

# It's My Party—Or Is It? First Amendment Problems Arising from the Mixed Role of Political Parties in Elections

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In its recently concluded October Term 2007, the Supreme Court decided two cases—*New York State Board of Elections v. López Torres* and *Washington State Grange v. Washington State Republican Party*<sup>1</sup>—involving the role of political parties in elections and the First Amendment limits on state regulation of election procedures. Both cases rejected First Amendment challenges to the laws at issue, reversing the decisions of the Second and Ninth Circuits, respectively. The result in each case was more a function of the posture in which the cases were presented to the Court, however, and tells us little about political parties and the First Amendment per se. Of more interest are the Court's discussion of the role of political parties and the questions left open in its decisions.

Parts I and II of this article will describe the *López Torres* and *Washington State Grange* cases, highlighting the relatively narrow grounds for decision and the broader discussions of the role of political parties in our election processes.

Part III will discuss how these two cases illustrate the First Amendment problems and confusion arising from the dual public and private roles, and excessive entanglement, of political parties in the formal election mechanisms of the states and a potential path for avoiding such problems and confusion in the future. I argue that political parties are, and should be treated as, strictly private expressive associations, and that delegating to such parties the governmental function of being a gatekeeper for ballot access is the source of

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<sup>1</sup> 552 U.S. \_\_\_\_\_, 128 S. Ct. 791 (2008); 552 U.S. \_\_\_\_\_, 128 S. Ct. 1184 (2008).

those problems. Separating the public function of regulating ballot access from the private function of being an association for political advocacy would significantly alleviate the tensions between those two roles and clarify the application of the First Amendment to party conduct and election processes.

### I. The Decision in *New York State Board of Elections v. López Torres*

In *López Torres*, the Court considered the constitutionality of New York State's method of electing judges to serve on the state's trial court, idiosyncratically called the New York State Supreme Court. Justices of the New York State Supreme Court are elected by judicial district in partisan elections to serve 14 year terms.<sup>2</sup> Over the years, the state has allowed various methods of nominating candidates for judicial office, including both direct primaries and party conventions.

Since 1921, however, state law has required political parties to select their supreme court judicial candidates by a hybrid method of electing party delegates who must then choose a party's candidates at a convention.<sup>3</sup> Candidates chosen at the party conventions automatically gain access to the general election ballot and are identified on that ballot as the party's nominees.<sup>4</sup> Independent candidates and candidates of political organizations whose candidate for governor received fewer than 50,000 votes in the previous election may gain access through a nominating petition process.<sup>5</sup>

<sup>2</sup> By "partisan elections" I mean an election in which recognized political parties are given a reserved spot for their nominees for various offices on the general election ballot. In such elections, each recognized party is given the power and responsibility of winnowing potential candidates from that party to a single nominee for each office, who then appears on the general election ballot. The winnowing process can take a variety of forms—including primary elections segregated by party, party conventions, or caucuses—with particular nominating processes sometimes required, and often regulated, by the state.

<sup>3</sup> *López Torres*, 128 S. Ct. at 795–96 (citing Act of May 2, 1921, ch. 479 § 45(1), 110, 1921 N.Y. Laws 1451, 1471, currently codified at N.Y. Elec. Law Ann. § 6-106, *et seq.* (West 2007)). Unless otherwise noted, all statutory citations hereafter are to sections of N.Y. Elec. Law Ann.

<sup>4</sup> § 7-104(5).

<sup>5</sup> §§ 1-104(3), 6-138, 6-142(2).

Judge Margarita López Torres and several other prospective candidates (and their supporters) challenged the procedures for nominating supreme court candidates, arguing that the convention process imposed an excessive burden on challengers seeking nominations as against candidates preferred by the party leadership. They claimed that such procedures violated the First Amendment rights of challengers and voters “to gain access to the ballot and to associate in choosing their party’s candidates.”<sup>6</sup> They argued that because single political parties tended to dominate particular judicial districts, the party nomination process effectively determined the outcome of the general election and thus they were entitled to a realistic chance to secure the party’s nomination notwithstanding their lack of support from the party leadership. Respondents sought an injunction mandating a direct primary election to select party nominees for supreme court justice.

The district court granted their request for an injunction and the Second Circuit affirmed. The court of appeals held that “voters and candidates possess a First Amendment right to a ‘realistic opportunity to participate in [a political party’s] nominating process, and to do so free from burdens that are both severe and unnecessary.’”<sup>7</sup> The court reasoned that the supposed one-party rule within particular judicial districts, combined with the difficulties of fielding a competing slate of delegates against the party leadership, denied respondents such an opportunity. The court thus upheld the injunction requiring direct primary elections until such time as New York adopted some other system that complied with the standard the court announced.<sup>8</sup>

The Supreme Court, in an opinion by Justice Antonin Scalia for eight of the justices, reversed. Justice John Paul Stevens, joined by Justice David Souter, filed a concurring opinion. Justice Anthony Kennedy filed an opinion concurring in the judgment, which opinion was joined in part by Justice Stephen Breyer.

The crux of the Court’s reasoning was straightforward: While party members may have a right to participate in some form in the

<sup>6</sup> López Torres, 128 S. Ct. at 797.

<sup>7</sup> *Id.* (quoting *New York State Board of Elections v. López Torres*, 462 F.3d 161, 187 (2d Cir. 2006)).

<sup>8</sup> *Id.* (citing 462 F.3d at 193–200).

selection of party-nominated candidates, and perhaps even to seek nomination without “undue state-imposed impediment,” they have no First Amendment right to be nominated or to have their preferred candidate nominated.<sup>9</sup> Finding that the requirements for running a competing slate of delegates in the delegate primary preceding the party convention were “far from excessive,” and finding ample opportunity to persuade whatever delegates were elected that they should choose a competing potential nominee at the convention, respondents’ argument boiled down to the objection that “the party leadership has more widespread support than a candidate not supported by the leadership.”<sup>10</sup>

The Court thus observed that the challengers “complain not of the state law, but of the voters’ (and their elected delegates’) preference for the choices of the party leadership.”<sup>11</sup> The suggestion that challengers for nomination are entitled to a “fair shot” at success, said the Court, might be appropriate for legislative judgment, but was unmanageable as a judicially imposed rule and not required by the Constitution.<sup>12</sup> The Court also rejected the suggestion that the non-competitiveness of the general election in districts dominated by single parties (making the primary and the convention effectively determinative of the outcome in the general election) somehow enhanced the challengers’ rights to have a direct primary. Once again, voters and potential candidates have no right to any “fair shot” at nomination or electoral success, merely a right to “an adequate opportunity to appear on the general election ballot,” which was “easily” satisfied by New York’s petition process.<sup>13</sup>

The Court’s ruling that individuals have no First Amendment right to win the endorsement of a party as its nominee, nor even to a “fair shot” at winning nomination, is hardly remarkable. Political parties themselves have a First Amendment right to associate and to choose their standard-bearers for an election. But where a potential candidate’s prospects for party nomination are dim due to a lack of support within the party leadership, any barrier to nomination is a

<sup>9</sup> *Id.* at 798.

<sup>10</sup> *Id.* at 798–99.

<sup>11</sup> *Id.* at 799.

<sup>12</sup> *Id.* at 799–800.

<sup>13</sup> *Id.* at 800.

function of private choice—not governmental impediment—and the First Amendment protects rather than restricts such private choices.

Of greater interest than the overall result was the Court's general discussion of state regulation of, and constitutional limits on, party nominating procedures. In the first instance, the Court recognized that a "political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."<sup>14</sup> The Court tempered that broad statement by noting that such rights are "circumscribed, however, when the State gives the party a role in the election process."<sup>15</sup>

The tension between the political parties' First Amendment rights of association and the constitutional obligations and state prerogatives that come from being incorporated into state election processes, has led to limits on political parties' freedom to conduct their nomination process as they see fit. Thus, as the Court noted, it has found a political party's racial discrimination in connection with primary elections to be state action that violated the Fifteenth Amendment, and has allowed states to regulate and dictate, up to a point, the parties' nominating processes.<sup>16</sup> Indeed, with little argument or explanation, the Court endorsed the conclusory and questionable holding in *American Party of Texas v. White*, that it was "'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot."<sup>17</sup>

The Court also offered an odd discussion of the nature of the First Amendment rights at issue, stating that they involved only the political parties' own rights "to structure their internal party processes and to select the candidate of the party's choosing."<sup>18</sup> While failing to acknowledge that it was state law, not merely private

<sup>14</sup> *Id.* at 797 (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981); *California Democratic Party v. Jones*, 530 U.S. 567, 574–575 (2000)).

<sup>15</sup> *Id.* at 797.

<sup>16</sup> *Id.* at 798 (citing *Jones*, 530 U.S. at 573–77 (discussing various cases regarding constitutional and state-law restrictions on primaries, but holding that a state may not force parties to allow non-members a vote in determining party nominees)).

<sup>17</sup> *Id.* (quoting *American Party of Texas v. White*, 415 U.S. 767, 781 (1974)).

<sup>18</sup> *Id.* at 798.

choice, that dictated the nominating procedures, the Court noted that the parties themselves defended the state law requiring the hybrid delegate election/party convention process. The Court thus reasoned that individual party members and potential nominees claimed only a nebulous right “to have a certain degree of influence in[ ] the party.”<sup>19</sup>

Justice Stevens, joined by Justice Souter, authored a brief concurrence noting his distaste for the deficiencies of the New York nominating process and for the broader practice of electing judges.<sup>20</sup>

Justice Kennedy authored an opinion concurring in the judgment, joined in part by Justice Breyer (who also had joined the majority opinion). Kennedy maintained that where the state mandates a particular process for selecting a party’s nominees, the state must not design its process to impose severe burdens on First Amendment rights.<sup>21</sup> He noted, however, that the option of petitioning onto the general election ballot mitigated any constitutional deficiencies that might otherwise arise from New York’s party nomination procedure. Although believing that such an alternative means of access to the general election ballot would not always cure deficiencies in the party nomination process, and suggesting that there was indeed an individual right “to have a voice in the selection of” a party’s candidate for office, he found no unconstitutional burden on that right on the particular facts of this case.<sup>22</sup> Finally, like Justice Stevens, Justice Kennedy noted his concerns with New York’s process for selecting judges and the need for a process that produces “both the perception and the reality of a system committed to the highest ideals of the law.”<sup>23</sup>

## II. The Decision in *Washington State Grange v. Washington Republican Party*

In *Washington State Grange*, the Court considered a challenge by the political parties to a Washington voter initiative (Initiative 872, or I-872) that adopted a nonpartisan blanket primary in which all

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 801 (Stevens, J., concurring).

<sup>21</sup> *Id.* (Kennedy, J., concurring in the judgment).

<sup>22</sup> *Id.* at 803.

<sup>23</sup> *Id.*

candidates for a state office (potentially including multiple candidates from the same party) petition onto a single primary ballot.<sup>24</sup> All voters, regardless of their party, could then vote for whichever candidate they preferred, and the top two vote-getters would move on to the general election ballot.<sup>25</sup> Washington's process is unusual, however, in that it requires each candidate to

file a "declaration of candidacy" form, on which he declares his "major or minor party preference, or independent status." Wash. Rev. Code § 29A.24.030 (Supp. 2005). Each candidate and his party preference (or independent status) is in turn designated on the primary election ballot. A political party cannot prevent a candidate who is unaffiliated with, or even repugnant to, the party from designating it as his party of preference. See Wash. Admin. Code § 434-215-015 (2005).<sup>26</sup>

The parties themselves are given no opportunity on either the primary or general election ballot to endorse or repudiate a given candidate's party preference, or to identify any candidate as the party's nominee. It is this novel feature—the identification of party preference on the ballot—that led I-872 to be challenged by the Republican, Democratic, and Libertarian Parties as a violation of their First Amendment rights of association.<sup>27</sup>

<sup>24</sup> The Washington State Grange is a fraternal, social, and civic organization originally formed to represent the interests of farmers. The organization has advocated a variety of goals, and sponsored I-872. It joined the suit below as a defendant and filed its own petition for a writ of certiorari, in addition to the petition brought by the State of Washington.

<sup>25</sup> Wash. Admin. Code § 434-262-012 (2005).

<sup>26</sup> Washington State Grange, 128 S. Ct. at 1189. The party-preference feature is only applied in what Washington deems to be elections for "partisan offices." *Id.*, 128 S. Ct. at 1189 & n. 4. But a "partisan office" is defined, circularly, as "a public office for which a candidate may indicate a political party preference on his or her declaration of candidacy and have that preference appear on the primary and general election ballot in conjunction with his or her name." Wash. Rev. Code § 29A.04.110 (Supp. 2005). Despite Washington's novel definition, this article will continue to refer to Washington's system as a nonpartisan blanket primary because voting is not segregated by party and access to the general election ballot does not turn on nomination by a party.

<sup>27</sup> Washington State Grange, 128 S.Ct. at 1189.

Before turning to the particulars of that challenge, some background is required. Before adopting I-872, Washington used a partisan blanket primary to select nominees for state and local office. In such a primary, any voter, regardless of party, may vote for any candidate. Those candidates from each party that receive the most votes then become their party's nominee in the general election. Under that system the state gave everyone (including members of rival parties) the ability to influence who became a particular party's candidate.

In 2004, the Supreme Court in *California Democratic Party v. Jones* struck down a similar partisan blanket primary system in California. The Court held that the blanket primary was an abridgment of the parties' First Amendment rights because it forced them to associate with non-members and allowed non-members to influence—and in some cases control—who became the parties' nominee.<sup>28</sup> In the course of that holding, the Court also found that a nonpartisan blanket primary “was a less restrictive alternative to California's system because such a primary does not nominate candidates.”<sup>29</sup> Following the decision in *Jones*, the Ninth Circuit struck down Washington's partisan blanket primary system.<sup>30</sup>

Washington adopted I-872 to replace its invalidated blanket partisan primary system with the nonpartisan variety seemingly endorsed by the Court in *Jones*. Washington voters under the new system are not choosing a party's nominee, so such a system generally would not infringe upon the parties' First Amendment rights. But I-872 maintained a vestige of the old system's partisan qualities by requiring each candidate to declare his or her “major or minor party preference, or independent status.”<sup>31</sup>

Because candidates were thus allowed to affiliate themselves with the political parties, even against the parties' wishes and without opportunity on the ballot for rebuttal, the Washington State Republican Party brought a facial challenge to the law, contending “that

<sup>28</sup> *Jones*, 530 U.S. at 581.

<sup>29</sup> Washington State Grange, 128 S. Ct. at 1192 (describing and citing *Jones*, 530 U.S. at 585–86 (The nonpartisan blanket primary “has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee.”)).

<sup>30</sup> Democratic Party of Washington State v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003).

<sup>31</sup> Wash. Rev. Code § 29A.24.030 (Supp. 2005).

the new system violates its associational rights by usurping its right to nominate its own candidates and by forcing it to associate with candidates it does not endorse."<sup>32</sup>

The district court granted summary judgment in the political parties' favor and enjoined implementation of I-872, and the Ninth Circuit affirmed.<sup>33</sup> The court of appeals held that I-872 imposed a severe burden on the parties' First Amendment rights of association because it created an "impression of associational ties" between a candidate and his preferred party even where such party opposed the association and did not consider the candidate to be its nominee.<sup>34</sup> The court of appeals noted that the problem was particularly acute in light of the special attention given to ballots when used as a "vehicle[ ] for political expression."<sup>35</sup>

The Supreme Court, in a decision by Justice Clarence Thomas for seven Justices, reversed. Chief Justice John Roberts, joined by Justice Samuel Alito, filed a concurring opinion. Justice Scalia, joined by Justice Kennedy, dissented.

As in *López Torres*, the crux of the majority opinion was straightforward, and rested on the narrow grounds that the challengers had failed to satisfy the high standards for succeeding on a *facial* challenge.<sup>36</sup> Resolution of the First Amendment issues, said the Court, would depend upon a variety of matters that were currently speculative, such as: the form in which a candidate's party "preference" appeared on the ballot; whether the public was likely to be confused by the statement of preference into a false assumption of association; and whether state courts adopted any limiting constructions of the law.<sup>37</sup>

The Court noted that *Jones* was not dispositive of the validity of the nonpartisan blanket primary in this case because the Court "had no occasion in *Jones* to determine whether a primary system that indicates each candidate's party preference on the ballot, in effect,

<sup>32</sup> Washington State Grange, 128 S. Ct. at 1189.

<sup>33</sup> Washington State Republican Party v. Logan, 377 F. Supp.2d 907 (W.D. Wash. 2005), *aff'd*, 460 F.3d 1108 (9th Cir. 2006).

<sup>34</sup> Logan, 460 F.3d at 1119.

<sup>35</sup> *Id.* at 1121.

<sup>36</sup> Washington State Grange, 128 S. Ct. at 1190–91, 1195.

<sup>37</sup> *Id.* at 1194.

chooses the parties' nominees."<sup>38</sup> But the Court rejected the claim that Washington's process, by allowing candidates to express a party preference, made the winners in the primary "the *de facto* nominees of the parties they prefer, thereby violating the parties' right to choose their own standard-bearers."<sup>39</sup>

[U]nlike the California primary, the I-872 primary does not, by its terms, choose parties' nominees. The essence of nomination—the choice of a party representative—does not occur under I-872. The law never refers to the candidates as nominees of any party, nor does it treat them as such. To the contrary, the election regulations specifically provide that the primary "does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." Wash. Admin. Code § 434-262-012. The top two candidates from the primary election proceed to the general election regardless of their party preferences. Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose because I-872 repealed Washington's prior regulations governing party nominations."<sup>40</sup>

The Court instead noted that, "[a]t bottom, respondents' objection to I-872 is that voters will be confused by candidates' party-preference designations," and that "even if voters do not assume that candidates on the general election ballot are the nominees of their parties, they will at least assume that the parties associate with, and approve of, them."<sup>41</sup> Such claimed confusion and mistaken association, said the Court, is not evident from the face of I-872, but turns merely on the "possibility" that voters will be confused—and thus amounts to "sheer speculation" that is insufficient to support a facial challenge.<sup>42</sup>

After reviewing a variety of ways in which I-872 might be implemented in order to avoid such voter confusion and misperception,

<sup>38</sup> *Id.* at 1192.

<sup>39</sup> *Id.*.

<sup>40</sup> *Id.* at 1192–93 (footnote omitted).

<sup>41</sup> *Id.* at 1193.

<sup>42</sup> *Id.*

the Court concluded that the availability of such methods of implementation “is fatal to respondents’ facial challenge.”<sup>43</sup>

Beyond the basic holding of the case, focusing on the speculative nature of the alleged harm, the Court made a number of more general observations regarding the First Amendment rights of political parties. For example, the Court observed that while parties may no longer indicate their nominees on the ballot, this is unexceptionable:

The First Amendment does not give political parties a right to have their nominees designated as such on the ballot. . . . Parties do not gain such a right simply because the State affords candidates the opportunity to indicate their party preference on the ballot. “Ballots serve primarily to elect candidates, not as forums for political expression.”<sup>44</sup>

Also interesting was the Court’s effort to distinguish the case before it from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*<sup>45</sup> and *Boy Scouts of America v. Dale*.<sup>46</sup> Those cases, said the Court, involved situations in which “actual association threatened to distort the groups’ intended messages. We are aware of no case in which the mere *impression* of association was held to place a severe burden on a group’s First Amendment rights, but we need not decide that question here.”<sup>47</sup> The Court similarly argued that I-872 did not force the political parties to engage in responsive speech, as was the case in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,<sup>48</sup> because “it simply provides a place on the ballot for candidates to designate their party preferences. Facilitation of speech to which a political party may choose to respond does not amount to forcing the political party to speak.”<sup>49</sup>

Chief Justice Roberts concurred, joined by Justice Alito. Accepting the proposition that “whether voters *perceive* the candidate and the

<sup>43</sup> *Id.* at 1195.

<sup>44</sup> *Id.* at 1193 n. 7 (citing and quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 362–363 (1997)).

<sup>45</sup> 515 U.S. 557 (1995).

<sup>46</sup> 530 U.S. 640 (2000).

<sup>47</sup> *Washington State Grange*, 128 S. Ct. at 1194 n. 9 (emphasis in original).

<sup>48</sup> 475 U.S. 1 (1986).

<sup>49</sup> *Washington State Grange*, 128 S. Ct. at 1194 n. 10.

party to be associated is relevant to the constitutional inquiry," he nonetheless observed that "individuals frequently claim to favor this or that political party; these preferences, without more, do not create an unconstitutional forced association."<sup>50</sup>

Responding to Justice Scalia's dissenting argument that the ballot is a unique vehicle for shaping voters' perceptions at a critical point in time, and hence that I-872 denies political parties an equivalent opportunity for counter-speech to rebut any unwanted associations with candidates, the Chief Justice argued that "because respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like."<sup>51</sup> He considered it at least possible that a ballot could be designed such that "no reasonable voter would believe that the candidates listed there are nominees or members of, or otherwise associated with, the parties the candidates claimed to 'prefer,'" and thus preferred to wait for an as-applied challenge after the new system was actually implemented.<sup>52</sup> Recognizing the strength of the dissenting arguments, however, he noted that "if the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge."<sup>53</sup>

As for the dissent's argument that even a unilateral statement of party preference by a candidate will affect the voters' views of a party, thereby altering the party's message without an equivalent opportunity for rebuttal by the party, the Chief Justice acknowledged that while a party ordinarily would have no "right to stop an individual from saying, 'I prefer this party,' even if the party would rather he not," this case was different because "the State controls the content of the ballot, which we have never considered a public forum."<sup>54</sup> Expressing skepticism that the state was particularly interested in crafting a ballot that might avoid the problems identified by the

<sup>50</sup> *Id.* at 1196 (Roberts, C.J., concurring) (emphasis in original).

<sup>51</sup> *Id.* at 1196–97.

<sup>52</sup> *Id.*, at 1197.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

dissent, he nonetheless thought it “important to know what the ballot actually says—both about the candidate and about the party’s association with the candidate . . . before deciding whether it is unconstitutional.”<sup>55</sup> The majority and concurring opinions thus continue the Court’s emerging trend of being reluctant to entertain facial challenges.

Justice Scalia, joined by Justice Kennedy, dissented.

The crux of Justice Scalia’s argument was that when “the state-printed ballot for the general election causes a party to be associated with candidates who may not fully (if at all) represent its views, it undermines” both the “electorate’s perception of a political party’s beliefs[, which] is colored by its perception of those who support the party,” and the party’s defining act of selecting a candidate and “conferring upon him the party’s endorsement.”<sup>56</sup>

While recognizing that a state need not affirmatively support or favor political parties, and “is entirely free to decline running primaries for the selection of party nominees and to hold nonpartisan general elections in which party labels have no place on the ballot,” he viewed I-872 as seeking “to reduce the effectiveness of that endorsement by allowing *any* candidate to use the ballot for drawing upon the goodwill that a party has developed, while preventing the party from using the ballot to reject the claimed association or to identify the genuine candidate of its choice.”<sup>57</sup> But allowing a candidate unilaterally to express a party preference on the ballot, while “preventing the party from using the ballot to reject the claimed association or to identify the genuine candidate of its choice . . . makes the ballot an instrument by which party building is impeded, permitting unrebutted associations that the party itself does not approve.”<sup>58</sup> It is the special role of the ballot that precludes the state from mandating such selective access and limiting it to only one side of a claimed association: “[B]ecause the ballot is the only document voters are guaranteed to see, and the last thing they see before casting their vote, there is ‘no means of replying’ that ‘would be equally effective with the voter.’”<sup>59</sup>

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1197–98 (Scalia, J., dissenting).

<sup>57</sup> *Id.* at 1198 (emphasis in original).

<sup>58</sup> *Id.* at 1199.

<sup>59</sup> *Id.* at 1200 (citation omitted).

Justice Scalia rejected the need to wait for an as-applied challenge, noting that even the mere statement of a party preference sufficiently associates a candidate with a party to distort the image of the party and burden its rights.<sup>60</sup>

Finding no compelling interest for including party preferences on the ballot, Justice Scalia rejected the state's minor interest in "providing voters with a modicum of relevant information about the candidates."<sup>61</sup> He questioned whether that claimed interest would even satisfy the "rational basis" test because, if adherence to a particular party philosophy is indeed important to voters, it seems "irrational not to allow the party to disclaim that self-association, or to identify its own endorsed candidate."<sup>62</sup> Indeed, the failure also to permit "parties to disclaim on the general-election ballot the asserted association or to designate on the ballot their true nominees" meant that the law was not narrowly tailored to avoid undue intrusion on the parties' association rights.<sup>63</sup>

### III. First Amendment Problems from the Dual Roles of Political Parties, and Potential Solutions

The particular results in *López Torres* and *Washington State Grange*, rejecting First Amendment challenges to very different state election processes, are based on fairly narrow holdings that in themselves tell us little about political parties and the First Amendment. Some of the related reasoning and commentary in those opinions, however, are useful in that they highlight the unusual public and private roles parties play in connection with elections, and illustrate some of the problems caused by those dual roles.

*López Torres*, for example, merely rejected the novel argument that disenchanting party members have a First Amendment *right* to have the state force upon parties a particular nominating process that would supposedly enhance ordinary members' influence within the party relative to the party "bosses" and improve the challengers' chances of winning the party's nomination for office. Describing the right the challengers sought is enough to reject it.

<sup>60</sup> *Id.* at 1200–01.

<sup>61</sup> *Id.* at 1202 (quoting Petitioners' Brief, 2007 WL 1538050, at \*24, 48–49).

<sup>62</sup> *Id.* at 1202.

<sup>63</sup> *Id.* at 1203.

Other aspects of the *López Torres* opinion, however, suggest a different way of looking at the First Amendment issues raised by New York's judicial election scheme. Thus, while the Court was correct in finding no First Amendment right of members to have any particular degree of influence within a party, it too readily characterized the respondents' injuries as stemming entirely from the private choices of the party leadership and voters, rather than from the New York law that mandated the nominating process at issue.

Given that freedom of association encompasses not only the right of a party to choose *who* shall be its nominee and standard-bearer in an election, but also *how* to structure its internal procedures,<sup>64</sup> it does not at all seem "'too plain for argument' that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot."<sup>65</sup> Instead, the choice of what method to use in selecting a party's nominee would seem squarely within the First Amendment rights to freedom of speech and association.

Although the Court recognized the right of a party "to structure [its] internal party processes and to select the candidate of the party's choosing,"<sup>66</sup> it treated that right as belonging to a party as an entity, rather than to its members. And in disposing of any objection by noting that the parties themselves supported New York's law mandating conventions, the Court passed over the underlying nature of the rights at issue and missed the genuine objection that could have been raised to the law.

As for the nature of the right to structure internal party processes, those belong to the party only as a matter of convenience. The rights of a political association, of course, are derivative of the rights of its members. It is the party members themselves who have a right to decide on the internal procedures of the party. While individual

<sup>64</sup> See, e.g., *Jones*, 530 U.S. at 573 (Constitution protects parties' "internal processes"); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (First Amendment protects processes by which party selects a "standard bearer"); *Democratic Party of United States v. Wisconsin ex rel. La Follete*, 450 U.S. 107, 122 (1981) (freedom of party to define and limit those who constitute the association).

<sup>65</sup> *López Torres*, 128 S. Ct. at 798 (quoting *American Party of Texas v. White*, 415 U.S. at 781).

<sup>66</sup> *Id.* at 798.

members or less popular factions within the party certainly do not have a right to get their way in internal deliberations on what procedures to use, they would certainly seem to have a right to an *opportunity* to influence the internal procedures. But by enacting a law that mandates a particular procedure, even one favored by the controlling faction of a political party, the state short-circuits the very deliberative processes by which a party might choose to change its nominating procedure.

The First Amendment problem in this case does not arise from the lack of greater influence over the outcome of the nominating process, but from the lack of any genuine opportunity to seek a different process within the party itself without, in the Court's words, "undue state-imposed impediment."<sup>67</sup> New York's law requiring a particular nominating process thus infringes on the freedom of association by short-circuiting the internal party politics that either will lead to a compromise best suited to the particular party and its members or that may prove the dispute to be intractable and hence lead to new associations.

Under this alternative view of the First Amendment rights implicated by the law in *López Torres*, the First Amendment rights of the party leadership and the party rank and file are not in tension at all, but are in fact two sides of the same coin. In choosing to associate with a party, members take the existing association as it is. If they find aspects of the association not to their liking—whether it is the leadership structure, the method of choosing candidates to support, or elements of the party platform—they are free to work within the party to change things. Failing that, they are free to accept the good along with the bad or to seek out different associations with which their views are more compatible. As the Court correctly notes in connection with the selection of a nominee, for the party itself to deny individual members a particular degree of say in party affairs does not deny them any *rights* whatsoever, but merely denies them their *preference* on a disputed matter of internal policy.<sup>68</sup> While the Constitution protects the right of such individuals to try to change party procedure from within, or to seek other associations more to

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 799.

their liking, it hardly compels other similarly free members of the party to accommodate such dissenting desires.

What neither faction in an internal dispute may do, however, is use the resources and authority of the state to tilt the scales of an internal dispute—to enforce a particular solution to that dispute, or, worst of all, to shift the blame (and hence the political responsibility) for the resolution of such dispute to the state—thus short-circuiting the intra-party political process. Yet that is precisely the result of the New York law mandating a particular nominating method.

In fairness, the Court did not undertake this sort of analysis because none of the parties advocated it. Indeed, the challengers' request for an injunction ordering the state to use direct primaries was as much a violation of the principles outlined above as is existing New York law.<sup>69</sup> But even if the Court had considered such an argument, it still would have confronted its various cases, including *American Party of Texas*, giving states considerable leeway to dictate the nominating procedures of political parties.

Those cases, however, turn on the idea that party nomination processes have an element of state action in them—based on the incorporation of the political parties into state election machinery and the delegation of at least part of the government's gatekeeping function of controlling ballot access in partisan elections. In such a gatekeeping role, party selection of candidates to be placed on the general election ballot does seem to involve state action so as to make party nominee selection processes less than wholly private affairs. Indeed, such intertwining of party and government processes is precisely what has driven the Court to apply various constitutional limitations to the conduct of partisan primaries.<sup>70</sup> As described by

<sup>69</sup> The Cato Institute, in an amicus brief in support of no party, noted precisely that tension in the case and argued that the proper result was to strike down the New York law *and* deny the requested injunction because both were a violation of the First Amendment. See Brief of Amici Curiae the Cato Institute, Reason Foundation, and the Center for Competitive Politics, in Support of None of the Parties, in No. 06-766, *New York State Board of Elections v. López Torres* (May 7, 2007) (available at [http://www.cato.org/pubs/legalbriefs/López\\_Torres\\_amicus.pdf](http://www.cato.org/pubs/legalbriefs/López_Torres_amicus.pdf)). (In the interest of full disclosure I should note that I authored that brief.) The parties would thus be free to use a party-boss-dominated convention to select its nominees, but would have to take internal political responsibility for that decision with the party rank and file.

<sup>70</sup> See *Jones*, 530 U.S. at 573 (discussing *Smith v. Allwright*, 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953)); *López Torres*, 463 F.3d at 185–86 (discussing *Terry* and *United States v. Classic*, 313 U.S. 299 (1941)).

Justice Scalia, the free association rights of political parties “are circumscribed, however, when the State gives the party a role in the election process—as New York has done here by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot.”<sup>71</sup>

In light of such entanglement between the private functions of the parties and the public functions of the government in regulating elections and ballot access, states would indeed seem to have significant interests in regulating related party conduct as well. But appearances can be misleading in this context insofar as the states generally compel parties to play such a gatekeeping role. Asserting a state interest in regulating such gatekeeping functions thus begs the question of whether forcing private associations into governmental roles is compatible with the First Amendment, particularly where the role likewise forces them to sacrifice essential aspects of their freedom of association.

From a private-association perspective on political parties, of course, the decision to nominate a candidate for office is in fact little more than a decision formally to endorse a prospective candidate. It has no power or effect beyond its expressive and persuasive significance, and does not in and of itself have any legal consequence. An endorsement, without more, does not get a candidate on a ballot, though it certainly indicates that the candidate is likely to be able to fulfill any neutral criteria for ballot access. Where the private association perspective gets difficult is in connection with the wholly distinct state decision to use party endorsement as a proxy for its own responsibility for regulating ballot access. Giving legal effect to a mere party endorsement by converting it into the controlling factor for ballot access in effect delegates the state’s power over ballot access to private associations.<sup>72</sup> Such delegation, in turn, is used to justify greater state regulation of those private associations

<sup>71</sup> López Torres, 128 S. Ct. at 797–98.

<sup>72</sup> Allowing candidate names to appear on the ballot with their party endorsement, by contrast, hardly seems relevant to whether the parties are engaged in state action and hence subject to constitutional and state-law regulation. Instead, it is more aptly viewed as the opening up of a nonpublic forum and then applying discriminatory criteria regarding whose endorsement may appear on the ballot. The proper challenge to that would come from a candidate seeking to include on the ballot an endorsement from a person or entity other than a political party.

until the distinction between public and private actors is so blurred that the First Amendment begins to lose meaning.

While a state may certainly have valid interests in seeking to free-ride on the activity of private associations in making the state's own ballot access decisions and to narrow the field to serious contenders, those interests do not justify imposing the further burden on free association of then interfering with the internal processes of such associations. To the extent that a party's nomination procedure is deemed inadequate to meet the state's interests in winnowing the field in an appropriate manner, the state is free to adopt alternative methods of regulating ballot access that do not rely on party processes (such as requiring prospective candidates to gather a certain number of signatures or percentage of the vote in the previous election). It is not free, however, to strip parties of their private character and remake them in the state's preferred image. And while a state might conceivably (though not necessarily) condition automatic ballot access on use of a favored nominating process, it cannot command the parties to play the role of gatekeeper and then use that forced role to regulate their First Amendment activities.

Even assuming that a state can legitimately force candidates to run a party gauntlet (or abandon party affiliations entirely and run as independents) in order to gain access to the general election ballot, the proposition that a party can be limited to a single slot on the ballot for each office merely justifies requiring parties to make a choice, not controlling the manner in which such a choice is made. If the state feels that party decisionmaking is too restrictive of candidate access, it is certainly free to make access to the general ballot easier and less party-dependant. That is by far a less restrictive alternative for advancing any legitimate state interests. But having forced the parties into a gatekeeper role, any dissatisfaction with how they perform that role is a self-inflicted wound that does not justify restricting party First Amendment rights in lieu of having the state directly set party-neutral ballot-access rules for the general election.<sup>73</sup>

<sup>73</sup> One, though not the only, solution, would be to have nonpartisan elections, as was almost the case in *Washington State Grange*. Political parties would, of course, remain free to endorse whichever candidates they desired—and to assist such favored candidates in getting a place on the ballot by, for example, collecting the necessary signatures to petition onto the ballot—but their decision of whom to endorse would return to the wholly private function that it should be, separate and apart from the government's requirements regarding ballot access.

Any further purported interests in preventing party splitting or minimizing factionalism not only involve harms that are—at best—speculative, but such interests are directly counter to the very core of free association. Using state power to hinder or discourage individuals from freely leaving existing associations and forming new ones (that is, party splitting) on its face runs counter to the freedom of association by coercing individuals to remain in existing associations and to forego associations with others (or with a subset of their current associates) who may have a greater congruence of views. Similarly, attempting to fight factionalism by tilting the scales in favor of existing factions more likely to achieve majority status simply misconceives the whole problem of faction. Madison’s greatest concern regarding the “violence of faction” was not the proliferation of many small factions, but the “superior force of an interested majority.”<sup>74</sup> The solution to the danger of faction was not to replace conflicting factions with a single majority faction of the public, but rather to render any potential majority faction “unable to concert and carry into effect schemes of oppression.”<sup>75</sup> Far from being compelling, a desire to decrease or hobble the formation of smaller factions is anathema to the “republican remedy for the disease[ ]” of factionalism.<sup>76</sup> The proper remedy for a concern with factions is not to bind them into majorities, but rather to encourage their diversity and freedom, thereby allowing them to check each other with their conflicting efforts. The alternative of trying to suppress the phenomenon of numerous factions “by destroying the liberty which is essential to its existence,” is a remedy “worse than the disease.”<sup>77</sup>

Ultimately, a more coherent First Amendment perspective would recognize that a state’s preference to delegate some of its election-related functions to private associations cannot be a valid justification for intruding into such private associations and converting them into state actors. Co-opting and controlling the field of effective political associations is no less an offense to the First Amendment than suppressing such associations directly.

<sup>74</sup> Federalist No. 10, *The Federalist Papers* 45 (Rossiter & Kesler eds. 1999).

<sup>75</sup> *Id.* at 49.

<sup>76</sup> *Id.* at 52.

<sup>77</sup> *Id.* at 45–46.

The decision in *Washington State Grange* thus offers an interesting counterpoint to New York's mandate of a particular party nominating process and the conflicting dual roles of political parties. As for the result in that case, it seems to be a fairly narrow holding based more on the procedural posture of the case than on any significant dispute over the rights at issue. Indeed, the Chief Justice and Justice Alito in their concurrence were quite sympathetic to the substantive views of the dissent, differing primarily on whether one could conclusively presume severe First Amendment harm from *any* ballot statement of a candidate's party preference, regardless of the form or context. While, in my estimation, Justice Scalia has the slightly better of that argument, it is hard to quibble with the Court's reticence to resolve such a claim without a concrete example before it.

Aside from the result, however, *Washington State Grange* illustrates a system in which political parties are essentially divorced from involvement in the formal election machinery, and hence can be treated as the private expressive associations they are, rather than as quasi-state actors in the context of partisan elections. Parties in Washington are now far freer to structure their affairs and advocate for their preferred candidates than they are in many other states.<sup>78</sup> And their lack of control over access to the ballot removes essentially all of the supposed justification for regulating them in the first place.

The problem in *Washington State Grange* was not that it went too far in removing the parties from formal involvement in the election process. Even Justice Scalia acknowledged that states may effectively exclude political parties from any formal involvement in the election process, by declining to run party primaries or to include party affiliations on nonpartisan ballots.<sup>79</sup> Instead, the state did not go far enough and attempted to hold on to some of the partisan nature of the process by including party preference on the ballot. That it did so in an apparent effort to dilute the content of the party label rather than to assist the parties, as seems to be the goal of ordinary partisan elections, does not change the First Amendment problems with giving parties a special role in elections and special acknowledgment on the ballot.

<sup>78</sup> See *supra* at 14–15 (quoting *Washington State Grange*, 128 S. Ct. at 1192).

<sup>79</sup> *Washington State Grange*, 128 S. Ct. at 1198 (Scalia, J., dissenting).

Indeed, what is troubling about Justice Scalia's opinion is that he seems to see no problem with *helping* the major parties by granting access to and labeling particular candidates as party nominees, even though he challenges the state's power to require other particular information about a candidate on the ballot.

Again, it is perhaps no surprise that such issues are not addressed in *Washington State Grange*, given that the parties themselves certainly were in no position to object to giving party affiliation a favored place on the ballot. Any challenge of that sort would have to come from an independent candidate who unsuccessfully sought to include some other information next to his name that was as meaningful as party affiliation (for example, endorsement by a prominent politician or non-party organization such as the Sierra Club or the Chamber of Commerce).

In any event, *Washington State Grange* at least shows a possible path toward segregating the expressive functions of a party from the election functions of the state, though Washington itself failed to follow that path to its end. Full separation would mean that parties have no special role in elections beyond their private expressive function—and may structure their affairs, select candidates to endorse, and advocate vigorously—without any suggestion that they are engaging in state action. They then would be treated like any other private expressive association.

The state likewise would be able to focus on its core function of running fair and efficient elections. That limited function would most readily comport with the First Amendment if the state limited itself to imposing speech-and-association-neutral requirements for ballot access (as Washington has done) and refrained from making the ballot a billboard or other type of expressive forum for particular views or pieces of information that the state seeks to inject into the election process. The state should confine itself to winnowing the field under neutral criteria and identifying the candidates in a non-confusing manner, leaving the provision of substantive information and advocacy about the candidates to the marketplace of ideas.