

## PARTY PRIMARIES FOR CANDIDATE SELECTION? RIGHT QUESTION, WRONG ANSWER

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### I INTRODUCTION

Political parties act as gatekeepers to Parliament,<sup>1</sup> and hence to law-making and ministerial government. Theirs is gatekeeping in a special sense, however. Occupational gatekeepers screen entrants to professions using defined and transparent measures. The process of becoming an MP, however, is a thoroughly political one. As Lord Hoffmann observed, ‘the main criterion is likely to be the popularity of the candidate with the voters ... the candidate who, for whatever reason, seems ... most likely to win’.<sup>2</sup> Along with that criterion, internal party ideology, rivalries and factionalism may play a part. Given the long-standing dominance by parties of electoral politics – and hence of Parliaments, law-making and executive governance – the gatekeeping role of parties is not merely a matter of internal party concern, but of considerable interest to the wider community and to public law itself.

In the common law world, this parliamentary gatekeeping is described as candidate ‘endorsement’ or ‘preselection’.<sup>3</sup> These very terms imply that the process is within the party’s control. They assume a coherent, intentional body, identifiable as ‘the party’, which gives its imprimatur to candidates to contest general elections on its behalf. In contrast, candidate selection in the United States of America (‘US’) is taken out of the hands of parties, and placed in the hands of a broader electorate. Through the mechanism of the direct primary election, candidate selection in the US is more open, and even more political (in the public sense),<sup>4</sup> than elsewhere. This process precludes the very idea of ‘the party’ as a coherent, intentional body founded in an exclusive and clearly defined membership. In the US, the legal mandate to hold primaries reinforces the position of parties as essentially banners under which individual candidates compete. In contrast, in the Anglo-Australian tradition, a party remains

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1 Graeme Orr, ‘Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?’ (2001) 12 *Public Law Review* 89.

2 *Watt (formerly Carter) v Ahsan* [2008] 2 WLR 17, 23 (Lord Hoffmann).

3 ‘Preselection’ is more commonly used in Australia.

4 That is, of public, rather than organisational politics.

understood as a membership and hierarchy bound together under the law and customs of associations, by a set of mutual rights and obligations defined in an autochthonous constitution.

That conception of the political party as an organic, membership-based outgrowth of civil society has been under challenge for some time internationally and in Australia. A confluence of an ongoing decline in membership, a centralisation of activity and power in a cadre of professional administrators and leaders, and a sense that parties are dislocated from any social base, has generated a literature on party ‘malaise’ which extends to depicting the major parties as a cartel.<sup>5</sup> Significant voices within and across the parties have acknowledged and responded to these concerns. One common response has been to advocate and even experiment with primary elections.

In essence, a primary system allows people with no substantive or ongoing commitment to a party to vote on who will stand under that party’s label in an upcoming election. Such primaries have their roots in practices that evolved in the US in the late 19<sup>th</sup> century. The regulatory weight and practical consequences of any system mandating primaries cannot be overestimated. In the words of one legal scholar:

In the United States, political parties since the early twentieth century have been more heavily state regulated than parties in any other Western democracy. ... State laws, not party rules, determine who can become a party member and what the conditions of membership will be. These conditions are sometimes minimal, as weak in many places as declaring party membership on primary election day.<sup>6</sup>

The aim of this article is to assess the context and relevance of the move to embrace primaries in countries such as Australia, against the fundamental questions of ‘what is a political party’ and ‘what do we mean by party “membership”’. As Schattschneider famously wrote, ‘modern democracy is unthinkable save in terms of political parties’;<sup>7</sup> but to say that is to invite the question ‘what shape and roles should parties take?’

This article is concerned with candidate selection processes, especially the primary option. Related to this concern is the degree to which the law should intervene to enforce party rules and processes. The treatment in *Cameron v Hogan*<sup>8</sup> of party affairs as essentially private and non-justiciable has been effectively sidestepped since the finding in *Baldwin v Everingham*<sup>9</sup> that party

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5 Richard S Katz and Peter Mair, ‘Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party’ (1995) 1 *Party Politics* 5; Richard S Katz and Peter Mair, ‘The Cartel Party Thesis: A Restatement’ (2009) 7 *Perspectives on Politics* 753. In the Australian context see Ian Marsh (ed), *Political Parties in Transition?* (Federation Press, 2006), especially Ian Ward, ‘Cartel Parties and Election Campaigning in Australia’ ch 4; Rodney Smith and John O’Mahony, ‘The Cartel Parties and Electoral Barriers’ ch 5; cf Murray Goot, ‘The Australian Party System, Pauline Hanson’s One Nation and the Party Cartelisation Thesis’ ch 9.

6 Richard H Pildes, ‘The Supreme Court 2003 Term – Foreword: The Constitutionalization of Democratic Politics’ (2004) 118 *Harvard Law Review* 25, 102–3. Pildes notes that in 2004, 23 US states were so lax.

7 E E Schattschneider, *Party Government* (Farrar and Rinehart, 1942) 1.

8 (1934) 51 CLR 538.

9 [1993] 1 Qd R 10 (‘*Baldwin*’).

affairs are justiciable, at least at the suit of a member.<sup>10</sup> The public importance of parties has been recognised in laws providing for their registration and even public funding.<sup>11</sup> Besides court oversight, a ‘clean election’ preselection process could be run by the electoral commissions, just as trade union elections are.<sup>12</sup> In each of these approaches, subject to implications from natural justice,<sup>13</sup> the courts or electoral administrators are only concerned with fidelity to the processes laid out in existing party rules, whatever those rules may be. The question of primaries goes deeper, potentially to revolutionise the very substance of preselection processes, the balance of power within parties and the role of the wider electorate in party affairs.

The direct primary system is a public law mandate unique to the US and skewed to common law traditions of party organisation and membership. Under the US system, parties are porous labels rather than definite entities. Interest in primaries outside the US is understandable, given the concern to revivify political life and the place of parties within it. But the US system is surely the wrong answer to the right question. This is not to say that parties outside the US ought not explore alternative structures and practices. Such experimentation is consistent with freedom of association. However, as we shall see, there are practical concerns even with party-run primaries. They are better seen as strategic and tactical devices to reach out to a broader group of supporters in a time of declining party membership, rather than as a sustainable model for candidate preselection.

## II CALLS FOR PRIMARIES OUTSIDE THE UNITED STATES

Calls for primaries in Australia are not new. In 2001, academic and former Victorian Speaker Ken Coghill called for primaries in Australia, to overcome problems of oligarchical control, eroding membership and branch-stacking affecting party preselections.<sup>14</sup> A former Hawke Government Minister recently

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10 *Baldwin* [1993] 1 Qd R 10 (case brought by disgruntled preselection candidate); *Cameron v Hogan* (1934) 51 CLR 358 (expulsion of member – who happened to be Victorian Premier). Outsiders or prospective members have been denied standing: *Baker v The Liberal Party of Australia (SA Division)* (1997) 68 SASR 366.

11 This insight grounded *Baldwin*'s sea change on the question of justiciability. For discussion see Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate, 2010), especially ch 3; Gary Johns, ‘Political Parties: From Private to Public’ (1999) 37(2) *Commonwealth and Comparative Politics* 89. For a rejection of *Baldwin* see J R S Forbes, *Justice in Tribunals* (Federation Press, 2002) 66–70 [5.7]–[5.13].

12 Orr, above n 1, 93–4.

13 Which more adventurous judges may imply into party rules: see Caroline Morris, ‘Political Parties and Natural Justice’ [2008] *New Zealand Law Journal* 399.

14 Ken Coghill, ‘Let the People Decide: Primaries for Preselections’ (Paper presented at Good Governance: Fair Elections and Ethical Parties Conference, Monash University, 23 February 2001). Scott Bennett, ‘Australia’s Political Parties: More Regulation?’ (Research Paper No 21, Parliamentary Library, Parliament of Australia, 2002) records the ALP’s Wayne Swan, now federal Treasurer, also speaking favourably of primaries.

echoed that call: 'The first step must be to adopt, at least in principle, the US primary system.'<sup>15</sup> Whilst much of the debate is a reaction to concerns about the balance of internal power between party 'powerbrokers' and rank-and-file members, a second, more generalisable argument made for primaries is that they may rejuvenate electoral participation and choice, especially for voters in safe seats.<sup>16</sup> In short, as a New South Wales Parliamentary Library paper endorsed them, primaries appear 'more democratic', in the twin sense of minimising internal party corruption and maximising public electoral choices.<sup>17</sup>

There is a paradox at the heart of arguing that for the good of democracy within parties, parties should be *required* to cede their preselection processes to primaries open to non-members. In the face of that, advocates of primaries in Australia have tended not to embrace systems mandated by law, but to promote the adoption of primaries by parties under their own rules. Indeed, such arguments have gone beyond academic and media debate, to bear fruit in specific experiments and proposals. Thus both the ALP in Victoria and the Nationals in New South Wales have trialled primary elections, in each instance in winnable seats not held by them.<sup>18</sup> These primaries were open to any elector in the seat willing to declare that they intended to support the party at the general election.<sup>19</sup> The Nationals' interest in primaries was explicitly seen as an attempt to embrace candidate-centred politics to counteract the loss of seats to rural independents.<sup>20</sup> The 2010 National Review of the Labor Party, in a despairing critique of the moribundity of the party's grassroots, recommended adopting primaries for all preselections, beginning in seats without a continuing Labor MP. The say accorded to outsiders who declare themselves 'Labor supporters', however, would be weighted at just one third of that accorded to the local Labor membership.<sup>21</sup> New South Wales Labor has gone further and will trial primaries in some state seats in which 50 per cent of the say will go to outsiders.<sup>22</sup> In the Liberal corner, a review conducted after the 2010 election recommended 100 per

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15 Barry Cohen, 'Faction Bosses will Sink Labor', *The Australian* (Sydney), 27 April 2011, 10.

16 A safe seat is one dominated by staunch supporters of a particular party, where the election of the candidate endorsed by that party is almost a fait accompli.

17 Rowena Johns, 'Electoral Misconduct and the Regulation of Political Parties' (Briefing Paper No 5, Parliamentary Library Research Service, Parliament of New South Wales, 2001) 51.

18 ABC Radio National, 'Parties Look at Primaries to Reconnect', *PM Program*, 16 February 2010 <<http://www.abc.net.au/pm/content/2010/s2821427.htm>>. For a political science perspective, see Narelle Miragliotta and Wayne Errington, 'Revitalizing Parties from Within? The Use of Primary Based Selection Methods by Australian Parties' (Paper presented at Australian Political Studies Association Conference, University of Melbourne, 27–9 September 2010).

19 Peter van Onselen, 'Nats Turn to Uncle Sam for Party Reform', *The Australian* (Sydney), 17 January 2009, 16; David Rood, 'ALP to Try US-style Polling', *The Age* (Melbourne), 9 February 2010, 8 (noting ALP also required supporters to declare they were not members of a rival party).

20 Van Onselen, above n 18, quoting political scientist Wayne Errington.

21 The weighting is outsiders (20 per cent), local ALP members (60 per cent) and representatives of factions/affiliated unions (20 per cent). See Steve Bracks, John Faulkner and Bob Carr, *Australian Labor Party, 2010 National Review: Report to the ALP National Executive* (February 2011) 22–3.

22 *New South Wales Labor Conference Says 'Yes' to Reform* (10 August 2011) Labor Renewal (online) <<http://laborrenewal.org/nsw-alp-conference-says-%E2%80%98yes%E2%80%99-to-reform>>.

cent member-controlled plebiscites as a general rule, but with the trialling of full-scale primaries as an alternative.<sup>23</sup>

The UK Conservatives now routinely use primary elections, having employed them for many dozens of Westminster constituencies since 2003,<sup>24</sup> and in 2009, in one constituency, even canvassed all 69 000 constituents with postal ballots.<sup>25</sup> The Times, in the same year, editorialised in favour of legislating to mandate primaries, at least for the larger parties.<sup>26</sup> Party-run primaries have also been supported by a contender for the British Labour leadership, David Miliband.<sup>27</sup> Interest in primaries extends beyond the Anglosphere. There have been calls to adopt them in Ireland,<sup>28</sup> whilst the French Socialists have followed their Greek counterparts, Pasok, in embracing a Presidential primary open to left-wing supporters.<sup>29</sup>

### III TRADITIONAL PARTY PRESELECTION METHODS

As Epstein noted in his study of Australian parties in 1977, Australian candidate selection has traditionally been conceived as purely an internal party matter, along the lines of the British model.<sup>30</sup> Since parties are hierarchical membership associations, their endorsements have involved a mix of central decision-making, input from affiliates (like trade unions in the ALP) and the voice of members at local branch or intermediate delegate levels.<sup>31</sup> As Miragliotta and Errington argue, ‘corresponding with the emergence of the mass party model, the selection of candidates was regarded as a matter for the local,

23 Peter Reith, Liberal Party of Australia, *Review of the 2010 Federal Election* (25 May 2011) 20–3.

24 Oonagh Gay and Stephen Jones, ‘Candidate Selection – Primaries’ (Note SN/PC/05168, House of Commons Library, 23 September 2009). Constituency associations, the traditional heart of the Conservative party, retained a theoretical right to not confirm a primary result: Mark Low, ‘The Intricacies of the Local Parliamentary Selection Process in the British Conservative Party: An Organisational Approach’ (Paper presented at the Political Studies Association Annual Conference, London, 19–21 April 2011). Robert McIlveen, ‘Ladies of the Right: An Interim Analysis of the A-List’ (2009) 19 *Journal of Elections, Public Opinion and Parties* 147, 155 surveyed 76 Conservative primaries to show women candidates did less well under that system.

25 Andrew Sparrow, ‘Cameron’s Open Primary Candidate Selection Plan “Would Help Men More than Women”’, *The Guardian* (online), 14 July 2009 <<http://www.guardian.co.uk/politics/blog/2009/jul/14/conservative-elections-primaries-women-candidates>>.

26 ‘Primary Colours: Open Selection of Parliamentary Candidates Should Be Mandated by Law’, *The Times* (online), 23 May 2009 <[http://www.timesonline.co.uk/tol/comment/leading\\_article/article6345758.ece](http://www.timesonline.co.uk/tol/comment/leading_article/article6345758.ece)>.

27 Gay and Jones, above n 24, 5–6.

28 Hugh Treacey, ‘How to Get a Better Class of TDs: Reform the System of Picking Candidates’, *The Sunday Times* (Dublin), 20 September 2009, 15. (A ‘TD’ or Teachta Dála is an Irish lower house MP).

29 Rudhán MacCormaic, ‘French Socialists to Hold US-Style Open Primary’, *The Irish Times* (online), 13 January 2011 <<http://www.irishtimes.com/newspaper/world/2011/0113/1224287412685.html>>.

30 Leon D Epstein, ‘A Comparative Study of Australian Political Parties’ (1977) 7 *British Journal of Political Science* 1, 16.

31 Lex Watson, ‘The Party Machines’ in Henry Mayer and Helen Nelson (eds), *Australian Politics: a Third Reader* (Cheshire, 1974) 339, 360–1 tabulates the range of practices in Australian parties in the early 1970s.

voluntary association' but, over time, 'local and rank and file control over such processes has been transferred to higher decision-making units' within parties.<sup>32</sup> This should come as no surprise. During the 20<sup>th</sup> century, constituency politics gave way to centralised campaigning, following the growth of the mass media and the homogenising and centralising of politics and law in Australia. The degree of centralisation of decision-making within parties, however, is but one axis of the question of candidate selection. The other, as Hazan and Rahat described, is inclusiveness.<sup>33</sup> By this is meant the degree to which candidate selection is elite versus open. Those authors identify a continuum from highly exclusive (control by party apparatchiki) through to highly inclusive (say a primary election open to the public at large).<sup>34</sup>

Australian party practices and rules have varied over time and across parties and states. Gary Johns, himself a former MP, published an 'audit' in 2000.<sup>35</sup> Modern Labor Party preselection procedures, for lower house seats,<sup>36</sup> balance voting power between local branch members and a central committee representing the factional/union elements of the party. Modern Liberal Party preselections for lower house seats typically involve a preselection panel, with some 'selectors' chosen centrally and a larger number nominated from within local branches in proportion to their membership.<sup>37</sup> Plebiscites or selection panel processes today are also typically subject to screening of potential candidates by an administrative committee.<sup>38</sup> More contentious is the grant of power to a central executive to override or even cancel a plebiscite in cases of urgency or perceived strategic need.<sup>39</sup>

It has been said that the ALP in NSW historically relied on 'primaries' for candidate preselection, but what is really meant is a direct plebiscite of members.<sup>40</sup> Such plebiscites give party members directly (as opposed to indirectly, through elected officials) the power to select candidates. Member plebiscites were also used in the Australian Democrats to elect their party leaders, instead of selection by a parliamentary caucus.<sup>41</sup> Misleadingly labelled

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32 Miragliotta and Errington, above n 18.

33 Reuven Y Hazan and Gideon Rahat, *Democracy within Parties: Candidate Selection Methods and Their Political Consequences* (Oxford University Press, 2010) 19.

34 Ibid 19–21; Miragliotta and Errington, above n 18, 20.

35 Gary Johns, 'Party Democracy: An Audit of Australian Parties' (2000) 35 *Australian Journal of Political Science* 401, 409–22.

36 For multi-member upper house seats requiring a slate of candidates across a large region, parties usually conduct preselections using a central committee and party members are only indirectly represented.

37 See, eg, *Coleman v Liberal Party of Australia, NSW Division (No 2)* (2007) 212 FLR 271, 275 [14]–[15].

38 See, eg, *Rules of the Australian Labor Party (NSW Branch)* (2011) rule N.13.

39 For judicial discussion, see *Jackson v Bitar* [2011] VSC 11 (28 January 2011). For an example of a specific override rule, see Liberal-National Party of Queensland, *Constitution*, Queensland Electoral Commission, rule U.12(a) <[http://www.ecq.qld.gov.au/political\\_parties.aspx?id=121](http://www.ecq.qld.gov.au/political_parties.aspx?id=121)>.

40 Epstein, above n 30, 17. D W Rawson, *Labor in Vain? A Survey of the Australian Labor Party* (Longmans, 1966) 23–4 notes the NSW Division preselecting by ballot of local members only.

41 A senior Liberal recently called for the Liberal Party leaders to be elected by their members: Christopher Pyne, 'Voting for the Leader is the Next Step for Liberal Reform' (2008) 60(2) *Institute of Public Affairs Review* 38.



‘primaries’, member plebiscites also feature in the election of leaders in Canadian and Israeli parties. Clearly such broad member plebiscites alter the dynamics of power in a party and encourage a semi-public campaigning for positions within the party, but they remain essentially internal, member-only processes.

The idea of a ‘primary’, by contrast, involves a radical redefinition of what a ‘party’ and its ‘membership’ are to mean. In the US, there is no party membership in the traditional common law sense. Rather, ‘membership’ just means a weak affiliation. When an elector enrolls, she can make a public declaration that she identifies with a particular party – or, for that matter, as an independent. Before we assay US law and practice, we need first to orient ourselves by defining what we mean by a ‘political party’ and ‘party membership’ in the common law and Australian tradition.

#### IV WHAT IS A PARTY AND WHO ARE ITS ‘MEMBERS’?

Many associations and groups, whether trade unions, business or issue-oriented lobbies, act politically. What differentiates parties? Parties can be defined in terms of ideal functions. Tham, for instance, distils three broad party functions: (a) responsive functions involving representing opinion, channelling participation and, of course, appealing for electoral support; (b) agenda-setting functions such as policy development; and (c) if electorally successful, parliamentary and governmental functions such as implementing policy.<sup>42</sup> Parties can also be defined descriptively, in institutional terms. In VO Key’s well-known analysis, Western parties have a tri-partite manifestation. There is the party-in-the-electorate, the party-in-government and the party-organisation.<sup>43</sup> These are not radically separate heads to the hydra. The organisation’s peak role is to mount campaigns, to appeal to the electorate and to secure governmental power.

On any definition of what constitutes a political party, the function of endorsing or selecting candidates for elective office is a central and fundamental one. What demarks the essence of a political party is that it exists to select and promote candidates for public elections.<sup>44</sup> Australian law recognises this. The definition of a ‘political party’ in the *Commonwealth Electoral Act 1918* (Cth) (‘the Act’) is positively monothematic. A ‘political party’ is ‘an organization the object or activity, or one of the objects or activities, of which is the promotion of the election ... of a candidate or candidates endorsed by it.’<sup>45</sup>

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42 Joo-Cheong Tham, ‘Reclaiming the Political Protection of Rights: A Defence of Australian Party Politics’ in Tom Campbell, K D Ewing and Adam Tomkin (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 312, 317–8.

43 VO Key, *Politics, Parties and Pressure Groups* (Crowell, 1964) 163–5.

44 ‘Put simply, the right to be on the election ballot is what separates a political party from other political associations’: Nancy L Rosenblum, ‘Political Parties as Membership Groups’ (2000) 100 *Columbia Law Review* 813, 814–5.

45 *Commonwealth Electoral Act 1918* (Cth) s 4 (definition of ‘political party’).

That Act does not demand registered parties have a mass-membership: either 500 members or an MP will suffice to illustrate a minimum level of community support.<sup>46</sup> Tellingly, a party will be involuntarily deregistered if it ceases to endorse candidates.<sup>47</sup> At one level it is unsurprising that an electoral act would focus attention on parties as preselection machines, but this is also consistent with the evolution of Australian democracy. Parties here have not served other social functions, such as distributing patronage.<sup>48</sup> Further, whilst some Australian parties started out as broader social movements and interest groups, the early extension of the franchise, compulsory voting and an accent on governmental stability, all helped ensure the electoral-centricity of Australian politics.

Aside from functional and institutional definitions, parties can also be considered in terms of their legal status. In Australia, as in the common law generally, political parties are almost always structured as unincorporated associations.<sup>49</sup> Until the emergence of political finance laws in the early 1980s,<sup>50</sup> parties flew below the legislative radar.<sup>51</sup> Australian parties, particularly the major parties, benefit not just from public funding, but from laws enacting majoritarian democracy for the parliamentary lower houses,<sup>52</sup> compelling enrolment and voting and, with the exception of two states, mandating full preferential voting. As a consequence of such laws, voters in safe seats may feel as if their choice is perfunctory, whilst parties are freed of the job of stimulating turnout that accompanies voluntary voting.

If we turn from the party as a legal entity to its membership, we find that being a member of a political party is a contractual relationship, akin to being a member of a private association or club. It involves being accepted into the organisation, after vetting by the executive or a membership committee. It involves an ongoing commitment to the party's constitution and rules. This includes potential disciplinary sanctions for failure to abide by such rules. In return, the member is privy to the party's internal processes. As a member they may be involved in everything from the quotidian affairs of the local branch, all the way up to being a delegate to the party's convention, serving on its executive or nominating for preselection. The ability to vote in preselections is perhaps the key privilege of membership.

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46 *Commonwealth Electoral Act 1918* (Cth) s 123(1). State regulations set somewhat different standards for registration, but because the national senate is organised on state lines, parties' state divisions seek to register at both levels, and hence aim to meet whichever standard is higher.

47 *Commonwealth Electoral Act 1918* (Cth) s 136(1).

48 In less developed systems of government, patronage parties can serve welfare functions, although that role is now seen as corrupt in advanced democracies.

49 They can of course then incorporate (eg under association incorporation legislation) or even be founded as a company limited by guarantee, but such structures are rare in Australian parties.

50 On the emergence of those laws, see Deborah Z Cass and Sonia Burrows, 'Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits' (2000) 22 *Sydney Law Review* 477.

51 With the exception of the constitutional reform of 1977 to give parties some 'ownership' of Senate vacancies: Tom Round, 'Party Endorsement and Senate Vacancies: The Constitution and the *Commonwealth Electoral Act*' (1998) 7 *Griffith Law Review* 297.

52 Tasmania and the Australian Capital Territory are exceptions.



None of this, it should be understood, flows by legal necessity. The law imposes no given model on party structures and affairs, let alone any particular notion of internal democracy.<sup>53</sup> Indeed, as the Pauline Hanson and One Nation Party deregistration cases demonstrated, the common law is torn between two views of how to construe the membership contract.<sup>54</sup> On one view, membership is relational, so becoming a member is about internal acceptance into the community of the organisation.<sup>55</sup> On another view, membership can be judged objectively, from outside the organisation. If someone has been issued with a membership ticket then they are a member even if the rules have not been abided by.<sup>56</sup> For our purposes, the distinction is not vital. On either view, party membership is a quid pro quo. The member pays annual dues and in return, like every other member, they enjoy certain benefits and are subject to certain obligations.

This is *not* what party ‘membership’ means in the US. The common law and culture affecting associations generally is not radically different in the US. The difference lies in the specific statutory law and culture of elections and parties in the US, a difference attributable in large part to primaries. In the US, the key act by which ordinary citizens become associated with a political party is not by joining it in the sense of paying annual dues to become privy to the party’s internal affairs. Rather, it is to declare, at the time they register as a voter, that they accept the label ‘Democrat’ or ‘Republican’. This entitles them not merely to vote in the primary to select the party’s candidates, but to run in the primary itself.

To the rest of the common law world, this is not joining a political party. It is at best an act of self-identification. In US law, such formal public identification with a party is a keystone of the primary system, and has been for over a century.<sup>57</sup> Hence in the US Supreme Court, the concepts of public ‘party affiliation’ and becoming ‘a member of a party’ are literally interchangeable.<sup>58</sup> US parties of course have their own internal affairs – administrative machines, committees and accounts – relatively sealed off from the outside world and electorate at large. But on the crucial question of who is entitled to run under the banner and ballot label of ‘Republican’ or ‘Democrat’ in a general election, the power is ceded to a broader electorate of people who would in no sense be considered party ‘members’ in the Anglo-Australian tradition.

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53 Gauja, above n 11, 70, 100–3.

54 Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2010) 133–5.

55 *Sharples v O’Shea* [1999] QSC 190 (18 August 1999).

56 *R v Hanson; R v Ettridge* [2003] QCA 488 (6 November 2003).

57 *Ladd v Holmes*, 66 P 714, 721 (Or, 1901) approved a law requiring merely that an elector, to participate in a party’s primary, declare that he had voted for a majority of its candidates at the last election or that he intended to support a majority of its candidates at the upcoming poll.

58 See, eg, *California Democratic Party v Jones*, 530 US 567, 577 (2000): ‘even when it is made quite easy for a voter to change his party affiliation the day of the primary ... at least he must *formally become a member of the party*; and once he does so, he is limited to voting for candidates of that party’ (emphasis in original).

What then does party affiliation involve in the US? Nuanced generalisation about the US as a whole can be difficult, since election law in that country is ‘hyper-federalised’. (That is, it varies from state to state and in some respects from county to county, even for federal elections).<sup>59</sup> But one commonality is the idea that the law redefines party ‘membership’ by opening pre-selections to the public. We can take the largest jurisdiction, California, to glean a sense of the process.<sup>60</sup> When a US citizen registers as an elector in California, the affidavit of registration poses a question about ‘political party preference’. The question is said to be mandatory, though this just means an official must enter something in that field of the register.<sup>61</sup> Electors are told they can leave party identification blank, however this will deprive them of the ability to vote in primaries.<sup>62</sup> A blank response defaults to ‘no party’,<sup>63</sup> often described as ‘independent’ status.

Party affiliation is public and searchable: it cannot be repressed, unlike the electoral address of a victim of domestic violence. Technologies vary from place to place, but many US jurisdictions enable party affiliation to be searched online. Californian electors are reminded that whilst ‘commercial use of voter registration information is prohibited ... voter information may be provided to a candidate for office ... or other persons for election, scholarly, journalistic, political or governmental purposes ...’.<sup>64</sup> The most obvious example of such a use is in identifying the political affiliations of judges.<sup>65</sup>

In the US then, as Winkler has commented, ‘[s]tate-mandated affiliation oaths displaced the ability of the party leaders to set their own membership requirements’.<sup>66</sup> That observation is accurate as to the consequence of the primary laws in the US. However, it implies that party leaders outside the US act unilaterally to ‘set’ membership requirements. In any typical party, such basic constitutional rules have to be agreed upon by the party membership or convention.

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59 For an account – and defence – of hyper-federalisation in US election law, see Alec C Ewald, *The Way We Vote: The Local Dimensions of American Suffrage* (Vanderbilt University Press, 2009).

60 What follows summarises the *California Elections Code*, Cal Elec Code, §§ 2150–7.

61 *California Elections Code* § 2150(a)(8) (‘shall show ... party preference’); cf § 2151(a) (‘may disclose’).

62 *California Elections Code* § 2151(b)(1).

63 *California Elections Code* § 2154(b).

64 *California Elections Code* § 2157.2. Compare how the roll in Australia is a public document and can be supplied electronically not just say to aid medical researchers, but to registered political parties to assist in their direct mail campaigning: *Commonwealth Electoral Act 1918* (Cth) ss 90A–91B.

65 Such information becomes used as a crude cipher for a judge’s political and even philosophical leanings. In more nuanced ways, scholars incorporate party affiliation with other jurimetrical indicators. See, eg, the inclusion of party affiliations of Supreme Court judges in this database: Lee Epstein et al, *Codebook: US Supreme Court Justices Database* (26 January 2010) <<http://epstein.law.northwestern.edu/research/justicesdata.pdf>>.

66 Adam Winkler, ‘Voters’ Rights and Parties’ Wrongs: Early Political Party Regulation in the State Courts, 1866–1915’ (2000) 100 *Columbia Law Review* 873, 889.

## V THE DIRECT PRIMARY IN UNITED STATES LAW AND HISTORY

The ‘direct primary’ is a system where ordinary electors vote to pre-select candidates. To borrow Key’s terminology,<sup>67</sup> in a direct primary, the party-in-the-electorate, rather than the party-organisation, determines who will carry that party’s label on the general election ballot. As an American, Key naturally understood the party-in-the-electorate as embracing its supporters, when in the Anglo-Australian tradition, the traditional focus was on the party as a membership-based organisation. The world is most familiar with the idea of primary elections through their use in the endorsement of US Presidential tickets. However the offices of President and Vice-President are peculiar, not typical. They are the only nationwide elected offices, and are executive, not legislative. Further, ‘the States themselves have no constitutionally mandated role’ in selecting candidates for those offices.<sup>68</sup> A better analogue for our parliamentary system is the state-run primary for members of congress and state legislatures.

Again, the hyper-federalised patchwork of laws and practices can make accurate generalisation difficult.<sup>69</sup> At the risk of over-simplification, the direct primary exists on a continuum from ‘closed’ to ‘open’.<sup>70</sup> The closed primary is restricted to those who publicly register as affiliates of the party: the period of registration may run up until primary polling day itself. In one variant on openness, electors may register as ‘independents’ yet still vote in one party’s primary. In really open primaries, the voter can choose on primary election day which party’s primary to participate in.<sup>71</sup> The most open type of primary yet devised even permitted electors to cherry-pick between parties depending on the office involved. Laws mandating such ‘blanket’ primaries were, however, declared unconstitutional recently as a step-too-far against party freedom of association.<sup>72</sup> (Freedom of association can also protect a party’s desire to opt for a *more* open primary than the statute law may require.)<sup>73</sup>

How did primaries come about?<sup>74</sup> In the early American republic, nominations tended to be made via informal caucuses of legislators. The legislative caucus was not merely elitist, but suffered from being geographically

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67 Key, above n 43.

68 Lawrence Tribe, *American Constitutional Law* (Foundation Press, 2<sup>nd</sup> ed, 1988) 1114, citing *Cousins v Wigoda*, 419 US 477, 489–90 (1975).

69 John F Bibby and Brian F Schaffner, *Politics, Parties and Elections in America* (Thomson Wadsworth, 6<sup>th</sup> ed, 2008) 142 produce a table outlining legal practice circa 2000: 13 states operated closed primaries in the sense of requiring party registration in advance. Another 25 operated semi-closed or semi-open primaries which required some public declaration of party status.

70 Louisiana even has non-partisan primaries, where there is a single primary ballot regardless of party, and the top two place-getters then stand at the general election. This is akin to the French run-off ballot.

71 Bibby and Schaffner, above n 68, list nine states as using such an ‘open’ system in 2000.

72 *California Democratic Party v Jones*, 530 US 567 (2000).

73 *Tashjian v Republican Party of Connecticut*, 479 US 208 (1986).

74 For more detailed histories, see Leon D Epstein, *Political Parties in the American Mold* (University of Wisconsin Press, 1986) 158–74; Alan Ware, *The American Direct Primary: Party Institutionalization and Transformation in the North* (Cambridge University Press, 2002).

arbitrary. It gave way in the 19<sup>th</sup> century to a more open system involving local caucuses of party faithful – not members in any legal sense – that nominated delegates to regional and state-wide conventions.<sup>75</sup> These conventions then endorsed the party's candidates. Whilst more open, participative and discursive than a meeting of legislators, the system of indirect election of conventions through local caucuses came under increasing challenge, and increasing regulation.

In its place evolved the now familiar system of the direct primary.<sup>76</sup> In the South, this development followed from the antebellum rise of virtual one-party (Democratic Party) states. In the North, it is often attributed to the egalitarian and anti-corruption Progressive movement.<sup>77</sup> Ware however rejects this attribution as too simplistic.<sup>78</sup> After all, if primaries were essentially a manifestation of hostility to party bosses, why would party leaders *as legislators* have come to accept them as mandatory and the subject of legislative control?<sup>79</sup> Ware instead argues that the caucus-convention system became unwieldy, but since US parties were decentralised, they needed state-wide laws to achieve consistent reform of their internal practices. Laws regulating and mandating primaries in the US first appeared in the late 19<sup>th</sup> century,<sup>80</sup> then spread rapidly. By 1903–4, no fewer than 43 states had enacted some laws regulating primaries and party selection processes.<sup>81</sup> By 1915 all but three states had legislated for direct primaries, and in most all elective offices were covered.<sup>82</sup>

In jurisprudential terms, the principle justifying state mandated and regulated primaries permits sublimating freedom of association in favour of a broadened conception of the right to vote.<sup>83</sup> The primary extended the franchise beyond the general election, back into the nomination process. By erecting such a distinction between freedom of association and a liberal view of the franchise,<sup>84</sup> the freedom of parties to prescribe membership rules and control their candidate selections was washed away. In the words of one state court, freedom of association was reduced to a right of activists to 'assemble and consult together for their common

75 Bibby and Schaffner, above n 69, 138; Epstein, above n 74, 160. For a detailed account see Ware, above n 74, ch 3.

76 Experimentation with direct primaries has been dated to party branches in one Pennsylvania county as early as 1842: see Epstein, above n 74, 168, citing Austin Ranney, *Curing the Mischiefs of Faction: Party Reform in America* (University of California Press, 1975).

77 Charles Edward Merriam and Louise Overacker, *Primary Elections* (University of Chicago Press, 1928); Ranney, above n 76.

78 Ware, above n 74, 15–8.

79 Ibid 255.

80 Winkler, above n 66, 877 cites New York, in 1882, as adopting the first 'mandatory party regulations'; Ware, above n 74, 15 credits Minnesota in 1899 for the first mandatory primary law; Epstein, above 73, 168 cites the Wisconsin legislative mandate of 1903 as the most influential.

81 Floyd R Mechem, 'Constitutional Limitations on Primary Election Legislation' (1905) 3 *Michigan Law Review* 364, 381–6 (appendix).

82 Ware, above n 74, 15. Indiana was the last state to mandate primaries generally: Bibby and Schaffner, above n 69, 140. As earlier noted, the Presidential system is distinct and more complex.

83 Mechem, above n 81, 369.

84 See Winkler, above n 66, 874–5, 881–2 (concluding courts used the rhetoric of individual voting rights over concerns for party autonomy).

good', coupled with the inescapable free speech right to advocate policies without restriction.<sup>85</sup>

Parties could lose, to the primary system, control not merely of candidate selection, but even the ability to control the election of their committees or to discipline such officials.<sup>86</sup> In the hollowed out freedom of association, state law made a nest. As a Nebraskan court put it as early as 1905, 'regulation of the membership of the party and of the right to participate in the nomination of its candidates ... is taken from the party and placed in control of the Legislature.'<sup>87</sup>

Court endorsements of primary laws, however, were motivated not simply by deference to legislators or by some democratic idealism, but by a prevailing disgust at party bosses and machines, who were perceived to have engaged in fraudulent electoral practices generally in the 19<sup>th</sup> century.<sup>88</sup> '[P]arty leaders were blamed for the corruption of the ballot box, thereby dooming the claims of the parties to associational freedom.'<sup>89</sup>

Similar corruptions, through bribery and intimidation, had plagued British and Australian elections of course. Yet strong, professional parties arose in those jurisdictions rather than the primary system. Something else must explain the path that American law took. The most obvious explanation is the long-standing aversion to 'factions' in the US, captured in Madison's description of them as 'dangerous vices' which 'divided mankind into parties, inflamed them with mutual animosities and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.'<sup>90</sup>

Parties were seen as a principal and developed, if not only, form of social faction.<sup>91</sup> Hence party 'bosses' were seen as representing factions within factions. Madison did not believe in a naive Burkean rendering of politics as a trusted elite legislating in the public interest far above the fray of competing social groupings. Rather, the great constitutional question was not whether parties could be eliminated, but how to restrain their excesses as factions. State controlled primaries, open to the general public, were a key limit.

A second aspect of the historical context is illustrative. The chief legal weapon against 19<sup>th</sup> century electoral corruption proved to be the 'Australian ballot'. The Australian ballot was simply the official form of the secret ballot, which supplanted more open voting methods. Under the open ballot, there was no need for a candidate nomination process for general elections. Anyone could print their own ticket, which supporters would place in the ballot box. The official state printed ballot paper necessitated a system of ordering and limiting

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85 *Ladd v Holmes*, 66 P 714, 722 (Or, 1901); more generally discussing and rejecting freedom of association arguments against primary laws: at 719–22.

86 *People v Democratic General Committee of Kings County*, 58 NE 124 (NY, 1900).

87 *Adair v Drexel*, 105 NW 174, 179 (Neb, 1905).

88 Winkler, above n 66, 882–4.

89 *Ibid* 875.

90 James Madison, 'The Federalist No. 10: The Utility of Union as a Safeguard against Domestic Faction and Insurrection', *Daily Advertiser* (New York), 22 November 1787, <<http://www.constitution.org/fed/federa10.htm>>.

91 In the true sense, a faction is any sectoral or interest group.

ballot access. Primaries, as the very name reveals, were constructed in the US as a way of regulating those nominations. The technological innovation of the official ballot was thus not merely a clean-election measure alongside state controlled primaries, but an essential precursor of the primary. Substantial parties in the US were given privileged access to the official ballot, but at a cost to their internal freedom, strength and cohesiveness.<sup>92</sup>

## VI MAKING SENSE OF CALLS FOR PRIMARIES: PARTY STRENGTH AND MALAISE

Primaries, as developed in the US, have been a means of weakening the power of political parties themselves in favour of candidate-centred politics. As the leading US election law text puts it:

the history of American political parties has been to give voters more, not less direct control over party candidates ... Direct primaries ... allow candidates to appeal over the heads of party leaders directly to voters. They have become a prime device for weakening party discipline.<sup>93</sup>

Or, in Epstein's magisterial account of the US party system, 'the direct primary itself is not so much a cause of candidate-centred politics as it is an institutionalised means for pursuing such politics in a civic culture that is broadly hostile to party organisational control.'<sup>94</sup>

It is paradoxical, then, that behind calls for primary elections in contemporary Australia and elsewhere lie assumptions about party decline. Primaries are hardly a vehicle to strengthen parties. Such decline is most evident in statistics on party membership. Parties are notoriously coy about revealing membership numbers,<sup>95</sup> and despite receiving public funding they are under no obligation to do so. The 2010 ALP Review however openly spoke of a 'haemorrhage' in ALP branches, especially in the larger states, generating a 'crisis in membership'.<sup>96</sup> It published a graph showing a steady decline in total party membership from just under 50 000 to well below 40 000.<sup>97</sup> Liberal Party

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92 Cf Epstein, above n 74, 162–7, 241–50.

93 Daniel Hays Lowenstein, Richard L Hasen and Daniel P Tokaji, *Election Law* (Carolina Academic Press, 4<sup>th</sup> ed, 2008) 419.

94 Epstein, above n 74, 155–6. '[T]he primary contributes to the porousness [of American parties] as well as confirming it in statutory form': at 245.

95 See, eg, Dean Jaensch, Peter Brent and Brett Bowden, 'Australian Political Parties in the Spotlight' (Report No 4, Democratic Audit of Australia, Australian National University, 2004) 55. For rare candour, see Nick Minchin and Judith Troeth, 'Debating Preselection Reform in the Liberal Party: The Cases of South Australia and Victoria' in Marian Simms (ed), *The Paradox of Parties: Australian Political Parties in the 1990s* (Allen & Unwin, 1996) 60, 62–4 (admitting Liberal Party membership at just 70 000 in 1996, including a two-thirds decline in South Australia alone between the 1970s and 1990s).

96 Bracks, Faulkner and Carr, above n 21, 9.

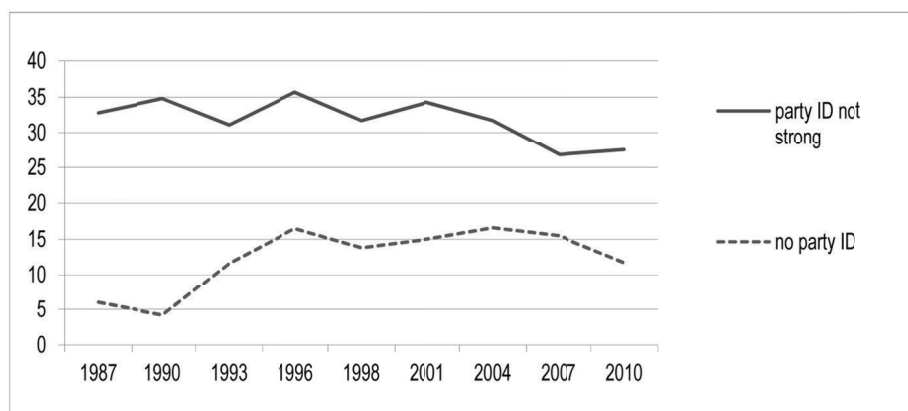
97 Ibid 10 (Figure 1).



claims to double that number of members are seen as hyperbole.<sup>98</sup> The Greens, whilst experiencing membership growth, have only around 9 000 members.<sup>99</sup> Support for the major parties is more volatile than in the heyday of the two-party system in the later 1940s and early 1950s.

Yet the glass measuring party-strength is as much half full, as half empty. Membership may have waned, yet evidence of decline in the *party system* is much more difficult to find. On the contrary, data on citizen identification with parties show the system has proven fairly robust in the past two decades, despite a supposed ideological convergence between the major parties. The graph in Figure 1 is taken from the Australian Election Studies series,<sup>100</sup> covering the past nine election cycles. The bottom line shows that the percentage of the electoral population identifying with ‘no party’ has returned to the 10 per cent level.<sup>101</sup> Similarly, the top line shows no growth in the lukewarmness of party identification. If anything, the trend has been to slightly stronger attachment.

Figure 1: Australian Election Studies (1987-2010): Party Identification<sup>102</sup>



A third measure is popular opinion on whether parties are necessary to make the system work. Again, that criterion has proven remarkably stable over the past two decades. Over 95 per cent of Australians agree parties are necessary, with just 3–5 per cent saying that parties are not needed. A similar stability is revealed

98 Anika Gauja, quoted in Julie Hare, ‘They’re Astute, Organised and Media Savvy. Today’s Young Political Activists are Shunning the Mainstream Parties and Dancing to a Different Tune’, *The Australian Magazine* (Australia), 19 March 2011, 12.

99 Tad Tietze, ‘The Greens, the Crisis and the Left’ (2010) 199 *Overland* 27.

100 The study interviews electors on or shortly after polling day.

101 The spike affecting the 1993–6 results is explicable by a decline in attachment to the ALP between the Hawke and Keating years.

102 Australian Social Science Data Archive, *Australian Election Studies* <<http://nesstar.assda.edu.au/webview/>>. Respondents who offered a party identification were then asked if that identification were ‘very strong’, ‘fairly strong’ or ‘not very strong’.

in the proportion who see parties as ‘clearly’ necessary (40–45 per cent).<sup>103</sup> By international standards, Australians may lag northern Europeans in rating party necessity. But tellingly, US parties rate lowest on this measure, consistent with the candidate-centricity of its politics.<sup>104</sup>

It is true that merely volunteering a party identification, especially around election day, is just one bald measure of the health of the system. The data, as shown in Figure 1, is unable to measure either intensity of political interest, or the ongoing relevance of parties to people. But the statistics do suggest a high level of contentment. What is going on here? Party membership is withering, yet identification with parties and the party system remains high. Party organisations are shrinking and in that sense the party-in-the-electorate is under pressure. Parties are less a site for community participation in politics, and they have fewer organic connections to the wider citizenry. Yet the party-in-government has not lost its place. There has been some shift from party-democracy to audience-democracy, as Manin argued.<sup>105</sup> This shift is manifest in Australia in an emphasis on the party leader over the parliamentary caucus and even the front-bench. But parties remain predominant in Parliament and necessarily so according to the bulk of the electorate. In electioneering terms, the party organisation also remains critical to promoting the parliamentary party, its policies, brand and leaders, especially during campaign periods.

Parties are thus institutionally supported and entrenched in the public mind, yet are suffering declining organisational vitality and robustness.<sup>106</sup> The call for primaries in countries like Australia is a reaction to this. It may be linked to a sense that since parties receive public funds to defray electioneering costs, they should be more regulated. Yet parties do not become more easily regulated simply because they receive assistance, any more than the law should interfere in the affairs of say arts or environmental organisations merely because they receive grants.<sup>107</sup> Nor is the call for primaries in Australia driven by the sort of motivations that gave birth to them in the US over a century ago, such as parties desiring to streamline practices, popular prejudices about party ‘bosses’, or an assumption that doubling the franchise would be a democratic advance. There is little evidence in Australia of any great concern with the quality of preselection

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103 Ibid.

104 Russell J Dalton and Steven A Weldon, ‘Public Images of Political Parties: A Necessary Evil?’ (2005) 28 *West European Politics* 931, 934.

105 Bernard Manin, *The Principles of Representative Government* (Cambridge University Press, 1997).

106 See, eg, Andrew Norton, ‘Prospects for the Two-Party System in a Pluralising Political World’ (2002) 61(2) *Australian Journal of Public Administration* 33, 33–9 (setting out evidence of major party decline); Jaensch, Brent and Bowden, above n 93, ch 4, Table 4.3 (declining membership statistics); Ian Marsh, ‘Australia’s Political Institutions and the Corruption of Public Opinion’ (2007) 66 *Australian Journal of Public Administration* 329, 333–4 (evidencing waning party organisational bases and with it their role in channelling participation and activism).

107 Graeme Orr, ‘Justifications for Regulating Party Affairs: Competition not Public Funding’ in Keith Ewing, Jacob Rowbottom and Joo-Cheong Tham (eds), *The Funding of Political Parties: Where Now?* (Routledge, 2011) 249.

outcomes.<sup>108</sup> Nor are primaries being touted as a response to ongoing concern with the balance of power between party apparatchiki and the rank-and-file. On the contrary, since primaries cede some power to people outside the party, they bypass that balance altogether.

Instead, interest in primaries is an experiment with bleeding the boundaries of the notion of party ‘membership’ in response to the numerical decline of that membership. In Key’s terminology, it is about renewing connections between the party-in-the-electorate and the party-organisation, with an accent on the party-in-the-electorate. Parties are jealous of internet-based movements such as Get Up!, which claims over 400 000 members.<sup>109</sup> In truth, the ‘membership’ of such groups is little more than an emailing list. This is not to downplay the ability of such pressure-groups to channel participation: Get Up! harnesses the power of the internet to quickly mount petitions, occasional rallies and, most of all, to solicit funds for targeted issue advertising. But in terms of setting policy agendas, such movements are even more top-down, and certainly less accountable, than political parties. Their style of participation is also distinctly transactional. Campaigns spring up and disappear, and individuals opt-in, say by signing a petition, with minimal commitment. In short, it is an organisational model dramatically different from the traditional notion of a political party as an association of members.

Jealous of this emerging model, parties are considering primaries as a lure, to reach out to supporters who are not interested in joining or committing to the party, with the promise of a say in the party’s seminal activity: candidate selection. The appeal of primaries to the party as a brand is clear. They may raise the party’s profile in the electorate concerned and sound democratic to outsiders, even if the democratisation may be more formal than real.<sup>110</sup> Those supporters can then form a mailing list of potential donors and even election day volunteers. The appeal of primaries to ordinary party members however is non-existent. Why would the party give away its most precious internal right to people who have no commitment to the party other than a declaration that they are a ‘supporter’? At worst, to adapt Katz, an ‘expansion of the selectorate can be an elite model to defang the base’,<sup>111</sup> especially if the party leadership sees the membership base as too ideological or too focused on local concerns. Similarly, Katz and Mair suggest that far from breaking up the cartel-party, a move to ‘plebiscitarian democracy’ through primary elections involving outside supporters may only

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108 If anything, there is a stalemate between those who approve centralised candidate selection to ensure talented candidates with broad appeal, and those who prefer more internal democracy to allow branches to prefer local activists over a factional favourite being ‘parachuted’ in from outside.

109 Get Up! <<http://www.getup.org.au/>>. Get Up! is inspired by, if not modelled on, MoveOn <<http://front.moveon.org/>> in the US.

110 As a study of membership plebiscites concluded: Jonathan Hopkin, ‘Bringing the Members Back In?: Democratizing Candidate Selection in Britain and Spain’ (2001) 7 *Party Politics* 343.

111 Richard S Katz, ‘The Problem of Candidate Selection and Models of Party Democracy’ (2001) 7 *Party Politics* 277, 293.

strengthen the elite party leadership over the party organisation and membership.<sup>112</sup>

Party-run primaries also face significant practical hurdles. There is concern for internal democracy in preselections, given evidence of branch-manipulation by factional warriors. Yet how much more readily 'stackable' will be party-run primaries, since there will be no memberships to pay to gain voting rights? There is also the spectre of supporters of rival parties taking part in a primary to cause mischief or help choose the least electable candidate. Further, at least under the current common law, mere party supporters (as opposed to members) would have no rights to litigate problems in party-run primaries.<sup>113</sup> These issues are less problematic in the US with legally-mandated primaries, whose scale is much larger and which benefit from the integrity of being state-run. Parties in Australia do not have the funds to institutionally mimic such primaries: indeed the cost of party-run primary ballots is sure to inhibit their professionalism.<sup>114</sup> Just as a new technology (the official ballot) was a stimulus to US primaries in the 19<sup>th</sup> century, if primaries are to take off here in the 21<sup>st</sup> century, the technology of the internet will have to drive the process. But whilst cheaper than running elections by ballot, primaries conducted over the internet would face serious security and integrity concerns.

Most of all, affiliating with a party in the US is not costless. The elector must make a public declaration which may follow him all his life. In contrast, under party-run primaries in Australia, such 'supporter declarations' must almost certainly remain private. To do otherwise would fly in the face of a long-standing culture of privacy of party affiliation, and be counter-productive to the goal of encouraging widespread participation in primaries. Even that goal is a two-edged sword: if primaries became too popular, the US problem of an arms-race in the cost of primary campaigning could be imported. Full-on primaries would open a new front in the conundrum of how to regulate political finance to enhance political equality. They will also, as is well known from US experience, heighten the problem of public corruption, since it is easier to 'buy' individual candidates and legislators than an entire party. In summary, party-run primaries, whilst not infeasible, face significant questions of design, integrity and expense. Whilst not insurmountable, adopting party-run primaries, rather than the fully-fledged public model of the US, is akin to being a bit pregnant. Yet the fully-fledged model would radically transform the nature of parties as voluntary associations, and not necessarily for the better.

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112 Katz and Mair, above n 5, 761.

113 See *Baldwin v Everingham* [1993] 1 Qd R 10; *Cameron v Hogan* (1934) 51 CLR 358; *Baker v The Liberal Party of Australia (SA Division)* (1997) 68 SASR 366.

114 Gay and Jones, above n 24, 6 report the British Conservatives as spending £38 000 on a single primary (admittedly one where all electors were sent postal ballots).

## VII CONCLUSION: PRIMARIES A SECONDARY OPTION

Outsiders looking into the US system may find themselves as bemused as a prominent UK political scientist, who observed some 40 years ago:

It is common in the US for writers on parties to refer to ‘the party in the electorate’ ... the notion of party-in-the-electorate seems a strange one on the face of it. It is rather as though one were to refer not to the buyers of Campbell’s soup but to the Campbell-Soup-Company-in-the-market.<sup>115</sup>

To the common law mindset outside the US, the party is an organism with distinct boundaries. In its campaign mode, it pitches to an electorate as a soup company might pitch to its consumers. US parties are less distinct, and this is nowhere more obvious than in the selection of candidates, since the direct primary system incorporates the general electorate.

In contrast with not just Australia, but other common law systems, US political parties are relatively weak – in the sense of being loose rather than cohesive and disciplined – and have been for a long time.<sup>116</sup> Some characterise this ‘weakness’ as a strength, from the viewpoint of decentralised and participatory democracy. Others see it guaranteeing an absence of any sense of collective responsibility, especially in national government.<sup>117</sup>

Superficially, it is understandable that parties across the western world, seeking to revivify themselves after a century as member-centred organisations, might look to the US and its distinctive system of primaries. Campaign techniques developed in the US are often adapted elsewhere. The phenomenon of human interactions becoming less defined by status and long-term commitments (à la membership of associations) and more defined by ad hoc transactions is a well-discussed feature of contemporary market-oriented societies.<sup>118</sup> From the perspective of the individual elector, interested in dabbling in candidate preselection relatively costlessly,<sup>119</sup> the primary system may seem ideal. From the point of view of parties wishing to attract attention and build lists of potential supporters for marketing purposes, primaries may also seem worth the administrative burden.

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115 Anthony King, ‘Political Parties in Western Democracies: Some Sceptical Reflections’ (1969) 2 *Polity* 111, 114.

116 Calls to revitalise the US party system appear every generation, but hardly universally: the fear of ‘faction’ remains strong. To outsiders brought up on Westminster traditions of electoral accountability through strong parties, an executive in Parliament and a shadow executive in opposition, US partisanship seems mild, and more a product of ‘checks and balances’ descending into gridlock through a *lack of party discipline*, than its excess.

117 ‘The only way collective responsibility has ever existed, and can exist given our institutions, is through the agency of the political party; in American politics, *responsibility requires cohesive parties*’: Morris Fiorina, ‘The Decline of Collective Responsibility in American Politics’ (1980) 109(3) *Daedalus* 25, 26 (emphasis added).

118 See, eg, Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster, 2000).

119 There are transaction costs in making a declaration as a party supporter and voting in a primary, but these are no greater than enrolling and voting for a general election and much less than the financial cost, rule-based obligations and commitment expected of party members.

In the short term, primaries would spell neither the death nor rebirth of parties in Australia. It would take many years for an electoral culture focussed on short, party-centred general election campaigns under compulsory voting to embrace a longer-winded, two-stage process involving candidate-focused primary elections under voluntary voting. And parties, of course, have some power to calibrate primaries as they see fit. This is most obvious if primaries are left entirely to party rules. Even if they were governed by or even mandated by legislation, the parliamentary parties, in Gauja's terms, are 'authors of their own destiny' in having a key say in shaping that legislation.<sup>120</sup> Party-run primaries present no problems from the perspective of freedom of association law. Mandatory primaries might pose problems, although only a handful of Australian judges have endorsed a constitutionally implied freedom of political association. It would however be paradoxical if an implication arising from the phrase 'directly chosen by the people' were to be employed to invalidate primaries. If nothing else, primaries give the people a double choice.

Ultimately, the problems this article identifies with the interest in primaries in countries like Australia are not ones of legal, let alone constitutional, form and limits. They are ones about a (mis)matching of ends and means in the design of political institutions. Parties and political commentators are sensibly concerned with the weakening and declining vitality of parties as membership-driven organisations. The question of finding ways to make membership more attractive and meaningful is a laudable one. The right answer is surely greater power-sharing *within* parties. This can be achieved through a relaxation of the power of the leadership cabal in both the party-organisation and the party-in-Parliament, and through enhancing membership voices in both policy forums and member dominated plebiscites on matters such as preselection. The answer of adapting the US primary model, born in another era but now entrenched in a candidate-centred political system featuring weak, literally dismembered parties, is a curious solution at best. If the goal is to halt the hollowing out of party memberships, primaries are the wrong answer to the right question.

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120 Anika Gauja, 'State Regulation and the Internal Organization of Political Parties: The Impact of Party Law in Australia, Canada, New Zealand and the United Kingdom' (2008) 46 *Commonwealth and Comparative Politics* 244, 259. As Katz and Mair put it, parties are not just 'objects' of the law but also 'subjects': Katz and Mair, above n 5, 756. That said, Katz and Mair recognise that political and legal barriers ensure parties are not entirely free agents in drafting laws to suit themselves: at 759.