fore, even if the Indiana legislature eventually overturns SEA 483 or enacts legislation that rejects the Court's theory, *Crawford* will remain good law, and the Court's theory of democracy will remain in place.

More importantly for the issue of entrenchment, however, *Crawford* embedded the Court's theory of voting in democracy in a distinctive way. Unlike most election laws that the Supreme Court has assessed, SEA 483 was not aimed at election mechanisms such as procedural voter registration requirements, redistricting,[75] or restrictions on who could appear on the ballot.[76] Instead, it was about the identities of the voters themselves and was aimed squarely at the question of who could cast a ballot on Election Day. In *Crawford*, the Court broke a tradition dating back to the 1960s of overturning laws that imposed requirements on individual voters that could prevent them from voting. It thus entrenched its vision of democracy in a unique — and uniquely harmful — way.

D. Freedom of Association

State Primary Regulation. — Supreme Court cases assessing challenges to state requirements for primary ballot access balance the associational rights of political parties to choose their own candidates against the state's interest in ensuring the fairness and representativeness of primary elections. Last Term, in *New York State Board of Elections v. López Torres*,[1] the Supreme Court held unanimously that New York's primary system for nominating Supreme Court Justice candidates did not violate the First Amendment rights of unsuccessful candidates and their supporters, despite facts showing that, under that system, party leaders effectively controlled the choice of nominee. Instead of treating the issue as purely involving a private organization's associational rights, the Court should have recognized that political parties are encompassed by both the private and public spheres and that the state has a strong interest in regulating the public sphere in order to avoid partisan entrenchment. Using this analysis, the Court should have found New York's primary system unconstitutional.

Party nominees are chosen for New York's Supreme Court via an elaborate convention system, codified in state election law, that is unique in the United States.[2] Supreme Court Justices are elected from

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[75] *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267 (2004).

[76] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428 (1992); Munro v. Socialist Workers Party, 479 U.S. 189 (1986).

[1] 128 S. Ct. 791 (2008).

[2] *See id.* at 796; *see also* N.Y. ELEC. LAW § 6-124 (McKinney 2007). The election for the office of Supreme Court Justice is the only judicial election in New York that uses a party convention as a primary; all other judicial elections involve a direct primary election. López Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 215–16 (E.D.N.Y. 2006).

the state's twelve judicial districts, which are comprised of multiple assembly districts.[3] Each judicial district has a party nominating convention that determines the party's candidates for that district's general election. The nominating conventions are attended by delegates who are themselves elected in the parties' primaries, one to two weeks prior.[4] In order to be placed on the ballot for the delegate election, an individual must collect 500 signatures in his assembly district.[5] A candidate may run as an independent or third-party candidate on the general election ballot, however, by submitting nominating petitions with a small required number of signatures.[6]

Margarita López Torres won election to a seat on the Civil Court of the City of New York in 1992 with the support of the local Democratic County Committee.[7] After alienating party leaders in a hiring dispute,[8] she attempted to become a Justice of the Supreme Court on five separate occasions, but never progressed further than having her name placed in contention at the nominating convention.[9] López Torres — along with disgruntled voters, a public interest organization, and other candidates who had failed to secure party nominations for Supreme Court positions — sued the New York State Board of Elections in the Eastern District of New York.[10] The plaintiffs argued that the convention scheme violated the First Amendment right of political association of the candidates and their supporters and, by placing unequal burdens on the right to vote, the Equal Protection Clause of the Four-

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[3] *López Torres*, 411 F. Supp. 2d at 217.

[4] *See id.* at 218 & n.7, 224. These conventions can involve hundreds of delegates and alternates, as determined by the party. *See id.* at 218–20. For instance, the 2004 Republican judicial nominating convention for Suffolk and Nassau counties involved a total of 370 elected delegates and alternates. *See id.* at 219.

[5] *Id.* at 220. The signatures must be from party members, and each party member may sign only a single petition. As a practical matter, therefore, for a candidacy to withstand legal challenges to its petitions, it must gather two to three times the officially required number of signatures. *See id.* at 220–21.

[6] *See López Torres*, 128 S. Ct. at 796–97. The petitions require the lesser of two numbers of signatures — either 3500 or 4000 signatures from district voters (the number depends on the particular district), or signatures of 5% of the number of votes cast for Governor in that district in the prior election. *See id.*

[7] *López Torres*, 411 F. Supp. 2d at 234. The Civil Court has a more limited jurisdiction than the Supreme Court, *López Torres*, 128 S. Ct. at 797, and in Kings County an election to the former often precedes election to the latter, *López Torres*, 411 F. Supp. 2d at 234.

[8] *See* López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 178–79 (2d Cir. 2006). López Torres refused to hire an unqualified candidate suggested by local party leaders as her law secretary and later refused to hire a local Assemblyman's daughter for the same position. *See id.*

[9] *See López Torres*, 411 F. Supp. 2d at 235–36.

[10] *López Torres*, 128 S. Ct. at 797. The district court permitted the New York County Democratic Committee, the New York Republican State Committee, the Associations of New York State Supreme Court Justices in the City and State of New York, and the State Association's president to intervene on the side of the Board of Elections. *López Torres*, 462 F.3d at 182.

teenth Amendment.[11] They sought a declaration that the scheme was unconstitutional and a preliminary injunction requiring the legislature to enact a new method of electing justices, with direct primary elections being conducted in the interim.[12]

The district court declined to direct the legislature to create a new electoral system, but enjoined the Board of Elections from enforcing the provisions at issue.[13] The court made extensive factual findings, concluding that the nomination of Supreme Court Justices and the general election were designed to maximize the control of party leaders. The court found that the delegates would "rubber stamp" the choices of county leaders at the convention[14] and that it was practically impossible for challengers to field a slate of delegates who could win a majority of seats in a judicial district.[15] The nominating conventions were perfunctory and irrelevant, as were the general elections, in which no independent candidate had ever won election, and the high percentage of uncontested elections indicated the prevalence of one-party rule in most districts.[16]

Turning to the merits of the claim, the court noted that the governing test required balancing the political party's injured First and Fourteenth Amendment rights against the importance of the state's regulatory interests.[17] Addressing the defendants' argument that the ability to petition on to the general election ballot vitiates any potential constitutional violation in the primaries, the court held that, given the de facto one-party rule in most of New York, the primary was effectively the controlling method of choosing a Justice, and hence the First and Fourteenth Amendment right to vote applied to the primary.[18] The court asked whether a "reasonably diligent independent candidate [could] be expected to satisfy the signature requirements"[19] and determined that, indeed, reasonably diligent outsider candidates had no chance of obtaining the nomination as a result of the requirements — making the burden placed on candidates severe.[20] Although the court found both that the goal of protecting incumbents for the sake of advancing independence and impartiality was compelling and that the

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[11] *López Torres*, 462 F.3d at 182.

[12] *Id.*

[13] *See López Torres*, 411 F. Supp. 2d at 255–56.

[14] *Id.* at 229. The nominating conventions themselves are usually brief affairs; over a twelve-year span 96% of nominations were uncontested. *López Torres*, 462 F.3d at 178.

[15] *See López Torres*, 411 F. Supp. 2d at 220–21.

[16] *See id.* at 229–31. From 1990 to 2002, 47% of the general elections for Supreme Court Justice were entirely uncontested. *Id.* at 230.

[17] *Id.* at 243 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

[18] *See id.* at 245–48.

[19] *Id.* at 248 (quoting Storer v. Brown, 415 U.S. 724, 742 (1974)).

[20] *See id.* at 249.

convention scheme furthered that interest,[21] it nonetheless determined that under a "principle of transparency,"[22] the state may not claim to provide for judicial elections but in practice substitute the judgment of party leaders for that of the people.[23] Therefore, it declared that the plaintiffs were likely to succeed in their claim that the scheme was unconstitutional and granted a preliminary injunction.[24] Noting that it had no power to compel the legislature to enact a new scheme, the court instead, via injunction, put into place a system of direct primary elections to last until the legislature chose to act.[25] Later, it stayed the injunction until after the 2006 general election.[26]

The Second Circuit affirmed. Writing for a unanimous panel, Judge Straub found that the district court had acted within its discretion both in finding that the convention scheme likely violated the First Amendment and in granting the injunction.[27] After relating the facts of the case in accordance with the district court's findings, the court set forth its test for First Amendment violations: if an assessment based on how the electoral laws function in fact determined that the burden on the First Amendment rights of voters and candidates was severe, strict scrutiny would be applied.[28] The court found that "constitutional protection extends to each State-created or State-endorsed 'integral part of the election machinery.'"[29] Moreover, the court determined, the scope of that protection reached further than merely granting voters and candidates "access" to the nominating process. Rather, it prohibited electoral schemes that *in practice* exclude candidates and voters.[30]

The court found that New York's nominating process was in fact so burdensome that it deprived candidates not backed by party leaders

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[21] *Id.* at 253. In contrast, while the court found that the state's interests in protecting the associational rights of the parties and promoting geographic and racial diversity among the Justices were legitimate, it did not find the convention scheme narrowly tailored to advance those interests. *See id.* at 250–53.

[22] *Id.* at 254 (citing Republican Party of Minn. v. White, 536 U.S. 765 (2002)).

[23] *Id.*

[24] *See id.* at 255. The court noted that the First Amendment claim alone was sufficient to prove the scheme unconstitutional; therefore, it did not reach the Equal Protection claim. *Id.* at 256.

[25] *Id.* at 255–56. The court first determined that neither a joinder issue nor the Voting Rights Act prevented injunctive relief. *See id.* at 241–42.

[26] *See* López Torres v. N.Y. State Bd. of Elections, 462 F.3d 161, 183 (2d Cir. 2006).

[27] *Id.* at 208. Judge Straub was joined in his opinion by Judges Sotomayor and Hall.

[28] *See id.* at 184.

[29] *Id.* at 186 (quoting United States v. Classic, 313 U.S. 299, 318 (1941)).

[30] *Id.* at 187–88. Previous exclusionary schemes include extortionate filing fees in Texas, *see* Bullock v. Carter, 405 U.S. 134 (1972), and extremely early filing deadlines for independent candidates in Ohio, *see* Anderson v. Celebrezze, 460 U.S. 780 (1983). The court noted that, as with other strict scrutiny analyses, exceptions exist for exclusionary regulations that further a compelling state interest. *See López Torres*, 462 F.3d at 188.

of access to the primary altogether.[31] It noted that not all convention-based systems are per se constitutional and that the associational rights of political parties were not sufficiently strong to overcome the associational rights of qualified party-member voters and candidates.[32] Relying on Supreme Court precedent, the court found that the existence of an alternate means of access to the general election ballot does not automatically make a restrictive primary scheme constitutional.[33] Finally, it agreed with the district court that the burdens inflicted on voters and candidates by the primary scheme were severe and that the scheme was not narrowly tailored to advance any compelling state interest;[34] it also approved the remedy crafted by the district court.[35]

The Supreme Court reversed. Writing for the Court, Justice Scalia found that the First Amendment did not mandate a "fair shot" at party nomination.[36] The Court acknowledged that, although political parties have a First Amendment right to choose their candidates for election, that right becomes circumscribed when the State gives the party a role in the election: the party's action may become constitutionally prohibited state action, and the state thus acquires a legitimate interest in ensuring the fairness of the choice.[37] However, the Court characterized the right asserted by the plaintiffs not as one of the associational rights of the party, but as a right of the candidates themselves to "have a certain degree of influence in . . . the party."[38] This right of influence, it held, is not protected by the First Amendment. Noting that no law compelled delegates to vote for the slate backed by party leaders or prohibited a candidate from lobbying delegates, the Court characterized its previous jurisprudence as focusing on statutory requirements for voting or running in primaries rather than on the way political actors maneuvered under those requirements.[39] Thus, New York's statutory requirements were not unconstitutional. The Court also stated that the right to have a "fair shot" at a nomination would be a particularly unmanageable constitutional standard for the judiciary and its enforcement was better suited for legislative decisionmaking. The New York legislature had already determined that a convention was the best method of carrying out its election goals.[40]

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[31] *López Torres*, 462 F.3d at 189.

[32] *See id.* at 189–93.

[33] *Id.* at 193–95 (citing *Bullock*, 405 U.S. at 146–47).

[34] *Id.* at 200–01, 204.

[35] *See id.* at 204–08.

[36] *López Torres*, 128 S. Ct. at 799. The opinion was joined by all Justices except Justice Kennedy.

[37] *Id.* at 797–98.

[38] *Id.* at 798.

[39] *Id.* at 799.

[40] *See id.* at 799–800.

The Court then addressed the plaintiffs' argument that the entrenchment of one-party rule in New York's judicial districts required additional First Amendment protections in the primary process to ensure competition. The Court stated that although competitiveness in the general election was important to voters and to minor-party candidates, this interest did not require competitiveness in party nomination procedures, as it was sufficiently well protected by the opportunity for alternative candidates to appear on the general election ballot.[41] Moreover, the Court declared, one-party rule generally results from voters approving of a particular party's candidates and positions, and the First Amendment did not require that those positions be changed.[42] Giving the power to assure competitive elections to the federal courts would require impossible line-drawing to determine the bounds of judicial intervention.

Justice Stevens concurred, writing separately to emphasize that New York's system may have been flawed as a matter of electoral policy — as may be electing judges at all. Nonetheless, he noted, the deficiencies of the scheme did not make it unconstitutional.[43]

Justice Kennedy concurred in the judgment. Examining the difficulties of the New York nomination scheme, he suggested that were it the only way of obtaining a spot on the general election ballot, the Court would need to scrutinize whether a reasonably diligent independent candidate could be nominated, as the district court had done in *López Torres* and as the Court had done previously in *Storer v. Brown*.[44] Under that test, he indicated, the scheme might well be prohibited by the First Amendment.[45] However, the opportunity to petition on to the general election ballot changed Justice Kennedy's analysis. While he acknowledged that an alternative route to the general election does not exempt primaries from all scrutiny,[46] he postulated that there is a balancing relationship between permissible burdens placed on candidates at the primary level and at the general election level: large primary burdens could be made constitutional by making the barrier to being listed on the general ballot low.[47] Some primary burdens, like the filing fees in *Bullock v. Carter*,[48] could be so severe

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41 *Id.* at 800. The Court noted that nowhere outside the Fourteenth and Fifteenth Amendment contexts had it required judicial interference with a party's nominating process. *See id.*

42 *Id.* at 801. The Court noted that the States do have limited powers to discourage party monopoly. *Id.*

43 *See id.* (Stevens, J., concurring). Justice Stevens was joined by Justice Souter.

44 415 U.S. 724 (1974).

45 *See López Torres*, 128 S. Ct. at 802 (Kennedy, J., concurring in the judgment).

46 *See id.* (citing Bullock v. Carter, 405 U.S. 134, 143–44, 146–47 (1972)).

47 *See id.*

48 405 U.S. 134.

that low barriers to the general election could not mitigate them.[49] The petition alternative in New York, however, was a small enough burden for the general election ballot that it mitigated the difficulty of obtaining a party's nomination during the primary.[50] Nonetheless, Justice Kennedy, echoing Justice Stevens, suggested that policymakers in New York should examine their election system in order to determine whether it upheld the "highest ideals of the law" and avoided "manipulation, criticism, and serious abuse."[51]

The crux of the *López Torres* litigation was a conflict between two constituencies of the New York political parties: the "party organization," consisting of the individuals who manage and promote the party, and the "party-in-the-electorate," consisting of the set of voters and candidates who share the ideological views espoused by the party and are therefore registered as members.[52] The major argument of the plaintiffs was that the party organization determined the nominees with only a modicum of input from the party-in-the-electorate, in whose interest the plaintiffs claimed to advocate.[53] This process infringed, they claimed, on their First Amendment right to associate. The Court, in assessing the right of association of the party as a whole, came down firmly on the side of the party organization:

> [T]he party's associational rights are at issue (if at all) only as a shield and not as a sword. [Plaintiffs] are in no position to rely on the right that the First Amendment confers on political parties to structure their internal party processes and to select the candidate of the party's choosing. . . . The weapon wielded by these plaintiffs is their *own* claimed associational right not only to join, but to have a certain degree of influence in, the party. . . . This contention finds no support in our precedents.[54]

This was an unsurprising result; the Court had previously ruled in favor of a party's associational rights against state regulation even though a majority of the party's members who voted on the regulation were in support, clearly indicating that the wishes of the party members do not control the party's associational rights.[55] The party liti-

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[49] *López Torres*, 128 S. Ct. at 802 (Kennedy, J., concurring in the judgment).

[50] *See id.* at 802–03.

[51] *See id.* at 803. Justice Breyer joined Justice Kennedy in this part of his opinion.

[52] *See* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2185 (2001) (citing V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 163–65 (5th ed. 1964)).

[53] *See* Brief for Respondents at 1–2, *López Torres*, 128 S. Ct. 791 (2008) (No. 06-766) ("[T]he cumulative impact of New York's statutory nominating procedures is to vest power to select the nominee in the party's leadership, rendering it effectively impossible for rank-and-file party members to influence the choice of their party's nominee.").

[54] *López Torres*, 128 S. Ct. at 798.

[55] *See* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000). *Jones* invalidated a "blanket primary" initiative, which permitted voters to vote across party lines in primaries, on the grounds that it violated the First Amendment associational rights of the parties. *See id.* According to exit

gates through its organization, and courts often disregard the party-in-the-electorate's disagreement with the leadership's litigation position.[56]

The unstated presumption behind protecting party associational rights is that a candidate disfavored by his party organization can, along with the members of the party-in-the-electorate who support him, exercise the right to participate in the political process elsewhere, either via another political party or by acting as independents. In *López Torres*, the Court did not address whether a candidate's ability to obtain a slot on the general election ballot mitigates the potential unconstitutionality of primary ballot access restrictions, noting only that candidates' and voters' interests in the competitiveness of the general election were satisfied by general election ballot access.[57] Previous cases had held explicitly that there are situations in which restrictions in primaries cannot be justified by general election access: "Apart from the fact that the primary election may be more crucial than the general election . . . we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens . . . imposed by state law."[58] Admittedly, none of these cases rested exclusively on the First Amendment right of association; *Bullock v. Carter*, for example, was decided under the Equal Protection Clause.[59] Justice Kennedy, in contrast to the *López Torres* majority, postulated a "dynamic relationship between . . . the convention system and the [general election] petition process,"[60] something that was also suggested by the defendants in the case.[61] The majority clearly chose not to adopt this analysis but did not discuss that choice, implying instead that the constitutionality of primary restrictions under the First Amendment has nothing to do with restrictions on the general election.

Although access to the general election ballot might not impact primary restrictions, it is nonetheless guaranteed under the Equal Pro-

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polling, the law had been supported by 61% of Democrats, 57% of Republicans, and 69% of Independents. Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997).

56 *See* Persily, *supra* note 52, at 2186.

57 *See López Torres*, 128 S. Ct. at 800.

58 Bullock v. Carter, 405 U.S. 134, 146–47 (1972)*; see also* United States v. Classic, 313 U.S. 299, 319 (1941) ("[T]he practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice.").

59 *See Bullock*, 405 U.S. at 149.

60 *López Torres*, 128 S. Ct. at 802 (Kennedy, J., concurring in the judgment).

61 *See* Reply Brief for Petitioners New York State Board of Elections, Douglas Kellner, Neil W. Kelleher, Helena Moses Donohue and Evelyn J. Aquila at 11–12, *López Torres*, 128 S. Ct. 791 (2008) (No. 06-766).

tection Clause to candidates with a significant modicum of support.[62] What is not guaranteed to those candidates is any assurance of a competitive general election, given the Court's declaration that one-party rule is not a constitutional violation without an additional exclusionary component.[63] The mere opportunity to get on the ballot is sufficient to satisfy the candidates' and voters' interest in competitiveness.

The Court has therefore backed members of the party-in-the-electorate into a corner: in a situation where one-party rule is entrenched, members of that party can either stay within the party and have no real chance of obtaining its nomination if they are disfavored by party leaders, or they can leave and have no real chance of being elected without party nomination. In the case of New York's elections for Supreme Court Justice, no independent candidate has obtained a position since the convention system was statutorily prescribed.[64]

As Professor Richard Pildes has suggested, much of the bind that minor-party or primary-challenger candidates find themselves in is caused by the Court's use of formalism in its decisions regarding election law and democratic processes.[65] By deciding these cases as if they involved nothing more than standard exercises of the First Amendment by any private organization, the Court ignores the functional purposes of the American electoral system. When suggesting that candidates who do not get along with their party leadership run as independents, for example, the Court is failing to take into account that in a "first past the post" election system — the type utilized in the United States — only two major political parties with a substantial chance of winning are likely to form.[66] It is these parties' candidates that have the only substantial chance of winning. Although the Court argues that the function of its jurisprudence in ballot access cases is to ensure that the requirements imposed on candidates are not so severe as to prevent them from obtaining "an equal opportunity to win votes"[67] by getting on the ballot as a third-party or independent candidate, substantively the "equal opportunity" is a hollow one — running outside of a major party line is an almost certain guarantee of defeat.

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[62] *See, e.g.*, Jenness v. Fortson, 403 U.S. 431 (1971); Williams v. Rhodes, 393 U.S. 23, 33–34 (1968).

[63] *See López Torres*, 128 S. Ct. at 801.

[64] López Torres v. N.Y. State Bd. of Elections, 411 F. Supp. 2d 212, 231 (E.D.N.Y. 2006).

[65] *See* Richard H. Pildes, *Formalism and Functionalism in the Constitutional Law of Politics*, 35 CONN. L. REV. 1525, 1529–31 (2003).

[66] This maxim is known as "Duverger's Law." *See* Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 825–26 (2001); A. James Reichley, *The Future of the American Two-Party System in the Twenty-First Century*, *in* THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 15, 17 (John C. Green & Daniel J. Coffey eds., 5th ed. 2007).

[67] *Williams*, 393 U.S. at 31.

One response to this dilemma is a "public rights" theory of the First Amendment, which recognizes that major political parties and their attendant apparatuses are a part of both public and private spheres. It thereby balances the parties' interest in autonomy with the public's First Amendment interests in competitiveness and the avoidance of entrenchment.[68] Under this theory, the First Amendment "empowers courts to facilitate the public debate required for self-government . . . because the public rights theory views the political process as a popular enterprise that requires maximum participation and engagement of the people."[69] In contrast, the standard view of the First Amendment is that it is designed to protect individual expression from government interference, and that it provides no special protection for speech designed to affect public policy.[70] Under the public rights theory, statutes and regulations that structure political mechanisms to the benefit of incumbents — so-called "partisan lockups"[71] — are particularly suspect. This paradigm supports placing the locus of party power firmly with the party-in-the-electorate.[72]

The state laws at issue in *López Torres* are prime examples of laws operating in both the public and private sphere, as emphasized in the public rights theory. Although, as the Court frequently emphasized, the regulated parties are private organizations, the laws are designed to protect the power of the party organization in public elections. The laws are designed to create partisan lockups, as they prevent challengers within the party from attaining governmental power and instead concentrate that power in the hands of the leaders of the party organization. Instead of treating the First Amendment rights of the parties as the strong shield that they would be for a fully private organization,[73] the Court should instead have recognized that the members of the party-in-the-electorate have a right to select the candidate of their choice (however weak that right may be) and that the state, and the party organizations allied with it, lack a legitimate interest that trumps

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[68] *See* Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 2004–06 (2003).

[69] *Id.* at 1983.

[70] *See* Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 110 (2004).

[71] *See* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998).

[72] Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 789 (2000).

[73] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that the First Amendment right of expressive association permitted the Boy Scouts of America, a private organization, to exclude gays from its ranks).

that right.[74] These laws should receive heightened scrutiny because of their role in establishing lockups.[75]

In policing election law, the courts have a duty not only to protect the rights of incumbent party leaders, but also to promote a competitive election market. Political primaries can play an enormous role in determining whether an election is truly competitive, as the Court has previously recognized.[76] Permitting the party organization to present as the chosen candidate of the party one whose political success has only been gaining the support of that organization, rather than that of the party electorate as a whole, undercuts both the First Amendment rights of the electorate and the state's interest in maintaining fair and competitive elections. Courts should strive to look past the formal divide between the public and private spheres that was maintained in *López Torres* and recognize the functionally public nature of party primaries.

E. Freedom of Speech and Expression

1. Campaign Finance Regulation. — The Supreme Court's newest member, Justice Alito, joined the Court after promising to practice judicial restraint by deciding cases narrowly and avoiding broad and hasty doctrinal changes.[1] Campaign finance doctrine is one area of law in which he has delivered on that promise.[2] Last Term, in *Davis v. FEC*,[3] the Supreme Court held that the "Millionaire's Amendment" provision of the Bipartisan Campaign Reform Act (BCRA) unconstitutionally burdened speech through its asymmetrical expenditure limits. In a carefully written opinion, Justice Alito reasoned that the asymmetrical restriction scheme constituted a penalty unsupported by a compelling state interest. Despite Justice Alito's narrow opinion, some commentators have suggested that the logic of

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[74] *See* David Schleicher, *"Politics As Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 214–15 (2006).

[75] Issacharoff & Pildes, *supra* note 71, at 670.

[76] *See* United States v. Classic, 313 U.S. 299, 320 (1941).

[1] *See, e.g.*, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 343 (2006) [hereinafter *Alito Confirmation Hearing*] (statement of then-Judge Samuel A. Alito, Jr.).

[2] Although this is the first Supreme Court opinion Justice Alito has written on campaign finance, Justice Alito joined the Chief Justice in trimming back *McConnell v. FEC*, 540 U.S. 93 (2003), through a narrow as-applied challenge to the Bipartisan Campaign Reform Act in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). Along with the Chief Justice, Justice Alito also provided Justice Breyer with a plurality for his opinion in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), which employed narrow reasoning in striking down Vermont's extremely low cap on campaign expenditures.

[3] 128 S. Ct. 2759 (2008).