

**ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672**  
**6952 HOUSE JUDICIARY**

### L. VALIDITY OF 6 AAC 25.160.

Alaska Administrative Code Title 6, Section 25.160, was adopted pursuant to authority delegated to the director of elections by AS 15.15.010. That statute provides that the director "may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections." DeNardo does not claim that the director failed in any way to comply with the provisions of Alaska's Administrative Procedure Act (APA) in promulgating 6 AAC 25.160. Nor does DeNardo challenge the substance of the regulation or the legislature's power to enact such a rule.<sup>1</sup>

Instead, DeNardo claims that the division had no power "to make election laws." DeNardo argues that 6 AAC 25.160 was a void attempt by the division to amend former AS 15.25.160, which this court held unconstitutional in *Vogler v. Miller*, 651 P.2d 1, 5-6 (Alaska 1982) (*Vogler I*). AS 15.25.160 provided that a gubernatorial candidate who did not represent a political party<sup>2</sup> had to be nominated by petition signed by qualified voters equal in number to at least three percent of the number of votes cast in the preceding general election. Ch. 88, § 5.53, SLA 1960; ch. 100, § 188, SLA 1980; see also *Vogler I*, 651 P.2d at 2.

In *Vogler I*, we recognized as legitimate the state's justifications for the statute, including the desire to eliminate voter confusion that would result from having a multitude of candidates on the ballot. 651 P.2d at 4. We nevertheless found that none of these explanations justified the increase from the equivalent of a one percent<sup>3</sup> to a three percent signature requirement. Since the state failed to show that a one percent requirement would be any less effective in achieving the purported goals of the statute, we found that the state had not shown the compelling interest required

1. Indeed, the legislature has since enacted a statutory one percent signature requirement. AS 15.25.160.

2. "Political party" is defined as an organized group of voters that had polled a certain percentage of votes in the preceding gubernatorial election. Prior to 1983, the statutory percentage was 10%. This was found to be an unconstitutional

restriction on access to the ballot. *Vogler v. Miller*, 660 P.2d 1192, 1195-96 (Alaska 1983) (*Vogler II*). In 1984, the percentage was lowered to 3%. Ch. 85, § 34, SLA 1984.

to save the three percent provision. *Id.* at 5-6.

The statute was not amended to comport with the one percent rule implicitly approved in *Vogler I* until June 6, 1986, five days after the filing deadline for nonparty candidates' nomination petitions for the 1986 gubernatorial election. Chapter 85, § 46, SLA 1986; AS 15.25.160. When it became clear that the legislature would not act in time, the division of elections promulgated 6 AAC 25.160 to govern the 1986 election.

[1] DeNardo relies on *State v. Marshall*, 688 P.2d 227, 233-34 n. 19 (Alaska 1981,) in support of his argument that the division's adoption of 6 AAC 25.160 was in effect an attempt to amend an unconstitutional statute. This reliance is misplaced. It is clear, as DeNardo argues, that agency rules cannot amend a statute. See *id.* But, contrary to DeNardo's apparent position, the fact that the legislature has at some point enacted legislation dealing with a particular topic does not forever foreclose the legislature from delegating authority to an agency to make rules affecting the same topic.

This court has soundly rejected such an argument. In *Kelly v. Zamarella*, 486 P.2d 906 (Alaska 1971), we stated:

When administrative rule-making is based upon clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect. We have held that, under proper standards, such delegations of legislative power to administrative agencies are constitutional. *Boski v. Sobrs Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960).

*Id.* 489 P.2d at 909.

In *Boski*, the following language appears:

ditional restriction on access to the ballot. *Vogler v. Miller*, 660 P.2d 1192, 1195-96 (Alaska 1983) (*Vogler II*). In 1984, the percentage was lowered to 3%. Ch. 85, § 34, SLA 1984.

3. The statute had previously required 1000 signatures, slightly less than 1% of the votes cast in 1978. *Vogler I*, 651 P.2d at 5 n. 10.

[P]rovision is made [in the Alaska Constitution] for creation by the legislature of regulatory agencies that are not under the supervision of the executive. Alaska Constitution, Art. 11, §§ 22, 24, 26. Such agencies would obviously have the function of exercising authority and control in places where the legislature has decided not to exercise all the authority and control itself. This would be a delegation of legislative power and the constitution provides for it.

*Id.* 349 P.2d at 588 (footnote integrated into text).

The three percent provision of former AS 15.25.160 became null and void upon this court's decision in *Vogler I*, 651 P.2d at 5-6. The division's subsequent regulatory enactments could not "amend" a void statute. Rather, the division stepped in to address a question regarding which the legislature implicitly decided not to exercise all of its authority and control.

Thus DeNardo's argument that the division generally has no power to make election laws is without merit. The legislature is constitutionally empowered to delegate legislative authority to regulatory agencies under certain circumstances.

[2] The question remains whether the specific regulation actually adopted by the division is valid. Resolution of this question involves a two-part inquiry: first, is the regulation consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency,<sup>4</sup> and second, is the regulation reasonable and not arbitrary. *Kelly*, 486 P.2d at 911.

The relevant delegating statute provides: The director [of elections] shall provide general administrative supervision over the conduct of state elections, and may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections.

AS 15.15.010. The delegation of authority is further limited by the APA:

<sup>4</sup> This aspect of review insures that the agency has not exceeded the power delegated by the

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. Thus, 6 AAC 25.160 was valid if it was consistent with relevant statutes and reasonably necessary for the administration of state elections. After *Vogler I*, there was no effective statute governing the number of signatures required for a nominating petition. Moreover, the legislature had previously expressed its desire to place some limitation on access to the gubernatorial ballot by enacting former AS 15.25.160. We recognized this as a legitimate concern in noting "[t]hat 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate." *Vogler I*, 651 P.2d at 5, quoting *Lubin v. Panish*, 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702, 708 (1974). In addition, the legislature has confirmed its continued approval of the policy of limiting access to the ballot by enacting the new AS 15.25.160, which is virtually identical to 6 AAC 25.160. Thus, 6 AAC 25.160 did not conflict with any statute in effect and was consistent with the expressed legislative intent.

Moreover, by implicitly approving a one percent voter signature requirement in *Vogler I*, we have already found the rule to be neither unreasonable nor arbitrary. *Vogler I*, 651 P.2d at 5-6.

6 AAC 25.160 was validly enacted. DeNardo failed to comply therewith and the division properly rejected his nominating petition.

## II. ISSUES RELATING TO ACCESS OF WRITE-IN CANDIDATES TO VOTERS.

The superior court concluded that issues relating to the propriety of the division's legislature. *Kelly*, 486 P.2d at 911.

alleged refusal to include write-in candidates in voter information pamphlets were not ripe for decision. These issues were dismissed without prejudice. At the time of the hearing on DeNardo's "writ of mandamus," the pamphlet deadlines were still months away.

Apparently, the only pertinent information before the superior court was DeNardo's affidavit which stated: "Unofficially through the Division of Elections, Mr. DeNardo was informed that a write-in candidate would not have access to the election pamphlet." In its oral decision, the superior court deferred the issue of write-in candidate access to the voter information pamphlet, and invited each side to brief the question.

[3] DeNardo chose to appeal instead, arguing that the dismissal without prejudice was error because the access issue was "inextricably intertwined" with the nomination petition question. It cannot be determined from the record, however, whether DeNardo in fact attempted to wage a write-in campaign. It is thus impossible to discern the factual posture of this claim. The superior court wisely recognized this claim as unripe for judicial determination and declined to address it. We do likewise.

### III. CONCLUSION.

The division of elections acted within the scope of the authority delegated to it by the legislature when it enacted 6 AAC 25-160. DeNardo failed to comply with its provisions and the division properly rejected his petition. The superior court correctly found that DeNardo's claims relating to his write-in candidacy were not ripe for review.<sup>5</sup>

The superior court's decision is **AFFIRMED**.



5. The division also argues that DeNardo's claim is moot. In view of our disposition regarding

Carlos RODRIQUEZ, Appellant,

v.

STATE of Alaska, Appellee.

No. A-323.

Court of Appeals of Alaska.

Aug. 7, 1987.

Defendant was convicted in the Superior Court, Third Judicial District, Ralph E. Moody, J., of lewd and lascivious acts toward children and contributing to delinquency of a minor. Defendant appealed. The Court of Appeals, Coats, J., held that: (1) testimony of expert on sexually exploited children was admissible; (2) testimony of police officers called by defendant was not admissible; (3) sentence for attempted rape was excessive; and (4) defense counsel was not ineffective.

Affirmed in part, and reversed and remanded in part.

#### 1. Criminal Law §-469

Testimony by expert witness which provides useful background information to aid jury in evaluating testimony of another witness is admissible.

#### 2. Criminal Law §-469

Testimony of social worker, to the effect that testimony of alleged sexual abuse victims was consistent with patterns exhibited by sexually exploited children he had observed while working with children who had been exploited through child pornography or prostitution and child sex rings, was admissible as background information.

#### 3. Infants §-29

Testimony of police officers, who had been in defendant's home approximately five years before trial and who did not make thorough search of defendant's residence, to the effect that they had not seen drugs, pornography, or film-making equip-

the validity of the regulation, we do not address the mootness issue.

# MEMORANDUM

State of Alaska

Department of Law

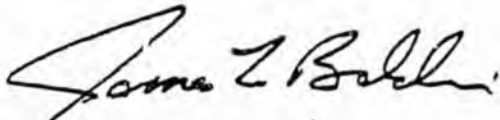
Elizabeth A. Ziegler  
Deputy Director  
Division of Elections  
Office of the Governor

DATE December 3, 1991

FILE NO 663-92-0209

TEL. NO 465-3600

SUBJECT Implementation of  
closed primary  
procedures



James L. Baldwin  
Assistant Attorney General  
Governmental Affairs-Juneau

FROM

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

nas sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S. 767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashjian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denardo v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

Elizabeth A. Ziegler  
Our File #: 663-92-0209

December 3, 1991  
Page 5

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

P.O. Box Y, Juneau, Alaska 99811  
(907) 465-3867 or 465-2450  
FAX (907) 465-2029

Deliveries to: 240 Main Street  
Court Plaza, Room 500  
Mail Stop 3101

### MEMORANDUM

April 3, 1991

**SUBJECT:** Party rules and primary election laws

**TO:** Senator Pat Pourchot  
Attn: Jeanne Larson

**FROM:** John B. Gaguine *JBG*  
Legislative Counsel

You have asked about the relationship between party rules and the state's primary election laws. The question is easily answered: if there is a clash between party rules and election laws (e.g., the party rules call for a closed primary, and the election laws provide for an open one), the party rules prevail.

This answer derives from a recent decision of the United States Supreme Court, Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 55 U.S.L.W. 4057 (1986). In that case Connecticut law restricted voting in a party's primary to registered members of the party, and the Republican party wanted to open its primary to independents as well as registered Republicans. The Court ruled in favor of the Republicans, holding that the party's First Amendment's guarantee of freedom of association overrode the state law.

Ideally, state law should be amended to conform with party rules. (In Tashjian the Republicans in the legislature passed a bill to open primaries to independents, only to have the bill vetoed by the Democratic governor.) However, if that is not done the party rules nevertheless control. A court, I believe, would clearly have the power to order the Division of Elections to follow procedures consistent with party rules and inconsistent with the statutes. I also believe that even absent a lawsuit the lieutenant governor would be empowered to issue regulations reflecting the party rules, since the law is clear on this point.

However, I should note a significant difference between Alaska and Connecticut. Connecticut law required a closed primary, and the only effect of Tashjian would seem to be to require election officials to give Republican ballots to those independents who request them, as well as Republicans. In Alaska, however, implementation of the Republican party rules would require a total overhaul of the primary process.

Senator Pat Pourchot

April 3, 1991

Page 2

There would seemingly have to be two separate ballots prepared - one with Republican candidates, and one with candidates of other parties. (If other parties changed their rules to parallel the Republican rules, there would seemingly have to be even more ballots prepared.) Thus, a court might allow the lieutenant governor to phase in a new system gradually. However, if the lieutenant governor decided to implement party rules without a statutory change, I do not think that a court would enjoin this, even given the magnitude of the procedural change that would be necessary. <sup>1/</sup>

If I may be of further assistance, please advise.

JBG:pl  
91-225.plm

---

<sup>1/</sup> My research has disclosed no post-Tashjian cases on this point, so my conclusions must be tentative.

# MEMORANDUM

State of Alaska  
Department of Law

TO: Hon. John B. "Jack" Coghill  
Lieutenant Governor

DATE: February 28, 1992

FILE NO: 663-92-0407

TEL. NO: 465-3600

SUBJECT: Whether the Tashjian case  
requires implementation of  
the Republican Party rules

44.1 C L.L.  
FROM: Charles E. Cole  
Attorney General

You have asked whether the state must modify its primary election to implement rules adopted by the Alaska Republican Party. These rules conflict with state election law by limiting the voters who can participate in the selection of Republican nominees at the primary election. We believe that, in light of recent decisions of the United States Supreme Court, the First and Fourteenth Amendments to the United States Constitution require implementation of these rules.

## I. State law and Republican Party rules

Alaska has a "blanket" primary, in which all voters select the nominees of all parties. <sup>1/</sup> Under AS 15.25.010 -- 15.25.130, all candidates of all political parties run on one ballot, and any registered voters, regardless of party affiliation, can vote for any candidate. The only restriction is that voters may cast only one vote for each office on the ballot. The party candidate receiving the most votes is placed on the general election ballot as the party's nominee for that office.

In 1990, the Republican Party of Alaska adopted a rule providing that

[o]nly registered Republicans, registered Independents [sic], and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S.

---

<sup>1/</sup> In a blanket primary, all voters receive the same ballot, and may vote for one candidate for each office, regardless of party. In an open primary, a voter may vote for candidates of only one party, but may choose which party regardless of affiliation. In a closed party, only voters affiliated with one party may participate in that party's primary. See Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 116, 117 n.2 (1984).

Hon. John B. "Jack" Coghill  
Lieutenant Governor  
Our file #663-92-0407

February 28, 1992

Page 2

Representative, and members of the State  
Legislature. 2/

After the 1990 general election, the party adopted several related rules, and submitted all of its rules to the United States Department of Justice for preclearance, as required by the federal Voting Rights Act, 42 U.S.C. § 1973c. The Department of Justice approved them, and the party submitted the rules to you in May 1991.

These rules are obviously incompatible with the state blanket primary law. That incompatibility has given rise to your opinion request.

## II. Tashjian and Democratic Party v. Wisconsin

In Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), the Supreme Court recognized that the associational rights of political parties, as protected by the first amendment, can take priority over state election laws. In Tashjian, the Republican Party of Connecticut had adopted a party rule allowing nonaffiliated voters to vote in the party's primary. This rule conflicted with Connecticut statutes, which provided for a closed primary. Thus, those statutes limited the "group of voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates." 479 U.S. at 215-16 (citation omitted). The Court did not find the limitation justified by any compelling state interests. Accordingly, the Court held that the limitation constituted an unconstitutional burden on the Party's associational rights protected by the First and Fourteenth Amendments to the U.S. Constitution.

The Court rejected Connecticut's proffered justification that implementation of the rule would possibly result in greater administrative costs for purchase of voting machines, training of officials, and potentially for printing of additional ballot materials. Id. at 218. It further found that "[t]he State's legitimate interests in preventing voter confusion and providing

---

2/ Because of the shortness of time between the party's adoption of the rule and the 1990 primary election, the state declined to implement the rule for that election. The state successfully defended a federal court lawsuit initiated by the party. Doyle v. State, No. A90-248 Civil. The district court denied the party's motion for a preliminary injunction, requiring the state to give effect to the party's rules. The case was subsequently dismissed by the party.

for educated and responsible voter decisions in no respect 'make it necessary to burden the [Party's] rights.'" Id. at 221-22.

The Party rules in question here are different from those in Tashjian, in that the Alaska Republican Party seeks to narrow the field of voters who may participate in choosing Republican nominees. However, Democratic Party v. Wisconsin, 450 U.S. 107 (1981) (one of the major underpinnings of Tashjian), did address a situation involving a party rule that was more restrictive than the state statute. Wisconsin concerned that state's presidential primary election. While Wisconsin law let the parties choose the method of selecting delegates to the national conventions of the national parties, it required that those delegates vote according to the outcome of the state's open presidential primary. This law conflicted with the National Democratic Party's rule that, "restricted participation in the delegate selection process in primaries or caucuses to 'Democratic voters only who publicly declare their party preference and have that preference publicly recorded.'" 450 U.S. at 118. Because of this conflict, the national party announced its intent not to seat the Wisconsin delegates. The state therefore brought suit in state court, seeking a declaratory judgment that the state law was constitutional and that the national party had to seat those delegates. See Democratic Party v. Wisconsin, 287 N.W.2d 512 (Wis. 1980) (upholding the state law).

The United States Supreme Court invalidated the provision of the state law that infringed on the party's nominating procedure. It held that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State," and that freedom of political association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 121-22 (citations omitted).

### III. Discussion

We believe, in light of Tashjian and Wisconsin, a court would hold that the Republican Party's rule limiting participation in the selection of the party's candidates must be implemented, notwithstanding its conflict with Alaska's blanket primary statutes. <sup>3/</sup> Indeed, Alaska's law impacts the Alaska

---

<sup>3/</sup> We have found no authority on point on this question. This lack of authority is not surprising, since only Alaska and Washington have blanket primaries. See generally Noe, North  
(continued...)

Republican Party's associational interests to a far greater degree than did the Connecticut statutes at issue in Tashjian. 4/  
Moreover, when Tashjian is read in conjunction with Wisconsin, where an open primary was at issue, the necessity to implement the Republican rule becomes even clearer. 5/

Moreover, in Tashjian the majority expressed concern that wide-open party rules might infringe on the rights of other parties: "Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes [upheld in other cases] were designed to prevent." 479 U.S. at 224 n.13. Alaska's blanket primary laws do precisely what the Court said that a party might not be able to do constitutionally.

As part of the debate surrounding this issue, it has been suggested that the modification of the blanket primary may infringe on a voter's constitutional right to vote. Voters not affiliated with a party, however, do not have constitutional rights to participate in that party's primary election if either state law or party rules provide for a closed primary. Nader v. Schaffer, 417

---

3/ (...continued)

Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters to Vote in Party Primaries, 66 N.C. L. Rev. 1208 (1988) ("there is a strong argument that both the open and blanket primary are unconstitutional").

4/ The dissent in Tashjian did not agree that Connecticut's law was unconstitutional. However, it observed that "[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom." 479 U.S. at 235-36 (Scalia, J., dissenting). This indicates to us that even the dissenters would not uphold Alaska's blanket primary law against a Republican Party challenge.

5/ We believe that both blanket primaries and open primaries impact a party's freedom of association claim. In both, members of one party may take part in the selection of another party's candidates.

Hon. John B. "Jack" Coghill  
Lieutenant Governor  
Our file #663-92-0407

February 28, 1992

Page 5

F. Supp. 837 (D. Conn), aff'd mem., 429 U.S. 989 (1976); Ferency v. Secretary of State, 476 N.W.2d 417 (Mich. App. 1991). 6/

It has also been suggested that Tashjian would not apply in Alaska because our law, unlike Connecticut's, does not require registration by party. We do not believe that a court would find this argument convincing. First, nothing in Tashjian suggests that Connecticut's statutory registration requirement was essential to the Court's decision. Second, although Alaska law does not require, or even specifically authorize, voter registration by party, there has been a long-standing practice of allowing such registration; indeed, since at least 1968, the registration forms have provided a place to indicate party registration. Third, Alaska law does implicitly authorize party registration: AS 15.25.030(a)(16), enacted in 1980, requires that a "member of a political party" seeking to become a candidate of that party in the primary attest "that the candidate is registered to vote as a member of the political party whose nomination is being sought."

Nor is Tashjian inapplicable because Alaska law, unlike Connecticut's, does not regulate political parties. Although Alaska law does not regulate the parties, it recognizes them as viable entities and confers rights on them. See, e.g., AS 15.25.056 (authorizing party central committee or party district committee to replace unopposed incumbent candidate for renomination if candidate dies or is disqualified or incapacitated); AS 15.25.110 (authorizing same committees to certify party nominee on general election ballot as incapacitated); AS 15.25.130 (authorizing party, through same committees or as otherwise provided in party bylaws, to replace party nominees on general election ballot who have died, withdrawn, resigned, or become disqualified or incapacitated).

We wish to comment on one other aspect of the Republican Party rules. In our opinion the state does not have to enforce Article XIV, section 3, of those rules, "A Rule to Maximize Voter

---

6/ Both Nader and Ferency involved primaries that were closed by state law, rather than by party rule. Tashjian makes it clear that this difference is without constitutional significance. The Court specifically states that "the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 479 U.S. at 215 n.6. Significantly, the Court was distinguishing Nader and Rosario v. Rockefeller, 410 U.S. 752 (1973), where the restrictions on nonmembers were the product of state law, rather than party choices.

Hon. John B. "Jack" Coghill  
Lieutenant Governor  
Our file #663-92-0407

February 28, 1992

Page 6

Participation in Primary Elections" (allowing Republicans and independents to participate in the Republican primary even if they have also voted in the blanket primary and/or some other party's primary).

The party apparently believes that it can validly extend its association to voters who meet the requirements of the 1990 rule regardless of whether those voters also participated in the selection of other party candidates. However, several U.S. Supreme Court decisions hold that the Party's federal constitutional interest in associating with those voters is outweighed by the compelling interest of the state in "confining each voter to a single nominating act." Storer v. Brown, 415 U.S. 724, 743 (1974); see also American Party of Texas v. White, 415 U.S. 767, 785 (1974), ("Electors may vote in only one party primary"). Given the well-established nature of the "one nominating act only" principle, and the absence, to our knowledge, of any jurisdiction allowing a voter to participate in multiple primaries, we feel quite confident that the Alaska Supreme Court would reach the same conclusion as a matter of Alaska constitutional law.

If we may be of further assistance, please let us know.

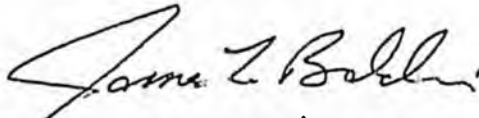
# MEMORANDUM

State of Alaska

Department of Law

TO: Elizabeth A. Ziegler  
Deputy Director  
Division of Elections  
Office of the Governor

DATE: December 3, 1991  
FILE NO.: 663-92-0209  
TEL. NO.: 465-3600  
SUBJECT: Implementation of  
closed primary  
procedures



FROM: James L. Baldwin  
Assistant Attorney General  
Governmental Affairs-Juneau

DEC 3 1991

DIV OF ELECTIONS

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

has sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208. (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S. 767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashjian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denarao v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

Elizabeth A. Ziegler  
Our File #: 663-92-0209

December 3, 1991  
Page 5

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

# Alaska State Legislature

*Closed primary*

Legislative Research Agency



P.O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 183-3991  
Fax: (907) 183-3351

January 15, 1991

## MEMORANDUM

TO: Representative Mike Navarre  
FROM: Gordon S. Harrison, Director *gsh*  
RE: Alaska's Blanket Primary and the *Tashjian* Decision  
Research Request 91.080

You asked for a description of the various methods used throughout the country to conduct primary elections for state offices. You also asked for a review of the effect on state primaries of recent U.S. Supreme Court decisions that have given state parties substantial prerogatives to determine the rules for nominating their own candidates, notably the *Tashjian* decision [*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986)]. Finally, you asked if there is a need to modify Alaska's primary election laws in the wake of the challenge last summer to those laws by the Republican Party of Alaska armed with the *Tashjian* decision (*Doyle v. State of Alaska*).

This memorandum will discuss these matters under the following five subject headings: 1) classification of state primaries, 2) legislative history of Alaska's blanket primary, 3) freedom of association and the *Tashjian* decision, 4) Alaska's primary and *Doyle v. State of Alaska*, and 5) revision of Alaska's primary election laws. The recommendation of the memorandum is that--presuming the legislature wants to retain the blanket primary--revision of Alaska's current statute should wait until after the courts have ruled on the constitutionality of the blanket primary. To modify Alaska's primary election laws prior to court action would prematurely, and perhaps unnecessarily, concede that the blanket primary has constitutional defects.

### Classification of State Primaries

The direct primary is used to nominate party candidates for state office in virtually all of the states today.<sup>1</sup> It replaces nomination by party convention and caucus, methods prevalent throughout the country in the last century. Nomination of candidates by popular vote in a party primary was a key political reform of the progressive movement early in this century. It opened the

---

<sup>1</sup>In a few states conventions are still used to nominate candidates for certain offices, or under special circumstances. See Council of State Governments, *Book of the States 1990-91*, Table 5.2. pp. 234-35.

nominating process to the voters and thereby undercut the influence of party bosses in determining who would stand for election.

Generally speaking, direct primaries are described as being either "closed", "open", or "blanket", although there is significant variation within these categories.

#### Closed Primary

In a closed primary system, voters must be registered party members to participate in the party primary election. A person registered as a Democrat, for example, may vote only in the Democratic primary. At the polling place, he or she will receive a ballot containing only candidates seeking the Democratic nomination. Voters who are registered as nonpartisans or who have not declared a party preference (unaffiliated voters), may not vote in the primary election.

Closed primaries are more or less closed, depending on the length of time that a voter must be registered prior to the primary. In the classic closed system, voters must be registered for 30 days or longer before the primary, and they may not change their party registration during that period. In semi-closed systems, voters may register or change their party registration as late as election day. According to a recent political science textbook, 27 states use a closed primary, including ten that allow voters to register or change party registration at the polling place.<sup>2</sup>

#### Open Primary

In an open primary system, voters do not have to be registered members of a party to vote in the primary of that party. A person registered as a Republican, for example, may choose to vote in the Democratic primary. Unaffiliated voters may vote in the primary of any party that qualifies for the ballot (normally only the two major parties do so).

Open primaries vary in their degree of openness: in the classic open primary, voters decide which party ballot to vote in the privacy of the voting booth (either they are given one ballot with party candidates in separate columns, and they vote only one column, or they are given separate ballots for each party and they return only one with voting marks). In semi-open primaries, the voters must publicly request a party ballot. Twenty states use an open

---

<sup>2</sup>John F. Bibby, et al., "Parties in State Politics," *Politics in the American States*, Virginia Gray, Herbert Jacobs, Robert B. Albritton, eds. 5th Edition, 1989, p. 98.

primary, including 11 of the semi-open type that require voters to request a party ballot.<sup>3</sup>

### Blanket Primary

In both the open and closed primary, voters may cast votes for candidates of only one party. In the blanket primary, all voters receive a single ballot that groups candidates of both parties by office, and they may cross from one party to the next as they move through the list of offices. That is, a voter may cast a ballot for a Republican candidate for governor, a Democratic candidate for state senator, a Republican candidate for state representative, and so on, regardless of the voter's own party affiliation (or lack thereof). This system is the most open of the conventional party primaries, as it is least constraining from the standpoint of the individual voter. Two states have a classic blanket primary: Washington and Alaska.

Louisiana has had since 1976 a unique nonpartisan primary which bears some resemblance to a blanket primary. The critical difference between the Louisiana primary and the blanket primaries of Alaska and Washington is that it is not designed to produce nominees from each of the contending parties. The ballot is organized like a blanket primary ballot (with all candidates for an office, regardless of their party, listed by office), but the two candidates who receive the highest number of votes advance to the general election, even if they are of the same party. Furthermore, if one of the candidates receives a majority (more than 50 percent) of the vote in the primary, he is the victor and does not have to stand at the general election.

### Impact of the Primary System on Parties

The purpose of the direct primary was to reduce the influence of parties in the political life of the nation, and it has undeniably had that effect, together with other factors that have also contributed to the decline of parties in our society. It is interesting to note that a respectable body of opinion in the United States today laments the moribund state of the major parties and believes that revitalized parties could invigorate and animate American democracy.<sup>4</sup> While few observers or political practitioners advocate the return to party conventions and caucuses for nominating electoral candidates, many are critical of open, and especially blanket, primaries. The closed primary is preferred by many political scientists and party activists because it encourages party affiliation, gives meaning to party ties, and enhances the development and significance of party platforms. The popularity of open

---

<sup>3</sup>*Ibid.*, p. 98.

<sup>4</sup>See, for example, Leon D. Epstein, *Political Parties in the American Mold*, University of Wisconsin Press, 1986, especially pp. 9-39.

primaries with voters, however, is usually to check the impulse of party officials to seek the closing of an open primary, and accounts for the fact that only 17 states have a classic closed system.

### Legislative History of Alaska's Blanket Primary

Alaska first adopted the blanket primary in 1947, during territorial days. Prior to that time Alaska had an open primary: at the polls, voters were given a single ballot listing the party candidates in two separate columns. Voters could vote in only one column.

In the special legislative session of 1946, when both houses of the legislature were overwhelmingly dominated by Democrats, a conservative Juneau Democrat, Curtis Shattuck, introduced House Bill 4 which would have changed the open primary to a blanket primary. While the bill did not have sufficient support in the House of Representatives to pass, there was enough interest to keep it alive. The compromise was an amendment to put the question before the voters in a referendum at the next general election (October 8, 1946).<sup>5</sup> The amended bill passed the House of Representatives with no dissenting votes, and it passed the Senate with only three dissenting votes.

There was apparently little public discussion of the issue preceding the referendum, in part perhaps because it was overshadowed by a second referendum on the same ballot--a referendum on the hotly debated question of statehood. In any case, the question of a blanket primary seems not to have generated much controversy. The *Anchorage Daily Times* opined that the proposal "has received virtually no publicity and the vote on it will probably be unintelligent." The newspaper editorial said "nobody seems to know what it is all about." It continued:

...inasmuch as the two parties in Alaska are different only in leadership and in their position as "in" or "out" of power, it can be argued that the blanket ballot would be appropriate here.

---

<sup>5</sup>Historian Bob DeArmond of Juneau wrote the following about the adoption of the blanket primary in his column "Days of Yore", published in *Info Juneau*, October 25, 1986. The blanket primary "was particularly pushed by Editor Sidney D. Charles of the *Alaska Fishing News* (now the *Ketchikan Daily News*) and a bill was introduced in the 1945 legislative session by Representative Curt Shattuck of Juneau. It was quickly batted down by the party stalwarts, but in 1946 there was a special session and Shattuck introduced it again. To get rid of it, the opponents turned it into a referendum for the 1946 general election."

Both parties are interested in developing Alaska. Either one would follow a program very similar to the other should it be placed in power. It has been said that the voters, during the primary election, separate into two parties for the purpose of eliminating some candidates for public office and nominating others. The general election is a continuation of this process, only with the voters all using the same ballot with the candidates of the parties on the same list. Therefore, it is argued, there would be nothing lost by having a blanket ballot in the primary.

We have heard no argument that is, by itself, convincing. We believe that Alaska will fare just as well no matter what form of ballot is used.<sup>6</sup>

While newspaper editors may have been indifferent, the voters clearly were not: the opportunity to vote for candidates from either party in the primary strongly appealed to Alaskans, who voted yes on the referendum to adopt a blanket primary by an extraordinary margin.<sup>7</sup> In the face of this unequivocal support by the electorate, members of the Eighteenth Legislature dutifully adopted a blanket primary in 1947. It passed without a dissenting vote in the House of Representatives, and with two Democrats and two Republicans casting no votes in the Senate.

Increasingly, however, the question of the blanket primary became a partisan issue. Democrats tended to oppose it, and Republicans to support it. Democrats feared that it would erode party loyalty and discipline,<sup>8</sup> and they thought that Republicans used it to their advantage by crossing party lines in the primary to nominate the weakest Democratic candidates. Republicans

---

<sup>6</sup>*Anchorage Daily Times*, October 7, 1946.

<sup>7</sup>Unofficial returns from 46 of the 60 precincts reported in the *Anchorage Daily Times* on October 10, 1946, showed 4,225 in favor of the blanket primary and 878 opposed. DeArmond states "In the final tally . . . a whopping 78 percent [of the voters] wanted the [blanket] primary." DeArmond, "Days of Yore," *op. cit.*

<sup>8</sup>In a letter to Secretary of State Lew Williams in 1948, Alaska's Delegate in Congress Bob Bartlett (a Democrat) commented on the new blanket primary: "I still fail to appreciate whatever good qualities, if any, it may have. The good old party ballot was good enough for me. I still think that party responsibility will, to a large degree, be a thing of the past with this form of ballot." University of Alaska Archives, Bartlett Collection, Box 14, Personal File 1948.

supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and nonaligned voters.<sup>9</sup>

In the first session of the first state legislature in 1959, when Democrats firmly controlled both houses and the governor's office, the blanket primary was replaced by the single ballot open primary.<sup>10</sup> Adoption of the comprehensive election code in 1960 incorporated this change.<sup>11</sup>

Republicans led the opposition to the single-ballot open primary, although some Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democrat-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times*.<sup>12</sup> Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Ketchikan spoke in favor the bill. Senator Blodgett is reported to have said:

The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill."

Senator Ziegler declared:

The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this show of bipartisan support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both houses and Republican Walter Hickel was elected governor. The blanket primary was thereupon restored during the first session of the Fifth

---

<sup>9</sup>Interview with Judge (Ret.) Thomas B. Stewart. See also Herman E. Slotnick, "Alaska: Empire of the North," in Frank H. Jonas, ed. *Politics in the American West* (Salt Lake City: University of Utah Press, 1970). Since the 1930s, the Republican party tended to be the minority party in Alaska, and it is the minority party that typically perceives partisan advantage in opening primaries.

<sup>10</sup>Chapter 41 SLA 1959 (HB 8).

<sup>11</sup>Chapter 83 SLA 1960 (CSHB 252).

<sup>12</sup>March 28, 1966.

Legislature.<sup>13</sup> The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.

The blanket primary seems to suit contemporary Alaska, where party ties and party organizations are weak.<sup>14</sup> Elected officials from both parties acquiesce to (and many benefit from) voter enthusiasm for the blanket primary.

Open primaries of all kinds, however, are often unpopular with party loyalists and party candidates because they allow nonparty members to "cross over" and influence the selection of party candidates. If done with mischievous intent--so-called strategic voting--the result may be the nomination of the weakest candidate. Even if not done mischievously, cross-over voting may sufficiently dilute the vote of party members to produce a nominee with little attachment to the party platform. Do parties have any rights to determine who may vote in their primary? A recent opinion of the U.S. Supreme Court says that they do, although the opinion was rendered in a case involving the efforts of a party to open (partially) its closed primary. That is the *Tashjian* decision.

#### Freedom of Association and the *Tashjian* Decision

Although the freedom of association is not explicitly guaranteed by the U.S. Constitution or the Bill of Rights, the U.S. Supreme Court has, through a series of cases that began in the late 1950s, conferred constitutional status upon it, declaring that the right to freedom of association is implicit in such constitutionally protected rights as speech, petition, and assembly. Although initially applied in civil rights cases, the doctrine of freedom of association has recently been invoked by the courts in disputes over state

---

<sup>13</sup>Chapter 1 SLA 1967 (HB 1am).

<sup>14</sup>More than half of the voters in Alaska are unaffiliated with a party (at registration they decline to state a party preference or declare themselves nonpartisan). Information from the Division of Elections prior to the 1990 elections showed there were 285,219 people registered to vote in Alaska with the following party affiliation: Democrats, 56,074; Republicans, 59,107; Alaska Independence Party, 2,227; nonpartisan, 89,548; undeclared, 72,195; and other, 6,068. For a general discussion of parties in Alaska see Carl E. Shepro, "Alaska's Political Parties," Gerald A. McBeath and Thomas A. Morehouse, eds. *Alaska State Government and Politics* (Fairbanks: University of Alaska Press, 1987).

regulation of political parties. The U.S. Supreme Court has used it to uphold challenges by parties to state regulations that unduly interfere with internal party operations and the process by which the parties select their electoral candidates. The notable case involving state primaries is *Julia H. Tashjian, Secretary of State of Connecticut, Appellant v. Republican Party of Connecticut et al.* [479 U.S. 208 (1986)].

### The *Tashjian* Decision

Connecticut has a history of strong party organizations, and since 1955 it has had a classic closed primary. The state Republican party has fewer registered voters than the Democratic party, and there are a substantial number of unaffiliated voters in the state. In January, 1984, the state convention of the Republican party adopted a rule that allowed unaffiliated voters to participate in the Republican primary for certain offices (excluding state legislative office). This rule conflicted with the state's election law. After failing to obtain the necessary statutory amendment from the legislature (which was dominated by Democrats), the party sued on constitutional grounds in federal court to enjoin the state from enforcing the closed primary statute. The party prevailed in the U.S. district court and the circuit court of appeals, and the state appealed to the U.S. Supreme Court.

The Supreme Court sided with the Republican party, upholding the lower court decisions. It ruled that the Connecticut statute was unconstitutional because its infringement on the associational rights of the party was not justified by compelling state interests. Prohibiting unaffiliated voters from participating in the primary of a party that invites such participation "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."

### The Implications of *Tashjian*

At a minimum, the *Tashjian* decision means that states with closed primaries may not prohibit unaffiliated voters from voting in the primary of a party that takes formal action to open its primary to these voters. A number of closed primary states with election laws similar to Connecticut's have made the necessary statutory amendments to bring their codes into compliance with *Tashjian*. The relevant laws in states that have not done so will be unenforceable in the face of party action to open a primary to unaffiliated voters.

Because few political parties have followed the precedent of the Connecticut Republicans in seeking to open, even partially, their closed primary, and because only the participation of unaffiliated voters is at stake (a small proportion of registered voters in most states), the *Tashjian* decision has not had a tumultuous impact. The big question about *Tashjian*, however, is what

the underlying logic of the decision implies for other forms of state regulation of parties and primaries. That is, how much freedom of association will the Supreme Court ultimately extend to political parties? Leon Epstein, a noted political scientist, has observed: "Only if parties were able, as well as willing, to use *Tashjian* as a precedent for broader challenges to state primaries would there be far-reaching political consequences."<sup>15</sup>

Open and blanket primaries are clearly suspect under an extension of the freedom-of-association reasoning in *Tashjian*. If prohibiting a party from allowing unaffiliated voters to participate in its primary amounts to an unconstitutional interference in a party's affairs, what of election laws that force a party to accept the participation of voters registered in opposition parties? More than one analysis of the *Tashjian* decision has pointed to the possible consequences for open and blanket primaries. For example, "*Tashjian* clearly indicates that great deference should be accorded to a party's determination of its affiliates. The open and blanket primary systems, however, limit the ability of parties to choose their affiliates by preventing parties from restricting their primaries to party members. . . . Thus, there is a strong argument that both the open and blanket primary systems are unconstitutional."<sup>16</sup>

The limits of the *Tashjian* decision in this regard have not been tested because no party in an open or blanket primary state has sought to close its primary by party rule and to enforce this closure through court action against contrary state laws. That is, no party had done so until June, 1990, when *Allen Grant Doyle, Jr. and the Republican Party of Alaska v. State of Alaska et al.* was filed in the U.S. District Court in Anchorage.

#### Alaska's Primary and Doyle v. State of Alaska

At its statewide convention in March, 1990, the Republican party of Alaska amended its rules by adopting the following provision:

Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

---

<sup>15</sup>Leon D. Epstein, "Will American Political Parties Be Privatized?" *Journal of Law and Politics*, Vol. 239, p. 240.

<sup>16</sup>Susan Yarborough Noe, "North Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters to Vote in Party Primaries," *North Carolina Law Review*, Vol. 66, No. 6 (September 1988).

The Republicans expected the Democratic party at its statewide convention in May to adopt a similar provision closing its primary to registered Republicans, but the Democratic party did not do so. Notwithstanding this development, the Republican party thereupon requested state election officials to honor the new rule in the up-coming primary (August, 1990). State officials protested that the request for a change in the method of holding the August primary was too ambiguous and made too late to be implemented. Furthermore, state officials demanded that the party rule be "precleared" by the U.S. Department of Justice under the federal Voting Rights Act of 1965 before they could begin to modify state election procedures (a process that would also require preclearance by the federal justice department).

Confronted with these objections, the Republican party filed suit asking the court to enjoin the state from conducting the August primary in a manner contrary to its new rule.

In its response to the plaintiff's motion, the state did not dwell at length on the merits of the Republican party's assertion that the doctrine of associational rights enunciated in *Tashjian* conferred upon the party the prerogative to close its primary to Democrats. Rather, confronted with the immediate threat of an injunction against the August primary, the state built its defense around the argument that a change in the election procedures at such a late date would cause confusion and uncertainty that would disadvantage minority voters, in violation of the federal Voting Rights Act of 1965.

The Democratic party of Alaska and the Alaska Federation of Natives (AFN) filed a joint *amicus curiae* brief in support of the state's opposition to the party's motion. The *amici* also stressed the harm that would be suffered by rural Native voters if electoral procedures were altered for the August primary. However, both the state and the *amici* argued that it was not clear, as averred by the Republican plaintiffs, that the party's suit would ultimately prevail on its merits, and they both offered several reasons why the blanket primary could survive constitutional scrutiny, notwithstanding the *Tashjian* doctrine.

Also, both the state and the *amici* suggested that the federal voting rights act may be a fundamental impediment to closing Alaska's primary. The *amici* brief stated:

Any election procedure which abridges the opportunity for Native voters to enhance their political influence through bi-partisan coalitions fundamentally impairs voting prerogatives protected under the "no retrogression" provisions of the Act. (Indeed, AFN suspects that the Party Rule is specifically intended to frustrate the formation of bi-partisan coalitions

and, in turn, to impair the influential role of legislators who represent Native voters).<sup>17</sup>

The brief warned that the Alaska Federation of Natives "intends to raise claims under Section 2 of the Act which allege that implementation of the Party Rule is violative of the substantive protection of the Act. (AFN notes that the State has indicated that it, too, may assert such claims as a counter-claim in the immediate litigation.)"<sup>18</sup>

On July 16, 1990, the district court denied the request for a preliminary injunction. However, the case is still active and will be decided on its merits unless the Republican party withdraws the action.

#### Revision of Alaska's Primary Election Law

Efforts of the Republican party in the summer of 1990 to partially close its primary were thwarted because its request to modify the ballot and voting procedures was deemed untimely, and because state officials and party leaders could not agree on an interpretation of the party rule.<sup>19</sup> Had the request been made earlier, the state may have acquiesced to it and not contested the merits of the Republican party's claim that the blanket primary is unconstitutional under the *Tashjian* doctrine. In anticipation of future requests by one or both parties to close their primaries to voters of other parties, should the legislature now establish procedures in law that will smooth the process? For example, should state statutory provisions specify deadlines for filing requests, and authorize the state Division of Elections to determine by administrative procedure the form of the ballot?

The legislature should not revise the blanket primary to facilitate future efforts by the parties to close their primaries unless it first decides as a matter of policy that the blanket primary should be abandoned (or, at a minimum, that the desire of a party to close its primary to some extent should take precedence over the protection of the integrity of the blanket primary). If the legislature favors the blanket primary, its constitutionality should be defended in court before any revision to the election laws is contemplated.

---

<sup>17</sup>Memorandum of Amicus Curiae in Opposition to Motion for Preliminary Injunction, p. 18.

<sup>18</sup>*Ibid.*, p. 18.

<sup>19</sup>The state argued, for example, that it was not inconsistent with the party rule to include on the Republican ballot the names of Democratic candidates, in order that Republican and unaffiliated voters could continue to enjoy a blanket primary.

Despite the presumptive case against the blanket primary on the basis of rights of freedom of association of political parties, a plausible defense can be made on its behalf. In deciding cases such as these, the court weighs the severity of the infringement on the party against the interest of the state in imposing it. The U.S. Supreme Court recognizes the importance of regulations that strengthen the two-party system and preserve the integrity of the electoral process. Indeed, a footnote in the *Tashjian* decision cautioned that the reach of the decision may not be very far. It said that had the request of the Republican party of Connecticut been to open its primary to Democrats in addition to unaffiliated voters, the circumstances would have been much different because of the potential disruption to the party system.<sup>20</sup> Also, the defense of Alaska's blanket primary around the federal Voting Rights Act of 1965--and the compelling interest of the state in protecting the electoral participation of Alaska Natives--is also available.

Furthermore, the Republican party may decide not to pursue *Doyle v. State of Alaska*. The circumstances that prompted the suit may now make it moot.<sup>21</sup> In general, political parties have demonstrated caution in using the *Tashjian* doctrine to upset the status quo. The *Doyle* suit was improbable. Writing about the likelihood of such a suit, political scientist Epstein noted:

It is hard to conceive of many electoral circumstances in which a party would find it expedient to exercise such a right [to close an open primary]. For one party in a competitive two-party state to require a previously unused party registration only for its primaries, thus excluding customary primary voters who remain unaffiliated, looks politically risky.<sup>22</sup>

The politics of the issue in Alaska are certainly complicated, if not risky. For example, the bill restoring the blanket primary in 1966 was introduced at the request of Governor Hickel. How his new administration will deal with the *Doyle* case is not yet clear.

I hope this overview of the primary situation in Alaska is helpful to you.

---

<sup>20</sup>*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) n. 13.

<sup>21</sup>Presumably, the conservative wing of the Republican party sought to close its primary to Democratic voters to forestall them from crossing over and casting ballots for Arliss Sturgulewski, a moderate Republican candidate for governor.

<sup>22</sup>Epstein, "Will American Political Parties Be Privatized?" p. 271.

# ELECTIONS

## Table 5.3 PRIMARY ELECTION INFORMATION

State or other jurisdiction	Dates of 1990 primaries for state officials		Party affiliation for primary voting		Voters receive ballot of:	
	Primary	Runoff (a)	Voters must declare/change affiliation prior to election day	Voters select party on election day	One party (b)	All parties participating (c)
Alabama	June 5	June 26	...	*	*	...
Alaska	Aug. 28	...	...	(d)	...	* (d)
Arizona	Sept. 11	...	At least 50 days before	...	*	...
Arkansas	May 29	June 12	...	*	*	...
California	June 5	...	At least 29 days before	...	*	...
Colorado	Aug. 14	...	At least 25 days before	(c)	*	...
Connecticut	Sept. 11	...	At least 6 months before (e)	(c)	*	...
Delaware	Sept. 8	...	By March 1 of election year	...	*	...
Florida	Sept. 4	Oct. 2	At least 30 days before	...	*	...
Georgia	July 17	Aug. 7	...	*	*	...
Hawaii	Sept. 22	...	...	*	...	*
Idaho	May 22	...	...	*	...	*
Illinois	March 20	...	...	*	*	...
Indiana	May 8	...	...	*	*	...
Iowa	June 5	...	...	*	*	...
Kansas	Aug. 7	...	At least 20 days before (e)	(e)	*	...
Kentucky	May 29	...	At least 30 days before	...	*	...
Louisiana	Sept. 29	Nov. 6 (f)	At least 24 days before (f)	...	...	(f)
Maine	June 12	...	At least 90 days before (e)	(e)	*	...
Maryland	Sept. 11	...	At least 84 days before (e)	...	*	...
Massachusetts	Sept. 18	...	At least 28 days before (e)	(e)	*	...
Michigan	Aug. 7	...	...	*	...	*
Minnesota	Sept. 11	...	...	*	...	*
Mississippi	June 5	June 26	...	*	*	...
Missouri	Aug. 7	...	...	*	...	*
Montana	June 5	...	...	*	...	*
Nebraska	May 15	...	By 2nd Friday before election	...	*	...
Nevada	Sept. 4	...	At least 30 days before	...	*	...
New Hampshire	Sept. 11	...	At least 10 days before	...	*	...
New Jersey	June 5	...	At least 50 days before (e)	(e)	*	...
New Mexico	June 5	...	By Jan. 25 of election year (g)	...	*	...
New York	Sept. 11	...	At least 1 year before (e)	...	*	...
North Carolina	May 8	June 5	At least 21 days before (h)	(c)	*	...
North Dakota	June 12	...	...	*	*	...
Ohio	May 8	...	...	*	*	...
Oklahoma	Aug. 28	Sept. 18	At least 10 days before (i)	(i)	*	...
Oregon	May 15	...	At least 20 days before (e)	...	*	...
Pennsylvania	May 15	...	At least 30 days before	...	*	...
Rhode Island	Sept. 11	...	At least 90 days before (e)	(e)	*	...
South Carolina	June 12	June 26	...	*	...	*
South Dakota	June 5	...	At least 15 days before	...	*	...
Tennessee	Aug. 2	...	...	*	...	*
Texas	March 13	April 10	...	*	...	*
Utah	Aug. 21	...	...	*	...	*
Vermont	Sept. 11	...	...	*	...	*
Virginia	June 12	...	...	*	...	*
Washington	Sept. 18	...	...	(d)	...	* (d)
West Virginia	May 8	...	At least 30 days before	...	*	...
Wisconsin	Sept. 11	...	...	*	...	*
Wyoming	Aug. 21	...	...	*	*	...
Dist. of Columbia	Aug. 11	...	At least 30 days before	...	*	...
Guam	Sept. 1	...	...	*	...	*
U.S. Virgin Islands	Sept. 11	...	At least 30 days before	...	*	...

Sources: Federal Election Commission; League of Women Voters, *Vote! The First Steps*; state election administration offices.

**Key:**

- ... — No provision
- (a) A runoff election between the top two candidates is held if the leading candidate does not get a majority of the votes cast in the first primary.
- (b) The type of primary in which voters receive only the ballot of their party choice in a primary (voters must declare their affiliation on, or prior to, election day) is generally referred to as a *closed* primary.
- (c) The type of primary in which voters receive a ballot for all parties and select the party of their choice in the privacy of the voting booth is generally referred to as an *open* primary.
- (d) Voters are not restricted to one party. In Alaska and Washington, voters participate in a *blanket* primary. As in regular open primaries, voters receive a ballot that contains the primary ballot for all parties. However, a voter in the blanket primary may pick and choose among the parties in moving through the lists of candidates for various offices. The only restriction is that the voter can indicate only one preference for each office.
- (e) Applies to previously affiliated registered voters. In Connecticut, un-

affiliated voters may now vote in some Republican primaries but not in Democratic primaries. In Colorado, Connecticut, Kansas, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey (new voters) and Rhode Island, unaffiliated voters may declare party at the polls. North Carolina may choose Republican at the polls. In Maryland and Oregon, new registrants declare at time of registration. In New York, new voters declare affiliation at least 30 days before, while previously eligible voters declare at least 60 days before.

(f) Louisiana has an open primary which requires all candidates, regardless of party affiliation, to appear on a single ballot. If a candidate receives over 30 percent of the vote in the primary, he is elected to the office. If no candidate receives a majority vote, then a single election is held between the two candidates receiving the most votes.

(g) Previously affiliated voters may not change party affiliation after proclamation of primary.

(h) Business days.

(i) New registrants declare at time of registration; however, no changes in party affiliation are allowed between July 1 and Sept. 30 in an even-numbered year.

*pen*

Page 57

PROCEDURES FOR PARTY PRIMARIES IN OTHER STATES

ALABAMA as of: 5/11/90

TOTAL 2,294,193

Party primaries:

No record of party is kept by the State of Alabama Elections Division. A voter need only declare either Democrat or Republican at the polls and he will be given the corresponding ballot.

-----  
ARKANSAS as of: 5/1/90

TOTAL 1,171,027

Party primaries:

In the state of Arkansas, voters are not required to indicate a party preference, however, the state has only two official parties: Democrat and Republican. There is no state-wide standard for holding party primaries-- each county is responsible for its own procedure. In counties where joint primaries are held, the voter must request to vote either Republican or Democrat.

-----  
CALIFORNIA

Democrat	49.94%
Republican	39.20%
American Independent	1.17%
Libertarian	.36%
Peace & Freedom	.34%

Party primaries:

At the primary the voter must request a ballot for the party with which he is affiliated. In the California primary there are five such parties which participate (see above). If a voter is not a member of one of these five parties, he may only vote for non-partisan candidates and for or against ballot propositions and other issues. Otherwise the non-partisan voter must wait until the general election. If a voter wishes to request a primary election ballot for a party of which he is not a member, he must change his affiliation at least 29 days prior to the state-wide election.

CONNECTICUT

as of: 2/90

Democrat	681,306 - 39%
Republican	468,517 - 27%
Minor Parties	972
Unaffiliated	577,071 - 33%
TOTAL	1,727,866

Party primaries:

Only Democrats may vote in Democratic primaries; in Republican primaries for some offices, both Republicans and voters who are unaffiliated with any party may vote. These offices are: Governor, Lt. Governor, Secretary of State, Treasurer, Comptroller, Attorney General, U.S. Senator, and U.S. Representative. In Republican primaries for such offices as state legislator, city mayor, or city council member, only Republicans may participate.

-----

DELAWARE

as of: 11/88

Democrat	125,297 - 43%
Republican	110,301 - 38%
Other	58,095 - 20%
TOTAL	293,693

Party primaries:

Only Democrats may vote in Democratic primaries, only Republicans may vote in Republican primaries.

-----

DISTRICT OF COLUMBIA

Democrat	214,283 - 79%
Republican	25,194 - 9%
Statehood	2,054
Independent	33,695 - 12%
Other Parties	174
TOTAL	275,400

Party primaries:

In the District of Columbia primary, the Democratic, Republican, and Statehood parties each have a separate ballot. A voter must be a member of the party for which he requests a ballot. If not, he must change his affiliation at least 30 days prior to the election.

FLORIDA

Democrat	3,037,978 - 53%
Republican	2,312,735 - 40%
Other	400,441 - 7%
TOTAL	5,751,154

Party primaries:

A voter must be a member of the party for which he requests a ballot. If not, he must change his affiliation at least 30 days prior to the election. If a run-off election should occur, the voter may not cross parties. Voters affiliated with political parties other than Democrat and Republican may only vote in the general election.

-----

GEORGIA as of: 11/88

TOTAL	2,941,339
-------	-----------

Party primaries:

No record of party is kept by the Georgia Elections Division. A citizen need only be registered to participate in either primary.

-----

KENTUCKY

Democrat	1,233,230 - 68%
Republican	538,859 - 30%
No Preference	41,151 - 2%
Other	13,259
TOTAL	1,826,499

Party primaries:

A voter in Kentucky must be a member of either the Republican or Democratic party in order to vote in the primary election. If he is not he may only vote in the general election. If he should wish to change his political affiliation after the general election, it will not become effective until **after** the following primary election; until then his status will be listed as non-partisan. However, if a voter chooses to change his affiliation between the dates of the primary and general elections, his party status will become effective by the date of the general election.

ILLINOIS

TOTAL 6,014,961

Party primaries:

No record of party is kept by the Illinois Board of Elections. However, voters must declare a party to vote in a primary election.

-----

INDIANA

as of: 1/90

TOTAL 2,839,561

Party primaries:

No record of party is kept by the Indiana State Election Board. Voters participate in primaries by requesting a ballot for either primary at the polls.

-----

IOWA

as of: 5/1/90

Democrat	549,176	- 37%
Republican	477,375	- 32%
No Party	475,861	- 32%

TOTAL 1,502,412

Party primaries:

A registered voter may vote in any primary. However, if he is not already a member of the party in whose primary he wishes to vote, he must declare at the polls.

-----

MASSACHUSSETTS

as of: 2/90

Democrat	1,390,785	44.22%
Republican	424,800	13.50%
Unenrolled	1,328,863	42.26%

TOTAL (as of 10/89) 3,268,017

Party primaries:

Voters may chose to vote in either primary regardless of their party affiliation.

MISSISSIPPI

as of: 5/88

TOTAL 1,595,826

Party primaries:

No record of party is kept by the State of Mississippi Elections Division. In the first of the two Mississippi primaries a voter requests either a Republican or Democratic ballot. In the second primary the voter most vote the same way; he cannot cross parties.

---

NEVADA

Democrat	202,343 - 46%
Republican	192,155 - 43%
Non-Partisan	48,941 - 11%
TOTAL	443,439

Party primaries:

Only Democrats may vote in the Democratic primary, only Republicans may vote in the republican primary. Non-Partisans may not vote unless they change their affiliation at least 30 days prior to the primary.

---

NEW HAMPSHIRE

as of: 5/24/90

Democrat	197,409 - 30%
Republican	252,720 - 39%
Undeclared	199,651 - 31%
TOTAL	649,780

Party primaries:

On the day of the primary, a voter, regardless of party declaration, may request a ballot for either primary. The voter then automatically becomes a member of that party in whose primary he participated.

NEW JERSEY

Democrat	1,199,098 - 32%
Republican	787,822 - 21%
Unaffiliated	1,727,107 - 46%
Independent	4,571
<b>TOTAL</b>	<b>3,718,598</b>

Party primaries:

Unaffiliated and independents cannot vote in party primaries.

---

NEW YORK

Democrat	3,904,183 - 47%
Republican	2,640,179 - 32%
Right-to-Life	23,973 - 1%
Conservative	113,756 - 2%
Liberal	61,101 - 1%
Non-in-Roll	1,502,641 - 18%
<b>TOTAL</b>	<b>8,255,833</b>

Party primaries:

If a candidate is running for an office unopposed, no primary for that office is held. If a party nominates no candidates for a specific office voters registered under that party will not participate in the primary for that office. If a voter wishes to change his affiliation, he must have done so prior to the previous general election.

---

OHIO

Democrat	1,802,977 - 31%
Republican	1,165,141 - 20%
Independent	2,814,895 - 49%
<b>TOTAL</b>	<b>5,783,079</b>

Party Primaries:

A voter must declare a party (either Democrat or Republican) at the polls on election day. Independents who don't declare a party may not vote.

RHODE ISLAND

as of: 11/7/89

TOTAL:

536,406

Party primaries:

No official record of party is kept by the Rhode Island Division of Elections. However, while a voter may vote in either primary, whichever primary he participates in will act as a declaration of party. His party affiliation is then handwritten on the original voter registration form/card. If the voter wishes to vote in a party primary different from his affiliation, he must disaffiliate at least 90 days before that primary is held.

-----

SOUTH CAROLINA

as of: 4/4/90

TOTAL

1,290,869

Party primaries:

No record of party is kept by the South Carolina State Election Commission. A citizen need only be registered to participate in either primary.

-----

TENNESSEE

as of: 12/89

TOTAL

2,521,996

Party primaries:

No record of party is kept by the Tennessee Elections Division. A citizen need only be registered to participate in either primary.

-----

TEXAS

as of: 3/15/90

TOTAL

8,285,308

Party primaries:

No record of party is kept by the Texas Elections Division. On the day of the primary election a registered voter votes at either a Democratic poll or a Republican poll. These polls are either located together or at separate sites. Each party controls its own primary. In the event of a run-off election, voters may not cross parties when they vote in the second election.

See pg. 287

MARCH FONG EU, Secretary of State of California, et al., Appellants

v

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE et al.

489 US —, 103 L Ed 2d 271, 109 S Ct —

[No. 87-1269]

Argued December 5, 1988. Decided February 22, 1989.

Decision: California law banning endorsement of primary candidates by parties' governing bodies held to violate parties' speech and association rights under Federal Constitution's First Amendment.

#### SUMMARY

Provisions of the California Elections Code (1) forbade the official governing bodies of political parties from endorsing candidates in party primaries, (2) restricted the organization and composition of such official governing bodies, (3) limited the term of office for a party's state central committee chair, and (4) required that the chair rotate between residents of northern and southern California. Various county central committees of the Democratic and Republican parties, and other groups and individuals active in partisan politics in California, brought an action in the United States District Court for the Northern District of California against state officials responsible for enforcing the Code. The plaintiffs contended that the provisions in question deprived political parties and their members of the rights of free speech and free association guaranteed by the Federal Constitution's First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the United States Court of Appeals affirmed (792 F2d 802). On appeal, the United States Supreme Court vacated and remanded (479 US 1024, 93 L Ed 2d 820, 107 S Ct 864) for further consideration in light of its decision in *Tashjian v Republican Party of Connecticut* (1986) 479 US 208, 93 L Ed 2d 514, 107 S Ct 544. After supplemental briefing, the Court of Appeals concluded that its previous decision was supported by the *Tashjian* decision, *supra*, and accordingly reinstated its judgment affirming the District Court's decision (826 F2d 814).

On appeal, the United States Supreme Court affirmed. In an opinion by

MARSHALL, J., joined by BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., it was held that (1) the provision concerning endorsement of primary candidates (a) infringed upon the free speech rights of parties and their members, because it directly hampered the ability of a party to spread its message and hamstrung voters seeking to inform themselves about the candidates and the campaign issues, (b) infringed upon political parties' freedom of association, because the provision prevented parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community, and (c) could not be justified as advancing the state's compelling interests in maintaining a stable political system, protecting primary voters from confusion and undue influence, or preserving party stability; and (2) the provisions regulating the parties' internal affairs (a) burdened the freedom of association of political parties and their members, because such provisions limited a party's discretion in how to organize itself, conduct its affairs, and select its leaders, and (b) could not be justified as serving compelling state interests in preserving the integrity of the election process, insuring the democratic management of a party's internal affairs, or preventing regional friction.

STEVENS, J., concurring, joined the court's opinion, but expressed the view that such phrases as "compelling state interest" were too convenient and result-oriented to be helpful for constitutional analysis.

REHNQUIST, Ch. J., did not participate.

## EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

### HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

**Constitutional Law § 940.5 — freedom of speech and association — party endorsement of primary candidates**

1a-1j. A state elections code provision that forbids the official governing bodies of political parties from endorsing candidates in party primaries violates the free speech rights, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because the provision, which affects speech that is at the core of the electoral process and of the First Amendment freedoms, directly hampers the ability of a party to spread its message and hampers voters seeking to inform themselves about the candidates and

the campaign issues; such a provision infringes upon political parties' freedom of association protected by the First and Fourteenth Amendments, because the provision prevents parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community; such a provision may not be justified as advancing the state's compelling interests in maintaining a stable political system and protecting primary voters from confusion and undue influence, where the state does not adequately explain how the provision advances those interests; nor

### TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

25 Am Jur 2d, Elections §§ 117-119, 123-125, 129-131, 150-152

USCS, Constitution, Amendments 1, 14

US L Ed Digest, Constitutional Law § 940.5; Elections § 2

Index to Annotations, Elections and Voting; Freedom of Association; Freedom of Speech and Press; Politics and Political Matters

**VERALEX®**: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, Auto-Cite® and SHOWME®. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

### ANNOTATION REFERENCES

Supreme Court's views regarding First Amendment guaranties of freedom of speech or of the press as applied to electoral or referendum process. 71 L Ed 2d 1000.

Supreme Court's views regarding First Amendment right of association as applied to advancement of political beliefs. 67 L Ed 2d 859.

may the provision be justified as serving a compelling state interest in party stability, since preserving party unity during a primary is not a compelling state interest.

**Constitutional Law § 940.5 — freedom of association — regulation of party's internal structure**

2a-2f. State statutory provisions that (1) restrict the organization and composition of the official governing bodies of political parties, (2) limit the term of office for a party's state central committee chair, and (3) require that the chair rotate between residents of northern and southern parts of the state burden the freedom of association, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because such provisions limit a party's discretion in how to organize itself, conduct its affairs, and select its leaders; such provisions cannot be justified as serving a compelling state interest in preserving the integrity of the election process, where the state does not show that the provisions are necessary to insure the order and fairness of elections; such provisions cannot be justified as serving a compelling state interest in the democratic management of a party's internal affairs, where state intervention is not necessary to prevent the derogation of the civil rights of party adherents, because the state has no interest in protecting the integrity of the party against the party itself; the provisions regulating the party chair cannot be justified as preventing regional friction, because a state cannot substitute its judgment for that of a party as to the desirability of a particular internal party structure.

274

**Constitutional Law § 940.5 — First Amendment — validity of state regulations**

3. A state's broad power to regulate the time, place, and manner of elections does not extinguish the state's responsibility to observe the limits established by the rights of the state's citizens under the Federal Constitution's First Amendment; to assess the constitutionality of a state election law, a court first examines whether the law burdens rights protected by the First and Fourteenth Amendments; if the challenged law burdens the rights of political parties and their members, the law can survive constitutional scrutiny only if the state shows that the law advances a compelling state interest and is narrowly tailored to serve that interest.

**Constitutional Law § 940.5 — freedom of speech — election campaigns — primaries**

4. The Federal Constitution's First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office; for First Amendment purposes, free discussion about candidates for public office is no less critical before a primary than before a general election, since in both instances, the election campaign is a means of disseminating ideas as well as attaining political office.

**Constitutional Law §§ 933, 940.5 — First Amendment — censorship — political speech**

5. A state's highly paternalistic approach limiting what people may hear is generally suspect under the Federal Constitution's First Amendment, but it is particularly egregious where the state censors the political speech that a political party shares with its members.

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

Constitutional Law § 940.5 — freedom of association — political parties

6. Partisan political organizations enjoy freedom of association protected by the Federal Constitution's First and Fourteenth Amendments; such freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences.

Constitutional Law § 940.5 — right of association

7. Imposing limitations on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is a restraint on the federal constitutional right of association.

Constitutional Law § 940.5 — free speech and association — political stability — informed electorate

8a, 8b. For purposes of the rule that a state's burden on the rights to free speech and free association can survive constitutional scrutiny only if a compelling governmental interest is served, maintaining a stable political system is a compelling state interest, and a state has a legitimate interest in fostering an informed electorate.

Elections § 2 — flow of political information

9. A state may properly regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption.

Appeal § 1331.5 — what reviewable

10a, 10b. On appeal from a United States Court of Appeals decision that affirmed a United States District Court judgment holding that a state's election code provisions violated the free speech and associational rights of political parties, the United States Supreme Court will not disturb the District Court's ruling that the central committees of various political parties had authorization and capacity to bring and maintain the litigation, where the Court of Appeals did not disturb this ruling.

Constitutional Law § 940.5 — freedom of association — political parties

11. A political party's determination of the structure which best allows it to pursue its political goals is protected by the Federal Constitution; freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders.

Constitutional Law § 940.5 — associational rights — integrity of election process — regulation of parties

12a, 12b. For purposes of the federal constitutional requirement that laws burdening the associational rights of political parties and their members serve a compelling state interest, a state has a compelling interest in preserving the integrity of its election process; toward that end, a state may properly enact laws that interfere with a political party's internal affairs when necessary to insure that elections are fair and honest; for example, a state may properly impose certain eligibility requirements for voters in the general election, even though they limit

the ability of political parties to garner support and members, where such requirements are necessary to insure that elections are fair and honest; however, a state cannot justify regulating a party's internal affairs without showing that such regulation is necessary to insure an election that is orderly and fair.

Appeal § 1331.5 — what reviewable

13a, 13b. On appeal from a United States Court of Appeals decision

holding that a state's election code provisions, purportedly designed to curb friction within political parties, violate the parties' free speech and associational rights, the United States Supreme Court need not address the contention that the challenged laws weaken rather than strengthen parties, where the Supreme Court finds that the state has no compelling interest in curbing intraparty friction as long as the electoral process remains fair and orderly.

#### SYLLABUS BY REPORTER OF DECISIONS

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a primary to claim official party endorsement. Other Code sections dictate the organization and composition of parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, inter alia, that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

*Held:* The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their mem-

bers without serving a compelling state interest.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstring voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and to select a standard bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

peculiar that it is virtually the only State to determine that such a ban is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction.

(b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be upheld. These laws directly burden the associational rights of a party and its members by limiting the

party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A state cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure.

826 F2d 814, affirmed.

Marshall, J., delivered the opinion of the Court, in which all other Members joined, except Rehnquist, C.J., who took no part in the consideration or decision of the case. Stevens, J., filed a concurring opinion.

APPEARANCES OF COUNSEL

Geoffrey Lloyd Graybill argued the cause for appellants.  
James J. Brosnahan argued the cause for appellees.

OPINION OF THE COURT

Justice Marshall delivered the opinion of the Court.

[1a, 2a] The California Elections Code forbids the official governing

bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, lim-

its the term of office of party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F2d 814 (1987). We noted probable jurisdiction, 485 US —, 99 L Ed 2d 696, 108 S Ct 1466 (1988), and now affirm.

## I

## A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties.<sup>1</sup> The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and

"county central committees," Cal Elec Code Ann § 11702 (West 1977), and that these bodies are responsible for conducting the party's campaigns.<sup>2</sup> At the same time, the Code provides that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." *Ibid.* It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates.<sup>3</sup> With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to

1. A "ballot-qualified" party is eligible to participate in any primary election because: (a) during the last gubernatorial election one of its candidates for state-wide office received two percent of the vote; (b) one percent of the State's voters are registered with the party; or (c) a petition establishing the party has been filed by ten percent of the State's voters. Cal Elec Code Ann § 6430 (West 1977).

In the interest of simplicity, we use the terms "ballot-qualified party" and "political party" interchangeably.

2. The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interest of the party. Cal Elec Code Ann § 8777 (West Supp 1988) (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic

Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

3. For example, while voters cannot learn what the Democratic state and county central committees think of candidates, they may be flooded with endorsements from disparate groups across the State such as the Berkeley Democratic Club, the Muleskinners Democratic Club, and the District 8 Democratic Club. Addendum to Motion to Affirm or to Dismiss (Addendum) 39A § 7 (declaration of Mary King, chair of the Alameda County Democratic Central Committee); Addendum 48 § 7 (declaration of Linda Post, chair of San Francisco County Democratic Central Committee).

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

those of her party nevertheless to win its primary.<sup>4</sup>

In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees;<sup>5</sup> set forth rules governing the selection and removal of committee members;<sup>6</sup> fix the maximum term of office for the chair of the state central committee;<sup>7</sup> require that the chair rotate between residents of northern and southern California;<sup>8</sup> specify the time and place of committee meetings;<sup>9</sup> and limit the dues parties may impose on members.<sup>10</sup> Violations of these provisions are criminal offen-

ses punishable by fine and imprisonment.

B

Various county central committees of the Democratic and Republican parties, the state central committee of the Libertarian Party, members of various state and county central committees, and other groups and individuals active in partisan politics in California brought this action in federal court against state officials responsible for enforcing the Code. (State or California).<sup>11</sup> They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the

4. In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area, although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party. Addendum 15a ¶ 2 (declaration of Edmond Costantini, member of the Executive Board of the Democratic state central committee).

5. For example, the Code dictates the precise mix of elected officials, party nominees, and party activists who are members of the state central committees of the Republican and Democratic parties as well as who may nominate the various committee members. Cal Elec Code Ann §§ 8660-8661, 8663 (West 1977 & Supp 1988) (Democratic Party); §§ 9160-9164 (Republican Party). Other parties are similarly regulated. See § 9640 (American Independent Party); §§ 9762, 9765 (Peace and Freedom Party) (West 1977).

6. §§ 8663-8667, 8669 (Democratic Party); §§ 9161-9164, 9168, 9170 (Republican Party); §§ 9641-9644, 9648-9650 (American Independent Party); §§ 9790-9794 (Peace and Freedom Party).

7. The Code limits the term of office of the chair of the state central committee to two years and prohibits successive terms. See § 8774 (Democratic Party); § 9274 (Republican

Party); § 9685 (American Independent Party); § 9816 (Peace and Freedom Party).

8. § 8774 (West Supp 1988) (Democratic state central committee); § 9274 (West 1977) (Republican state central committee); § 9816 (Peace and Freedom state central committee).

9. §§ 8710-8711 (West Supp 1988) (Democratic state central committee); §§ 8920-8921 (West 1977 & Supp 1988) (Democratic county central committee); § 9210 (West Supp 1988) (Republican state central committee); §§ 9420-9421 (West 1977 & Supp 1988) (Republican county central committee); §§ 9730-9732 (American Independent county central committee); § 9800 (West 1977) (Peace and Freedom state central committee); §§ 9830, 9840-9842 (Peace and Freedom county central committee).

10. §§ 8775, 8945 (West 1977 & Supp 1988) (Democratic Party); § 9275 (West 1977) (Republican Party); §§ 9687, 9745 (American Independent Party); §§ 9818, 9855 (Peace and Freedom Party).

11. The plaintiffs sued March Fong Eu, Secretary of State of California; John K. Van de Kamp, Attorney General of California; Arlo Smith, District Attorney of San Francisco County; and Leo Himmelsbach, District Attorney of Santa Clara County.

United States Constitution.<sup>12</sup> The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss and filed a cross-motion for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in § 11702 and § 29430 violated the First Amendment as applied to the States

through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of *Railroad Comm'n of Texas v Pullman Co.*, 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941).<sup>13</sup> On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' term of office, and designating that the chair rotate between residents of northern and southern California violate the First Amendment.<sup>14</sup> The court denied summary judgment with respect to the statutory provisions establishing the time and place of committee meetings and the amount of dues. Civ No. C-83-5599 MHP (ND Cal, May 3, 1984).

The Court of Appeals for the Ninth Circuit affirmed. 792 F2d 802 (1986). This Court vacated that decision, 479 US 1024, 93 L Ed 2d 820, 107 S Ct 864 (1987), and remanded for further consideration in light of *Tashjian v Republican Party of Connecticut*, 479 US 208, 93 L Ed 2d 514, 107 S Ct 544 (1986).

After supplemental briefing, the Court of Appeals again affirmed. 826 F2d 814 (1987). The court first rejected the State's arguments based

12. The plaintiffs also asserted that the statutes violated the Equal Protection Clause of the Fourteenth Amendment. Because the District Court held that the statutes violate the First Amendment, it did not reach this claim.

13. An appeal was then pending in the California Supreme Court presenting a First Amendment challenge to a ban on endorsements by political parties of candidates in nonpartisan school, county, and municipal elections. The California Supreme Court ultimately decided that the Code did not prohibit such endorsements and so did not reach the First Amendment question. *Unger v Superior Court*, 37 Cal 3d 612, 692 P2d 238 (1984). A ban on party endorsements in nonpartisan

elections subsequently was enacted by ballot initiative. A Federal District Court has ruled that this ban violates the First and Fourteenth Amendments. *Geary v Renne*, Civ No. C-87-4724 AJZ (ND Cal, April 27), stayed, 856 F2d 1456 (CA9 1988).

14. The District Court invalidated the following Code sections: Cal Elec Cods §§ 8660-8661, 8663-8667, 8669 (Democratic state central committee); §§ 9160, 9160.5, 9161, 9161.5, 9162-9164 (West 1977 and Supp 1988) (Republican state central committee); § 9274 (Republican state central committee chair); and § 9816 (Peace and Freedom state central committee chair). In addition, it held that § 29102 was unconstitutional as applied.

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

on nonjusticiability, lack of standing, Eleventh Amendment immunity and Pullman abstention. 826 F2d, at 821-825. Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. *Id.*, at 833. "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." *Id.*, at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." *Id.*, at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. *Ibid.* The court concluded that the ban was not necessary to protect voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." *Id.*, at 836.

The Court of Appeals also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." *Id.*, at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest for a State has a legitimate interest "in orderly elections, not orderly parties." *Id.*, at 831. In any event, the court noted, the State had failed to submit "'a shred of evidence,'" *id.*, at 833 (quoting Civ No. C-83-5599 (ND Cal May

3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.

II

[3] A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." *Tashjian v Republican Party of Connecticut*, *supra*, at 217, 93 L Ed 2d 514, 107 S Ct 544. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. 479 US, at 214, 93 L Ed 2d 514, 107 S Ct 544; *Anderson v Celebrezze*, 460 US 780, 789, 75 L Ed 2d 547, 103 S Ct 1564 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, *Tashjian*, *supra*, at 217, 222, 93 L Ed 2d 514, 107 S Ct 544; *Illinois State Bd. of Elections v Socialist Workers Party*, 440 US 173, 184, 59 L Ed 2d 230, 99 S Ct 983 (1979); *American Party of Texas v White*, 415 US 767, 780, and n 11, 39 L Ed 2d 744, 94 S Ct 1296 (1974); *Williams v Rhodes*, 393 US 23, 31, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236 (1968), and is narrowly tailored to serve that interest. *Illinois State Bd. of Elections*, *supra*, at 185, 59 L Ed 2d 230, 99 S Ct 983; *Kusper v Pontikes*, 414 US 51, 58-59, 38 L Ed 2d 260, 94 S Ct 303 (1973); *Dunn v Blumstein*, 405 US 330, 343, 31 L Ed 2d 274, 92 S Ct 995 (1972).

## A

[1b, 4] We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, *Tr of Oral Arg 17*, but contends that the burden is "miniscule." *Id.*, at 7. We disagree. The ban directly affects speech which "is at the core of our electoral process and of the First Amendment freedoms." *Williams v Rhodes*, *supra*, at 32, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236. We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." *Buckley v Valeo*, 424 US 1, 14, 46 L Ed 2d 659, 96 S Ct 612 (1976) (*per curiam*); see also *NAACP v Claiborne Hardware Co.*, 458 US 886, 913, 73 L Ed 2d 1215, 102 S Ct 3409 (1982); *Carey v Brown*, 447 US 455, 467, 65 L Ed 2d 263, 100 S Ct 2286 (1980); *Garrison v Louisiana*, 379 US 64, 74-75, 13 L Ed 2d 125, 85 S Ct 209 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. *Monitor Patriot Co. v Roy*, 401 US 265, 272, 28 L Ed 2d 35, 91 S Ct 621 (1971); see also *Mills v Alabama*, 384 US 214, 218, 16 L Ed 2d 484, 86 S Ct 1434 (1966). Free discussion about candidates for public office is no less critical before a primary than before a general election. Cf. *Storer v Brown*, 415 US 724, 735, 39 L Ed 2d 714, 94 S Ct 1274 (1974); *Smith v Allwright*, 321 US 649, 666, 88 L Ed 987, 64 S Ct 757, 151 ALR 1110 (1944); *United States v Classic*, 313 US 299, 314, 85 L Ed 1368, 61 S Ct 1031 (1941). In both instances, the "election cam-

paign is a means of disseminating ideas as well as attaining political office." *Illinois State Bd. of Elections*, *supra*, at 186, 59 L Ed 2d 230, 99 Ct 983.

[1c, 5] California's ban on primary endorsements, however, prevents party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought. This prohibition directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issue. See *Tashjian*, *supra*, at 220-222, 93 L Ed 2d 514, 107 S Ct 544; *Pacific Gas & Electric Co. v Public Utilities Comm'n of California*, 475 US 1, 89 L Ed 2d 1, 106 S Ct 903 (1986). *Brown v Hartlage*, 456 US 45, 60, 72 L Ed 2d 732, 102 S Ct 1523 (1982); *First National Bank of Boston v Bellotti*, 435 US 765, 791-792, 55 L Ed 2d 707, 98 S Ct 1407 (1978). A "highly paternalistic approach" limiting what people may hear is generally suspect, *Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 770, 48 L Ed 2d 346, 96 S Ct 1817 (1976); see also *First National Bank of Boston*, *supra*, at 790-792, 55 L Ed 2d 707, 98 S Ct 1407, but it is particularly egregious where the State censors the political speech a political party shares with its members. See *Roberts v United States Jaycees*, 468 US 609, 634, 82 L Ed 2d 462, 104 S Ct 3244 (1984) (*O'Connor, J.*, concurring).

[1d, 6] Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544; see also Elrod v Burns, 427 US 347, 357, 49 L Ed 2d 547, 96 S Ct 2673 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544 (quoting Kusper, supra, at 57, 38 L Ed 2d 260, 94 S Ct 303), but also that a political party has a right to "identify the people who constitute the association," Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544 (quoting Democratic Party of the United States v Wisconsin ex rel. La Follette, 450 US 107, 122, 67 L Ed 2d 82, 101 S Ct 1010 (1981)); cf. NAACP v Alabama, 357 US 449, 460-462, 2 L Ed 2d 1488, 78 S Ct 1163 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." Ripon Society, Inc. v National Republican Party, 173 US App DC 350, 384, 525 F2d 567, 601 (1975) (Tamm, J., concurring in result), cert denied,

424 US 933, 47 L Ed 2d 341, 96 S Ct 1147, 96 S Ct 1148 (1976).

[1e, 7] Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." Tashjian, supra, at 216, 93 L Ed 2d 514, 107 S Ct 544. Even though individual members of the state central committee and county central committees are free to issue endorsements, imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." Citizens Against Rent Control/Coalition for Fair Housing v Berkeley, 454 US 290, 296, 70 L Ed 2d 492, 102 S Ct 434 (1981).

[1f, 8a] Because the ban burdens the appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest.<sup>16</sup> The State offers two: stable government and protecting vot-

15. California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this

lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, e. g., Addendum 12a-13a ¶¶ 7-9 (declaration of Bert Coffey, chair of the Democratic state central committee). More-

ers from confusion and undue influence.<sup>16</sup> Maintaining a stable political system is, unquestionably, a compelling state interest. See *Storer v Brown*, 415 US, at 736, 39 L Ed 2d 714, 94 S Ct 1274. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only

State that has determined that such a ban is necessary.<sup>17</sup>

[19] The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on *Storer v Brown*, where we stated that because "splintered parties and untrained factionalism may do significant damage to the fabric of government," *supra*, at 736, 39 L Ed 2d 714, 94 S Ct 1274, States may regulate elections to ensure that "some sort of order, rather than chaos . . .

over, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns. See *Storer v Brown*, 415 US 724, 746, 39 L Ed 2d 714, 94 S Ct 1274 (1974); *Anderson v Celebrezze*, 460 US 780, 799, n 26, 75 L Ed 2d 547, 103 S Ct 1564 (1983).

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

18. The State also claims that the ban on primary endorsements serves a compelling state interest in "confining each voter to a single nominating act." *Tashjian v Republican Party of Connecticut*, 479 US 208, 225, n 13, 93 L Ed 2d 514, 107 S Ct 544 (1986) (quoting *Anderson*, *supra*, at 802, n 29, 75 L Ed 2d 547, 103 S Ct 1564). This argument is meritless. It fails to distinguish between a nominating act—the vote cast at the primary

election—and speech that may influence that act. The logic of the State's argument not only would support a ban on endorsements by every organization and individual, but also would justify a total ban on all discussion of a candidate's qualifications and political positions. Such a blanket prohibition cannot coexist with the constitutional protection of political speech.

The State's claim that the endorsement ban is necessary to serve any compelling state interest is called into question by its argument before the District Court and the Court of Appeals that this action is not justiciable because the State has never enforced the challenged election laws. 826 F2d 814, 821 (1987).

17. New Jersey also bans primary endorsements by political parties. NJ Stat Ann § 19:34-52 (West 1964); see Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S Cal L Rev 213, 271-272, n 343 (1984). Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See *Abrams v Reno*, 462 F Supp 1166, 1171-1172 (SD Fla 1978), *aff'd*, 649 F2d 342 (CA5 1981), cert denied, 455 US 1016, 72 L Ed 2d 133, 102 S Ct 1710 (1982). Several States provide formal procedures for party primary endorsements. See, e.g., Conn Gen Stat § 9-390 (West 1967 & Supp 1988); RI Gen Laws § 17-12-4 (1988); see also Advisory Commission on Intergovernmental Relations, *The Transformation in American Politics: Implications for Federalism* 148 (1986).

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

accompan[ies] the democratic processes." 415 US, at 730, 39 L Ed 2d 714, 94 S Ct 1274. Our decision in *Storer*, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, *Storer* recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." *Id.*, at 735, 39 L Ed 2d 714, 94 S Ct 1274. A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them. *Ibid.*; *American Party of Texas v White*, 415 US, at 781, 39 L Ed 2d 744, 94 S Ct 1296. *Tashjian* recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544.

It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements

saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party. See *ibid.*; *Democratic Party of United States*, 450 US, at 124, 67 L Ed 2d 82, 101 S Ct 1010. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

[1h, 8b, 9, 10a] The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate. *Tashjian*, *supra*, at 220, 93 L Ed 2d 514, 107 S Ct 544; *Anderson v Celebrezze*, 460 US, at 796, 75 L Ed 2d 547, 103 S Ct 1564; *American Party of Texas v White*, *supra*, at 782, n 14, 39 L Ed 2d 744, 94 S Ct 1296; *Bullock v Carter*, 405 US 134, 145, 31 L Ed 2d 92, 92 S Ct 849 (1972); *Jenness v Fortson*, 403 US 431, 442, 29 L Ed 2d 554, 91 S Ct 1970 (1971). However, "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Tashjian*, *supra*, at 221, 93 L Ed 2d 514, 107 S Ct 544 (quoting *Anderson v Celebrezze*, *supra*, at 798, 75 L Ed 2d 547, 103 S Ct 1564). While a State may regulate

18. It is doubtful that the silencing of official party committees, alone among the various groups interested in the outcome of a primary election, is the key to protecting voters from confusion. Indeed, the growing number of endorsements by political organizations using the labels "Democratic" or "Republican" has likely misled voters into believing that the official governing bodies were supporting the candidates.

The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union. In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their

LIBRARY

the flow of information between political associations and their members when necessary to prevent fraud and corruption, see *Buckley v Valeo*, 424 US, at 26-27, 46 L Ed 2d 659, 96 S Ct 612; *Jenness v Fortson*, supra, at 442, 29 L Ed 2d 554, 91 S Ct 1970, there is no evidence that California's ban on party primary endorsements serves that purpose."

[11] Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that § 11702 and § 29430 violate the First and Fourteenth Amendment.

#### B

[2b, 11] We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted

in *Tashjian*, a political party's "termination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. See *Democratic Party of the United States*, supra, (State cannot dictate process of selecting state delegates to Democratic National Convention); *Cousins v Wigoda*, 419 US 477, 42 L Ed 2d 595, 95 S Ct 541 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); cf. *Tashjian*, supra, at 235-236, 93 L Ed 2d 514, 107 S Ct 544 (Scalia, J., dissenting) ("The ability of the members of [a political party] to select their own candidate . . . unquestionably implicates an associational freedom").

[2c] The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best.<sup>20</sup> And by specifying who

vote. For example, in the 1982 New York Democratic gubernatorial contest, Mario Cuomo won the primary over Edward Koch, who had been endorsed by the party. That year gubernatorial candidates endorsed by their parties also lost the primary election to nonendorsed candidates in Massachusetts and Minnesota. Even where the party-endorsed candidate wins the primary, one study has concluded that the party endorsement has little, if any effect, on the way voters cast their vote. App 97-98 ¶¶ 10, 14-17 (declaration of Malcolm E. Jewell, Professor of Political Science, University of Kentucky).

19. [10b] The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a

party endorsement, Tr of Oral Arg 8-9, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves. To the extent that the State is claiming that the appellees are not authorized to represent the official party governing bodies and their members, the State simply is reasserting its standing claim which the District Court rejected. Civ No. C-83-5599 (ND Cal, June 1, 1984) ("the plaintiff central committees . . . have authorization and capacity to bring and maintain this litigation"). The Court of Appeals did not disturb this ruling, 826 F2d, at 822, n 17; nor do we.

20. For example, the Libertarian Party was forced to abandon its region-based organization in favor of the statutorily mandated county-based system.

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders.<sup>21</sup>

[2d, 12a] Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A

State indisputably has a compelling interest in preserving the integrity of its election process. *Rosario v Rockefeller*, 410 US 752, 761, 36 L Ed 2d 1, 93 S Ct 1245 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. *Storer v Brown*, 415 US, at 730, 39 L Ed 2d 714, 94 S Ct 1274. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, e.g., *Dunn v Blumstein*, 405 US, at 343-344, 31 L Ed 2d 274, 92 S Ct 995 (residence requirement); *Oregon v Mitchell*, 400 US 112, 118, 27 L Ed 272, 91 S Ct 260 (1970) (age minimum); *Kramer v Union Free School Dist No. 15*, 395 US 621, 625, 23 L Ed 2d 583, 89 S Ct 1886 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See, e.g., *American Party of Texas v White*, 415 US, at 779-780, 39 L Ed 2d 744, 94 S Ct 1296 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); *id.*, at 785-786, 39 L Ed 2d 744, 94 S Ct 1296 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); *Rosario v Rockefeller*, *supra* (waiting periods before voters may change party registration and participate in another party's primary); *Bullock v Carter*, 405 US, at

21. By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with

the parties' decisions as to the best means to promote that message.

145, 31 L Ed 2d 92, 92 S Ct 849 (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of a party's leaders.<sup>22</sup> Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.'" Brief for Appellants 43 (quoting 415 US, at 781, n 15, 39 L Ed 2d 744, 94 S Ct 1296). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. *Smith v Allwright*, 321 US 649, 88 L Ed 987, 64 S Ct 757, 151 ALR 1110 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integ-

riety of the Party against the Party itself." *Tashjian*, 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.'" Brief for Appellants 48. However, a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise. *Tashjian*, supra, at 224, 93 L Ed 2d 514, 107 S Ct 544.

[12b, 13a] In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld.<sup>23</sup>

### III

[1], 2] For the reasons stated above, we hold that the challenged California election laws burden the

22. *Marchioro v Chaney*, 442 US 191, 60 L Ed 2d 816, 99 S Ct 2243 (1979) is not to the contrary. There we upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. *Id.*, at 198-199, 60 L Ed 2d 816, 99 S Ct 2243. The statute only required that the state central committee perform certain limited functions such as filing vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions. The party members did not claim that these statutory requirements imposed impermissible burdens

on the party or themselves so we had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and if so, whether the law served a compelling state interest. *Id.*, at 197, n 12, 60 L Ed 2d 816, 99 S Ct 2243. Here, in contrast, it is state law, not a political party's charter, that places the state central committees at a party's helm and in particular assigns the statutorily-mandated committee responsibility for conducting the party's campaigns.

23. [13b] Because we find that curbing intraparty friction is not a compelling state interest as long as the electoral process remains fair and orderly, we need not address the appellants' contention that the challenged laws weaken rather than strengthen parties.

EU v SAN FRANCISCO DEMOCRATIC COM.

103 L Ed 2d 271

First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is affirmed.

Chief Justice Rehnquist took no part in the consideration or decision of this case.

SEPARATE OPINION

Justice Stevens, concurring.

Today the Court relies on its opinion in *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173, 183-185, 59 L Ed 2d 230, 99 S Ct 983 (1979)—and, in particular, on a portion of that opinion that I did not join—for its formulation of the governing standards in election cases. In that case Justice Blackmun explained his acceptance of the Court's approach in words that precisely express my views about this case. He wrote:

"Although I join the Court's opinion . . . , I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' See, ante, at 184, 185, and 186 [59 L Ed 2d 230, 99 S Ct 983]. I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely an-

nounces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion." *Id.*, at 188-189, 59 L Ed 2d 230, 99 S Ct 983.

With those same reservations I join the Court's opinion today.

FILED

JUL 15 1990

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

ALLEN GRANT DOYLE, JR., and the )  
REPUBLICAN PARTY OF ALASKA, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
STATE OF ALASKA, et al., )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. A90-248 Civil

ORDER

(Preliminary Injunction Denied)

The court has under consideration a motion for preliminary injunction, filed June 11, 1990, by plaintiffs Allen Grant Doyle, Jr., and the Republican Party of Alaska.<sup>1</sup> Doyle is state chairman of the Republican Party of Alaska ("Party"). The motion seeks an order restraining and enjoining the several defendants from conducting the Party's August 28, 1990, primary

<sup>1</sup> This action was originally filed in Fairbanks on June 11, 1990, and assigned to District Judge Kleinfeld. Judge Kleinfeld subsequently recused himself, and the case was transferred to Anchorage on June 22, 1990.

in any manner other than as provided by Article XIV of the Party's rules, which was adopted in March of 1990 at the Party's statewide convention. As part of the desired injunctive relief, plaintiffs additionally request the court to restrain and enjoin defendants from enforcing, in the Party's August primary, two state statutes: AS 15.25.060 (requiring a single primary election ballot containing the names of all candidates for each office, grouped by office, without regard to party affiliation) and AS 15.07.070(c) and (d) (which defendants interpret to require that voters designate their party affiliation, or non-affiliation, at least thirty days prior to the primary).

Defendants include the State of Alaska; the State's Division of Elections ("DOE"); David Koivuniemi, the director of the DOE; and Lieutenant Governor Stephen McAlpine, in his official capacity as supervisor of elections. Defendants oppose plaintiffs' motion. A joint amicus curiae brief has been filed by the Alaska Federation of Natives and the Alaska Democratic Party. The amici also oppose plaintiffs' motion for provisional relief.

Additionally, plaintiffs filed a motion on July 6, 1990, requesting the court to enter an order directing the State of Alaska to make certain submissions to the Voting Section, Civil Rights Division of the Department of Justice, Washington, D.C., (hereinafter referred to as "Voting Section"), pursuant to section 5 of the Voting Rights Act of 1965. On July 9, 1990,

defendants filed an opposition to plaintiffs' motion for an order directing submission.

A telephonic status conference was held on July 9, 1990. Counsel for plaintiffs, defendants, and amici participated, as well as an attorney from the Voting Section. The court heard oral argument on Thursday, July 12, 1990. For the reasons outlined hereinbelow, plaintiffs' motion for preliminary injunction and motion for an order directing the state to submit matters to the Department of Justice are denied.

#### Jurisdiction

The motion for preliminary injunction raises federal constitutional issues, as well as certain matters cognizable under the Voting Rights Act of 1965 (as amended), 42 U.S.C. §§ 1971-1974 (1981). Additionally, plaintiffs have moved for an order requiring defendants to submit matters to the Voting Section in accordance with regulations promulgated by the Department of Justice pursuant to the Voting Rights Act. Jurisdiction is, as a general proposition, appropriate under 28 U.S.C. § 1331.

#### Background

Since 1967, statewide primaries in Alaska have been conducted as "blanket, open" primaries, with respect to the nomination of candidates for elective statewide and federal political offices. AS 15.25.010, et. seq. Primary candidates are listed on a single ballot, grouped together by office sought

rather than party affiliation. AS 15.25.060. Primary voters are not restricted to voting for candidates who correspond with the individual voter's political party affiliation (or lack thereof). By statute, voters are not eligible to vote in a primary unless they have registered to vote at least thirty days in advance of the scheduled date for a primary. AS 15.07.070. A voter wishing to change his or her existing registration must also do so at least thirty days in advance. AS 15.07.060 lists the information required for registration, but does not include a requirement that a registrant's party affiliation be declared. However, by administrative interpretation, the State has determined that a registrant must declare party affiliation (or lack thereof) thirty days in advance of an election as part of the registration process.

The Party held its statewide convention in March of 1990. Shortly before the convention began, a delegate to the convention informed Linda Edgeworth, a key staff member at the DOE, that the Party was likely to adopt a rule change regarding the 1990 primary. On March 31, 1990, the convention adopted a party rule directly affecting the manner in which the Party's primary, which is scheduled to be held on August 28, 1990, would be conducted. The newly adopted rule, Article XIV, provided as follows:<sup>2</sup>

---

<sup>2</sup> Although the rule is silent on the subject, the Party intended that any voter might change his designated party affiliation at the polls on the day of the primary election and

Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

The Party clearly desired that its new rule be implemented by defendants in time for the August 1990 primary. A copy of the rule was hand-carried to Linda Edgeworth's office on April 2, 1990. Lieutenant Governor McAlpine's office was notified telephonically on April 9, 11, 12, and 16 regarding the newly adopted rule. On April 20, 1990, the Party wrote a letter to McAlpine's office. The full text of the new rule was set forth in the letter, and the Party requested McAlpine to revise the voting procedures for the August 1990 primary to properly implement the new rule change. The Lieutenant Governor's office received the letter on April 27. Defendant Koivuniemi received a telefaxed copy of the same letter on April 25, 1990, and James Baldwin of the state Attorney General's Office also received a copy in late April. By letter dated May 5, 1990, Ken Jacobus advised Stephen McAlpine of certain case law authority upon which the Party relied in adopting the new rule. A copy of Jacobus' May 5 letter was also sent to defendant Koivuniemi.

After this initial flurry of activity, the Party waited for the outcome of the Alaska Democratic Party convention, held

---

thereby qualify to vote in the Republican primary.

in Nome in mid-May. The Party apparently expected that the Democrats would adopt a similar rule change, but they did not.

After the Democratic convention, the Party began a series of earnest contacts with defendants to ensure that defendants would and could implement the rule change in time for the August primary. These contacts have been extensively briefed by the parties and the court only summarizes them herein.

On May 24, 1990, a telephone conference was held by defendant Koivuniemi. Participants included Ken and Cheri Jacobus, counsel for the State, and key State election officials. Among other things, Koivuniemi expressed concern regarding the State's ability to properly implement the new rule, given the short time remaining before the primary. He opined that the rule was ambiguously worded and requested clarification on the Party's proposal that voters be permitted to change their party registration as late as the day of polling. There was also discussion regarding the manner in which absentee ballots would have to be handled if the rule were implemented for the August 1990 primary. On May 28, 1990, Kenneth Jacobus, Party counsel, sent a follow-up letter to Koivuniemi addressing the aforementioned concerns.

A second telephone conference was held by Koivuniemi on June 5, 1990, with essentially the same participants as before. Again, the discussion centered on several specific logistical problems (preparation of primary ballots, mailing of

absentee ballots, and so forth) that the State felt must be resolved in order to properly implement the new rule.<sup>3</sup> During this telephone conference, the Party learned that it needed to "preclear" its rule change with the Voting Section. Nothing was resolved in the second telephone conference. The State firmly maintained that it would apply the thirty-day registration requirement with respect to changes of party affiliation in conjunction with implementing the new rule, and generally reiterated its belief that insufficient time remained for implementation. The Party then made a submission to the Voting Section, to which the State formally objected by its letter to the Department of Justice dated June 15, 1990, and in a follow-up letter dated June 25, 1990. The instant action was filed on June 11, 1990.

#### Applicability of the Voting Rights Act

The primary purpose of the Voting Rights Act ("Act") is to extend the protections of the fifteenth amendment to members of racial and language minorities, to prevent discrimination in the form of denial or abridgement of the right to vote. State of South Carolina v. Katzenbach, 383 U.S. 301 (1966). Of particular concern are voting qualifications, prerequisites, standards, practices, or procedures which might have a racially discriminatory effect. Section 5 of the Act

---

<sup>3</sup> The extensive regulatory changes that the State believes necessary to implement the rule change for the August primary are thoroughly documented in the two affidavits of Linda Edgeworth filed in this action.

requires that any jurisdiction "covered" by the Act may not enforce any change pertaining to the manner in which elections are conducted without obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change is not discriminatory within the meaning of the Act. 42 U.S.C. § 1973c. Alternatively, a covered jurisdiction may satisfy the requirements of Section 5 by submitting the proposed change, along with certain supporting documents, to the Attorney General of the United States for "preclearance". See generally, 28 C.F.R. § 51 (1990); see also, Allen v. State Board of Elections, 393 U.S. 544, 549-50 (1969). The United States Supreme Court has consistently construed Section 5 to have the broadest possible scope. Perkins v. Matthews, 400 U.S. 379, 387 (1971). This has resulted in jurisdictions routinely submitting a plethora of proposed election changes to the Attorney General, some of which are very minor in nature. See, 28 C.F.R § 51.12. While most of the submissions are provided by states, political parties are subject to Section 5 of the Act and its preclearance requirements. 28 C.F.R. § 51.7 provides in part:

Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. ....Changes with respect to the conduct of

primary elections at which party nominees ... are chosen are subject to the preclearance requirement of section 5 ....

Submissions are made to the Voting Section. Under pertinent regulatory guidelines, the Attorney General has sixty days in which to review a submitted election change. 28 C.F.R. § 51.9. However, if a submitting jurisdiction materially supplements its original submission, then a new sixty-day period of consideration may go into effect. 28 C.F.R. § 51.39. If the Voting Section objects to the proposed change, the submitting party may request reconsideration. This, too, results in a new sixty-day period for review by the Voting Section. 28 C.F.R. § 51.45.

In this case, it is agreed that Alaska is a "covered" jurisdiction (see, 28 C.F.R. § 55 Appendix) and that the Party's new rule is subject to the preclearance requirement of Section 5 of the Act. Pursuant to 28 C.F.R. § 51.7, the Party made its submission on June 7, 1990, and requested expedited consideration. The party subsequently learned that defendants would also have to submit any new regulations and guidelines developed to implement the Party rule. See, 28 C.F.R. § 51.22. After contacting counsel for the Voting Section, the Party learned that the Voting Section would concurrently consider defendants' proposed implementation guidelines, notwithstanding that defendants are not required to submit such guidelines until the Party's rule had already been precleared. Counsel for the

Voting Section suggested to defendants that they prepare a submission for concurrent consideration. Plaintiffs filed a motion on July 6, 1990, requesting the court to order defendants to make their submission immediately. In the telephonic status conference held July 9, 1990, defendants averred that they have been working diligently to prepare the submission, and that it should be sent to the Voting Section, by express mail, on July 13, 1990. This was confirmed at oral argument on July 12, 1990.

In the July 9 status conference, counsel for the Voting Section indicated that the Voting Section had received several supplementations from the Party, the latest having been received that day. The court was also advised that the Voting Section would likely consider the latest supplementation to be a "material" one, such that a new sixty-day review period had begun to run; that the Voting Section viewed the Party rule as presenting a fairly substantive change which would require thorough review; and that it intended to obtain additional input from interested parties, particularly the Native voters in Alaska.

Thus, plaintiffs seek provisional relief from this court prior to any preclearance decision by the Voting Section. The parties are in agreement that the rule change cannot be validly employed in an election without preclearance from the Voting Section. The court's research shows this to be correct.

See, e.g., 28 C.F.R. § 51.1, 51.10. The Supreme Court has consistently so held. See, Connor v. Waller, 421 U.S. 656 (1975) (per curiam) (changes not precleared pursuant to Section 5 are "not effective as law"); Georgia v. United States, 411 U.S. 526, 538 (1973) (election laws are "frozen" until declaratory judgment or preclearance is obtained); City of Rome v. United States, 446 U.S. 156, 160-61, reh'g denied, 447 U.S. 916 (1980) (preclearance required); McDaniel v. Sanchez, 452 U.S. 130, 137 (1981) (laws not effective without preclearance).

The Party would have the court enter a prospective order enforcing the new rule for a Republican primary conditioned upon Voting Section clearance of the rule. To grant such an order, the court must necessarily evaluate the Party's alleged constitutional rights which, if established, would support implementation of the rule. In voting rights cases, it has been held that it is error for a court to adjudicate such constitutional claims until the Voting Section acts on the proposed change in voting rules.<sup>4</sup> This court concludes that it

---

<sup>4</sup> See, e.g., McDaniel v. Sanchez, 452 U.S. 130, 146 (1981) (quoting Wise v. Lipscomb, 437 U.S. 535, 542 (1978)); United States v. Board of Supervisors, 429 U.S. 642, 646-47 (1977); and Connor v. Waller, 421 U.S. 656 (1975) (per curiam). Cf. Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982), wherein plaintiffs raised constitutional challenges both to the existing Texas voter apportionment scheme and to a new apportionment plan adopted by the state. The three-judge court struck down the existing scheme, but held that it could not adjudicate the constitutionality of the new plan which had failed to obtain Department of Justice preclearance. However, the court retained jurisdiction in order to fashion an emergency apportionment plan for upcoming statewide elections, and the plan

is presently foreclosed from ruling upon whether the Party's rule is constitutionally protected until the rule becomes operative and effective by virtue of Voting Section review and approval. To act sooner would amount to the court rendering an advisory decision in violation of article III, section 2, of the United States Constitution.

#### Preliminary Injunction Analysis

The foregoing discussion disposes of plaintiffs' motion for preliminary injunction and, indeed, suggests that plaintiffs' complaint is subject to dismissal on the theory that there is not presently any justiciable case or controversy. For the sake of completeness, and in order that the court's entire analysis of plaintiffs' motion may be available for possible appellate review, the following additional discussion of the matters before the court are included.

In a straightforward fashion, plaintiffs seek to have the court order the defendants to place the new Republican primary rule into effect. They claim that their decision to alter the primary is fully supported by constitutional case law construing the first amendment rights of association enjoyed by state political parties. Plaintiffs principally rely on the holdings in Tashjian v. Republican Party of Connecticut, 479 U.S.

---

was ordered without preclearance. Id. at 525-526 n.14 (citing Conner v. Waller, 421 U.S. at 656-57 (inability to adjudicate constitutional claims regarding new plans does not divest district court of jurisdiction to order a temporary plan)).

208 (1986); and San Francisco County Democratic Central Committee v. Eu, 792 F.2d 802 (9th Cir. 1986), vacated & remanded, 479 U.S. 1024, on remand, 826 F.2d 814 (9th Cir 1987), affirmed, 489 U.S. 214 (1989). Plaintiffs see two primary benefits resulting from the new rule: a decreased opportunity for crossover voting ("raiding"), and a chance to strengthen the Party by nominating and electing Republican candidates who are more consistent in their party's ideology.

Defendants acknowledge the rights of association at issue here, but contend that the State of Alaska has certain compelling governmental interests which must be balanced against plaintiffs' alleged right to alter the primary. Specifically, defendants aver that the State has a duty to ensure the integrity and orderliness of elections, and that insufficient time remains before the August primary in which to properly implement the Party rule and still fulfill that duty. Within that duty, defendants express two major concerns: that the State must shoulder an unacceptable administrative burden to make all the necessary changes to implement the Republican primary, and that many voters (particularly rural voters, many of whom are Native and protected under the Voting Rights Act) will be confused and possibly disenfranchised due to the late change in the primary election procedures.

In addition to their Voting Rights Act arguments, amicus Alaska Federation of Natives expresses two concerns.

First, it argues that implementation cannot be smoothly carried out in the few weeks remaining until the primary election, which will result in confusion and disenfranchisement among Native voters who will not be properly and timely advised of the changes. Secondly, the Federation contends that Native voters have traditionally benefitted from being able to employ crossover voting to build political coalitions helpful to Native causes. In a related vein, the Alaska Democratic Party asserts that it still welcomes Republican voters crossing over in the primary.

The Ninth Circuit recently articulated and summarized the pertinent factors which a district court must consider in deciding whether to grant or deny injunctive relief. State of Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988). Those four factors are:

- (1) The likelihood of the plaintiff's success on the merits;
- (2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
- (3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,
- (4) the public interest.

Id. at 1388. The court went on to note that the four factors can really be condensed into two factors: the likelihood of success on the merits and the relative balance of potential hardships to the plaintiff, the defendant, and the public. Id. at 1389. Those two primary factors have been employed in a test framed in

the alternative, though the alternatives are really to be treated by the district court, for analytical purposes, as "extremes of a single continuum." Id., quoting Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). The alternative test has been framed thusly:

Basically, plaintiffs are entitled to preliminary injunctive relief if:

- 1) They demonstrate
  - . a probable success on the merits, and
  - . a possibility of irreparable injury;
- 2) or if they demonstrate
  - . a fair chance of success on the merits (i.e., serious questions are raised), and
  - . the balance of hardships tips sharply in their favor.

Native Village of Venetie, 856 F.2d at 1389.

Applying the foregoing, the court will first focus upon the issue of probable success on the merits. As discussed above, the court cannot say that plaintiffs will probably succeed on the merits. At the most, plaintiffs raise a serious question. The court accepts, and the defendants themselves appear to accept, plaintiffs' contention that first amendment rights of free association are substantially implicated in the rule change which the Party would put into effect. The United States Supreme Court has recognized this right in its decision in Tashjian v.

Republican Party of Connecticut, 479 U.S. 208 (1986). ~~was~~

important as these rights may be, however, there is little chance of plaintiffs prevailing on the merits of the present complaint because, as set out above, the Party seeks to enforce an inchoate rule--that is, a rule raising serious constitutional questions which this court does not presently have the power to reach due to the absence of Voting Rights Act preclearance.

The foregoing appraisal of the Party's chances of success on the merits calls into play that portion of the test for granting or denying preliminary injunctions which calls upon a plaintiff to demonstrate that the balance of hardships tips sharply in the plaintiff's favor. In this case, the court concludes that the hardships are substantially in equipoise.

The court's refusal to order implementation of the Party's primary election rule will result in the conduct of a "blanket" open primary in which registered members of other political parties can vote in the Republican Party primary. The court's decision forces the Republican Party to associate with those Democrats or Alaska Independence Party members who would cross party lines and vote for a Republican in the upcoming primary election. The harm is of a nature which is substantially irreparable.

On the other side, defendants and amici argue persuasively that rural Alaskans will be disenfranchised because of the complexity of regulatory changes which must take place in

order to implement the Party's new primary rule. While the State of Alaska is blessed with substantial means of communication between large cities and most of the very small villages in the state, the court is convinced, on the basis of defendants' showing, that there is inadequate time to formulate the rule changes, educate the rural election workers, and still provide time enough for the latter as well as others using public radio, television, and other means of communication to educate the public as to the options available to them in the upcoming primary election under the Party's new rule. Especially troubling to the court is the Party's suggestion that, under its rule, an individual voter might be entitled to vote in both the Republican primary and the "other" primary as well. The possibility of a voter having two votes (one in each primary) strikes the court as dramatic proof of the complexity (which the court did not initially perceive) of educating the electorate.

Similarly, the defendants' approach to structuring ballots, were the Party's rule to be implemented, suggests further complexities. The defendants suggest that the Republican Party ballot should list all candidates, of whatever party, such that Republicans could vote for whomever they wish; and that the "other" primary should list all candidates except Republican candidates. The court's initial reaction to this proposed implementation of the Party's rule was that it stood the rule on its head. On further reflection, the court is still of a view

that the State's suggestion for the ballot structure is disingenuous; but the mere fact that it is a plausible approach to implementation of the rule further underscores the complexity of conducting simultaneously two or more primary elections when the rules for all are not the same and where, as here, a certain amount of crossover voting is still allowed. Thus the court has concluded that there is a substantial risk that the defendants will be unable to adequately instruct the electorate in time for an August 28, 1990, primary election, and that some will be discouraged from voting and others will be at best confused, and at worst misled, despite everyone's best efforts as regards exercising their vote. The court views this type of hardship as irreparable also.

Understandably, neither the Party nor the defendants have attempted, nor is it likely that they would be able to quantify in a meaningful fashion the extent of hardship occasioned by the harm to which the court perceives each side to be exposed. Given the prospective nature of the analysis, it is not possible to say how many votes may be cast by Democrats in what should be a Republican rule primary, nor is it possible to say how many voters may be disenfranchised because of inadequate opportunity to construct a new primary election procedure and implement it. This much the court can say very readily: The balance of hardships certainly does not tip sharply in the Party's favor. In a very rough sense, the amount of harm to

which each is exposed is the same; and, in the absence of any other proof, the court concludes that the harm to the Party and to the voters who may be disenfranchised is roughly equal.

In addition, the public interest has a part in the balance of hardships which is not addressed by the foregoing. Native Village of Venetie, 856 F.2d at 1388. "In this case, the court perceives there to be a substantial public interest in having elections conducted timely and in an orderly fashion." Coghill v. Booher, 511 P.2d 1297 (Alaska 1973); Terrazas v. Clements, 537 F. Supp. 514, 527 (N.D. Tex. 1982).

The Party, on brief and in oral argument, has made fleeting reference to the possibility of deferring the primary election in order to afford more time for instruction to the voters and more time for the Department of Justice to clear the Party's new primary election rule. The foregoing authorities suggest that such action should not be taken except for very compelling reasons. The court perceives no compelling reason to disrupt the normal election process in this case. It takes no great amount of imagination, nor is it unduly speculative, for the court to suggest that a delay in the primary election risks changing the chemistry of the election itself. It is impossible to say what changes might occur between August 28, 1990, and some subsequent date to which an election might be postponed. Inevitably, a change in the election date will affect the ability or willingness of some voters to participate in the election.

Thus the public interest consideration adds weight on the defendants' side of the balance of hardships, not the plaintiffs.

Finally, and not a part of the general calculus for granting or denying preliminary injunctions, the court has given some small consideration and weight to the defendants' contention that the Party has delayed seeking to effect the rights which it would have the court order. Injunctive relief is equitable in nature, and the court has the discretion to consider whether or not the party seeking injunctive relief has timely moved to protect his or its interests. In this instance, there is an element of delay on the part of the Party. The Party might have sought preclearance from the Voting Section of the Department of Justice immediately upon adopting its rule for a Republican primary election. It did not do so. The Party delayed more than sixty days between the adoption of its rule and the presentation of the matter to the Department of Justice. At the conclusion of oral argument, the court suggested that the Party was accountable for some laches or delay in pursuing its rights. On further reflection, the court has come to doubt that the loss of sixty days' time for consideration of the Party's rule by the Department of Justice has any role in determining, as between the Party and the defendants, whether a preliminary injunction should issue. There was no delay on the part of the Party in its dealings with the defendants, and the Party has already been saddled with the effect of its delay before the Justice

Department when the court held that it was without power to consider the constitutional aspects of the Party's new primary election rule because the Voting Section had not acted.

For the foregoing reasons, the court would deny a preliminary injunction even if it had the power to consider the merits of plaintiffs' complaint.

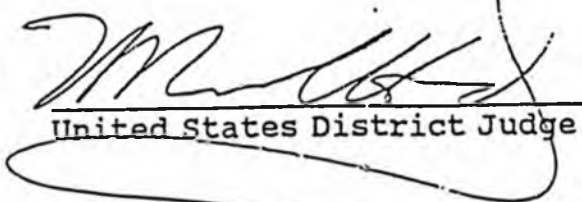
Plaintiffs have also moved for an order requiring the State of Alaska to immediately make its submission to the Department of Justice, Voting Rights Section. This motion is now in substance moot in light of the fact that the plaintiffs' motion for preliminary injunction has been denied. More generally, the parties now seem in agreement that there is no regulatory requirement that the State file its procedures with the Department of Justice until after the Voting Section has acted upon the Party's presentation. See 28 C.F.R. § 51.22.

Accordingly, the plaintiffs' motion with regard to the State filing with the Department of Justice is denied.

Finally, the Party has suggested that the court must rule upon certain state law questions which it fears will be outside the purview of the Justice Department's Voting Section. Here the Party has reference to disagreements with the State as to (among other things) whether a voter's party designation may be changed on the day of election or whether it must be changed thirty days in advance. These matters present state law questions which are not necessarily raised by the motions

presently before the court, and the court declines to offer any opinion on these issues at this time.

DATED at Anchorage, Alaska, this 13th day of July, 1990.

  
United States District Judge

cc: W. Ross (ROSS)  
K. Jacobus  
AAG-K  
J. Rubini (BIRCH)

[479 US 208]  
JULIA H. TASHJIAN, Secretary of State of Connecticut, Appellant

v

REPUBLICAN PARTY OF CONNECTICUT et al.

479 US 208, 93 L Ed 2d 514, 107 S Ct 544

[No. 85-766]

Argued October 8, 1986. Decided December 10, 1986.

**Decision:** Connecticut prohibition of political party's choice to permit independents to vote in certain party primary elections held to violate freedom of association under First and Fourteenth Amendments.

#### SUMMARY

A Connecticut statute allowed only party members to vote in a primary election for a nomination to public office by a major political party. In 1983, one of the state's two major political parties adopted a rule (1) attempting to permit independents—registered voters not affiliated with any political party—to vote in the party's primaries for federal and statewide public offices, while (2) remaining silent as to the party's primaries for nominations for the state legislature. Then, challenging the state statute, the party, its federal officeholders, and its state chairperson filed suit in the United States District Court for the District of Connecticut against the Secretary of the State of Connecticut, who was charged with the administration of the state's election statutes. The District Court granted summary judgment in favor of the party and its members, expressing the view that the statute (1) imposed a substantial burden on their right of association under the First and Fourteenth Amendments to the United States Constitution, and (2) was not supported by any compelling state interests (599 F Supp 1228). On appeal, the United States Court of Appeals for the Second Circuit affirmed, expressing the view that (1) the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment to the United States Constitution, requiring that voters in elections for the United States House of Representatives and Senate have the same qualifications as voters in elections for the most numerous branch of the state legislature, did not apply to party primaries; and (2) the state statute prohibiting the party rule substantially interfered with the party's constitutional right of political association, by determining

Briefs of Counsel, p 1089, infra.

who was eligible to participate in the party's candidate selection process (770 F2d 265).

On appeal, the United States Supreme Court affirmed. In an opinion by MARSHALL, J., joined by BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., it was held that (1) the state's statutory prohibition of the party's primary voting rule placed an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments, while the interests asserted by the state in defense of the statute were insubstantial, and (2) the party rule did not violate the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment, because the clauses did not require a perfect symmetry, even though the clauses did apply to congressional primary elections.

STEVENS, J., joined by SCALIA, J., dissented, expressing the view that, under the circumstances, allowing independents to vote in primary elections for the United States House of Representatives and Senate, while prohibiting such voters from participating in primary elections for the state house of representatives, violated the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment.

SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, J., dissented, expressing the view that the Connecticut restriction on a party's primary voting to party members was constitutional, and that the Supreme Court's opinion exaggerated the importance of the associational interest at issue, if indeed such an interest existed.

**Constitutional Law § 940.5; Elections § 2 — party choice to allow independents to vote in primaries — freedom of association**

1a-1g. A state statute which prohibits a political party from exercising its choice to permit independents—registered voters not affiliated with any party—to vote in the party's primary elections for federal and statewide offices places an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments to the

United States Constitution, where (1) any interference with the freedom of a political party is simultaneously an interference with the freedom of its adherents; (2) under the circumstances, there is no conflict between the associational interests of members and nonmembers over voting in such elections; (3) a state law which permits registration as a party member until noon of the last business day preceding a primary is not a satisfactory response, for it requires action by the voters rather than the party, and insists upon a public act

**TOTAL CLIENT-SERVICE LIBRARY® REFERENCES**

25 Am Jur 2d, Elections §§ 116-119, 129-131, 150-152, 159; 77 Am Jur 2d, United States § 23

USCS, Constitution, Article I § 2 cl 1, Article I § 4 cl 1, Amendments 1, 14, 17

US L Ed Digest, Constitutional Law § 940.5; Elections §§ 2, 4 Index to Annotations; Congress; Due Process; Elections and Voting; Freedom of Association; Legislature; States

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, Auto-Cite® and SHOWME™. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

**ANNOTATION REFERENCES**

Supreme Court's views regarding the First Amendment right of association as applied to the advancement of political beliefs. 67 L Ed 2d 859.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Fourteenth Amendment as affecting nomination or election to state office. 11 L Ed 2d 1057, 23 L Ed 2d 782.

of affiliation with the party as a condition of association; (4) the power of the state under the Constitution (Art I, § 4, cl 1) to prescribe the time, place, and manner of holding elections for United States Senators and Representatives, which power is matched by state control over the election process for state offices, does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens; and (5) the interests which the state asserts in defense of the statute are insubstantial. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented from this holding.)

**Elections §§ 2, 4 — primaries — different qualifications for federal congressional and state legislative voters**

2a-2e. A political party's rule permitting independents—registered voters not affiliated with any party—to vote in the party's primary elections for the United States House of Representatives and Senate, while remaining silent as to voting by such independents in the party's primary elections for the state legislature, does not violate the Federal Constitution's clauses on qualifications of federal congressional electors (Art I, § 2, cl 1, and the Seventeenth Amendment), where (1) the two clauses apply to the state's primary elections in precisely the same fashion as they apply to general congressional elections, (2) the two clauses do not require perfect symmetry, and (3) the party rule does not disenfranchise any voter in a federal congressional election who is qualified to vote in a primary or general election for the more numerous house of the state's legislature. (Stevens and Scalia, JJ., dissented from this holding.)

**Constitutional Law § 940.5; Elections § 1 — First Amendment — tests**

3. Constitutional challenges to specific provisions of a state's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions; instead, a court must (1) consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that a plaintiff seeks to vindicate, and (2) identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule; a court must not only determine the legitimacy and strength of each of these state interests, but also consider the extent to which these interests make it necessary to burden the plaintiff's rights.

**Constitutional Law § 36.3 — freedom of speech and association — due process**

4. Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Federal Constitution's Fourteenth Amendment, which embraces freedom of speech.

**Constitutional Law § 940.5 — freedom of political association — extent**

5a-5c. The freedom of association protected by the First and Fourteenth Amendments of the United States Constitution includes partisan political organization; the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom; freedom to join together in the furtherance of common political beliefs necessarily presupposes the freedom