

CHAPTER 3:

STATE REGULATIONS THAT AFFECT POLITICAL PARTIES

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I. INTRODUCTION

States have broad, but not unlimited, power to regulate the time, place, and manner of elections because of their acknowledged interests in orderly elections, electoral integrity, minimized voter confusion, political stability, and electoral finality.¹ By the same token, individuals have a constitutionally protected right to associate with like-minded others to advance their political goals.² A common means individuals use to advance shared political goals is the organization of a political party. Elections can result in tension and conflicts between these public and private interests.

With a proper showing of necessity to ensure fair and honest elections, states are permitted to set regulations that affect political parties.³ State regulations directly affect political parties when the state:

1. regulates the political party itself,
2. establishes ballot access requirements, and
3. conducts primary elections.⁴

These three areas of state regulation implicate political parties' and voters' First and Fourteenth Amendment voting, political speech, and associational rights.

This chapter discusses the state's ability to regulate political parties and the attendant legal challenges.

¹ See *Storer v. Brown*, 415 U.S. 724, 730 (1974) (noting "substantial regulation" of elections is necessary to ensure they are fair, honest, and orderly) and *supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access.

² U.S. CONST. amend. I.

³ See *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 231 (1989).

⁴ States indirectly regulate political parties when states establish voter eligibility criteria, including restrictions on voter eligibility for primary election participation. See *infra* Chapter 5: State Regulation of Voters for additional information on voter eligibility issues.

II. STATE REGULATION OF POLITICAL PARTIES

Two of the many ways that states regulate political parties are by establishing requirements necessary to create a new political party and dictating party processes. A primary way individuals associate to advance their political goals is by creating a new political party. Although third parties challenge the political mainstream,⁵ and could be viewed as contrary to the state's interests in political stability, citizens have a federal constitutional right to create and develop them.⁶

Depending on the state, a group may be required to demonstrate it is a bona fide political party with a local and state party structure before it is permitted to run a candidate under a political party label. States may also require the party to hold party conventions or meetings and demonstrate the public's support of the party.⁷

In general, once political parties are established, states may not regulate their internal structure, governance, or policymaking.⁸ However, if a state can posit a relationship between its regulations and "fair and honest" elections⁹, a state may usually (1) enact laws that set voter eligibility requirements, including eligibility to participate in a primary election, (2) require that candidates be citizens, and (3) specify whether the party must use a primary election or nominating convention to select its general election candidates.¹⁰ States may generally regulate these areas even though the party might prefer to make other choices.¹¹

When the state-required selection process for a party nominee conflicts with national party guidelines, the latter prevail, at least when the selection of the party's electors to its presidential nominating convention is at stake. For example, states cannot require political parties to select their presidential electors in an open primary, which allows non-party members to vote, when the national party rules limited participation to party members only.¹² In addition, states may not tell a political party which individuals will serve as its delegates to the party's presidential nominating convention.¹³

⁵ See *Munro v. Socialist Workers Party*, 479 U.S. 189, 200 (1986) (Marshall, J., dissenting) (offering a discussion on the historical importance of third parties).

⁶ *Norman v. Reed*, 502 U.S. 279, 288-89 (1992).

⁷ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997).

⁸ See *id.* at 363.

⁹ *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214, 231 (1989) (noting that a state's interest in "fair and honest" elections is a subset of the state's interest in electoral integrity) (citing *Storer v. Brown* 415 U.S. 724, 730).

¹⁰ See *id.* at 231.

¹¹ See *Timmons*, 520 U.S. at 364 (noting elaborate, empirical justification of the strength of the state's justification is unnecessary and that "[l]egislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights") (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

¹² *Timmons*, 520 U.S. 351.

¹³ *Cousins v. Wigoda*, 419 U.S. 477 (1975).

In general, the court may hear lawsuits brought by parties alleging the state's regulation of political party's results in constitutional failures. The state will typically not bring suit because its remedy to alleged compliance failures by the political parties is to simply deny ballot access in the general election.

Although this situation appears to be rare, if individuals satisfy a state's statutory requirements for establishing a recognized political party and election officials fail to comply with their official duty to recognize the party, then the court should issue a writ of mandamus to compel the state officials to grant official recognition to the new party. Alternately, a plaintiff can claim that the state granted party recognition to a group of individuals who failed to satisfy all the statutory requirements for a political party. In this instance, the court will be asked to order state officials to cancel the party recognition.

More likely, individuals who wish to establish a political party will bring a constitutional challenge that claims the state's requirements to do so are unconstitutionally burdensome. Courts evaluate constitutional challenges to a state's regulation of First Amendment political associational rights by determining how severely the regulation burdens these rights. States must narrowly tailor regulations to serve a compelling state interest if the regulations impose severe burdens on associational rights.¹⁴ States can usually justify regulations that impose lesser burdens on associational rights if the regulations are reasonable and non-discriminatory.¹⁵ No bright line separates the two categories; thus, courts must make "hard judgments"¹⁶ about how severely the regulation burdens associational rights.

III. SELECTION OF THE PARTY NOMINEE

States may structure and monitor the methods political parties use to select their candidates, and may require primary elections.¹⁷ While some states require parties to use primary elections to determine their candidate for the general election ballot, other states allow political parties to use party conventions or party caucuses instead. States also have latitude in regulating voter participation in political party primary elections because of the state's interest in electoral stability and integrity.

Primary elections currently¹⁸ follow one of three formats:

- open,
- closed, or
- semi-open/semi-closed.

¹⁴ *Clingman v. Beaver*, 544 U.S. 581, 586 (2005).

¹⁵ *Id.* at 587.

¹⁶ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

¹⁷ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000).

¹⁸ In the past, some states held blanket primaries in which voters received one ballot that combined all the candidates for all the offices. Blanket primaries allowed voters to split tickets by mixing and matching the different political parties' candidates. The Supreme Court declared blanket primaries unconstitutional because they violated political parties' right to "not associate" with members of other political parties. See *id.* at 567.

An open primary allows participation by any qualified voter, regardless of party registration, but the voter is limited to only one party's ballot. Thus a voter cannot split a ticket among multiple parties.

In a closed primary, only registered party members can vote.

Semi-closed/semi-open primaries allow independent and non-party affiliated voters to participate in a party primary if the party's own rules allow it. Voters who are registered party members are restricted to voting in their own party's primary.

Legal challenges to primary elections tend to involve constitutional attacks on primary election regulations, especially regarding limits on who may vote in the primary. In general, courts have more cut-and-dried guidelines at their disposal when they evaluate state regulation of voter participation in primary elections than voter participation in general elections.

Regardless of whether the state, a political party, or a private association actually conducts the primary election, primary elections are state functions with constitutional protections for the right to vote, including the right to have one's vote counted.¹⁹ States are complicit if they allow political parties to discriminate in granting voting rights.²⁰ Private associations are state actors when they select a political party's general election nominee and, as such, are subject to the same constitutional requirements applicable to the state.²¹ Thus, private associations and political parties cannot exclude primary voters on account of their age²², race, previous condition of servitude, or sex. Although not a constitutional challenge, if the state is a covered jurisdiction under Section 5 of the Voting Rights Act (VRA),²³ any change a political party makes to its candidate selection process may require preclearance or be subject to challenge for failure to do so. For example, VRA preclearance was necessary before a political party could begin charging its convention delegates a participation fee.²⁴

States may not require political parties to open their primaries to all registered voters.²⁵ States also may not prohibit political parties from allowing independent voters to participate in a political party's primary election if the party wishes to do so.²⁶ States may restrict primary election participation to registered party members and independent or non-affiliated voters, and deny participation by voters affiliated with a different political party, even if the political party sponsoring the primary election wants to allow all voters to participate.²⁷

¹⁹ *United States v. Classic*, 313 U.S. 299 (1941).

²⁰ *Smith v. Allwright*, 321 U.S. 649 (1944).

²¹ *Terry v. Adams*, 345 U.S. 461 (1953).

²² States may not exclude primary voters if they are at least eighteen years old – although states may permit younger persons to participate.

²³ 42 U.S.C. § 1973c (West 2007).

²⁴ *Morse v. Republican Party of Va.*, 517 U.S. 186 (1996) (5-4 decision).

²⁵ *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

²⁶ *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (finding an unconstitutional violation of the state Republican party's right of political association by a state law that prohibited the party from allowing independent voters to participate in the party primary).

²⁷ *Clingman v. Beaver*, 544 U.S. 581 (2005).

If a political party uses a primary election to determine its general election nominee, its candidates' names must generally appear on the primary election ballot.²⁸ Because the Constitution does not guarantee an absolute right to use the ballot for political association,²⁹ states do not need to prove actual voter confusion, ballot overcrowding, or a history of frivolous candidacies before they enact ballot access restrictions.

IV. PARTY BALLOT ACCESS FOR THE GENERAL ELECTION

Unless candidates run for office as independents or the election is non-partisan, candidates run under a political party label. Before states grant ballot access to a political party's candidates, states may require the party to demonstrate it has the public's support as indicated by signature petitions, party-affiliated voter registrations, or previous electoral success.³⁰

State ballot access regulations restrict all political parties, but are a major concern of third parties. While the major political parties—and some individual minor parties—are guaranteed ballot access because of past demonstrations of support,³¹ most third parties are not. Political parties without guaranteed ballot access must expend considerable amounts of their personnel and financial resources seeking ballot access.

In general, four categories of political parties may attempt to gain ballot access for their candidates during a partisan election. The four categories are:

- major,
- minor,
- small, and
- new.

Specifically, the Democratic and Republican parties are the two major national political parties, although other parties may achieve major party status in individual states. Major political parties have automatic access to the general election ballot for every partisan office if the party decides to run a candidate. If more party-affiliated candidates are interested in the office than the number of seats available, the party winnows the candidate list through a nominating convention, party caucus, or primary election.

In popular parlance, all political parties other than the Democratic and Republican parties are third parties. Thus the third party label applies equally to established minor parties, small parties, and the new political parties that occasionally arise. Some states' statutes establish

²⁸ If the candidate's name does not appear on the primary ballot, state regulations determine whether a write-in candidacy will be recognized by the state.

²⁹ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

³⁰ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1997). *See also* *Clements v. Fashing*, 457 U.S. 957, 965 (1982) (plurality) (quoting *Storer v. Brown*, 415 U.S. 724 (1974); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) and *Jenness v. Fortson*, 403 U.S. 431 (1971)).

³¹ Although ballot access is guaranteed for the major party's candidate, candidate ballot access restrictions, such as disaffiliation, age, experience, residence, or citizenship requirements impact the candidate selection choices of major parties as well as third parties.

different ballot access requirements—usually public support requirements—based on whether a political party is a major party, a minor party, a small party, or a new party.

Minor political parties are established political parties that qualify for automatic ballot access for *some* partisan offices because of past levels of voter support for their candidates or because a threshold number of the state's voters registered as members of the party. Unlike major political parties, minor parties have not demonstrated sufficient public support to automatically qualify a candidate for the ballot for *all* partisan offices. If minor parties do not have automatic ballot access for a particular office, their minor party status may nonetheless allow them to qualify their candidate under less stringent requirements than those applicable to small or new political parties.

Small political parties may be established local, regional, or national parties that regularly run candidates for office, but do not poll sufficient voter support in any election to qualify for automatic ballot access for any partisan office and must re-qualify for ballot access every election cycle. Regional variations in party support mean that a minor political party in one state may be a small party in another or vice versa.

New political parties are those that have not yet qualified a candidate for the ballot.

Small and new political parties may fail to qualify any candidates for the ballot or they may succeed in qualifying candidates for only a few elective offices. If their candidates do not receive a statutorily-specified percentage of votes in the primary election, the candidate may be kept off the general election ballot. Likewise, their lack of demonstrated support in the general election may prevent them from gaining automatic ballot access in succeeding primary or general elections.

Major political parties routinely receive general election ballot access for their successful primary candidates. States routinely—and constitutionally—condition third-party general election ballot access on a candidate's receipt of a specified number of votes in the primary election.³² These support requirements allow the state to preserve the general election for the resolution of major political struggles.³³

Courts are likely to hear ballot access challenges in two contexts that both occur prior to the election. In the first, the dispute concerns whether the party fully complied with the requirements such that ballot access should be granted. In the second, the party challenges the constitutionality of the access regulation itself.

³² See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (upholding as reasonable a requirement that candidates receive 1% of the total votes cast for the office in the primary election before their names would be placed on the general election ballot); *Bullock v. Carter*, 405 U.S. 134 (1972) (finding that general election ballot access by a minor party or independent candidate may be conditioned on a showing of a modicum of support by potential voters).

³³ *Munro*, 479 U.S. at 196.

These compliance-based challenges arise in several contexts. First, a party candidate may contest the primary election results or the political party's nomination process.³⁴ In general, absent a primary election contest, courts refuse to become involved in intra-party disputes over who should represent the party in the general election.³⁵ If the political party uses a convention or caucus permitted by state law to select its nominee, then the party's choice is generally considered an internal party matter best decided by the party itself, especially when multiple individuals or groups claim they speak for the party.³⁶ In general, intra-party disputes over which faction is entitled to use the official emblem should be settled within the party and should not involve the courts.³⁷

Second, aggrieved individuals—usually candidates, but also voters as state statutes allow—may challenge election officials' decision to grant or deny ballot access to a political party's candidate, with one side claiming all statutory requirements were met while another claims they were not. The alleged deficiencies may involve candidate qualifications,³⁸ compliance with petition requirements, or the prospective political party's ability to satisfy statutory requirements to become established and to demonstrate a party structure. In one instance, a political party that was denied ballot access sued over the appropriate voter registration figures to use when determining if enough voters identified themselves as party members for the party to qualify for automatic ballot access.³⁹

Before turning to the courts, the plaintiff may be required to exhaust all available administrative review options. Because election officials usually lack discretion to deny ballot access to a political party or its candidate that met all ballot access requirements,⁴⁰ the court is generally able to issue a writ of mandamus to compel election officials to add a candidate's name to the ballot when it was denied in error. The court may also be able to enjoin the use of a ballot that lists an unqualified candidate or, alternately, order that any ballots cast for an unqualified candidate have no legal effect.

³⁴ See *infra* Chapter 9: Election Contests for additional information.

³⁵ *Id.*

³⁶ *But see* *Jordan v. Kusper*, 518 N.E.2d 432 (Ill. App. Ct. 1987). In this unique case, the court resolved an intra-party dispute over the identity of the official party nominee, *id.* No one formally filed to run for the party's nomination to a circuit court judgeship and the elections board certified the name of a write-in candidate even though the five votes he received did not satisfy statutory requirements to win, *id.* A self-proclaimed candidate, who filed an untimely election contest, and a party-selected nominee challenged the write-in candidate's certification to the general election ballot, *id.* The court dismissed the election contest because it was filed by a non-candidate, dismissed the challenge by the party "nominee" because statutes required primary winners to be certified for the general election ballot, and upheld the certification of the write-in candidate, *id.*

³⁷ *Am. Indep. Party of Mich. (Morse-Smith Faction) v. Secretary of State*, 247 N.W.2d 17 (Mich. 1976).

³⁸ See *supra* Chapter 2: State Regulation of Candidacies and Candidate Ballot Access for additional information.

³⁹ *Peace and Freedom Party v. Shelley*, 8 Cal. Rptr. 3d 497, 499 (Ct. App. 2004) (holding that counting only those voters in the active voter registration file was a "reasonable, nondiscriminatory restriction" that furthered protection of the integrity and stability of elections because the inactive file contained unreliable and duplicative information that the state was prevented from purging).

⁴⁰ If a political party is unable to qualify its candidate for ballot access under the party's label, its candidates might nonetheless qualify to run as independents.⁴⁰

Third, because primary election and general election ballot access are usually separate processes, a third party may dispute the state's failure to allow its candidate's name to appear on the general election ballot because the candidate failed to garner sufficient votes to qualify. If the court finds that the political party fulfilled the public support requirements, it can order election officials to add the party's candidates' names to the general election ballot.

In addition to compliance-related challenges, political parties may challenge the constitutionality of a state's ballot access regulations. Although the state need not remove all hurdles facing third parties,⁴¹ the state's ballot access requirements should be reasonable and allow ballot access that is "genuinely open to all."⁴² A state's legitimate interests in regulating elections mean the regulations will necessarily burden individuals' rights to vote and associate for political purposes.⁴³ Thus, no "litmus-paper test" exists to separate valid from invalid state regulations,⁴⁴ nor is strict scrutiny the appropriate level of review for all election regulations.⁴⁵

Courts evaluating constitutional challenges must first look at the character and magnitude of injury the state's regulation causes to the First and Fourteenth Amendment rights the plaintiff seeks to vindicate.⁴⁶ The court then identifies and evaluates the interests the state offers to justify the regulation.⁴⁷ Finally, the court determines the strength and legitimacy of the state's interests and the extent to which they necessitate the specific burden the plaintiff has suffered.⁴⁸

To justify the limitations its regulations place on a third party's ballot access, the state's interests must be "sufficiently weighty," with severe restrictions receiving strict scrutiny review,⁴⁹ and lesser restrictions receiving less searching review. Strict scrutiny review requires the state to demonstrate the regulation is the least restrictive and narrowly tailored to uphold a compelling state interest, but courts do not evaluate the sufficiency of the state's evidence offered to justify its challenged regulation.⁵⁰ The court assesses whether a ballot access requirement is narrowly

⁴¹ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997).

⁴² *Lubin v. Panish*, 415 U.S. 709, 718-19 (1974).

⁴³ *Anderson v. Celebrezze*, 460 U.S. 780, 789. See also *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

⁴⁴ *Celebrezze*, 460 U.S. at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

⁴⁵ *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting that strict scrutiny review for all election regulations would "tie the hands" of states in their efforts to ensure equitable and efficient elections).

⁴⁶ *Celebrezze*, 460 U.S. at 789.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (citations omitted); *Perez-Guzman v. Gracia*, 346 F.3d 229, 239 (1st Cir. 2003). See also *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 383 n.2 (1997) (Souter, J., dissenting) (describing the level of review as similar to "midlevel scrutiny" used in commercial speech cases).

⁵⁰ *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (wanting to avoid endless court battles regarding the sufficiency of the state's evidence if the state was required to show its ballot-crowding concerns were well-grounded). See also *Timmons*, 520 U.S. at 364 (noting that states may justify limits imposed on a party's rights if the state's regulatory interest is "sufficiently weighty," although no empirical proof is necessary) (citations omitted).

tailored by comparing it to the state's other requirements,⁵¹ as well as the ballot access criteria used by other states.

Courts have declared state ballot access regulations unconstitutional when their combined effect made it impossible for new political parties to gain ballot access regardless of the party's widespread public support.⁵² For example, the U.S. Supreme Court found an unconstitutional infringement on associational rights by state ballot access regulations that:

- forbade independent candidacies,
- required new political parties to obtain supporting signatures from 15% of the voters in the last gubernatorial election (while the Democratic and Republican parties only needed to obtain 10% of the votes cast in the last gubernatorial election),
- required nominating petitions be signed by individuals who had never voted before, and
- required the new party's nominating convention delegates to have been unaffiliated with any political party for four years.⁵³

In another ballot access challenge, the court applied strict scrutiny and overturned a regulation in Puerto Rico that required new political parties to have each of the 100,000 required petition signatures individually notarized.⁵⁴ The notarization requirement severely burdened the political party's rights because it:

- inserted a third-party—the notary—into the communication channel between the petition circulator and voter,
- reduced significantly the political party's likelihood of success because state regulations created entry barriers to potential notaries, thereby limiting total available notaries
- added at least \$1,500,000 to the cost of ballot access.⁵⁵

⁵¹ *Perez-Guzman v. Gracia*, 346 F.3d 229, 245 (1st Cir. 2003). See also *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (finding that requiring new political parties or independent candidates, when running for office serving less than the entire state, to obtain 25,000 signatures to gain ballot access was unconstitutional as not the least restrictive means necessary, noting the requirement was higher to run for mayor of Chicago than for statewide office); *Norman*, 502 U.S. 279 (using the statewide ballot access requirement as measuring criteria for local ballot access requirements and holding signature requirement that effectively required more signatures for ballot access in multi-district political subdivision than it did for statewide office was unconstitutional but requirement that signatures for multiple political subdivision ballot access end up aggregating to more than statewide totals are constitutional). But see *Norman*, 502 U.S. 279 (requiring a new party to demonstrate it has the public's support in each of the multi-district political subdivisions in which it wishes to field a candidate is consistent with the Constitution).

⁵² *Williams v. Rhodes*, 393 U.S. 23 (1968) (holding that the combination of code provisions favoring established two parties and making it virtually impossible for a third party to qualify for ballot access was unconstitutional); *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003) (holding that the combination of burdens on third party ballot access—especially the requirement that every petition signature had to be notarized when only lawyers could serve as notaries—was unconstitutional when the government failed to demonstrate they were narrowly tailored to serve a compelling state interest).

⁵³ *Williams*, 393 U.S. at 25-26 n.1 (describing Ohio law).

⁵⁴ *Perez-Guzman*, 346 F.3d at 245.

⁵⁵ *Id.* at 240.

In contrast to the above examples where the court applied strict scrutiny, the U.S. Supreme Court held that the state's interests in promoting political stability and electoral integrity were sufficiently weighty to permit it to prohibit fusion candidacies.⁵⁶ Fusion candidacy prohibitions are constitutional because they do not prevent a political party or its members from endorsing, supporting, or voting for its favorite candidate, nor do they interfere with the party's internal structure governance, or policymaking ability.⁵⁷

⁵⁶ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). See *supra* Chapter 2: State Regulations of Candidacies and Candidate Ballot Access for additional information on fusion candidacies, where one person runs for an office as the nominee of two different political parties.

⁵⁷ *Timmons*, 520 U.S. 351.