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It’s Whose Party? Accurately Defining Political Parties in First Amendment Cases

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It's Whose Party? Accurately Defining Political Parties in First Amendment Cases

An association for political [purposes] . . . is a powerful and enlightened member of the community, which cannot be disposed of at pleasure or oppressed without remonstrance, and which, by defending its own rights against the encroachments of the government, saves the common liberties of the country.[1]

—Alexis de Tocqueville

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1. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 324 (Phillips Bradley ed., Henry Reeve trans., 1945).

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I. INTRODUCTION

The First Amendment demands exacting scrutiny of laws that severely burden political parties—but accurately measuring the severity of that burden requires first accurately defining the political party itself. For without accurately defining the bearer of a burden, a court cannot adequately measure the severity of that burden. Indeed, as a split Tenth Circuit panel recently demonstrated, to define a party is to determine the outcome: By defining the Utah Republican Party (the "Party") as "like-minded *individuals*," the majority found no burden on the Party's associational freedoms.[2] In contrast, by defining the Party as an *organization* "distinct from . . . the individuals that form its membership," the dissent found severe burdens on the Party's associational freedoms.[3] This definitional dispute is not unique to the Tenth Circuit. Despite historical prevalence of cases involving political parties, there is no clear articulation of how to legally define these groups.[4] Some courts define a party by its members, measuring a law's burden on each individual member's associational freedoms;[5] some define a party by its institutional

2. Utah Republican Party v. Cox, 885 F.3d 1219, 1232–33 (10th Cir. 2018) (emphasis added), *cert. denied*, 139 S. Ct. 1290. By way of general disclaimer, I also worked extensively on that petition for the Utah Republican Party.

3. *Id.* at 1256 (Tymkovich, C.J., concurring in part and dissenting in part).

4. *See, e.g.*, Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 775 (2000) ("Despite the increasing number of cases involving political parties that have occupied court dockets in the last half-century, judges have been unable to develop a coherent or consistent theoretical framework for defining the legal relationship between political parties, the state, and the individual."); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 279 (2001) (stating that throughout the caselaw there is persistent "legal uncertainty about what the party actually is"); Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95 (noting how the judiciary has "failed to develop sophisticated positive and normative views of political parties, resulting in a jurisprudence of the political process that is inconsistent and unsatisfying").

5. *E.g.*, *Utah Republican Party*, 885 F.3d at 1232–33 (measuring a law's burden on party members); *see also* Alaskan Indep. Party v. Alaska, 545 F.3d 1173 (9th Cir. 2008) (same); Swamp v. Kennedy, 950 F.2d 383 (7th Cir. 1991) (same); Geary v. Renne, 880 F.2d 1062 (9th Cir. 1989) (same).

organization, customs, bylaws, or leadership;[6] and some approach the task more holistically, defining parties by some combination of membership, leadership, and structure.[7] At worst, courts simply refer to such plaintiffs as "the party,"[8] grossly simplifying what both legal scholars and political scientists agree is an entity with many distinct components.[9]

No doubt, clarifying the muddy line[10] between permissible and impermissible burdens on political party associational freedoms would be a laudable endeavor—perhaps especially as political parties are fundamental to our democratic system.[11] But before clarifying that line, we must first accurately define the parties themselves. To measure a law's burden, a court must know the "who"—who actually bears a burden, or on whom should that burden be measured. Accurately defining the party thus gives courts this crucial "who," ensuring that they do not improperly define political parties as the Tenth Circuit did in *Utah Republican Party*.

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6. *E.g.*, *Utah Republican Party*, 885 F.3d at 1256 (Tymkovich, C.J., concurring in part and dissenting in part); *see also* Green Party of Ark. v. Martin, 649 F.3d 675, 682 (8th Cir. 2011) (finding no burden because regulation "does not regulate the [Green Party]'s *internal processes*, its authority to exclude unwanted members, or its capacity to communicate with the public") (emphasis added) (quoting Clingman v. Beaver, 544 U.S. 581, 583 (2005)).

7. *E.g.*, Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 587 (6th Cir. 2006) (looking at "the effect of the regulations on the voters, the parties and the candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election").

8. *E.g.*, *Martin*, 649 F.3d at 683 (finding that an Arkansas statute did not "severely infringe[] the Green Party's association rights," without specifically defining the party).

9. *See, e.g.*, V. O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 164–65 (5th ed. 1964) (identifying the three component parts of a party: party-organization, party-in-government, and party-electorate); *see also* Persily & Cain, *supra* note 4, at 778 (identifying V. O. Key's three components as a "foundational work of political science"); Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights when the Primary Election Process is Construed Along a Continuum*, 88 MINN. L. REV. 159, 166–68 (2003) (same). This trichotomy is also discussed below in section IV.B.

10. *Cf.* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.") (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

11. 2 DE TOCQUEVILLE, *supra* note 1; *see also* Michael R. Dimino, Sr., *It's My Party and I'll Do What I Want to: Political Parties, Unconstitutional Conditions, and the Freedom of Association*, 12 FIRST. AMEND. L. REV. 65, 75 (2013) ("[T]he First Amendment's protections of associational autonomy should apply with 'special force' to political parties, whose very existence is dedicated to the collective expression and propagation of shared [political] ideals." (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (internal quotation marks omitted) (Alito, J., concurring) (alteration in original))).

Like most legal scholarship, however, the answer is "it depends." In defining the "party," factors like the plaintiff's characteristics, the election stage being regulated, and the individual or entity acting on behalf of the party all inform how a political party is accurately defined. Using these factors and pulling from legal and interdisciplinary literature on political parties and expanding that scholarship a bit further, this Note introduces the Plaintiff-Stage framework—a systematic and objective approach to accurately defining political parties at various stages of the election process.

Parts II and III provide context by summarizing both *Utah Republican Party v. Cox* and the *Anderson-Burdick* test, a framework used to determine an election law's constitutionality. Part IV describes the first iteration of the Plaintiff-Stage framework by schematizing existing scholarship and case law. But because this version of the framework does not quite address the effect of laws like Utah's SB54, Part V addresses and remedies these deficiencies, ultimately providing a completed iteration of this framework. Part VI then briefly responds to normative (and often subjective) considerations that judges may use in deciding these cases. At least as applied to the recent *Utah Republican Party* case, the Plaintiff-Stage framework would have diametrically altered the Tenth Circuit's conclusions. In a broader sense, the Plaintiff-Stage framework offers judges an objective and systematic method of accurately defining political parties in order to then accurately measure burdens on associational rights.

II. *UTAH REPUBLICAN PARTY V. COX*

The Utah Republican Party has a specific way in which it nominates candidates for state primary elections. Delegates are selected in neighborhood caucuses to represent their respective neighborhoods, and those delegates convene in the Party's state convention to nominate candidates to the primary ballot.[12] In 2014, the Utah Legislature enacted Senate Bill 54 (SB54), altering how candidate names are placed on the ballot. Under SB54, political parties like the Utah Republican Party could still place candidates on its primary ballot through its caucus meetings and convention,

12. *See* Utah Republican Party v. Cox, 885 F.3d 1219, 1224 (10th Cir. 2018).

but it could not limit primary candidates to this exclusive method of nomination. Instead, "a candidate who is unwilling or unable to gain placement on the primary ballot through the caucus and convention [could] still qualify for the primary by gathering a set number of signatures by petition from eligible primary voters."[13] In this way, SB54 allows candidates to seek nomination by "*either or both* of the following methods:" adhere to the "political party's convention process" or "by collecting signatures."[14] Colloquially, this became known as the "Either or Both Provision."

After an initial lawsuit in which the district court excised a different provision of SB54 on constitutional grounds,[15] the Utah Republican Party asked the court to rule that the Either or Both Provision was also unconstitutional.[16] The Party alleged that because SB54 allowed candidates to circumvent the Party's self-selected method of choosing its own standard-bearers, SB54 could impermissibly alter the Party's message, violating its associational rights. The district court rejected this argument, holding that the Either or Both Provision did not infringe upon the Party's right of association.[17] The Tenth Circuit affirmed, supporting its analysis by two determinations that, as described in Parts IV and V below, are critical in defining "the party": determining which stage of the election is affected by SB54 and how a party is defined at that stage. Determining the stage affected, the court held that SB54 did not target the nomination or endorsement stages—internal processes that states usually cannot regulate. Instead, the court found SB54 to affect the Party's external processes, or the primary election itself.[18]

13. *Id.* at 1225. "Eligible primary voters" are only those voters who belong to the specific party participating in a primary as the court found in an earlier case. *See infra* note 15.

14. *Id.* (quoting UTAH CODE ANN. § 20A-9-101(12)(c) (West 2019)).

15. *See generally* Utah Republican Party v. Herbert, 144 F. Supp. 3d 1263, 1278 (D. Utah 2015) (excising the Unaffiliated Voter Provision, which allowed the signature requirement to be met by gathering signatures from any Utah voter rather than from members of the parties themselves, because it imposed severe burdens on the Utah Republican Party's First Amendment rights and because the state had no compelling interests supporting the provision).

16. *Utah Republican Party*, 885 F.3d at 1226.

17. Utah Republican Party v. Cox, 178 F. Supp. 3d 1150, 1179 (D. Utah 2016).

18. *Utah Republican Party*, 885 F.3d at 1229 (noting SB54 targets the "method by which [the Party] selects its nominee to appear on the *general election ballot for state and federal offices*") (emphasis added); *see also id.* at 1230 ("[O]ur consideration . . . extends only insomuch as they indicate that a party's external activities in selecting candidates for public office

Then, defining "the party" at the primary stage, the court stated that the "Utah Republican Party" only consisted of Republican *voters*.[19]

These determinations proved dispositive in the Tenth Circuit's analysis. By categorizing SB54 as only affecting the primary stage, it was logical to only measure SB54's burden on those directly involved in the primary, that is, party members in the electorate. And because SB54 "ensure[d] that all party members have some voice in deciding who their party's representative will be," SB54 would ensure "the will of *all* the [Party]" was expressed.[20] Categorized in this way, SB54 did not burden the Party vis-à-vis its members from choosing its standard bearer.[21] Moreover, in defining the Party as its members, it was irrelevant whether the law burdened other components of the Party like its leadership, who may have disagreed with the nomination of a candidate.[22] Thus, the court held that "the Either or Both Provision is at most only a minimal burden on the [Party's] First Amendment associational rights."[23]

Had the panel defined the stage affected or "the party" differently, the court would have reached a drastically different conclusion. For example, the dissent found that SB54 actually impacted the nomination stage as it "change[d] the substantive type of candidates the Party nominates" by changing the Party's nominating procedure.[24] As the dissent continued, "[t]he problem [with SB54] is that the Party cannot use the caucus system as its *exclusive means of nomination* while still being able to list its endorsements on the ballot."[25] Put in other words, the Party could not determine the candidates it would endorse through its self-selected procedures. Instead, candidates without the Party's institutional endorsement (*via* the caucus system) would be

must necessarily be subject to greater state involvement and scrutiny than its wholly internal machinations.").

19. *Id.* at 1232–33.

20. *Id.* at 1232 (emphasis added in second quotation).

21. *Id.* at 1232–33. *Contra* Calif. Democratic Party v. Jones, 530 U.S. 567 (2000) (invalidating California's mandated blanket primary in which voters, regardless of affiliation, could vote for a party's candidates in the primaries).

22. *Utah Republican Party*, 885 F.3d at 1235.

23. *Id.*

24. *Id.* at 1246, 1255 (Tymkovich, C.J., concurring in part and dissenting in part) (emphasis in original omitted).

25. *Id.* at 1255 (emphasis added).

representing the Party on the Party's own primary ballot and possibly (if the candidate succeeded) in the general election.

This categorization heavily influenced how the dissent defined "the party": "A political party is more than the sum of its members . . . . Parties therefore have associational rights that are distinct from those of the individuals that form its membership. The superstructure of the party—its bylaws, customs, and leadership—are protected by the First Amendment too."[26]

These two alternative determinations—that SB54 affected the nomination stage and that the party was defined by its "bylaws, customs, and leadership"—led to a conclusion diametrically opposed to the majority's: Because SB54 grants candidates authority to circumvent the Party's self-designated nomination procedures, the law would clearly impose a severe burden on the Party vis-à-vis the burden placed on the Party's internal structures and procedures.[27]

I have already noted the dissenting judge was most likely correct in his analysis, but to understand this conclusion it is important to first understand what framework the Tenth Circuit should have used. Accordingly, this Note continues with a brief discussion of the *Anderson-Burdick* test—the relevant test for measuring burdens on political parties—followed by an evaluation of existing scholarship used to define "the party." This scholarship falls short in determining both the stage affected and how to define the "party." As neither courts nor scholars have squarely addressed this question, the remainder of this Note is dedicated to that discussion. In sum, for situations similar to SB54 and the Utah Republican Party where the regulation affects the nomination process itself, "the party" is best defined, as the dissent suggested, by the "bylaws" and "customs" of a party.[28] And it is the burden on those bylaws and customs, i.e., the party as an *institution*, that should have informed the Tenth Circuit's *Anderson-Burdick* analysis.

26. *Id.* at 1256.
27. *Id.* at 1257–58.
28. *See id.* at 1256.

III. THE *ANDERSON-BURDICK* TEST

The Constitution grants Congress the right to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives."[29] The U.S. Supreme Court has also held that states enjoy a similar right in regulating their own elections because "as a practical matter, there must be some substantial regulation of elections if they are to be fair and honest and if some order, rather than chaos, is to accompany the democratic process."[30] Competing against this state interest, however, is the fundamental and constitutional significance of a free election process.[31] Thus, courts "take great care to scrutinize any electoral regulation" that would burden this process.[32] Courts use the *Anderson-Burdick* test to perform such scrutiny.

This test does not restrict every burden, however, as even the smallest regulation impacts the election process in some way. Instead, the *Anderson-Burdick* test scrutinizes only those regulations that impose unconstitutionally severe burdens.[33] In *Anderson v. Celebrezze*,[34] later clarified by *Burdick v. Takushi*,[35] the U.S. Supreme Court explained the relationship between burden severity and unconstitutionality in the following balancing test:

29. U.S. CONST., art. I, § 4, cl. 1.

30. Storer v. Brown, 415 U.S. 724, 730 (1974); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("[I]t is also clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *see also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (reaffirming the states' interests to regulate their own elections).

31. Burdick v. Takushi, 504 U.S. 428, 433 (1992) (noting that the election process is of "most fundamental significance under our constitutional structure") (internal quotation marks omitted).

32. *Utah Republican Party*, 885 F.3d at 1228.

33. *See, e.g.*, *id.* ("For example, even a state's decision to close its polls at 7:00 PM instead of 8:00 PM will invariably burden some voters—and therefore their respective parties—for whom the earlier time is inconvenient; so too, however, if the state chose 8:00 PM instead of 9:00 PM. These burdens, then must necessarily accommodate a state's legitimate interest in providing order, stability, and legitimacy to the electoral process.").

34. Anderson v. Celebrezze, 460 U.S. 780, 782–89 (1983) (striking down an early filing deadline in Ohio, reiterating that no litmus-paper test existed for defining acceptable and unacceptable burdens on voting and association given that substantial regulation of the electoral process is necessary).

35. *Burdick*, 504 U.S. at 428 (upholding Hawaii's write-in voting ban and clarifying that when the burden is severe, strict scrutiny applies, but when the law imposes only "reasonable, nondiscriminatory restrictions" then state interests are usually sufficient).

> [A] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that *the plaintiff* seeks to vindicate" against the "precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden *the plaintiff's* rights."[36]

In other words, if a court finds that a law imposes "severe burdens on [a party's] associational rights," the court engages in a strict scrutiny analysis.[37] Contrastingly, if the law imposes "lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[38] As two legal scholars have put it, this test can be simplified to four key questions: First, "whose rights were violated?" or rather, who is "the plaintiff"? Second, "[h]ow severe is the deprivation of the [plaintiff's] rights?" Third, what are the state interests justifying the burden? And fourth, depending on whether the burden was severe or reasonable, are the state interests "sufficiently weighty to justify the restraint on the [plaintiff's] rights?"[39]

Despite the "simple mechanics" of this test, "unforeseeable results" follow.[40] For example and most relevant to this Note, how does a court define "the plaintiff" in order to define the plaintiff's rights? As demonstrated both in the previous section and the sections that follow, when "the party" is the plaintiff, the *Anderson-Burdick* test provides no guidance on how that plaintiff should be defined.[41] The following analysis is thus focused on this ambiguity—how a court defines the plaintiff and its asserted rights when that plaintiff is a political party. And while this Note does not discuss the severity of burdens or the justification of state interests, at least in *Utah Republican Party* the court made clear that if SB54

36. *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789) (emphasis added).

37. Clingman v. Beaver, 544 U.S. 581, 586 (2005) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (internal quotation marks omitted)).

38. *Id.* at 586–87 (quoting *Timmons*, 520 U.S. at 358) (internal quotation marks omitted).

39. Persily & Cain, *supra* note 4, at 776–77.

40. *Id.* at 777; *see also supra* note 4 and accompanying sources.

41. *See* DANIEL P. TOKAJI, ELECTION LAW IN A NUTSHELL 265 (2013) (explaining how both *Anderson* and *Burdick* were analyzed around facts dealing with ballot access, not party rights).

had *severely* burdened the Party, the State of Utah had weak interests justifying such a burden.[42]

IV. DEFINING "THE PARTY"

Unfortunately, no scholar or court seems to have squarely addressed how political parties are to be defined in First Amendment cases. But the current literature and court cases do provide much to be gleaned. Accordingly, this Part draws upon and schematizes these sources to create the Plaintiff-Stage framework. This Part provides only a preliminary iteration, however, as there are deficiencies that the Plaintiff-Stage framework 1.0 does not address. That said, I address these deficiencies and supplement the framework in Part V. In both this part and the next, I have relied on three key questions to develop this framework: (1) Who is the plaintiff? (2) What component of the party is suing? And (3) what stage of the election process does the state regulation affect? As I discuss below, these ultimately stem from the broader *Anderson-Burdick* test itself.

A. Who is "the Plaintiff"?

Properly defining parties in these cases first begins with determining who the plaintiff really is and what rights the plaintiff is asserting.[43] In fact, properly identifying "the plaintiff" begins to harmonize the "incompatible" election law jurisprudence that scholars have categorized as an "ad hoc approach . . . produc[ing] contradictory results via incompatible methodologies."[44] For example, when voters allege that an election law burdens their

42. Utah Republican Party v. Cox, 885 F.3d 1219, 1229 (10th Cir. 2018) ("The distinction between wholly internal aspects of party administration on one hand and participation in state-run, state-financed elections on the other is at the heart of this case. When a party selects its platform, its Chairman, or even whom it will endorse in the upcoming election, the state generally has no more interest in these internal activities than in the administration of the local Elks lodge or bar association. But when the party's actions turn outwards to the actual nomination and election of an individual who will swear an oath not to protect the Party, but instead the Constitution, and when the individual ultimately elected has the responsibility to represent all the residents in his or her district, the state acquires a manifest interest in that activity, and the party's interest in such activity must share the stage with the state's manifest interest.").

43. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

44. Dimino, *supra* note 11, at 66.

associational rights as voters, it is intuitive that a court focus on how the law burdens voters themselves.[45] Similarly, when candidates challenge their ability to access the ballot due to burdensome signature requirements, courts analyze a law's burdens on that individual.[46] The same intuition should follow when a political party brings suit: a court should analyze burdens on the *party's* associational rights.

Simply looking at each side of the "*v.*," however, is not always instructive. For example, when some conglomeration of parties, candidates, and voters are suing, determining the right-bearing plaintiff can be more challenging. Under the *Anderson-Burdick* test, a court is not only to identify the plaintiff, but, more generally, "the character and magnitude of the asserted injury to the *rights* protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate."[47] Thus the "asserted injury" and the "rights" alleged can also help a court determine who truly is "the plaintiff." For example, in *Lightfoot v. Eu*, write-in candidates and a party itself sued the State of California for its law requiring political parties to nominate candidates by direct primary and requiring candidates to demonstrate some support before appearing on the general ballot.[48] Because both the individual candidates and the party each asserted their own associational rights, the court separately analyzed the California law's burden on *both* the

45. *E.g.*, Voting for Am., Inc. v. Steen, 732 F.3d 382 (5th Cir. 2013) (explaining that a voting organization brought suit against a law affecting voter rights; burden on voters analyzed); Werme v. Merrill, 84 F.3d 479 (1st Cir. 1996) (analyzing the burden of a law impacting voter rights; voting organization brought suit).

46. *E.g.*, Marcellus v. Va. State Bd. of Elections, 849 F.3d 169 (4th Cir. 2017) (analyzing the candidate's First Amendment rights); Kucinich v. Tex. Democratic Party, 563 F.3d 161 (5th Cir. 2009) (same); Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005) (analyzing the burdens on individual judges when a state law forbade judges from speaking out on political topics); LaRouche v. Fowler, 152 F.3d 974 (D.C. Cir. 1998) (analyzing a candidate's First Amendment rights against state interests); Duke v. Cleland, 954 F.2d 1526 (11th Cir. 1992) (analyzing individual candidate's First Amendment associational rights); Fletcher v. Marino, 882 F.2d 605 (2d Cir. 1989) (same). Note that some of these cases also measure burdens on the voters themselves because what is really at issue is a voter's ability to associate with a candidate. *See, e.g.*, Rosen v. Brown, 970 F.2d 169 (6th Cir. 1992) (analyzing the burden on voters of a state regulation removing "Independent" from a non-affiliated candidate's name on the ballot).

47. *Burdick*, 504 U.S. at 434 (emphasis added) (quoting *Anderson*, 460 U.S. at 789).

48. Lightfoot v. Eu, 964 F.2d 865, 865 (9th Cir. 1992).

individual candidates and the party.[49] Contrastingly, in *Price v. New York State Board of Elections*, a candidate, voters, and a party all brought suit challenging New York's absentee ballot restrictions, but the court focused exclusively on the burden on voters' rights: because the ballot restrictions primarily impacted voters themselves, the primary "rights" affected and the "asserted injury" were voters' rights, making voters themselves the focus.[50]

Thus, when the core "rights" or "asserted injury" involve *party* associational rights like in *Lightfoot*, a court should then measure the law's burdens on the political party itself as "the plaintiff" under the *Anderson-Burdick* framework. And it goes without saying that in cases where the party *alone* is bringing suit for its own First Amendment associational rights, like in *Utah Republican Party*,[51] a court should focus on ways in which it can define and measure the burden on that political party.

B. What Component of "the Party" Is Suing?

But even in cases where a political party itself brings suit, asserting its own rights, a court must still define "the party." A party is not the unitary entity that courts often consider it to be. As the dissent in *Utah Republican Party* aptly noted,

> [w]hile only party members can vote in the party's primary, not all members are the same. . . . [T]he act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.[52]

Indeed, some courts have correctly recognized that "the party" is not a unitary organism. For example, in *Eu v. San Francisco City*

49. *Id.* at 873 (ruling that requiring "write-in candidates [to] demonstrate a modicum of support" before gaining access to the general election ballot did not violate the individual candidate's associational rights; and ruling that requiring parties to nominate candidates by direct primary rather than by convention did not violate the associational rights of political parties).

50. Price v. N.Y. State Bd. of Elections, 540 F.3d 101, 109–10 (2d Cir. 2008).

51. Utah Republican Party v. Cox, 885 F.3d 1219 (10th Cir. 2018); *see also, e.g.,* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (asserting First Amendment rights as a political party); Republican Party of Ark. v. Faulkner Cty., 49 F.3d 1289 (8th Cir. 1995) (same).

52. *Utah Republican Party*, 885 F.3d at 1254 (Tymkovich, C.J., dissenting) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 215 (1986) (internal quotation marks omitted)).

Democratic Central Committee,[53] the U.S. Supreme Court noted that the challenged regulation in that case "directly implicate[d] the associational rights of political parties *and* their members."[54] Similarly in *Tashjian v. Republican Party of Connecticut*,[55] the Court evaluated "the burden cast by the statute upon the associational rights of the Party *and* its members."[56]

Consonantly, political scientists agree that parties are made up of different constituent parts. In the most common breakdown of political parties, political scientist V. O. Key identified three components of modern-day political parties: party members currently serving in elected government office ("party-government"), lay party members comprising a portion of the electorate ("party-electorate"), and professional party workers, including party leadership ("party-organization").[57] Several legal scholars have also adopted this tripartite and have used it to further synthesize and simplify our election law jurisprudence.[58] But if nothing else, to reference a political group as only "the party" is a gross overgeneralization.

Determining which component of a party is suing (and thus defining "the party" in a suit), however, proves no easy feat. This is especially true when the party is fractured or the interests of the party-government, party-electorate, and party-organization diverge. In *Utah Republican Party*, for example, the Utah Republican Party *as an organization* was suing, and clearly the Utah Republican Party organization did not agree with the effect of SB54. However, on the

53. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989).

54. *Id.* at 229 (emphasis added).

55. *Tashjian*, 479 U.S. 208.

56. *Id.* at 217 (emphasis added); *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 581 (2000) ("the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders"); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 363 (1997) (the law in question did not "restrict the ability of the New Party and its members to endorse . . . ").

57. KEY, *supra* note 9.

58. *E.g.*, Gur Bligh, *Extremism in the Electoral Arena: Challenging the Myth of American Exceptionalism*, 2008 BYU L. REV. 1367, 1430 n.312 (2008) (highlighting Key's tripartite classification of political parties); Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2185–86 (2001) (accepting Key's three components as the "tripartite classification" of the party); Persily & Cain, *supra* note 4, at 778 (identifying V. O. Key's three components as a "foundational work of political science"); Nancy L. Rosenblum, *Political Parties As Membership Groups*, 100 COLUM. L. REV. 813, 818 (2000) (same); Hancock, *supra* note 9 (same).

other side of the "*v.*", the party-government (at least in the Tenth Circuit majority's view) had passed SB54, and the party-electorate were likely supportive as SB54 still allowed them to choose their preferred candidate.[59] *Utah Republican Party* is no anomaly—often some component of the party appears on both sides of the litigation.[60]

To solve this issue, courts could look to who is authorized to sue on behalf of the party at large: "the courts that often side with the *party organization* conclude that the party 'speaks' and 'sues' through its official body . . . ."[61] But as a party's lay members will rarely sue (or have the capacity to sue) as the official party, this conclusion would lead to a court defining a party *only* by its leadership in every situation. This singular approach poses its own challenges as this would contradict the accepted policy allowing state election regulations to "set their faces against party bosses" and protect the party-electorate.[62] Thus, looking only to who is acting on behalf of the party is insufficient.

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59. Utah Republican Party v. Cox, 885 F.3d 1219, 1224 (10th Cir. 2018) (noting that "the Utah Legislature—comprised of overwhelming Republican majorities in both the State House and State Senate—passed SB54"). Additionally, the Tenth Circuit noted that SB54 was enacted "only to ensure that all the party members have some voice in deciding who their party's representative will be in the general election. SB54's goal was to ensure only that the will of all the URP was not being truncated by an overly restrictive and potentially unrepresentative nominating process." *Id.* at 1232.

60. *See* Persily, *supra* note 58, at 2185 ("In almost any case involving a political party, members of the party will be on both sides of the lawsuit. [Election law] issue[s] arise[] when a party organization challenges a state law that was passed either by the majority of the party's voters in an initiative [party-electorate] or with the consent of the [party-government].").

61. *Id.* at 2186 (emphasis added).

62. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 205 (2008) (internal quotation marks omitted). Professor Persily also critiques this default definition of "the party" as the party-organization by pointing out the paternalistic results it yields:

> In the context of a primary ballot access lawsuit, the court must determine the constitutional limits on the power of the party organization and the party-in-the-legislature to limit the choices available to the party-in-the-electorate. At the stage of preprimary litigation, no one knows whether the bulk of the membership of the party wants the names of additional candidates to appear on the primary ballot. Indeed, the precise question in the litigation is whether party members will even have the opportunity to express their candidate preferences. Thus, in the litigation, the party organization effectively takes the position of arguing that "the party" has a First Amendment right to prevent itself from expressing its preferences for particular candidates. Of course, the paternalism inherent in this position is obvious: The party organization is trying to protect the party-in-the-electorate from itself.

Persily, *supra* note 58, at 2186; *see also Utah Republican Party*, 885 F.3d. at 1231 (quoting "party bosses" language in *Lopez Torres*, 552 U.S. at 205).

But despite the difficulty of this inquiry, a court must at least attempt to identify which component of "the party" is bringing suit. Thankfully, there are still two other considerations that will help a court determine which component of "the party" is being burdened: the stage affected and which component of a party exercises the party's associational rights at that stage.

C. What Stage of the Nominating Process Does the Law Affect?

Because election regulations usually impact a specific portion of the election process, identifying that affected stage greatly enhances our understanding of how to accurately define "the party." At different stages along the nomination process, "different components of the party have different degrees of power and different rights at stake."[63] And, as the *Anderson-Burdick* inquiry focuses not only on "the plaintiff" but also on "the *rights* . . . that the plaintiff seeks to vindicate,"[64] understanding the rights of the party-government, party-electorate, and party-organization relative to each other at each stage of the nomination process can only further clarify how courts can accurately define "the party" in any given litigation.

There are four basic stages of the nomination process: ballot access, endorsement procedures, party conventions, and the primary itself.[65] In the ballot access stage, parties attempt to be recognized with their candidates on the primary ballot, and cases involving ballot access often concern the rules determining which parties and candidates can be placed on the ballot."[66]At this stage, the party-electorate are minimally involved and "likely [do] not even know who the possible candidates are."[67] Accordingly, the party and its rights at this stage are best protected by

63. *See generally* Hancock, *supra* note 9.

64. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (emphasis added) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

65. Hancock, *supra* note 9, at 169.

66. *See id.* at 170, 180. The most frequent type of case is when a candidate or party is unable to access a *general election* ballot and therefore sues. *See generally, e.g.,* Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) (New Party brought suit when it was unable to place its party name next to a candidate on the general election ballot); S.C. Green Party v. S.C. State Election Comm'n, 612 F.3d 752 (4th Cir. 2010) (candidate challenged the state statute preventing him from accessing the general election ballot via another party when he had already lost in the Democratic primary).

67. Hancock, *supra* note 9, at 181.

balancing the "rights of the *organization* to run the candidate of its choosing and the rights of the government to preserve a stable electoral process."[68]

At the endorsement stage, parties use their "financing, organization, and personnel" to endorse candidates and send "a cue to loyal party voters, effectively garnering those votes."[69] At issue in endorsement cases is usually a party's ability to endorse candidates of its choice.[70] During the party convention stage (which tends to overlap with the endorsement stage), the party uses a convention to select candidates for the primary ballot, endorse candidates in the primary, or choose which candidates will run in the general election, forgoing the primary completely.[71] Issues in convention stage cases often involve infringements on how parties structure their conventions.[72] In both the endorsement and convention stages, "candidate selection *through voting* is never at issue, thereby minimizing the role of the [party-]electorate."[73] Accordingly, both stages are "viewed as the province of the *organization*" rather than the party-electorate or party-government.[74]

At least at the endorsement stage, the U.S. Supreme Court in *Eu v. San Francisco County Democratic Central Committee* implicitly affirmed this conclusion, defining "the party" by party-organization: A law banning a party from endorsing candidates in the primaries "prevent[ed] *party governing bodies* from stating

68. *Id.* (emphasis added). Note also that at the ballot access stage, Hancock ultimately concludes that courts should give the most deference to the party-government. While at first this seems contradictory to my explanation of Hancock's conclusions, there is in fact no contradiction. Hancock states that when *balancing* between the party-government and party-organization, the party-government has more of an interest than the party-organization. *See id.* at 180–82. In other words, after a court has already defined "the party" as the party-organization, it must balance those interests against the government interests under the traditional *Anderson-Burdick* framework. *See id.* Because, however, this Note's analysis focuses exclusively on how a court defines "the party" on the plaintiff side of the "*v.*" and not the ultimate balancing inquiry, I have not included her ultimate conclusion of how a court would rule in ballot access cases.

69. *Id.* at 171.

70. *See generally, e.g.*, Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989) (California law proscribed party governing bodies from endorsing candidates at the primary stage).

71. Hancock*, supra* note 9, at 172.

72. *E.g.*, Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981) (striking down Wisconsin law binding party delegates to vote in a certain way, dissonant with national party self-selected rules).

73. Hancock*, supra* note 9, at 182 (emphasis added) (emphasis omitted).

74. *See id.* (emphasis added).

whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought."[75]

As to the convention stage, scholars agree that the stage is also clearly "considered the province of the organization" as it is a time "where party members . . . meet to discuss the most effective means of furthering the *organization's* goals."[76] Supporting this conclusion, Professor Nathaniel Persily concluded:

> The party convention represents the purest expression of the "party as organization": It creates the party's platform, it brings together partisans from all levels of government . . . . What a party means and stands for are determined at a convention. The right to determine representation at the convention, just like the right to determine who can lead a Boy Scout troop or march in a Saint Patrick's Day parade, will determine the party's message. . . . For the week that [delegates] convene, they engage in pure acts of speech and association.[77]

The final stage in the nomination process is the primary election itself. Often at issue in primary election cases is who can actually vote in the primary.[78] In contrast to the previous three stages, the very nature of this stage suggests that "the party" in these cases should be defined by the party-electorate: party *members*, not leaders in the organization or those in government, vote to select candidate(s) that move on to the general election.[79] And, notably, the basic "purpose of nominating by primary elections is to enable voters, rather than a party organization or leaders, to choose the nominee."[80] Accordingly, defining "the party" by its members

75. *Eu*, 489 U.S. at 223 (emphasis added).

76. Hancock, *supra* note 9, at 183 (emphasis added).

77. Persily, *supra* note 58, at 2218 (footnotes omitted).

78. *See generally, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (invalidating California law opening up party primaries to those not members of a given party); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (adjudicating a primary-stage case involving Connecticut's law closing primaries to only member voters).

79. *See* Hancock, *supra* note 9, at 188. Of course, there may exist primary systems where members do not vote, such as where party leadership directly selects which candidates will be placed on the general election, forgoing the primary election all together.

80. MALCOLM E. JEWELL & DAVID M. OLSON, POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES 104 (3d ed. 1988); *see also* PAUL ALLEN BECK & FRANK J. SORAUF, PARTY POLITICS IN AMERICA 249–50 (7th ed. 1992) ("[I]f . . . the primary was to replace the caucuses and conventions of the party organizations as nominators, the primary fails when it falls

(i.e., party-electorate) best preserves the purpose of holding *direct* primaries in the first place.

Using these stages to more accurately define "the party" demonstrates a core principle: the component of a party tasked with exercising the party's associational rights at the impacted stage best defines "the party."[81] For example, it is the party-organization, not the party-electorate, that structures, funds, and coordinates the ballot access, endorsement, and convention stages. Party leaders are authorized to speak on behalf of the party and endorse a candidate, to allocate and direct the party's finances, and to organize, run, and oversee the convention process. In the primary itself, however, the party-organization no longer wields the responsibility of acting on the party's behalf. Instead, the members themselves vote and "select a standard bearer who best represents the party's ideologies and preferences."[82] Moreover, defining "the party" by a component *not* exercising the party's rights or authority at a given stage seems illogical: that component will rarely (if ever) feel any burden, as it has no authority to act on behalf of the party at the relevant stage. At best, this would make the *Anderson-Burdick* test obsolete as burdens would rarely be severe. Instead, defining "the party" by that component of the party which acts on behalf of the party as a whole during the impacted stage meets both the plaintiff-focused and rights/injury-focused nature of the *Anderson-Burdick* test.

under the sway of those organizations. . . . The direct primary perhaps can be best thought of . . . as creating a veto body that passes on the work of party nominators . . . ."); Hancock, *supra* note 9, at 188 ("Because the government and organization have their associational rights emphasized and protected during the earlier steps in the process, such as the ballot access, endorsement, and convention stages, the primary should be considered the province of the electorate. Essentially, the primary is the only step in the process where the voters of the electorate can fully exercise their roles as party affiliates. In fact, the act of voting in a party's primary can fairly be seen as one of the *most* significant acts of affiliation the electorate can accomplish." (footnote omitted)).

81. This principle is similar to the point made earlier where some define "the party" by who is authorized to sue on behalf of the party. *See supra* Section IV.C, para. 4; *see also supra* note 62. While that definition was unsatisfactory because of its inflexibility, the principle proffered here allows courts to define "the party" in accordance with the relevant stage affected and who within the party acts on behalf of "the party" at that given stage. Thus, this principle affords the flexibility that different aspects of the party could be the focal point of a court's burden measuring without creating a default rule that artificially binds courts from considering the actual rights at stake.

82. *Jones*, 530 U.S. at 575 (alteration omitted) (quoting Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 224 (1989)).

D. The Plaintiff-Stage Framework 1.0

The previous sections have focused on various questions a court can and should ask in defining the party: Who is the plaintiff? Which component of the party is suing? And, what stage of the nomination process does the election law affect (and thus which component of the party acts as "the party" writ large at that stage)? Together these questions create the Plaintiff-Stage framework summarized in the tables below. But as I mentioned above, this iteration is not without its deficiencies. These deficiencies and a final iteration of this framework are discussed in the next Part.

PLAINTIFF-STAGE FRAMEWORK 1.0

Step 1: Categorizing "the plaintiff" in election law cases

<table>
<tr><th colspan="2"></th><th>Burden Measured On</th></tr>
<tr><td rowspan="3">Step 1: Who is "the plaintiff"? (Whose rights/injuries are being asserted?)</td><td>Voter
(e.g., right to associate with each other or with a candidate)</td><td>Voters</td></tr>
<tr><td>Candidate
(e.g., right to associate with a party or with voters)</td><td>Candidates (and voters)[83]</td></tr>
<tr><td>"Party"
(e.g., right to define membership, structure internal affairs, endorse candidates)</td><td>(see step 2)</td></tr>
</table>

83. As noted above, *see supra* note 46, courts often analyze the burden on a candidate in these types of cases. Often, however, the burden is also measured on voters because their rights to associate with any given candidate are usually implicated.

Step 2: Categorizing "the party" in election law cases

		Party Definition (*ergo* Burden Measure)
Step 2: What stage of the nomination process does the regulation affect?	*Ballot Access*	Party-organization
	Endorsements	Party-organization
	Convention	Party-organization
	Primary	Party-electorate

V. OVERCOMING DEFICIENCIES: THE PLAINTIFF-STAGE FRAMEWORK 2.0

Despite the comprehensiveness of this framework, it still fails to resolve how the Tenth Circuit should have defined the Utah Republican Party in its recent decision. Applying the framework above, the court agreed that SB54's burden should have been measured on the Party, but the court did not agree on which component of the Party the burden should have been measured. Applying the framework above, SB54 clearly does not regulate the endorsement, convention, or primary stages.[84] SB54 does not affect endorsements because, as the Tenth Circuit majority correctly noted, "nothing in SB54 prevents the [Party] from endorsing the candidate of its choice and using traditional advertising channels to communicate that endorsement to the state's voters."[85] Neither does SB54 burden the convention stage as the Party may still hold its caucuses and convention as it pleases.[86] Finally, SB54 does

84. The ballot access stage is likewise not implicated, but because this is obvious, I have not mentioned it.

85. Utah Republican Party v. Cox, 885 F.3d 1219, 1219, 1232 (10th Cir. 2018).

86. *Id.* at 1225 ("If a party chooses to register as a [Qualified Political Party, as the Utah Republican Party did], however, it may still hold a caucus, and may certify the winners of the caucus to the primary ballot as before."); *see* UTAH CODE ANN. § 20A-9-403(3)(a) (West 2019).

nothing to restrict or open the primaries to various members of the electorate and thus does not impact the primary stage.[87]

It could be argued that SB54 affects the ballot access stage as in the simplest terms it impacts how candidates access the ballots. But this too is not quite on point. The prototypical fact pattern for ballot access cases usually involves a minority party unable to place their candidates on the general election ballot because it failed to meet the ballot access thresholds.[88] But these facts are incongruous with SB54's effect on the Utah Republican Party. The Utah Republican Party is neither a minority party nor are its candidates unable to be placed on the ballot. Moreover, SB54 primarily targeted the Party's *primary* election rather than the general election typically involved in prototypical ballot access cases. Most importantly, SB54 does not merely regulate who can be on an electoral ballot—it regulates how parties, like the Utah Republican Party, choose their standard bearers. In other words, categorizing SB54 as a ballot access law oversimplifies its impact on political parties.

My schematic contribution would be of little value if the analysis stopped here. And so, continuing forward, the next Part addresses the two key deficiencies that make the Plaintiff-Stage framework incomplete: the current framework fails to identify (A) a broader stage of the nomination process and (B) an additional component of "the party" responsible at that stage. Remedying these deficiencies completes the Plaintiff-Stage framework and provides a clearer answer of how to deal with laws like SB54.

A. Deficiency 1—Ignoring an Additional Nomination Stage: Procedure Creation

While the Plaintiff-Stage framework accounts for laws affecting the individual steps of the nomination process, it does not account for laws, like SB54, that alter the process as a whole. For laws that change the *individual steps* of the nomination process, the Plaintiff-Stage framework does provide an answer: laws changing who

87. *Contra, e.g.,* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (a primary-stage case involving California's law opening primaries to all voters whether affiliated with a party or not); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (a primary-stage case involving Connecticut's law closing primaries to only member voters).

88. *See supra* note 66 and accompanying text.

participates in the primaries burden the party-electorate,[89] and laws affecting how conventions are structured or who can be endorsed burden the party-organization.[90] But what happens, however, when a law alters the nomination procedure as a whole, that is, the procedure by which candidates are selected? SB54, for example, does not affect which voters participate in primaries, who makes endorsements, or how the convention process is structured. Instead, it amends the nomination procedure *itself* by changing how candidates are selected. Thus, to complete the Plaintiff-Stage framework, we must recognize a *nomination procedure creation* stage to account for laws that impact the nomination procedure as a whole instead of the individual stages of that process. If nothing else, this stage must be recognized simply because laws affecting procedure are inextricably tied to substantive changes in expressive association—a point this Note discusses in more detail below.

B. Deficiency 2—Ignoring an Additional Component of the Party: Party-Institution

Even if the Plaintiff-Stage framework recognizes the nomination procedure creation stage, this does not answer how "the party" should be defined in these types of cases. Like above, we can look to who exercises authority over the nomination procedure creation stage to determine how the party should be defined. Put in other words, we must identify who determines the process by which candidates are nominated.[91] However, none of

89. *See supra* note 87.

90. *E.g.*, Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989) (striking down law restricting how endorsements were made); Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107 (1981) (striking down Wisconsin law binding party delegates to vote in a certain way, dissonant with national party self-selected rules).

91. Asking who determines *how* candidates are nominated is not the same as asking who determines *who* gets on the primary ballot. The answer to the latter question is one of the main justifications for the Tenth Circuit's holding in Utah Republican Party: because the party-electorate could choose *who* they wanted to be on the primary ballot, the court decided that there was no severe burden on the party vis-à-vis its members. *See Utah Republican Party*, 885 F.3d at 1232. However, the court did not address whether the State had the authority in the first place to determine that the party-electorate could determine which candidates were placed on the primary ballot. In other words, the Tenth Circuit reached their conclusion based in part on *who* was determining *who* got on the ballot. What that question should have been, and what this Note addresses, is *who* determines *how* candidates get on the ballot. Still in other words, this Note focuses on who has authority to determine the nomination process, not just on who is participating in that process.

the tripartite definitions of party—party-organization, party-electorate, or party-government—adequately serve as a proper definition of "the party" in cases involving laws altering the overall nomination procedure. Thus, a second deficiency is that the Plaintiff-Stage framework needs to recognize a fourth definition of "the party" in these types of cases: the *party-institution*.

1. The Party or the State?

In defining who has the authority to determine a party's nomination process, there are two options: the party or the state. Because states have constitutional and precedential authority to regulate elections, it could follow that states also have the authority to determine how candidates are placed on the general election ballot and, by continuation, on the primary ballot.[92] As the Court noted in *New York State Board of Elections v. Lopez Torres*, while it may be "the party's nominating process," states have "a legitimate governmental interest in ensuring the fairness of . . . that process . . . ."[93]

Accepting that the states hold this authority in totality, however, would give states unchecked power to determine how candidates were placed on the primary ballot. For starters, parties would likely have no cognizable claim against the state in these types of cases: if states possessed the complete rights to regulate the nomination procedure, parties would have no rights, and, thus, no claim that their self-selected procedures were burdened. Such an outcome, however, would be contrary to the relevant caselaw, which does not remotely suggest that parties have no standing in election law cases.[94]

92. *See* U.S. CONST. art I, § 4, cl. 1; *Tashjian*, 479 U.S. at 217 ("[T]he Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices." (internal citation omitted)); Storer v. Brown, 415 U.S. 724, 730 (1974) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.").

93. N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 202–03 (2008).

94. *See, e.g.*, Utah Republican Party v. Cox, 885 F.3d 1219, 1239 (10th Cir. 2018) (considering no other reason to dismiss the case for lack of standing or failing to state a claim upon which relief could be granted); Alaskan Indep. Party v. Alaska, 545 F.3d 1173, 1175–76 (9th Cir. 2008) (same).

Additionally, accepting this conclusion would violate the commonly accepted protection of "a political party's decisions about the identity of, and *the process for electing*, its leaders."[95] Just because a state has "legitimate governmental interests" to "prescribe what [the nomination] process must be,"[96] this does not mean the state has the sole decision-making authority to determine how candidates are placed on the primary ballot. In fact, in *Eu*, the Supreme Court simultaneously recognized that states have a legitimate government interest in ensuring fairness *and* that, "[a] political party has a First Amendment right . . . to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform."[97] The *Anderson-Burdick* test provides for both of these considerations—the state interests balanced against the party's rights. And if state interests are already represented in the *Anderson-Burdick* test, that leaves the party with the right to determine the nomination procedure. After all, if states alone possessed the right to create nomination procedures, states would be limited only by their own interests when burdening political parties. In other words, there would be no limitations at all. Instead, the party, however we define it, holds the right to create nomination procedures.

2. Which component of "the party"?

With the party (not the state) having the right to determine how candidates are selected, we are again left with having to define "the party." However, answering who has the authority to create these nomination procedures quickly becomes circular: Party members, party leaders, or both could determine these procedures. But whoever determines those procedures is likely already determined by preexisting party rules and bylaws. In an odd chicken-or-egg situation, rules determine who can set the rules.

If, for simplicity's sake, we were to define the party by its party leaders (*i.e.*, party-organization), a court would, in cases like *Utah Republican Party*, only look at whether the party's leaders were burdened by the state's regulation. However, such an exclusive

95. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989) (emphasis added).
96. *Lopez Torres*, 552 U.S. at 203.
97. *Id.* at 202–03.

focus on party leadership could give judges and scholars heartburn, as it entirely removes lay party members from the initial nominating procedure creation.[98] Of course, we could use party members, or both members and leaders, to define "the party" in these cases, but, at any rate, this is simply an arbitrary decision that may or may not reflect how a specific party functions. Moreover, if, as discussed above, the party-electorate and the party-organization are at odds with each other, there would be no way to clarify how to define a party. Perhaps we could define "the party" by each party's self-selected body that is in charge of creating the bylaws and procedures, but this still creates the same chicken-or-egg problem.

Though political scientist V. O. Key's tripartite (party-organization, party-electorate, and party-government) certainly describes many components of "the party," there is no clear component of the party responsible for the creation of nomination procedures in every situation. However, identifying a fourth component of "the party" can remedy this issue. Even though identifying who exercises the authority to create a party's nomination procedures, bylaws, and rules is unclear, the party's self-selected nomination process is clear. These party bylaws, procedures, and rules comprise the fourth, albeit inanimate, component of political parties: the party-institution. While the party-organization includes leaders, delegates, and party workers,[99] neither the party-organization, party-government, nor party-electorate account for a party's bylaws, procedures, customs, or constitution. In contrast, the party-institution is comprised of exclusively these institutional elements of the party.

98. *See, e.g.*, *id.* at 205 ("To be sure, we have . . . permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries."); *Utah Republican Party*, 885 F.3d at 1234 ("[The language in *Lopez Torres*] establishes that the associational rights of a political party expand beyond the party leadership, and would be toothless if party bosses could dictate how candidates can qualify for the primary ballot, perhaps, for example, by requiring candidates to win the support of 'party bosses' in order to qualify for the primary ballot, leading to primary 'elections' with a single candidate on the ballot." (citation omitted) (internal quotation marks omitted)); *Alaskan Indep. Party*, 545 F.3d at 1177 (upholding an Alaskan law because it "remove[d] party nominating decisions from the infamous 'smoke-filled rooms' and place[d] them instead in the hands of a party's rank-and-file . . .") (internal quotation marks omitted).

99. KEY, *supra* note 9.

For example, the Utah Republican Party has structured its procedures such that a candidate can be nominated only through the caucus-convention system: if a candidate receives over 60% of the convention vote, that candidate is placed directly on the general election ballot without participating in the primary election.[100] If, however, no candidate gains 60% of the convention vote, the top two candidates participate in a state-run primary.[101] No doubt, SB54 severely infringes on the Party's self-selected bylaws and procedures themselves as the State gives candidates safe passage to circumvent those bylaws and procedures and be nominated in another way.[102]

Additionally, precedent supports recognizing this additional component of the party: In *Eu v. San Francisco County Democratic Central Committee*, for example, the Court stated that "freedom of association also encompasses a political party's *decisions about the . . . process* for electing[] its leaders."[103] Those constitutionally protected decisions are the procedures and bylaws that the party itself selects. In *Tashjian*, the Court reaffirmed this principle by stating that a "Party's determination of . . . the structure which best allows it to pursue its political goals, is protected by the Constitution."[104] Again, "the structure[,]" or institutional procedures of the party, "is protected by the Constitution."[105]

Several benefits arise from using this additional definition of "the party" in cases, like *Utah Republican Party*, where the state law directly burdens the party's choice of its nomination process. First, focusing on a party's self-selected procedures is supported by and explains apparent discrepancies between leading Supreme Court precedent. In *Jones*, the Court held that a state could not force a party to include unaffiliated voters in the party's primary.[106] Contrastingly, in *Tashjian* the Court also held that a state could not force a party to exclude unaffiliated voters in the party's primary.[107] While the cases seem to contradict each other, they can be

100. *Utah Republican Party*, 885 F.3d at 1224.
101. *Id.*
102. *See id.* at 1263–64.
103. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989) (emphasis added).
104. Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986).
105. *Id.*
106. Cal. Democratic Party v. Jones, 530 U.S. 567, 567–68 (2000).
107. *Tashjian*, 479 U.S. at 208–09.

reconciled if, instead of asking only *who* was allowed to vote in a party's primary, we ask *how* the nomination process was structured prior to a state's regulation. In *Jones*, the California Democratic Party, according to its bylaws, only allowed voters affiliated with the party to participate in its primary election; yet the California law contradicted the Democratic Party's self-selected procedure by forcing an open primary and was thus ruled unconstitutional.[108] In *Tashjian*, the Connecticut Republican Party adopted a rule permitting unaffiliated, independent voters to vote in the party's primary; yet the Connecticut law forced a closed primary, and was thus ruled unconstitutional as well.[109] In both cases, the Court ultimately gave considerable weight to the party's self-selected procedures: in *Jones,* the party's self-selected rules were to keep unaffiliated voters out, and in *Tashjian* they were to allow unaffiliated voters in.[110]

Second, using a party-institution definition massively simplifies a court's task of defining "the party," avoiding the chicken-or-egg problem described above. Because a court is looking only at how severely a law burdens a party's structure and nomination procedures, it is not wrapped up in trying to determine which traditional part of the party—be it party-organization or party-electorate—is acting on behalf of the party and thus bears the burden of the law at the nomination process creation stage. Rather, defining "the party" by its institutional and procedural existence allows a court to side-step this hairy categorization game altogether at this stage.[111]

108. *Jones*, 530 U.S. at 570 ("Until 1996 [when the law in question was enacted], to determine the nominees of qualified parties California held what is known as a 'closed' partisan primary, in which only persons who are members of the political party—*i. e.*, who have declared affiliation with that party when they register to vote—can vote on its nominee[.]" (internal citations omitted) (internal quotation marks omitted)).

109. *Tashjian*, 479 U.S. at 208.

110. Note that this principle of focusing on an expressive association's self-selected rules and procedures is not unique to election law jurisprudence. For example, in *Boy Scouts of America v. Dale*, the Court respected the Boy Scout's "official position" not to associate with homosexuals. 530 U.S. 640, 655 (2000) ("The Boy Scouts takes an official position with respect to homosexual conduct, and that is sufficient for First Amendment purposes.").

111. While this Note focuses on laws that affect the entire nomination process itself, party-institution could be used to define "the party" in cases where election laws burden *how* a specific stage is structured. For example, how a primary is conducted (as opposed to who is able to participate in it) or how endorsements are made (as opposed to who can endorse

A third benefit in using a party-institution definition is that it ensures that the entire purpose of political party First Amendment association is realized, which is the "collective expression and propagation of shared [political] ideals."[112] When freedom of association was first recognized, the Court noted that "[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association . . . ."[113] In differentiating between the various types of association, the Court identified both intrinsic or intimate associations, or associations designed to "maintain . . . human relationships," and instrumental associations, or associations designed to engage in "speech, assembly, [and] petition . . . ."[114] Thus, instrumental associations like political parties have First Amendment rights for truly one purpose: to "express[] and propagat[e]" political ideals.

Most certainly, the actual expressions and propagations of expressive associations are also protected under the First Amendment—a court would find no constitutional concerns with protecting a party's actual endorsement, for example, within certain constitutional constraints.[115] But the First Amendment does not protect only a party's candidate endorsement. As the Supreme Court noted in *Jones*, "[u]nsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, *the process* by which a political party select[s] a standard bearer who best represents the party's ideologies and

or be endorsed). The case law seems to suggest that use of party-institution in specific nomination stage cases is not far from the mark. In endorsement cases, for example, if a state were to somehow limit the endorsement capabilities of a party, *see, e.g.*, Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 229 (1989), a court could look at how severely the state law burdened the party-institution, i.e., how severely the state law infringed on what the party itself chose as its endorsement process. Similarly, in convention cases, a court could look to how severely a state law impacted a party's self-selected way of organizing its convention. In many ways, when a court is measuring "the party" by the party-organization in these cases, it is very likely that what drives a court's conclusion is not how severely did the law burden the party's leaders' ability to endorse a candidate, but rather how much does the law disable party leaders from following the party's self-selected endorsement procedures.

112. Dimino, *supra* note 11, at 75 (quoting Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 200 (2012) (Alito, J., concurring) (alteration in original)).

113. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

114. Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

115. *See generally, e.g.*, Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989) (striking down a law as violative of the First Amendment as it limited political parties' ability to endorse candidates at the primary stage).

preferences."[116] Thus, the Court reaffirmed that the Constitution protects both a party's choice *and* its process in choosing a standard bearer.

Why such a focus on process and ensuring that a party's institutional procedures are protected? The dissent in *Utah Republican Party* explains it perfectly:

> American legal thought is famed for its focus on procedure. And there is good reason: as every first-year civil procedure student learns, substance and procedure frequently form a Gordian knot—impossible to disentangle. . . . One change to procedure can work a profound change to the substance of political parties, including which candidates they choose and what messages they communicate.[117]

In more simple terms, the Constitution protects not only the expression itself, but also the process by which that expression is created.

C. The Plaintiff-Stage Framework 2.0

While my initial iteration of the Plaintiff-Stage framework failed to adequately provide for cases like *Utah Republican Party* and SB54, a second iteration remedies these deficiencies by incorporating both the nomination procedure creation stage and the party-institution component of "the party." A summary is provided in the tables below.

116. Cal. Democratic Party v. Jones, 530 U.S. 567, 575 (2000) (emphasis added) (quoting *Eu*, 489 U.S. at 224) (internal quotation marks omitted).

117. Utah Republican Party v. Cox, 885 F.3d 1219, 1246 (10th Cir. 2018) (Tymkovich, C.J., concurring in part), *revised and superseded by* 892 F.3d 1066 (10th Cir. 2018).

PLAINTIFF-STAGE FRAMEWORK (2.0)

Step 1: Categorizing "the plaintiff" in election law cases

		Burden Measured On
Step 1: Who is "the plaintiff"? (Whose rights/injury are being asserted?)	*Voter* (e.g., right to associate with each other or with a candidate)	Voters
	Candidate (e.g., right to associate with a party or with voters)	Candidates (and voters)[118]
	"Party" (e.g., right to define membership, structure internal affairs, endorse candidates)	(see Step 2)

Step 2: Categorizing "the party" in election law cases

		Party Definition (*ergo* Burden Measure)
Step 2: What stage of the nomination process does the regulation affect?	*Ballot Access*	Party-organization
	Endorsement	Party-organization
	Convention	Party-organization
	Primary	Party-electorate
	Nomination Procedures	Party-institution

VI. NORMATIVE CONSIDERATIONS: WHAT *SHOULD* THE ROLE OF PARTIES BE?

Even using the objective framework suggested in this Note, how a judge normatively views the role of parties in our democratic system could affect how he or she ultimately defines and measures

118. As noted above, courts often analyze the burden on a candidate in these types of cases. *See supra* note 46. Often, however, the burden is also measured on voters because their rights to associate with any given candidate are usually implicated.

a burden. I mention it here not because a court should engage in this subjective reasoning, but because ignoring this possibility would be unwise. As Professor Elizabeth Garret noted, "to decide political party cases, judges are very likely to rely on their own views of the best governance structures for a stable democracy."[119] Of course, if judges approached cases with their own subjective viewpoints, our legal system would fail to provide consistency and notice to both states and regulated political parties. In general, a judge may engage in two main normative considerations: (1) whether political parties are private actors or state actors, and (2) what the preferred hierarchies of power are within a party itself. While the state-actor question primarily influences how judges measure the severity of the burden and a state's interests (later considerations of the *Anderson-Burdick* test not covered here), the Plaintiff-Stage framework helps objectify both considerations, especially providing a formulaic approach to answering the party-hierarchy question.

A. The State-Actor Question

The public or private nature of political parties influences the level of protection provided by the First Amendment. For example, if parties and their primaries were considered purely private matters, "then parties could effectively exclude racial minorities from the political process."[120] In the *White Primary Cases*, however, the courts consistently struck down every attempt of the Texas Democratic Party to exclude African Americans in its party primaries.[121] These cases demonstrate that political parties *do* have constitutional limits, suggesting they are at least not purely private actors.[122]

This has led some scholars to conclude that because "parties play a central role in the electoral process through their power to nominate candidates," parties are state actors, constitutionally

119. Garrett, *supra* note 4, at 131.

120. MICHAEL DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW 445 (2010).

121. *See, e.g.*, Terry v. Adams, 345 U.S. 461, 462–63, 470 (1953); *see also* TOKAJI, *supra* note 41, at 245 (noting that the *White Primary Cases* provide an example of how political parties have constitutional obligations, making them not purely private).

122. *See supra* note 120.

limited in their autonomy.[123] But this extreme view yields unsatisfying results. If parties were purely state actors, a party would be unable to raise First Amendment claims when a state regulated its associational freedoms—a party could not choose its members, its leaders, or, most alarmingly, have "standing to sue the government . . . for any imposition whatsoever" as it would be the equivalent of the state suing itself.[124]

With neither extreme satisfactory, most scholars and courts have settled into the hazy middle ground: "Parties thus occupy a distinctive position in the U.S. system of government. They are neither completely private nor completely public entities, and they have constitutional obligations as well as constitutional rights."[125] Adding to the complexity of defining the party as something between a state actor and private actor is "the familiar law review refrain, it depends."[126] The Plaintiff-Stage framework comports with the majority of judges and scholars: political parties are somewhere between purely public and purely private. If anything, however, this question is best answered with the *Anderson-Burdick* test: as a party's activities become more public in nature (i.e., involving more of the party-electorate), states have a greater interest in regulating those party activities. The *White Primary Cases* provide some example of this: because the parties were participating in *primaries*, which themselves directly influenced who could vote and how "public issues are decided or public officials selected," parties could not restrict their membership based on race.[127] The Texas Democratic Party had "become an

123. Dimino, *supra* note 11, at 65–66.

124. Persily & Cain, *supra* note 4, at 777–78.

125. TOKAJI, *supra* note 41, at 245; *see also* Cal. Democratic Party v. Jones, 530 U.S. 567, 572–73 (2000) ("[W]e have not held . . . that the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely.").

126. Persily & Cain, *supra* note 4, at 777–78 ("As most recognize, this sticky state actor question is probably best answered by some categorization of parties as state actor hybrids, or . . . by the familiar law review refrain, it depends.") (internal quotation marks omitted). For more scholarship on the state-actor question, see generally Dimino, *supra* note 11. Dimino provides a thorough overview of the state-actor question and then advocates for a new system in which parties would be completely autonomous organizations (not state– or hybrid-actors) and that the State could then offer benefits (such as participation in a state-funded primary) based on certain conditions. So long as those conditions were constitutional, states would not violate a party's First Amendment associational rights. Dimino, *supra* note 11.

127. Terry v. Adams, 345 U.S. 461, 465–69 (1953).

integral part . . . of the elective process that determines who shall rule and govern in the county."[128] Ultimately, however, as this Note is focused on the first prong of the *Anderson-Burdick* test and as the state-actor question is more related to the later prongs, further analysis on this question is left for another day.

B. The Party-Hierarchy Question

As discussed below, parties are comprised of various groups that function in different capacities and at different times. Recognizing these different components of political parties, Professors Persily and Cain created five paradigms that normatively order how power should be allocated within parties: the Managerial, Libertarian, Progressive, Political Markets, and Pluralist Paradigms.[129] Each of the Persily-Cain paradigms begins with different views on the primary purpose of political parties. These purposes then determine how many political parties our system should have, where power should be centered in a party, what interests, if any, the state has in regulating the party system, and what role, if any, the judiciary should have.[130]

If, for example, a judge thinks the primary purpose of parties is to express the political opinions of their members—a view referred to as the Libertarian Paradigm—that judge may be indifferent to the number of political parties in the system, but she will give deference to the party's formal organization over the lay party members, strongly encourage states to stay out of party affairs, and view herself as an interventionist seeking to preserve the ballot box as a public forum.[131] If, on the other hand, a judge ascribes to the Progressive, Political Markets, or Critical Paradigms, that judge will nearly always measure a law's burden on the electorate, as the electorate is the top of the paradigm's preferred power hierarchy within political parties. Similarly, judges ascribing to the Libertarian or Pluralist Paradigms will scrutinize any burdens on the party organization, as judges holding these views consider the organization itself to be the center of party power.[132]

128. *Id.* at 469.
129. *See generally* Persily & Cain, *supra* note 4.
130. *See generally id.*
131. *Id.* at 782–85, 791–96.
132. For more on the Persily-Cain paradigms, see *id.*

The relevance of these paradigms is clear: Suppose a regulation severely burdens a party's institution, organization, or leadership, but places no burden on party members (as was the case with SB54). If a judge views lay party members as the first seat of party power, that judge will not find the regulation severely burdensome. If, however, the judge considers other components of the party to hold the first seat of party power, the judge would consider the regulation a severe burden. As discussed above,[133] the majority and dissent in *Utah Republican Party* aptly demonstrated this dichotomy.[134]

The challenge with these paradigms, however, is that the outcome of a case would depend on the opinions of the sitting judge—an approach that fosters neither consistency nor adequate notice to states or political parties. The Plaintiff-Stage framework removes this subjectivity by objectively defining which component of the party should be considered the center of party power at each stage of the election process. With this framework, regardless of a judge's particular views, courts can consistently define and measure burdens on political parties at any stage of an election. All in all, the Plaintiff-Stage framework also removes many of the subjective considerations that may inform a judge's ruling in these types of cases.

VII. CONCLUSION

Despite the importance of political parties in our modern democratic system, case law and scholarship provide no clear framework for accurately defining political parties. Yet how a court defines a political party is most certainly decisive.[135] If nothing else,

133. *See generally supra* Part II.

134. The majority frequently cited language from the case law and reasoned that a law burdening the leadership, but not the lay party members, would not be a severe burden: "[I]f the URP wants to open its doors to roughly 600,000 people across the state of Utah, the associational rights *of the party* are not severely burdened when the will of those voters might reflect a different choice than would be made by the party leadership," especially since "States [are permitted] to set their faces against 'party bosses' . . . ." Utah Republican Party v. Cox, 885 F.3d 1219, 1233–34 (10th Cir. 2018). Here, the majority was identifying their preferred power hierarchy within the party: first, lay members, and somewhere after that, leadership. *See id. See generally supra* Part II.

135. Persily, *supra* note 58, at 2185–86 ("Because a primary election represents the opportunity for the party to express itself by rallying behind a candidate . . . a court's ex ante

the Tenth Circuit's recent definition of the Utah Republican Party demonstrates this: by defining "the party" as the party-electorate, the court concluded that SB54 placed only a minimal burden, if any, on the party.[136] But, the dissent, defining "the party" by its institutional procedures and bylaws, found SB54 to severely burden the Party's associational rights. To help remedy this definitional dispute among judges, I have suggested an objective and schematic approach to accurately define political parties: the Plaintiff-Stage framework. For in accurately defining "the party," a court will know on whom to measure the burden of an election regulation. And by accurately measuring these burdens, a court will more accurately determine the severity of such burdens.

To summarize, the Plaintiff-Stage framework instructs judges on how to define "the party" in the various election law cases they may face. Obviously, the plaintiff matters. When voters or candidates are suing, defining "the party" is irrelevant—the burden is simply measured on the voters or candidates, respectively. Even when a political party is a plaintiff (oftentimes bringing suit in conjunction with voters or candidates), the party may be asserting the rights of voters or candidates and not its own. In these cases, defining "the party" is also irrelevant: alleging infringements of voter or candidate rights directs a court to measure any burdens on those rights-holders. But following the *Anderson-Burdick* framework, if the plaintiff is a political party and asserts that its rights *as a party* have been violated, a court must attempt to define "the party." Because a political party is a multifaceted group with different components that each act on behalf of the party at different stages of the nomination process, a court must identify which stage is affected by the regulation. In cases where a law affects either the convention or endorsement stages, "the party" is most appropriately defined by the party-organization, and any burdens should be measured on that component of the party. When a law affects the primary stage, "the

determination as to which component of the party can speak for it in litigation can have the effect of determining the content of the party's expression in the primary." (internal quotation marks omitted)).

136. *See* Utah Republican Party v. Cox, 885 F.3d 1219, 1235 (10th Cir.), *revised and superseded by* 892 F.3d 1066 (10th Cir. 2018).

party" is most appropriately defined by the party-electorate, and any burdens should be measured on that component of the party.

But, in cases where a law affects procedure itself—how the candidates are selected and nominated in general, that is, the nomination procedure creation stage as it was described above—"the party" is best defined by the party-institution (i.e., its bylaws, rules, and procedures). Not only does this definition more accurately reflect the true burden of the state's regulation when it affects procedure, but it also comports with a long line of precedent zealously protecting procedure due to its effect on substance. Of course, simply defining "the party" by its institutional bylaws and procedures does not remove a court's challenging inquiry into what constitutes a "severe" burden or, even more challenging, what state interests justify such a burden. But these topics are left for another day.

From this country's founding, associations of like-minded people have shaped the social and political landscape. It was a simple principle—"[e]ffective advocacy of both public and private points of view . . . is undeniably enhanced by group association"—that led the United States Supreme Court in 1958 to reaffirm an individual's "freedom to engage in association for the advancement of beliefs and ideas" as an "inseparable aspect" of liberty.[137] And it is paramount that courts accurately define political parties—groups created for the sole purpose of engaging in expressive association—so that any burdens placed upon their associational rights can be measured accurately. Without this accurate measurement, however, courts will make the same mistake the Tenth Circuit did in *Utah Republican Party*, where a state law that circumvented a political party's self-selected procedure for determining its own standard-bearer was found to impose no burden on the party's associational rights. By applying the completed Plaintiff-Stage framework, courts will avoid making such mistakes going forward.

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137. NAACP v. Alabama, 357 U.S. 449, 460 (1958).

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