

Associational Rights of the Major Political Parties: A Political and Jurisprudential Dead End

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When Senator Bill Bradley (D-N.J.) announced that he would not run for a fourth term, he said the political system was "broken" and added that

Neither political party speaks to people where they live their lives. . . . Both have moved away from my own concept of service and my own idea of what America can be (Levy 1995).

Although the source of these strong sentiments may have been surprising, the sentiments themselves cannot have been remarkable to anyone who has lived in the United States for the past couple of decades, which have been a time of collapsing public confidence in political leaders and institutions.

Some accounts of popular disenchantment emphasize substantive failures of government and the unwillingness of parties to offer programs that appeal to major portions of the public (e.g., Dionne 1991). However, much of the debate over how public confidence might be enhanced centers on reforming the political process. "Populist" measures such as legislative term limits and severe limits on campaign contributions and expenditures appear to enjoy the most public support. In contrast, many students of government contend that the best way to enhance belief in democracy would be to strengthen the ability of parties to govern in ways that would heighten their accountability to the electorate (e.g., Fiorina 1980; Pomper 1977).

Possibly the most concerted and self-conscious effort to strengthen the role of parties in American politics in recent years has been carried forth under the banner of the Committee on Party Renewal. The Committee, together with its members and supporters, has produced a considerable quantity of valuable scholarship and has stimulated widespread discussion of important questions relating to parties. But the party renewal movement's most prominent activity has been the support or sponsorship of litigation intended to liberate parties from state regulation (Lawson 1985).

In an immediate and tangible sense, the success of the movement's litigation campaign has been impressive. Two Supreme Court cases supported

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or sponsored by party renewal activists established the principle that parties' First Amendment right of association gives them broad protection against state regulation. First, in *Tashjian v. Republican Party of Connecticut*, the Court ruled that the Connecticut Republicans could permit independents to vote in certain Republican primaries, despite a Connecticut statute that limited primary voting to voters registered in the party. Only three years later the party renewal movement won another victory in *Eu v. San Francisco County Democratic Central Committee*. In *Eu*, the Supreme Court struck down California statutes that prohibited both a party and its state and county central committees from endorsing candidates in the party's primaries. The Court also held that parties were not required to comply with a variety of statutes regulating the structure and governance of party committees.

This paper neither questions nor defends the party renewal goal of enhancing governmental accountability by energizing and strengthening the major parties. The desirability of moving toward that goal will be assumed. Nevertheless, the paper argues that litigation along the lines of *Tashjian* and *Eu* is often an inexpedient means of seeking to move toward the goal. At best, such litigation threatens to distract attention from the much more difficult but much more important task of orienting political conflict and debate along partisan lines. At worst, inviting the judiciary to arbitrate what I shall contend are largely intra-party disputes is more likely to undermine than to enhance the autonomy of political parties.

In addition, I shall criticize *Tashjian* and *Eu* on jurisprudential grounds. These cases exemplify mechanical jurisprudence at its worst, in which doctrinal bromides superficially applied substitute for an informed judiciary coming to grips with the conflicts that are actually at stake in a constitutional controversy.

The Superficiality of Constitutional Doctrine

Conventional Doctrine

The doctrinal argument against state regulation of political parties is simple and, within the conventional First Amendment framework, nearly irresistible. Its starting point, and only sticking point, is the premise that a political party is a private organization. From this premise it follows that a party and its members, like other private organizations and their members, enjoy the First Amendment right of freedom of association (Tribe 1988, 1010-22). Furthermore, since on most accounts the First Amendment is centrally concerned with protection of political speech and association (e.g., Meiklejohn 1948), the constitutional right of freedom of association enjoyed

by a political party is especially strong in comparison with the rights of nonpolitical groups. Because the First Amendment protects the freedom of association of parties, it follows that any substantial infringement of this freedom by government is unconstitutional unless the infringement is the least restrictive means by which a compelling state interest can be served.

Theoretically, the state could defend its regulation of political parties by pointing to such a compelling interest. But it is unlikely that regulations of the sort that have been litigated (open v. closed primaries, party endorsements, party structure and governance) can be so justified. Usually, such regulations do not reflect a carefully planned, coherent set of rules and procedures. Rather, they have been subject to continual tinkering in response to changing needs and political pressures. Accordingly, examining the party statutes in search of a clear and consistent plan is likely to reveal nothing but "an illogical, disordered pattern" (Friedman 1956, 71).

Even if a state's laws governing parties were adopted as one coherent and consistent whole, particular regulatory provisions would probably be unable to pass the compelling interest test. As Justice Marshall observed in *Tashjian* (at 222), the "relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century." The same is more or less true of the other regulations that have been challenged, and the state has no "compelling" need to be on one side or the other of issues so perennially debatable and, perhaps, of so little consequence.

It is irrelevant that the plaintiffs who assert a party's constitutional rights would be no more able than the state to demonstrate a compelling interest in adopting a particular procedure. The point is not that there exists (or is claimed) a constitutional right to an open primary per se or to the governing arrangements preferred by the plaintiffs in *Eu*. What is claimed is the right to have these matters decided by the party rather than by the state (Gottlieb 1985; Geyh 1983). Except in the unlikely event that the state can demonstrate a compelling reason to impose its command on the party, this claim is a strong one under conventional contemporary constitutional doctrine.

As was mentioned above, the only fly in the doctrinal ointment is the premise that parties are private organizations. Although this may seem to be an obvious proposition, it is complicated by the White Primary Cases. In order to conclude that the Constitution prohibited parties from excluding primary voters on grounds of race, the Supreme Court found it necessary to treat the conducting of a party primary as state action (see *Smith v. Allwright*). If parties owe constitutional obligations to citizens on the theory that the parties are public entities, how can they claim to be private entities

entitled to constitutional protection against state regulation? The present paper will not dwell on this problem, which the Court swept under the rug in *Tashjian* and *Eu*. Whatever conceptual difficulties may exist for devout adherents to the state action doctrine, the result that parties are both subject to constitutional obligations in their dealings with citizens and bearers of constitutional rights against government intrusion is surely a sensible one.

Political Parties and the State

The weakness in the Court's doctrine is not the fact that parties are entitled to freedom of association but the application of that freedom without regard to the special relationship between parties and the state.

Conventional First Amendment analysis conceives of the state as autonomous and active. Of course, one of the central purposes of the First Amendment is to protect the right of private individuals and organizations to attempt to influence government policy. Nevertheless, in considering a particular First Amendment claim, conventional doctrine is uninterested in the private sector influences that brought about the challenged governmental action. In that sense, doctrine treats the state as if it were autonomous.

By the same token, First Amendment doctrine sees the state as active in the sense that the state operates on individuals and groups within the private sector. The doctrine is not concerned with, and in that sense does not recognize, the operations of private sector individuals and groups upon the government. Nor is the First Amendment ordinarily concerned with operations of one part of the government on other parts. By reason of the state action doctrine, the First Amendment is similarly unconcerned with operations of persons in the private sector on one another. First Amendment doctrine may therefore be represented as dealing only with operations of a unified government upon distinctly private individuals and organizations, as illustrated in Figure 1.

This conventional framework is inadequate for properly analyzing the relationship between parties and the government. Parties' major interactions with the government are not as objects of government actions. To the contrary, it is the parties that operate upon and actually constitute the government. A state statute is enacted by men and women who have been elected to office as Republicans or Democrats, who in most instances have organized their legislative houses as Republicans and Democrats, and whose activities and decisions occur in a formal and informal structure fundamentally influenced by the fact that they are Republicans and Democrats.

The distinct relationship between parties and the state is represented by Figure 2, which is similar to Figure 1 in that it shows that the Republicans

Figure 1

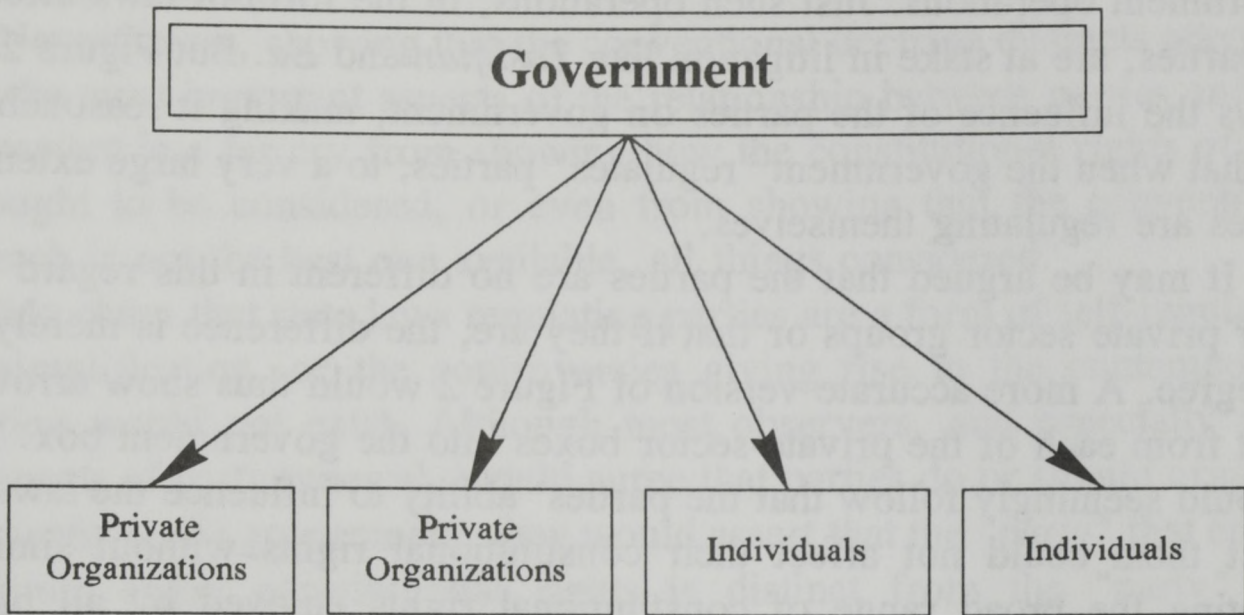
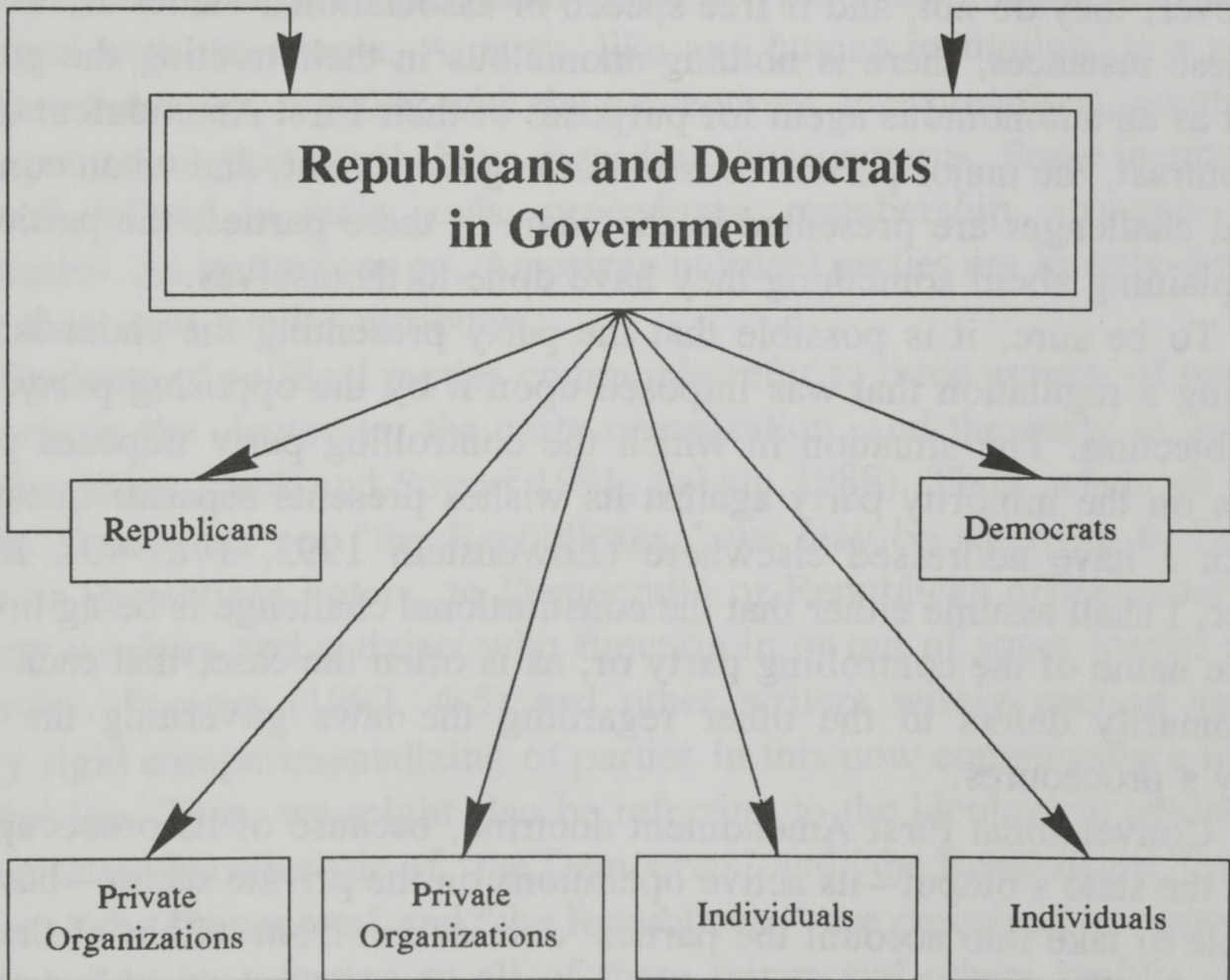


Figure 2



and Democrats, like all private organizations and individuals, are subject to government operations. Just such operations, in the form of laws affecting the parties, are at stake in litigation like *Tashjian* and *Eu*. But Figure 2 also shows the influence of the parties on government, making it reasonable to say that when the government "regulates" parties, to a very large extent the parties are regulating themselves.

It may be argued that the parties are no different in this regard from other private sector groups or that if they are, the difference is merely one of degree. A more accurate version of Figure 2 would thus show arrows of input from each of the private-sector boxes into the government box. Then it would seemingly follow that the parties' ability to influence the laws that affect them could not affect their constitutional rights without similarly affecting the broad range of constitutional rights enjoyed by all private groups and individuals.

If the question were simply one of ability to influence the government, this argument would have merit. But unlike any other private groups, political parties routinely, pervasively, and legitimately exercise their influence from within the government. Farmers, fundamentalists, steel workers, oil executives, environmentalists, and the host of other interest groups that seek to influence government sometimes get much of what they want. Sometimes, however, they do not, and if free speech or associational values are at stake in these instances, there is nothing anomalous in their treating the government as an autonomous agent for purposes of their First Amendment claim. In contrast, the major parties constitute the government, and when constitutional challenges are presented in the name of these parties, the parties are complaining about something they have done to themselves.

To be sure, it is possible that the party presenting the claim is challenging a regulation that was imposed upon it by the opposing party, over its objection. The situation in which the controlling party imposes procedures on the minority party against its wishes presents separate questions, which I have addressed elsewhere (Lowenstein 1993, 1787-90). In this paper, I shall assume either that the constitutional challenge is being brought in the name of the controlling party or, as is often the case, that each party customarily defers to the other regarding the laws governing the other party's procedures.

Conventional First Amendment doctrine, because of its preoccupation with the state's output—its active operations on the private sector—has been unable to take into account the parties' domination from within of the state and its policies, which is much the more important relationship between parties and the state. A doctrine that is so detached from the reality of its

subject almost inevitably leads to the mechanical quality that characterizes both *Tashjian* and *Eu*.

Nevertheless, showing that the conventional doctrine distracts attention from the most important aspects of the relationship between parties and the government is a far cry from showing how the constitutional rights of parties ought to be considered, or even from showing that the conventional approach is not the best one available, all things considered.

My claim that state laws regulating parties are a form of self-regulation is a simplification, or the controversies giving rise to the contemporary litigation would not exist. Although most observers, and especially most proponents of party renewal, would agree that parties do or should organize and constitute the government, they would assert that the "party" that enjoys or should enjoy constitutional rights is distinct from the "party" that organizes the government. To advance more deeply into the issues raised by the party renewal litigation, it is necessary to come to grips with the manifold nature of political parties.

The Manifold Party

Unlike a chair, or a planet, or a baked potato, a political party is not something that occupies a particular space at a particular time or that can be discerned with the senses. A party, like any human institution, is a set of patterns of activity, together with the perceptions, interpretations, emotions, and expectations that people have regarding those patterns. Some institutions are well-defined in their goals, procedures, membership, structure, and boundaries. As institutions go, American political parties are loosely-defined along these and similar attributes.

Students of political parties commonly refer to three aspects of parties: the party in the electorate, the party organization, and the party in or running for office (Beck and Sorauf 1991; Sabato 1988). Thus, when we refer to "the Democrats" or "the Republicans," we may be referring to Democratic or Republican voters, to Democratic or Republican officeholders, or to party workers and activists who function in or out of some formal party hierarchy. Pomper (1992, 4-5) and other writers wisely caution against overly rigid compartmentalizing of parties in this now commonplace tripartite division. Thus, we might also be referring to the ideological tendencies more or less characteristic of "the Democrats" and "the Republicans," or the interests "the Democrats" and "the Republicans" are perceived to represent. Or we might be referring to all of these things and others besides, or to some combination of them.

The renewalists who call for party immunity from state regulation and the judges who answer these calls generally fail to address the manifold nature of parties. When a regulatory statute is challenged in constitutional litigation, the regulation exists because the "party in office" either chose to impose it or declined to repeal it. The plaintiff represents some element in the party that objects to the regulation. The usually unstated assumption is that the "party" that enjoys First Amendment protection is the formal party organization.

The privileged position accorded to extragovernmental party organization by party renewalists and courts may be in large part the result of a tendency to reify the parties (cf. Scarrow 1967, 777). Even an analyst who is quite aware of the manifold nature of parties may fall into the assumption that this "thing," designated by the singular noun "party," must have a center or head that controls the other parts or that the lack of such a center must be a sign of pathology. The only locus of a political party that resembles in form the governing bodies of other private associations in our society is the extragovernmental organization, with its local, state, and national committees and its executive officers. The analyst accepts the widely held view among students of government that "parties" must be strong. It is understandable, though not justified, that the analyst, losing sight of the manifold nature of parties, jumps to the conclusion that strong parties must mean strong extragovernmental organizations.

Thinking of this sort permits party renewalists to conceive of a law suit challenging a regulatory statute as a straightforward conflict between a "party" and the "state." In fact, the dispute is an intra-party conflict between the partisans in office who chose to adopt (or not to repeal) the statute and whatever elements in the party may be represented by the plaintiffs. If it were clear that the extragovernmental organization were the most important element for the party to prosper and carry out its functions, then the constitutional privileging of the organization might be justified. But the justification would derive from the supreme importance of the extragovernmental organization, not from the misleading doctrinal assumption that an entity entitled the state is violating the freedom of a distinct entity entitled the party.

As it happens, the supreme importance of the extragovernmental organization is far from clear. Neither positive nor normative theories of parties necessarily conceive of the extragovernmental organization as occupying an especially pivotal position. It would be well beyond the scope of this paper to attempt to canvass all theories of parties or to argue for the superiority of one such theory. It will suffice to refer to a couple of well-known examples.

Joseph Schlesinger (1991) and John Aldrich (1995) have expounded a cogent positive theory that identifies elected officials and candidates for office as the driving force behind political parties. For Schlesinger, the structure of opportunity offered to ambitious office-seekers is the crucial force underlying patterns of party activity. Aldrich adds as an additional force the usefulness of parties in overcoming cycling and other social choice and collective action problems within legislatures. Extragovernmental party organizations play no particularly central role in the Schlesinger-Aldrich theory.

Probably the best known normative theory of parties is the theory known as responsible party government. Actually, "responsible party government" is a term that can refer to so many variations that perhaps it should be referred to as a family of theories (see, e.g., Committee on Political Parties 1950; Ranney 1954; Downs 1957; Fiorina 1980, 1981; Gottlieb 1991). At their core, all such theories maintain that partisanship can make government accountable to the public by means of mutually dependent incentives created for voters and for candidates seeking election or reelection to public office. The underlying assumption is that it is much easier for a voter to understand the program and monitor the performance of candidates and office-holders who are associated under a party label than to learn the views and assess the performance of each candidate and representative individually. To the extent people vote on the basis of the party label rather than on personal evaluations of the candidates, candidates and office-holders within a party will have an incentive to compile an attractive collective record rather than to engage in activities such as Mayhew's (1974) advertising, credit-claiming, and position-taking. The system can be self-reinforcing, because to the extent office-holders' actions reflect the policies of their parties, voters are further encouraged to vote on the basis of party rather than on the personal characteristics of candidates. The party in or seeking office and the party in the electorate, not the extragovernmental party organization, are the essential components of responsible party government theories.

Of course, variations of a positive theory of parties based on the ambition of office-seekers or a normative theory of responsible party government could be developed to include essential functions for extragovernmental organizations. Different theories might more naturally emphasize party organizations, such as theories that place high value on citizen participation in political affairs. The point is not that as a matter of either theory or practice, party organizations must be relegated to a position of inferiority. Rather, the point is that there is no theoretical consensus or practical reality that justifies a constitutionally privileged position for party organizations

requiring judicial interference with procedures and policies for party governance enacted by the parties in office.

Judicial Intervention and Party Autonomy

It does not follow from the foregoing that the judiciary should be unwilling to accord First Amendment protection to political parties. A distinction should be made between speech and associational claims. The ban on endorsements of candidates in party primaries in *Eu* was a restriction of speech. Insofar as the California statute banned endorsements in the name of the party, it could have and perhaps should have been upheld on the ground that the action of the voters in the primary would determine "the party's" choice and that therefore it would be deceptive for anyone to speak in the name of "the party" before the primary. But the California statute also banned endorsements by party committees in their own name. Such a ban on speech should require a stronger justification than anyone has suggested in support of the California statute.

An even stronger free speech claim was put forward against another California provision in *Renne v. Geary*. A 1986 amendment to the California Constitution prohibited party endorsements in nonpartisan elections. In *Renne*, the Supreme Court—correctly, in my opinion—dismissed a First Amendment challenge to this prohibition on procedural grounds. But if the challenge had been properly brought by a party committee that wished to make such an endorsement, the 9th Circuit's ruling striking down the amendment would have been correct (*Geary v. Renne*). In a regime of free speech, the views of political parties on election contests should not be suppressed, and in a non-partisan election the party committees are the only entities that plausibly can speak for the parties.

Even in speech cases, it ought to be acknowledged that it is one element of the party that wishes to suppress the speech of another element rather than the paradigmatic First Amendment case of an autonomous state suppressing the speech of a distinct, private entity. Nevertheless, the First Amendment is hostile to the suppression of speech, and even an intra-party suppression should be subject to careful review when state law is used as the instrument of suppression.

Associational cases stand on a different footing. The issue is not whether the party and its component parts can speak, but how the party will be managed. "Freedom of association" for the party should mean that the party's autonomy will be assured and its activities protected from outside interference. Conventional doctrine, by assuming a dispute between "the state" and "the (distinct) party," assumes that the state is the "outside" entity

that threatens the party's autonomy. Recognition of the manifold nature of parties suggests a different perspective: that the regulation adopted by or left undisturbed by the "party in office" and the objection to that regulation by other elements within the party both represent "inside" party forces. Autonomy for the party means letting these forces reach their own accommodation. The "outside" force whose interference threatens the party's autonomy is the court.

I shall illustrate this point with two examples. In the first, a lower court decision that correctly anticipated the doctrine of *Tashjian* and *Eu* fairly clearly had the effect of overturning a party decision in the name of protecting the party's freedom of association. In the second, a series of recent controversies highlights the unspoken but decisive question in *Tashjian-Eu* cases: Who speaks for the party?

Party Autonomy

Until 1975, Rhode Island statutes provided for cities, including Providence, to be divided into wards. Voters in each party elected ward committees, the members of which also made up the party's city committee. By party rule, each of the thirteen wards in Providence elected eleven members to the Democratic ward committee. In 1974, David Fahey was elected to the Ninth Ward Democratic Committee and was elected chairman of that committee. As a member of the ward committee, he also sat on the city committee, which elected Francis J. Darigan as its chair.

In 1975, the Rhode Island legislature, dominated by Democrats, amended the statute that established the ward and city committees. The amended statute set the number of members of each Providence ward committee at 19. This meant that the overall size of the city committee would be raised from 143 to 247. The amendments also provided that the chairman of the city committee (i.e., Darigan in the case of the Democrats) would be able to appoint the 104 new members who would sit until the next election, in 1978. The explanation offered for the increase and for the transitional method of filling the new seats by appointment was that compliance with new affirmative action requirements imposed by the National Democratic Party (NDP) would be made possible.

Fahey, a political opponent of Darigan, challenged both the establishment of a statutory size for the ward and city committees and the transitional power of appointment given to Darigan. In *Fahey v. Darigan*, a federal judge struck down the statutory changes for reasons that perfectly anticipated the doctrine that was later established by *Tashjian* and *Eu*. Determination of the size and method of appointment of the ward and city

committees was a private rather than a public activity. Accordingly, the statute infringed on "the party's"—of course, the court used no such quotation marks—freedom of association. The desire to comply with the dictates of the national party did not constitute a compelling state interest that could justify the infringement, on this reasoning:

It is not contended that failure to comply with the NDP Charter and affirmative action program will in any way result in a violation of state or federal constitutional or statutory law or otherwise undermine the integrity and stability of the state political process.

The Court fails to see how this purpose, however salutary its implementation may be, would constitute a state interest, let alone a compelling one. [Emphasis in original.]

Fahey not only correctly anticipated the *Tashjian-Eu* doctrine, but it also dramatically illustrated the pitfalls of that doctrine by showing that a court that claims to be defending a party's freedom of association may in fact be frustrating the party's ability to effectuate the outcomes that result from its own political processes. The litigation represented a conflict between two factions of the Providence Democratic Party. Darigan had the support of a majority of the elected members of the city committee, his plan for enlarging the committees had the support of the Democrats in the state legislature, and the stated purpose of the plan was to carry out the dictates of the national party. Nevertheless, Fahey, having been defeated by the majority faction that controlled both the city committee and the legislature, prevailed because the federal judge treated him as representing the associational interests of the Democratic Party.

Why did the judge deploy the party's associational freedom to overrule the decisions of the party's leadership? One can understand that the judge disliked Darigan being given the power to fill a large number of committee seats by appointment. The judge exaggerated in his opinion when he said that the changes occurred "in derogation of the party electorate's choice." After all, Darigan's faction won the election. Nevertheless, these appointments made it possible for Darigan greatly to increase the size of his majority. In addition to his associational claim, Fahey argued that the transitional provisions contravened the right to vote. The judge could have ruled that the party's right to determine its own procedures—expressed in this case through the party in the state legislature enacting a statute requested by the party's elected city leader—was outweighed by the infringement of the right to vote. Such a ruling might have deserved criticism, but not on analytical grounds, because the judge would have correctly identified the competing

values that were at stake. As it happened, the judge expressly rejected the right-to-vote claim.

Striking down the amendments as a violation of the party's associational rights can only be explained on the purely formal ground that a statute was used to change procedures that previously had been determined by party rule. But it is clear that the change was supported by the dominant group in the party and opposed only by a dissenting faction. The passage quoted above suggests how perverse is the formalistic approach. In the name of party freedom of association, it is held against the state that its reason for acting is to facilitate the carrying out of the party's wishes.

The judge added insult to injury in a footnote:

The Court feels constrained to comment on what it perceives to be the unfortunate fact that this case ever arose in federal court at all. The defendant's inability to proffer a compelling, or indeed any, state interest furthered by the challenged portions of the statute is not surprising in view of the defendant's own statement that the statute was passed at his urging to further Party goals. . . . The fact that this law suit was instituted is itself evidence that the Chairman's objectives were opposed within his own party. Instead of subverting the public political process to private party purposes and thereby fully exposing party activities to judicial review, the party factions should have resolved their differences by intraparty politicking, as is ordinarily and properly the case. [Footnote 12, emphasis in original.]

Of course, the statute challenged in *Fahey* was precisely the resolution of factional differences "by intraparty politicking." In the name of party freedom of association, the judge overruled that intraparty resolution at the behest of the losers.

Who Speaks for the Party?

The *Tashjian-Eu* doctrine ignores the manifold nature of parties and therefore assumes that there is one unified entity whose right to associate is protected against interference by the state, an entirely separate entity. Under the doctrine, the question of which side in litigation is assumed to be speaking for "the party" and its associational interests is likely to be decisive. Yet, because the doctrine ignores the probability that the litigation reflects an intraparty dispute, it has no means of even acknowledging the existence of the question, much less resolving it in a consistent and coherent fashion. The determinative issue is decided silently and, presumably, unreflectively.

This problem did not arise in *Tashjian* itself. *Tashjian* was an interparty dispute in which all major elements in the Republican Party had agreed that independents should be permitted to vote in Republican primaries, but only

for the races at the top of the ticket. It was the unwillingness first of a Democratic majority in the Connecticut legislature to amend the primary statutes and later of a Democratic governor to sign the amendment passed by a Republican-controlled legislature that gave rise to the litigation. Even in interparty disputes there are reasons for courts to proceed cautiously (Lowenstein 1993, 1787-90), but the plaintiff's claim based on associational rights of the party can be accepted as genuine.

Most of the reported cases in which associational rights of parties are asserted appear to be intraparty disputes. The cases are silent regarding how it is determined who will be presumed to speak for the party, and there is no discernible pattern that might explain the results.

When individual voters challenge statutes that they claim interfere with their right to associate with a party, the courts generally seem willing to assume that the statutes are intended to preserve the parties' autonomy and to weigh that intended goal against the infringement of the rights of the individual plaintiffs. This was the case, for example, in *Rosario v. Rockefeller*, and *Kusper v. Pontikes*, in which voters objected to time delays between their switching their registration from one party to another and their eligibility to vote in the primaries of their new party. The Court was willing to assume that the statutory delays were intended to protect party autonomy by discouraging "raiding," and to balance the state's legitimate interest in protecting party autonomy against the limitation on the individual's right to vote.

Presumably, if a challenge to a regulatory statute is brought in the name of a major party by the state committee of that party, the courts will assume that the committee is entitled to speak for the party. But the intraparty cases to date generally have not been brought by state party committees. In *Fahey v. Darigan*, the plaintiff claimed to be asserting the Democratic Party's freedom of association, but he represented the losing faction within the party. Why did he have more of a right to speak for the party than the plaintiffs in *Rosario* and *Kusper*? In those cases, the Court was willing to accept an unsupported assertion that the statutes were intended to protect the parties. In *Fahey*, it was clear that the statute was enacted because the majority elements in the party wanted it. Yet the court regarded the facilitation of a party's wish to govern itself in a particular manner as an illegitimate goal for the state to pursue.

The question of who speaks for the party was especially embarrassing in *Eu*—or it would have been, if the Court had bothered to acknowledge it. The plaintiffs, "[v]arious 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," were assumed to speak for the parties. The Court simply swept under the rug the inconvenient fact that neither major-party state central committee was a plaintiff or otherwise had expressed a desire to assert the associational claims. Thus, even if the constitutional privileging of the extragovernmental party organization—which I argued against earlier in this paper—is accepted, *Eu* gives no guidance for the decisive step of determining which side in the litigation is treated as speaking for the party.

This gap in the *Tashjian-Eu* doctrine is illustrated by the difficulty the 11th Circuit has had in recent litigation over the efforts of David Duke to appear on the ballot as a presidential candidate in the 1992 Republican primaries in Georgia and Florida. Duke is a former Ku Klux Klan officer who received nationwide notoriety when he was elected to the Louisiana state legislature and then made it as far as a run-off election as a gubernatorial candidate. When Duke announced he was a candidate for the Republican presidential nomination in 1992, most mainstream Republican leaders regarded him as an embarrassment to the party and welcomed the opportunity to keep him off the ballot when permitted by state law.

In Georgia, the initial list of candidates for each party's primary was created by the Secretary of State, but a candidate could be eliminated from the list if the two state legislative leaders of that party and the state party chair so agreed. The Secretary of State included Duke's name on the preliminary list, but the Republican panel eliminated it. Florida's system was generally similar, except that the initial list was drawn by the party, and a panel similar to the Georgia panel could add or eliminate names. Duke's name was omitted from the party's original list and there was no support on the Republican panel for his inclusion. Duke challenged the exclusion in each state, asserting a variety of First Amendment and due process claims.

In *Duke v. Cleland (Duke I)*, the appeals court in the Georgia case affirmed the refusal of the lower court to issue a preliminary injunction. Crucial to *Duke I*'s ruling against Duke was the court's assumption that the defendant spoke for the party.

[W]e conclude that the Republican Party in this case enjoys a constitutionally protected right of freedom of association. We conclude that the Party's constitutionally protected right encompasses its decision to exclude Duke as a candidate on the Republican Primary ballot because Duke's political beliefs are inconsistent with those of the Republican Party.

Duke himself did not include a *Tashjian-Eu* claim in his complaint. This no doubt facilitated the *Duke I* panel's reliance on the party's freedom of association as a reason to uphold the statute. But it is hard to see why that

freedom of association supports a statute that delegates powers to a panel of party leaders in Georgia while it undermines a statute delegating powers to a Rhode Island party leader in *Fahey*. Nor is it clear why the Georgia statute should be seen as protecting party autonomy while the California governance regulations violate the parties' associational rights in *Eu*.

Duke I involved only the denial of a preliminary injunction. Although it doomed Duke's chances of getting on the ballot in the 1992 Georgia primary, he was permitted to continue to press his suit because of the possibility that the controversy would recur in future elections. The trial court dismissed the case on the ground that there was no state action. A different panel of appellate judges reversed this ruling in *Duke v. Cleland (Duke II)*. *Duke II*'s state action ruling seems obviously correct, but the *Duke II* reasoning is not easily reconciled with *Duke I*. According to *Duke II*, the selection committee's power

to restrict ballot access flows directly from the state ab initio. The parties themselves do not select their primary candidates or retain ultimate responsibility for choosing those it seeks for representation. Indeed, the Committee's determinations are essentially unreviewable by the party membership. . . .

Because the Committee is an arm of the state, the private associational rights of the Republican party do not end the inquiry in this case.

Unlike the earlier panel, the *Duke II* court seems unwilling to accept the idea that the three Republican leaders, empowered by state statute, could be regarded as acting for the party.

Similarly, the Florida statute was declared unconstitutional on the due process ground that the statute provided no standards for determining which candidates should be placed on the ballot. The lack of standards is indeed objectionable if the selection panel is regarded as subject to the normal standards applicable to instrumentalities of the state. But the Florida and Georgia statutes are intended to leave the selection process to "the parties." Members of both major parties in each legislature apparently settled on a mutually agreeable procedure whereby three leaders of each party would select candidates for the ballot, presumably on political grounds. From the stand-point of party autonomy, the delineation of selection standards is not only unnecessary but would be objectionable. As in *Fahey*, the unrealistic assumption that "the state" and "the party" are entirely distinct entities leads to a perverse result in which arrangements that permit party leaders to manage party activities as they choose are treated as restrictions of the party's freedom of association.

Conclusion

The inconsistent rulings in the David Duke controversies are predictable results of the mechanical jurisprudence in *Tashjian* and *Eu*. A First Amendment paradigm of an active, autonomous state regulating private individuals and organizations has been applied uncritically in a context where it fails to capture the reality of the underlying conflicts. In an intraparty conflict, the side that is treated as speaking for "the party" will probably win and the side that speaks for "the state" will probably lose. The necessity to make this artificial but decisive classification has not even been recognized by the courts, which therefore have not developed any criteria for making it.

It would be difficult to contend that any of the *Tashjian-Eu* cases decided to date have had a major effect on the party system, for better or for worse. Nevertheless, contrary to the intentions of the party renewal movement, judicial overriding of political decisions affecting parties is a setback rather than a gain for the cause of party autonomy.

More broadly, those who believe a strengthened party system can help reverse the widespread discontent referred to in the Introduction of this paper would make a mistake if they assume that the judiciary can make a major contribution. Party-line voting was once the widely accepted norm in the United States. Today, the overwhelmingly dominant view of politics is a progressivist view that recommends voting for the candidate rather than the party. Parties are still vaguely associated with bosses and corrupt practices, while nonpartisanship is a virtue. Those who wish to place parties at the heart of a revitalized political system deceive themselves if they believe they can achieve their goal without directly confronting these widely held views.

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