HB
150

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

February 14, 1977

Subject: Closed v. Open Primary (W.O. #3357)

To: Representative Bob Bradley, Chairman
House State Affairs Committee

From: Jack C. Doyle, Executive Director

This is in response to your request for some background information on the subject of primary elections which might be used in connection with the committee's consideration of House Bill No. 150 which seeks to restore the party primary in Alaska and replace the "blanket primary" which was reinstated in 1967.

Of the 50 states, 39 have the strict party or closed primary. Eight states provide the voter with the ballots of all parties and the voter chooses in the privacy of the voting booth the one he wishes to vote on. Alaska and two other states (Washington and Louisiana) have the "blanket primary". An article on the peculiar Louisiana law and its origins is attached. Also attached is a 1975 table from The Book of the States (1976-77) of the Council of State Governments showing in table form the information noted above.

I am also pleased to enclose an extract from a 1951 report of the National Municipal League which gives the standard pros and cons of the open versus the closed primary. Special attention is given to the Washington blanket primary which has had periodic popularity in Alaska.

Of more current significance is a recent decision of the United States District Court for Connecticut (Nader v. Schaffer) which was upheld without issuing a further opinion by the U.S. Supreme Court on December 6, 1976. The news clipping and the district court opinion are included with this memorandum. The opinion is probably the most organized response I have ever read to the standard complaint of the independent voter to the party primary system.

I hope this material will meet your need for the background information. Please let me know if we may be of further assistance.

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Primaries ruled for parties only

Examiner News Services

WASHINGTON -- The Supreme Court held today that independent voters have no constitutional right to participate in primary elections.

The justices acted without issuing an opinion. They affirmed a three-judge federal court decision that upheld Connecticut's law limiting primary participation to members of political parties.

The lower court ruled that Connecticut's law was an appropriate means for the Legislature to preserve "the integrity of the electoral process."

Connecticut has an interest, the court said, in assuring "that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies and goals of the party."

The state law was challenged by Nathra Nader and Albert Snyder, independent voters who sought to vote in Connecticut's 1976 primary. They claimed that by limiting participation to party members, the state denied them their right to vote at a critical stage of the electoral process.

The three-judge court noted that Connecticut provides petition procedures for placing independent candidates on the ballot and that party registration, enabling a person to vote in the primary, is easy.

"Connecticut's voting laws clearly provide avenues for supporting candidates of one's persuasion without affiliating with an established 'major' political party," the court said.

Limiting primary participation serves the rights of those who wish to join a party, the court said, and lets party candidates know who can vote to nominate them and presumably who is sympathetic with the political goals of the party.

"... In order to protect party members from 'intrusion by those with adverse political principles,' the lower court concluded, "and to preserve the integrity of the electoral process, a state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party."

The court also:

• Ruled that the exclusion of even one prospective juror for general scruples against capital punishment automatically voids any death penalty imposed in a

High court takes Redwood City porn sales case

United Press International

WASHINGTON — The Supreme Court today agreed in a California case to decide whether "pandering" can be a factor in an obscenity case when there was no evidence the defendant tried to exploit the pornography commercially.

The court accepted for later argument and decision the appeal of Roy Splawn, a Redwood City bookstore owner convicted of selling some pornographic films to a part-time policeman. The sale took place only after the policeman had asked for the material several times.

Splawn's conviction was affirmed a second time by the California Court of Appeal after the Supreme Court established new guidelines for state obscenity cases.

Splawn was sentenced to 91 days in the county jail, one day suspended, and fined $1,000, plus state assessment. He has been free on bond of $1,250.

Copy of USDC Conn. opinion is attached

cially neutral; however, no black person has ever been elected to city office, notwithstanding black population levels in excess of 30 percent. While support of the city's black voters is actively sought by all candidates in city elections, blacks appear condemned to submergence in the local political sphere for the foreseeable future. Where black voters have provided the margin of victory, their effect has been only to tip the balance in favor of either of two white candidates. This is not the sort of meaningful access to political processes intended by the Fourteenth Amendment.

The city has a long history of official racial discrimination and unresponsiveness that have long affected all aspects of the lives of the city's black citizens. Only recently have the legal obstacles to black voting been removed. Housing remains almost totally segregated, and residual effects of past discrimination linger in public employment. Black voter registration percentages remain lower than proportionate white registration.

At-large voting for city commissioners has been the rule since 1910. Because blacks were disenfranchised at that time, the court perceives no "tenuous policy" underlying the use of at-large voting in the city.

In the past, local officials clearly neglected their responsibilities to the needs of black persons. Recreational facilities were completely segregated, and those in black neighborhoods were inferior. Blacks were not appointed to committees and boards of local importance, and the record of black employment by the city was, and still is, shameful. Finally, governmental services and facilities generally were disproportionately poor in black neighborhoods. While there are now some sincere efforts to achieve racial fairness in dispensing public benefits, the record bespeaks many still lingering failures remaining to be rectified. The present political scheme of things has not, and will not, guarantee the black minority any more than peripheral participation in the solution.

The majority primary law, the requirement that candidates run for specific seats, the requirement that city commissioners reside only in the city and not in any specific part of it, and racially polarized voting have all exacerbated the almost total foreclosure of blacks from truly effective exercise of the ballot. Accordingly, those portions of the city charter that require only that various commissioners be residents of the city—from no particular neighborhood, district or section—and by common consent and practice during the 26 years since the charter's adoption all elected commissioners have run at-large, operate impermissibly to dilute the voting power of black voters in violation of the Equal Protection Clause. These provisions deprive black voters as a class of the opportunity meaningfully to participate in the political processes and to elect legislators of their choice. Of course, as the chief executive officer of the city, necessarily the mayor must be elected by voters in an at-large election.—Dawkins, J.

—USDC WLa; Blacks United For Lasting Leadership, Inc. v. Shreveport, Louisiana, 7/16/76.

PRIMARIES—

Connecticut law that restricts voting in primary to voters enrolled with party holding primary does not deny voters registered independently of any party equal protection or freedom of association and does not infringe their right to vote.

The independent voters argue that the alternative avenues of political activity open to them under state law are ineffectual and unrealistic, since in most general elections only the Democratic and Republican nominees have reasonable chances of success. But any dominant position enjoyed by the major parties is not the result of any improper support or discrimination in their favor by the state; it is because over a period of time they have been successful in attracting the bulk of the electorate so that they now have substantial followings.

The independents also argue that the challenged law limits their constitutionally protected right not to associate. It is true that in order to vote in a party's primary, a voter must publicly affiliate with that party. But enrollment imposes absolutely no affirmative party obligations on the voter in terms of time or money, and it does not even obligate him to vote for the party's candidates, or to vote at all. State law does permit erasure of the voter's name from the party's enrollment list upon a proper showing that he does not support the party's principles or candidates; but in actual practice this provision is not used. Such limited public affiliation is simply not comparable to the coerced orthodoxy imposed by government officials in cases such as West Virginia State Bd. of Education v. Barnett, 319 U.S. 624 (1943).

The independent voters also argue that the public nature of enrollment violates their right to privacy or association by potentially subjecting them to harassment because of their affiliations with a party. It is insufficient, however, for them to merely raise the spectre of harassment; they must make a detailed factual showing of actual threats or incidents of harassment.

They further argue that the state may not force them to comply with the challenged law unless it establishes that the law serves a compelling state interest by the least drastic means available. A political party, however, is a voluntary association. Its ultimate goal is to win elections. It seeks to nominate those candidates who are most likely to win elections while remaining faithful to the policies and philosophies of the party's membership. Constitutionally protected associational rights of its members are vitally essential to the candidate selection process. Any attempt to interfere with a party's ability to organize itself in the way that will make it the most effective political organization is also an interference with the associational rights of its members. The rights of party members may to some extent offset the importance of allegedly conflicting rights asserted by persons challenging some aspect of the candidate selection process. More importantly, the state has a legitimate interest in protecting party members' associational rights by legislating to protect the party from intrusion by those with adverse political principles.

Additionally, a state has a legitimate interest in protecting the overall integrity of the electoral process. This includes preserving parties as viable and identifiable interest groups, insuring that the results of primary elections accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes that will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies. The Supreme Court has recognized the legitimacy of this state interest in a number of decisions.

It is clear from these cases that, in order to protect party members from intrusion by those with adverse political principles and to preserve the integrity of the electoral process a state may legitimately condition one's participation in a party's nominating process on some showing of loyalty to that party, and that is precisely what Connecticut does. The enrollment process is not particularly burdensome, and it is a minimal demonstration by the voter that he has some commitment to the party in whose primary he wishes to participate.

The independent voters argue that the law does not accomplish legitimate state goals because the waiting period for persons who are independent voters is less than three weeks, and that this is an insufficient period to deter fraudulent or deceptive conduct by those planning it. But this argument goes only to the length of

the waiting period, and not to the method used. The legislature has determined that enrollment 18 days before the primary is sufficient to demonstrate that a previously independent voter will not engage in disruptive or deceptive voting conduct inconsistent with the associational rights of other party members and the preservation of the integrity of the nominating process. The legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in other parties, as they are perhaps more likely to have a hostile motivation.

The claim that Connecticut could prevent raiding and other distortive or deceptive conduct by a less drastic means, namely, criminal sanctions against the perpetrators, is not persuasive. Assuming arguendo that the least drastic means test applies here, that standard does not require the state to chose ineffectual means to accomplish its goals. Although criminal sanctions might be effective to punish the ringleaders of any raid, it would be difficult to detect and punish individual voters who engaged in the proscribed conduct. Unless the deterrent aspect of the law were totally effective, such a law would apply only after the damage had been done and would be in the nature of punishment, not remedy. The state obviously cannot conduct a test on each voter to determine his political ideas before allowing him to vote in a primary, and the enrollment requirement is a constitutionally acceptable surrogate.

The independents also argue that the law deprives them of equal protection by denying them the right to participate in elections in which they are interested and by which they are affected to the same extent as those persons who may vote, solely because the independents do not enroll in political parties But the independent voters are not interested in primary elections in the crucial, distinguishing aspect that party members are interested. Specifically, they are not interested in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies. The constitutional validity of this distinction between enrolled party members and other voters, on which the challenged law is based, is at least implicit in the Supreme Court's flat statement in Ray v. Blair, 343 U.S. 214 (1952), that "a state might reasonably classify voters or candidates according to party affiliations." The challenged law, therefore, does not make an invidious discrimination that would offend the Constitution. Not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review. Similarly, a state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a compelling interest justification. The court, therefore, holds that the challenged law is reasonably related to the accomplishment of legitimate state goals.—Anderson, J.

—USDC Conn (three-judge court); Nader v. Schaffer, 7/14/76.

Evidence

TAX RETURNS—

Yacht owner's federal income tax returns are subject to discovery in Jones Act case as relevant to issue of whether, at time of injury, yacht was being used for business purposes even though owner's income is not directly in issue.

In this Jones Act case, the complaint alleges that the injured party was a crew member of a yacht that, at the time of injury, was being used for business purposes. The yacht owner denies that he was using the yacht in the pursuit of his business at the time of the injury. Thus, the critical question is whether at the time of the injury, the yacht was being used for a business purpose or for a pleasure voyage. The issue here is whether the yacht owner's federal income tax returns are subject to discovery even though his income is not an issue in the case. Those seeking the discovery compelling production of the documents contend that the returns will reveal the extent to which the vessel had been used in a business capacity and, therefore, are relevant and material to the question of whether the yacht was being used for a business purpose at the time of injury.

As a general rule, federal income tax returns are subject to discovery in civil suits where a litigant tenders an issue as to the amount of his income. This is consistent with the public policy against unnecessary disclosures of federal returns. Such returns are not absolutely privileged from discovery, but federal courts have been cautious in ordering the disclosure of tax returns, and in most instances, it has been held that production of a tax return should not be ordered unless there appears to be a compelling need for information that is not otherwise readily attainable.

In this case, the extent to which the vessel had been used for a business purpose, as may be revealed by the business deductions showing on the federal tax returns is relevant to the factual issue raised by the owner's denials. Indeed, it may be the only source of this information available to the injured party. As a litigant, the yacht owner ought not be permitted to raise an issue upon which his tax returns may pass significant light and then claim that his returns are not subject to disclosure. Thus, the income tax returns are subject to discovery in this case, even though the owner's income is not directly in issue. It is not enough that the owner examine the contents of the return and swear by affidavit as to what they contain.—Leighton, J.

—USDC Nlll; Shaver v. Yacht Outward Bound, 6/25/76.

Labor

EQUAL OPPORTUNITY—

Complaint challenging as racially discriminatory employer's disqualification for manual labor of workers who suffer from bone degeneration, which is condition commonly resulting from sickle cell anemia disease that affects blacks almost exclusively, sufficiently raises both "intent" and "effect" claims under Title VII of 1964 Civil Rights Act.

The employee successfully passed a preemployment physical examination and performed satisfactorily as a manual laborer during a probationary period. His continued employment was dependent upon the results of a second medical examination generally given around the 90th day of an employee's probationary period. Such examination determined that the employee suffered "bone degeneration in his spinal region and was physically disqualified for any manual labor job at the plant." The employee, and his personal physician, when informed of the bad back diagnosis informed the company doctor that the bad back diagnosis could be explained by his history of sickle cell anemia, a blood disorder affecting black Americans almost exclusively. The company thereafter terminated the employee.

The district court rejected the employee's assertions that he was "discharged because the [company] suspected that [he] has sickle cell anemia, a disease common to Black Americans," and that he was discharged for "reasons made unlawful by Title VII * * *."

This case must be remanded for further consideration of the possible liability of the employer based on employment practices that are fair in form but discriminatory in operation. As construed by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 39 LW 4317 (1971), Title VII requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the

cess to the entrenched and well-organized."

ROSALINE LEVENSON
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Louisiana Adopts Open Election System

Louisiana has abolished its closed primary method of nominating candidates for state and local elections and has replaced it with an "open election" system. Passed by the legislature, signed by Governor Edwin W. Edwards and approved by the United States Department of Justice, the new system will go into effect for the regular state elections in November.

Unlike any other election process, the open election combines elements of nonpartisanship and the open primary (particularly the "blanket" primary variation) found in other states. Instead of a Democratic primary and runoff (if needed) followed by a general election if there is Republican, independent or third-party opposition, all candidates regardless of party affiliation will be listed alphabetically. Democras, Republicans, third party and independents will all run on the same ballot against each other. Should no candidate receive a majority, there would be a runoff between the top two.

These features are quite similar to those of a nonpartisan election, but there is an additional provision of the open election which distinguishes it from other systems. The party affiliation of the candidates will be indicated on the ballot next to their names. There is no effort here to create a nonpartisan election climate; Republicans and Democrats will be labeled as such. If a third party were to gain legal status, its candidates would also be listed with a party designation. Independents will be identified by the phrase "No Party" unless they request no label. The voter may cast a ballot for any candidate regardless of the party affiliation of either. If no one receives a majority in the first election, the runoff could involve any combination of candidates and parties.

This legislation does not apply to congressional, presidential or party committee elections, which remain partisan in nature. There may be some confusion when local elections are held at the same time as congressional primaries. When that occurs, Democratic voters will participate in a closed primary for the congressional races and in the open election for local offices. (Republican congressional candidates are normally designated by the party without any primary.) Voters who are not Democrats may vote only in the local contests. There is a great potential for confusion in such situations.

While the open election bill passed both houses of the state legislature (both heavily Democratic; there are only four Republican members), the measure did produce considerable debate in the chambers and throughout the state. Proponents of the new process cited four main arguments in favor of the change. Most often mentioned was the fact that the state could save hundreds of thousands of dollars by reducing the number of elections from three to two. In addition to saving the state money, the reduction in the number of elections, and thus the length of the campaign, would cut campaign costs.

It was also pointed out that under the proposed system there would be no advantage for latent Republicans to retain their Democratic registration. A widely held assumption in Louisiana politics is that many voters who might want to register as Republicans become affiliated with the Democratic party instead because most elections are decided in the Democratic primaries. One argument was then that the open election would lead to the development of larger numbers of registered Republicans and thus a stronger two-party system.

Another argument focused on the advantages of the new system to the voter. The voter would be able to look at all candidates for a particular office at the same time and vote for first choice in the first election rather than having to wait possibly until the general election assuming the first choice were a Republican or independent. Moreover, the voter would have to participate in only two elections rather than three.

Least discussed but probably most important of the arguments for the change was that it would eliminate the unfair advantage the Republican party is now believed to have. Less than 3 percent of Louisiana voters are registered as Republicans, yet the Republican party can force the Democratic nominee into a third campaign (the general election) simply by designating a nominee. In theory, then, the party of 3 percent of the voters can require a candidate submitted to 97 percent of the voters to once again go before the people.

Opponents of the new election system argued that it would not contribute to the development of competitive party politics. They noted that while some voters might be encouraged to change their registration from Democrat to Republican because they could now participate in state and local elections without reference to party affiliation, the Republican party would no longer enjoy an automatic spot in the general election. Instead Republican candidates would be grouped together with Democrats and independents in the first election with no guarantee, and perhaps little chance, of getting into the second election. If a voter does change his registration from Democrat to Republican this will prohibit him from participating in the Democratic congressional primaries which are still "closed."

Furthermore, whatever sense of party responsibility might have developed in the state would be destroyed by eliminating any party role in the nominating process. Cohesive, identifiable parties would not emerge under this proposal.

Most important, critics perceived that the state political leadership had found a way to relieve Democrats of the necessity of running against a Republican in the general elections. Republican opponents in particular believed that this measure was, despite protestations to the contrary, aimed at weakening their already precarious foothold in Louisiana politics.

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Maine's Independent Governor Succeeds with Legislature

Despite fears of a stalemated state government in Maine which arose after the 1974 election of an Independent governor, a Republican Senate and a Democratic House of Representatives, substantial cooperation emerged during the regular session of the 107th legislature. The session, which adjourned in early July, was the longest in Maine's history.

Governor James B. Longley was successful in carrying out a "no new taxes" pledge made during his election campaign. The legislature defeated various efforts to increase the rates of the income and gasoline taxes, and finally accepted without major revisions the governor's $703-million, two-year budget. The financial plan generally establishes a moratorium on new programs and sets out a first-year reduction of approximately 5 percent in Maine's 13,000 state employees.

Governor Longley vetoed more measures (26) than any Maine chief executive in half a century. The governor based most vetoes on the factor of costs. The legislature upheld a veto of a controversial bill creating a Maine medical school, though it did vote to override rejection of a $4.9-million social services supplemental bill. Altogether the legislature enacted 14 measures over the governor's opposition, marking the first legislative

TABLE 8

PRIMARY ELECTIONS FOR STATE OFFICERS

State or other jurisdiction	Dates for 1976–77 primaries for officers with statewide jurisdiction*		Method of nominating candidates (a)	Party affiliation for primary voting		Voters receive ballot of	
	1976 primary	Runoff primary		Recorded on registration form	Declare for party ballot	One party	All parties participating
Alabama	May 1	June 1	C,P(b)	...	★(c)	★	...
Alaska	Aug. 24	...	P	...	...	...	★(d)
Arizona	Sept. 7	...	P	★	...	★	...
Arkansas	May 25	June 8	P	...	★(c)	★	...
California	June 8	...	P	★	...	★	...
Colorado	Sept. 14	...	X(e)	★	...	★	...
Connecticut	(f,h)	...	X(f)	★(g)	...	★(h)	...
Delaware	Sept. 11	...	X(f)	★	...	★	...
Florida	Sept. 7	Sept. 28	P	★	...	★	...
Georgia	Aug. 10	Aug. 31	C,P(b)	...	★(i)	★	...
Hawaii	Oct. 2	...	P	...	★(j)	★	...
Idaho	Aug. 3	...	P	...	...	...	★(k)
Illinois	March 16	...	C,P(l)	...	★(m)	★	...
Indiana	May 4	...	C,P(b)	...	★(i)	★	...
Iowa	June 8	...	X(n)	★(o)	...	★	...
Kansas	Aug. 3	...	C,P(b)	...	★(j)	★	...
Kentucky	May 25	...	P	★	...	★	...
	(1977) May 24	...					
Louisiana	...	...	P	★	...	...	★(d)
Maine	June 8	...	P	★	...	★	...
Maryland	May 18	...	P	★	...	★	...
Massachusetts	Sept. 14	...	P	★(p)	...	★	...
Michigan	Aug. 3	...	CP(q)	...	...	...	★(k)
Minnesota	Sept. 14	...	P	...	...	...	★(k)
Mississippi	June 1	June 22	P	...	★(c)	★	...
Missouri	Aug. 3	...	P	...	★(m)	★	...
Montana	June 1	...	P	...	...	...	★(k)
Nebraska	May 11	...	P	★	...	★	...
Nevada	Sept. 14	...	P	★	...	★	...
New Hampshire	Sept. 14	...	P	★	...	★	...
New Jersey	(1977) June 7	...	P	...	★(m)	★	...
New Mexico	June 1	...	P	★	...	★	...
New York	Sept. 14	...	CC,P	★	...	★	...
North Carolina	Aug. 17	Sept. 14	P	★	...	★	...
North Dakota	Sept. 7	...	P	...	...	...	★(k)
Ohio	June 8	...	P	...	★(i)	★	...
Oklahoma	Aug. 24	Sept. 21	P	★	...	★	...
Oregon	May 25	...	P	★	...	★	...
Pennsylvania	Apr. 27	...	P	★	...	★	...
Rhode Island	Sept. 14	...	P	...	★(m)	★	...
South Carolina	June 8	(r)	C,P(b)	...	★(s)	★(s)	...
South Dakota	June 1	...	X(n)	★	...	★	...
Tennessee	Aug. 5	...	P	...	★(m)	★	...
Texas	May 1	June 5	P	...	★(c)	★(s)	...
Utah	Sept. 14	...	X(c)	...	...	...	★(k)
Vermont	Sept. 14	...	P	...	...	...	★(k)
Virginia	(1977) June 7	...	C,P(b)	...	★(c)	★	...
Washington	Sept. 21	...	P	...	...	...	★(d)
West Virginia	May 11	...	P	★	...	★	...
Wisconsin	Sept. 14	...	P	...	...	...	★(k)
Wyoming	Sept. 14	...	P	★(t)	...	★	...
District of Columbia	May 4	...	P	★	...	★	...
Guam	Sept. 4	...	P	...	...	...	★(k)
Puerto Rico	(u)	(u)	C	...	★(s)	★	...

*Primaries for statewide offices in 1977 include (1977) before the date. For a listing of candidates to be voted upon, see "General Elections in 1976 and 1977."

(a) Abbreviations: C—Convention; P—Direct primary; CP—Some candidates in convention, some in direct primary; X—Combination of convention and direct primary; CC,P—State Central Committees or direct primary.

(b) The party officials may choose whether they wish to nominate candidates in convention or by primary elections. Usually major party candidates are elected by primary.

(c) Political party law prescribes individual party membership.

(d) Blanket primary—voting is permitted for candidates of more than one party.

(e) Preprimary endorsement assemblies are held in Colorado and preprimary conventions are held in Utah. If one candidate in Utah receives 70 percent of the delegate vote he is certified the candidate and is not required to run in the primary.

(f) A post-convention primary can be held if convention action is contested by a candidate receiving a specified minimum percentage of the convention vote: Connecticut, 20 percent; Delaware, 35 percent.

(g) A party enrollment list of party members is maintained separate from the registration books.

(h) Primaries of different parties are held on separate days.

(i) By written declaration. Ohio: party selection in primary is noted on registration [illegible] at each election.

(j) Party designation is made the first time a voter participates in a primary election by his selection of a "party ballot." This designation becomes permanent until changed at the City Clerk's office no later than 19 days before another primary. Kansas: 20 days.

(k) Voter is restricted to candidates of one party only. Ballots of all parties are received by voter and his party selection is private.

(l) Trustees of the University of Illinois are the only state officers nominated in convention.

(m) By oral declaration or request for ballot.

(n) If for any office no candidate receives 35 percent of votes cast at the primary, a convention is held to select a candidate.

(o) Party affiliation may be changed at the primary, but if challenged, a voter must take an oath that the change is made in good faith. The new party designation is entered on registration form.

(p) A voter who is a member of no party may declare to vote in a party's primary up to and including election day. By filling out a card after he votes, an elector may return to being a member of no party after the election.

(q) The Governor is the only state officer nominated by primary election.

(r) First runoff held two weeks after primary; second runoff held two weeks after that, if necessary.

(s) Polling areas for the different parties are physically separate.

(t) Party affiliation can be declared if uncommitted, or changed at the polls on primary election day.

(u) Primaries are not mandatory unless party regulations require them.

satisfied with the major parties may express their protest, and often
y have advocated governmental reforms which were later supported
one of the major parties and adopted. A number of states have un-
rtunately enacted legislation which makes it extremely difficult for
w parties to secure a place on the ballot at the general election. In-
ed, in the 1948 presidential election, the voters in two sta were not
rmitted to cast their ballots for the national Democratic candidates,
ho were unable under state law to secure a place on the ballots of
ose states.

Open, Closed or Blanket Type of Primary?

Recommendation No. 8. It is deemed unwise to offer any positive recommendation as between the "open," "closed" and "blanket ballot" types of primary. The merits and objections to each type are summarized below. The system which is best suited for a particular state will depend in large part on the party traditions and history within the state.

losed Primary

Under the closed primary, which is used by the large majority of ates, only voters who have registered their party affiliation ahead of me, or who declare it at the polls when they apply to vote in the primary lection, are permitted to vote. They are handed the ballot of the party ith which they have declared themselves and are limited in the primary lection to the candidates of that party.

In eighteen of the states which use the closed primary, voters are equired to register their party affiliation prior to the primary, while in he other states they are required to declare their party affiliation when hey apply for a ballot and may be challenged on the ground that they re not *bona fide* members of the party. A number of states require the oter to state that he has supported all candidates of the party in the ast, but the usual provision is that the voter must simply state that he s generally affiliated with the party. Some states attempt to bind the oter to vote for all candidates nominated by the party but this is unound as a public policy and is not legally enforceable.

Open Primary

In the open primary the voter is not required to register his party affiliation ahead of time or to disclose it when he applies for a primary ballot. He is handed the ballots of all political parties and, in the secrecy of the polling booth, selects the party ballot which he wishes to vote. In some states the several party ballots are stapled together and the voter selects one and marks it; in other states they are printed on a single ballot paper but the voter invalidates his ballot if he does not confine his

A Model Direct Primary Election System

Report of the
Committee on Direct Primary

Extract

Prepared by
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NATIONAL MUNICIPAL LEAGUE
New York City

marks to candidates in one party. The open primary is used in the following eight states: Wisconsin, Minnesota, Montana, Idaho, Washington, Utah, Michigan and North Dakota. The last five states listed adopted the open primary during the period of 1935-39, indicating a trend in this direction in that period, but it does not appear that any other state has adopted the open primary since 1939.

Blanket Primary

One state, Washington, uses the blanket ballot type of primary described below, which is more wide open than that of the other states.

Merits of the Closed Primary System

The closed primary is the type predominantly used in this country and is generally favored by persons who believe in a strong party system. Advocates maintain that only persons who are definitely identified as members of the party should be permitted to participate in the party primary. They regard the direct primary as a substitute for the party nominating convention—the means whereby the voters of the party, instead of delegates to a convention, select the candidates of the party. Independent voters, as well as those who are unwilling to declare themselves as members of the party, are free to choose between the candidates of the competing parties at the final election but, it is maintained, should not be permitted to participate in the selection of the party nominees.

Advocates of the closed primary oppose the open system because the latter permits voters who are not affiliated with a party to participate in the party primary and permits "raiding" by the opposite party. If there is no contest in the primary of one party, its voters are able under the open primary system to vote in the primary of the opposite party in which there are contests and, it is asserted, often vote deliberately for the weaker candidate to improve the chances of victory of the candidates of their own party. The voters of each party, it is maintained, should be free to choose the candidates of their party without any interference or help from outsiders who have no natural right to vote in the primary.

Another argument for the closed primary is that the party system is strengthened by the requirement that voters shall register or declare themselves as members of the party in order to vote in the primary election. The registration of party affiliation gives the party workers a list of the voters of the party and facilitates party work. It requires members of the party "to stand up and be counted" and tends to make for more definite party alignment.

Merits of the Open Primary System

In support of the open type of primary, it is stated that the requirement of voters to register as members of a party, or to declare publicly their party affiliation when they apply to vote at the primary election, impairs the secrecy of the ballot. Many voters regard this requirement as offensive and an invasion of their rights; others who do not regard themselves as partisans are reluctant to register as such, and consequently are deterred from voting at all in the primary election (which may be, in fact, more pivotal than the final election).

The open primary is usually favored by persons who are largely independent in their outlook and who are accustomed to vote for the man rather than for the party, particularly in state and local elections. They are generally critical of political parties as they operate in this country and regard them as not only ineffective and often meaningless in state and local government but also frequently harmful as well. While they dislike the forced party alignment which the closed primary requires, they recognize, nevertheless, that in most states the primary election is the decisive contest and are unwilling to be restricted in their right to participate in the primary. They prefer the open primary because it avoids the requirement of public declaration or registration of party affiliation and permits the voter at the primary election to choose, in the secrecy of the polling booth, the ballot of the party in which he wishes to vote. The independent voter and the voter who does not regard himself as a strong party man, they contend, is entitled to participate in the primary election and will vote as intelligently and as patriotically as the bitter partisan. They maintain that the amount of "raiding" in the primary is relatively small and that, while independents and persons who do not regard themselves as strong partisans usually vote in the primary of the dominant party when contests occur, they vote for the candidates whom they favor and expect to support in the final election.

Amount of Cross-Over Voting

The extent to which voters in open primary states cross over and vote in the primary of the opposite party is not known and, because of the secrecy of the ballot, would be difficult to ascertain. It should be noted that even in closed primary states, particularly those which rely on the challenge method of party test, voters are able to cross over and vote in the opposite party primary when there are no real contests in their own. Many voters in open primary states, who regard themselves as independent in their party affiliation, feel free to vote in the primary where the most important contests are taking place. In closed primary states it is common practice for independent voters to register and vote in the primary of the dominant party. It would be difficult to ascertain to what extent the participation of independent voters in the primary election prevails more widely in one type of system than the other, but it may be assumed that it is more common in open primary states. As a rule, however, the vote cast in the primary election, aside from the "solid south," is considerably lower than in the final election because of the tendency for only party regulars to come out and vote in the primary.

Another type of cross-over voting is where voters enter the opposite primary and vote for candidates whom they have no intention of supporting in the final election, hoping to nominate a weak candidate so as to improve the chances of the candidate of their own party. This practice is usually designated as "raiding" the opposite party. In a few closed primary states—Illinois, New Jersey and others, for example—there have been notorious cases of this kind where large numbers of voters crossed over as a result of a deal between political bosses.[18] Party leaders usually discourage raiding for fear that their regular voters may be encouraged to split the ticket in the final election. The available evidence seems to indicate that voters who cross over to the opposite primary on their own volition usually vote for the candidates whom they favor, and vote for the same candidates in the final election.[19]

One of the generally unrecognized effects of the direct primary, whether open or closed, is that both voters and candidates tend to identify themselves with the dominant party in state or local elections. In closed primary states they register as members of the party, though their attachment to it may be slight; in open primary states they are free to vote in the primary of either party regardless of their individual leanings or sympathies. Candidates also are impelled to identify themselves with the dominant party if they aspire to a public career. The result is to build up a one-party system in which the second party is rarely able to constitute a real challenge to the dominant party.

Many states, not merely in the "solid south," may be regarded as essentially one-party states. The one-party situation obtains even more widely in local elections. In a number of states, New York, for example, the two major parties are evenly matched in state elections but each party is predominant in certain areas. The absence of a true two-party system in many parts of the country is an important fact which needs to be taken into account in any consideration of the nominating system. It will be generally agreed that a one-party system is not desirable and that two vigorous competing political parties are essential to healthy party life.

Washington Blanket Ballot Primary: Pro and Con

A third type of primary is the "blanket ballot" system adopted by the state of Washington in 1935. A single blanket ballot is used at the primary election covering all parties. The names of all candidates, irrespective of party affiliation, are grouped together under the office which they seek. The name of each candidate is followed on the ballot by the name of the party whose nomination he seeks. Voters are permitted to vote for any candidate whom they favor, irrespective of party affiliation. A voter may thus vote in the Republican nomination contest for governor and in the Democratic contest for senatorial nomination on the same

18 See Clarence A. Berdahl, "Party Membership in the United States," 36 *Political Science Review* (1942), 16-51, 241-63.

19 James K. Pollock, *The Direct Primary in Michigan, 1909-1935*, Ann Arbor, 1943, 60.

ballot paper. The candidate of each party who receives the highest vote in the primary becomes the nominee of the party in the final election.

The major advantage claimed for the system is that it gives voters freedom to vote for the candidates of their choice. Voters in Washington have long been noted for their independence. Prior to 1932 the state was strongly Republican, electing less than a dozen Democratic members to the state legislature. Nevertheless, even at that time the voters elected a Democrat to the United States Senate. When the political upheaval of 1932 brought the Democratic party into power in the state and established a two-party system, the proposal for a blanket ballot primary, which was advanced by the State Grange, received widespread support from voters who saw no real reason why they should not be permitted to vote for the candidates whom they favored in either party in the primary election.

Advocates of the blanket ballot primary system do not regard the primary election as merely a party affair; they consider it in reality a public election and in most states the decisive election. The decisions of the United States Supreme Court in the "white primary" cases support this point of view. The plan makes it unnecessary for voters to register their party affiliation or to declare it publicly and it avoids disfranchising the independent voters in the primary election.

The principal criticism of the Washington blanket ballot primary is that it is too wide open, that voters should not be permitted in the primary election to vote for candidates in both parties but should be restricted to the candidates of the party with which they are affiliated. It is contended that the system disregards the fundamental purpose of the primary election, which is to nominate the candidates of each party and, as such, should be restricted to members of the party. Critics of the plan regard it as essentially a nonpartisan primary which in the long run will weaken party alignment and tend to destroy political parties. The system has been criticized by some party leaders and strong party men in the state who prefer the closed primary which prevailed before 1935 but, in the main, it is accepted by leaders of both parties and there has been little agitation to go back to the former system.

A careful analysis of the operation of the Washington primary law during its first twelve years indicates that in only four contests out of 34 for statewide offices was there any substantial number of voters who crossed over and voted in a contest in the opposite party, and in only one case does it appear that the results may have been changed by cross-over voters.[20] Voters of both major parties, though free to vote for can-

20 See Daniel M. Ogden, Jr., "The Blanket Primary and Party Regularity in Washington," 39 *Pacific Northwest Quarterly* (1948), 33-38, summarizing the findings of a master's thesis by the author at the University of Chicago. See also Claudius O. Johnson, "The Washington Blanket Primary," 33 *Pacific Northwest Quarterly* (1942), 27-39, and Daniel M. Ogden, Jr., "Parties Survive Cross-Voting," 39 *National Municipal Review* (1950), 237-241. The case in which the results of the primary may have been affected by "cross over" voters occurred in 1936, when many Republican voters cast their ballots at the primary for the incumbent Democratic governor, Mr. Martin. His opponent, Mr. Stevenson, was a left-wing candidate who had attracted a wide

didates of an opposing party, have voted with surprising regularity for candidates of their own party. The total vote polled by all candidates of a party for a particular office has seldom varied by more than 5 per cent of the median vote cast by the party for all offices. Voters have crossed over only when they felt strongly about the election and favored the candidate of the opposite party. It is generally believed that voters who cross over in the primary support the candidates of their choice in the final election also.

The Washington type of primary does not appear to have weakened political parties, which have continued to function there very much as they did under the previous system. Since the plan has been in effect only fifteen years, and in only one state, it is perhaps too early to assert what its long run effects on political parties will be. It may be noted, however, that although prior to 1932 the state was predominantly Republican, within recent years the two major parties have been fairly evenly matched, which may be attributed in part to the novel primary system. The plan is highly regarded by the Grange, which was responsible for its adoption, and appears to have the approval of voters generally.

A final argument for the blanket ballot primary is that it provides voters always with alternative choices in the primary, and hence the means to voice their disapproval of candidates who are proposed by the party organization. If the party organizations are authorized to propose candidates, as recommended in this report, the effect will be to strengthen the party organization and to give it much greater influence than it has had heretofore under the direct primary. The experience of Colorado over a period of nearly 40 years with a pre-primary party endorsement of candidates indicates that those who receive the party endorsement are usually unopposed, and hence the voters seldom have a choice in the primary. The effect of a single, blanket ballot in the primary would be to afford voters always an alternative choice and hence the party organizations would, of necessity, have to propose candidates who are acceptable to the rank and file of the party.

The Rules for Counting

Recommendation No. 9. The candidate of each party who polls the highest vote within the party shall receive the party nomination. In strongly one-party states it may be advisable to provide for a second or "run-off" primary election between the two highest candidates in case no candidate receives a majority at the first primary.

following as a radio announcer and was strenuously opposed by the more conservative elements in both parties. The Republican candidate, who was unopposed, was a former governor of the state, Mr. Hartley, an ultra conservative who had lost most of the following he once had. If the Democrats had nominated Mr. Stevenson the voters would have been confronted with a choice between an ultra radical and an ultra conservative, neither of whom was acceptable to the majority of voters. Mr. Martin was unquestionably the stronger candidate, and won the election by an overwhelming majority.

Most states at present follow the recommendation above for r
ination of the candidate with the highest or plurality vote in the
mary, though there are obvious objections to this rule. Frequently,
didates who receive less than a majority are nominated and the pri
elections are subject to manipulation by introducing candidates to
opposition. The alternative of providing a second or run-off primar
is the practice in most southern states, is usually regarded as too bur
some and expensive to be adopted. In the south, as is well known,
final election is more or less a formality and the real contest takes p
in the Democratic primaries. Because of this fact, most southern s
provide a run-off primary as a means of assuring that the nominee
have received a majority vote. No northern state uses this system.

The use of a system of preferential voting in the primary elec
would obviate the necessity for a second primary and also avoid th
fect of plurality nominations. However, the only workable schem
preferential voting is one in which the counting rules provide tha
no candidate receives a majority, the candidate with the lowest
shall be dropped and his ballots transferred to their second choices,
this process kept up until a candidate receives a majority or only
candidates remain. Preferential voting is used successfully in a nu
of Canadian provinces which have a very short ballot but has n
found favor in this country. With the typical ballot of the Amer
state, it would be more difficult to vote and to count; but if it were
successfully it would avert the hazards of plurality nominations in
infrequent three-sided (or multi-sided) contests.

Recommendation No. 10. If the Washington blanket ballot type of primary is used, it should be provided that any candidate who receives a majority of all votes cast in the primary shall be declared elected.

The advantages of this are: (1) it makes it possible for candi
to be elected to public office after a single campaign instead of ha
to incur the bother and expense of two. This will make public
more attractive to men and women of ability who may be willing t
through one campaign but are unwilling to run for office if it req
two campaigns; (2) it will increase interest and attention in the pri
election and result in a larger vote being cast.

The objections to the provision are: (1) the vote cast at the
mary election may be small and, hence, the rule might result in elec
by a small minority of the voters, though a majority of those votin
the primary; (2) since many offices would be filled at the primary
tion, the final election would no longer be a clear-cut contest bet
the two major parties; (3) in close contests the candidate who rec

Primaries ruled for parties only

Examiner News Services

WASHINGTON — The Supreme Court held today that independent voters have no constitutional right to participate in primary elections.

The justices acted without issuing an opinion. They affirmed a three-judge federal court decision that upheld Connecticut's law limiting primary participation to members of political parties.

The lower court ruled that Connecticut's law was an appropriate means for the Legislature to preserve "the integrity of the electoral process."

Connecticut has an interest, the court said, in assuring "that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies and goals of the party."

The state law was challenged by Nathra Nader and Albert Snyder, independent voters who sought to vote in Connecticut's 1976 primary. They claimed that by limiting participation to party members, the state denied them their right to vote at a critical stage of the electoral process.

The three-judge court noted that Connecticut provides petition procedures for placing independent candidates on the ballot and that party registration, enabling a person to vote in the primary, is easy.

"Connecticut's voting laws clearly provide avenues for supporting candidates of one's persuasion without affiliating with an established 'major' political party," the court said.

Limiting primary participation serves the rights of those who wish to join a party, the court said, and lets party candidates know who can vote to nominate them and presumably who is sympathetic with the political goals of the party.

"... In order to protect party members from 'intrusion by those with adverse political principles,' the lower court concluded, "and to preserve the integrity of the electoral process, a state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party."

The court also:

• Ruled that the exclusion of even one prospective juror for general scruples against capital punishment automatically voids any death penalty imposed in a

High court takes Redwood City porn sales case

United Press International

WASHINGTON — The Supreme Court today agreed in a California case to decide whether "pandering" can be a factor in an obscenity case when there was no evidence the defendant tried to exploit the pornography commercially.

The court accepted for later argument and decision the appeal of Roy Splawn, a Redwood City bookstore owner convicted of selling some pornographic films to a part-time policeman. The sale took place only after the policeman had asked for the material several times.

Splawn's conviction was affirmed a second time by the California Court of Appeal after the Supreme Court established new guidelines for state obscenity cases.

Splawn was sentenced to 91 days in the county jail, one day suspended, and fined $1,000, plus state assessment. He has been free on bond of $1,250.

Copy of U.S.D.C. Conn. opinion is attached

cially neutral; however, no black person has ever been elected to city office, notwithstanding black population levels in excess of 30 percent. While support of the city's black voters is actively sought by all candidates in city elections, blacks appear condemned to submergence in the local political sphere for the foreseeable future. Where black voters have provided the margin of victory, their effect has been only to tip the balance in favor of either of two white candidates. This is not the sort of meaningful access to political processes intended by the Fourteenth Amendment.

The city has a long history of official racial discrimination and unresponsiveness that have long affected all aspects of the lives of the city's black citizens. Only recently have the legal obstacles to black voting been removed. Housing remains almost totally segregated, and residual effects of past discrimination linger in public employment. Black voter registration percentages remain lower than proportionate white registration.

At-large voting for city commissioners has been the rule since 1910. Because blacks were disenfranchised at that time, the court perceives no "tenuous policy" underlying the use of at-large voting in the city.

In the past, local officials clearly neglected their responsibilities to the needs of black persons. Recreational facilities were completely segregated, and those in black neighborhoods were inferior. Blacks were not appointed to committees and boards of local importance, and the record of black employment by the city was, and still is, shameful. Finally, governmental services and facilities generally were disproportionately poor in black neighborhoods. While there are now some sincere efforts to achieve racial fairness in dispensing public benefits, the record bespeaks many still lingering failures remaining to be rectified. The present political scheme of things has not, and will not, guarantee the black minority any more than peripheral participation in the solution.

The majority primary law, the requirement that candidates run for specific seats, the requirement that city commissioners reside only in the city and not in any specific part of it, and racially polarized voting have all exacerbated the almost total foreclosure of blacks from truly effective exercise of the ballot. Accordingly, those portions of the city charter that require only that various commissioners be residents of the city—from no particular neighborhood, district or section—and by common consent and practice during the 26 years since the charter's adoption all elected commissioners have run at-large, operate impermissibly to dilute the voting power of black voters in violation of the Equal Protection Clause. These provisions deprive black voters as a class of the opportunity meaningfully to participate in the political processes and to elect legislators of their choice. Of course, as the chief executive officer of the city, necessarily the mayor must be elected by voters in an at-large election.—Dawkins, J.

—USDC WLa; Blacks United For Lasting Leadership, Inc. v. Shreveport, Louisiana, 7/16/76.

PRIMARIES—

Connecticut law that restricts voting in primary to voters enrolled with party holding primary does not deny voters registered independently of any party equal protection or freedom of association and does not infringe their right to vote.

The independent voters argue that the alternative avenues of political activity open to them under state law are ineffectual and unrealistic, since in most general elections only the Democratic and Republican nominees have reasonable chances of success. But any dominant position enjoyed by the major parties is not the result of any improper support or discrimination in their favor by the state; it is because over a period of time they have been successful in attracting the bulk of the electorate so that they now have substantial followings.

The independents also argue that the challenged law limits their constitutionally protected right not to associate. It is true that in order to vote in a party's primary, a voter must publicly affiliate with that party. But enrollment imposes absolutely no affirmative party obligations on the voter in terms of time or money, and it does not even obligate him to vote for the party's candidates, or to vote at all. State law does permit erasure of the voter's name from the party's enrollment list upon a proper showing that he does not support the party's principles or candidates; but in actual practice this provision is not used. Such limited public affiliation is simply not comparable to the coerced orthodoxy imposed by government officials in cases such as West Virginia State Bd. of Education v. Barnett, 319 U.S. 624 (1943).

The independent voters also argue that the public nature of enrollment violates their right to privacy or association by potentially subjecting them to harassment because of their affiliations with a party. It is insufficient, however, for them to merely raise the spectre of harassment; they must make a detailed factual showing of actual threats or incidents of harassment.

They further argue that the state may not force them to comply with the challenged law unless it establishes that the law serves a compelling state interest by the least drastic means available. A political party, however, is a voluntary association. Its ultimate goal is to win elections. It seeks to nominate those candidates who are most likely to win elections while remaining faithful to the policies and philosophies of the party's membership. Constitutionally protected associational rights of its members are vitally essential to the candidate selection process. Any attempt to interfere with a party's ability to organize itself in the way that will make it the most effective political organization is also an interference with the associational rights of its members. The rights of party members may to some extent offset, the importance of allegedly conflicting rights asserted by persons challenging some aspect of the candidate selection process. More importantly, the state has a legitimate interest in protecting party members' associational rights by legislating to protect the party from intrusion by those with adverse political principles.

Additionally, a state has a legitimate interest in protecting the overall integrity of the electoral process. This includes preserving parties as viable and identifiable interest groups, insuring that the results of primary elections accurately reflect the voting of party members. Parties should be able to avoid primary election outcomes that will confuse or mislead the general electorate to the extent it relies on party labels as representative of certain ideologies. The Supreme Court has recognized the legitimacy of this state interest in a number of decisions.

It is clear from these cases that, in order to protect party members from intrusion by those with adverse political principles and to preserve the integrity of the electoral process a state may legitimately condition one's participation in a party's nominating process on some showing of loyalty to that party, and that is precisely what Connecticut does. The enrollment process is not particularly burdensome, and it is a minimal demonstration by the voter that he has some commitment to the party in whose primary he wishes to participate.

The independent voters argue that the law does not accomplish legitimate state goals because the waiting period for persons who are independent voters is less than three weeks, and that this is an insufficient period to deter fraudulent or deceptive conduct by those planning it. But this argument goes only to the length of

the waiting period, and not to the method used. The legislature has determined that enrollment 18 days before the primary is sufficient to demonstrate that a previously independent voter will not engage in disruptive or deceptive voting conduct inconsistent with the associational rights of other party members and the preservation of the integrity of the nominating process. The legislature has, with some logic, imposed a longer waiting period on voters previously enrolled in other parties, as they are perhaps more likely to have a hostile motivation.

The claim that Connecticut could prevent raiding and other distortive or deceptive conduct by a less drastic means, namely, criminal sanctions against the perpetrators, is not persuasive. Assuming arguendo that the least drastic means test applies here, that standard does not require the state to chose ineffectual means to accomplish its goals. Although criminal sanctions might be effective to punish the ringleaders of any raid, it would be difficult to detect and punish individual voters who engaged in the proscribed conduct. Unless the deterrent aspect of the law were totally effective, such a law would apply only after the damage had been done and would be in the nature of punishment, not remedy. The state obviously cannot conduct a test on each voter to determine his political ideas before allowing him to vote in a primary, and the enrollment requirement is a constitutionally acceptable surrogate.

The independents also argue that the law deprives them of equal protection by denying them the right to participate in elections in which they are interested and by which they are affected to the same extent as those persons who may vote, solely because the independents do not enroll in political parties But the independent voters are not interested in primary elections in the crucial, distinguishing aspect that party members are interested. Specifically, they are not interested in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies. The constitutional validity of this distinction between enrolled party members and other voters, on which the challenged law is based, is at least implicit in the Supreme Court's flat statement in Ray v. Blair, 343 U.S. 214 (1952), that "a state might reasonably classify voters or candidates according to party affiliations." The challenged law, therefore, does not make an invidious discrimination that would offend the Constitution. Not every limitation or incidental burden on the exercise of voting rights is subject to a strict standard of review. Similarly, a state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a compelling interest justification. The court, therefore, holds that the challenged law is reasonably related to the accomplishment of legitimate state goals.—Anderson, J.

—USDC Conn (three-judge court); Nader v. Schaffer, 7/14/76.

Evidence

TAX RETURNS—

Yacht owner's federal income tax returns are subject to discovery in Jones Act case as relevant to issue of whether, at time of injury, yacht was being used for business purposes even though owner's income is not directly in issue.

In this Jones Act case, the complaint alleges that the injured party was a crew member of a yacht that, at the time of injury, was being used for business purposes. The yacht owner denies that he was using the yacht in the pursuit of his business at the time of the injury. Thus, the critical question is whether at the time of the injury, the yacht was being used for a business purpose or for a pleasure voyage. The issue here is whether the yacht owner's federal income tax returns are subject to discovery even though his income is not an issue in the case. Those seeking the discovery compelling production of the documents contend that the returns will reveal the extent to which the vessel had been used in a business capacity and, therefore, are relevant and material to the question of whether the yacht was being used for a business purpose at the time of injury.

As a general rule, federal income tax returns are subject to discovery in civil suits where a litigant tenders an issue as to the amount of his income. This is consistent with the public policy against unnecessary disclosures of federal returns. Such returns are not absolutely privileged from discovery, but federal courts have been cautious in ordering the disclosure of tax returns, and in most instances, it has been held that production of a tax return should not be ordered unless there appears to be a compelling need for information that is not otherwise readily attainable.

In this case, the extent to which the vessel had been used for a business purpose, as may be revealed by the business deductions showing on the federal tax returns is relevant to the factual issue raised by the owner's denials. Indeed, it may be the only source of this information available to the injured party. As a litigant, the yacht owner ought not be permitted to raise an issue upon which his tax returns may pass significant light and then claim that his returns are not subject to disclosure. Thus, the income tax returns are subject to discovery in this case, even though the owner's income is not directly in issue. It is not enough that the owner examine the contents of the return and swear by affidavit as to what they contain.—Leighton, J.

—USDC Nlll; Shaver v. Yacht Outward Bound, 6/25/76.

Labor

EQUAL OPPORTUNITY—

Complaint challenging as racially discriminatory employer's disqualification for manual labor of workers who suffer from bone degeneration, which is condition commonly resulting from sickle cell anemia disease that affects blacks almost exclusively, sufficiently raises both "intent" and "effect" claims under Title VII of 1964 Civil Rights Act.

The employee successfully passed a preemployment physical examination and performed satisfactorily as a manual laborer during a probationary period. His continued employment was dependent upon the results of a second medical examination generally given around the 90th day of an employee's probationary period. Such examination determined that the employee suffered "bone degeneration in his spinal region and was physically disqualified for any manual labor job at the plant." The employee, and his personal physician, when informed of the bad back diagnosis informed the company doctor that the bad back diagnosis could be explained by his history of sickle cell anemia, a blood disorder affecting black Americans almost exclusively. The company thereafter terminated the employee.

The district court rejected the employee's assertions that he was "discharged because the [company] suspected that [he] has sickle cell anemia, a disease common to Black Americans," and that he was discharged for "reasons made unlawful by Title VII * * *."

This case must be remanded for further consideration of the possible liability of the employer based on employment practices that are fair in form but discriminatory in operation. As construed by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 39 LW 4317 (1971), Title VII requires the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the

cess to the entrenched and well-organized."

ROSALINE LEVENSON
California State University, Chico

Louisiana Adopts Open Election System

Louisiana has abolished its closed primary method of nominating candidates for state and local elections and has replaced it with an "open election" system. Passed by the legislature, signed by Governor Edwin W. Edwards and approved by the United States Department of Justice, the new system will go into effect for the regular state elections in November.

Unlike any other election process, the open election combines elements of nonpartisanship and the open primary (particularly the "blanket" primary variation) found in other states. Instead of a Democratic primary and runoff (if needed) followed by a general election if there is Republican, independent or third-party opposition, all candidates regardless of party affiliation will be listed alphabetically. Democras, Republicans, third party and independents will all run on the same ballot against each other. Should no candidate receive a majority, there would be a runoff between the top two.

These features are quite similar to those of a nonpartisan election, but there is an additional provision of the open election which distinguishes it from other systems. The party affiliation of the candidates will be indicated on the ballot next to their names. There is no effort here to create a nonpartisan election climate; Republicans and Democrats will be labeled as such. If a third party were to gain legal status, its candidates would also be listed with a party designation. Independents will be identified by the phrase "No Party" unless they request no label. The voter may cast a ballot for any candidate regardless of the party affiliation of either. If no one receives a majority in the first election, the runoff could involve any combination of candidates and parties.

This legislation does not apply to congressional, presidential or party committee elections, which remain partisan in nature. There may be some confusion when local elections are held at the same time as congressional primaries. When that occurs, Democratic voters will participate in a closed primary for the congressional races and in the open election for local offices. (Republican congressional candidates are normally designated by the party without any primary.) Voters who are not Democrats may vote only in the local contests. There is a great potential for confusion in such situations.

While the open election bill passed both houses of the state legislature (both heavily Democratic; there are only four Republican members), the measure did produce considerable debate in the chambers and throughout the state. Proponents of the new process cited four main arguments in favor of the change. Most often mentioned was the fact that the state could save hundreds of thousands of dollars by reducing the number of elections from three to two. In addition to saving the state money, the reduction in the number of elections, and thus the length of the campaign, would cut campaign costs.

It was also pointed out that under the proposed system there would be no advantage for latent Republicans to retain their Democratic registration. A widely held assumption in Louisiana politics is that many voters who might want to register as Republicans become affiliated with the Democratic party instead because most elections are decided in the Democratic primaries. One argument was then that the open election would lead to the development of larger numbers of registered Republicans and thus a stronger two-party system.

Another argument focused on the advantages of the new system to the voter. The voter would be able to look at all candidates for a particular office at the same time and vote for first choice in the first election rather than having to wait possibly until the general election assuming the first choice were a Republican or independent. Moreover, the voter would have to participate in only two elections rather than three.

Least discussed but probably most important of the arguments for the change was that it would eliminate the unfair advantage the Republican party is now believed to have. Less than 3 percent of Louisiana voters are registered as Republicans, yet the Republican party can force the Democratic nominee into a third campaign (the general election) simply by designating a nominee. In theory, then, the party of 3 percent of the voters can require a candidate submitted to 97 percent of the voters to once again go before the people.

Opponents of the new election system argued that it would not contribute to the development of competitive party politics. They noted that while some voters might be encouraged to change their registration from Democrat to Republican because they could now participate in state and local elections without reference to party affiliation, the Republican party would no longer enjoy an automatic spot in the general election. Instead Republican candidates would be grouped together with Democrats and independents in the first election with no guarantee, and perhaps little chance, of getting into the second election. If a voter does change his registration from Democrat to Republican this will prohibit him from participating in the Democratic congressional primaries which are still "closed."

Furthermore, whatever sense of party responsibility might have developed in the state would be destroyed by eliminating any party role in the nominating process. Cohesive, identifiable parties would not emerge under this proposal.

Most important, critics perceived that the state political leadership had found a way to relieve Democrats of the necessity of running against a Republican in the general elections. Republican opponents in particular believed that this measure was, despite protestations to the contrary, aimed at weakening their already precarious foothold in Louisiana politics.

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Maine's Independent Governor Succeeds with Legislature

Despite fears of a stalemated state government in Maine which arose after the 1974 election of an Independent governor, a Republican Senate and a Democratic House of Representatives, substantial cooperation emerged during the regular session of the 107th legislature. The session, which adjourned in early July, was the longest in Maine's history.

Governor James B. Longley was successful in carrying out a "no new taxes" pledge made during his election campaign. The legislature defeated various efforts to increase the rates of the income and gasoline taxes, and finally accepted without major revisions the governor's $703-million, two-year budget. The financial plan generally establishes a moratorium on new programs and sets out a first-year reduction of approximately 5 percent in Maine's 13,000 state employees.

Governor Longley vetoed more measures (26) than any Maine chief executive in half a century. The governor based most vetoes on the factor of costs. The legislature upheld a veto of a controversial bill creating a Maine medical school, though it did vote to override rejection of a $4.9-million social services supplemental bill. Altogether the legislature enacted 14 measures over the governor's opposition, marking the first legislative

TABLE 8

PRIMARY ELECTIONS FOR STATE OFFICERS

State or other jurisdiction	Dates for 1976-77 primaries for officers with statewide jurisdiction*		Method of nominating candidates (a)	Party affiliation for primary voting		Voters receive ballot of	
	1976 primary	Runoff primary		Recorded on registration form	Declare for party ballot	One party	All parties participating
Alabama	May 1	June 1	C,P(b)	...	★(c)	★	...
Alaska	Aug. 24	...	P	...	...	...	★(d)
Arizona	Sept. 7	...	P	★	...	★	...
Arkansas	May 25	June 8	P	...	★(c)	★	...
California	June 8	...	P	★	...	★	...
Colorado	Sept. 14	...	X(e)	★	...	★	...
Connecticut	(f,h)	...	X(f)	★(g)	...	★(h)	...
Delaware	Sept. 11	...	X(f)	★	...	★	...
Florida	Sept. 7	Sept. 28	P	★	...	★	...
Georgia	Aug. 10	Aug. 31	C,P(b)	...	★(i)	★	...
Hawaii	Oct. 2	...	P	...	★(j)	★	...
Idaho	Aug. 3	...	P	...	...	...	★(k)
Illinois	March 16	...	C,P(l)	...	★(m)	★	...
Indiana	May 4	...	C,P(b)	...	★(i)	★	...
Iowa	June 8	...	X(n)	★(o)	...	★	...
Kansas	Aug. 3	...	C,P(b)	...	★(j)	★	...
Kentucky	May 25	...	P	★	...	★	...
	(1977) May 24	...					
Louisiana	...	...	P	★	...	...	★(d)
Maine	June 8	...	P	★	...	★	...
Maryland	May 18	...	P	★	...	★	...
Massachusetts	Sept. 14	...	P	★(p)	...	★	...
Michigan	Aug. 3	...	CP(q)	...	...	...	★(k)
Minnesota	Sept. 14	...	P	...	...	...	★(k)
Mississippi	June 1	June 22	P	...	★(c)	★	...
Missouri	Aug. 3	...	P	...	★(m)	★	...
Montana	June 1	...	P	...	...	...	★(k)
Nebraska	May 11	...	P	★	...	★	...
Nevada	Sept. 14	...	P	★	...	★	...
New Hampshire	Sept. 14	...	P	★	...	★	...
New Jersey	(1977) June 7	...	P	...	★(m)	★	...
New Mexico	June 1	...	P	★	...	★	...
New York	Sept. 14	...	CC,P	★	...	★	...
North Carolina	Aug. 17	Sept. 14	P	★	...	★	...
North Dakota	Sept. 7	...	P	...	...	...	★(k)
Ohio	June 8	...	P	...	★(l)	★	...
Oklahoma	Aug. 24	Sept. 21	P	★	...	★	...
Oregon	May 25	...	P	★	...	★	...
Pennsylvania	Apr. 27	...	P	★	...	★	...
Rhode Island	Sept. 14	...	P	...	★(m)	★	...
South Carolina	June 8	(r)	C,P(b)	...	★(s)	★(s)	...
South Dakota	June 1	...	X(u)	★	...	★	...
Tennessee	Aug. 5	...	P	...	★(m)	★	...
Texas	May 1	June 5	P	...	★(c)	★(s)	...
Utah	Sept. 14	...	X(e)	...	...	...	★(k)
Vermont	Sept. 14	...	P	...	...	...	★(k)
Virginia	(1977) June 7	...	C,P(b)	...	★(c)	★	...
Washington	Sept. 21	...	P	...	...	...	★(d)
West Virginia	May 11	...	P	★	...	★	...
Wisconsin	Sept. 14	...	P	...	...	...	★(k)
Wyoming	Sept. 14	...	P	★(t)	...	★	...
District of Columbia	May 6	...	P	★	...	★	...
Guam	Sept. 4	...	P	...	...	...	★(k)
Puerto Rico	(u)	(u)	C	...	★(s)	★	...

*Primaries for statewide offices in 1977 include (1977) before the date. For a listing of candidates to be voted upon, see "General Elections in 1976 and 1977."

(a) Abbreviations: C—Convention; P—Direct primary; CP—Some candidates in convention, some in direct primary; X—Combination of convention and direct primary; CC,P—State Central Committees or direct primary.

(b) The party officials may choose whether they wish to nominate candidates in convention or by primary elections. Usually major party candidates are elected by primary.

(c) Political party law prescribes individual party membership.

(d) Blanket primary—voting is permitted for candidates of more than one party.

(e) Preprimary endorsement assemblies are held in Colorado and preprimary conventions are held in Utah. If one candidate in Utah receives 70 percent of the delegate vote he is certified the candidate and is not required to run in the primary.

(f) A post-convention primary can be held if convention action is contested by a candidate receiving a specified minimum percentage of the convention vote: Connecticut, 20 percent; Delaware, 35 percent.

(g) A party enrollment list of party members is maintained separate from the registration books.

(h) Primaries of different parties are held on separate days.

(i) By written declaration. Ohio: party selection in primary is noted on registration slip at each election.

(j) Party designation is made the first time a voter participates in a primary election by his selection of a "party ballot." This designation becomes permanent until changed at the City Clerk's office no later than 19 days before another primary. Kansas: 20 days.

(k) Voter is restricted to candidates of one party only. Ballots of all parties are received by voter and his party selection is private.

(l) Trustees of the University of Illinois are the only state officers nominated in convention.

(m) By oral declaration or request for ballot.

(n) If for any office no candidate receives 35 percent of votes cast at the primary, a convention is held to select a candidate.

(o) Party affiliation may be changed at the primary, but if challenged, a voter must take an oath that the change is made in good faith. The new party designation is entered on registration form.

(p) A voter who is a member of no party may declare to vote in a party's primary up to and including election day. By filling out a card after he votes, an elector may return to being a member of no party after the election.

(q) The Governor is the only state officer nominated by primary election.

(r) First runoff held two weeks after primary; second runoff held two weeks after that, if necessary.

(s) Polling areas for the different parties are physically separate.

(t) Party affiliation can be declared if uncommitted, or changed at the polls on primary election day.

(u) Primaries are not mandatory unless party regulations require them.