

The Parties in Court

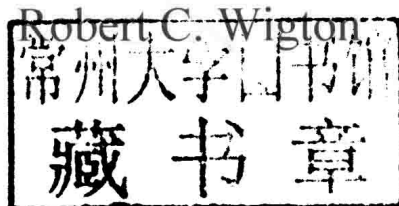


*American Political Parties
under the Constitution*

Robert C. Wigton

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Chapter One

American Political Parties, Government Regulation, and Constitutional Law

I. THE CONSTITUTIONAL SETTING

Political parties have long occupied an uncertain place in American constitutional law. Parties were not mentioned in the Constitution and developed largely outside the constitutional system. As a consequence, they have grown to possess attributes of both public and private organizations and undertake activities associated with both types of organizations. This hybrid quality of parties has made it difficult for the courts to apply constitutional standards to parties and the state laws that govern them. The vague legal status of parties has helped fuel the debate over the proper role of parties in a democracy. Some favor treating parties as private entities largely beyond state regulation. Others favor nearly complete state regulation of parties as public organizations. The problems, issues, and potential solutions to this dilemma are the subject of this book.

The debate over the status and role of political parties can be traced to the earliest years of American history.¹ Many of the Founding Fathers manifested a deep suspicion of such organized interests and believed that they were detrimental to a political system.² The constitutional silence on political parties was part of a calculated effort to frustrate the emergence of political "factions." James Madison is perhaps the most famous early opponent of political party formation, stating in Federalist Number 10:

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the

different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them more disposed to vex and oppress each other, than to co-operate for their common good.³

Despite this antipathy towards parties Madison did eventually come to view the development of parties as inevitable, concluding that they had to be tolerated rather than prohibited in a democracy. Instead, Madison favored *controlling* factions through the structural features of the federal government.⁴ Madison's early views were apparently shared by George Washington who registered a famous objection to parties in his Farewell Address to the nation:

There is an opinion that parties in free countries are useful checks upon the Administration of Government and serve to keep alive the spirit of Liberty. This within certain limits is probably true, and in Governments of a Monarchical case Patriotism may look with indulgence, if not favour, upon the spirit of party. But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged. From their natural tendency, it is certain there will always be enough of that spirit for every salutary purpose. And there being in constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it. A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming it should consume.⁵

Compounding the constitutional silence on political parties has been the dearth of congressional legislation directed at the parties. True to the Founders' intent, Congress appears to have considered party regulation as a matter best left to the individual states.⁶ There seems to be little doubt that Congress could legislate extensively on political parties if it chose to do so.⁷ However, the only major national legislation to date regulating political parties deals with matters of campaign finance.⁸ Most laws affecting the parties have been enacted by state legislatures, often in pursuit of goals other than regulating political parties.

The constitutionally ambiguous status of political parties has deep historical roots but it did not take on serious dimensions until the states began regulating their parties. The growth in state regulation began in the nineteenth century but has increased significantly in recent decades. This expansion of state power over parties has increasingly forced the question of how far the states can go in this process without infringing on the constitutional rights of parties, voters, and candidates. These challenges to state laws have

resulted in many state and federal court opinions where judges have wrestled anew with the old issue of how parties should fit into American democracy.

The complexity of the constitutional issues raised and the great variety of legal scenarios in which they arise has made the resolution of these issues particularly difficult for the courts. State regulation of parties routinely implicates fundamental rights of speech, association, and voting. State laws regulating almost any aspect of elections have some impact on the parties. This means that the issue of the parties' legal status has come up in an amazing range of situations, from state ballot access laws to limitations on the campaign speech of judicial candidates. As the web of state regulation over parties and elections has grown, the venerable question of the status of parties has become more pressing.

This chapter describes the theoretical dilemma that has confronted the courts as they have considered legislation regulating political parties. The dilemma grows in large part out of the various competing political ideals which are raised when the government attempts to regulate some aspect of party behavior or internal party functions. Subsequent chapters will trace the evolution of judicial efforts to strike a balance among these ideals through the development of various guidelines setting the parameters for appropriate regulation of parties. As would be expected, judges have differed considerably over how to strike the balance between government regulation and party independence. Some have emphasized the importance of independent parties for a healthy political process. Others have struck the balance in favor of government maintenance of a fair electoral system.

This chapter is an investigation of the government regulation of American political parties. In particular, the focus will be on the growing role of the federal courts in searching for a satisfactory balance among the various competing political values found in this area. With increasing frequency the federal courts have found themselves faced with important and far-reaching questions concerning the degree of independence which political parties should enjoy within our democratic system. The question of the degree of party independence from government regulation has become more pressing in recent years with the rise in efforts by the government (primarily state legislatures) to regulate the expanding array of activities undertaken by modern political parties.

Three somewhat related trends have converged in this area that have sharpened the issues associated with the constitutional status of political parties. The first of these has been the steady rise in state efforts to regulate their parties and electoral processes. This trend has meant that parties have increasingly been treated as public entities subject to pervasive state regulation. The second trend has been the increasing diversity of activities that American political parties have undertaken as they have adapted to modern campaign practices. These two trends necessarily create a situation where

there will be more state-party collisions over how far states can go in regulating party behavior. A third trend paralleling the other two is the major changes in constitutional law doctrines over several decades that have facilitated greater judicial involvement in these disputes between parties and states over the formers' constitutional standing. Together, these three trends have created an environment where the courts are now equipped with multiple constitutional tools for resolving the dilemma that increasing asserts itself.

II. A TRADITION OF STATE REGULATION

For the first century of our nation's history the parties enjoyed an extra-legal existence and nearly complete autonomy from government control. During these early decades the parties were almost completely free to control their own membership, nominate candidates for public office, adopt party platforms, and manage election campaigns. Parties were considered to be private organizations at this time by both courts and legislatures. However, this situation began to change rapidly as parties became more powerful and visible in the latter half of the nineteenth century.⁹ The first states to enact regulatory legislation of political parties were California and New York in 1866. California's Porter Law was a permissive statute which set forth model by-laws for parties operating in that state. New York took a different approach by outlawing fraud, bribery, and voter intimidation in party affairs. Other states quickly followed these two leads as the extent of party corruption became more widely condemned with some states going so far as to regulate the internal structure and organization of political parties at this time.

The efforts of the Progressive Movement in the late nineteenth century would eventually prove to have the greatest effect in converting American political parties from private organizations to public entities.¹⁰ The first of these major reforms was the adoption of the Australian ballot which provided for the secret casting of votes. Before this time, ballots had been prepared by each party and were often color-coded, making it clear which party one was supporting at an election. In order to preserve secrecy in the casting of votes and prevent voter intimidation at the polls, the states rapidly began adopting the Australian ballot after 1888. In taking over this party function, the states successfully injected themselves into the mechanics of the election process at the expense of the party machinery. The long-term impact created by the adoption of the Australian ballot was that it gave the states the power to determine which parties and candidates should have access to the now-official ballot. This, in turn, required that the states define what a "political party" was and what renders a person eligible for candidacy for specific offices. Thus, while this important reform may have curbed party corruption,

it also accelerated the pace of state regulation of parties. The two major parties were often given special status under these laws, but with official recognition came significant and expanding state regulation. This process of gradually expanding state regulation of parties continued and soon effectively domesticated the previously autonomous American political parties.¹¹

The other great catalyst in the evolution of parties from private to quasi-public entities was the adoption of the direct primary by the states. Spurred by the reformers of the Progressive Era, the direct primary was seen as a device for limiting corruption of political parties through greater voter participation in the electoral process. The primary was seen by its advocates as a means for breaking the power of state and local party bosses and generally furthering the goals of good government. Before this time, the parties tightly controlled the nomination process through the caucus system, where party regulars and activists dominated the proceedings. Under this system there was very limited participation in the nomination of candidates by the general public. The Reformers hoped that the institution of the direct primary would both widen public participation in the selection process and diminish the power of party committees.¹²

Wisconsin adopted the first complete primary law in 1903, and by 1917 a majority of the states made some use of the direct primary.¹³ The loss of the vital and arguably most basic function of candidate nomination was a serious blow to the parties. The parties had also lost some control over their party label and even part of their identity. With the rise of the primaries, outsiders and political novices could run and secure the nomination of a party with which they had had minimal previous contact or with which they shared little ideological compatibility.

Other Progressive Era reforms facilitated state control over party membership. These reforms signaled another area of state encroachment on operations previously left to the parties themselves. These state laws often took the form of requirements that voters register for a particular party in order to participate in that party's primaries. The states thus began performing the unusual service of maintaining membership lists for what were nominally private organizations. These early reforms gradually but inexorably increased the degree of overlap between the private and public sides of American political parties. Through these means, the parties were first recognized, then regulated, and ultimately made virtual agents of the states in many instances.¹⁴

It should be noted that many state laws "regulating" parties were in fact thought to actually protect or benefit political parties.¹⁵ Many states gave parties special mention in their constitutions as a means of "recognizing" the existence of political parties, or at least the two major parties. A few states gave parties some official roles in the state's political process such as serving on bipartisan elections boards or helping to fill legislative vacancies.¹⁶ The

common requirement that a voter pre-register with a party before voting in its primary was, in part, aimed at helping preserve the ideological coherence and integrity of the parties. This sort of “protective legislation” for the parties continued into the twentieth century. Many states eventually adopted “closed” primary laws whereby only those persons registered with a party for a prescribed time were able to vote in its primaries. These laws were aimed at preventing the “raiding” of primaries by persons affiliated with another party. Some states also adopted anti-fusion statutes which disallowed candidates from running with multiple party nominations and appearing more than once on a ballot.¹⁷ These statutes were meant, in part, to ensure that the parties’ ideological integrity was protected and that party labels could serve as reliable guides to voters. But these laws also signaled more state control over party behavior in areas vital to their existence and autonomy.

A. The Early Judicial Response

State legislatures led the charge in extending government regulation to political parties but these early efforts were soon tested in the courts. Initial judicial reaction to state efforts to control the parties varied considerably among the states. Many judges were often skeptical of legislative attempts to curb party corruption through regulatory means.¹⁸ These early challenges usually attacked state primary laws by claiming that they infringed the political parties’ right of association or the voting rights of party members.¹⁹ There were also early challenges to state adoption of the first Australian ballot laws. These latter cases generally sustained the Australian ballot as within legislative power “so long as it merely regulates the exercise of the elective franchise and does not deny the franchise itself either directly or by rendering its exercise so difficult and inconvenient as to amount to a denial.”²⁰

The California Supreme Court made the connection between voting and political parties explicit when it struck down that state’s primary law in 1900. Justice Henshaw, for the court in *Britton v. Board of Elections Commissioners*,²¹ explained the link between parties and the right to vote thusly:

No expression is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its constitution.²²

Other state courts seemed to place the emphasis on the people’s right of assembly.²³ However, most early decisions did not find that the new primary laws infringed on the association rights of political parties or their members.²⁴ Typical of the judicial treatment of association claims raised against

state primary laws was this 1908 statement from the Louisiana Supreme Court:

The next ground is that the statute . . . deprives the people of their reserved right to "meet and choose and name their candidates as they please." The answer is that the people have no such reserved right, but that the Legislature has the perfect and undoubted right to prescribe rules and regulations for the conduct of elections, primaries included.²⁵

The courts soon found that the regulation of elections was well within the states' police powers. A representative view of the prevailing position was expressed by the Ohio Supreme Court in *State v. Felton* which upheld that state's primary law that required a showing of 10 percent at the last election for a political party to secure automatic ballot access.²⁶ State courts quickly came to accept the anti-raiding justification for primary laws,²⁷ and also recognized the "evils and abuses" of political parties that motivated legislatures during this period.²⁸

Only a few early courts raised the possibility that government regulation might infringe on the parties' rights to govern themselves internally.²⁹ The Colorado Supreme Court in adjudicating a dispute between rival delegations to a party convention in 1898 ruled that, "the courts have no control over questions of party policy, but those must be determined by the party itself in its regularly called and organized conventions."³⁰ Most early judicial comments noting the importance of a party's ability to control its internal affairs arose in similar contexts of delegate certification.³¹ But broader judicial concerns over the possibility of regulatory schemes taking over internal party governance had to await the later enactment of state laws that would go beyond the direct primary and Australian ballot laws.

B. Modern Regulatory Schemes

Since the Progressive Era the states have, with great diversity, continued to expand their regulation of the structure and behavior of political parties within their boundaries. This trend has given rise to complex statutory schemes in many states. Some states, such as California, are well known for their pervasive regulation of parties. Other states are comparatively lax in their regulation. State regulations pertaining to political parties fall broadly into two categories: those concerned primarily with "internal" party structures and behavior, and those dealing with the "external" or electoral functions of parties.³²

Nearly every state controls by law some aspect of the organizational structure, composition, or internal procedures of its parties' state central committees. Typical regulations of internal party matters include laws governing: the election and composition of state and local party central commit-

tees, committee meeting dates, and internal party rules. State laws regulating the *selection* of the party state central committee usually mandate that these party officials be chosen either by voters or by other party officials.³³ Those states which regulate the *composition* of the party state central committee often require that the committees have a certain number of elected officials or maintain a gender balance.³⁴ State regulation of state central committee meeting times and places is less common, and only a few states regulate both time and place of these meetings.³⁵

A more intrusive form of state regulation of parties is the specification of various internal rules and procedures which must be followed by the state central committees.³⁶ There is a wide range of internal matters which the states have chosen to regulate, including: how committee vacancies are to be filled, the use of proxy votes, quorum size, powers and duties of committee chairs, use of executive committees, pre-meeting notification procedures, voting strength and rights of members, method of selection and terms of office for committee officers, unit rules in voting, and the party affiliation of committee members. The regulation of *local* party organizations has also been popular with state legislatures. These regulations mirror those directed at the internal governance of the state-level party committees, and deal with voting procedures, party affiliation and residency requirements, and time and place of meetings.³⁷

State legislative efforts to regulate the "external" or electoral side of political parties have been much more extensive.³⁸ These state laws tend to impact the parties more indirectly than those that are aimed at the party organizations themselves. These state laws limit and control modern American parties in what has become their most important function: the selection and running of candidates for public office. Most states have an array of regulations that controls both primaries and general elections. These laws deal with such matters as ballot access, the format of election ballots themselves, the size of the vote needed to win, the possibility of run-off elections, the frequency of elections, the size, number, and configuration of electoral districts, voter eligibility requirements, and campaign finances. These state laws often make distinctions among the major parties, third parties, and independent candidates. Many states, however, have gone further and regulate such things as pre-primary endorsements by party leaders and the campaign activities of the parties.

In those states where primaries are held for state offices, further statutory controls are common. The most basic of these is whether the party primary may be "open" to non-party voters, or "closed" in which only registered party members may vote. This requirement is usually seen as a voter eligibility issue, but it also directly affects the parties by controlling who participates in their primary elections. The open primary originated as an electoral reform during the Progressive Era in U.S. history as a means for fostering greater

voter participation. However, most party regulars prefer the closed form which curtails the number of crossover voters who are not strongly affiliated with the party. It can also lead to the practice of "raiding" where members of one party systematically vote in the opposing party's primary and select the weakest candidate. It is generally believed that the closed form of the primary favors stronger parties by increasing the influence of party activists over the election outcome. In recent years, most states have chosen to move toward the closed form of primary elections.³⁹

Closely related to the method by which statewide nominations are made is the matter of party endorsement of candidates. Of course, such endorsements typically come from the party organization itself, dominated by party activists. Thus, state limitations on party endorsements can affect the organizational strength of a party in state politics. Some states that have adopted the direct primary as the method for statewide nominations have preserved the party's right to a pre-primary endorsement as a kind of compromise, ensuring some input from the party organization into the nomination process. As of the mid-1980s, most states had no law regulating pre-primary endorsements, two states barred them, and eight either required or expressly permitted some form of pre-primary endorsement.⁴⁰

Most states also regulate the process by which their state parties choose their delegates for the *national* party conventions. Like the state laws regulating state and local nominations, these laws are usually regarded as primarily "electoral" laws designed to ensure that the selection process is fair and democratic. However, these laws regulate the relationship between individual state parties and their national counterparts are different and pose more intrusive limitations on the parties. While the interests of each state in preserving certain features of the nominations process for state and local offices is undeniably great, the interest of the individual states in controlling (even indirectly) the internal operations of the *national* parties is much more tenuous. This latter set of statutory guidelines raises more serious issues of party independence and freedom from government control.⁴¹

Another popular type of state electoral regulation that directly affects the vitality of political parties are so-called "sore loser" statutes which have been enacted in a majority of states. These laws prevent a candidate from running in the general election as an independent who has lost in a party primary election for that office. The effect of these laws is to foster post-primary unity in the parties. Some would argue that they also serve the larger political system by helping to limit the number of candidates for office.⁴² Even state control over ballot formulation and the balloting mechanism can be relevant to political parties. For instance, the use of "party column" ballots where all candidates from each party are conveniently listed in a single column on the ballot can facilitate straight-ticket voting and be helpful to the parties by encouraging party solidarity at the polls.⁴³

A final area where state laws have had an impact on political parties has been in the area of campaign finance laws.⁴⁴ State legislation regulating campaign finances has tended to mirror that used by the federal government. Thus, many states have sought to simultaneously place limits on contributions *to* candidates and expenditures *by* candidates. Some states have also instituted various forms of public funding for office-seekers and requirements that candidates make a public disclosure of campaign finances through filing.⁴⁵ Although most of these laws are directed towards candidates and their campaign organizations, some of them touch parties and party organization as well. One of the most common of state financial laws is that of a filing requirement. Virtually every state imposes some sort of filing requirement on candidates and political committees. However, only twenty-three states expressly require a filing statement from the parties themselves.⁴⁶

In their effort to control financial contributions to political campaigns, the states have set limits on contributions by corporations, labor unions, and state-regulated industries (e.g., state lotteries, public utilities). However, of the forty-two states that place some limits on financial contributions to candidates, only fifteen of these also limit what party organizations may give to candidates.⁴⁷ The public funding of state elections began in 1973 and today about half of the states provide for some form of public assistance for candidates. This assistance usually comes in the form of tax provisions relating to political donations such as tax credits, tax deductions, check off provisions, or a surcharge. Many of these state public finance laws also specify *where* the money collected is to go. Most states give the funds directly to the candidates, but fifteen of them distribute some or all of the money directly to the parties.⁴⁸ This is significant as an indicator that these states are attempting to use their tax laws to reinforce the strength of the parties in their state. Under the federal scheme, most public funding goes directly to the campaign organizations of the major party nominees, with only a relatively small sum going to the national parties to operate their conventions.⁴⁹

Many state regulations have had the effect of strengthening political parties. For instance, the closed primary, bans on "sore losers" candidacies, and provisions for straight-ticket voting all arguably help the party organizations. Nonetheless, even these forms of state regulation represent some infringement on party independence and set the precedent for less salutary state regulations touching political parties. The concern of this work will be primarily with those state regulations which are commonly regarded as "infringing" party independence or strength and which have resulted in litigation. Most of the other regulations mentioned above fall into this latter category.

III. PARTIES: AN EVOLVING ROLE

Judicial efforts to define an appropriate level of government regulation over political parties in our political system have been complicated by the ever-changing role played by American parties.⁵⁰ Over the course of U.S. history, the major parties have undertaken many different activities and have seen their influence over parts of the political process vary considerably. Before 1838, American parties were "incompletely developed and seen as foreign, unwelcome, and one hoped, temporary intrusions into public affairs."⁵¹ During these early decades parties were essentially elite organizations with little in the way of subnational structure. At this time, the contribution of parties to American politics was necessarily limited. The early parties functioned more as "factions" giving politicians at the national level a means to organize themselves. Even during this early time, however, the parties served as political guideposts that helped the average citizen comprehend politics and elections.

From the late 1830s to the 1890s, political parties in this country took on a much more central role in the nation's politics. At the beginning of this period there were strong forces which favored the development of new political organizations, including the rapid growth in the size of the American electorate and the emergence of divisive national issues. Parties at this time shifted from being intermittent organizations composed of volunteers to professional entities with structure, organization and continuity. It was during this period that parties also took on many of the important functions commonly associated with modern parties: the recruitment and nomination of candidates, the development of party positions on issues, the operation of campaigns, the mobilization of voters, and the holding of caucuses and conventions. The major parties of this period sought vigorously to distinguish themselves from one another. Voters responded to these changes by developing strong party allegiances, further heightening the competition between the parties. This period is often regarded as the golden era of American political parties because of their organizational strength and near dominance over the political process. During their heyday parties even began to resemble the responsible party model by attempting to implement their campaign promises once in office. This was an era characterized by sharp ideological debate through partisan newspapers, the frequent emergence of third political parties, and finally the emergence of urban political machines.⁵²

The period in American history from 1890s to the 1950s is referred to as a "post-party" or nonpartisan era by a leading party historian.⁵³ During this half century, American parties grew beyond simple partisan confrontations. The 1890s saw a major realignment of American parties and the emergence of a fourth party system. This upheaval was brought on by agrarian unrest and the economic panic of 1893.⁵⁴ Parties at the turn of the century continued

many of their traditional operations, both internally and in the electoral realm. However, partisan debate declined significantly with the emergence of many one-party regions in the nation.⁵⁵ Parties began to lose their monopoly over politics as new avenues for influencing government opened up. The process of party decline was accelerated considerably by the legislative successes of the Progressive movement, which began in the 1880s but continued for decades thereafter. This movement's nonpartisan reforms of the electoral system had the effect of splitting parties from the voters. This was achieved gradually through reforms of the ballot preparation process, the institution of voter registration, and the arrival of the direct primary.⁵⁶

The first decades of the twentieth century witnessed a series of developments which further disengaged parties from the political mainstream. Growth in government's role in society through public programs led to a greater need for technical experts in government jobs rather than the political generalists who were usually supplied by the parties. The gradual growth of the civil service system for government employees further reinforced this trend disfavoring parties by limiting patronage opportunities. Finally, the enactment of various welfare functions by the government deprived parties of their "social service" function and their links to certain groups of voters. The cumulative effect of these developments before and after 1900 was to radically change the role of parties in and their contribution to American politics. Ever after parties would have to compete with aggressive, often non-partisan, interest groups. Partisanship among voters survived this period, but the parties' dominance of political discourse, candidate recruitment, and policy-making were all sharply limited.

The contributions of parties to American politics began to shift again in the 1950s. In many ways this period was a continuation of the previous fifty years in that parties continued to decline in relative importance on the American political scene. Nonparty political elements, particularly the mass media and interest groups, became more firmly entrenched after a brief party revival during the New Deal Era. Media influence over politics grew on the heels of greater diversity of media modes and greater access to American homes.⁵⁷ Interest group popularity and power grew as the federal government expanded its regulatory powers and social programs. In this new environment, parties and partisan discussion of issues became less important. Leaner, more efficient interest groups began picking up many traditional party functions.⁵⁸

Since 1950 we have also seen something of a renewal of the distrust of political parties which has appeared periodically over U.S. history. Parties were subjected to significant criticism in the media during this time, eroding much of their legitimacy as a political institution.⁵⁹ Individual voters during this period moved away from the strong party allegiances and straight-ticket voting patterns of their parents.⁶⁰ The modern American voter was becoming