'highly paternalistic approach' limiting what people may hear is generally suspect".¹⁵ The strong connection between speech, association, and competition drawn by these

¹³ 479 U.S. at 214-15.

¹⁴ 489 U.S. at 223, citing Buckley v. Valeo, 424 U.S. 1 (per curiam) (1976).

¹⁵ 489 U.S. at 223.

justices is evident in Eu: let the parties and the voters make their own decisions in an open political "field", with only minimal state restriction of their choices.

Cases involving party registration requirements for voters also raise issues of competition and its restriction. In his dissent in Rosario v. Rockefeller, a case in which the majority justices upheld a New York State statute that mandated a deadline for party registration in order to vote in a future party primary, Justice Powell, joined by Douglas, Brennan and Marshall, characterizes New York's requirement as "facially burdensome", as well as "substantial and unnecessary".¹⁶ Since "a citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family", choice is restricted by New York. Such a restriction can prevent a citizen "from voting in a primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State", and in so doing it "runs contrary to the fundamental rights of personal choice and expression which voting in this country was designed to serve".¹⁷ Political competition is distorted by such restrictions, since political outcomes are affected.

¹⁶ Rosario v. Rockefeller, 410 U.S. 752, 763-764 (Powell, J., dissenting); emphasis mine.

¹⁷ 410 U.S. at 764, 769-70 (Powell, J., dissenting).

Powell also disagrees with the majority in Rosario that these restrictions are due to the inaction of the voters themselves. According to Powell, he could agree with this if the registration deadline were "less severe", but

It is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a fundamental constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation.¹⁸

Nor does Powell find the fact that the ban is not absolute to be persuasive. A substantial infringement is still an infringement, and this one "totally disenfranchises" a particular class of citizens who register or change party affiliation late "for quite legitimate reasons".¹⁹

The implicit standard used by these justices to evaluate such restrictions is a comparison of state laws on a national basis. Powell emphasizes that New York's requirements are "lengthy", and that New York is the only state with such severe restrictions; the law's uniqueness appears to be reason for suspicion to these justices, as more lenient laws from a variety of states are cited in a footnote. Powell notes that "other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New

¹⁸ 410 U.S. at 765 (Powell, J., dissenting).

¹⁹ 410 U.S. at 765-67 (Powell, J., dissenting).

York".²⁰ Competition, in essence, should only be burdened if absolutely necessary for its own preservation, and a national standard is best for evaluating this issue.

The concern of the "natural order" perspective for open competition is clearly reflected in these cases. Party registration deadlines, restriction of primary participation, and state control over who participates in the nomination process at a national party convention are all called into question as restrictions on freedom of association. The deeper concern, however, is to protect the right of parties and voters to make free choices in order to protect democratic competition.

Party Structure and Functions

The justices who favor the "natural order" perspective, as seen in the discussion of competition, believe in the right of parties to determine much of their own structure and procedures. In general, state governments should be only minimally involved in determining a party's procedures, particularly those of a national party. As a result, the decisions favor a variety of party choices, some that restrict participation in a party procedure²¹

²⁰ Rosario, 410 U.S. at 763-64, 771 (Powell, J., dissenting).

²¹ La Follette, 450 U.S. 107 (1981), where the Justices upheld the right of the National Democratic Party to bar Wisconsin from binding the votes of its delegates to the Democratic National Convention on the basis of the results in Wisconsin's open primary, thus allowing it to

and some that open up participation in a party primary.²² These justices do not take a "black and white" stand on what a party should look like, but leave that choice to the parties themselves.

Brennan's majority opinion in Cousins takes a clear position in favor of party choice, arguing against the proposition that "the interest of the state in protecting the effective right to participate in primaries is superior" to the party's interests. He even questions if the state's objective could be achieved, since the Convention could refuse to seat the state's delegates.²³ This sounds odd when placed against the concerns for competition and voter choice noted in the last section and in the ballot access cases, but it is a nuanced distinction. While these justices are concerned with the state restricting voter choice, there is an equal concern with the restriction of party choice. With regard to internal affairs, such as nomination procedures, the parties are seen as properly in control of their own identity, including the essential question of

restrict its participatory boundaries to publicly affiliated Democrats.

²² Tashjian, 479 U.S. 208 (1986), where the Connecticut Republicans sought to open parts of their primary to unaffiliated voters.

²³ 419 U.S. at 488.

boundaries.²⁴ Parties are seen as both better decisionmakers than state legislatures and better representatives of the democratic and competitive interests at stake.²⁵

Brennan also speaks to the role of the national convention. In concluding his opinion, he states that "this is a case where 'the convention itself [was] the proper forum for determining intra-party disputes as to which delegates [should] be seated'".²⁶ The party machinery is thus properly employed to decide party issues; barring the prevention of discrimination, government has no role in such situations. As we have seen in the examination of the ballot access cases, state intrusions are seen as artificially biasing the political system; the same applies to internal party affairs.

The justices' concern for the integrity of the free choices of party organizations and processes is evident in Stewart's majority opinion in La Follette, in which the justices ruled that Wisconsin could not bind the votes of its delegates to the Democratic National Convention to the

²⁴ The major constitutional exception to this control is a prohibition on invidiously discriminatory practices that would exclude certain groups such as African-Americans. This was established by the Court's rulings in the aforementioned "White Primary" cases, which culminated in Smith v. Allwright.

²⁵ For an argument favoring this interpretation, see Gottlieb, "The Courts And Party Reform".

²⁶ 419 U.S. at 491, quoting O'Brien, 409 U.S. 1, 4.

results of Wisconsin's open primary, since that would violate national Democratic Party rules restricting nomination procedures to Democrats only.²⁷ Stewart states that past Court opinions have noted "that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions, thus impairing the party's essential functions". On that basis, "political parties may accordingly protect themselves 'from intrusion by those with adverse political principles'".²⁸ The Wisconsin law is seen as opening the door to such intrusions.

With regard to the issue of intrusion in Wisconsin, Stewart cites David Adamany's study of crossover voting in Wisconsin primary elections, to explain the derivation of Rule 2A restricting participation to declared Democrats. Adamany's numbers on past crossover voting are recited in detail in a footnote.²⁹ Adamany's data and argument generally support the justices' overall arguments, as he finds that crossover voters may well "dilute" the role of

²⁷ La Follette, 450 U.S. 107. The specific rule at issue is Democratic Party Rule 2A, passed to ensure that party delegation votes are not manipulated by forces outside the Party.

²⁸ 450 U.S. at 122, quoting Ray v. Blair, 343 U.S. 214, 221-22 (1953).

²⁹ 450 U.S. at 118-19.

Democratic voters.³⁰ Stewart makes it clear in a footnote that raiding, i.e., crossing over with intent to disrupt, is not at issue here; the Democrat's concern is "with crossover voters in general, regardless of their motivation".³¹

Two examples from past political contests reveal how the purpose of the direct primary could be frustrated by "outside forces". In 1938, the Republican state chairman of Georgia sent a letter urging Republicans to vote in the Democratic primary, in order to nominate conservative Walter George for reelection to the U.S. Senate.³² Thirty-four years later, George Wallace won the 1972 Michigan Democratic presidential primary with large numbers of crossover voters.³³ It was this type of "abuse" to which the majority justices appear to be objecting in the La Follette case.

This emphasis on free party choice is reinforced by Marshall's Tashjian opinion, as we have seen in our

³⁰ David Adamany, "Cross-Over Voting and the Democratic Party's Reform Rules", American Political Science Review 70 (June 1976), pp. 536-41. Adamany states that the evidence he presents "tends to confirm the factual assumptions underlying the Democratic party's rules preferring advance party registration of voters participating in delegate selection primaries".

³¹ 450 U.S. at 123, n. 23.

³² Kenneth S. Davis, FDR: Into The Storm, 1937-1940 (New York: Random House, 1993), pp. 291-92.

³³ John F. Bibby, Politics, Parties, And Elections In America, p. 173.

discussion of competition. Marshall notes that there is a "spectrum of roles" to be filled in a party, and elaborates on his view thus:

Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.³⁴

A party is seen as a multifaceted organization best able to determine the avenues of participation in its activities.

Marshall makes yet another distinction about the structure of parties in his Eu opinion. In dismissing the state claim that the parties "consented" to the preprimary endorsement ban, he separates the party members from the official structure of the party; they have independent views and rights. According to Marshall, "it is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights".³⁵ Thus, parties are viewed as complex and multifaceted entities by the "natural order" perspective.

In Tashjian, Marshall also notes the damage state laws can do to parties and their activities. He analogizes the restriction of primary voting to party members to

³⁴ 479 U.S. at 215; emphasis added.

³⁵ 489 U.S. at 225, footnote 18.

restrictions on financial support for party nominees to party members, and emphasizes that such prohibitions would clearly infringe on associational rights. He makes it clear that the key decision maker is the party; if the party does not want the nonmembers to participate, they have some right to restrict such participation.³⁶

Marshall cites Julia Guttman's Yale Law Journal article on the La Follette decision to emphasize the centrality of the party's right to choose.³⁷ Guttman argues that the pivotal issue is the right of the party to set its own boundaries, and agrees with the distinction of Nader v. Schaeffer³⁸:

Central to our conception of the political party is its ability to determine what its ideological slant and its base of support will be-whether the party will be broad-based and non-ideological or closely-knit and ideological. Thus, deference to the political party's ability to define its own boundaries forms an appropriate cornerstone for the law of state regulation of participation in primary elections, as that ability goes to the very heart of freedom of association.³⁹

Guttman's piece, however, also argues that the justices' application of the means-ends test in La Follette has

³⁶ 479 U.S. at 215, including note 6.

³⁷ Tashjian, 479 U.S. at 216, citing Guttman, "Primary Elections".

³⁸ Nader v. Schaeffer, 417 F. Supp. 837 (D. Conn. 1976), aff'd. mem. 429 U.S. 989 (1976), in which the justices upheld a lower court decision denying an unaffiliated voter's challenge to his exclusion from the Connecticut Republican primary.

³⁹ Guttman, "Primary Elections", p. 137.

turned it "into a virtual guarantee of the supremacy of the right of political association" by "insulating" freedom of association from claims of state interests.⁴⁰ Thus, the majority view is not unequivocally supported by this citation, as Guttman argues that state interests cannot be illogically ignored by an absolute freedom of association.

The "natural order" justices do recognize particular functions as central to parties as organizations. The nomination of candidates is one of these functions. In Tashjian, Marshall emphasizes the centrality of nominating power to party activities. He describes the nomination of candidates as a "basic function" of parties, citing the party registration case of Kusper v. Pontikes. He describes this function as a pivotal political moment, "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community".⁴¹

Marshall emphasizes that Connecticut's approach to nominating activity leaves the party no way to broaden participation in this process beyond publicly affiliated members if they so choose; the state insists on a public act of affiliation.⁴² The party's power over nominations is thereby reduced, because the pool of decisionmakers is

⁴⁰ Guttman, "Primary Elections", p. 136.

⁴¹ 479 U.S. at 216-17, including note 7, citing Kusper v. Pontikes, 414 U.S. 51 (1973).

⁴² Tashjian, 479 U.S. at 216-17.

not of the party's design. Marshall thus makes a direct connection between a central function of parties and the freedom of parties to choose how they structure themselves to perform that function. His opinion in Eu quotes Tashjian and reaffirms this position.⁴³

Marshall's opinion in Eu reflects the "natural order" view that the right of parties to manage their own structure and leadership, as well as nomination procedures, is protected by the Constitution. Citing the precedents of Cousins, LaFollette, and Tashjian, Marshall asserts that California's laws regarding party structure prevent "the political parties from governing themselves with the structure they think best" and restrict "the parties' choice of leaders". He then proceeds to describe a variety of leadership and organizational changes that the parties could not make under the California statutes. He contends that "the associational rights at stake are much stronger than those we credited in Tashjian"; party members are seeking only internal power to choose their leaders, not power over the more public nomination process.⁴⁴ The fact that Eu was a nearly unanimous decision, while Tashjian was closely divided, reflects that even the "constructed order" justices appreciate the strength of that associational claim.

⁴³ 489 U.S. at 224.

⁴⁴ 489 U.S. at 230.

At the heart of the dispute over party membership and who should manage the structure and functions of parties is the issue of distortion. Two types of distortion issues concern the "natural order" justices: the distortion of party choices by "raiding" or "crossover" voting, and the distortion of these choices by state-mandated procedures of voting or delegate selection. Notably, their concern with distortion is centered on the parties, but not on the choices of popularly elected state governments.

Powell's Rosario dissent addresses the issue of distortion by "party raiding" and "crossover" voting, asserted as a state interest by New York. He admits that such a state interest is legitimate, since raiding would damage "the efficacy of the party system in the democratic process" and "its usefulness in providing a unity of divergent factions in an alliance for power", quoting from the lower court's opinion. However, he takes issue with the "presumption" that "most persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary". According to Powell, "any such presumption assumes a willingness to manipulate the system which is not likely to be widespread".⁴⁵

The affiliation decisions of citizens are usually unrelated to any desire to disrupt a party, according to

⁴⁵ 410 U.S. at 768-69 (Powell, J., dissenting).

Powell; they decide their vote on the basis of candidates and issues.⁴⁶ This latter point seems implicitly to reflect an awareness of how the role of parties has diminished in favor of individual candidates.

Powell also sees raiding as less germane to a situation such as New York's, where previously unaffiliated voters are involved.⁴⁷ Thus, the concern about distortion should not center solely on raiding, but also on the voting restrictions that the statute brings about.

Powell's Rosario dissent takes a skeptical view of raiding, and a pessimistic view of the fortunes of parties. According to Powell, parties are not the political force they used to be:

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates.⁴⁸

The threat of raiding is also usually more immediate than the eight to eleven month period imposed by the statute. A deadline closer to the primary would therefore place less burden on the right to participate and vote, while still protecting the party from whatever dangers of raiding do exist.⁴⁹ The state should thus adopt less drastic measures

⁴⁶ Rosario, 410 U.S. at 769 (Powell, J., dissenting).

⁴⁷ 410 U.S. at 770 (Powell, J., dissenting).

⁴⁸ 410 U.S. at 771 (Powell, J., dissenting).

⁴⁹ 410 U.S. at 771 (Powell, J., dissenting).

to guard against this possible disruption; measures like New York's may be worse than the disease they seek to cure. Stewart's majority opinion in Kusper v. Pontikes also finds the state interest in preventing raiding insufficient to support the burden placed on voter Harriet Pontikes.⁵⁰

Marshall's Tashjian opinion also addresses the issue of party raiding. Marshall finds the state's concern with raiding to be inapplicable to the facts at issue, and thus asserts that the judgment gives "no opinion" on the question of raiding. In so doing, however, Marshall appears to reveal a belief that raiding may well not exist. He cites a Democratic Party study which argued that "the existence of 'raiding' has never been conclusively proven by survey research", and the issue on which no opinion is expressed is "whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice".⁵¹ This is a backhanded way of dismissing the issue of raiding without formally taking that position, and reveals the "natural order"'s greater concern with state-induced distortion than with party or voter-induced distortion.

The justices have also addressed the issue of party endorsements in the primary process. Marshall's Eu opinion

⁵⁰ 414 U.S. at 61. In Kusper, the majority of justices struck down an Illinois law which mandated a 23 month waiting period for voters who had voted in one party's primary to vote in another party's primary.

⁵¹ 479 U.S. at 219, including note 9.

highlights the differential associational standard imposed on parties by California law, noting that, "although the official governing bodies of political parties are barred from issuing endorsements, other groups are not". In this way the parties are "silenced" in this part of the political process. Such a state-imposed scheme of "imposing limitations on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association".⁵²

Marshall's discussion of preprimary endorsements also reflects the "natural order" understanding of parties as organizations that possess both freedom and boundaries. He asserts that prohibition of preprimary endorsements has made it "possible for a candidate with views antithetical to those of her party nevertheless to win its primary".⁵³ This may reflect a differential understanding of party access to the political process and party operations within that process, i.e., between interparty and intraparty democracy. The justices seem more concerned with the former than with the latter. Marshall's Eu opinion, for example, cites La Follette for the position that parties have a right to identify the parameters of their membership. This ability enables parties "to select a standard bearer who

⁵² 489 U.S. at 217, 224.

⁵³ Eu, 489 U.S. at 218.

best represents the party's ideologies and preferences". According to Marshall, "depriving a political party of the right to endorse suffocates this right".⁵⁴ This is reminiscent of E.E. Schattschneider's observation that democracy happens between the parties, not within them.⁵⁵

Stewart's opinion in La Follette supports this viewpoint. He notes that participation is open "for everyone who claims a stake in the Democratic Party"; the concept of investment is thus introduced, differentiating between initial access to the political process and access to the internal affairs of parties. The justices who favor the "natural order" perspective focus on dilution of participation in the latter, a striking nuance on their broader participatory arguments. Stewart later argues for this position by asserting that unaffiliated voters, i.e. those without a stake, can distort collective decisions and thereby impair the "essential functions" of parties. This gives parties the justifiable right to protect themselves from those with "adverse principles".⁵⁶ But, as Tashjian indicated, such a choice is for the party, not the state or a court, to make.

This trust of parties as decisionmakers is also reflected in Marshall's Eu opinion. He treats the claim

⁵⁴ 489 U.S. at 224.

⁵⁵ E.E. Schattschneider, Party Government (New York: Rinehart and Co., 1942), p. 60.

⁵⁶ La Follette, 450 U.S. at 116-17, 122.

that preprimary endorsements can lead to intraparty factionalism with great skepticism, quoting generously from the Court of Appeals opinion to support this view. That court saw the prohibition of preprimary endorsements as an "'outright ban' on political speech", and Marshall notes its assertion that the state has not shown how its law would prevent factionalism. He also quotes the view that "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment", shielding parties from "disruptions of their own making".⁵⁷

The Court of Appeals in Eu also draws a distinction between parties and elections which the justices appear to accept. Marshall quotes their opinion that "a State has a legitimate interest in orderly elections, not orderly parties".⁵⁸ This understanding is supported by Marshall's view of the purpose of primaries. In dismissing California's reliance on the Storer precedent, he asserts that it "does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign". Instead, Marshall sees the primary as the "ideal forum" for settling such disputes before the general election, noting that "Tashjian recognizes precisely this distinction". Parties, he adds,

⁵⁷ 489 U.S. at 221.

⁵⁸ 489 U.S. at 222.

can be protected from without, not from within, and therefore "preserving party unity during a primary campaign is not a compelling state interest".⁵⁹

In the balance between electioneering and the promotion of ideas as functions of political parties, the justices who favor the "natural order" perspective show a bias toward the latter. Marshall's opinion in Eu quotes his own opinion in the ballot access case of Illinois State Board to emphasize that the "election campaign is a means of disseminating ideas as well as attaining political office". Parties and elections will not be viewed simply as the pursuit of jobs and authority, but as a means of articulating and enacting ideas as well. Marshall claims that California's preprimary endorsement ban defeats that purpose because it "directly hampers the ability of a party to spread its message and hamstring voters seeking to inform themselves about the candidates and the campaign issues". These state-created limits are also seen as "particularly egregious where the State censors the political speech a political party shares with its members".⁶⁰

The "natural order" justices also assert that the message and ideas of a party are shaped by the party's structure. In a footnote in Eu, Marshall notes that

⁵⁹ 489 U.S. at 227.

⁶⁰ 489 U.S. at 223-24.

regulation of party leadership "may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message".⁶¹ There is a direct relation between organization and leadership and the issues and positions of a party.

Marshall's Eu opinion also makes an important distinction between legislators and the party to which they belong. He states that "simply because a legislator belongs to a political party does not make her at all times a representative of party interests". This is in line with the findings of political scientists that elections are now dominated more by candidates than parties. Marshall expands on the implications of this state of affairs:

In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. Moreover, the State's argument ignores those parties with negligible, if any, representation in the legislature.⁶²

In this, we see a suspicion both of the motives and allegiances of the legislative branch and of the parties currently in power. Party interests are thus not seen to be

⁶¹ 489 U.S. at 230.

⁶² 489 U.S. at 225, footnote 18. For a political science perspective on this issue, see Paul Herrnson, Party Campaigning In The 1980's (Cambridge: Harvard University Press, 1988), and Sabato, The Party's Just Begun. They note, but are not happy with, this "candidate-centered" politics.

automatically protected by a party "controlled" legislature or government.

The justices who favor the "natural order" perspective do not have a fully consistent view of what parties should look like, but they are consistent in favoring the freedom of parties to make choices about internal structure, membership, and the nomination process. On the one hand, parties are supported in making their own determinations of who can and cannot participate in that process. On the other hand, in supporting that free choice, the justices find themselves supporting both expanded and contracted participation in the process. They are thus not married to one particular ideological construct of party membership and control.

Standards of Evidence and Burden

As in the ballot access cases, the justices who favor the "natural order" perspective hold the states to standards of strict scrutiny and compelling state interest. Brennan makes this clear in Cousins:

Even though legitimate, the 'subordinating interest of the State must be compelling...' to justify the injunction's abridgement of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association. NAACP v. Alabama, 357 U.S. 449, 463 (1958).⁶³

⁶³ 419 U.S. at 489.

A simple standard of reasonableness or rationality is insufficient; the state must give strong reasons for its infringement of association, which is given the benefit of the doubt. The states must prove that their involvement in these processes are justified actions, and not unwarranted distortions that burden freedom of association.

Powell's dissent in Rosario, for example, questions the majority opinion in that case for its failure to identify the proper standard of scrutiny, a failure which he contends is likely to confuse other courts and state legislatures when they try to understand how such burdens should and will be evaluated. The majority's description of the New York law is characterized as "nebulous promulgations", which are essentially analogous to the "rational basis test" that is sometimes employed by the justices. Powell's central contention on standards is that past Court precedents do not support the use of the rational basis test in these cases, but call instead for a stricter standard of review.⁶⁴

Powell contends that the proper yardstick is "whether the exclusions are necessary to promote a compelling state interest". He asserts that past decisions value the right of association highly, arguing that this right "must be carefully protected from state encroachment". The standard that past cases call for is one of "strict judicial

⁶⁴ 410 U.S. at 767 (Powell, J., dissenting).

scrutiny". Interests must be evaluated "in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede". He also quotes with approval considerations from Dunn v. Blumstein. States pursuing legitimate interests must draw statutes with "precision", and they "must be tailored to serve their legitimate objectives"; they must also choose "less drastic means" of pursuing their objectives. The onus is thus on the states to infringe as little as possible upon the freedoms exercised in the electoral process. Powell sees New York as failing in that objective.⁶⁵

The "natural order" perspective uses a comparative standard to evaluate state laws, in that the experiences and statutes of other states are noted as evidence. In Stevens's unanimous opinion in Marchioro v. Chaney, for example, he places particular emphasis on the widespread nature of statutory requirements for state committee structure, citing numerous state laws.⁶⁶ This indicates that these justices will not blindly rule in favor of freedom of association claims. Similarly, in Tashjian,

⁶⁵ 410 U.S. at 768-70 (Powell, J., dissenting).

⁶⁶ Marchioro v. Chaney, 442 U.S. 191 (1979), at 195. Marchioro involved a challenge by members of the Washington State Democratic Party to state statutes which required political parties to have state committees composed of two members from each county in the state. In a unanimous opinion, the justices found that the regulations did not infringe on party freedom of association, since the Democratic Party had made a free choice to vest power in its state committee.

Marshall refers to the Anderson ballot access opinion to emphasize that there is no "litmus paper test" to resolve these controversies; decisions must be made on a case by case basis, using the Anderson three part test.⁶⁷ The states are nonetheless given the heavier burden of proof, as the Anderson test calls for a compelling state interest, not simply a reasonable or rational basis.

Marshall's Eu opinion reinforces that demanding standard for state interests. He enunciates a test similar to those employed in the ballot access cases. The justices must "first examine whether it [the state statute] burdens rights protected by the First and Fourteenth Amendments". If such a burden is found on parties and their members, "it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest".⁶⁸

The key to understanding the approaches of both the "natural order" and "constructed order" perspectives to the issue of standards is the elasticity of the terms that constitute the standards. What constitutes a "compelling state interest", an interest that is "legitimate", or a "rational basis" is ultimately defined in part by the justices themselves, employing past precedent as guidance but without any objective definition fixed for all time.

⁶⁷ 479 U.S. at 213.

⁶⁸ 489 U.S. at 222.

The use of precedent, while setting some parameters, still leaves significant case-by-case interpretive authority with the justices. The justices who favor the "natural order" perspective have employed that flexibility to hold the states to a very stringent standard that favors the challengers of state laws involving party organization and nomination procedures.

The Role of Government

The "natural order" justices' suspicion of extensive state management of the electoral process, evident in their views of competition, parties, and judicial standards, may also be seen in their attitudes toward state laws in the area of party organization, registration, and nomination methods. These justices are skeptical of the interests advanced by the states in these cases, showing a preference for the concerns of parties and for claims of national interest. The latter theme is particularly evident in the presidential nomination cases of Cousins and La Follette.

The solicitude of the "natural order" justices for national interests as opposed to state concerns is reflected in Brennan's Cousins opinion. He asserts that the key issue in that dispute is "whether the Appellate Court was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention"; he then indicates that they

were not correct in doing so.⁶⁹ National interests are thus to be preferred, particularly as regards presidential nominations; it matters not that the party is a private, not a public, concern, since the process is one of public significance.

Brennan is unconvinced by the counterargument that Illinois had "a compelling interest in protecting the integrity of its electoral processes and the rights of its citizens under the State and Federal Constitutions to effective suffrage". He responds by noting that a national party convention is involved, whose delegates have a "special function", i.e., they "perform a task of supreme importance to every citizen of the Nation regardless of their state of residence", namely, the nomination of presidential and vice-presidential candidates.⁷⁰ Such national concerns, in Brennan's view, weigh decisively against any claim of state interest.

Brennan pushes the state vs. nation question still farther, bluntly stating that "the States themselves have no constitutionally mandated role in the great task of the selection of presidential and vice-presidential candidates". He also asserts that, if the states were allowed to set their own rules, you could have 50 different standards for the "vital process" of choosing nominees, "an

⁶⁹ 419 U.S. at 483.

⁷⁰ 419 U.S. at 489.

obviously intolerable result".⁷¹ Cousins thus stands for the proposition of a nationalized presidential election system, a modification of federalism congruent with 20th century American political history. Brennan describes the Convention as serving "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State".⁷² Brennan and the majority justices thus accept the nationalizing of the presidential selection process brought about by the Democratic reforms that lie at the heart of the facts of Cousins.⁷³

The nation/state political balance was also at issue in La Follette. The pivotal question in the case, according to Stewart, is whether Wisconsin and its state Democratic party "may compel the National [Democratic] Party to seat a delegation chosen in a way that violates the rules of the Party".⁷⁴ The question is not the constitutionality of the Wisconsin open primary per se, but whether it is binding on a national party whose rules specify a different process.

⁷¹ 419 U.S. at 490, quoting Wigoda V. Cousins, 342 F. Supp. 82, 86 (ND Ill. 1972).

⁷² 419 U.S. at 490; emphasis added.

⁷³ It must be noted that the current of political events has not fully favored this emphasis. In practice, the Democratic Party has modified its movement toward uniform national rules, while the Republican Party has continued to allow state parties to shape many delegate selection procedures.

⁷⁴ 450 U.S. at 121.

In this area, the answer given by the La Follette justices favors the national party's interests, but it may also be seen as favoring a more general policy of minimal state intervention in the electoral process. Stewart asserts that, "even if the State were correct, the State may not choose for the party" in this situation.⁷⁵ Barring any unconstitutional standards, the stringency of membership is an issue that belongs only to the parties, not to government.

The justices in La Follette do not dismiss the states out of hand; they admit that the states have important regulatory interests. They conclude, however, that the interests asserted--the integrity of the electoral process, secrecy of the ballot, voter participation, and the prevention of harassment of voters--all involve the primary, which is not at issue in the case.⁷⁶ For the "natural order" justices, the issue of binding delegates is distinguishable and totally separate from the primary itself. Even if the ultimate purpose of the primary is lost by such a distinction, these justices see the national interest as the central factor in this case.

The Tashjian case reveals the approach of the "natural order" justices to conflicts between state government interests in their own "internal" electoral processes and

⁷⁵ 450 U.S. at 123.

⁷⁶ 450 U.S. at 125.

state party autonomy. Marshall's opinion views Connecticut's interests as insufficient to burden the associational rights of the state's Republican Party. While he accepts the authority of Article 1, Section 4, Clause 1 of the Constitution (the times, places, and manner clause), which gives states a role in controlling their own electoral processes, its "authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens". He notes that the clause by itself is not enough to abridge such rights; more compelling interests must be asserted.⁷⁷ This position is reaffirmed by Marshall's opinion in Eu.⁷⁸

Marshall also finds the other interests asserted by Connecticut to be insufficient. He dismisses the alleged administrative burden with familiar language about using cost arguments to shield the established parties from competition. The state's concern with raiding is also found to be inapplicable to the Connecticut facts, since independents are not moving from another party's primary and since independents could join a party at a late date under existing state law. The state interest in avoiding voter confusion is also unfounded and insufficient, since the past decisions of the justices "reflect a greater faith in the ability of individual voters to inform themselves

⁷⁷ 479 U.S. at 217.

⁷⁸ 489 U.S. at 222.

about campaign issues"; Marshall cites Anderson's emphasis on the contradiction of restricting information in order to promote more informed decisions by voters.⁷⁹

The "natural order" justices' lack of deference to state laws is also reflected in the fairly equal respect they give to official political party documents and state statutes. Stewart in La Follette, for example, begins his opinion by noting that the Charter of the Democratic Party established the "Democrats only" policy for the nomination process. He also carefully reviews the history of official party pronouncements on this issue, with particular reference to Wisconsin's situation.⁸⁰

This same respect is evident in Stevens' Marchioro opinion, which found for the State of Washington on the grounds that the Democratic Party charter, not state statutes specifying party structures, was responsible for the refusal of the Party to add members to the State Committee. The State Committee decision and activity was authorized by the Party's own charter, and both state law and party rules agreed that the state convention was the ultimate ruling body of the Party. The decisions in question were made because of a delegation of authority by the convention; since the source of the complaint is

⁷⁹ Tashjian, 479 U.S. at 217-20.

⁸⁰ 450 U.S. at 109.

ultimately the party itself, there is no burden, and the challengers have no case.⁸¹

As Marchioro reveals, this respect for party documents can be a double-edged sword; even the "natural order" justices will not blindly dismiss state claims or blindly favor party assertions. These justices do realize that there is a role for states. As Stewart makes clear in Kusper, "the administration of the electoral process is a matter that the Constitution entrusts largely to the states".⁸² Nonetheless, Kusper also confirms that a state's actions cannot infringe on constitutional protection in the process of using proper state authority. Illinois had done so by locking voters into their current affiliations for a significant time.

The justices who favor the "natural order" perspective also demand that a state convincingly connect its statutory actions to the achievement of its asserted interests. In his Eu opinion, Marshall considers two state interests: "stable government and protecting voters from confusion and undue influence". He immediately admits that the former is compelling; however, he contends that California has not made a case that connects its interest in a stable polity to the endorsement ban. No evidence is presented on the effect of the ban, and Marshall is struck by the fact that

⁸¹ 442 U.S. at 193, 198-99.

⁸² 414 U.S. at 57.

California is "virtually the only State" with such a ban. He is also skeptical of the asserted interest because of a claim made by California in the lower court that "this action is not justiciable because the State has never enforced the challenged election laws".⁸³

In making these arguments, Marshall cites Arthur M. Weisburd's 1984 Southern California Law Review article on constitutional protection of party nominating methods, which makes an even stronger argument for party freedom than Marshall's opinion. Weisburd argues that primary election statutes in general "appear to be unconstitutional", that the state interest in party democracy ultimately denies associational rights, and that "party organizations and party leaders enjoy the same free speech protection as other associations and individuals". Weisburd's article is strongly supportive of Marshall's argument, and more, arguing from past Court decisions that strict scrutiny should be extended to the whole concept of state-mandated primaries.⁸⁴

With regard to the state claim of confusion and undue influence in Eu, Marshall accepts the legitimacy of the interest but sees it as unsupported by sufficient

⁸³ 489 U.S. at 226; emphasis added.

⁸⁴ Weisburd, "Candidate-Making and the Constitution", p. 277, 280-81. This is a step which the justices have not yet taken and are not likely to take in the foreseeable future, given the more conservative composition of the current Court and the public's attitudes toward primaries.

evidence. He cites the Anderson/Tashjian concern about the restriction of political communication to voters, as well as the Jenness/Buckley acceptance of preventing fraud and corruption, to argue that California's ban does the former but shows no evidence for the latter. Marshall also cites Malcolm Jewell and the results of the 1982 New York State Democratic primary for governor to argue that voters in fact pay little attention to party endorsements in making their voting decisions.⁸⁵ The results of the 1990 gubernatorial primaries in Massachusetts, where both candidates endorsed by preprimary conventions were defeated, is further confirmation that a party endorsement does not a secure victory in the subsequent primary.

Discussing California's restrictions on party organization and leadership, Marshall accepts that states may restrict parties in these areas "when necessary to ensure that elections are fair and honest"; this includes eligibility requirements for voters and various specifications of primary procedures. He notes, however, that "none of these restrictions...involved direct regulation of a party's leaders", and distinguishes the Marchioro case in a footnote; any restrictions on party members were an "indirect consequence". California justified its laws on the basis of the "democratic management of the political party's internal affairs";

⁸⁵ 489 U.S. at 228-29, including note 19.

Marshall rejects this type of claim on the now familiar ground that the state cannot judge for the party.⁸⁶ Unless fairness and honesty are demonstrably implicated and connected to the state laws, the state has no proper role in managing the internal affairs, and occasional disharmonies, of a party.⁸⁷

The "natural order" justices have also used historical evidence to evaluate state claims of authority derived from the Constitution. In Tashjian, for example, Connecticut claimed that the Republican Party's inclusion of independent voters in the U.S. Congress, but not state legislative, primaries would violate the Constitution's Qualifications clause. In responding to this argument, Marshall's opinion cites Federalist 52 and the Records of the Constitutional Convention to argue that the Qualifications clause is concerned with federal election disenfranchisement, not absolute symmetry between states and federal electorates.⁸⁸

This citation of Madison by Marshall is well chosen, as Madison's discussion of this issue emphasizes how critical it was to enshrine the federal voting right in the Constitution, as not to have done so "would have rendered

⁸⁶ 489 U.S. at 232.

⁸⁷ As noted earlier. discrimination, particularly on the basis of race, is a valid ground for state intervention.

⁸⁸ 479 U.S. at 228.

too dependent on the state governments that branch of the federal government which ought to be dependent on the people alone". Madison also feels this right will be safe under the Qualifications Clause because the right to vote in state legislative elections is protected by state constitutions.⁸⁹

The Records of the Constitutional Convention cited by Marshall also appear to bear out his argument. In opposing a property qualification for federal voting, James Wilson notes that

It was difficult to form any uniform rule of qualifications for all the States. Unnecessary innovations he thought too should be avoided. It would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature and to be excluded from a vote for those in the National Legislature.⁹⁰

The key concern is federal disenfranchisement, and its possible impact on political acceptance of the new national order; this point is noted by Oliver Ellsworth and John Rutledge.⁹¹ Thus, as Marshall notes, the intent is not the limitation of the federal vote, but the insurance that the

⁸⁹ Madison, Essay 10, in The Federalist Papers, p. 165.

⁹⁰ James Wilson, quoted in James Madison notes for August 7, 1787, in Max Farrand, ed., The Records of the Federal Convention of 1787, Volume 2 (New Haven: Yale University Press, 1966), p. 201.

⁹¹ Farrand, Records, Volume 2, pp. 201-205.

vote is not limited by Congress or state governments; he sees no such limitation in the Connecticut case.⁹²

The "natural order" justices reveal in these cases a lack of deference and some skepticism toward state statutes and the interests asserted to support them. While not blindly dismissing the arguments of the states, these justices put a high value on the interests of party and voter choice, as well as any processes (such as presidential selection) with national repercussions. For state infringement on such freedoms and interests to be justified, the "natural order" justices set a standard of compelling state interest and require strong evidence that such interests are in fact advanced by the state laws at issue in each dispute. The parties and their freedom of association, not state laws, receive the benefit of the doubt.

The "Constructed Order" Viewpoint

The justices who favor the "constructed order" perspective are at odds with the "natural order" justices, maintaining that states have the constitutional right to play a wide-ranging role in managing party registration and the nomination process, and even internal party organization, in the interests of fair and honest elections. They are less concerned with competition, at

⁹² Tashjian, 479 U.S. at 228-29.

least as the majority understands it, and they are much more inclined to favor the rights of individual states over those of state or national parties. They also do not share the same concern with party self-determination held to the "natural order" justices, and they hold the states to a much more lenient standard of evidence and judicial scrutiny.

This viewpoint has been consistently in the minority in these opinions, in contrast to the ballot access decisions. This indicates that the balance of opinion among the justices has gravitated to the "natural order" view of parties as internally autonomous but not identical to the "party in government", i.e. elected officeholders who hold the party label, as opposed to the "constructed order" view of parties as state-managed but valuable electoral organizations. An examination of the "constructed order" viewpoint in these cases bears this out.

Party Competition and Choice

The "constructed order" justices see the free actions of individuals and organizations, not state laws, as a key explanatory factor in understanding the limitations of political choice and competition. In his majority opinion in Rosario, for example, Stewart emphasizes that the plaintiffs were unable to register before New York's cutoff date because they failed to do so, not because of the law; he also stresses their admission that they had failed to do

so.⁹³ Thus, competition and the ability to participate is limited by free human inaction as much as by law, a point that is telling for Stewart.

This logic is evident in Stewart's further remarks in Rosario. In dismissing the argument that a series of past Court cases on disenfranchisement apply to the New York law, he asserts that in those cases "the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote". Section 186 of the New York statutes, on the other hand, "did not absolutely disenfranchise the class to which the petitioners belong", but "merely imposed a time deadline on their enrollment". As Stewart puts it, "if their plight can be characterized as disenfranchisement at all, it was not caused by Section 186, but by their own failure to take timely steps to effect their enrollment". He dismisses the claims of impaired association with political parties using the same logic.⁹⁴

The element of free choice is also crucial for Blackmun in his dissenting opinion in Kusper v. Pontikes. He notes that disenfranchisement of Harriet Pontikes was brought about "by her personal and voluntary decision", a situation which only "lightly brushes" voting and

⁹³ 410 U.S. at 755.

⁹⁴ 410 U.S. at 757-58.

associational rights. He places great emphasis on the fact that the past precedents cited by the majority all involved infringements on the rights of a "discrete class" of persons, infringements that were "the result of an involuntary condition not directly tied to the franchise". The pivotal characteristic was that these cases involved "direct impairment" of participation in the electoral process "without voluntary action" on the part of the plaintiffs.⁹⁵ Volition is the critical consideration for Blackmun, as it is for the majority in Rosario.

Blackmun also emphasizes volition in his discussion of the statutes and their focuses. In New York, an arbitrary time limit controlled who could vote in a primary. In contrast, the Illinois statute called for an actual vote, a volitional act, as the standard for controlling primary voting. The latter is characterized as "more rational" by Blackmun, another indication of the centrality of free choice to his disposition of these matters.⁹⁶

In addition to the issue of volition and choice, Blackmun notes that the prevention of voting in "one primary of one party" is a "meager restraint" upon freedom of association; Illinois voters are otherwise "fully free to associate with the party of her varying choice". A voter does not have the right to participate in all elections on

⁹⁵ 414 U.S. at 62 (Blackmun, J., dissenting).

⁹⁶ Kusper, 414 U.S. at 64 (Blackmun, J., dissenting).

an open basis; the states and parties can limit voting to this extent. Blackmun notes further that this situation mainly involves personal desire to undo an affiliation, and treats this with some skepticism. Ultimately, the Illinois statute places only a "minor burden" on "a few uniquely situated citizens" in order "to preserve an otherwise vulnerable structure", the primary.⁹⁷

Scalia's dissent in Tashjian, joined by Rehnquist and O'Connor, is even more concerned with free choice and participation. He begins his argument as follows:

Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic government.⁹⁸

In essence, the free process itself is not sufficient to insure fair and effective party action; the states have an important structuring role. This is a clear example of the view that party competition and democracy are best preserved by a "constructed order" of politics.

In addition to defending the state role, Scalia takes issue with the majority's view of freedom of association and asserts that the majority "exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists". The Connecticut Republican Party's ability to associate is not restricted, nor is the

⁹⁷ Kusper, 414 U.S. at 61-64 (Blackmun, J., dissenting).

⁹⁸ 479 U.S. at 234 (Scalia, J., dissenting).

association of their members. The key is that the party wants to allow nonmembers to participate in candidate selection, a desire which Scalia sees as a "fanciful" definition of freedom of association and as "casual contacts".⁹⁹ Scalia thus takes a narrower view of membership and legitimate participation than the "natural order" justices do.

Powell's dissent in La Follette does not seem to share this narrower view. His sense of the Wisconsin law is that it "does not impose a substantial burden on the associational freedom of the National Party, and actually promotes the free political activity of the citizens of Wisconsin". Powell cites the founding history and purposes of the primary, its grounding in expanding participation and giving meaningful control to citizens rather than party bosses.¹⁰⁰

Contrary to Scalia, Powell asserts that by keeping its primary open, not closed, Wisconsin promotes politics. As he puts it, the Democratic Party's effort to use Rule 2A to open up participation "has the ironic effect of calling into question a state law that was intended itself to open up participation in the nominating process and minimize the influence of party bosses". He describes the Wisconsin law as attempting "to ensure that the prospect of public party

⁹⁹ Tashjian, 479 U.S. at 235 (Scalia, J., dissenting).

¹⁰⁰ 450 U.S. at 127 (Powell, J., dissenting).

affiliation will not inhibit voters from participating in a Democratic primary".¹⁰¹ While these two positions are seemingly in conflict, both justices agree on the legitimacy of the choices made by state governments. Like the "natural order" viewpoint, the political results of this "constructed order" viewpoint can be contradictory.

The "constructed order" justices are much less concerned with giving maximum protection to the free competition and choices of parties. While those concerns are not dismissed, these justices feel that the states have an essential role to play in preserving and structuring the electoral process, a role enshrined in the Constitution. They feel the majority has given insufficient weight to the rights of states, all in the name of minimal and tenuous associations between parties and individuals. As a result, they contend that fair and honest political competition and democratic choices are hindered rather than helped by the decisions of the Court.

Party Structure and Functions

On the issue of party structure and membership, the "constructed order" justices seem to follow their ballot access opinions, which stress the proper state role in insuring party integrity. Their opinions, however, would also result in contradictory political outcomes, as some

¹⁰¹ La Follette, 450 U.S. at 128, 136 (Powell, J., dissenting).

favor expanded choices and party boundaries, while others favor restricted boundaries. Like the "natural order" justices, the "constructed order" justices do not appear to favor a particular type of party organization or electoral structure, but rather believe that the states have the right to some authority over those matters, and their choices are owed some deference by the Court.

In Rosario, Stewart initially shows little concern for the boundaries of a party, detailing how New York voters could easily move from one party registration to another with minimal difficulty and were not unavoidably "locked in" to a particular party affiliation.¹⁰² Rehnquist's dissent in Kusper is also not wedded to any particular form of party enrollment, as his acceptance of the differing statutory schemes of New York and Illinois indicates.¹⁰³ The unifying factor in these views is that the states can make these choices, as long as the disenfranchisement that occurs is due to individual action and is not the result of a full statutory bar.

With regard to the boundaries of parties, the "constructed order" justices most often defer to state political cultures and expressed state interests, rather than to any abstract standard or model. These justices, for example, reach contrasting positions on the issue of

¹⁰² 410 U.S. at 759.

¹⁰³ 414 U.S. at 67 (Rehnquist, J., dissenting).

raiding and crossover voting. In Rosario, Stewart emphasizes the prevention of raiding as an important state goal and argues that the general election timing of the registration deadline acted as a "deterrent" to such raiding.¹⁰⁴ Blackmun's dissent in Kusper also believes that preventing raiding is of "unquestioned" legitimacy, and implicitly favors a well-bounded party by noting that those most affected by the Illinois statute are likely to be "party switchers", who "clearly are the group most amenable to organized raiding".¹⁰⁵ Rehnquist's dissent in Kusper also recognizes the prevention of raiding as a legitimate state interest.¹⁰⁶

Powell's dissent in La Follette, however, takes a strongly contrasting view of party membership and party boundaries. In allowing secret and limited voter affiliation at its primary, Wisconsin, Powell argues, is exercising a legitimate and compelling state choice. He does note that "the Democrats remain free to require public affiliation from anyone wishing any greater degree of participation in party affairs", and that the caucuses and delegates must be publicly affiliated.¹⁰⁷ He would, however, vote to uphold Wisconsin's right to use the open

¹⁰⁴ 410 U.S. at 760-62.

¹⁰⁵ 414 U.S. at 63-65 (Blackmun, J., dissenting).

¹⁰⁶ 414 U.S. at 69 (Rehnquist, J., dissenting).

¹⁰⁷ 450 U.S. at 129-30 (Powell, J., dissenting).

primary and have it accepted. While this view seems at odds with the opinions noted above, they are united in their deference to and defense of the choice made by the particular state; the needs and political realities of each situation are seen as worthy of serious weight in judging these conflicts.

Scalia's dissent in Tashjian is also concerned with the issue of party membership. Scalia sees a lack of meaningful contact between the party and independent voters in this case, arguing that the "casual contacts" implied here do not really constitute freedom of association. Implicitly, he is arguing that parties must have reasonable boundaries if their freedom of association is to have any clear parameters. This is made clearer in his assertion that the State can legitimately limit the selection process to party members in order to protect against the dilution of the votes of those members by "outsiders".¹⁰⁸

Nor does Scalia's Tashjian dissent agree that Connecticut's action is protecting the Republican Party from itself. He puts great emphasis on the fact that the decision to allow independents

was not made by democratic ballot, but by the Party's state convention-which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-a-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the

¹⁰⁸ 479 U.S. at 235-36 (Scalia, J., dissenting).

Party's rank and file.¹⁰⁹

In essence, Scalia argues that democracy may have been distorted by the state convention. His description is an implicit reference to the fact that Lowell Weicker, more liberal than most of the Connecticut Republican Party, was a major backer of this change in order to advance his own chances of nomination. This is seen by Scalia as a distortion of the party, an unusual focus on the ideological character of a party. He asserts, "I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this kind of minority control", citing Nader v. Schaeffer.¹¹⁰

Powell's dissent in La Follette admits that Wisconsin "has, to an extent, regulated the terms on which a citizen may become a 'member' of the group of people permitted to influence that decision", i.e., the selection of a presidential nominee. He argues, however, that this is only an issue if the party has "a particular ideological orientation or political mission". The Democratic Party, as well as our other major parties in history, he concludes, have been much more malleable in their ideas and membership.¹¹¹

¹⁰⁹ 479 U.S. at 236 (Scalia, J., dissenting).

¹¹⁰ 479 U.S. at 236 (Scalia, J., dissenting).

¹¹¹ 450 U.S. at 131 (Powell, J., dissenting).

Powell puts great weight on the nonideological character of the major parties. With regard to the Democratic Party, "it can hardly be denied that this Party generally has been composed of various elements reflecting most of the American political spectrum". He admits the party has taken positions, but focuses on their shifts over time. On this basis, he argues that "it is hard to see what the Democratic Party has to fear from an open primary plan". In fact, an open primary will allow voters to go to the party that speaks to their ideological concerns, which should add to party support.¹¹²

Powell's citation of Robert Horn in his opinion is interesting, in that Horn discusses the permeability of parties in the context of lamenting this lack of discipline and cohesion. He states that the major parties in America "are prepared to welcome almost anyone with open arms and strive to make almost anyone feel at home in their midst"; his discussion is in the context of the rights of groups under the Constitution, a product of the American ideal of majority rule. But in discussing the then contemporary 1950 APSA Report and related calls for responsible parties, Horn seems to have grave doubts about the potential for changing parties. He states that "surely those who think our parties are now inadequate for their tasks ought to pause before

¹¹² 450 U.S. at 131-33 (Powell, J., dissenting).

laying this additional burden on them".¹¹³ He seems to favor Powell's position, but not the positions of those states seeking to preserve the boundaries of their parties.

In a footnote, Powell also offers a lengthy quotation from Austin Ranney's Curing The Mischiefs of Faction, citing the virtue of the American party trend to accommodation.¹¹⁴ The overall point of Ranney's work is to highlight the often unintended consequences of party reform throughout American history and to suggest that "party reform is one of the easier forms of social engineering" and therefore often adopted despite the unlikely chances of success.¹¹⁵ Powell also cites Frank Sorauf on the differences between open and closed primaries, as well as on the Progressive focus on curing ills of democracy with more democracy.¹¹⁶

¹¹³ Robert A. Horn, Groups And The Constitution (Stanford: Stanford University Press, 1956), pp. 97-99, 103-4.

¹¹⁴ 450 U.S. at 132 (Powell, J., dissenting).

¹¹⁵ Austin Ranney, Curing The Mischiefs of Faction: Party Reform In America (Berkeley and Los Angeles: University of California Press, 1975), p. 210. A number of other prominent political scientists have echoed this assessment. See for example Julius Turner, "Responsible Parties: A Dissent From The Floor", American Political Science Review 45 (March 1951), pp. 143-52; Jeane J. Kirkpatrick, Dismantling The Parties (Washington, D.C.: American Enterprise Institute, 1978); and Edward C. Banfield, "In Defense Of The American Party System", in Robert A. Goldwin, ed., Political Parties, U.S.A. (Chicago: Rand McNally and Co., 1961), pp. 21-39.

¹¹⁶ 450 U.S. at 133-34 (Powell, J., dissenting), citing Frank Sorauf, Party Politics In America, 4th ed. (Boston: Little, Brown, 1980), pp. 203-5.

Powell's dissent places little importance on the participation of unaffiliated voters, stating that the resulting delegates will likely not differ much from those of other states and regions. He also takes issue with the distortion argument, contending that the national party's alternative methods, such as a caucus, "would be as least as likely as an open primary to reflect inaccurately the views of a State's Democrats". The ease of affiliation in Wisconsin also weakens the national party's argument.¹¹⁷

The views of the "constructed order" justices on the proper boundaries of party membership are thus as contradictory as those of the "natural order" justices, in that both expanded and restricted participation are favored in different cases. What unites these justices and separates them from the "natural order" viewpoint is that they defer to whatever choice a particular state has made in structuring its party registration or nomination methods. The differences are thus less over the character of parties and electoral methods per se and more over who should have the authority to make those choices: the parties or the state governments.

Standards of Evidence and Burden

It is clear that the "constructed order" justices hold the states to a much more lenient standard of review than

¹¹⁷ La Follette, 450 U.S. at 132-33 (Powell, J., dissenting).

do the "natural order" justices. In Rosario, Stewart notes that the New York limitation is "not an arbitrary time limit unconnected to any important state goal". It is motivated by desires to prevent interparty raiding and to preserve the integrity of the electoral process, which it accomplishes by forcing voters and politicians into "deliberate inconsistencies" that occur by encouraging registration in one party and general election voting for an opposing party. The timing of primary and general elections appears to be crucial in the majority's decision to uphold the statute.¹¹⁸

Thus the standard seems one of reasonableness. In dismissing the substitution of a law whereby party registrants could be challenged, Stewart emphasizes that the state is not bound to use "ineffectual means" simply to protect fundamental rights.¹¹⁹ Blackmun in Kusper reaffirms these lenient standards. In discussing the Illinois statute, he finds the asserted state interest in protecting the ballot box and the party system "clearly legitimate" and the statute "reasonably related to the fulfillment of that interest".¹²⁰

In these opinions, there is no talk of strict scrutiny, but instead an emphasis on reasonableness and

¹¹⁸ 410 U.S. at 760-61.

¹¹⁹ Rosario, 410 U.S. at 762.

¹²⁰ 414 U.S. at 63 (Blackmun, J., dissenting).

legitimacy, a much lesser hurdle than "compelling state interest". In fact, Blackmun concludes his opinion in Kusper by emphatically stating that the "incongruity" between Kusper and Rosario "underscores what I believe to be the potential mischief that results from an easy and all-too-ready resort to a strict-scrutiny standard in election cases of this kind".¹²¹ Rehnquist's dissent in Kusper shares this emphasis on legitimacy as the proper standard.¹²²

Powell's La Follette dissent accepts the standard test in this area: "if the law can be said to impose a burden on the freedom of association, then the question becomes whether this burden is justified by a compelling state interest". He does not agree that the Wisconsin law creates a burden, however, nor does he accept the majority's distinction between the primary and the voting of delegates at the convention. He sees little burden on association, and a strong argument for compelling state interest.¹²³ He writes:

I am unwilling-at least in the context of a claim by one of the two major political parties-to conclude that every conflict between state law and party rules concerning participation in the nominating process creates a burden on associational rights. Instead, I would look closely at the nature of the intrusion, in light of the association involved,

¹²¹ 414 U.S. at 65 (Blackmun, J., dissenting).

¹²² 414 U.S. at 69 (Rehnquist, J., dissenting).

¹²³ 450 U.S. at 128 (Powell, J., dissenting).

to see whether we are presented with a real limitation on First Amendment freedoms.¹²⁴

In other words, claims against freedom will not be themselves accepted without scrutiny.

As for the state, Powell's reference to Rosario appears to indicate that "a particularized legitimate purpose" is sufficient. In La Follette, he sees the majority ruling "without any serious inquiry into the extent of the burden on associational freedoms and without due consideration of the countervailing state interest".¹²⁵ Stevens' concurrence in Eu, which consists almost solely of a quote of Blackmun's opinion in Illinois Board, is grounded in the same belief that the majority has taken its standard too far with "too easy phrases".¹²⁶

That the "constructed order" justices choose rationality over compelling interest is confirmed by Scalia's dissent in Tashjian. He argues from past Court experience that accommodation of freedom with fair and effective state action "does not lend itself to bright line rules". Instead, it "requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case". Scalia cites Anderson and Storer to support this

¹²⁴ 450 U.S. at 130-31 (Powell, J., dissenting).

¹²⁵ 450 U.S. at 136, 138 (Powell, J., dissenting).

¹²⁶ 489 U.S. at 233-34 (Stevens, J., concurring).

position.¹²⁷ He also proposes a major modification of the majority's compelling state interest standard, in that he gives equal weight to freedom of association and state interest by his phrasing ("the one or the other interest"). He is clearly unwilling to hold the states to a more demanding standard.

Scalia's Tashjian dissent joins this lenient standard to an argument for the predictability of decisions. He asserts that predictability in this area of the law is "important", adding that "today's decision already exceeds the permissible limit of First Amendment restrictions upon the State's ordering of elections".¹²⁸ The argument of the majority is turned around; the issue is not the limits of the State's power, but the limits of First Amendment restrictions on that power. This is clearly a pro-state standard at work.

The "constructed order" justices, though clearly in a minority in these cases, assert a clear case for a standard more responsive to state interests. While the compelling state interest standard is not disputed per se, these justices seek to apply it more leniently to the states, and look at challenges to state laws more critically. In general, this reflects a more deferential attitude both to state governments and the diverse political cultures of the

¹²⁷ 479 U.S. at 234 (Scalia, J., dissenting).

¹²⁸ 479 U.S. at 234-35 (Scalia, J., dissenting).

states. The interpretation of "compelling" by the "constructed order" justices is much different than that of the "natural order" justices.

The Role of Government

That the "constructed order" justices accept the broad premise of freedom of association is indicated by Rehnquist's concurrence in Cousins, one of the pivotal decisions made by the justices in this area. He begins by emphasizing that he supports the freedom of association of the plaintiff delegates and agrees with the majority that the interests of Illinois are not sufficiently compelling to prevent the seating of the plaintiffs.¹²⁹

The differences between the justices are not over outcomes, but rather over ideas and principles. Rehnquist insists that, in reaching their conclusion, the Cousins majority has engaged questions beyond the scope of the case at hand and put forward "gratuitous observations". He sees the majority as incorrectly dismissing the interests of states in the presidential selection process, and of supporting its claim of "national interest" solely with a dissenting opinion in Newberry v. United States that does not give credence to constitutional provisions such as Article II, Section 1, which Rehnquist believes gives the states a role with presidential electors. As he sees it,

¹²⁹ 419 U.S. at 491 (Rehnquist, J., concurring).

Under our constitutional system, the States also have residual authority in all areas not taken from them by the Constitution or by validly enacted congressional legislation. The question for us, therefore, is not whether the States have a "constitutionally mandated role" in the task of selecting Presidential and Vice-Presidential candidates, but whether the authority of the State of Illinois is sufficient in this case to authorize an injunction flatly prohibiting petitioners from asserting before the Democratic National Convention their claim to be seated as delegates.¹³⁰

Thus, while Rehnquist supports the outcome of the majority, he does it on much narrower ground regarding the state role, which should not be restricted in a cavalier manner.

Stewart's opinion in Rosario indicates that the states have a full right to be involved in the management of the electoral process in order to protect the integrity of the existing political system; the latter emphasis is more implied than stated. The critical emphasis seems to be on the word "integrity"; the "constructed order" justices would seem to equate this term with stability. Yet this emphasis is not fully clear. Stewart himself notes that much party shifting is still possible under the New York system.¹³¹ The more basic concern is thus with the sanctity of the state's right to choose how it pursues its objectives, rather than the chosen methods or objectives per se. That this was the case seems clear in the opinions of these justices following Rosario.

¹³⁰ Cousins, 419 U.S. at 496 (Rehnquist, J., concurring).

¹³¹ 410 U.S. at 759.

Blackmun's dissent in Kusper puts great stock in the difficulty of managing the electoral process and the challenge this task presents to the states; we hear this in his description of the statutory structure as "complex". His discussion of raiding also indicates that the states should have room to make choices. While he admits the existence of raiding is debatable, he characterizes the legitimacy of trying to prevent it as "unquestioned". Most importantly, he refers to Illinois' history of significant party regimentation to argue that the justices should be cautious in second guessing the choice of methods to deal with such political realities.¹³² This echoes Rosario in its emphasis on allowing the states to choose, rather than mandating a particular method of dealing with electoral issues. Blackmun makes this association clear:

By resorting to a standard of rigid and strict review, and by indulging in what I fear is a departure from the appropriately deferential approach in Rosario, the Court places itself in the position of failing to give the States the elbow room they deserve and must possess if they are to formulate solutions for the many and particular problems confronting them that are associated with the preservation of the integrity of the franchise.¹³³

Thus, we see clearly stated the deference that "constructed order" justices pay to the authority of the states, and their acceptance of the states as a major manager and problem solver of the electoral process.

¹³² 414 U.S. at 63 (Blackmun, J., dissenting).

¹³³ 414 U.S. at 63 (Blackmun, J., dissenting).

This emphasis is mirrored in Rehnquist's Kusper dissent. Rehnquist emphasizes that Illinois, unlike New York, does not require party enrollment prior to election day, with the result that Illinois has chosen a different approach to protecting its process from interparty raiding, a legitimate interest. While neither state's approach is "perfect", both are legitimate and constitutionally permissible.¹³⁴ Rehnquist shows great deference to the right of individual states to choose their own methods for managing the electoral process, as well as a standard of review based on legitimate rather than compelling state interests.

Powell's partial dissent in Cousins goes even further to defend the role of states. He maintains that while the plaintiff delegates bring valid claims, the state of Illinois "has a legitimate interest in protecting its citizens from being represented by delegates who have been rejected by these citizens in a democratic election".¹³⁵ The states, rather than a national political party, should have power over delegate representation procedures.

Powell also asserts a positive view of state purposes in his La Follette dissent. He notes that the Wisconsin open primary was designed to maximize participation, an implicit argument that state action can be a positive force

¹³⁴ 414 U.S. at 65-69 (Rehnquist, J., dissenting).

¹³⁵ 419 U.S. at 497 (Powell, J., dissenting).

for promoting democratic ideals. He also defends the state by asserting that the case "involves a state statutory scheme that regulates delegate selection only indirectly", which "differs substantially from the direct state interference in delegate selection at issue in Cousins". Powell cites Marchioro to support this contention.¹³⁶

Powell's dissent also notes that the state party in Wisconsin has taken a position favoring the state law. To him, this carries an equal if not greater weight than the claims of the national party. He sees the history of party regulation as "a continuing accommodation of the interests of the parties with those of the States and their citizens". He also sees the nonbinding primary as inadequate for the state goals, since the primary's purpose is to "give control over the nomination process to individual voters"; the state's purpose is deserving of adequate means.¹³⁷

The solicitude with which the state role is viewed is evident in Scalia's dissent in Tashjian. In arguing against the freedom of association claims of the Connecticut Republican Party, Scalia asserts that freedom is not impaired and that "the State is under no obligation ... to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies

¹³⁶ 450 U.S. at 128-29 (Powell, J., dissenting).

¹³⁷ La Follette, 450 U.S. at 133-34, 137 (Powell, J., dissenting).

the relative popularity of its potential candidates among independents". He also states that there is not

any reason apparent to me why the State cannot insist that this decision to support what might be called the independent's choice be taken by the party membership in a democratic fashion, rather than through a process that permits the members' votes to be diluted-and perhaps even absolutely outnumbered-by the votes of outsiders.¹³⁸

This is an explicit assertion that the states may properly "construct" the electoral process in order to preserve competition.

Scalia goes even further to assert that, even if the party faithful wanted to allow independents, "there is no reason why the State is bound to honor that desire", comparing this desire to a desire to use conventions or an executive committee to choose nominees and finding them unacceptable even if democratically approved. This is so because

the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument", American Party of Texas v. White, 415 U.S. 767, 781 (1974), presupposes that the State has the right to "protect the Party against the Party itself". Connecticut may lawfully require that significant elements of the democratic election process be democratic-whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic

¹³⁸ 479 U.S. at 236 (Scalia, J., dissenting); emphasis added.

choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.¹³⁹

Thus, Scalia seeks to roll back freedom of association to the extent that it treads on state authority to "protect" the democratic process. He characterizes Connecticut's power to specify democratic votes by members in this area to be "plainly and entirely constitutional".¹⁴⁰ Thus, he argues for a democratic structure constructed in part by statute.

Stevens' dissent in Tashjian, joined by Scalia, focuses on another aspect of participation: the qualifications of voters, and the role granted to the states in this area by the Qualifications Clause of the Constitution. Stevens views this clause as the fulcrum of the case, and finds the Connecticut Republican Party's plan unconstitutional for that reason. Its "facial disparity" and "the more stringent qualifications for electors to the state legislature" would clearly violate the Constitution. He does not accept the majority's "freewheeling interpretation" or their characterizations of the Founders' intent or Oregon v. Mitchell.¹⁴¹ In this way, Stevens seems to be protecting a particular view of participation and of states rights.

¹³⁹ 479 U.S. at 236-37 (Scalia, J., dissenting); emphases added.

¹⁴⁰ 479 U.S. at 237 (Scalia, J., dissenting).

¹⁴¹ 479 U.S. at 230-31 (Stevens, J., dissenting).

Like the majority justices, Stevens's opinion in Tashjian cites the debates of the Constitutional Convention to buttress his argument on the Qualifications Clause, emphasizing that the original draft of the clause by the Committee on Detail, which was argued about in the notes cited by the majority, specified that the qualifications of electors "shall be the same".¹⁴² His citation of the Committee's draft is accurate.¹⁴³ But he neglects the critical fact that the final and enacted Constitution does not state that the qualifications shall be the same; it says simply that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature".¹⁴⁴ The implication is not necessarily absolute symmetry, but simply federal qualifications that are not less than the states'.

The "constructed order" justices ultimately take a strongly solicitous view of state purposes and interests, granting them significant deference. It is clear that the deference is not total; the basic legitimacy of freedom of association is not challenged. These justices are nevertheless in agreement in asserting that such freedom has been given too much credence, and legitimate state purposes have been short-changed with easy phrases.

¹⁴² 479 U.S. at 232 (Stevens, J., dissenting).

¹⁴³ Farrand, Records, Volume 2, p. 178.

¹⁴⁴ U.S. Constitution, Article I, Section 2.

Conclusions: Parties, States, and the Power of Choice

The "natural order" justices' opinions involving party organization, party registration, and nominating methods reveal a definite preference for an electoral process governed more by the parties and the free choices of voters than by state-mandated statutory schemes. These justices do not favor a particular type of party organization or nominating method, but rather favor choices, however different, made by parties themselves. In this sense, these opinions have no particular theory of party organization or membership. What they do reflect is a preference for free competition and free choices by voters and parties as the best method of promoting competition and democracy. The parties themselves are viewed as the proper decisionmaker.

The "natural order" perspective is skeptical of state claims of ensuring democracy by statute. A high standard of both scrutiny and evidence is applied to state claims, and most of these claims are found wanting (Marchioro is the significant exception). The overall outcome and perspective is a "precedential environment" friendly to party claims and doubtful of state interests, one that has carried the majority of justices in the decisions of the Court in this area.

The "natural order" justices make a more limited use of political science in these decisions than in the ballot access opinions, perhaps because they find themselves in a majority and thus have less need of extrajudicial evidence

for arguments. Eu is noteworthy in that this most recent of nomination/party organization opinions makes virtually no use of political science references, except for a citation to a statement in the record by political scientist Malcolm Jewell; this is particularly ironic because political scientists were a critical force in challenging California's statutes. Nonetheless, the earlier and now precedential opinions in this area do make telling and effective use of authorities like David Adamany, Arthur Weisburd, and the Records of the Constitutional Convention.

The "constructed order" justices, whose opinions have often been in dissent in these cases, offer a striking, though by no means absolute, contrast to the "natural order" justices' treatment of parties and the state. Their trust seems to lie much more with the actions of popularly elected state legislatures, and much greater deference is given to legislative actions and the interests asserted in support of them. The "constructed order" justices also pay attention to very different concerns than those which are noticed by the "natural order" justices. These include the asserted interests of state governments; the political context of the cases; and the practical political implications, small or large, of the Court's decisions.

The "natural order" justices appear to favor broad and universally applied principles, with less attention to particular political context. The essence of the "constructed order" viewpoint is that state governments

have a perfectly valid right to protect the boundaries of political parties and to be a player in shaping the party system. The states do play a role in preserving a particular political order, a role which these justices are either not prepared to usurp or believe is fully legitimate.

It is interesting to note that citation of outside authority such as political science and historical accounts seems to occur more frequently in these dissenting opinions. Particular justices appear to use these sources as a way to make their policy stances clear and argue their view of the political/constitutional order.

The jurisprudence of the Court in this area is thus divided between a "natural order" viewpoint that values freedom of association highly and suspects the effects of state regulation, and a "constructed order" viewpoint that is much more sensitive to state interests and the actions of politically elected legislatures. The former viewpoint has held the majority in cases involving party organization and nomination processes, but the latter viewpoint has maintained a continuous and active counterargument among the justices. The critical difference between the two is not so much the political outcomes they favor, but who should have the authority to shape the electoral process and make the particular choices among political alternatives.

CHAPTER 4

THE SUPREME COURT AND CAMPAIGN FINANCE: HOW MUCH CAN THE GOVERNMENT REGULATE?

Once a party organizes itself, nominates candidates, and gains access to the ballot, its candidates must campaign for the vote. A key ingredient of modern campaigning is money. A lack of money limits communication with the voters, thereby damaging a candidate's chances of election. At the same time, money has long been seen as a source of political corruption, and state and federal governments in the U.S. have attempted to regulate campaign finance since the late nineteenth century.

Early examples of government efforts to stem the "corruption" of campaign finance met with mixed results. The 1883 Pendleton Act restrictions on soliciting political funds from federal employees, the first in a series of acts reducing the "political" nature of public employment, had a noticeable impact on the financial relationship of government employees and political campaigns. In contrast, despite the 1907 Tillman Act prohibition of direct corporate contributions, much corporate money still flowed into the coffers of political parties. Both types of governmental initiative grew out of the Progressive hostility toward the perceived political power of "big

money", as well as the Progressive distrust of political party "machines".¹

In general, most of the pre-1971 campaign finance laws were poorly monitored and enforced. Not until the 1974 Amendments to the Federal Election Campaign Act of 1971 (FECA) was an enforcement agency created in this area. That agency, the Federal Election Commission (FEC), and the various provisions of the FECA, have been the focus of most of the Supreme Court litigation on campaign finance in recent years.²

¹ The Progressive foundation of continuing efforts to regulate and reform campaign finance is well noted by Frank Sorauf, Inside Campaign Finance: Myths and Realities (New Haven: Yale University Press, 1992), especially chap. 1, "The First Ninety Years". The 1940 Hatch Act placed further restrictions on financial contributions by government employees, while the 1943 Smith/Connally Act and the 1947 Taft/Hartley Act broadened the restriction on direct corporate contributions to include labor union organizations as well. Margaret Latus Nugent and John R. Johannes, eds., Money, Elections, and Democracy: Reforming Congressional Campaign Finance (Boulder, CO: Westview Press, 1990), pp. 3-4.

² For a brief history of campaign finance regulation, see Herbert Alexander, Financing Elections: Money, Elections, And Political Reform, 4th ed. (Washington, DC: CQ Press, 1992), particularly chap. 2. The literature on campaign finance is extensive, with the focus of many works being reformist and centered upon the patterns of contributions and expenditures and their implications for democracy. A representative sample includes Alexander Heard, The Costs of Democracy (Chapel Hill: University of North Carolina Press, 1960); Elizabeth Drew, Politics and Money: The New Road To Corruption (New York: Macmillan, 1983); Michael J. Malbin, ed., Parties, Interest Groups, and Campaign Finance Laws (Washington, DC: American Enterprise Institute, 1984); Robert Mutch, Campaigns, Congress and Courts (New York: Praeger, 1988); Brooks Jackson, Honest Graft (New York: Alfred A. Knopf, 1988); and Nugent and Johannes, eds., Money, Elections and Democracy. A recent study which critiques a number of the

The identification of money with both speech and corruption produces the dilemma facing the justices and campaign finance regulators. While officials strive to reduce corruption by regulating campaign finance, they must do so without abridging the free speech of individuals or groups. This conflict is reflected in Supreme Court jurisprudence in this area, where the majority's position is that money constitutes a form of speech protected by the Constitution.³

In general, the differences over how to handle this dilemma divide the "natural order" and "constructed order" viewpoints along the same fault lines revealed by the ballot access and nominations decisions, with the "constructed order" being more supportive of the government's right to regulate. At the same time, the breadth of the division is blurred by a shift in the stances of Brennan and Marshall, two of the most consistent advocates of the "natural order" perspective. Unlike the other areas examined in this dissertation, campaign finance regulation is often approved by these justices on the grounds that preventing corruption is a compelling state interest. In this area of jurisprudence, the perception

reformist arguments about campaign finance is Sorauf's Inside Campaign Finance. Contrary to claims of ever-increasing campaign spending and PAC proliferation, Sorauf finds that the growth of PACs, contributions, and spending have all stabilized since the mid-1980's.

³ Only Justice Byron White consistently dissented from the majority's identification of money as speech.

that unregulated campaign money has a potent and detrimental effect on political competition significantly moderates the stance of the "natural order" perspective that state laws damage healthy competition.

While most justices since the decision in Buckley v. Valeo have supported the position that money is speech, they have also upheld a variety of federal and state efforts to regulate campaign money. With the exception of Burger and Scalia, the dividing line between the justices in this area has not been if government can regulate, but how extensively it may in order to prevent corruption of the electoral process. It is not that the justices who normally support the "natural order" have changed their standards; they simply find campaign finance to be an exception, a case where state action can enhance democracy. Nonetheless, Rehnquist and White, the Justices who most consistently advocate the "constructed order" perspective in these cases, are still willing to allow a wider range of government regulation than their "natural order" counterparts. Thus, although the judicial fault lines have shifted, questions of authority (government control of campaign finance practices) and democracy (how to preserve political competition) continue to divide the two perspectives.

The justices' treatment of specific campaign finance statutes reflects this balance. They have upheld FECA contribution limits, disclosure requirements, and public

financing of presidential campaigns⁴; FECA limits on contributions by unincorporated associations to multicandidate committees⁵; an FEC prohibition of corporate solicitation of nonmembers for political funds⁶; and a Michigan statute prohibiting the independent use of unsegregated corporate treasury funds to support or oppose candidates for state office.⁷ In contrast, they have struck down FECA expenditure limitations, independent expenditure limitations, and limits on expenditures of personal or family funds⁸; a Massachusetts law barring corporate and union expenditures in referendum campaigns⁹; a New York State prohibition on enclosing policy statements in electricity bills¹⁰; FEC limits on independent expenditures by political committees on behalf of publicly funded presidential candidates¹¹; and limits on

⁴ Buckley v. Valeo, 424 U.S. 1 (1976).

⁵ California Medical Association v. FEC, 453 U.S. 182 (1981).

⁶ FEC v. National Right To Work Committee (NRWC), 459 U.S. 197 (1982).

⁷ Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

⁸ Buckley, 424 U.S. 1.

⁹ First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

¹⁰ Consolidated Edison of N.Y. v. Public Service Commission of N.Y., 447 U.S. 530 (1980).

¹¹ FEC v. National Conservative Political Action Committee (NCPAC), 470 U.S. 480 (1985).

independent expenditures by political, non-business corporations.¹² In broad terms, the majority of justices have favored contribution limits, particularly with regard to corporations and candidates; they are more skeptical of expenditure limits and limits on independent or general policy issue spending.

The two central concerns of justices in campaign finance cases -- the danger of corruption, particularly by corporate wealth, and the relationship between money and speech -- are rooted in differing ideas of how to promote political competition. The "natural order" perspective seeks to support competition by striking down expenditure limits, equating money with speech, and supporting public financing of presidential elections, while preventing corruption of that competition by supporting contribution limits and disclosure requirements. The most extreme variant does not even support these governmental intrusions into the competitive process. The "constructed order" perspective shares the concern for competition, but is more deferential to government regulatory efforts in this area as the best method of preserving competition. This position on campaign finance is congruent with their government-friendly stance in ballot access and nomination cases. The most extreme variant here denies that money is a form of protected free speech.

¹² FEC v. Massachusetts Citizens For Life, Inc. (MCFL), 479 U.S. 238 (1986).

It is notable that both the "constructed order" and the "natural order" perspectives have justices who argue for and against protection of the interests of minor political parties in campaign finance regulation. On a broader level, neither perspective defends any unique or assured role for political parties in the campaign finance arena. While the justices' decisions have led indirectly to more campaign money being channelled through party committees, their opinions do not enshrine any associational protections for parties in this area of the electoral process.¹³

While campaign finance disputes involve a wide array of groups and individuals, most of these cases have not involved political parties directly. Nevertheless, such regulation has a profound effect on the electoral system in which parties function, so it is reasonable to ask how the opinions of justices in this area relate to their views on

¹³ The justices' upholding of FECA contribution limits in 1976 meant that those individuals and groups wishing to funnel large amounts of money into the political process could no longer do so directly through candidates, and contributions to political action committees were limited as well. An alternate "route" for campaign money--through party committees--was established by a 1979 amendment to the FECA which allows unlimited contributions to state and local party organizations for voter registration and "get out the vote" activities for presidential candidates, as well as the production of election paraphernalia for federal candidates. These contributions, now known as "soft money", often flow legally through national party committees, strengthening those organizations as well. Thus, the justices' defense of contribution limits has played a part in increasing the role of parties in campaign financing.

parties and the electoral process. Analysis of these opinions reinforces the thematic findings of the previous chapters, with an important twist: while the essential differences between the "natural order" and "constructed order" persist, the former's concern for party associational rights is overridden by fears of corruption, resulting in more "common ground" between the two perspectives.

The "Natural Order" Perspective

The "natural order" perspective favors a limited regulatory role for government with regard to campaign finance, similar to its skepticism about government management of ballot access and party organizational\nomination procedures. Unlike the latter cases, however, the "natural order" is more accommodating to regulation, seeing government as having an important role to play in controlling the corrupting influence that concentrated wealth and unlimited contributions may have on candidates, the party system, and the electoral process. Restriction and disclosure of contributions, as well as public funding of major party presidential campaigns, are seen as permissible to prevent such corruption. The "natural order" therefore finds more common ground with the "constructed order" in this area of disputes.

Ironically, the only justices who consistently follow the antigovernment skepticism of the "natural order"

perspective in the campaign finance cases are Burger, who shifts between the two perspectives in other areas, and Scalia, who supports the "constructed order" deference to government statutes and interests when ballot access and nomination\organization procedures are involved. In this area, however, supporting the "natural order" perspective is consistent with their own positions over time. Burger's opinions in other cases, particularly the filing fee cases of Bullock and Lubin discussed in Chapter Two, reflect a strong sensitivity to issues of financial requirements or regulation in the electoral process. Scalia's "departure" in these cases is consistent with his longstanding sensitivity to First Amendment free speech concerns.¹⁴

Party Competition and Choice

In seeking to further healthy political competition, the "natural order" justices are equally concerned with enabling free speech and preventing corruption. The seminal case is Buckley v. Valeo. Buckley, which involved a challenge to the constitutionality of the Federal Election Campaign Act Amendments of 1974 (FECA), led the justices to an examination of all the major provisions of that Act. The original Act, passed in 1971, led inadvertently to the

¹⁴ On Scalia's broad reading of First Amendment freedoms, and his particular displeasure at their narrowing by the majority in Austin v. Michigan Chamber of Commerce (to be discussed in this chapter), see David G. Savage, Turning Right: The Making Of The Rehnquist Supreme Court (New York: John Wiley and Sons, 1992), pp. 328-29.

fundraising abuses of the 1972 Nixon campaign that occurred just prior to the law's taking effect. These abuses, revealed by the Watergate investigation, produced the reforms contained in the 1974 Amendments: expenditure and contribution limits for all campaigns for federal office; reporting and disclosure requirements of all contributions of \$250 or more; a system of public financing for the presidential election process; and the establishment of a Federal Election Commission (FEC) to monitor and enforce these regulations. Buckley represented a quick, but largely unsuccessful, effort by opponents of the law to challenge the constitutionality of the FECA.

The per curiam majority opinion focuses on the two concerns emphasized by the "natural order" justices in this area of jurisprudence: (1) whether money is speech protected by the First Amendment from state limitation, and (2) whether large and undisclosed contributions were a threat to corrupt fair political competition. The answers to these questions of authority and democracy have important implications for the role that political parties can and will play in the electoral process. The ability of parties to raise and spend money shapes the volume of their "speech", while corruption can pervert the balance of intraparty and interparty competition.

Buckley begins with a strong defense of free speech, quoting New York Times v. Sullivan to argue that "debate on public issues should be uninhibited, robust, and wide-

open", as such debate affects "the ability of the citizenry to make informed choices among candidates for office".¹⁵

In considering the constitutionality of the FECA expenditure and contribution limitations, the justices address the question of whether money is a form of free speech. For the "natural order" majority, the answer is mixed; money is speech, but it is worthy of full constitutional protection only if it is direct speech.

The "natural order" finds that expenditures constitute direct speech, asserting that "this Court has never suggested that the dependence of a communication on the expenditure of money operates to introduce a nonspeech element" into the action. For the "natural order" justices, the use of money in the political process is fully protected by the First Amendment. Expenditure limitations are compared to "being free to drive an automobile as far and as often as one desires on a single tank of gas".¹⁶

¹⁵ 424 U.S. at 14.

¹⁶ Buckley, 424 U.S. at 15-16, 19, 39, including n. 18 on p. 19. With regard to other expenditure limits, corruption is seen as an "inadequate" justification for the ceiling on independent expenditures, since the restriction "prevents only some large expenditures". Nor is the corruption danger as great; since the candidate has no connection to the expenditures, there is an "absence of prearrangement and coordination". The limits on personal expenditures are also found to be unjustified by the interest in preventing corruption. Marshall dissents on personal expenditures, noting that the ceilings are substantially higher than those for other contributions, and that they are justified by the governmental interest in "promoting the reality and appearance of equal access to the political arena". He cites the Court's ballot access opinions as supportive of that interest. Those opinions

In contrast to their ballot access opinions, the "natural order" justices do not appear as concerned about financial equality among candidates as they are about equal ballot access. The goal of "equalizing the relative ability of all voters to affect electoral outcomes" by limiting expenditures is not viewed as constitutionally legitimate.¹⁷ In a confrontation between free competition and enforced equality of expenditure, the former value will be upheld under the First Amendment, despite the "natural order" concerns with corruption.

The justices in Buckley who joined the full opinion (Brennan, Marshall, Powell, and Stewart), while protecting the use of money in politics, do not endow the collection of money, i.e. contributions, with the same constitutional protection. Contributions are not seen as direct speech, but as promoting someone else's speech and, thus, are not entitled to the same stringent protection. They are outweighed by a compelling governmental interest in the prevention of corruption, real or apparent. The justices

used that interest to strike down governmental action, while here it is cited to support governmental regulation. The promotion of access is the ultimate value for Marshall. 424 U.S. at 45-47, 53.

The government may properly limit expenditures by publicly funded candidates, as well as some corporate and union expenditures. The FECA puts expenditure limits on presidential candidates who accept public funding; these were upheld in Buckley. Direct contributions of unsegregated corporate and union funds to federal candidate campaigns are prohibited by a variety of statutes, including the 1947 Taft-Hartley Act.

¹⁷ Buckley, 424 U.S. at 17.

argue that large contributions do not accurately reflect the speech of the community, thereby warping the competitive process.¹⁸

In responding to free speech concerns, the justices argue that contribution limits "do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues". Moreover, they also see no evidence of adverse impact on campaign funding, simply a need to raise funds from more contributors and shift contributor expenditures to direct expression. The limits restrict only one important means of associating, leaving many other avenues of competition and

¹⁸ 424 U.S. at 26-27. The Justices do not take positions on the issues of equalizing citizen ability or opening up access for poor candidates, which contrasts with their solicitude toward such candidates and citizens in filing fee and signature requirement cases. In fact, in Austin vs. Michigan Chamber of Commerce, Marshall implicitly argues against the propriety of equalization, noting that the Michigan act in question "does not attempt 'to equalize the relative influence of speakers on elections'", as Justice Kennedy contends, but instead assures "that expenditures reflect actual political support". 494 U.S. at 660.

Limits on contributions by political committees, the organizational requirements for such committees, and a yearly limitation on total contributions by an individual are upheld on the basis of avoiding evasion of the individual contribution limits; they are not seen as favoring "established interest groups". The Justices' approval of the exemption of volunteer time services from limits, while still upholding limits on material assistance, indicates that participation per se is not seen as a source of corruption. The key danger is large contributions of other people's money to a candidate's campaign. Buckley, 424 U.S. at 35-38.

expression open.¹⁹ The limits thereby protect democratic competition from corruption without fundamentally limiting the realm of speech and association.

The concern of the "natural order" justices with corruption also led them to uphold the reporting and disclosure requirements of the FECA.²⁰ Like Louis Brandeis, they held that "sunlight" is "the best of disinfectants".²¹ FECA "impose[s] no ceiling on campaign-related activities" and thereby survives the "exacting scrutiny" to which such items are subject under the NAACP freedom of association precedents.²² At the same time, the Buckley majority upholds the public funding of qualified presidential candidates as a proper effort to enhance competition. They argue that public funding "furthers, not

¹⁹ Buckley, 424 U.S. at 20-22, 28-29. This language is very similar to the "alternate means of access" emphasized in the ballot access opinions.

²⁰ Buckley, 424 U.S. at 61-62, citing Burroughs v. U.S., 290 U.S. 534 (1934). The justices cite federal campaign finance disclosure laws enacted in 1910 and 1925, and the upholding of the latter statute in Burroughs, as legal precedent for the requirements.

²¹ 424 U.S. at 67, citing Louis Brandeis, Other People's Money (New York: National Home Library Foundation ed., 1933), p. 62. The title of Brandeis' book reflects the "natural order" view of the pivotal source of corruption in campaign finance. The connection between disclosure and uncorrupted party/candidate competition is evident in the justices' distinction between candidate related independent spending and spending unrelated to a political candidate. They approve the FECA's reporting requirements on the former on the grounds that it helps voters to be aware of what groups are supporting a candidate. 424 U.S. at 81.

²² 424 U.S. at 64-72.

abridges, pertinent First Amendment values" because it will "facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people".²³

The restrictions on speech within the public financing scheme are justified by an argument drawn from a unanimous ballot access opinion, Jenness v. Fortson. In this view, "Congress may legitimately require 'some preliminary showing of a significant modicum of support'...as an eligibility requirement for public funds".²⁴ They also distinguish their application of this principle in the ballot access cases from public financing in the following manner:

Our decisions finding a need for an alternative means turn on the nature and the extent of the burden imposed in the absence of available alternatives. We have earlier stated our view that Chapter 95 [the law governing public funding of the presidential general election campaign] is far less burdensome upon and restrictive of constitutional rights than the regulations involved in the ballot access cases.²⁵

The justices argue that "any risk of harm to minority interests is speculative" and that "campaigns can be successfully carried out by means other than public

²³ 424 U.S. at 92-93.

²⁴ Buckley, 424 U.S. at 96.

²⁵ Buckley, 424 U.S. at 101.

financing, arguing that they have been up to this date, and this avenue is still open to all candidates".²⁶

In judging the fairness of public funding, the critical element for the "natural order" justices is not equal results, but equal opportunity to be part of the competition. Any failure of minor parties to gain public funding does not directly restrict their ability to run candidates or obtain votes; it simply forces them to rely more on private contributions, which candidates with public funding are wholly denied.²⁷ In other words, claims of restricted competition must be genuine and significant.

Unlike the moderation of the majority, Burger's dissent in Buckley represents the "natural order" perspective taken to its furthest extent of antigovernment skepticism. Burger finds virtually all the provisions of the FECA to be unconstitutional, arguing that many of them do more to damage competition than to assist it. Burger's major argument is that contributions and expenditures are worthy of equal First Amendment protection, and that restrictions on either are therefore unconstitutional.²⁸ Burger asserts that

We do little but engage in word games unless we

²⁶ 424 U.S. at 101.

²⁷ Buckley, 424 U.S. at 94. It is important to note that private contributions can be indirectly channeled to the support of publicly funded presidential candidates through independent expenditures and "soft money".

²⁸ 424 U.S. at 235 (Burger, C.J., dissenting).

recognize that people-candidates and contributors-spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utters the words.²⁹

He argues that both types of limitations will "drastically" change or "foreclose" some candidacies.³⁰ Since competition will be reduced by the limits, they are logically insupportable. On this point, Blackmun's dissent in Buckley joins Burger in failing to see "a principled constitutional distinction" between the contribution and expenditure limits, and he too would invalidate both.³¹

Burger also takes Congress to task on the content of their disclosure requirements, arguing that they gave "little or no thought" to the matter and simply "lifted figures out of a 65-year-old statute". He sees the claim of corruption by small contributions as "too extravagant to be maintained", asserting that "Congress has used a shotgun to kill wrens as well as hawks". He also argues that "the public right to know ought not to be absolute when its exercise reveals private political convictions". Citing the secrecy of the ballot, he argues that "secrecy and privacy as to political preferences and convictions are fundamental in a free society". In rebutting the majority, he argues

²⁹ 424 U.S. at 244 (Burger, C.J., dissenting).

³⁰ 424 U.S. at 244 (Burger, C.J., dissenting).

³¹ 424 U.S. at 290 (Blackmun, J., dissenting).

they "failed to give the traditional standing to some of the First Amendment values at stake here".³²

Burger also objects to the public funding of presidential elections, viewing it as "an impermissible intrusion by the Government into the traditionally private political process".³³ The danger he sees in public financing is that government financing of conventions and the electoral process could subvert the private nature of these processes and provide "a springboard for later attempts to impose a whole range of requirements on delegate selection and convention activities".³⁴

Justice Burger in Buckley finds the rationing of political expression in the FECA unacceptable. As he puts it, "freedom is hazardous, but some restraints are worse".³⁵ In his view, Congress' restrictions, requirements, and resources run afoul of the First Amendment and also invidiously discriminate against challengers outside the major parties. This is a much more antigovernment argument than is evident in some of Burger's other opinions, but it is likely due to Burger's particular

³² Buckley, 424 U.S. at 237-39 (Burger, C.J., dissenting).

³³ Buckley, 424 U.S. at 237-39 (Burger, C.J., dissenting).

³⁴ 424 U.S. at 250 (Burger, C.J., dissenting).

³⁵ 424 U.S. at 256-57 (Burger, C.J., dissenting).

concern with the role of money in politics, evident is his Bullock and Lubin opinions.³⁶

The majority opinion in Buckley sets the tone for the justices' later opinions. The modified "natural order" perspective has continued (with some dissent) to defend the free expenditure of money in campaigns or political causes, but has also continued to uphold limitations on contributions on the grounds that large, unreported contributions pose a particular danger of corrupting the competitive process. The influence of corporate contributions and spending has received particular attention in both of these areas, while the conflict between free speech and controlling corruption has continued to be the center of division and debate.

Justice Powell's majority opinion in First National Bank of Boston v. Bellotti, which invalidated a Massachusetts law barring corporate and union expenditures in referendum campaigns, does show some divisions in the "natural order" Justices' deference to the prevention of

³⁶ It must also be noted that Burger argues against the majority's opinion on the ground that it "does violence to the intent of Congress in this comprehensive scheme of campaign finance". Burger asserts that "the whole of this Act is greater than the sum of its parts", and thus a piecemeal treatment violates congressional intent:

What remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program.

In his own way, Burger still respects legislative choices. 424 U.S. at 235-36 (Burger, C.J., dissenting).

corruption as a governmental interest.³⁷ Powell, joined by Stewart, Blackmun, Stevens, and Burger, asserts that the Massachusetts Supreme Judicial Court erred in limiting First Amendment corporate rights to business issues. He argues that, "if the speakers here were not corporations, no one would suggest that the State could silence their proposed speech". Speech cannot be limited simply because of concerns with the nature of corporate power; the people "may consider, in making their judgment, the source and credibility of the advocate".³⁸

In arguing that speech is "indispensable to decision making in a democracy", Powell cites Thomas Emerson's Toward A General Theory of the First Amendment and Alexander Meiklejohn's Free Speech and its Relation to Self Government.³⁹ This general view is not disputed by these constitutional scholars. Emerson does note that "certain restraints on expenditure of money in political campaigns" could be exceptions from the general rule that restrictions designed to "purify" the democratic process are usually invalid under law. He does not, however, elaborate on

³⁷ Bellotti, 435 U.S. 765 (1978).

³⁸ 435 U.S. at 777-80, 792.

³⁹ 435 U.S. at 777.

possible exceptions; his conclusions accept the need for positive government protection of free expression.⁴⁰

Alexander Meiklejohn's work describes the core of the First Amendment's meaning as facilitating the "thinking process" in "self-government"; free speech is a necessity of such governance. He adopts an absolutist view of the First Amendment, noting that "its great declaration is that intellectual freedom is the necessary bulwark of the public safety".⁴¹ In the case of corporate spending on a referendum, it would likely be seen as part of this thinking process; however, a sharp rebuke by Meiklejohn to the "speech" of modern commercial media and its money-making focus suggests that this conclusion requires some qualification.⁴²

Arguments could be made that corporations should be judged by the same standard as individuals, since Congress

⁴⁰ Thomas I. Emerson, Toward A General Theory Of The First Amendment (New York: Random House, 1966), pp. 103-5, 115-16.

⁴¹ Alexander Meiklejohn, Free Speech And Its Relation To Self-Government (Port Washington, N.Y.: Kennikat Press, 1972), pp. 26-27, 68.

⁴² Meiklejohn, Free Speech, p. 104-5. In words first penned in 1948, before the full rise of television, Meiklejohn took this view of the First Amendment and modern commercial media: "We have used it for the protection of private, possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture, the newspaper and other forms of publication, are giving the name 'freedoms' to the most flagrant enslavements of our minds and wills". Whether this would also apply to corporate-sponsored communication is unclear.

and states have legislated (and the Court has upheld) restrictions on direct corporate spending in election campaigns; referendum speech might hold the same threat of corruption that motivated the restrictions on corporate funding of candidates. The Bellotti majority does not reach that conclusion. Powell rejects for lack of evidence the argument that corporate wealth has altered referenda results.⁴³

In contrast to Powell's opinion, "natural order" Justices Brennan and Marshall join a dissent with Justice White in Bellotti.⁴⁴ In contrast to the majority, Brennan and Marshall are more concerned with the corrupting impact of corporate business money on the political process and less ready to make the distinction between referendum spending and candidate campaigns. Thus, even within the "natural order" viewpoint, there are differences of opinion as to how far the government may proceed in restricting speech. A crucial reason for those differences is a division of opinion on the degree of corruptive danger posed by corporate money in politics.⁴⁵

⁴³ 435 U.S. at 789.

⁴⁴ 435 U.S. at 803 (White, J., dissenting).

⁴⁵ Justice Powell's opinion in Consolidated Edison of N.Y. v. Public Service Commission of N.Y., joined by Brennan, Marshall, Burger, Stewart, and (notably) White, which overturned a New York State Public Service Commission prohibition on the inclusion of policy statements in monthly utility bills, argues that subject matter discussion cannot be restricted in such a forum. If customers do not like it, they can ignore it, and the cost

Marshall's opinion in California Medical Association v. FEC, which upheld FECA limits on contributions by unincorporated associations to multicandidate political committees, reemphasizes the "natural order" justices' general approval of contribution limits as a proper means of guarding against corruption.⁴⁶ Marshall notes that

of the insert can be segregated from general corporate funds. Consolidated Edison of N.Y. v. Public Service Commission of N.Y., 447 U.S. 530 (1980). Bellotti and Consolidated Edison demonstrate that corporate spending on politics per se is not seen as corruption by most of the "natural order" justices; the connection to candidates is important.

Justice White's participation is notable because it is the only instance where he voted to strike down a government prohibition or regulation in these cases; he is the most consistent advocate of the "constructed order" perspective.

A small but important note of skepticism about the case is raised by Justice Marshall in a separate concurrence. Marshall agrees with the overall decision, but is skeptical of the separability of the cost of the inserts. Consolidated Edison, 447 U.S. at 544 (Marshall, J., concurring). As his dissent in Bellotti demonstrates, and further cases reinforce, Marshall is more skeptical of corporate funds in politics than many of the other Justices who adopt the "natural order" perspective, even when he votes to protect corporate speech.

⁴⁶ California Medical Association v. FEC, 453 U.S. 182 (1981). Marshall's opinion is joined in full by Brennan, White, and Stevens. White's joining of the opinion is consistent with his greater deference to government regulation in this area. Justice Stewart filed a dissent joined by Powell, Burger, and Rehnquist, but it objected to the decision on jurisdictional rather than substantive grounds.

A concurrence by Blackmun, while supporting the general direction of Marshall's majority opinion, asserts that contributions are entitled to full First Amendment protection, and sees the key distinction as between contributions to candidates and independent political expenditures; the former is involved here, and on that basis the restriction should be upheld. 453 U.S. at 202-3 (Blackmun, J., concurring). The assertion that contributions have full First Amendment status is

corporations and unions are more restricted in their campaign finance activities than the unincorporated associations at issue here.⁴⁷ As in earlier decisions, corruption is identified more closely with direct financial ties to candidates, and less with political spending per se.

The "natural order" justices' willingness to protect expenditures made independently of candidates, particularly by organizations other than business corporations, is evident in Brennan's opinion in FEC v. Massachusetts Citizens For Life, Inc. (MCFL), which finds the FECA restriction on independent expenditures unconstitutional in so far as the danger of wealthy corporations is not involved.⁴⁸ Brennan, joined by Marshall, Powell, Scalia, and a concurrence by O'Connor, finds that the MCFL's "Special Edition" election newspaper violates Section 316 of the FECA, which prohibits corporate spending of unsegregated treasury funds on federal elections. But applying that statute to the MCFL is judged to be unconstitutional, since MCFL "does not accept contributions from business corporations or unions", deriving resources

consistent with Blackmun's dissent in Buckley; however, this case demonstrates that he will uphold restrictions on contributions in certain situations.

⁴⁷ 453 U.S. at 195, 199-200.

⁴⁸ FEC v. Massachusetts Citizens For Life, Inc. (MCFL), 479 U.S. 238 (1986).

solely from "member" voluntary contributions.⁴⁹ The logic of Brennan's opinion reveals that the "natural order" Justices continue to see large aggregations of unsegregated corporate wealth used to support political candidates, not the corporate form per se, as a critical nexus of corruption in campaign finance; the government can only infringe on speech and association in the former instance.⁵⁰

The fulcrum of Brennan's argument against the FEC position is that "voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form". Any fear of massive secret spending through such entities is obviated by the disclosure provisions which still apply to them. As a result, "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL".⁵¹

⁴⁹ 479 U.S. at 241-42. The violation occurred because the newspaper was an expenditure of corporate treasury funds to promote particular candidates, which is prohibited by Section 441(b).

⁵⁰ The skepticism of Brennan, and particularly Marshall, appears to extend beyond candidates to causes; note again their positions in Bellotti and Consolidated Edison.

⁵¹ 479 U.S. at 259-63. A concurrence by O'Connor joins the majority, but views the central burden on MCFL differently. She argues that the additional organizational requirements entailed by section 316 are the largest burden on MCFL. 479 U.S. at 265-66 (O'Connor, J., concurring).

If MCFL is not governed or seen as a normal corporation under these rules, the question becomes what makes it and others unique. Brennan offers three criteria: (1) the organization must be expressly formed to promote political ideas, not to do business; (2) it must have no shareholders who claim its assets; and (3) it cannot be established by, or receive contributions from, business corporations or unions. Such corporations avoid the corrupting dangers the campaign finance laws were designed to address.⁵²

Justice Marshall's opinion in Austin v. Michigan Chamber of Commerce, which upheld section 54(1) of the Michigan Campaign Finance Act prohibiting corporations from using corporate treasury funds independently to support or oppose candidates for state office, reinforces and expands past precedent and the distinctions enunciated in Massachusetts Citizens For Life.⁵³ Marshall notes that "state law grants corporations special advantages", quoting Massachusetts Citizens For Life to argue that these advantages "permit them to use 'resources amassed in the

⁵² 479 U.S. at 263-65.

⁵³ Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). Marshall, joined by Brennan, Blackmun, Stevens, White, and Rehnquist, upheld the statute on the grounds that "the provision is narrowly tailored to serve a compelling state interest", using a strong standard of review but finding that standard met. 494 U.S. at 655. The positions of White and Rehnquist are consistent with their "constructed order" deference to governmental statutes, and reveal another case in which the two perspectives have come together in this area of cases.

economic marketplace' to obtain 'an unfair advantage in the political marketplace' ". In exchange for the legal privileges it provides, the state can properly restrict corporate political expenditures in order to prevent undue political influence.⁵⁴

Brennan's concurrence in Austin rests on an analysis that distinguishes the Chamber from a corporation like MCFL, one that is implicitly relevant to party organizations. While sharing the majority's view that it is "first and foremost a business association", he argues that the state law also "protects the small businessperson" because without it "a member faces significant disincentives to withdraw, even if he disagrees with the Chamber's expenditures in support of a particular candidate". It also protects dissenting shareholders of member corporations from having their funds used for political campaigns.⁵⁵ Democracy and dissent are thus protected by the state action, a result which the "natural order" perspective favors for business as well as political parties.

⁵⁴ 494 U.S. at 658-61. Marshall argues that the Chamber of Commerce does not fit the criteria for distinction laid out in Massachusetts Citizens. Brennan's concurrence in Austin also argues that the Michigan law is not a complete ban on either corporate political participation or political expenditures, citing segregated funds and PACs. 494 U.S. at 669 (Brennan, J., concurring). This is reminiscent of the "alternative means of access" analysis in the ballot access opinions.

⁵⁵ 494 U.S. at 672-73 (Brennan, J., concurring).

Justice Stevens concurs in Austin on two grounds. First, he sees "the danger of either the fact, or the appearance, of quid pro quo relationships" as sufficient grounds in this context for the state regulation "of both expenditures and contributions". In addition, he finds the difference between speech on general policy and support for a particular candidate, first noted in Bellotti, as applicable to this case.⁵⁶ In general, he shares the majority's respect for the state interest in preventing corruption.

The more traditional "natural order" skepticism toward government regulation, argued at length in Burger's Buckley dissent, is also evident in the dissents of Scalia and Kennedy in Austin. Scalia objects to the majority opinion's view of corporations and corruption.⁵⁷ He begins with a sarcastic parody of the majority opinion:

⁵⁶ 494 U.S. at 678 (Stevens, J., concurring).

⁵⁷ Scalia does not agree with the logic of seeing corporate privileges as unique, noting that "other associations and private individuals" are granted advantages by state governments, without losing their First Amendment rights. Citing a 1984 decision involving a public TV station's freedom of speech, he argues that commercial corporations "are no less entitled to this Court's concern". While then noting the danger of wealth, he argues that independent expenditures avoid the threat of corruption such wealth poses, citing Buckley. He also argues that few candidates would want direct corporate support:

I expect I could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT&T or General Motors.

494 U.S. at 680-84 (Scalia, J., dissenting).

Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate:
-----⁵⁸

He characterizes the majority as saying that "too much speech is an evil that the democratic majority can proscribe".⁵⁹ Scalia instead adopts a laissez faire attitude toward campaign finance, grounded in a strong view of the First Amendment.

Scalia argues that the majority has in fact made its decision on the basis of "a hitherto unrecognized genus of political corruption". He quotes Marshall's opinion to define this "New Corruption", which is seen as

the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.⁶⁰

Scalia views this as an "illiberal free speech principle" of "one man, one minute", and argues that it was rejected in Buckley.⁶¹ The impact of such a standard on political competition is significant, in Scalia's view:

⁵⁸ 494 U.S. at 679 (Scalia, J., dissenting).

⁵⁹ 494 U.S. at 679 (Scalia, J., dissenting).

⁶⁰ Austin, 494 U.S. at 684 (Scalia, J., dissenting).

⁶¹ Nor does he accept Brennan's argument of protecting shareholders, claiming that the Michigan law is designed not for this "but to protect political candidates". A shareholder is subject to majority rule, and may easily sell his stock without disaster. 494 U.S. at 686-87 (Scalia, J., dissenting).

To eliminate voluntary associations - not only including powerful ones, but especially including powerful ones - from the public debate is either to augment the always dominant power of government or to impoverish the public debate.⁶²

Scalia is skeptical that "a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not".⁶³

Kennedy's dissent shares Scalia's concern for the role of private groups in the political process, citing Robert Horn's Groups And The Constitution, Federalist Number 10, and Toqueville for the proposition that "it is a distinctive part of the American character for individuals to join associations to enrich the public dialogue", group identity being "a part of the history of American democracy".⁶⁴ He concludes his opinion with the following:

By constructing a rationale for the jurispru-

⁶² 494 U.S. at 694 (Scalia, J., dissenting).

⁶³ 494 U.S. at 694-95 (Scalia, J., dissenting). Kennedy's dissent in Austin, joined by O'Connor and Scalia, takes a similar stance, arguing that the majority "validates not one censorship of speech but two": Michigan's law restricting independent corporate speech, and a Justice-created "value-laden, content-based speech suppression that permits some nonprofit corporate groups, but not others, to engage in political speech". 494 U.S. at 695-96 (Kennedy, J., dissenting). In his view, the majority's judgment of corporations as speakers goes against precedents in Consolidated Edison regarding content freedom and Bellotti regarding freedom for all speakers. 494 U.S. at 698-99 (Kennedy, J., dissenting). Both of these precedents, however, distinguish speech in favor of particular candidates, a distinction which Kennedy glosses over.

⁶⁴ Austin, 494 U.S. at 710 (Kennedy, J., dissenting).

dence of this Court that prevents distinguished organizations in public affairs from announcing that a candidate is qualified or not qualified for public office, the Court imposes its own model of speech, one far removed from economic and political reality. It is an unhappy paradox that this Court, which has the role of protecting speech and of barring censorship from all aspects of political life, now becomes itself the censor. In the course of doing so, the Court reveals a lack of concern for speech rights that have the full protection of the First Amendment.⁶⁵

This is a much higher level of trust in the actions of private economic groups in the campaign finance arena than is shown by the majority of "natural order" justices.

The "natural order" viewpoint's overall understanding of competition in the realm of campaign finance is grounded in a balance between protecting free speech and preventing corruption of the electoral process. In contrast to their ballot access and nominations opinions, the majority of "natural order" justices are much less skeptical of government regulation of campaign money, and much closer to the "constructed order" perspective in this area of opinions. In their view, the principal corrupting influence that government can properly limit is unlimited contributions, particularly those from business corporations and those given to candidates for office. The most consistent exceptions to this modified stance are Burger and Scalia, whose arguments are much more skeptical of government regulations and the prevention of "corruption" as a compelling state interest. One can almost

⁶⁵ 494 U.S. at 713 (Kennedy, J., dissenting).

argue that a number of justices have "traded places" between the two perspectives in this area of electoral jurisprudence.

Party Structure and Functions

The most striking feature of the "natural order" viewpoint on parties, enunciated in the campaign finance cases, is not the apparent lack of concern for third parties by all but Burger, which contrasts with the solicitude for such parties in the ballot access opinions, but the relative indifference to parties as an actor in the campaign finance process. Only Burger's discussion of FECA gives significant attention to the law's impact on parties. Minor parties cannot be pleased by the "natural order" opinions in this area, but major parties have little to celebrate. The public financing of presidential campaigns, upheld by most of the "natural order" justices, is a striking example of how the current system weakens an already shaky party role in the electoral process.⁶⁶

The comments of "natural order" justices in Buckley reveal some of their views on major and minor parties. The former are seen, in terms of ideology, as including "candidates of greater diversity" than minor parties. The major parties are not narrowly pigeonholed:

⁶⁶ As noted earlier, the justices' upholding of contribution limits has indirectly increased party involvement in campaign finance, by encouraging "soft money" donations to party organizations.

In many situations the label "Republican" or "Democrat" tells a voter little. The candidate who bears it may be supported by funds from the far right, the far left, or any place in between on the political spectrum.⁶⁷

Minor parties, on the other hand, "usually represent definite and publicized viewpoints" and are more ideologically focused.⁶⁸ The justices take no direct position on whether one type of party is superior to the other, but this positive view of major parties is in marked contrast to the ballot access and nomination cases, where doubts are raised about the ideological diversity of the major parties. Still, there is continuity in the portrayal of the major parties as entities with no fixed ideology save the winning of elections.

The majority opinion in Buckley raises the question of whether the FECA "invidiously discriminates against nonincumbent candidates and minor parties in contravention of the Fifth Amendment".⁶⁹ This echoes the ballot access "natural order" concern that the political playing field be kept level for all parties, yet the outcome is very different. In dealing with campaign finance, the justices find that FECA has not fostered a political imbalance; its

⁶⁷ 424 U.S. at 70.

⁶⁸ 424 U.S. at 70.

⁶⁹ 424 U.S. at 14.

restrictions are seen as "evenhanded" in their treatment of major and minor parties.⁷⁰

The public funding scheme for the presidential selection process is also found not to constitute "invidious discrimination against minor and new parties in violation of the Fifth Amendment". All parties are not required to be treated the same, a position for which the unanimous ballot access case opinion in Jenness v. Fortson is cited; the FECA provisions are simply a response to the historical fact of major party dominance in America. According to the justices, "no third party has posed a credible threat to the two major parties in presidential elections" since 1860; they have been unable to match the major parties in victories and fund raising.⁷¹

⁷⁰ The "natural order" justices assert that challengers to incumbents can raise large sums and defeat their opponents, citing statistical and other evidence in the record. While acknowledging that minor party claims are "more troubling", they find no evidence of discrimination against them in the record, although they do acknowledge that major parties receive more of the large contributions. Buckley, 424 U.S. at 32-33. The justices also dismiss the comparison of minor parties' privacy concerns under the FECA disclosure requirements to the facts of NAACP v. Alabama and related precedents. They see the claims of possible harassment as "highly speculative", and outweighed by "the substantial public interest in disclosure identified by the legislative history of this Act". The justices' concern with possible corruption outweighs any sensitivity to minor party disadvantages. 424 U.S. at 69-72.

⁷¹ Buckley, 424 U.S. at 97-98. This assertion clearly neglects the presidential election of 1912, where third party candidate Theodore Roosevelt (running under the banner of the Progressive Party) received more popular votes than the Republican incumbent, William Howard Taft.

Thus, the "natural order" perspective defends only a mixed role for parties in the area of campaign finance. In Buckley, the only campaign finance opinion which addresses parties at any length, the justices identify no special role, or great disadvantage, that qualifies minor parties for better treatment under federal law, nor do they see a protected role in campaign finance for parties as a class. Parties must compete with all other organizations in the political marketplace. While claims of disadvantage will not be ignored, the majority of "natural order" justices will not give parties any special advantages, or special role, in the arena of campaign finance.

Burger's dissent in Buckley offers the major alternative argument to this indifference within the "natural order" perspective. He sees much greater disadvantages and dangers for minor parties under the FECA legislation, and insists that the weight of such concerns calls the constitutionality of the FECA into question. To a greater extent than the "natural order" majority, he is sensitive to the roles played by parties in campaign finance.

One of Burger's major concerns is the impact of contribution disclosure requirements on third parties. He

In arguing against claims that minor parties are disadvantaged, the justices note that the past accomplishments of minor parties "in furthering the development of American democracy were accomplished without the help of public funds". 424 U.S. at 101-2.

agrees with the majority that minor parties are generally very ideological, but he uses this to argue that "the public can readily discern where such parties stand, without resorting to the indirect device of recording the names of financial supporters".⁷² He argues that minor party supporters may be more vulnerable to harassment as a result of disclosure, thus damaging speech and association.

Burger's dissent in Buckley also argues against the public financing scheme for presidential elections, contending that it will have a negative impact on the role of parties in the process. He cites an amicus brief argument that the public financing system "affects the role of the party in campaigns for office, changes the role of the incumbent government vis-a-vis all parties, and affects the relative strengths and strategies of candidates vis-a-vis each other and their party's leaders".⁷³ In essence, such a system weakens the role of the parties and is highly disruptive of the status quo. Burger is arguing for a process in which the role of parties and other forces is not preempted by a governmental structure.

Burger contends further that the public financing system "invidiously discriminates against minor parties". This occurs because public financing favors the current major parties, an unacceptable bias:

⁷² Buckley, 424 U.S. at 240 (Burger, C.J., dissenting).

⁷³ 424 U.S. at 247 (Burger, C.J., dissenting).

The fact that there have been few drastic realignments in our basic two-party structure in 200 years is no constitutional justification for freezing the status quo of the present major parties at the expense of such future political movements.⁷⁴

Burger sees "grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates".

Citing the level of support requirement of Jenness as acceptable, Burger concludes that the public financing system exceeds this requirement.⁷⁵ He argues too that the system's support for certain parties constitutes public favoritism.⁷⁶

In light of their concern in ballot access and nominations cases, the indifference of the "natural order"

⁷⁴ 424 U.S. at 251 (Burger, C.J., dissenting).

⁷⁵ 424 U.S. at 251 (Burger, C.J., dissenting).

⁷⁶ Burger also finds the matching funds requirements of public financing unacceptable, as they equate financial and political support, thereby putting poor candidates or candidates with poor supporters at a financial (and therefore a political) disadvantage. Burger's treatment of matching funds, as well as the other issues discussed above, reveal a strong concern for the interests of alternative political forces. However, this concern is explicitly tied to Justice Burger's sensitivity to finance issues in politics; he cites his opinions in both Bullock and Lubin in support of these objections in Buckley. 424 U.S. at 252 (Burger, C.J., dissenting).

In a broader sense, Burger is also skeptical of the propriety of public financing of private political activity. He explicitly questions whether "public financial assistance to the private political activity of individual citizens and parties is a legitimate expenditure of public funds". In his view, the presidential selection process should not be funded by government; parties and candidates should compete for private support in the political marketplace. 424 U.S. at 248 (Burger, C.J., dissenting).

justices to minor parties in the area of campaign finance is somewhat surprising. They give little attention, and less favorable consideration, to third party claims in Buckley, and have little to say about these matters in subsequent cases. Only Burger comes to the defense of parties, particularly minor parties, in the financing of presidential election campaigns. In the realm of campaign finance, parties are just equal players in a crowded field of competitors.

Standards Of Evidence and Burden

The campaign finance opinions that enunciate the "natural order" perspective apply the same standard of review as in the ballot access and nominations decisions, but differ in the outcomes of that application. In the ballot access and nomination cases, the "natural order" justices adopt a standard of "compelling state interest", and most often find that standard unmet by the statutes at issue. The same standard is applied in the campaign finance cases, but the majority of "natural order" justices find many FECA provisions and a Michigan law to be justified by a compelling state interest in the prevention of corruption (Burger, Scalia and Kennedy are the main exceptions).

In Buckley, for example, the "natural order" justices note that the Court of Appeals, in the upholding of most FECA provisions, found a "clear and compelling interest" in

"preserving the integrity of the electoral process".⁷⁷ The justices adopt this "compelling state interest" standard, but employ an additional interest not cited by the Court of Appeals: the prevention of corruption. They find that the expenditure limits fail these tests, but they uphold contribution limits on the basis of the government interest in preventing corruption.⁷⁸

The major example of corruption noted by the justices is the appearance of improper influence through large contributions, a "narrow aspect of political association". The public interest in preventing such influence is seen as "weighty", while the effect of necessary regulation is seen as "limited".⁷⁹

In addition to corruption, the "natural order" justices are also sensitive to issues of national governmental power. In Buckley they note, with respect to the FECA disclosure requirements, that there are "governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the

⁷⁷ Buckley, 424 U.S. at 10.

⁷⁸ While noting that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny", the justices assert that "[n]either the right to associate nor the right to participate in political activities is absolute". If the government shows "a sufficiently important interest" and uses "means closely drawn to avoid unnecessary abridgement of associational freedoms", its statutes may be upheld. 424 U.S. at 25, citing CSC v. Letter Carriers, 413 U.S. 548 (1973).

⁷⁹ Buckley, 424 U.S. at 27, 29.

'free functioning of our national institutions' is involved".⁸⁰ These include aiding voters in evaluating candidates by publicizing the source of their funds; deterring corruption by publicizing large contributions and expenditures; and gathering the data necessary to enforce contribution limitations.⁸¹

Burger's dissent in Buckley on disclosure limits takes issue with the majority's application of these standards of review. He argues that the standards are not as strict as past precedents and the Constitution warrant. Arguing that greater "precision of regulation" is required, Burger asserts that "no legitimate public interest has been shown in forcing the disclosure of modest contributions that are the prime support of new, unpopular, or unfashionable political causes".⁸² He finds the dangers of corruption to be outweighed by the potential of adverse impact on such political causes, a position closer to the "natural order" stance in the ballot access cases.

Powell's majority opinion in Bellotti also employs the compelling state interest/"exactng scrutiny" test. But unlike Buckley, the asserted state interests in active participation and protecting shareholder rights are not found to meet this test. While these interests are

⁸⁰ 424 U.S. at 66, citing Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).

⁸¹ 424 U.S. at 66-68.

⁸² 424 U.S. at 240 (Burger, C.J., dissenting).

substantial, they are not sufficiently connected to the law at issue. Powell puts particular emphasis on the lack of empirical evidence in the record regarding any dominant or significant corporate role in past referendum votes.⁸³

Bellotti indicates that the "natural order" justices will not automatically accept asserted state interests in protecting competition from corruption, though the dissents of Brennan and Marshall in the case are evidence of some division.⁸⁴

Brennan's opinion in Massachusetts Citizens For Life reaffirms the use of the "compelling state interest" standard when First Amendment rights are found to be burdened, but as in Bellotti and Consolidated Edison, the facts do not meet the standard. Brennan finds the various legal and organizational requirements for a "segregated fund", as well as the requirement itself, to be a "substantial" restriction on MCFL's speech. These facts make it "evident" to Brennan

that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These

⁸³ 435 U.S. at 786-88.

⁸⁴ Justice Powell in Consolidated Edison reemphasizes this compelling state interest standard, but again finds that the interests are not implicated by the regulations involved, and thus not applicable to the case. 447 U.S. at 540-43.

In their application of a standard of review, Bellotti and Consolidated Edison reflect a greater level of antigovernment skepticism than other "natural order" campaign finance opinions; notably, Burger joins the majority in both of these opinions.

additional regulations may create a disincentive for such organizations to engage in political speech.⁸⁵

With such a burden, "it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it".⁸⁶ Since the threat of corporate wealth corrupting politics is not involved in the case of MCFL, Brennan finds the "compelling state interest" standard is unmet.⁸⁷

⁸⁵ 479 U.S. at 254.

⁸⁶ 479 U.S. at 255.

⁸⁷ While noting the long history of regulation of corporate political activity, and the fact that corporate treasury funds "are not an indication of popular support for the corporation's political ideas", Brennan asserts that such regulation "has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes". MCFL is not seen to pose those dangers, since it "was formed to disseminate political ideas, not to amass capital". 479 U.S. at 256-59.

Marshall's opinion in Austin reaffirms that the use of funds to support a candidate is speech, and cites Massachusetts Citizens for the proposition that regulations on independent expenditures and requirements for segregated funds do burden freedom of association. As a result, the statute "must be justified by a compelling state interest". 494 U.S. at 657-658. The facts of Austin meet the standard; the statute is "precisely tailored" to serve the state interest as well. The distinction of media corporations, whose "resources are devoted to the collection of information and its dissemination to the public", is also viewed as compelling, given their "unique role" in the political process. 494 U.S. at 666-67.

Scalia's dissent in Austin accepts the "compelling state interest" standard of the majority, but finds it unmet by the facts of the case. He argues that the Court has held "that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere potential for producing social harm". He argues that such a principle would overturn a variety of past Court precedents, including NAACP v. Alabama. 494 U.S. at 688-90.

In contrast to the ballot access and nominations cases, the application of a strict standard of review in the campaign finance cases is not used consistently to invalidate most government action. While the "natural order" justices hold against some regulations, particularly those involving direct expenditures, many other statutes are upheld. The explanation lies in their concern for the prevention of corruption, an interest to they give great weight.

The Role of Government

As the preceding analysis suggests, the majority of "natural order" justices constitutionally support some government regulation in the area of campaign finance. Though the justices tend to give particular weight to national legislation like the FECA, the Austin decision is evidence that state regulations will also be treated with deference under their standards of review. The government is seen, in many of the cases, as a supportive rather than a destructive influence on the "natural" competitive order. The dangers of corruption seem to be the key ingredient that prompts the "natural order" justices to accept a wider government role in this part of the electoral process.

The Buckley opinion defends a proper role for the national government in this area. The constitutional power of Congress in this area is "well established and is not

questioned by any of the parties in this case".⁸⁸ What is at issue, then, is not whether Congress has a role, but the parameters of that role, i.e., how far regulation may proceed before it impinges upon other constitutional guarantees.

A number of actions are viewed as falling outside the proper parameters of this congressional power. Equalization of political "voices" by an independent expenditure ceiling, for example, is not accepted as a legitimate function of government by the Buckley majority . According to the opinion,

The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources'", and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' ".⁸⁹

Though access to the process should be open, the volume of voices within that process cannot be artificially restricted.⁹⁰ Even in its moderated treatment of campaign

⁸⁸ 424 U.S. at 13.

⁸⁹ 424 U.S. at 48-49. Yet, as we have seen, corporate speech and unlimited contributions to candidates can be limited.

⁹⁰ 424 U.S. at 54-55. The same justification used here to throw out independent expenditure restrictions also serves to discredit restrictions on expenditure of personal and family funds; the government cannot burden First Amendment rights in order to equalize "the relative financial resources of candidates". The interests in preventing corruption are not dismissed completely; rather,

finance regulation, the "natural order" does not fully shed its skepticism of government involvement in the electoral process.

The desire to reduce the rising cost of campaigns is also not accepted as a justification for limits on expenditures:

In the free society ordained by our Constitution, it is not the government but the people--individually as citizens and candidates and collectively as associations and political committees--who must retain control over the quantity and range of debate on public issues in a political campaign.⁹¹

The government cannot artificially limit the political process in the name of supposed wisdom.

In contrast, the Buckley majority views contribution limits and disclosure requirements as legitimate exercises of congressional power, addressing a compelling state interest in controlling political corruption:

The prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidate's positions and on their actions if elected to office.⁹²

Contribution limits are seen as a "necessary legislative concomitant" to dealing with corruption, and disclosure requirements serve an "informational interest" by helping "voters [to] define more of the candidates'

they are seen as sufficiently served by the contribution and disclosure provisions of the FECA.

⁹¹ Buckley, 424 U.S. at 57.

⁹² 424 U.S. at 25.

constituencies".⁹³ Free competition must be open, not manipulated by hidden actors or "other people's money".

Congress is also seen by the Buckley majority as having the power, under the "general welfare" clause of the Constitution, to decide on expending public money to fund the presidential selection process. That clause is interpreted not as a limitation, but rather a grant, of power. Three "general welfare" purposes are cited from a U.S. Senate report:

To reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising.⁹⁴

These purposes all involve the protection and promotion of political competition, an acceptable purpose for the "natural order" justices. Whether the means are wise is a decision for Congress to make, not the judiciary. The legislative decision to set different standards for minor parties to obtain this public funding is also seen as within "the permissible range". The funding of national conventions and the primary processes are supported with the same logic.⁹⁵

⁹³ 424 U.S. at 28, 80-81. The justices note that such disclosure applies only to candidate related spending, and thus is not impermissibly broad under the First Amendment.

⁹⁴ 424 U.S. at 90-91.

⁹⁵ 424 U.S. at 104-8.

Justice Powell's opinion in Bellotti reasserts the "natural order" perspective's skepticism of government regulation of the electoral process. Taking issue with an assertion by Rehnquist that the reach of the First Amendment is more limited with regard to state government power, Powell argues that "the states do not have greater latitude than Congress to abridge freedom of speech". He notes as well that Rehnquist's distinction between federal and state powers over speech has never been the position of a majority of justices on the Court.⁹⁶ In contrast to national power, the state role in regulation continues to be scrutinized carefully by the "natural order" justices, although Austin indicates that some will uphold some state regulations as well.⁹⁷

⁹⁶ 435 U.S. at 780-81.

⁹⁷ As noted earlier, Scalia argues in the campaign finance cases for a stricter application of the "natural order" majority's standard of review. His dissent in Austin saves its strongest critique for the majority's view of the proper role of the state in this area. Scalia sees the majority opinion's critical mistake as

its departure from long-accepted premises of our political system regarding the benevolence that can be expected of government in managing the arena of public debate, and the danger that is to be anticipated from powerful private institutions that compete with government, and with one another, within this arena.

494 U.S. at 692.

Scalia argues that the framers of the First Amendment would not even see prevention of the "new corruption" as a "desirable objective", much less a "compelling state interest". He cites Jefferson and Madison, as well as Toqueville on the critical role of private associations in politics, in order to buttress his point. 494 U.S. at 692-94.

As our analysis reveals, the majority of "natural order" justices will permit a substantial role for government in the regulation of campaign finance. The parameters of this role, however, are measured by how each state or national regulation relates to the government interest in preventing corruption, the only goal seen to be sufficiently compelling to override free speech rights. Those regulations not aimed at preventing corruption are much more likely to be viewed as unconstitutional. The "natural order" justices, while friendlier to campaign finance regulation than other areas of government involvement, still maintain a high standard for approving particular exercises of this role.

The "Constructed Order" Perspective

In campaign finance cases, the "constructed order" justices have been closer to the "natural order" justices than in other areas of party and electoral jurisprudence. Both perspectives have been willing to approve some government regulation of campaign money, but the "constructed order" perspective stands out for supporting a wider range of government action and holding government to a more lenient application of standards of review. Rehnquist and White, the justices who most consistently support the "constructed order" perspective in these cases, argue that the government's role enables, but rarely damages, the political process.

Rehnquist's dissent in Bellotti is a good example of the "constructed order" perspective. While the majority finds that the Massachusetts statute abridges freedom of expression protected by the First Amendment, Rehnquist argues that prohibition of corporate and union spending in referendum campaigns protects competition and prevents an imbalance of political influence.⁹⁸ For the "constructed order" justices, government preserves and protects the competitive process through democratically enacted regulations, and its judgment should be given great deference in all cases.

Party Competition And Choice

Like the "natural order" justices, those who favor the "constructed order" perspective seek to protect political competition, but are less likely to second-guess government statutes in order to provide such protection. Their view of the dangers of corporate corruption is like that held by the "natural order" perspective, but their definition of protected speech is more limited, especially in the case of White, and their deference toward government solutions is broader. In the "constructed order" perspective, state decisions to protect competition frequently outweigh speech rights.

⁹⁸ Bellotti, 435 U.S. at 822 (Rehnquist, J., dissenting).

The "constructed order" justices, who are more impressed by the threat of financial monopoly, often show deference to state efforts to control campaign finance. Blackmun's dissent in Consolidated Edison, joined by Rehnquist, emphasizes the monopoly status and role structure of the utilities: "the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech". Such monopoly power justifies extensive state oversight.⁹⁹ Speech and free choice is perverted by corporate action, so the state may legitimately intervene to prevent such distortion.

Most of the "constructed order" justices, however, are not prepared to accept all restrictions on campaign finance. This is particularly true of independent expenditures, as shown in FEC v. National Conservative Political Action Committee (NCPAC), which overturned the \$1000 ceiling on independent expenditures by political committees on behalf of publicly funded presidential candidates.¹⁰⁰ Direct speech is seen to be implicated, and the restriction is compared to "allowing a speaker in a public hall to express his views while denying him the use

⁹⁹ 447 U.S. at 549 (Blackmun, J., dissenting). It is noteworthy that Blackmun describes the effect of monopoly as "forced aid" to the utility's speech; this element of coercion is similar to Brennan's concern with "shareholder rights".

¹⁰⁰ FEC v. National Conservative Political Action Committee (NCPAC), 470 U.S. 480 (1985).

of an amplifying system".¹⁰¹ California Medical Association is distinguished on the grounds that expenditures from less powerful persons are involved, and FEC v. National Right to Work Committee is distinguished as involving a corporation, not a political committee.¹⁰²

An important distinction about corruption is made in FEC v. National Conservative Political Action Committee. Noting that the only compelling state interest in restricting PAC speech is the prevention of corruption, Rehnquist argues that NCPAC's independent expenditures are not implicated by that interest, because independent expenditures by their nature do not corrupt candidates.¹⁰³ Thus, if spending does not promote corruption, state interests are greatly diminished. With regard to this issue, the positions of the two perspectives are highly congruent.

Rehnquist's partial dissent in Massachusetts Citizens For Life, joined by Blackmun, White, and Stevens, is grounded in his unanimous opinion in National Right To Work Committee. Asserting that the latter decision "unanimously endorsed the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation'", Rehnquist argues that "I

¹⁰¹ Note the similarity to the "tank of gas" analogy in Buckley.

¹⁰² 470 U.S. at 493-95.

¹⁰³ 470 U.S. at 496-97.

cannot accept the conclusion that the statutory provisions [section 441b] are unconstitutional as applied to appellee Massachusetts Citizens For Life (MCFL)". He highlights the history of regulation, the purposes of preventing corruption and protecting shareholders, and the state-granted advantages enjoyed by corporations, citing the NRWC and NCPAC decisions as well as California Medical Association.¹⁰⁴ The corruption concern and state ties are central to Rehnquist's understanding of these issues.

The principal dissenter in many of the campaign finance cases is Justice White, who adopts the most government-friendly "constructed order" perspective among the justices. White's basic argument is that money is not equivalent to speech, a position that leads him to approve most government regulation of campaign finance. For White, the dangers of corruption posed by unregulated campaign and political money far outweigh any free speech concern posed by restrictions on that money.

White refuses to agree that money is speech, calling that argument "entirely too much". In Buckley, he notes that "money is not always equivalent to or used for speech, even in the context of political campaigns; there are "many expensive campaign activities that are not themselves communicative or remotely related to speech". On the positive side, expenditure ceilings "help eradicate the

¹⁰⁴ 479 U.S. at 266-67 (Rehnquist, C.J., dissenting in part).

hazard of corruption".¹⁰⁵ White feels the majority is insufficiently cognizant of the implications of their decision in this respect:

The holding perhaps is not that federal candidates have the constitutional right to purchase their election, but many will so interpret the Court's conclusion in this case. I cannot join the Court in this respect.¹⁰⁶

Thus, the chosen legislative purpose preserves, rather than restricts, the competitive political process.

White's dissent in Buckley sees equal potential for corruption in contributions and expenditures. He states that

It makes little sense to me, and apparently made none to Congress, to limit the amounts an individual may give to a candidate or spend with his approval but fail to limit the amounts that could be spent on his behalf.¹⁰⁷

Like Burger, White is concerned with maintaining and respecting the logic of congressional intent in legislation, but he reaches a conclusion opposed to Burger's. Instead of arguing that the whole law should fall as a unit, White asserts that it should be upheld as a unit.

White's dissent would also uphold the limitations on personal funds expenditures, supporting that government effort to preserve the competitive political process.

¹⁰⁵ 424 U.S. at 262-63 (White, J., dissenting).

¹⁰⁶ 424 U.S. at 266 (White, J., dissenting); emphasis added.

¹⁰⁷ 424 U.S. at 261 (White, J., dissenting).

Arguing that this restriction serves "salutary purposes related to the integrity of federal campaigns", White asserts that it forces candidates to demonstrate financial support among the voters and works in the direction of more equal access to the political arena.¹⁰⁸ These interests are supportive of both a more competitive politics and of a government role in helping to promote that politics.

White's dissent in Bellotti takes on the issue of competition and choice explicitly, finding the state statute was legitimately trying to level the playing field and prevent misuse of corporate funds. He differentiates corporate speech, citing Thomas Emerson in opposition to Powell's use of Emerson in the majority opinion, and argues that corporations and corporate speech do not "represent a manifestation of individual freedom of choice".¹⁰⁹ The emphasis is once again on freedom of choice, except that, here, the state is preserving, not restraining, such freedom.

Indeed, in Bellotti, White sees the state as protecting that freedom by seeking to prevent possible unfair political advantages for corporations. Such organizations are often in a position of economic dominance, power which could enable them to dominate "the very heart of our democracy, the electoral process". As

¹⁰⁸ Buckley, 424 U.S. at 266 (White, J., dissenting).

¹⁰⁹ 435 U.S. at 805 (White, J., dissenting).

White notes, "the State need not permit its own creation to consume it".¹¹⁰ As noted earlier, Brennan and Marshall find common ground with White in this particular dissent.

White's dissent in National Conservative Political Action Committee continues to argue against the proposition that money is speech. He asserts that the First Amendment protects "the right to speak, not the right to spend", and that money is a producer of speech rather than speech itself. He also argues that the distinction between independent and coordinated expenditures "blinks political reality", noting that the movement of persons between PACs and candidate staffs reflects the reality that "PACs do not operate in an anonymous vacuum". He also argues that contribution limits are pointless without spending limits.¹¹¹

The "constructed order" perspective on campaign finance and competition, like the "natural order", is not held in a consistent fashion by all the justices. Rehnquist, joined on occasion by Blackmun, approves of most

¹¹⁰ 435 U.S. at 809 (White, J., dissenting).

¹¹¹ 470 U.S. at 508-11 (White, J., dissenting). Notably, Marshall dissents from the majority and agrees with much of White's position, though not with his argument that money does not equal speech. 470 U.S. at 521 (Marshall, J., dissenting).

White's brief, one sentence dissent in Massachusetts Citizens joins Rehnquist's dissent, but also reaffirms his view that contributions and expenditures should be treated in the same fashion, citing his previous dissents in Buckley, Bellotti, and National Conservative Political Action Committee. 479 U.S. at 271 (White, J., dissenting).

government regulations, but is skeptical of expenditure limits on campaigns or independent spending. White consistently argues the "constructed order" perspective, but is alone in opposing the idea that money is a form of speech. He is much more suspicious of unregulated political money than of government regulation of such money. Overall, however, both Rehnquist and White agree on the positive role government regulation can play in protecting the competitiveness of the political process.

Party Structure and Functions

Like the "natural order" justices, the "constructed order" justices have little to say about political parties in their campaign finance opinions. They envision no special role for parties in the campaign finance process, and most do not give any particular attention to the interests of parties. The exception is Justice Rehnquist, who defends the rights of minor parties under the public financing system of presidential selection. Even Rehnquist, however, does not defend a particular role for parties.

Like Burger, Rehnquist's dissent in Buckley focuses attention on the treatment of minor parties and independent candidates; however, Rehnquist's defense of their interests is premised on different grounds than Burger's. He argues that the states are properly subject to fewer First Amendment strictures than the federal government; only the "general principle of free speech" is incorporated by the

Fourteenth Amendment. As a result, federal statutes must meet a higher standard of review, opening the FECA to stronger First Amendment attacks by minor parties. Rehnquist thus agrees with Burger on the disadvantage for minor parties created by public financing, asserting that the FECA "has enshrined the Republican and Democratic Parties in a permanently preferred position".¹¹² Rehnquist thereby distinguishes his ballot access views on the basis of state versus federal legislative purposes and authority.¹¹³

Beyond this defense of minor parties, however, the "constructed order" justices, Rehnquist and White, are silent on the relationship between parties and campaign finance. Parties are treated no differently than any other participant in the campaign finance arena. While Rehnquist does argue that no party should be disadvantaged by federal government statutes on campaign finance, neither he nor White (nor any other justice who joins the "constructed order" perspective) sees parties as playing any distinctive role in the process. Parties are left to fend for themselves in the "market" of campaign money.

¹¹² 424 U.S. at 291-93 (Rehnquist, J., dissenting).

¹¹³ As Chapter 2 noted, Rehnquist is very willing to judge most state initiatives in the electoral arena by a lenient standard of review.

Standards Of Evidence and Burden

While many of the justices who adopt the "constructed order" perspective in the campaign finance cases adopt the same "compelling state interest" standard of review as the "natural order" justices, the discussion of competition in the previous section indicates that their application of it is more lenient. Unlike their treatment of the ballot access and nomination cases, the "constructed order" justices are more likely to demand a compelling state interest in the campaign finance cases. At the same time, they are likely to find a supportable state interest. Thus, while the standards applied may have changed, the results of their application are similar.

White's application of standards is the most lenient among the "constructed order" justices. His dissent in Buckley argues that expenditure limits should be upheld, contending that there is "no sound basis" for invalidating them "so long as the purposes they serve are legitimate and sufficiently substantial, which in my view they are". He views such limits as reducing the possibility of corruption, easing the burdens of fundraising, and restoring confidence in federal elections.¹¹⁴ A standard of legitimate and substantial interests, rather than a compelling interest, is seen as sufficient to justify congressional legislation in this area. This is a standard

¹¹⁴ 424 U.S. at 264-65 (White, J., dissenting).

that is much more friendly to the governmental purposes and grows out of White's argument that money is not a form of speech.

Overall, the "constructed order" treatment of campaign finance statutes does not depart radically from their more lenient treatment of government regulation of ballot access and nomination procedures. While they invoke the compelling state interest standard, they most often find it met. While White departs from his colleagues in employing a more lenient standard of review, the only area in which the results differ are in his approval (and the majority's disapproval) of various expenditure limitations. Thus, the importance of standards of review lies both in their identity and their application.

The Role Of Government

The "constructed order" perspective in the campaign finance cases approves a strong and positive role for government regulation of political money, particularly at the federal level. While this role is not unlimited (only White, for example, approves the FECA limitations on expenditures), it is as broad as the state role allowed in ballot access and nomination procedures. In a departure from these areas, the "constructed order" position is more often joined by the "natural order" justices, out of a concern that both share about the corrupting effects of money in politics.

White's dissent in Buckley is a good example of the "constructed order" perspective on a strong role for government in regulating campaign money. White is highly supportive of the right of Congress to regulate the election process for federal offices. Citing the precedents of Ex Parte Yarbrough and Burroughs v. U.S., Justice White asserts that Congress in this area has "the authority to protect the elective processes against the 'two great natural and historical enemies of all republics, open violence and insidious corruption'". A key source of possible corruption is money in politics, and particularly the undue influence of great wealth.¹¹⁵

White's most visible departure from the majority in Buckley is his acceptance of FECA expenditure limitations. He sees both contributions and expenditures as aiding speech, but contends that the government's "nonspeech interests" in regulating money in federal elections "are sufficiently urgent to justify the incidental effects that the limitations visit upon the First Amendment interests of candidates and their supporters". The expenditures were also seen by Congress as having "corruptive potential", and White does not believe the justices should second guess this judgment.¹¹⁶

¹¹⁵ 424 U.S. at 257 (White, J., dissenting).

¹¹⁶ 424 U.S. at 259-61 (White, J., dissenting).

Rehnquist's dissent in Buckley reflects his continuing deference to state governments in most areas, but it also reveals some issues on which he does not approve of governmental action. He asserts, in discussing the Justices' ballot access opinions, that

If the states are to afford a republican form of government, they must by definition provide for general elections and for some standards as to the content of the official ballots which will be used at those elections.¹¹⁷

While this state government involvement in controlling the ballot is seen as not only permissible but a matter of "necessity", congressional involvement in public financing of presidential elections is viewed as lacking "the same sort of mandate of necessity as does a State's regulation of ballot access".¹¹⁸ Rehnquist cannot accept the position "that because no third party has posed a credible threat to the two major parties in Presidential elections since 1860, Congress may by law attempt to assure that this pattern will endure forever".¹¹⁹

White's dissent in Bellotti, as in the nominations cases, emphasizes the evidentiary weight of history and general political practice in judging the legitimacy of the Massachusetts restriction. He notes that statutes of this sort have been on the books for many years and that 31

¹¹⁷ 424 U.S. at 292 (Rehnquist, J., dissenting).

¹¹⁸ 424 U.S. at 292-93 (Rehnquist, J., dissenting).

¹¹⁹ 424 U.S. at 293-94 (Rehnquist, J., dissenting).

states have similar legislation. He also cites the Federal Corrupt Practices Act as precedent. White uses this evidence to argue that the justices have substituted their judgment for that of the legislature, neglecting the context of politics, and insists that the legislature should be left to make such judgments.¹²⁰ He also cites both common law traditions and Securities and Exchange Commission regulations designed to keep corporations out of direct political activity.¹²¹ In White's view, past state practice and general political practice should be respected as evidence, and state legislatures should not be second guessed.

In Bellotti, White finds a permissible state interest, which he characterizes as "strong", in detaching corporate investment decisions from politics.¹²² This is an interesting argument on the corporate form, which asserts that investors are unlikely to favor but have little voice in preventing corporate funding of political causes. Brennan, as has been noted, adopts a similar argument in Austin.

White's main argument in Bellotti is that regulation of corporate speech is justified by the fact that they have advantages gained through state laws and state granted

¹²⁰ 435 U.S. at 804 (White, J., dissenting).

¹²¹ 435 U.S. at 819 (White, J., dissenting).

¹²² 435 U.S. at 805 (White, J., dissenting).

privileges. These artificial advantages have put corporations in an economic position they could use to dominate "the very heart of our democracy, the electoral process". The state has a right to prevent this. As White puts it, "the State need not permit its own creation to consume it".¹²³ The state created nature of corporations is thus seen as central to distinguishing their speech rights and justifies state regulation of their activity. It does, however, run afoul the fact that a similar rationale for permitting party regulation has been severely limited by White's own colleagues on the Court.

White takes an unusually strong position in favor of the state interests in Bellotti. In challenging the majority opinion, he argues that

Once again, we are provided with no explanation whatsoever by the Court as to why the State's interest is of less constitutional weight than that of corporations to participate financially in the electoral process and as to why the balance between two First Amendment interests should be struck by the Court.¹²⁴

The state interest should be favored in this case so as to maintain the competitive balance of the electoral process.

Rehnquist's dissent in Bellotti emphasizes the evidentiary importance of comparative political practice in judging government statutes. Like White, he notes that Massachusetts, 30 other states and the U.S. Congress "have

¹²³ 435 U.S. at 809 (White, J., dissenting).

¹²⁴ 435 U.S. at 816 (White, J., dissenting).

all concluded that restrictions upon the political activity of business corporations are both politically desirable and constitutionally permissible". Such a "broad consensus" was "entitled to considerable deference from this Court". He goes beyond the other dissenters, and reaffirms his stance in Buckley, arguing that the application of the First Amendment to the states is more limited than to the federal government.¹²⁵

Blackmun's dissent in Consolidated Edison also argues for the legitimacy of a state regulation of corporate political activity. He finds that the Public Service Commission has a right to prohibit the inclusion of policy inserts with monthly electric bills, and asserts that the state has a legitimate interest in preventing undue advantages gained by monopoly power. Blackmun notes the widespread nature of prohibitions on political inserts in utility bills and of political donations by utility companies.¹²⁶ Empirical data on utility behavior and state practice is again seen as strong evidence.

White's dissent in National Conservative Political Action Committee reemphasizes his stance that there is no valid distinction between contributions and expenditures and that government interests are sufficient to uphold restrictions on both, including the limits at issue here.

¹²⁵ Bellotti, 435 U.S. at 822-823 (Rehnquist, J., dissenting).

¹²⁶ 447 U.S. at 550-53 (Blackmun, J., dissenting).

He argues that expenditures in this case are more accurately seen as contributions. He sees their restriction as part of an "integrated and complex system of public funding for Presidential campaigns", one which should not be tampered with lightly.¹²⁷

Rehnquist's partial dissent in Massachusetts Citizens For Life again favors both the choices of a legislature and the force of precedent. He attacks the majority position by asserting that it rejects past precedent and "the judgment of Congress". He goes on to argue that the distinctions among corporations drawn by Brennan are of degree, not kind, and are therefore "more properly drawn by the Legislature than the Judiciary".¹²⁸ His statement is clear in this regard:

Congress expressed its judgment in section 441b that the threat posed by corporate political activity warrants a prophylactic measure applicable to all groups that organize in the corporate form. Our previous cases have expressed a reluctance to fine-tune such judgments; I would adhere to such counsel here.¹²⁹

He argues that National Right to Work Committee establishes a standard of "considerable deference" to Congress on these questions, and asserts that National Conservative Political Action Committee recognizes "an acceptable distinction,

¹²⁷ 470 U.S. at 508 (White, J., dissenting).

¹²⁸ 479 U.S. at 267-68 (Rehnquist, C.J., dissenting in part).

¹²⁹ 479 U.S. at 268-69 (Rehnquist, C.J., dissenting in part).

grounded in the judgment of the political branch," between corporate actors and other organizations whose noncorporate status deprives them of state privileges.¹³⁰

Rehnquist hammers this point home in his conclusion. He notes that "the basically legislative character of the Court's decision is dramatically illustrated by its effort to carve out a constitutional niche for 'groups such as MCFL' ". He compares such actions to a "council of revision to modify legislative judgments", and asserts that the drawing of such modifications should be left to Congress.¹³¹ It is clear that Rehnquist's major concern is to protect legislative judgment, and not turn the Court into an unelected legislature.

Conclusions

The degree of harmony between the "natural order" and "constructed order" perspectives in the campaign finance cases make these opinions somewhat different as a group, though both perspectives maintain familiar outlines. Many of the "natural order" justices, in their desire to prevent corrupting effects of campaign money in the electoral process, are willing to allow significant government management of these finances. Similarly, many of the

¹³⁰ 479 U.S. at 269-70 (Rehnquist, C.J., dissenting in part).

¹³¹ Massachusetts Citizens For Life, 479 U.S. at 271 (Rehnquist, C.J., dissenting in part).

"constructed order" justices are willing to strike down some government regulations, particularly expenditure controls, in the name of protecting free speech and free competition.

Much of the "common ground" between the two perspectives is reflected in Justice Rehnquist's opinion in FEC v. National Right To Work Committee (NRWC), which upheld an FEC regulation barring corporations from soliciting political funds from nonmembers. This is the only unanimous campaign finance decision.¹³² Rehnquist, who advocates the "constructed order" perspective, argues that the central issue in the case is the legal concept of "membership". He rejects the NRWC's argument that members include all those who describe themselves as active and supportive of the organization, asserting that such an interpretation would destroy the restriction on nonmembers. He also notes that NRWC's articles of incorporation state that it has no members, and asserts that a proper standard of membership must involve "some relatively enduring and independently significant financial or organizational attachment".¹³³

¹³² 459 U.S. 197.

¹³³ 459 U.S. at 201-4. Examples of such attachment, according to Rehnquist, could include operation or administration of the corporation; election of officials; membership meetings; control over expenditure of contributions; and official membership. He seems to find all of these lacking in the instant case.

The necessity of meaningful attachment for full free speech protection of political funds solicited by corporations is congruent with the "natural order" perspective on the corruption of politics by unconnected, untraceable corporate funds, but also with the "constructed order" concern with standards of group membership. The agreement in this case is similar to the demand for a "show of support" in the unanimous ballot access case, Jenness v. Fortson. In both cases, all the justices involved agree that the government can legitimately set standards of support or commitment in regulating portions of the electoral process. With regard to the "natural order" view of campaign finance, this restriction is permissible because it prevents corruption by "other people's money".¹³⁴

The fulcrum of concern for both perspectives is the danger of corruption and the impact of corporate entities on politics. These concerns have a long history in American political rhetoric, but have been voiced with particular frequency since the Progressive Era, when reformers spotlighted the financial corruption of politics by large corporations, wealthy individuals, and political "machines". Both sides echo this Progressive suspicion of money in politics, but the "constructed order" appears more

¹³⁴ This is another reflection that the "compelling state interest" standard can be satisfied for the "natural order" justices.

prepared to accept government efforts to limit such corruption, particularly with regard to corporations. While both perspectives seek to prevent the corruption of politics, the "natural order" is still more wary of government regulation as a prophylactic for such corruption than is the "constructed order".

The views of both perspectives in these opinions are also marked by their relative indifference to political parties. The majority of justices pay little attention to either major or minor parties in their opinions. This silence seems due in part to the fact that they do not see parties as indispensable players in campaign finance, but due also to the absence of parties as plaintiffs or defendants in the cases. The end result is to ignore an institution which, thanks to the innovations of the national Republican Party, is again playing a major role in the financing of political campaigns.¹³⁵ Only Burger and Rehnquist actively defend the interests of parties, particularly minor parties, in the campaign finance process.

In considering why the differences between the two perspectives are more muted in this area of decisions, the aforementioned absence of parties as litigants or centers of controversy in most of these cases is an important

¹³⁵ For an account of the strengthened role of parties in campaign finance in the 1980's, see Herrnson, Party Campaigning In The 1980's.

factor. Most of the litigants are associations or corporations; parties have generally chosen not to pursue campaign finance issues through judicial challenges, particularly in the Supreme Court, but have instead relied on legislative changes to existing laws.¹³⁶ As a result, justices have not been called upon to address the roles and rights of parties in campaign finance, and the differing attitudes toward the scope of party freedom do not come into play as directly.

The focus of this litigation on private associations and corporations also helps to explain the measure of "agreement" between the two perspectives in these opinions. The "natural order" perspective, except for Burger and Scalia, views the rights of neither "group" with the same level of constitutional deference as party organizations. This is particularly true of business corporations. The associational and speech freedoms of these organizations are found to be outweighed in many cases by the danger of

¹³⁶ Associational litigants have included the California Medical Association, the National Right To Work Committee, and the National Conservative Political Action Committee. "Corporate" litigants have included the First National Bank of Boston, the Commonwealth Edison Company, the Massachusetts Citizens For Life, Inc., and the Michigan Chamber of Commerce. Only in Buckley was a challenge to campaign finance law brought by a candidate, Conservative Party Senator James Buckley of New York.

A good example of how the role of parties has been increased by legislative change is the 1979 amendments to the FECA, which enabled the flow of largely unregulated "soft money" through party organizations.

large, unrestricted, and undisclosed contributions, i.e. "other people's money", corrupting the political process.

When combined with a history of restrictions on direct corporate funding of candidates and a focus on direct speech as the critical right involved, associational concerns are given only secondary attention.¹³⁷ The right of association is asserted in these cases mainly to defend direct expenditures, an issue on which the "constructed order" takes a more anti-regulatory stance than in other areas examined in this work. Thus, the right of association is a less divisive and less visible doctrine in these cases because of the nature of the litigants, the broad agreement on protecting direct speech, and the largely shared concern about the corrupting effects of "other people's money". The absence of broad disputes in these cases over freedom of association is another explanation for why political party concerns receive less attention in their discussions.

The relative absence of parties from the opinions is due in part to the fact that most of them have dealt with provisions of the FECA, a federal statute. An examination of state campaign finance laws reveals important variations from the federal approach, particularly with regard to the

¹³⁷ The campaign finance opinions of both perspectives are notable for their almost exclusive grounding in the First Amendment, with very limited citation to freedom of association and other party and election opinions. In addition, few citations are made to social science research on campaign finance, in contrast to the numerous citations in ballot access, nomination procedures, and (as Chapter 5 will detail) patronage opinions.

role of parties. Currently, fifteen states give public money to parties. Of these, ten give money from tax surcharges or checkoffs to a taxpayer-designated party.¹³⁸ Five states determine the allocation of funds from such checkoffs or charges without taxpayer designation.¹³⁹ Thus, nearly one-third of state governments have some method for publicly funding party activity, which indicates that a significant number of states envision an important role for parties in financing the electoral process, a role largely ignored by the justices' jurisprudence.

Ultimately, the campaign finance opinions of the justices demonstrate that the division between a "natural order" perspective and a "constructed order" perspective does not preclude points of agreement and common ground between them. With campaign money, most of the justices agree on the propriety of some role for government in preventing corruption from the free and unregulated flow of "other people's money". The divisions arise over how far government can appropriately proceed in that direction without running afoul of First Amendment protections.

¹³⁸ Federal Election Commission, Campaign Finance Law 92 (Washington, D.C.: FEC, 1992), tax+public finance provision tables. The states involved are Alabama, Arizona, Idaho, Iowa, Kentucky, Maine, Oregon, Rhode Island, Utah, and Virginia.

¹³⁹ Ibid. The five states are California, Indiana, Minnesota, North Carolina, and Ohio. Indiana uses revenue from personalized license plates, while North Carolina will appropriate separate funds for special elections and contributor tax refunds.

Free speech means free competition, not equal results, to the justices from both perspectives. While to the "natural order" such competition means ballot access for party candidates and respect for party nomination procedures, money in politics is a commodity not tied solely to parties. As a result, neither perspective defends any special treatment for parties. Rehnquist (on the "constructed order" side) and Burger (on the "natural order" side) do argue that minor parties should not be disadvantaged by government action, but no justice argues for the interests of parties as a key player in the campaign finance process. While many justices do see a key role for parties in other parts of the electoral process, they are left to fend for themselves in the contest for money, the so-called "mother's milk of politics".

Ironically, it may be the relative absence of party concerns in the campaign finance opinions that is the most important "fact" for understanding the opinions' implications for parties. During the period of these decisions (1976-1990), both major parties asserted themselves organizationally by a more aggressive role in raising and disbursing campaign funds.¹⁴⁰ This role was

¹⁴⁰ This history is well treated in a variety of works. Some of the most notable are Herrnson, Party Campaigning In The 1980's; Sabato, The Party's Just Begun; and Brooks Jackson, Honest Graft. One should also note, however, Frank Sorauf's cautionary note about who benefits from this new campaign finance role: "As always, it is not the whole political party, but only a part of it, that is strengthened by adaptation". Frank J. Sorauf and Scott A.

encouraged indirectly by the 1979 FECA Amendments which led to the rise of "soft money" funneled through parties. In essence, the parties have been largely able to avoid the judicial forum in dealing with issues of campaign finance. While the justices may give no special role to parties in their lexicon of campaign finance, the parties have established just such a role through their own efforts. Party associational freedom in this arena has thus far not needed or "requested" judicial defense.¹⁴¹

Wilson, "Political Parties and Campaign Finance: Adaptation and Accommodation Toward a Changing Role", in L. Sandy Maisel, ed., The Parties Respond: Changes In American Parties And Campaigns, 2nd ed. (Boulder, CO: Westview Press, 1994).

¹⁴¹ What this also means, however, is that many questions involving the scope of party freedom of association in the campaign finance process have yet to be fully addressed by the justices, leaving the door open for future interpretation.

CHAPTER 5

THE COURT AND PATRONAGE: JOBS, GOVERNMENT, AND THE HEALTH OF PARTIES

From their earliest days as functioning organizations, American political parties have utilized government employment as a tool for recruiting and retaining party workers, who in turn help the parties turn out votes. Political patronage had its roots in the first presidential administrations, but it truly came of age during the administration of Andrew Jackson, when it became known as the "spoils system". This partisan use of the "spoils" that government jobs represented was both widespread and minimally regulated, at both the state and federal levels, for most of the nineteenth century.¹

Following the Civil War, however, pressure began to build for reform of the "spoils system" in the name of better administration of government. This pressure for a nonpartisan civil service was increased by public disgust at the excesses of New York's Tammany Hall and other political machines. The 1881 assassination of President James A. Garfield by a disappointed office seeker, and the public's reaction to it in the 1882 elections, led the Congress to pass the Pendleton Act of 1883, which forms the

¹ Sorauf, Party Politics In America, p. 82.

foundation of the modern federal civil service system. This Act was the first significant limitation of patronage.²

The Pendleton Act has been followed by more than a century of civil service expansion in the federal and state governments, greatly reducing the number of patronage positions available to parties. Progressive era efforts to professionalize municipal government, the passage of the Hatch Acts in 1939 and 1940, and socioeconomic changes are among the many factors which have led to a decline in both the opportunities and demand for patronage. The public administrative philosophy of a neutral public service is now widely accepted by the public at large and is a particularly potent inhibitor of any resurgence of patronage.³

Despite these legal and cultural forces, patronage has not been eliminated from the political landscape; opportunities for non-civil-service hiring still exist. The extent of this remaining patronage is debated. Some commentators see patronage as extremely limited⁴; others assert that it "remains a significant basis for recruiting

² See Carl Russell Fish, The Civil Service And The Patronage (New York, NY: Russell and Russell, 1963 -reprint of 1904 edition), pp. 209-28.

³ Sabato, The Party's Just Begun, pp. 230-31, and Key, Politics, Parties And Pressure Groups, 5th ed., pp. 355-59.

⁴ Sorauf, Party Politics In America; Sabato, The Party's Just Begun.

political workers", particularly at the state level.⁵ Limited or not, it is still a campaign issue in many places. Patronage charges were levelled by Christine Todd Whitman, for example, against Jim Florio in the 1993 New Jersey gubernatorial campaign.⁶ Whatever its status, patronage remains a political reality, as witnessed by three major patronage cases decided by the U.S. Supreme Court in the last two decades.

The majority opinions of the justices in these cases accord patronage a decidedly hostile reception. In Elrod v. Burns, the justices upheld injunctive relief for four employees of the Cook County, Illinois Sheriff's Department, who claimed they had been discharged solely due to partisan affiliation.⁷ In Branti v. Finkel, injunctive relief was upheld for two Assistant Public Defenders in Rockland County, New York who had been threatened with dismissal due to their partisan affiliation.⁸ Finally, in their most recent patronage decision, Rutan v. Republican

⁵ Bibby, Politics, Parties And Elections In America, p. 108.

⁶ Michael Aron, Governor's Race: A TV Reporter's Chronicle of The 1993 Florio/Whitman Campaign (New Brunswick: Rutgers University Press, 1994), p. 56.

⁷ Elrod v. Burns, 427 U.S. 347 (1976). Ironically, the sheriff involved, Richard Elrod, had "inherited" his patronage office from his father, Arthur Elrod, who was appointed by Chicago political boss Ed Kelly in the 1930's. Michael Barone, Our Country: The Shaping Of America From Roosevelt To Reagan (New York, NY: The Free Press, 1990), p. 138.

⁸ Branti v. Finkel, 445 U.S. 507 (1980).

Party of Illinois, the justices ruled that a group of Illinois state government employees had stated a valid legal claim in asserting that they were denied promotion, transfer, recall, or hiring on the basis of partisan affiliation; this extended the Elrod\Branti dismissal rule to those areas of the personnel process as well.⁹ Although the justices did not ban all uses of political affiliation in the personnel process, these decisions have further constricted the government positions available for patronage.

Examining these opinions from the same vantage point as the ballot access, nomination, and campaign finance opinions, one finds the majority justices favoring a nonpartisan government service in the name of freedom of speech and association, looking to prevent the current major parties from "monopolizing" the political process and stifling alternative views by means of employment pressures. The dissenting justices, in contrast, see patronage as a pivotal party function and an historically legitimate part of the process of politics. Thus, while the parallels are not exact, concerns about a "natural order" and a "constructed order" are very much present in these opinions, though the "construction" here is not directly statutory in nature. These two perspectives also divide on

⁹ Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

their views of parties, standards of review, and the role of states in the political process.

The "Natural Order" Perspective

The central concern of the "natural order" perspective is, as we have seen in earlier chapters, the fear that the two parties are monopolizing the political system through statutes. Here, the fear is similar: patronage is seen as a device through which the party in control of government preserves its power and monopolizes the electoral and ideological landscape. This appears to be the pivotal concern driving Brennan, Marshall, White, Stevens, and Blackmun, who compose the core of the majorities in these cases.

The critical nexus between the justices' understanding of patronage and "monopoly" is evident in the majority opinion in Branti, authored by Stevens. Stevens asserts that the central issue in the case is "orthodoxy", a monopoly of thought; patronage is seen as leading to such a restriction of thought and expression through the pressures of employment. Stevens found a precedent for striking down government actions that encouraged such orthodoxy in the famous "flag salute" case of Board of Education v. Barnette.¹⁰ The price of patronage is seen as a self-enforcing monopoly of support and ideas for the party in

¹⁰ 445 U.S. at 514, citing Board of Education v. Barnette, 319 U.S. 624 (1943).

power. This view colors and relates to the justices' views of party functions, the proper standard of review, and the proper role of the states in governing such issues.

Party Competition and Choice

The impact of patronage on competition and democracy is seen as highly negative by the "natural order" justices. One of their central objections to patronage is that it distorts electoral democracy. Brennan's opinion in Elrod views patronage as effecting a strong impairment of "the free functioning of the electoral process". He uses very pointed language to describe this impairment: patronage holds the "power to starve political opposition", and its practice "tips the electoral process in favor of the incumbent party".¹¹ He also characterizes patronage as leading to "the entrenchment of one or a few parties".¹² In essence, patronage gives a heavy advantage in political resources (money, volunteers, etc.) to those who control it, and leaves opponents at a comparative disadvantage.

Stevens's concurring opinion in Rutan also stresses the danger of "entrenchment". He points out that Scalia's dissent in that case (discussed in section II of this chapter) is "devoid of reference to meaningful evidence that patronage practices have played a significant role in

¹¹ 427 U.S. at 356.

¹² 427 U.S. at 369.

the preservation of the two party system". Stevens argues that patronage instead functions solely to protect the power of entrenched majorities.¹³ He supports this argument with a footnote citing his own discussion of a monopolized party system in Anderson v. Celebrezze.¹⁴

This language of monopoly and entrenchment, with its underlying suspicion of the parties in power, is strongly reminiscent of the majority opinion in Williams, which is in fact quoted in support of these themes in Brennan's Elrod opinion.¹⁵ The language of Elrod describes patronage as "inimical to the process which undergirds our system of government and... 'at war with the deeper traditions of democracy embodied in the First Amendment' ".¹⁶ The "natural order" justices' concern with monopoly is strongly rooted in the First Amendment.

Brennan's opinion in Rutan expands on this point, giving examples of the adverse effects of affiliation pressures on the beliefs and political activities of public employees. Brennan quotes his Elrod opinion to emphasize that "a democratic system requires the unfettered judgment of citizens", a judgment which is infringed by the

¹³ 497 U.S. at 88 (Stevens, J., concurring).

¹⁴ 497 U.S. at 92 (Stevens, J., concurring).

¹⁵ 427 U.S. 357. The opinion quotes Justice Black's Williams opinion, at 393 U.S. 32: "competition in ideas and governmental policies is at the core of our electoral process".

¹⁶ 427 U.S. at 357.

political orthodoxy of ideas that patronage encourages.¹⁷ His Elrod opinion also makes pointed reference to the fact that patronage has been employed to support such totalitarian regimes as Nazi Germany, a strongly negative association between patronage and orthodoxy.¹⁸

In Branti, Stevens emphasizes the connection between patronage and coercion, asserting that sponsorship does constitute coercion. He also asserts that such coercion does not need to be "proven"; all that needs to be shown is that someone has been discharged solely for reasons of political affiliation.¹⁹ Brennan in Rutan emphasizes that the claims of promotion, transfer and recall decisions having no effect on belief and association are not credible; "dead end positions" exert a very real pressure to change behavior to escape such situations.²⁰ Stevens' concurring opinion in Rutan argues that the claim of insignificant burden is contradicted by the "harsh reality of party discipline at the center of Justice Scalia's theory of patronage".²¹

Linked to this disapproval of monopoly is a finding that patronage and the consideration of partisan ties in

¹⁷ 110 S. Ct. at 2736-37.

¹⁸ 427 U.S. at 353.

¹⁹ 445 U.S. at 516-17.

²⁰ 497 U.S. at 73.

²¹ 497 U.S. at 89 (Stevens, J., concurring).

personnel decisions serve no useful governmental purpose. Stevens's Branti opinion asserts that party affiliation has "no relevant ties" to the effective performance of an assistant public defender's job. Only confidential and policymaking positions are sufficiently related to party platforms and functions for such ties to be legitimate employment criteria.²² For all other positions, partisan affiliations are "not relevant to government in its capacity as an employer", according to Justice Brennan in Rutan.²³

It is also argued that there is a strong association between partisan government and poor administration. In Elrod, Brennan cites United Public Workers v. Mitchell and CSC v. Letter Carriers to substantiate the point that "actively partisan government threatens good administration".²⁴ This sounds very much like the Progressive dichotomy between politics and administration, though no direct citation is made to this literature. Brennan supports this view of patronage by emphasizing the history of the Hatch Act, which has limited the political activities of federal employees. CSC v. Letter Carriers is cited as approving the Act as a method of preventing improper influence over the political process:

²² 445 U.S. at 519.

²³ 110 S. Ct. at 2735.

²⁴ 427 U.S. at 367.

The judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences.²⁵

Thus, patronage and partisan influence of or by government employees are seen as two sides of the same coin, that being the corruption of politics and government by a monopoly of views and parties. In Elrod, Brennan refers to the gain provided to representative government by the Hatch Act.²⁶ The recent revisions in the Hatch Act by the 103rd Congress would seem to weaken this argument somewhat, though not at all fatally.

Despite these objections, the majority finding against patronage practices requires cause, and is not automatic. The justices see the appropriateness of such practices in regard to policymaking positions, even though the definition of that term has been troublesome to many. In addition, they emphasize that not all burdens on the First

²⁵ 427 U.S. at 354, quoting CSC v. Letter Carriers, 413 U.S. 548, 564 (1973).

²⁶ 427 U.S. at 370. Sidney Milkis argues that the Act "short-circuited any effort on the part of Roosevelt and the New Dealers to develop a national party machine based on federal government spending and organization", but "was not so clearly a political defeat for President Roosevelt"; FDR was more interested in building an Executive Branch favorably inclined to liberal public policy, in Milkis' interpretation. As a result, FDR helped reduce the role of parties in politics. Milkis, The President And The Parties, pp. 93, 138.

Amendment will make an action or statute unconstitutional; according to Brennan in Elrod, "restraints are permitted for appropriate reasons".²⁷ There is room for compromise and dialogue. Stevens follows this position in Branti, asserting that party may be an acceptable requirement for some offices in order to support government effectiveness and efficiency.²⁸

But the ultimate conclusion is clearly stated by Brennan in the beginning of Rutan: "to the victor belong only those spoils that may be constitutionally obtained".²⁹ The constitutional disability of patronage is thus seen not as the party tie per se, but its use as a dismissal or disqualifying mechanism. These justices are concerned with preventing monopoly and promoting a neutral civil service; a patronage-dominated system is seen as detrimental to government and democracy.

Party Structure and Functions

Both implicitly and explicitly, the "natural order" patronage opinions have much to say about parties as organizations. Parties are understood as more than job-oriented, job-dependent entities; "political parties are nurtured by other, less intrusive and equally effective

²⁷ 427 U.S. at 360.

²⁸ 445 U.S. at 517.

²⁹ 497 U.S. at 64.

methods", according to Brennan in Elrod.³⁰ Solidary and purposive incentives can be as effective as material incentives in promoting and sustaining political parties. Brennan does not accept the position that patronage preserves the democratic process and is the price of the party system, a position for which the respondents quote V.O. Key. Brennan vehemently disagrees, stating that "partisan politics bears the imprimatur only of tradition, not the Constitution". In fact, he feels parties function better without patronage.³¹

This point is made even more explicitly in Rutan. Brennan cites Larry Sabato's Goodbye to Good-Time Charlie: The American Governorship Transformed and a 1959 article by Frank Sorauf to argue that many parties have "thrived" despite the decline of patronage.³² Parties, in Brennan's view, have no required need to use material incentives in order to survive and prosper. An examination of the sources cited, and the broader work of both scholars, leads to a more complex conclusion.

³⁰ 472 U.S. 372-73.

³¹ 427 U.S. at 368-69. The V.O. Key citation is from Politics, Parties, And Pressure Groups, 5th ed., p. 369. Key argues succinctly that parties continue to use and demand patronage, but also states that "fortunately, not all political organizations are corrupt, and over the long run the spoils system has come to operate within narrower bounds". This is the position more of a realist than an enthusiastic supporter of patronage.

³² 497 U.S. at 74-75.

Larry Sabato's work does note that patronage has declined across the nation, and cites the effect of Elrod on that process. He also notes that many governors support Brennan's viewpoint and have strengthened civil service in their states. While noting that patronage can lead to poorly qualified appointees, he emphasizes that political accountability is often reduced by a civil service system. Overall, patronage is more a burden than an advantage for governors.³³

Sabato's position in Goodbye To Good-Time Charlie can be seen as reluctantly supportive of Brennan, but his other writings are much friendlier to patronage. In The Party's Just Begun, Sabato calls for an increase in patronage in order to build stronger parties. He argues that "in the postpatronage age American political parties have become more structurally skeletal in character than before"; less patronage has weakened parties as organizations. In addition to the Progressive reform tradition, Sabato puts the "blame...for the modern continued decline of patronage" directly on the Court. A revival of patronage would, in Sabato's view, "involve more people in the party organizations".³⁴ Brennan's citation of Sabato's particular work supports his argument, but Sabato's later

³³ Larry Sabato, Goodbye To Good-Time Charlie: The American Governorship Transformed, 2nd ed. (Washington, D.C.: CQ Press, 1983), pp. 67-69.

³⁴ Sabato, The Party's Just Begun, pp. 229-32.

writing opposes Brennan's view; the latter's citation is thus less than convincing.

Brennan's citation of a work by Frank Sorauf also raises questions. While noting state and local parties that have thrived without patronage, Sorauf's 1959 article "Patronage and Party" also makes an argument for why many parties have "needed" patronage:

Above all, patronage has generally been the political way of life and the political ally of the local centers of power in their losing battle for political superiority in America. It survives to a great extent in their protest against the growth of national politics and centralized parties in the United States.³⁵

The decline of patronage is seen by Sorauf as leading to more nationalized parties, a point he makes explicitly in his 1960 article "The Silent Revolution in Patronage", in which he argues that parties will not be destroyed by less patronage, but will be more nationalized and disciplined.³⁶ Thus, while he does not call for more patronage, Sorauf views its disappearance as changing parties to more national entities. It is just such national parties that the "natural order" justices seem to favor. Thus, while raising questions, this citation also supports the majority's view of parties.

³⁵ Frank Sorauf, "Patronage and Party", Midwest Journal of Political Science 3 (1959), p. 126.

³⁶ Frank Sorauf, "The Silent Revolution In Patronage", Public Administration Review 20 (1960), pp. 33-34.

If the provision of material rewards through patronage and other means is not a pivotal function of parties, what do parties do? The answer is clearly reflected in the majority opinions: they focus on policy and ideas. The only jobs for which party is seen as an appropriate requirement or consideration are those that entail policymaking and confidentiality; this point is made in Branti and reaffirmed in Rutan.

The center of the "natural order" perspective's view of parties and their functions is a vision of parties as based in ideas and policies, not material employment and rewards. Therefore, appeals to the historical usage of patronage have minimal appeal to these justices, and are not seen by them as strong items for consideration. Parties can and should survive on more than a promise of "you scratch my back, I'll scratch yours". However, the scholarship they cite, and the wider range of scholars, do not necessarily support their viewpoint.

Standards Of Evidence and Burden

The "natural order" perspective adopts a standard of strict scrutiny in the patronage opinions. Brennan's opinion in Elrod cites the Court's opinions in Buckley v. Valeo and the NAACP cases to support a standard of "exacting scrutiny". The claims of the Illinois employees against their patronage-based dismissals are found to meet

that standard.³⁷ Such a standard tends to favor those challenging patronage practices.

In Branti, Stevens expands on the Elrod standard. The proper question to ask in such patronage cases is whether party is "essential to the discharge of the employee's governmental responsibilities". More precisely, the hiring authority must "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved". In the particular circumstance, Stevens sees no such relationship between party affiliation and the responsibilities of an assistant public defender.³⁸

The "natural order" justices have also responded to the "constructed order" justices' reliance on history, custom and tradition as standards of evaluation. In his Rutan concurrence, Stevens emphasizes that the standard is not one simply of history and tradition in the political realm, as Scalia asserts. Instead, "the tradition that is relevant in this case is the American commitment to examine and reexamine past and present practices against the basic principles embodied in the Constitution".³⁹

The standard of the "natural order" justices is one that favors a neutral civil service and individual freedom

³⁷ 427 U.S. at 362-63.

³⁸ 445 U.S. at 518-20.

³⁹ 497 U.S. at 92 (Stevens, J., concurring).

of belief. Parties do have a limited and proper role in this system, but the use of partisan affiliation as a criterion in personnel processes must be strictly scrutinized.

The Role of Government

It is clear that the "natural order" majority in the patronage cases is more strongly inclined to favor claims of constitutional infringement and national interests than they are the avowed interests of state and local governments. In discussing political question and separation of powers objections to the Court's adjudication in Elrod, Brennan emphasizes that these questions are relevant to disputes between coordinate branches of the national government, not to disputes between the Constitution and state governments. Implying that constitutional guarantees limit the power of states, Brennan asserts that "where there is no power, there can be no impairment of power".⁴⁰ This is certainly a nationally oriented position.

This position is also evident in the treatment of state interests in Elrod. To the assertion that patronage insures effective government and the efficiency of public employees, Brennan responds that patronage is a disincentive to such outcomes, resulting in frequent

⁴⁰ 427 U.S. at 351-52.

turnover and hostility bred by the prospect of dismissal. In addition, the argument is violated by the continuance of some employees if they can find sponsorship, and the inadequate training of new employees.⁴¹

With regard to the defense of patronage using governmental interests, Stevens in Rutan asserts that this defense "obfuscates the critical distinction between partisan interest and the public interest".⁴² This is the concern that ultimately lies at the heart of the whole "natural order" position: a concern with a neutral public interest and civil service that promotes maximum political competition and effective government.

The "Constructed Order" Perspective

In contrast to the "natural order" view of patronage, which has held a thin majority on the Court, has been a "constructed order" viewpoint contained in strong and passionately argued dissenting opinions by Powell (Elrod, Branti) and Scalia (Rutan), who have been joined consistently by Rehnquist. These dissents stress the important role of patronage in American political history, and its benefits for the political system. Beyond their view of patronage, they argue that questions regarding its propriety are the proper purview of elected representatives

⁴¹ 427 U.S. at 364-65.

⁴² 497 U.S. at 88 (Stevens, J., concurring).

and the people, not the judiciary. They also favor a reading of the Constitution which supports state authority in this area. Thus, for reasons of tradition and deference to elected branches of government, these justices support a different treatment of patronage.

Party Competition and Choice

The "constructed order" justices evince little concern about the threat of monopoly to competitive democracy. Instead, there is a sense that the current system and traditional practices play important roles in preserving democracy. Powell's dissent in Elrod calls patronage "a practice as old as the Republic" that has been a critical democratizing influence in American politics. He traces patronage not to the Jacksonian period, as Brennan does, but to the Washington Administration; patronage in the Adams and Jefferson Administrations, as well as New York and Pennsylvania state governments, are noted with a citation to Carl Fish's The Civil Service And The Patronage.⁴³ Powell's dissenting opinion in Branti reinforces this view, noting that "patronage is a long-accepted practice that has never been totally eliminated by civil service laws and regulations". To support this

⁴³ 427 U.S. at 376-78 (Powell, J., dissenting).

contention, he cites Eric L. McKittrick's essay on Lincoln's use of patronage in the Civil War years.⁴⁴

Fish's work is generally supportive of Powell's view of the history of patronage. Fish notes that as the first parties began to emerge, "Washington became more of a party man" and was determined to favor only Federalists for appointments. John Adams is also portrayed as removing a number of government personnel "for party reasons". However, Fish argues that the spoils system as such had not yet come into existence at this time; Jefferson is portrayed as its true progenitor.⁴⁵ As for the democratic benefits and necessity of patronage, Fish is relatively equivocal.⁴⁶

Eric McKittrick's essay on Civil War party affairs also supports Powell's argument. McKittrick emphasizes the lack of an opposition party in the South as a critical factor in weakening its war effort, while party competition in the North "was on the whole salutary for Lincoln's government and the Union cause".⁴⁷ With regard to patronage, the absence of political opposition in the Confederate system

⁴⁴ 449 U.S. at 522, and n. 1 (Powell, J., dissenting).

⁴⁵ Fish, The Civil Service and the Patronage, pp. 13-14, 19, 27, 51.

⁴⁶ Fish, The Civil Service and the Patronage, p. 235.

⁴⁷ Eric L. McKittrick, "Party Politics And The Union and Confederate War Efforts", in William Nisbet Chambers and Walter Dean Burnham, eds., The American Party Systems: Stages Of Political Development, 2nd ed. (New York: Oxford University Press, 1975), p. 121.

enabled President Davis to more easily ignore patronage demands -- a costly luxury in terms of political support, in McKittrick's view, since "one administration [Lincoln's] had an intricate set of standards for appraising energy and rewarding it...which was not available to the other".⁴⁸ Patronage is seen as part of the political glue which enables the Union to win the Civil War.

More interestingly, Powell in Elrod discusses the "strengthened parties" that result from patronage in the context of civil service reforms. He cites David Rosenbloom, also cited by Brennan on the history of civil service, to argue that corruption, inefficiency, and the power of professional politicians were the concerns that drove the civil service movement; "perceived impingement on employees' political beliefs was not a significant impetus to these reforms".⁴⁹ Thus, the argument implies, major campaigns against patronage have not been waged on free speech grounds. Similarly, Powell concludes his Branti dissent with the remark that "the First Amendment does not incorporate a national civil service system".⁵⁰

In a somewhat different approach, Scalia's Rutan dissent also takes issue with the majority's view of patronage and politics. Scalia's opinion begins with the

⁴⁸ McKittrick, "Party Politics", pp. 132-33.

⁴⁹ 427 U.S. at 379 (Powell, J., dissenting).

⁵⁰ 445 U.S. at 534 (Powell, J., dissenting).

assertion that judicial appointments have themselves been political and patronage related since the Founding, citing the facts of the landmark Marbury v. Madison case. Seeing such patronage even on the bench, Scalia comments on the majority opinion: "something must be wrong here, and I suggest it is the Court".⁵¹

Scalia's Rutan dissent speaks to the place of patronage and its relation to the merit principle at the heart of the "neutral civil service" concept of public administration. While he admits that the merit principle has generally been favored by events and the American public, he contends there is another point of view, one favoring patronage. He quotes its classic spokesperson, George Washington Plunkitt of Tammany Hall, on its political necessity:

I ain't up on sillygisms, but I can give you some arguments that nobody can answer. First, this great and glorious country was built up by political parties; second, parties can't hold together if their workers don't get offices when they win; third, if the parties goes to pieces, the government they built up must go to pieces, too; fourth, then there'll be hell to pay.⁵²

This is a cogent summation of the "constructed order" view of patronage. These justices are not dismissing civil service, but rather, according to Scalia, the choice between civil service and patronage is simply not clear

⁵¹ 497 U.S. at 93 (Scalia, J., dissenting).

⁵² 497 U.S. at 93 (Scalia, J., dissenting), quoting William Riordon, Plunkitt of Tammany Hall (New York: Alfred A. Knopf, 1963), p. 13.

enough to put forward a single, inflexible constitutional proposition such as the majority's.⁵³

Scalia also takes issue with the majority's view of the First Amendment, and advances a more restricted view in this context. "The provisions of the Bill of Rights", Scalia writes, "were designed to restrain transient minorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms". Patronage is seen by Scalia as such a norm, facing an ambiguous constitutional text. In his view, then, the First Amendment does not constitute an absolute protection for political speech; the context of such speech must be considered.⁵⁴

Complementary to this history are some strong benefits that patronage is seen as providing to the American democratic system. According to Powell in Elrod, patronage (1) stimulates political activity, (2) strengthens parties, (3) gives a needed boost up to minority ethnic groups (Samuel Lubell's The Future Of American Politics is cited to support this point), and (4) builds stable, nonfragmented parties (the Court's Storer opinion is cited to support this point). The majority, seen as "simply

⁵³ 449 U.S. at 94 (Scalia, J., dissenting).

⁵⁴ 497 U.S. at 95 (Scalia, J., dissenting). As noted in Chapter 4, Scalia will take a strong view of the First Amendment when he views the conduct as more private and the regulation or practice overriding political norms.

disparaging" these interests, is viewed as insensitive to political realities.⁵⁵ This emphasis on political considerations is evident throughout the dissenting patronage opinions.

Lubell's work is an appropriate citation, but his full viewpoint is more nuanced than Powell portrays. He does argue that patronage has aided the process of "Americanization" and advancement of immigrants, noting that the early demands of groups are often satiated initially by "an appointment as assistant district attorney" (assistant public defender positions were at issue in Branti). He correctly notes, however, that the same system "obstructs as well as advances minority progress". He also notes the declining influence of patronage brought about by federal largesse and socioeconomic advancement of immigrants.⁵⁶ Thus, Powell's use of this argument may be outdated by events.

Justice Powell in Elrod also cites the issue of suppression of political belief as a red herring. Past cases cited by the majority, such as Barnette, deal with the danger of eliminating political beliefs. In contrast, dismissal decisions and the patronage system in general have not resulted in elimination of beliefs; voting has

⁵⁵ 427 U.S. at 382-83 (Powell, J., dissenting).

⁵⁶ Samuel Lubell, The Future Of American Politics, 3rd ed. revised (New York: Harper Colophon, 1965), pp. 76, 85-86.

been protected since the advent of the Australian ballot, and patronage has in historical fact supported vigorous ideological competition.⁵⁷ Once again, differences between the "natural order" and "constructed order" perspectives appear to center not on the inherent value of competition, but on what political practices nurture such competition.

Party Structure and Functions

To the "constructed order" justices, the practice of patronage is a key function of political parties. Powell's Elrod dissent states: "we deal here with a highly practical and rather fundamental element of our political system, not the theoretical abstractions of a political science seminar".⁵⁸ This reveals the justices' view of the role of material rewards in politics, as well as their separation of political science "theory" and the practical needs of functioning parties. The "natural order" issue-centered conception of parties and politics is seen as not grounded in the concrete challenges of encouraging political activity and support.

In Branti, for example, Powell cites patronage as a primary function of political parties, since parties are formed to place people in positions of power. On this

⁵⁷ 427 U.S. at 387-88 (Powell, J., dissenting).

⁵⁸ 427 U.S. at 381-82 (Powell, J., dissenting); emphasis added.

score, he cites James Jupp's Political Parties.⁵⁹ Jupp's view of the "power" of American patronage is more cautious than Powell's. While he notes that it has been an "essential feature" of American politics, he also notes that the loose party discipline and membership of the American system have avoided machine control that some such as Ostrogorski had feared. He also notes that the patronage-based machines have lost much of their power in the U.S. as a result of "the spread of affluence and the professionalisation [sic] of bureaucracies".⁶⁰ Jupp's work is generally supportive of Powell's argument, but is more skeptical regarding the current role of patronage and the reach of its disciplinary powers.

Political competition and survival among parties are also as much a concern of the "constructed order" justices as of the "natural order" justices; however, they take very different roads to reach that goal and hold different visions of how it looks. According to Powell in Elrod, without patronage, candidates would not be able to acquire the time and money of volunteers, friends and cadres at the local level.⁶¹ Former U.S. Senator Paul Douglas is quoted on this score:

⁵⁹ 445 U.S. at 528 (Powell, J., dissenting).

⁶⁰ James Jupp, Political Parties (London: Routledge and Kegan Paul, 1968), pp. 26-27.

⁶¹ 427 U.S. at 384 (Powell, J., dissenting).

If we [liberals in Congress] are to survive we need some support rooted in gratitude for material favors which at the same time do not injure the general public.⁶²

In other words, practical politics runs on material rewards, not just ideas.

This position is reasserted in Powell's Branti dissent. According to him, "patronage appointments help build stable political parties by offering rewards to persons who assume the tasks necessary to the continuing functioning of political organizations". In addition, patronage helps to avoid factional splintering and builds loyalty to the party; the Court's decision in Storer is cited in support of this assertion.⁶³

The "constructed order" justices are highly suspicious of the majority's general view of parties. Powell's Elrod dissent asserts that "one cannot avoid the impression...that even a threatened demise of political parties would not trouble the plurality. In my view, this thinking reflects a disturbing insensitivity to the political realities relevant to the disposition of this case".⁶⁴ In his Branti dissent, he pointedly emphasizes the same concern: "until today, I would have believed that

⁶² Former Senator Paul H. Douglas (D-IL), letter to the New Republic, July 14, 1952, p. 2, quoted at 427 U.S. 384.

⁶³ 445 U.S. at 527-28 (Powell, J., dissenting).

⁶⁴ 427 U.S. at 383 (Powell, J., dissenting).

the importance of political parties was self-evident".⁶⁵
The majority justices are seen as being implicitly hostile to job-oriented parties and the role of material rewards in parties and politics.

Other pivotal functions of parties are also cited and discussed by the "constructed order" justices. Parties serve as a linkage mechanism, a device that enables our separation of powers system to work. Powell in Branti highlights this point with regard to the elected branches of government:

Over the decades of our national history, political parties have furthered - if not assured - a measure of cooperation between the Executive and Legislative Branches. A strong party allows an elected executive to implement his programs and policies by working with legislators of the same political organization.⁶⁶

Parties are the enablers of the democratic system, and must be allowed to function and support themselves by patronage if the democratic system is to survive.

Looking at current conditions, Powell in Branti sees the linkages provided by party falling apart. Legislators are now frequently free agents, a phenomena that the "constructed order" justices have connected to the decline of patronage. This failure of discipline "has been traced to the inability of successful political parties to offer patronage positions to their members or to the supporters

⁶⁵ 445 U.S. at 528 (Powell, J., dissenting).

⁶⁶ 445 U.S. at 530-31 (Powell, J., dissenting).

of elected officials". Edward Costikyan's Behind Closed Doors: Politics In The Public Interest is cited to support this assertion. The decline of patronage is the reason why, as Powell claims, the majority's decision will "decrease the accountability and denigrate the role of our national political parties".⁶⁷

Costikyan's work, which conveys his experiences as a Democratic leader in Manhattan during the 1950's and 1960's, generally supports Powell's positive view of patronage. Costikyan argues that patronage is a critical factor in the ability or inability of parties or executives to control legislators of their party, and notes that supporters expect rewards for their work.⁶⁸ He also argues that anti-political party good government has failed, and that party government should be tried to improve the cities and their governance.⁶⁹ However, Costikyan does not favor blind party discipline, opposing both reformers and regulars who demanded such discipline in the party. Instead, he favors "small d democracy", moderation, and compromise.⁷⁰ This is not quite the same

⁶⁷ 445 U.S. at 531 (Powell, J., dissenting).

⁶⁸ Edward Costikyan, Behind Closed Doors: Politics In The Public Interest (New York: Harcourt Brace And World, 1966), pp. 253-55.

⁶⁹ Costikyan, Behind Closed Doors, p. 352.

⁷⁰ Costikyan, Behind Closed Doors, pp. 33-39.

vision of party and patronage held by Powell and the other "constructed order" justices.

Scalia's Rutan dissent also sees harmful consequences for parties and democracy in the decline of patronage. He acknowledges the troubled history of political machines, but is also impressed by the fact of contemporary complaints of helplessness voiced by elected officials facing highly cohesive interest groups pushing their narrow agendas. The practice of patronage supports strong parties that can serve as a counterweight to such pressures, and because of this, the practice of patronage should be given the "benefit of the doubt", and its fate should be left to popularly elected representatives of the people.⁷¹

These dissenting justices see patronage as a key component of a democratic system, particularly with regard to small offices and little known candidates. They give such candidates and parties much needed support, and a fighting chance at the polls. To restrict this is to weaken the democratic process, which they charge the majority is doing; by getting voters to vote, patronage performs a public service.⁷²

Powell's opinion in Elrod also responds to the charge that patronage biases or reduces the information received by voters. He portrays it as a source of information that

⁷¹ 497 U.S. at 93 (Scalia, J., dissenting).

⁷² Branti, 449 U.S. at 528-529 (Powell, J., dissenting).

adds to, rather than detracts from, political discourse. It also enables parties to continue a series of essential functions: maintenance of precinct organizations, voter registration, and political favors for citizens. Such functions are not driven simply by ideas, "some academic interest in 'democracy' or other public service impulse".⁷³

Standards Of Evidence and Burden

The "constructed order" justices take the position that the standards of the majority in the patronage cases have been too stringent and strict. Objecting to the standard set forth in Elrod, they were even more opposed to the Branti approach of demanding that party affiliation be an appropriate requirement for the position in question; Powell correctly views this as a "new, and substantially expanded, standard".⁷⁴ As Powell points out, under that standard it is not enough to show that a position is confidential or policymaking; a nexus between political affiliation and the job must be proven. This standard is "framed in vague and sweeping language certain to create vast uncertainty".⁷⁵ A study of post-Branti court decisions by Susan Lorde Martin, cited by Scalia in his

⁷³ 427 U.S. at 385 (Powell, J., dissenting).

⁷⁴ 445 U.S. at 522 (Powell, J., dissenting).

⁷⁵ 445 U.S. at 524 (Powell, J., dissenting).

Rutan dissent a decade later, seems to bear this out. Martin examines post-Branti Circuit Court decisions involving patronage dismissals, and finds confusion, with different Circuits offering conflicting interpretations of the Branti precedent.⁷⁶

In Branti, Powell also disputes the precedents cited for the majority's standard. The pivotal cases cited by the majority, i.e. Barnette, Keyishian, and Perry, did not involve patronage. Nor does the majority address the major governmental interests at stake in the case.⁷⁷ Scalia in Rutan also questions the majority precedents, arguing that the "strict scrutiny standard finds no support in our cases".⁷⁸ Both Scalia and Powell see the majority's argument as being built on faulty precedents. As an alternative, they propose a standard weighted toward the states and their asserted interests.

Powell's Branti opinion asserts such a state-friendly standard as follows: "no constitutional violation exists if patronage practices further sufficiently important interests to justify tangential burdening of First Amendment rights".⁷⁹ Scalia in Rutan proposes a similar standard, arguing that there should simply be a rational

⁷⁶ Martin, "A Decade Of Branti Decisions", cited in 497 U.S. at 111 (Scalia, J., dissenting).

⁷⁷ 445 U.S. at 526-27 (Powell, J., dissenting).

⁷⁸ 497 U.S. at 98 (scalia, J., dissenting).

⁷⁹ 445 U.S. at 527 (Powell, J., dissenting).

connection between the use of partisan affiliation and the government's function as an employer.⁸⁰ Scalia expands on this standard later in the Rutan opinion, drawing his argument from the Court's opinion in United Public Workers v. Mitchell. Under Scalia's standard, the action involved must be reasonably deemed by the legislature to further a legitimate good.⁸¹ This is a relatively easy standard for a state to meet.

The Role of Government

The "constructed order" view is strongly inclined to favor state interests involving patronage. One of the pivotal issues for these justices in the patronage cases is the fact that the patronage system is being struck down by the judiciary, not popularly elected officials. Powell in Elrod states:

This ad hoc judicial judgment runs counter to the judgments of the representatives of the people in state and local governments, representatives who have chosen, in most instances, to retain some patronage practices in combination with a merit oriented civil service. One would think that elected representatives of the people are better equipped than we to weigh the need for some continuation of patronage practices in light of the interests above identified [footnote omitted], and particularly in view of local conditions [footnote omitted]".⁸²

⁸⁰ 497 U.S. at 98 (Scalia, J., dissenting).

⁸¹ 497 U.S. at 102 (Scalia, J., dissenting). See United Public Workers v. Mitchell, 300 U.S. 75 (1947).

⁸² 427 U.S. at 386 (Powell, J., dissenting).

The positions of elected officials, particularly when supported by long tradition, are not to be taken lightly. At the end of Elrod, Powell states that "we should not foreclose local options in the name of a constitutional right perceived to be applicable for the first time after nearly two centuries".⁸³

Powell's opening statement in his Branti dissent speaks directly to the same point: "the Court today continues the evisceration of patronage practices begun in Elrod v. Burns".⁸⁴ A footnote in that opinion bears out his attitude toward patronage and its management: "a strength of our system has been the blend of civil service and patronage appointments, subject always to oversight and change by the legislative branches of government".⁸⁵ Powell proceeds to assert that the Court is unjustifiably removing such decisions from legislative and executive discretion.⁸⁶

By removing this authority, the majority justices damage the ability of elected officials and their parties to govern effectively. According to Powell in Branti, strong parties aid governance by enabling implementation of ideas and platforms, implementation which could be stymied

⁸³ 427 U.S. at 389 (Powell, J., dissenting).

⁸⁴ 445 U.S. at 521 (Powell, J., dissenting).

⁸⁵ 445 U.S. at 525, n. 5 (Powell, J., dissenting).

⁸⁶ 445 U.S. at 525-26 (Powell, J., dissenting).

by a bureaucracy constituted completely by a civil service system. The majority standard would "impose unnecessary constraints upon the ability of responsible officials to govern effectively and to carry out new policies". Powell quotes Charles Peters of The Washington Monthly in this regard.⁸⁷

Scalia in Rutan also stresses this concern. The majority standard is seen as highly intrusive; "government office could not function if every employment decision became a constitutional matter", and a wide degree of deference should thus be given to the government. Affiliation as well as speech are reasonable grounds for dismissal if reasonably necessary to enable effective government.⁸⁸

Conclusions: Patronage And Party

An examination of the patronage opinions of the justices reveals a fundamental and consistent division regarding the practice of patronage. While the "natural order" is prone to restrict patronage, the "constructed order" is much more likely to view patronage positively, and leave patronage decisions to be made by the democratic process and elected institutions.

⁸⁷ 445 U.S. at 530 (Powell, J., dissenting).

⁸⁸ 497 U.S. at 99-100 (Scalia, J., dissenting).

The "natural order" view of patronage is highly negative, and seeks to reduce its role in the operations of government. This view is rooted in a concern that favors political competition and fears the possibilities of monopoly, a concern that also translates into a vision of parties as entities not dependent on material incentives. In addition, these justices hold patronage to a high standard of review and put little stock in the state interests advanced to support the practice of patronage. All of these positions are centered in a First Amendment conception of democracy that is grounded in maximum competition and political opportunity.

Despite its consistent majority on the Court in recent decades, this view of patronage has not been the only one among the justices. There has been a consistent undercurrent of three and four-justice dissents, which have defended the practice of patronage at length as part of the historical fabric of American politics. Their "constructed order" view is rooted in very different assumptions about democracy, parties, and state governments.

Like the "natural order" perspective, the "constructed order" perspective's concern with patronage is both a product of and a foundation for particular views of democracy, parties, and the role of the states. The "constructed order" has a positive view of job oriented parties and the role of material rewards in politics. As a result, they evaluate patronage practices by a more lenient

standard. They also favor the authority of elected representatives to decide the ultimate political parameters of patronage practices. In sum, the "constructed order" view takes a sanguine view of the political status quo, and argues for minimal judicial interference in this realm.

Beyond the divisions on the Court, one must also ask how the opposing views of patronage hold up under the microscope of political science. Here one finds many of the same divisions. On the one hand, a number of political scientists appreciate the importance of material rewards in building strong parties; Larry Sabato is particularly forthright in that regard.⁸⁹ But a number of political scientists have also pointed out the down side of patronage and the fact that the decline of parties is rooted in more than a loss of patronage.

Factually, the pro-patronage view may well have the better argument. The survival of a functioning party organization is substantially aided by the promise of jobs, even if parties can survive in some form without such incentives. Few if any political scientists have taken a position as ideological and extreme as that of the "natural order" justices.

With regard to entrenchment and the stifling of alternative views, the "natural order" justices present little or no evidence to build their case against

⁸⁹ Sabato, The Party's Just Begun, pp. 230-32.

patronage. While successful machines have certainly employed patronage to their advantage, it does not necessarily result in party entrenchment. Those with patronage have been thrown out by outsiders in many cases. Thus, while the "natural order" view may be correct, it is by no means an iron law; the entrenchment is vulnerable to collapse. The "constructed order" justices are also largely correct in their assertion that the moves to reform patronage have had much more to do with "effective government" concerns than they have with efforts to protect speech and alternative views.

The "natural order" justices make significant use of political science literature in their opinions. Brennan in Elrod cites Susan and Martin Tolchin's To The Victor as well as works by Fish, Rosenbloom, and Friedrich and Brzezinski⁹⁰, while Stevens' concurrence in Rutan cites Richard Hofstadter's classic work The Idea Of A Party System on the Founders' view of parties as a pathology, not a political norm. But the "constructed order" justices cite an equally wide literature, and appear to have the better of the argument.

In conclusion, the patronage opinions evince a strong division among the Justices, one which reflects very different understandings of the workings of parties and politics. To this point, the dominant view has been one

⁹⁰ 427 U.S. at 353.

that sees patronage as leading to monopoly and corruption and is a view decidedly unfriendly to job oriented parties, yet one that finds much support in the public psyche. The dissenting view, however, probably has the better grasp of political realities. It may also find its way to a majority in future cases before the justices, as the majority of justices who joined the Elrod, Branti, and Rutan majorities, i.e., Justices Brennan, Marshall, and White, have now departed from the Court. However, it is unlikely to find itself in a majority in the "court" of public opinion any time soon. A good case is made for patronage by the "constructed order", but the momentum of public opinion appears to favor the negative view of patronage espoused by the "natural order" justices.

CHAPTER 6

CONCLUSIONS-THE "NATURAL ORDER", THE "CONSTRUCTED ORDER", AND THE IMPLICATIONS FOR PARTIES AND POLITICS

This dissertation has examined a series of Supreme Court opinions involving ballot access, party organization and nomination procedures, campaign finance, and political patronage, and found that divisions within the opinions reflect two "schools of thought" regarding parties and electoral competition. This chapter evaluates the implications of that finding. It first assesses the significance of these schools of thought for efforts to build stronger parties, using the criteria specified in Chapter 1. It then examines the patterns of judicial voting in the cases, in order to consider the short and long term future of each school of thought in the deliberations of the Court. The next section weighs the current literature in this area in light of the findings here. The final section measures the overall significance of the schools of thought and the justices' opinions for electoral regulation, the future of political parties, and American politics as a whole.

Assessing The Perspectives: Do They Strengthen Parties?

Most of the scholars who study political parties share a belief that parties play a critical role in American democracy and are concerned with the health of the party

system.¹ The strong party attributes assessed here are derived from the work of James Ceaser and Larry Sabato, supplemented by questions designed to give greater definition to the basic attributes.

The interpretations of the justices are also critiqued from the perspective of the "responsible party" model, an important variant of the "strong party" model. Those who advocate for "responsible parties" believe that parties should take clear and differentiated policy stances, nominate candidates who share those stances, and work to enact those policies when their nominees are elected to office. In sum, they believe the primary function of parties should be programmatic, not simply electoral.²

The critique reveals that the differences between the justices represent a debate between direct democracy and less direct representative processes, as the "natural order" doubts most government efforts to shape partisan organization or electoral procedures for the good of the "beneficiaries'", while the "constructed order" puts greater faith in the decisions of elected representatives. Their debate is less over the outcome of politics per se, than over the processes used for political choice. In this regard, the "natural order" creates more favorable opportunities for parties to strengthen themselves.

¹ Sabato, The Party's Just Begun, p. 2.

² See APSA, Towards A More Responsible Two Party System, for the classic statement of this perspective.

Ultimately, however, neither perspective creates a fully supportive environment for stronger parties.

The Linkage of Citizens and Government

The first attribute of a strong party is a clear and continuing role in linking citizens with their government.³ Such linkage involves questions of citizen opportunity to participate in and influence the parties, as well as the perceived legitimacy of the electoral process. Do parties have full opportunity to offer themselves to the voters? How should citizens participate in party decisionmaking? How should parties be accountable to citizens? Do citizens feel the electoral process is legitimate? The perspectives diverge in their answers and their understanding of the role parties should play in linking citizens and government.

The ability of parties to offer their candidates to voters is essential to their role as linkage mechanisms. If this avenue is blocked, parties cannot perform this function effectively. The "natural order" is very sensitive to this issue, demanding full opportunity for all parties to compete at the voting booth, with Justice Marshall the strongest advocate of this position. The "constructed order", in contrast, asks whether a statute provides

³ For example, John Bibby calls the linkage function "the fundamental role of parties in a democratic society". Bibby, Parties and Politics, p. 5.

sufficient opportunity for serious candidates with substantial public support to gain a place on the ballot. As long as the elected representatives of citizens have allowed for such opportunities, minor parties that fail to qualify for ballot position are not seen as being unfairly disadvantaged. The two perspectives disagree as to what constitutes sufficient support ("constructed order") or sufficient opportunity ("natural order") for party candidates to be placed on the ballot.

The history of widespread regulation of candidate (and therefore party) access to a ballot position reflects a triumph of the "constructed order" perspective's emphasis on demonstrated public support. Ballot access regulations were first enacted in part to enhance the legitimacy and stability of the existing political system. The use of party-printed ballots for much of the nineteenth century had made voting subject to much documented fraud and intimidation.⁴ The enactment of secret ballot laws, while reducing such corruption, also introduced standards of access, standards that could be used to disadvantage minor parties seeking a place on the ballot.⁵ While the

⁴ Frank Sorauf, Party Politics In America, p. 227. V.O. Key emphasizes the concern with secrecy as a pivotal factor in the pressure for a government-printed ballot. Key, Politics, Parties, and Pressure Groups, 5th ed., p. 639.

⁵ J. David Gillespie, Politics At The Periphery: Third Parties in Two-Party America (Columbia, SC: University of South Carolina Press, 1993), p. 81. See also Key, Politics, Parties, and Pressure Groups, 5th ed., p. 641. Key notes

legitimacy of such practices is contested in both the Court and politics, many restrictive statutes remain on the books. Thus, parties must demonstrate public support before they can win a place for their candidates on the ballot.

Parties may also link citizens and government through citizen participation in party decisionmaking. The opportunity for such participation is influenced by the structure of party organization and nominating processes, and by what entity has the authority to shape those structures. The "natural order" perspective argues that parties, particularly national party organizations, should have the authority to control their own structures and processes, since governance by states could distort the will of the party. As the justices' decisions demonstrate, however, this rationale can approve both restricted (La Follette) and expanded (Tashjian) participation in party affairs. The "natural order" has no single model of intraparty participation.

The "constructed order" perspective takes a different approach to questions of citizen participation in parties. The main emphasis is on maintaining a stable and orderly electoral system which does not confuse the voters or make party labels meaningless. This emphasis views government as the proper authority to regulate party affairs and nomination procedures; those who challenge such regulations

that both organizational and signature requirements can be used to disadvantage minor parties.

have the legal burden of proof in contesting them. Like the "natural order", however, there is no one participatory model. In dissents, justices with this view have supported both open primaries (La Follette) and closed primaries (Tashjian).

The avenues of citizen participation in party decisionmaking, and the locus of authority for shaping these avenues, are intimately related to a third linkage issue: how parties are to be accountable to citizens. The "natural order" believes accountability is best insured by leaving the decision to the parties. The "constructed order", in contrast, views elected representatives as the most legitimate and effective locus of accountability for citizens, and entrusts them with the power to regulate party organization and nomination procedures. Government, not a national or state party committee or convention, is the proper decisionmaker for ensuring that the party system is accountable to its citizens.

In recent decades, the "natural order" view of parties as the proper center of authority and accountability in regard to party organization and nomination procedures has held sway among the justices, but its fortunes in politics have been less clear. While the justices' decisions have generally favored substantial deregulation of parties and nomination procedures and the nationalization of the presidential selection process, extensive state regulation

of parties persists.⁶ Thus, the "constructed order" approach of government management, which dominated politics from the Progressive Era through 1968, has not disappeared, though the justices' decisions and the presidential selection process reforms of 1968 and beyond have placed it on the defensive.⁷ Neither perspective, however, unequivocally favors expanded citizen participation; both

⁶ Larry Sabato, while noting with optimism the positive implications of decisions like Tashjian for party freedom, still wrote the following in 1988: "In this era when 'less government' is the premiere political mantra, it is appalling to discover how overregulated the parties are in most states". He cites tabular data on state laws compiled by the Advisory Committee on Intergovernmental Relations (ACIR) to support this assertion. Sabato, The Party's Just Begun, pp. 201-5. As noted in Chapter 1, Leon Epstein, Jerome Mileur, and other scholars are also skeptical of how much farther the Court will proceed in deregulating parties and nomination procedures.

⁷ The history of the Wisconsin open primary and the national Democratic Party is indicative of the political limits of party deregulation. While the national party was successful in contesting the principle of national control over state primary rules in Democratic Party v. Wisconsin ex rel La Follette, which allowed the Party to prohibit Wisconsin from choosing its presidential selection delegates through an open primary, they have been led to compromise in practice. While Wisconsin Democrats had to choose delegates by closed caucus procedures in 1984 (Bibby, Politics and Parties, p. 66), by 1988 the Party had reversed itself and decided to permit Wisconsin's continued use of the open primary. Jewell and Olson, Political Parties And Elections In American States, 3rd ed., p. 271. A full account of the genesis of the Wisconsin controversy is provided in Gary Wekkin, Democrat versus Democrat: The National Party's Campaign To Close The Wisconsin Primary (Columbia: University of Missouri Press, 1984).

For broad discussions of the 1968 reforms, and critiques of their impact, see Austin Ranney, Curing The Mischiefs of Faction; Ceaser, Reforming the Reforms; and Nelson Polsby, Consequences of Party Reform (New York: Oxford University Press, 1983). The retreat from the early reforms in more recent years reflects the continuing contest between the two viewpoints examined here.

ultimately allow the favored decisionmaker to choose either expansion and contraction of participation in party organization and nominating procedures, possibly limiting the linkage between citizens and government.

All of the issues above shape how citizens perceive the legitimacy of the current party system, the ultimate test of how well a political system is linking its citizens and government. For the "natural order" perspective, a legitimate electoral system provides full opportunity for parties to offer themselves to the voters as governing coalitions and vehicles for citizen participation.⁸ This view questions the legitimacy of a state-controlled party system and electoral process. It contends that many regulations are enacted by state legislatures dominated by the two major parties, domination verging on monopoly. This monopoly can lead to regulations that discriminate invidiously against minor parties or the bearers of unpopular ideas. As a result, the "natural order" questions how accurately the current system links citizen desires

⁸ This solicitude does not, however, extend to the practice of party patronage. The "natural order" sees patronage in personnel decisions involving nonpolicymaking employees as illegitimate, since it stifles the free speech of personnel and hires people on the basis of party and not competency, which is seen as leading to less effective governance. For this perspective, patronage is not democratic and does not lead to fairly administered (read nonpartisan), legitimate government. Instead, it biases and monopolizes government employment and policy. In contrast to their other positions, the "natural order" does not view parties in a positive light when it comes to linking citizens and government through patronage.

with political outcomes, raising issues of systemic legitimacy.

Elected and representative legislatures, not parties, are the heart of systemic legitimacy and citizen linkage with government for the "constructed order". For this perspective, government interests in protecting the integrity of the political system and preventing voter confusion are intertwined with the preservation of a legitimate system. Parties are seen as less accountable to citizens, and thereby are less reliable sources of systemic legitimacy than popularly elected representatives of the people.⁹

The campaign finance system is an area in which both perspectives find common ground regarding the legitimacy of representative processes structuring how campaign money is contributed and spent. The perspectives do not, however, endow this governmental role with equal power and legitimacy. The "natural order" sees regulation as a proper way to ensure a democratic electoral process only where the

⁹ Patronage practices are an exception to this skepticism. The "constructed order" sees patronage as a proper tool of democratic governance, one with long historical roots. Patronage helps the government to represent the people who elected the government, and increases governmental legitimacy by providing opportunity for a wide range of individuals to serve in the government. In this area only, the "constructed order" favors a stronger opportunity for parties to link citizens and government. This perspective has been in the minority among the justices, however, and has not been favored by recent historical trends. Thus, patronage is currently not a viable major strategy for parties to strengthen themselves as linkage agents between citizens and government.

danger of corruption clearly exists: such danger is present in corporate wealth and large contributions to a political candidate.¹⁰ The "constructed order" perspective accepts a wider government role, being willing to allow government regulation of all but direct political expenditures (and White will even accept that level of regulation) in order to protect the electoral process.

The question of the legitimacy of parties and the electoral system has been a lively one throughout American history, and the debate is more active than ever today. Americans have long had a love-hate relationship with parties, both participating in and distrusting their activities. While the "natural order" perspective on party legitimacy has held sway on the Court, modern public opinion is dominated by the strong suspicion of parties first nurtured in the Progressive Era. As a result, parties are not likely to be seen as fully legitimate centers of authority over the electoral process, and are unlikely to gain complete autonomy in structuring themselves to link citizens and government.¹¹ Thus, neither perspective has

¹⁰ The use of money in general is not seen as corrupting, but as a form of free speech. Parties as institutions are seen as legitimate actors in the process, but the "natural order" does nothing to guarantee any special campaign finance role for them.

¹¹ For a pessimistic view of public opinion on parties and its implications for party "deregulation", see Sabato, The Party's Just Begun, p. 132. The historical record reveals that the general public has also been concerned with the legitimacy of campaign finance practices in recent decades, spurred on by many public interest

dominated the debate over the legitimacy of the party system and the electoral process.

Ultimately, both perspectives argue that their positions on the structuring of parties and the electoral process help to ensure the linkage of citizens and government. The "natural order" is grounded in a view that favors maximum opportunity for largely autonomous parties to reach voters and choose their own structures and procedures, but also favors partially regulated money and nonpartisan governance as characteristics of a legitimate political system. Their ballot access and nomination positions (the former often in dissent) generally favor the strengthening of parties as linkage agents, but their campaign finance opinions can be seen as neutral, and their patronage decisions resist that avenue of "linkage".¹²

organizations like Common Cause and the Center For Responsive Politics; witness the popularity of books such as Philip Stern's The Best Congress Money Can Buy (New York, NY: Pantheon Books, 1988). The calls for continued reform indicate that the problem of legitimacy in this area is far from solved; reform efforts are likely to engender long term constitutional conflict with the First Amendment free speech guarantee.

Party patronage has also been in heavy disrepute since the Progressive Era. With regard to the decline of patronage in recent decades, see Sabato, The Party's Just Begun, p.231. For an argument that a significant amount of patronage persists, even after the Rutan decision, see Anne Freedman, Patronage: An American Tradition (Chicago, IL: Nelson-Hall, 1994).

¹² As noted, the ability of parties to choose their procedures may be a double-edged sword in terms of linkage; some parties may expand citizen opportunities, while others may restrict them.

The "constructed order" views controlled opportunity, state managed party organizations and nomination processes, and well regulated money as reflective of a legitimate democratic system. Parties are not given a great deal of freedom as linkage agents, except in the area of patronage, which a number of analysts do see as critical to building parties and democracy.¹³ While the "natural order" perspective has generally had the advantage in modern political debates and practice, the "constructed order" perspective has strong and persistent roots.

In overall terms, the ability of parties to serve as agents of popular linkage is generally enhanced by the "natural order" perspective, although the possible exception of patronage is an important one. Nonetheless, parties must take advantage of the freedom provided by the "natural order", and must also cope with the increased restriction of patronage. The "constructed order" position limits the linkage ability of minor parties at the ballot box, and has seen elected representatives as the more legitimate fulcrum of linkage between citizens and government, except where patronage is concerned. Party ability to link citizens and government has thus been both enhanced and compromised by the justices.

¹³ Larry Sabato is the most visible spokesman for this cause, calling for an increase in patronage positions in government. Sabato, The Party's Just Begun, pp. 229-32.

The Contesting of Elections

In addition to linking citizens and government, strong political parties actively contest elections. What types of candidates do the parties offer to the voters? Is there an opportunity for all parties to compete for support? Do parties have sufficient resources to contest elections? The two perspectives among the justices come to different conclusions as to the viability of the political status quo in providing full opportunities for parties to contest elections. The "natural order" is generally skeptical of the current state of party competition, while the "constructed order" has a positive view of the party system.

The "natural order" is most concerned about the ability of legitimate candidates and parties to gain a place on the ballot. Limits on who voters may select constrain the range of individual character and talent, and political parties, available for election. The "natural order" views these limits as an unfair monopoly for the major parties, since alternative candidates and minor parties are both disadvantaged by ballot access restrictions. This perspective would give more parties the chance to compete for electoral support, creating a positive environment for stronger party competition.

The "constructed order" views the ability of candidates and parties to win access to the ballot under current regulations in a more positive light. Restrictions

on ballot access ensure a stable and orderly electoral process by preventing damaging candidacies and favoring candidates with strong public support and good qualifications. Impeding certain candidacies and parties, however, weakens their ability to gain strength by contesting elections.

Clearly, ballot access regulation reduces the range of candidates and parties who may contest elections. Whether such regulation is responsible for the failure of third parties and the persistence of a "monopoly" two-party system in America is debated by the justices and students of politics.¹⁴ In practice, however, such regulations remain, supported by the majority of justices and the political system.

The choice of candidates to contest elections is also at the center of the party organization and nomination procedures opinions, and the debate between the two perspectives is focused on the question of what entity has

¹⁴ Many leading scholars contend that there are multiple causes for two-party dominance, including their capacity to absorb protest movements, the existence of the direct primary, ideological eclecticism, and coalitional flexibility. Bibby, Politics and Parties, pp. 39-43. As Bibby notes, Leon Epstein makes a strong argument for the primacy of the direct primary as an explanatory factor. Epstein, Political Parties In The American Mold, pp. 241-44. For arguments that put greater, though not exclusive weight, on ballot regulations as a causal factor, see Joseph F. Zimmerman, "Fair Representation for Minorities and Women", in Wilma Rule and Joseph F. Zimmerman, eds., United States Electoral Systems: Their Impact on Women and Minorities (New York, NY: Greenwood Press, 1992), pp. 3-11, and Gillespie, Politics At The Periphery.

the authority to structure candidate choice. The "natural order" views the choice of candidates as best left to the party organizations, particularly in the case of presidential selection. This perspective would clearly enhance potential party ability to contest elections by opening the door for a stronger party role in nomination procedures and candidate choice.¹⁵

The "constructed order", in contrast, argues that giving state or national parties more control over candidate choice and nomination procedures will produce candidates who do not reflect the choice of the citizens, and are therefore less representative in character and behavior. Their main concern is that candidates are chosen by citizen-authorized procedures; for the "constructed order", the character and behavior of candidates is more of a public, governmental concern. The choice of candidates by parties should not be a fully autonomous process.

The historical record reflects the fact that states have been active in structuring parties and the nominating process since the Progressive era. Many politicians and political scientists have taken issue with this control on the grounds that it undermines parties and produces candidates who have fewer party ties or loyalties; they

¹⁵ This opportunity does not guarantee increased party influence, however, since the current electoral system is likely to remain centered on individual candidates, not parties. Party organizations do have an uphill fight in this area, even with the deregulation enabled by the justices.

argue that returning control to parties will help to "renew" parties as organizations, producing better candidates and government.¹⁶ The public mood, however, favors the continuance of the direct primary and government regulation of the nominating process. Thus, despite the increased party autonomy enabled by the recent decisions of the justices, the future appears to favor only a limited resurgence of party influence in candidate selection.

The ability of parties to contest elections is also fundamentally shaped by their ability to obtain and utilize essential electoral resources, particularly money and campaign workers. With regard to campaign finance, both the "natural order" and "constructed order" perspectives perceive a need for government regulation, to protect the electoral process from corruption by unregulated contributions to candidates from secret sources. While the "natural order" is still less willing than the "constructed order" to entrust government with regulatory power, neither perspective advocates a stronger or more explicit role for parties in the campaign finance arena; they are neutral at best to the historical changes that have reduced the role of parties as institutions in fund raising.

An examination of modern campaign finance regulation reveals that the system has reshaped the pathways of

¹⁶ For examples of these arguments, see Sabato, The Party's Just Begun, pp. 205-12 and passim; Sorauf, Party Politics In America, pp. 220-24; and the publications of the Committee For Party Renewal.

campaign funds, but not the fundamental dominance of money in political campaigns; campaign contributors have found alternate avenues for their financial support.¹⁷ While parties have taken on an expanded role in recent decades through "soft money" and congressional campaign committees, they still have fewer resources for contesting elections than the now-dominant candidates, who raise most of their campaign funds from individual contributors or political action committees (PACs).¹⁸ The only notable impact of the justices' decisions has been indirect: the "soft money" loophole, which has led to a larger party role in campaign finance, can be seen as a result of the FECA restrictions upheld by the Court.

The issue of patronage is intimately related to the availability of another resource which parties have historically needed to contest elections, campaign workers. The lure of a government job has frequently been an attractive incentive for an individual to help a party

¹⁷ Frank Sorauf emphasizes the quick pace of "political learning" by participants in the post-FECA campaign finance environment, and the resulting shifts in campaign money, in Inside Campaign Finance: Myths and Realities.

¹⁸ Sorauf notes, for example, that in 1989-90 congressional candidates received 53% of their contributions from individuals and 32% from PACs. Party committees contributed only 1% of the total. Sorauf, Inside Campaign Finance, pp. 30-31. The power of the party committees is still significant, however, in their strategic contributions to particular candidates. In this regard, see Herrnson, Party Campaigning in the 1980's, and Herrnson, "The Revitalization of National Party Organizations".

campaign and get out the vote on election day. The "natural order" is very skeptical of this partisan use of government personnel positions to obtain campaign support. They argue that hiring for all but high policymaking positions should be based on merit, since good government is a product of neutral competence. This restricts a traditionally important campaign resource for many parties.

The "constructed order" perspective takes a diametrically opposed view of the desirability of patronage. Patronage is seen as a historically legitimate practice, and party ties are seen to be helpful in the selection of government personnel, a way of enabling the government to carry out the platform of the party in power. On the Court, however, this pro-patronage position has not held the day.

In historical terms, patronage has been practiced throughout American history, though its reach has been dramatically reduced by state and federal civil service systems. These systems are the product of fierce criticism of patronage hiring by reform movements since the late nineteenth century, critiques which continue to the present day and are supported by public opinion.¹⁹ In this regard, the "natural order" is probably more in line with public sympathies in its desire for a nonpartisan government

¹⁹ Sabato, The Party's Just Begun.

service, but the "constructed order" still stresses the usefulness of patronage in dissenting opinions.²⁰

In summary, the "natural order" argues that parties should have maximum opportunity to appeal to the voters and the power to determine their own electoral strategies and procedures, both of which would aid parties in contesting elections. With regard to other resources, however, parties are given no special role in campaign finance contests, and party campaign workers are reduced by the restrictions on patronage. The "constructed order" perspective, in contrast, approves of structuring parties and their ability to contest elections. Partisanship is, however, seen as a legitimate consideration in personnel decisions, giving some comfort to parties. Thus, while the "natural order" argues for greater party ability to contest elections, both perspectives support some type of increased role for partisanship in the political process.

The Management of Political Conflict

Beyond linkage and the contesting of elections lies another institutional attribute of a "strong party": the ability to manage political conflict by aggregating interests and enabling needed political change. The perspectives disagree over what level of party competition

²⁰ With a decreased reliance on individual volunteers in modern high-tech campaigns, the decline of patronage may not be as serious a resource deprivation for parties as it would have been in earlier, pre-television decades.

promotes a healthy level of conflict resolution and political change. While the "natural order" argues that third parties play an essential role in achieving these goals, the "constructed order" asserts that the current two-party system has been effective in promoting compromise and change.

Party organizational structures and nomination procedures, by shaping the character of party decisionmaking and candidates, strongly influence how parties aggregate interests and enable change. The "natural order" argues that the capacity of parties to manage and guide conflict is damaged by state-imposed organizational requirements for parties and nomination procedures. Parties must be free to structure themselves and choose candidates for office if they are to evolve politically and serve as effective managers of changing public demands and political conflicts.

The "constructed order", in contrast, argues that state party organization and nomination procedure statutes have a positive, not a negative, effect on the ability of parties to unite interests and enable change. These statutes implicitly reflect the political choices of state citizens, choices that would be impeded by unregulated party activity. For the "constructed order", the main locus of conflict resolution and change is representative government, not political parties.

In historical terms, the survival and evolution of the two-party system suggests to many students of parties that their organization and nomination systems have been roughly effective in uniting conflicting interests and promoting necessary political change. The "natural order" argues against this view, asserting that dissenting candidates and ideas, as well as the true wishes of parties, can be stifled by state-imposed structures, thereby warping the shape of interest aggregation and change. While this view has dominated the Court, significant state management of the nomination system persists in the form of the direct primary.²¹

The issue of ballot access goes to the heart of interest aggregation and the opportunities for political change. The "natural order" perspective argues that limits on ballot access, like state-constructed nomination procedures, can stifle dissenting opinions and alternative perspectives, in this case by obstructing the access of minor party candidates to a place on the ballot. This limits the range of interests addressed by the party system, and affects the amount of political change. As a

²¹ The dominance of the political system by the Democrats and Republicans since 1860 is viewed as a sign of political monopoly by a number of commentators, including Gillespie, Politics at the Periphery. Most political scientists, however, appear to agree with Howard Penniman, Sait's American Parties, that the dominance of the two parties, and the weakness of most third parties, is a result of political forces, not legally constructed monopoly status.

result, the ability of the party system to manage conflict can be impaired.

The "constructed order" asserts that government management of the ballot promotes the uniting of interests and needed political change, by providing voters with a meaningful choice of alternative candidates, rather than a clutter of numerous candidates. From this viewpoint, third parties damage rather than enhance the ability of the political system to aggregate conflicting interests in an orderly fashion. As earlier chapters have noted, this perspective is more concerned with promoting stability than encouraging change.

Historically, it has become more difficult for minor party candidates to gain a place on to the ballot and offer voters an alternative group(ing) of interests and platform for change. This is in part a consciously sought result of Progressive era electoral reforms, which were responding to the growing strength of the Socialist Party and other third parties at the turn of this century.²² With regard to political change, however, a strong argument can be made that the perspectives of third parties have in many instances been adopted by one of the major parties in later

²² Gillespie, Politics at the Periphery, pp. 34-35.

years, allowing for significant change under the existing system.²³

Party campaign finance and patronage practices also shape the scope and direction of political change. For the "natural order" perspective, both areas can be properly regulated in order to prevent corruption that would pervert political speech, political choices, and long-term political change. The "constructed order" perspective, however, sees patronage as enabling, rather than perverting, government policy and healthy long-term political change. Partisanship is seen as offering a clear program, endorsed by the voters, which can structure the choice of government personnel to effect the changes sought by voters.

While the regulation of campaign finance has been relatively neutral to parties as agents of change, the restriction of patronage does limit the ability of parties to influence change, by restricting the partisan character of government service. The historical record on patronage argues for both perspectives, from different vantage points. The "natural order" perspective seems confirmed by the corruption and entrenchment that patronage can enable

²³ V.O. Key asserts that minor parties often reflect tensions within the major parties over issues, and that the issues are ultimately addressed by the major party. Key, Politics, Parties, and Pressure Groups, 5th ed., pp. 280-81. Sorauf questions the idea that third parties "force" major parties to address issues, asserting that public pressure and readiness is the causal factor for major party action on issues. Sorauf, Party Politics In America, p. 48.

in the form of political machines.²⁴ Such machines were frequently not known for their political openness. At the same time, the "constructed order" perspective correctly reflects that patronage has also performed positive functions, including the enactment of political positions into government programs, enabling political change.²⁵

In sum, the two perspectives differ notably on the role that parties should play in managing political conflict and change. The "natural order" is skeptical of government management of the ballot and party procedures, seeing them as blocking or perverting the ability of parties to aggregate interests and manage change. With regard to campaign finance and patronage, however, the "natural order" sees a lesser role for partisanship in governmental administration, and a greater danger to long-term changes desired by the public. The "constructed order" is much more sanguine about the amount of interest aggregation and change enabled by our partially state-constructed system, particularly as expressed by elected

²⁴ For historical background on the relationship between patronage, political machines, and corruption, see Steven P. Erie, Rainbow's End: Irish-Americans and the Dilemmas of Urban Machine Politics, 1840-1985 (Berkeley and Los Angeles: University of California Press, 1988); Freedman, Patronage: An American Tradition. For the classic arguments in favor of patronage, see Riordon, Plunkitt of Tammany Hall.

²⁵ See Riordon, Plunkitt of Tammany Hall; Sabato, The Party's Just Begun, pp. 229-32.

representatives; parties have a more controlled role, except in the area of patronage.

The Guidance of Government and Public Policy

Once a party has succeeded in electing its candidates to office, it faces the task of trying to govern the political system. In this regard, a strong party is one which offers a platform, elects officeholders who work to enact the platform, and supplies individuals to staff government and implement the platform. While the two perspectives considered here are both concerned with this aspect of party affairs, they do implicitly support different aspects of "party government". The "natural order" emphasizes the ideological role of parties, while the "constructed order" emphasizes the role of partisanship in governance.

The "natural order" argues for a multiparty system where governing power is not monopolized and parties stand for particular ideas and policies. The issue of ballot access reflects this concern with achieving a nonmonopolized governmental system. A system open to all candidates and parties is likely to represent a broader range of ideas than the current two-party system, and platforms will be more meaningful. The stress is on platforms rather than their implementation.

The "constructed order" puts less stress on platforms, but more emphasis on the choices made by democratically

elected partisan officials, even if those choices do not rigorously adhere to party platforms. Ballot access regulation, for example, is viewed as essential to an effective democratic system. Parties in this perspective are given the chance to govern only if they can demonstrate credible public support.

The different types of party systems nurtured by these views of ballot access result in different patterns of power sharing and opportunities for parties to govern. The "natural order" perspective makes it easier for more parties to pursue governing power, while the "constructed order" encourages more controlled access to governing authority. In so doing, the former perspective presents more opportunity for parties to strengthen themselves in this area.

Government regulation of party organization and nomination procedures also shapes the type of party governance we receive. The ways in which parties structure themselves and candidates seek their nominations shape the party platform, the skills of those elected to office, and the connections between the two. The "natural order" perspective argues that allowing parties to choose their own structures and have a major voice in nominating procedures will produce a more unified party position and more effective governance. For the "constructed order", state power in this area is tied to the ability of citizens to structure their politics through the choices of

legislators. A state-structured process will ensure that the results accurately reflect public choices, and thereby produce the type of public officeholders and policy platforms that the public desires. Parties are seen as properly having an important, but ultimately subordinate, role in that structuring process.

Historically, the choices of party structure and nomination procedures have had a major effect on governance. As James Ceaser has argued, the modern selection process tends to weaken the tie between Presidents, other party officeholders, and parties, thereby making party governance more difficult.²⁶ The "natural order" perspective, which favors more party control, and the "constructed order" deference to state control both offer the opportunity for stronger party government, but the former gives parties more freedom to use that opportunity.

The practice of patronage is intimately related to the issue of governance and the role of political parties. The "natural order" sees patronage as an obstacle to effective government administration and an infringement on the free speech of government personnel. Thus, parties have a role in advocating and working to enact policy platforms, but partisanship stops at the door of administrative

²⁶ Ceaser, Reforming the Reforms, p. 109.

implementation; party government does not extend beyond policymaking.

The "constructed order" is more sanguine about patronage, seeing it as a positive force for carrying out the platform of the party in government. In contrast to its views on ballot access and nomination procedures, the "constructed order" supports a role for partisanship and parties in choosing government personnel. Partisan control and authority is proper if it is embodied in democratically elected officeholders, rather than mere organizations contesting to control government. In this way, their stance is consistent with the "government-centered" deference of their other positions.

The role of parties in governance is of great import to the perspectives examined here. The "natural order" argues that the best government will come from a nonmonopolized, free electoral process with a disclosed financial base, a process whose government is run by a nonpartisan public service for nonpolicymaking functions. The corruption caused by a possible monopoly of power by particular parties and ideas is their critical concern. The "constructed order" asserts that effective party governance does not occur naturally, but must be ensured by government regulation controlling the ballot, nomination procedures, and campaign finance. Once in office, use of partisan considerations is a part of proper governance in a party system. Thus, both perspectives create obstructions as well

as opportunities for the realization of a stronger party role in governance. This role is at the heart of the "responsible party government" model, and examining the implications of both perspectives for this model is our next task.

The "Responsible Party Government" Model

The relationship between parties, ideas, and public policy has been a longstanding concern among students of parties. The most notable model of how this relationship should be structured is known as the "doctrine of responsible party government". The arguments over the need for "responsible parties", and the character of such parties, have recurred in the literature on American politics and parties from the turn of the century to the present day.²⁷ The classic statement of the doctrine, however, is the 1950 report of the American Political Science Association (APSA) Committee on Political Parties, Towards A More Responsible Two-Party System.

A number of features characterize a "responsible" political party. Such a party must:

1. Evolve and enunciate a reasonably explicit statement of party programs and principles.
2. Nominate candidates loyal to the party program and willing to enact it into public policy if elected.

²⁷ For a historical treatment of these arguments, see Ranney, The Doctrine of Responsible Party Government. For a recent perspective, see White and Mileur, eds., Challenges.

3. Conduct its electoral campaigns in such a way that voters will grasp the programmatic differences between it and its opposing party and make their voting decisions substantially on that basis.
4. Guarantee that public officeholders elected under the party label will carry the party program into public policy and thus enable the party to take responsibility for their actions in office.²⁸

The distinguishing feature of this model is its explicit focus on the party as an organization whose members and officeholders are held responsible for enacting substantive public policy objectives. As Frank Sorauf notes, a responsible party "is concerned with capturing and using public office for predetermined goals and not merely for the thrill of winning, the division of patronage and spoils, or the reward of the office itself".²⁹

A "responsible party" would also possess the attributes of a strong party that we have considered here. This issue-oriented party would serve as a more effective policy link between citizens and government. It would increase the substantive importance of election contests, and make the aggregation of interests and competing visions of political change more explicit. Most notably, it would make party government an effective reality. Thus, a strong argument could be made that the responsible parties would also be stronger parties.

²⁸ Sorauf, Party Politics In America, 4th ed., p. 374.

²⁹ Ibid., p. 375; emphasis added.

Does either perspective support or encourage the growth of responsible parties? The "natural order" appears to offer notable support for such parties, while the "constructed order" is more satisfied with the party status quo. The "natural order" emphasis on parties as vehicles of ideas is certainly congruent with the issue orientation of "responsible parties". The view that parties should control their own organization and procedures is also a necessary step for parties to take explicit and consistent policy stances, in line with this model. Thus, the "natural order" perspective would appear to be very hospitable to "responsible parties".

The "natural order" justices can only offer an open door, however, to the achievement of "responsible parties" and "responsible party government". While they endorse a greater role for ideas and more freedom for parties to control their own organizations and candidate selection, parties themselves must take consistent platform stances and use these newfound freedoms. Even if parties actively work to become more responsible, however, they face the hurdle of the American political climate. Public opinion on parties is very negative, and direct primaries, which reduce party control over candidate selection, are held in high esteem.³⁰ Given the power of public opinion, it would seem that E.E. Schattschneider's 1942 assessment of the

³⁰ Sabato, The Party's Just Begun, p. 207.

future of responsible party government is even more accurate in the 1990's: "The greatest difficulties in the way of the development of party government in the United States have been intellectual, not legal".³¹ The justices have opened the door for responsible parties, but only the parties and the public may walk through it.

Conclusions: No Guarantee for Stronger Parties

In sum, the analysis above reveals that the "natural order" perspective will generally provide more opportunities for parties to develop the attributes of a "strong" party. This is particularly true with regard to the linkage of citizens and government, the contesting of elections, and the management of conflict. Neither perspective, however, offers any guarantee that parties will develop or emphasize these functional attributes. Parties can only become stronger through their own efforts, as the development of national party fundraising capacities indicates. The "natural order" justices have opened up opportunities for party self-government, but they cannot build parties by opinion; only political effort can strengthen parties effectively.

³¹ E.E. Schattschneider, Party Government, p. 209, quoted in White and Mileur, eds., Challenges, p. 15.

"Natural" Vs. "Constructed" Order

This analysis of the ballot access, party and nomination procedures, campaign finance, and patronage opinions of Supreme Court justices has shown that they comprise two general perspectives on the nature of electoral democracy. The allegiance of particular justices to each perspective needs to be assessed to determine the consistency with which the position of each is held. This will enable us to identify the "predictable" and the "swing" justices. This analysis reveals that, across the spectrum of cases considered here, the justices have been split between a small core of "predictable" votes and a larger number of "swing" votes, whose support for each doctrine has been qualified. These "swing" justices have been an important "brake" on the reach of the "natural order" perspective in Court jurisprudence.

A critical step in assessing the influence of a particular intellectual perspective is to determine who are its consistent proponents. The "natural order" perspective is most consistently asserted by Justices Brennan and Marshall; only in considering campaign finance do they back away from a strong skepticism of governmental activity in the electoral process. Even this seeming inconsistency is explained by the fact that their main concern is unchanging: the prevention of political monopoly and corruption. The difference with campaign finance is that it is the only area where they feel government statutes

prevent more corruption than they create. They are often joined by Chief Justice Burger and Justice Kennedy, whose only consistently departures from the "natural order" viewpoint are in the patronage decisions.³²

The "constructed order" perspective has found its most loyal foot soldier in (Chief) Justice Rehnquist. He has consistently given great deference to various state statutes in these areas, viewing them as proper expressions of the voice of the people expressed through democratically elected state legislatures. He is usually joined by Justices O'Connor and Scalia, who regularly depart from the perspective only in the area of campaign finance.

The remaining justices who have been involved in a significant number of the cases at issue have been "swing" justices, shifting between the perspectives between and within each area of cases. Justices Powell, Stewart, Blackmun, Stevens, and White fall into this group. Powell and Stewart lean toward the "constructed order" perspective, favoring it in ballot access, patronage, and some of the nominations decisions; they were more convinced by the "natural order" only in the area of campaign finance.³³ Blackmun also leans toward the "constructed

³² It should be noted that this placement of Kennedy is based on a small number of decisions (5): Rutan, Austin, Burdick, Norman, and Eu. These cases do, however, cover the spectrum of issue areas examined here.

³³ Given the pro-regulatory tilt of the "natural order" in the campaign finance cases, Powell and Stewart could be viewed as largely consistent supporters of the

order", favoring it in the nomination and ballot access cases; he is split in the campaign finance opinions, and supports the "natural order" position only in the patronage opinions. Stevens, in contrast, leans to the "natural order" perspective, supporting it in the patronage and ballot access opinions; only in some of the nomination and campaign finance cases does he favor the "constructed order" position. White is the only justice who is consistently split: he favors the "natural order" in the patronage and nominations cases, but supports the "constructed order" in ballot access and campaign finance.³⁴

The "swing" justices are thus not as clear cut in their positions as Brennan, Marshall, Burger, Kennedy, Rehnquist, O'Connor, and Scalia. A rough grouping, however, reflects that all but White can be placed close to one of the two perspectives. The "constructed order" view has seen Rehnquist, O'Connor, and Scalia joined with regularity by Powell, Stewart, and Blackmun, while the "natural order" perspective has seen Brennan, Marshall, Burger, and Kennedy joined in many decisions by Stevens.

There are two major implications that may be drawn from these patterns of support. First, the patterns

"constructed order" perspective.

³⁴ White appears to view government involvement in the electoral process as appropriate, but is less approving of partisan bias in government or government control of partisan decisions.

indicate that both perspectives have had to "fight" for supporters among the justices, since a number of justices have shifted between the two perspectives. More importantly, the "natural order" would now seem to be at a critical disadvantage in this search for support on the Court. The three most consistent advocates of the "natural order" perspective -- Brennan, Marshall, and Burger -- have all left the Court, while the three most active supporters of the "constructed order" perspective -- Rehnquist, O'Connor, and Scalia -- remain on the Court. This is not an encouraging state of affairs for those who might be considering constitutional challenges to party and electoral regulations.

"Natural" and "Constructed" Orders in Scholarly Context

Having analyzed the "natural order" and "constructed order" perspectives using a set of institutional criteria, we now understand the justices' views of parties in a wider perspective. A further question remains, however. How do these findings and arguments mesh with previous scholarly literature on parties and the law? This section addresses the arguments of the literature discussed in Chapter One in the light of the dissertation's findings.

The "natural order" focus on the parties as the proper decisionmakers for structuring their own procedures resonates with the analyses of Gottlieb, Geyh, Lawson, Sabato, Price, and Mileur. These works are united in their

contention that parties, not governments, are the best decisionmaker for party and electoral decisions. In fact, the concern of both perspectives examined here is less with a particular substantive result and more with the identity of the institution that structures the process. The "natural order" seeks to leave such decisions to the parties and citizens, while the "constructed order" trusts the government to make such decisions. This group of scholars supports the former position.

The analyses of Pierce, Weisburd, and Porto are also accurately reflective of judicial thinking in this area, and all appear to implicitly support the "natural order" trend on the Court. While Pierce's call for the justices to explicitly disavow the "political question" doctrine has not been heeded, our analysis reveals that the justices are now fully engaged in the full range of political decisions in this area, and are not likely to remove themselves at this point. The contention of Pierce and Weisburd that the "state action" doctrine has been negated by recent Court decisions also appears validated.³⁵ Porto correctly perceives the dominance of a state-friendly, "constructed

³⁵ Nonetheless, the state-friendly viewpoint of the "constructed order" would seem to leave the door open for possible future state intervention in party affairs. Add to this the standing precedent of Smith v. Allwright, which allowed intervention in party affairs to prevent invidious discrimination, and the face of "state action" might rear its head again in the right case. Note too, however, that Justice Marshall explicitly differentiated Smith v. Allwright from the current freedom of association cases in U.S. v. O'Brien.

order" standard of review in recent ballot access cases, but echoes the "natural order" minority's call for stricter standards of review to protect minor party interests.

Unlike the analysts above, other scholars take stronger issue with the justices' decisions, and echo the "constructed order" at times. Guttman's argument that the justices have shifted too far in favor of freedom of association claims can find reassurance in events that followed her analysis and the findings of this dissertation. The "constructed order" perspective has offered a continuing alternative to expanded freedom of association, limiting the scope of the Tashjian opinion and dominating recent ballot access decisions. The justices now seem in no danger of giving carte blanche to freedom of association claims, a fact which Leon Epstein's work correctly reflects.

The articles by Cammorosano and Brinkley also argue that an imbalance exists in the Court's jurisprudence, specifically in the justices' patronage decisions. Their work correctly portrays the dominance of the "natural order" disdain for patronage, but gives insufficient credence to the long term influence of the dissenting strain that the "constructed order" perspective represents. The analysis of Daniel Lowenstein, in arguing for greater legislative authority in party and electoral areas, goes even farther than the "constructed order" justices have

been prepared to go, calling for a judicial "hands off" policy.

The historical\quantitative analysis of Hadley and Epstein covers a wider range of cases than this dissertation, but its findings seem roughly borne out by the findings here. While some minor parties do not fare well in the ballot access cases, others do (Wallace's American Independent Party, Anderson's National Unity Campaign), and the dominant viewpoint in the other areas, the "natural order", is highly sensitive to minor party concerns. Minor parties do appear to have been generally well treated by these judicial opinions.

Clifton McCleskey's assertion that the justices' jurisprudence in this area is "confused" is not supported by the dissertation's findings, but this conflict may be as much semantics as substance. The division McCleskey sees in the ballot access cases between Anderson and a number of earlier cases like Storer and American Party does, in fact, reflect the arguments of the "natural order"\ "constructed order" debate posited in this dissertation.³⁶ The justices are seen as "confused" on freedom of association in the pre-La Follette organization/nomination opinions, but the divisions again reflect the contending schools of thought posited here.³⁷ With regard to patronage, McCleskey argues

³⁶ McCleskey, "Parties at the Bar", pp. 352-53.

³⁷ McCleskey, "Parties at the Bar", p. 361.

that the justices have applied differing and confusing bases for evaluating the use of partisan criteria in government personnel decisions, but this differences is one of degree, not kind; it is consistent with the findings here.³⁸ While some of McCleskey's critiques of judicial policymaking have validity, this dissertation takes issue with his claim that "judicial review has obscured more than it has clarified".³⁹

John Moeller's contention that the justices' opinions reflect not confusion but a contest between three competing visions of politics is the clearest alternative model to the schools of thought explicated in this dissertation. Moeller posits these three visions as contesting in the justices' opinions: "fair politics" (equal access to the political system), "First Amendment politics" (protection of associational rights), and "Madisonian politics" (politics as an open conflict of forces), with "First Amendment politics" (mixed with "fair politics") dominating the justices' jurisprudence.⁴⁰ While the visions Moeller presents have many similarities to the "schools of thought" posited here, their focus is ultimately distinct. This dissertation argues that the justices divide not only over the type of politics (and Moeller makes a strong case for

³⁸ McCleskey, "Parties at the Bar", pp. 363-66.

³⁹ McCleskey, "Parties at the Bar", p. 366.

⁴⁰ Moeller, "The Federal Courts".

his view), but over what constitutes a legitimate political system: a state-structured system (the "constructed order") or an unregulated party politics (the "natural order"). The issues are related but distinct.

"Natural" and "Constructed" Orders: Political Implications

The opinions of the justices have significance for the regulatory environment of the current electoral system and for efforts to strengthen political parties. Their decisions also shape the broader character of American democracy: their concrete actions change or reinforce the existing system, while the arguments in the opinions influence the parameters of debate about the system. The opinions thus have both theoretical and practical implications.

The justices' opinions have altered the regulatory structure of electoral politics in a number of ways. The ballot access opinions, dominated by the "constructed order" perspective, have supported a continuance of extensive state discretion over what a candidate must do to gain a place on the ballot. The state role in regulating nominations, in contrast, has been severely reduced by the "natural order" majority, opening up more choices for parties. In campaign finance, much of the FECA has been upheld by the "natural order" as an appropriate device to prevent corruption of the electoral process. Finally, a government's ability to use partisan criteria in personnel

decisions has been virtually eliminated, enabling government personnel to be less inhibited in holding alternate political views.

In terms of the justices' effects on efforts to strengthen parties, we saw in Part I of this chapter that the dominant "natural order" perspective does more to promote stronger parties. Nonetheless, it does limit the party role in personnel decisions. The "natural order" is also very suspicious of government management of the electoral process, a suspicion grounded in a concern of political monopoly. The danger in many ballot access, nomination, and patronage regulations is that the party or parties currently dominating the system will structure such regulation to their own advantage. This monopoly lies at the heart of what the "natural order" seeks to prevent: an artificially restricted political process.

The "natural order" also favors promoting the programmatic functions of parties, as part of their concern with monopoly. If the states and parties in power can structure the processes of politics, they can reduce the opportunity for alternate views to be heard. Promoting ideas is seen as a critical function of parties, one that should not be limited.

The "constructed order", in contrast, offers in great measure a maintenance of the political status quo. States could continue to limit access to the ballot in the name of order and stability, limiting this point of participation.

State laws could also continue to regulate the nominating process, even if party organization could not be specified; participation could also be restricted. Campaign finance could be regulated to prevent corruption. Finally, partisan considerations could be properly used in government personnel decisions, allowing a greater role for party allegiance in this area.

The "constructed order" sees the major parties as performing the work of democracy with great effectiveness, with the contesting of elections being the central contribution of parties. The structuring of the system is accomplished by democratically elected legislators; monopoly exists only if a system is blatantly discriminatory. State laws are in fact seen to promote, not reduce, meaningful competition, with the process open but performing a proper winnowing function.

Such a "constructed" system also has positive and negative implications for parties and politics. Government control of nomination procedures limits the parties' ability to determine an important part of their public character. On the other hand, the major parties would continue to benefit from their current ballot access advantages, as well as the ability to engage in some patronage practices. Thus, the "constructed order" would in some ways allow for more party power in politics than the "natural order".

The justices are ultimately divided by how they view the parameters of democracy. The "natural order" argues that both party competition and voter choice should be as wide as possible, subject to very limited restriction; state imposed restrictions could result in a system where politics, electorally and ideologically, is monopolized. The "constructed order" argues that democracy is much more fragile, and that democratic representatives can properly construct a series of rules to structure the electoral process in order to preserve it.

The debate also speaks to the ongoing development of an American "administrative state" at the national level. While the solicitude of the "natural order" towards national power and processes is certainly in line with the nationalization of American politics, the "constructed order" view reveals that the state oriented view of a federal system has not disappeared. In addition, the granting of autonomy to parties can be said to reduce the administrative state's control, while the disapproval of patronage practices reinforces the trend toward a nonpartisan "administrative state".

The structuring of political institutions in the electoral process is also seen differently by the two perspectives. The "natural order" envisions parties as the best decisionmakers of their own procedures, and views ideas as an important component of their identity. The "constructed order" views the major purpose of parties as

electoral, not ideological. Neither perspective has a fully consistent position on whether democracy should occur within or between the parties.

While they have expanded opportunities for parties to make their own choices in practice, neither the majority opinions of the justices or the many dissenting opinions offer a great deal of support to parties in theoretical terms. While the "natural order" perspective certainly looks favorably on the interests of minor parties, this grows more out of their concern for giving voice to all political voices than it does out of a concern for parties as parties. The "constructed order" perspective shows some more concern for the role of partisan considerations in governance, but it envisions no guaranteed political role for parties as a group.

Neither perspective argues directly for more responsible parties or a more party-centered system. Ultimately, what the justices debate is more democracy and the electoral process, not the exact shape or functions of parties. "Strong parties" are in no way guaranteed by either perspective.

What is important theoretically for parties is that the justices have taken on the power to make such choices. The questions are not dismissed due to their "political" nature, but are heard. What this means is that the Court is now an active player in defining these questions. Thus, the possible directions its decisions might take will add an

important voice to ongoing theoretical debates on the broader questions of democracy, a voice that will only speak when asked to but will then speak with meaningful practical authority.

Parties have been emancipated from government control of their internal choices, but their interests beyond their own affairs are not as clearly favored. The ballot is still restricted for minor parties, campaign finance is candidate centered, and patronage has been drastically limited with little concern for the impact on parties. Thus, parties cannot be said to have been greatly advantaged in practical terms by the jurisprudence of either perspective. They are freer to guide and shape their own identity, but they are given little special treatment in the political process in which they contest for power. While control over one's own household is certainly important, this newly regained autonomy does not change the fact that parties are a weakened player in the fiercely competitive arena of politics; the ballot access, campaign finance and patronage opinions offer them little assistance in rebuilding their strength.

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