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1991

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# THE CONSTITUTION AND POLITICAL PARTIES: SUPREME COURT JURISPRUDENCE AND ITS IMPLICATIONS FOR PARTYBUILDING

*Brian L. Porto**

## I. INTRODUCTION

During the 1980s, several political scientists produced commentaries criticizing federal court decisions concerning state regulation of political parties as reflecting judicial ambivalence about "responsible" or "ideological, programmatic, centralized and disciplined" political parties.[1] These commentators argued that the federal courts, notably the United States Supreme Court, are unclear

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1. See Debra L. Dodson, *The Federal Courts and American Political Parties: Legal Constraints on the Development of a Responsible Party System* 1 (paper presented to the Midwest Political Science Association, Chicago, April 11-15, 1984) ("*American Political Parties*").

Dodson notes that "responsible" political parties can be held accountable by the voters for their actions. Id. "Because there is one party line, the voters know the policies that the party will try to implement if it wins office." Id. at 2. Similarly, "[b]ecause the party is centralized and disciplined, the winning party has the resources to carry out its platform by coercion of unorthodox members if necessary." Id.

In a responsible party system, "[p]arties would have to exclude both voters and candidates with deviant ideologies in order to preserve ideological homogeneity." Id. at 1. "The party line would be determined at the highest level and lower level organizations and office holders would be compelled to follow it." Id. Hence, "[t]hose running under the party label would have to agree with the party principles and would have to support those principles if elected. If they did not, they would not be allowed to continue as leaders in the party." Id. at 2.

At present, a responsible party system does not exist in the United States. Dodson argues that "[i]f a responsible party system is to develop, the party must be freed from control of those with pragmatic, non-ideological motives and must have the ability to control access to the organization. In other words, the party must be viewed legally as an extra-legal organization, freed from the pragmatic concerns of state legislatures and the constraints of the Constitution." Id.

For additional analysis of responsible political parties and responsible political party systems, see generally, Samuel J. Eldersveld, *Political Parties in American Society* (Basic Books, 1982); Austin Ranney, *Curing the Mischiefs of Faction* (U. Cal. Press, 1975); and Committee on Political Parties, *Toward a More Responsible Two-Party System*, 44 Am. Pol. Sci. Rev. (supplement) 1-96 (Sept. 1950).

about the role that political parties should play in American politics and hence base their decisions concerning the regulation of parties upon constitutional doctrines such as equal protection and freedom of association, rather than upon a single, "holistic" model of party politics.[2]

According to these political scientists, the doctrinal emphasis produced confused, contradictory and unpredictable results[3] and hindered the development of responsible political parties in the United States.[4] For example, "court decisions have improved the stature of the national party," which "has a constitutional protection that allows it to ignore state election law," but the "ballot access cases and the patronage decisions surely have contributed to the general decline of political parties in recent years."[5]

In contrast to their political science counterparts, the authors who wrote law review commentaries on party regulation during the 1980s optimistically assessed recent Supreme Court and lower federal court decisions, praising the implications for efforts to build strong, ideological parties.[6] Although they did not share the political scientists' pessimism concerning political parties, the law review commentators did share the political scientists' desire for programmatic, disciplined parties.[7] The law review commentators emphasized what they perceived to be the Supreme Court's increased willingness, during the 1970s and 1980s, to view political parties as quasi-private entities whose members' freedom of association liberates their organizations from legislatively and judicially-imposed regulation of nomination processes.[8] In short, the law review authors focused upon the distance the Court had travelled in recogniz-

2. See note 1. See also John Moeller, *The Federal Courts' Involvement in the Reform of Political Parties*, 40 Western Pol. Q. 717 (1987); Malcolm E. Jewell, *Political Parties, Courts and the Nominating Process* (paper presented to the Southern Political Science Association, Nashville, November 7-9, 1985); Clifton McCleskey, *Parties at the Bar: Equal Protection, Freedom of Association and the Rights of Political Organizations*, 46 J. of Pol. 346 (1984).

3. McCleskey, 46 J. of Pol. at 361 (cited in note 2).

4. See generally Dodson, *American Political Parties* (cited in note 1).

5. Moeller, 40 W. Pol. Q. at 731-32 (cited in note 2).

6. See Note, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. Cin. L. Rev. 799-830 (1987); Arthur M. Weisburd, *Candidate-Making and the Constitution*, 57 S. Cal. L. Rev. 213 (1984); Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117 (1984); Craig L. Carr and Gary L. Scott, *The Constitutionality of State Primary Systems: An Associational Rights Analysis*, 10 J. Contemp. L. 83 (1984); Craig L. Carr and Gary L. Scott, *Political Parties Before the Bar: The Controversy Over Associational Rights*, 5 U. Puget Sound L. Rev. 267 (1982); Stephen E. Gottlieb, *Rebuilding the Right of Association: The Right to Hold a Convention as a Test Case*, 11 Hofstra L. Rev. 191 (1982); James S. Fay, *The Legal Regulation of Political Parties*, 9 J. Legis. 263 (1982).

7. See note 6.

8. See note 6.

ing the associational freedom of political parties, while the political scientists stressed the distance the Court must still travel if it is to assist in the development of a responsible party system in the United States.

The discussion that follows is an attempt to reconcile these divergent perspectives on the regulation of political parties and to assess the status of such regulation in the aftermath of the Supreme Court's decisions in *Tashjian v. Republican Party of Connecticut*[9] and *Eu v. San Francisco County Democratic Central Committee*.[10] The principal focus of that discussion will be decisions of the United States Supreme Court concerning state regulation of political party nomination and internal governance procedures. These decisions are sufficiently numerous and doctrinally complex that they warrant exclusive treatment herein; hence, Supreme Court policymaking concerning patronage, ballot access by independent candidates and campaign finance must await assessment at a later date. Thus, this commentary will not endeavor to present a comprehensive review of recent Supreme Court jurisprudence relative to state regulation of political parties, but will instead undertake a thorough examination of the Court's doctrinal shift in the past few years in nomination and internal governance cases.

There is merit in making this attempt to reconcile legal and political science perspectives because state regulation of political parties cannot be fully understood absent a firm grasp of both the doctrinal bases for the Supreme Court's decisions and the public policy goal of establishing responsible political parties in the United States. If the law review commentaries often lose sight of the public policy forest by becoming lost in the doctrinal trees, the political science commentaries frequently give short shrift to the trees that provide the forest with its peculiar hue and texture.

Once the present state of party regulation is understood, it becomes possible to predict the direction that future federal court decisions on this subject are likely to take. Moreover, an assessment of whether the federal judiciary is, as has been argued, an impediment to the development of responsible parties in the United States also becomes possible.

The discussion that follows will conclude that the United States Supreme Court's decisions in *Tashjian* and *Eu* call into question—at least with respect to party nomination and internal governance procedures—the political science wisdom that the federal judiciary represents an impediment to the formation of ideological,

9. 479 U.S. 208 (1986).
10. 489 U.S. 214 (1989).

programmatic, centralized and disciplined political parties in the United States.[11]

## II. THE EVOLUTION OF SUPREME COURT JURISPRUDENCE CONCERNING STATE REGULATION OF POLITICAL PARTIES

### A. THE SUPREME COURT'S CHANGING VIEWS OF STATE ACTION

Until recently, the federal courts have upheld legislatively or judicially-imposed controls on political parties on the ground that the parties' direct involvement in the electoral process renders party activities "state action" within the meaning of the fourteenth and fifteenth amendments to the United States Constitution.[12] As state action, party activities could be regulated or enjoined in order to ensure that they did not deny the equal protection of the laws to any segment of the electorate or abridge the right to vote or to associate with the political party of one's choice.[13] Party activities such as nominations were seen as "state action" because they performed the "public function" of selecting candidates to run for public office.[14]

In recent years, however, the Supreme Court has held that although nominations *can* be state action, such as when a particular nominating procedure is required by statute, nominations are not *necessarily* state action, and thus are not always subject to constitutional requirements.[15] This is because the Court has substantially altered the state action doctrine by restricting the "public function" concept upon which state action has long been based to activities that traditionally have been performed exclusively by the state.[16]

In this doctrinal scheme, nominations are not state action because they have not traditionally been performed by the state.[17] Some states establish requirements that candidates must meet in order to earn a position on an election ballot, such as a requisite number of petition signatures or a minimum percentage of the vote at an endorsing convention, but parties, not states, select the nomi-

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11. See note 2.

12. See, for example, *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941). See also Fay, 9 J. Legis. at 266 (cited in note 6).

13. See note 12.

14. Weisburd, 57 S. Cal. L. Rev. at 236-51 (1984) (cited in note 6).

15. Id. at 232.

16. Id. at 239-41. See also *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974).

17. Weisburd, 57 S. Cal. L. Rev. at 239 (cited in note 6).

nees.[18] Indeed, the nominating function bears no relationship to the neutral electoral duties customarily performed by the state, such as ensuring that voters and candidates are legally eligible to vote and to run, respectively, and that the casting and tallying of votes is free of fraud.[19] Although the nominating function is integral to an election, it is not integral to the particular electoral role traditionally played by the state. Under recent Supreme Court jurisprudence, it is not state action.[20]

Accordingly, unless they are statutorily mandated, political party nominating procedures are entirely free from the restrictions that the fourteenth and fifteenth amendments impose upon states.[21] Nonetheless, this paper will demonstrate that doctrinal grounds other than state action exist for prohibiting the race, ethnicity and gender-based exclusion of voters from the nomination process that state action has prohibited in the past.

### B. The Associational Freedom of Parties and Their Members

The Court first articulated the concept of freedom of association in *NAACP v. Alabama*[22] in 1958, holding that the state could not compel the NAACP to disclose its membership list. Basing its decision on the Due Process Clause, the Court ruled that forced disclosure infringed the members' "freedom to engage in association for the advancement of beliefs and ideas."[23] The Court indicated that associations were to be protected regardless of whether they focused on "political, economic, religious or cultural matters."[24]

Despite this broad definition of associational freedom, political parties did not benefit from *NAACP v. Alabama* until the mid-1970s. In 1975, the Court ruled in *Cousins v. Wigoda*[25] that the Democratic National Convention rather than the Illinois state election laws should determine the eligibility of state delegates to the Party's quadrennial national nominating convention.

Also during the 1970s, however, the Supreme Court in a series of cases upheld state regulation of *state* party nominations and governance procedures. In *Rosario v. Rockefeller*,[26] the Court upheld a

18. Id. at 246-49 n.221.
19. Id.
20. Id.
21. Id. at 251.
22. 357 U.S. 449 (1958).
23. Id. at 460.
24. Id.
25. 419 U.S. 477 (1975).
26. 410 U.S. 752 (1973).

New York law requiring voters to enroll in their party of choice at least thirty days before the general election in November in order to be eligible to vote in the next primary election after the general election. The Court reasoned that the enrollment statute was designed to serve, and would serve, the state's valid purpose of inhibiting the raiding of one party by voters loyal to another party.[27] In *Marchioro v. Chaney*,[28] the Court upheld a Washington statute requiring the Democratic and Republican parties to have state committees consisting of two persons elected from each of the thirty-nine counties in the state. The Court accepted the state's argument that the statute served its compelling interest in ensuring fair and orderly nomination processes.

In 1981, the Court hinted that *Cousins* would prevail over the primary cases. In *Democratic Party v. Wisconsin ex rel LaFollette*[29] the Court upheld the right of the Wisconsin Democratic Party—pursuant to state law—to elect its national delegates by means of an open primary, but simultaneously upheld the right of the National Democratic Party to refuse to seat delegates so chosen. The National Party rules required closed primaries, and the Court rested its decision squarely upon the freedom enjoyed by the National Democratic Party and its members, under the first amendment, to association for the purpose of advancing shared political beliefs. Justice Stewart's majority opinion noted that "[a] political party's choice among the various ways of determining the make-up of a state's delegation to the party's national convention is protected by the Constitution," and that "the courts may not interfere on the ground that they view a particular [method] as unwise or irrational."[30]

Both before and after *LaFollette*, many political scientists nevertheless concluded that states were free to regulate state party workings. They interpreted *Cousins* as resting primarily on the pervasive national interest inherent in a national party nominating convention.[31] One commentator wrote that neither *Cousins* nor *LaFollette* established "any useful precedent for determining whether state political parties may challenge state laws that control

27. Id. at 760-61. Later that term, however, the Court found the limits of a state's ability to require pre-registration. In *Kusper v. Pontikes*, 414 U.S. 51 (1973), the Court invalidated an Illinois law that prohibited a voter from voting in the primary election of one political party after having voted in the primary of another party during the preceding twenty-three months. The Court held that although preventing raiding was a legitimate state interest, the statute infringed too far on the voter's right to associate with a political party of choice.

28. 442 U.S. 191 (1979).

29. 450 U.S. 107 (1981).

30. Id. at 123-24.

31. See note 2.

voter participation in state primaries for the nomination of public officials."[32]

On the contrary, *LaFollette* is a useful precedent for determining whether state parties may challenge state laws controlling voter participation in primaries because its conclusion that national parties may challenge antagonistic state election laws is based not on the "national" nature of the national parties, but upon associational freedom, which is unrelated to an organization's national or statewide base. Indeed, *LaFollette* noted that political party members have a right to "protect themselves from 'intrusion by those with adverse political principles,' "[33] which suggests that a party can demand not merely nominal affiliation, but also acceptance of a particular ideology, as a condition of membership.[34] Hence, *LaFollette* can reasonably be construed to view state political parties as organizations whose activities, including nominations, are not state action, therefore are free from regulation by state legislatures and courts absent a showing of a compelling state interest in regulation and the availability of no less restrictive regulatory device than the one selected.[35] *LaFollette* can also reasonably be construed to view the freedom of association as guaranteeing the parties' right to exclude on ideological grounds.[36]

Thus, despite the political science critiques, it is reasonable to infer from *LaFollette* that state regulation of the nomination activities of a political party unconstitutionally burdens the associational freedom of party members unless the state demonstrates that the party's determination of who may participate in those activities, including a primary election, bears no relationship to the commonality of ideological purpose underlying the right to associate.[37] Accordingly, the state retains power to prevent parties from excluding would-be participants as a result of their race, ethnicity or gender because those characteristics bear no necessary nexus to ideology; the parties' power to exclude is a power to exclude on the basis of ideological incompatibility only.[38]

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32. Jewell, *Political Parties, Courts and the Nominating Process* at 6-7 (cited in note 2).

33. 450 U.S. at 122 (quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952)).

34. Weisburd, 57 S. Cal. L. Rev. at 213, 266 (cited in note 6).

35. Id. at 270.

36. See generally Note, 94 Yale L.J. at 117 (cited in note 6).

37. Id. at 129.

38. This power, though, does not derive from the fact that nominations are essential components of the electoral process, hence state action, as the Supreme Court held during the 1940s and 1950s, in striking down statutes that restricted participation in primaries to whites. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944). Rather, the state's power to prevent such exclusions from nomination processes after *LaFollette* derives from the fact that the exclusions are unrelated to the commonality of ideological purpose that underlies the parties' freedom of association.

This associational analysis of *LaFollette* has recently been validated by the Supreme Court. In *Tashjian v. Republican Party of Connecticut*[39] and *Eu v. San Francisco County Democratic Central Committee*,[40] the Court held that state parties' freedom of association entitles them to determine their own nomination and internal governance procedures free from state regulation.

At issue in *Tashjian* was a rule, adopted by the Republican Party of Connecticut in 1984, that permitted independent voters to vote in Republican primaries for federal and statewide offices.[41] The Party rule soon came into conflict with a Connecticut law that required voters in a primary to be registered members of the party in whose primary they participated.[42]

The Republican Party of Connecticut, its federal officeholders, and State Chair challenged the primary eligibility law, arguing that it deprived the Party of its first amendment right to enter into political association with individuals of its own choosing.[43] More precisely, the Party contended that opening its primary to independent voters represented an attempt to broaden its base of support in the electorate, which was essential to its exercise of the freedom of association.[44]

Secretary of State Tashjian countered that the contested statute was the least restrictive means available of advancing Connecticut's compelling interests in: (1) ensuring the orderly administration of primaries, (2) preventing "raiding" of one party's primary by voters loyal to an opposing party, (3) avoiding voter confusion and (4) protecting the "integrity of the two-party system" and the "responsibility of party government."[45]

The Court rejected each one of Tashjian's arguments. In response to her contention that it would be costly to administer primaries if the Party's rule controlled because additional voting machines, poll workers and ballots would be needed, the Court observed that increased administrative costs were an insufficient rea-

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39. 479 U.S. 208 (1986).

40. 489 U.S. 214 (1989).

41. 479 U.S. at 212. The rule stated:

> Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller, and Treasurer.

42. Gen. Stat. Conn. § 9-431 (1985). The statue provides in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district . . ."

43. 479 U.S. at 211.

44. Id. at 214.

45. Id. at 217.

son to infringe upon the associational freedom of the Party and its voters.[46] In response to Tashjian's argument that the challenged statute prevented "raiding," whereby voters sympathetic to one party designate themselves voters of the other party so as to influence the results of the raided party's primary, the Court noted that the Connecticut statute at issue did not impede raids on the Republican primary by independents because it permitted them to participate in that primary if they registered to vote with the Republican Party beforehand.[47] Hence, the law hardly served the State's legitimate interest in curtailing raiding so as to insure the integrity of the electoral process.[48]

The Court also dismissed Tashjian's argument that a closed primary serves the compelling state interest of avoiding voter confusion.[49] Voter confusion is increased by open primaries, Tashjian contended, because voters find it difficult to identify the political beliefs of a candidate who is nominated in part by an unknown group from outside the party, but who uses the party's label in running for public office.[50] The majority opined that voters are not so easily misled as Tashjian claimed and noted that state election law would reduce the potential confusion occasioned by an open primary considerably because it required a candidate to receive at least twenty percent of the vote at a state party convention in order to earn a place on a primary ballot.[51]

Finally, the Court rejected Tashjian's argument that the statute furthered the state's compelling interest in protecting the integrity of the two-party system and the responsibility of party government because closed primaries promote responsiveness by elected officials and strengthen political parties.[52] The majority acknowledged that Tashjian might be correct in her assertions, but noted that even if she were, the lesson of *LaFollette*—that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party"—controlled.[53] This is because "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."[54]

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46. Id. at 218.
47. Id. at 219.
48. Id.
49. Id. at 220-22.
50. Id. at 220.
51. Id. at 221.
52. Id. at 222.
53. Id. at 224 (quoting *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107, 123-24 (1981)).
54. Id. at 224.

At issue in *Eu v. San Francisco County Democratic Central Committee* were several sections of the California Elections Code, which forbade official governing bodies of political parties from endorsing candidates in primaries, dictated the necessary organization and composition of the State Central Committee, fixed the maximum terms of office for the Chair of that Committee, required that that post be held, alternately, by residents of northern and southern California, specified the time and place of Central Committee meetings, and limited the dues the parties could impose upon members.[55]

The plaintiffs were members of state and county central committees of political parties in California as well as other groups and individuals active in party politics in California.[56] They argued that the ban on endorsements and the restrictions on party self-government contained in the Elections Code deprived the parties and their members of the freedoms of speech and association guaranteed by the first and fourteenth amendments to the United States Constitution.[57]

Secretary of State March Fong Eu countered that the challenged provisions were the least restrictive means available of achieving compelling state interests: (1) insuring stable government and (2) protecting voters from the exercise of undue electoral influence by party leaders and from the fraud, corruption and voter confusion that could result from that exercise of influence.[58]

The Supreme Court rejected the State's arguments for both the ban on endorsements and the restrictions on party self-government. The endorsement ban violates the parties' freedom of association because it "directly hampers the ability of a party to spread its

55. Cal. Elec. Code § 11702 (West 1977) contains the endorsements ban. Sections 8660-61 and 8663 (West 1977 and supp. 1988) dictate the size and composition of the Democratic Party State Central Committee, while sections 9160-9164 specify the size and composition of the Republican counterpart. Sections 8663-67 and 8669 govern the selection and removal of Democratic Central Committee members and sections 9161-64, 9168 and 9170 perform the same function vis a vis Republican Central Committee members. Section 8774 limits the term of office of a Democratic Central Committee Chair to two years and prohibits successive terms, while Section 9274 applies identical restrictions to a Republican Central Committee Chair. Section 8774 contains the residential rotation requirement for the Democratic Chair and Section 9274 contains the same requirement for the Republican Chair. Sections 8710-11 specify the time and place of Democratic Central Committee meetings and Section 9275 specifies the same for Republican Central Committee meetings. Sections 8775 and 8945 indicate permissible dues for Democrats and Section 9275 indicates the same for Republicans. Other Code sections specify all of the above requirements for the American Independent Party and the Peace and Freedom Party, respectively. See *Eu v. San Francisco Democratic Committee*, 489 U.S. 214, nn.2-10 (1989).

56. *Eu*, 489 U.S. at 219.

57. Id.

58. Id. at 222-29.

message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues."[59] "Freedom of association," said the Court, quoting *LaFollette*, "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.' "[60]

In the face of such violations of the parties' freedom of association, the Court rejected the state's argument that the challenged statutory provisions were necessary for governmental stability and voter protection, because the state was unable to demonstrate that California's political system was any more stable in 1989 than it had been in 1963, when the ban was enacted.[61] Moreover, the Court questioned why, if such a ban were needed to insure stability, California was "virtually the only State that ha[d] determined that such a ban [was] necessary."[62]

The Court acknowledged that the prevention of electoral fraud and corruption is a compelling state interest that warrants state regulation of the electoral process, but stated that the state failed to present evidence demonstrating that a ban on party endorsements in primaries serves that interest.[63]

The Court rejected the contention that the challenged restrictions on party self-government served California's compelling interests in governmental stability and voter protection.[64] The Court noted that a state may enact laws that interfere with a political party's internal affairs in order to ensure that elections are fair and honest.[65] For example, a state may impose eligibility requirements that voters must satisfy in order to vote in a general election, including age, residency and citizenship requirements, and may specify waiting periods that must be observed before a voter who has switched party allegiances may vote in the primary of the "new" party.[66] "In sum," said the Court, "a State cannot justify regulating a party's internal affairs without showing that such regulation is

59. Id. at 223.

60. Id. at 224 (quoting *LaFollette*, 450 U.S. at 122 and *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm concurring)) (citations omitted)).

61. Id. at 226.

62. Id.

63. Id. at 228-29.

64. Id. at 229-33.

65. Id. at 231.

66. Id.

necessary to ensure an election that is orderly and fair."[67]

The Supreme Court's decision in *Eu*, then, stands for the proposition that the freedom of association encompasses a party's determination of: (1) the structure that best allows it to pursue its political goals; (2) the identity of its leaders and; (3) the process whereby those leaders will be selected.[68] A state cannot substitute its judgment for that of the party in such matters even if by doing so it would prevent the party from pursuing unwise, irrational or self-destructive ends.[69]

## III. JURISPRUDENCE AND PARTYBUILDING IN THE NINETIES: THE IMPLICATIONS OF TASHJIAN AND EU

The major implication of the United States Supreme Court's decisions in *Tashjian* and *Eu* is the need for a revision at least with respect to nominations and party self-governance, of political science critiques that contend that the federal judiciary is an impediment to the establishment of strong, programmatic political parties in the United States.[70] This is because those decisions recognized the constitutionally protected freedom of political parties to design their organizational structures and mechanisms of candidate selection so as to promote their chosen ideological and/or electoral ends, thereby giving the parties a powerful tool for achieving programmatic ends should they wish to do so.

In this respect, *Tashjian* and *Eu* represent a major change from Supreme Court decisions of the 1970s wherein the Court upheld state regulation of nominations and party governance procedures. The Court, in those earlier decisions, exhibited considerable deference to the rights of individual voters to participate in primaries and to the interest of a state in ensuring an orderly nomination process. In so doing, it gave short shrift to the associational freedom of political party members to run their organizations and select candidates in the manner they believed to be most advantageous to their parties' ideological and/or electoral goals. *Tashjian* and *Eu*, by contrast, recognize the importance of allowing political parties to run their own organizations and control their nominating procedures. That leaves us with the question to what extent this shift in jurisprudence might strengthen responsible, programmatic parties.

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67. Id. at 233.
68. Id. at 229.
69. Id. at 232-33.
70. For a list of publications and conference papers that contain such critiques, see notes 1 and 2.

A comparison of the Supreme Court's reasoning in *Tashjian* and *Eu* with the goals of advocates of responsible parties reveals that that reasoning and those goals are indeed compatible.[71] One political scientist has written that in order for the major political parties in the United States to become responsible parties, they must be able to control: (1) who can participate in their primaries; (2) the types of candidates who can run under their respective banners; and (3) who can participate in their activities that are unrelated to elections.[72]

The Court's decision in *Tashjian* supports the first goal. Admittedly, the *Tashjian* Court decided in favor of the Connecticut Republican Party's choice to open, rather than close—as responsible party advocates prefer—its primary election.[73] In so doing, though, the Court employed reasoning that should be dear to the hearts of responsible party proponents. The Court stated that a party's "determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution,"[74] and that "a State, or a court, may not constitutionally substitute its own judgment for that of the Party."[75] Such reasoning could just as easily be employed to uphold a political party's choice to close its primary.

The Court's decision in *Eu* supports the second goal. The *Eu* Court held that a state cannot constitutionally prevent a political party from endorsing candidates in a primary election because such a ban "directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues."[76]

Admittedly, *Eu* did not hold that a political party can prevent an unacceptable candidate from gaining a position on its primary election ballot, but instead, merely held that a party is entitled to express its members' preference among the candidates on its primary ballot by endorsing one of them publicly. Nonetheless, although the power to endorse may not amount to "control"[77] of the candidates running under the party's banner, it does amount to influence.[78]

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71. For a discussion of the goals that advocates of responsible parties are pursuing, see note 1.

72. Dodson, *American Political Parties* at 3 (cited in note 1).

73. *Tashjian*, 479 U.S. 208, 225 (1986).

74. Id. at 224.

75. Id. (quoting *Democratic Party v. Wisconsin ex. rel LaFollette*, 450 U.S. 107, 123-24 (1981)).

76. 489 U.S. at 223.

77. Dodson, *American Political Parties* at 3 (cited in note 1).

78. See generally, Jewell, *Political Parties, Courts and the Nominating Process* (cited in

One political scientist has studied thirteen states wherein either one party or both used either a formal or informal endorsement in gubernatorial primaries between 1950 and 1982. He concluded that: (1) endorsements discouraged challenges to the endorsee, especially when the endorsements were made formally, pursuant to statute; (2) even when another candidate challenged the endorsed candidate, the latter won 77% of the time and (3) endorsed candidates enjoyed easier access to volunteers and financial contributions than did non-endorsed candidates, in addition to the benefits of favorable publicity and "momentum."[79]

Thus, although *Eu* does not guarantee political parties the "control" over candidates that responsible party advocates would prefer, it does guarantee them a degree of influence that should serve programmatic and electoral goals admirably.

The Supreme Court's decision in *Eu* also supports the third goal stated above, namely, party control of participants in party activities that are not directly related to elections. The Court held that 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. And by specifying who shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders."[80] Moreover, the Court held that "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."[81] The latter statement can reasonably be construed as a grant of broad authority to political parties to determine who will participate in party activities that are not directly related to elections.

The *Tashjian* and *Eu* decisions, then, clearly establish that the United States Supreme Court is not an impediment, but rather an important aid to the development of responsible political parties, at least as far as nominations and party self-government are concerned. This is not to suggest that the realization of responsible parties is imminent in the United States, or that the Supreme Court is actively pursuing that end through the evolving doctrine of freedom of association.

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note 2). However, the power to endorse will not even amount to influence if the parties are unwilling to exercise their power of endorsement. Roy Christman and Barbara Norrander, *A Reflection on Political Party Deregulation Via the Courts: The Case of California*, 6 J. of L. and Pol. 723, 739-40 (1990) points out that even in the wake of the *Eu* decision, the California Republican Party decided not to endorse, except in special elections, and threatened to penalize county party committees that ignored state party wishes.

79. Jewell, *Political Parties, Courts and the Nominating Process* at 17 (cited in note 2).

80. *Eu*, 489 U.S. at 230 (footnote omitted).

81. Id. at 233.

Indeed, *Tashjian* and *Eu* leave open the question of whether a state can require political parties to nominate candidates by means of a primary election. The *Eu* Court observed that a state may enact laws that interfere with a party's internal affairs in order to ensure fair and honest elections.[82] In so doing, the Court noted that it had recognized, in *American Party of Texas v. White*,[83] a state's right to require major parties to nominate by means of primaries.[84]

Moreover, in the great majority of states that require primaries, state law does not enable party organizations to deny ballot access to candidates whom those organizations do not wish to support.[85] In only eight states (Colorado, Connecticut, Delaware, New Mexico, New York, North Dakota, Rhode Island, and Utah) where nominations must be made by primaries does state law give parties, through endorsing conventions, a degree of control over candidates' access to the primary ballot.[86] Typical of the eight states is New York, where the name of any candidate who receives twenty-five percent of the vote at the party's state convention will appear on the primary ballot, while other candidates must submit petitions containing a requisite number of signatures in order to gain a position on the ballot.[87]

Nonetheless, *Tashjian* and *Eu* do give advocates of responsible parties cause for optimism, because both cases stand for the proposition that neither state legislatures nor courts should substitute their judgments for those of the parties with respect to the manner in which the parties themselves and their nomination procedures are structured, absent a showing of a real threat to the fairness of the electoral process.[88] *Tashjian* and *Eu* have said that political parties, consistent with that proposition, can influence nomination procedures in their ideological and/or electoral interests by opening primaries and endorsing candidates.[89] Therefore, parties should also be able to influence nominations by denying primary ballot ac-

82. Id. at 227.

83. 415 U.S. 767 (1974).

84. 489 U.S. at 227.

85. Jewell, *Political Parties, Courts and the Nominating Process* (cited in note 2).

86. Id. In four states (Illinois, Massachusetts, Minnesota and Wisconsin) at least one of the political parties makes an informal preprimary endorsement. Endorsed candidates in these states are more likely to be challenged in the primaries and they occasionally lose primary elections. Unlike their counterparts in the eight states that feature statutorily-established endorsement procedures, endorsed candidates in the latter states do not benefit from special ballot privileges, such as easier access to the primary ballot or the top position on the ballot. Christman and Norrander, 6 J. of L. and Pol. at 738 (cited in note 78).

87. Jewell, *Political Parties, Courts and the Nominating Process* at 19 (cited in note 2).

88. *Tashjian* 479 U.S. at 224; *Eu* 489 U.S. at 232-33.

89. 479 U.S. at 224-25; 489 U.S. at 222-29.

cess to candidates who receive little or no support at party conventions or by replacing primaries with party nominating conventions.

It is therefore reasonable to infer from *Tashjian* and *Eu* that when the Supreme Court faces the question of whether state law can require political parties to nominate by means of primaries, the Court will answer that question consistent with *Tashjian* and *Eu*, rather than with *American Party of Texas v. White*,[90] which predates the ascendancy of associational freedom as applied to political parties.[91] More generally, it is reasonable to expect that, as the 1990s progress, the associational freedom model presented in *Tashjian* and *Eu* will enable political parties in the United States to gain control of the procedures by which candidates for public office are nominated.

If parties do gain control of such procedures, they will become better able than they are now to "develop and advance programs and policies, recruit or train future political leaders [and] hold incumbent officials accountable to a wide range of citizens and interests,"[92] which are "the very functions that make them most useful and necessary in democratic government."[93] The parties' increased clout would make them more attractive to assorted interest groups, which would be likely to pursue alliances with the parties.[94] Such alliances would enable the parties to "function as umbrella organization[s] for a wide variety of constituencies, to aggregate their philosophies and policy alternatives and to encourage those groups to consider their values and goals in relation to those of others."[95] The alliances might well "bring single issue groups into mainstream politics by offering them incentives to work within the parties."[96] In short, political parties would have an opportunity to do what they do best: facilitate debate, compromise and the effective presentation of a common viewpoint.[97]

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90. 415 U.S. 767 (1974).

91. See generally, *Democratic Party v. Wisconsin ex rel LaFollette*, 450 U.S. 107 (1981); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *NAACP v. Alabama*, 357 U.S. 449 (1958).

92. Kay Lawson, *Challenging Regulation of Political Parties: The California Case*, 2 J. of L. and Pol. 263, 276 (1985).

93. Id.

94. Fay, 9 J. Legis. at 263, 280 (cited in note 6).

95. Id.

96. Id.

97. Gottlieb, 11 Hofstra L. Rev. at 191, 216 (cited in note 6). The *Eu* decision may already have provided this opportunity to political parties in California, despite the fact that longstanding anti-party sentiments survive there. This is true even though the state's prohibition against party endorsements in judicial, city, county, school board and special district elections (not at issue in *Eu*) has been upheld by a federal district court and the Ninth Circuit Court of Appeals. See Christman and Norrander, 6 J. of L. and Pol. at 733 (cited in note 78). There is a perception, even in notoriously anti-party California, that decisions like *Eu* make parties more powerful and "in politics, the perception of power bestows power." Id. at 741.

## IV. CONCLUSION

The foregoing analysis calls into question political science critiques written during the past ten years that argue that the federal judiciary is a barrier to the development of responsible political parties in the United States. This analysis demonstrates that, in recent years, the United States Supreme Court has articulated a model of associational freedom that has greatly strengthened and promises to strengthen further political parties' capacity to govern themselves and to control the processes by which candidates are nominated for public office. In so doing, the Court has departed from its earlier doctrinal emphasis upon political party activities as "state action" subject to constitutional limitations and upon associational freedom as protecting individual voters' choices to align themselves with parties. Presently, the Court's doctrinal emphasis is upon the parties' choices to exclude from their nomination procedures voters and candidates who are ideologically antagonistic to party aims.

As a consequence of this doctrinal shift, it is no longer possible to state with certainty, as one political scientist did several years ago, that even if voters in the United States were to adopt favorable attitudes toward responsible political parties, the federal judiciary, including the Supreme Court, would remain an impediment to the achievement of a responsible party system in this country.[98] There is, of course, a need to examine recent Supreme Court jurisprudence concerning patronage, campaign finance and the ballot access of independent candidates in general elections before it can be stated that the Court has adopted a clearly pro-party jurisprudential model in place of the subject-by-subject orientation it has demonstrated in the past.

Hence, it remains an open question whether the doctrinal shift described herein is part of a comprehensive reorientation by the Court of its views concerning the proper scope of constitutional limitations on political parties. Nonetheless, that shift is real and it means that scholars can no longer state without reservation that the Supreme Court is an impediment to the establishment of ideological, programmatic, centralized, and disciplined political parties in the United States. Indeed, if the present jurisprudential trend continues, scholars may one day conclude that the court has been a major contributor to the cause of partybuilding in this country.

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Perceived party power induces candidates to head party platforms preparatory to seeking party endorsements. Id.

98. Dodson, *American Political Parties* at 54 (cited in note 1).