



Legal Analysis: 17-Year-Olds Voting Rights in Party Primaries

QUESTION PRESENTED

Under the freedom of association found in the First and Fourteenth Amendments to the U.S. Constitution, can a political party allow 17-year olds who will attain 18-years of age by the general election to vote in the party's primary election or caucus, regardless of contrary state law?

ARGUMENT

I. PERMITTING STATE LAW TO TAKE PRECEDENT OVER THE RULES OF A POLITICAL PARTY MAY VIOLATE THE U.S. CONSTITUTION.

Under the First and Fourteenth Amendments to the U.S. Constitution, a political party has the right to freely associate with whomever it desires. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Democratic Party of the U.S. v. Wis. ex. rel. La Follette*, 450 U.S. 107, 121 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). This freedom of association includes the party's right to determine the boundaries of its own association, the structure which best allows it to pursue its political goals, *Tashjian*, 479 U.S. at 224, and the right to decide who selects the standard bearer that best represents the party's ideologies and preferences. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989). Moreover, a state may not substitute its judgment for the party's merely because it feels that the decision the party is making is unwise or irrational. *Tashjian*, 479 U.S. at 224; *LaFollette*, 450 U.S. at 123-124.

A. A political party may associate with whomever it desires.

A political party has the constitutionally protected right to decide which individuals it would like to include in its association. Specifically, the First and Fourteenth Amendments grant political parties the freedom to associate with whomever they desire. *Tashjian*, 479 U.S. at 214; *LaFollette*, 450 U.S. at 121; *Cousins*, 419 U.S. at 487; *Jones*, 530 U.S. at 574. In *Tashjian v. Republican Party of Connecticut*, the issue was whether the Republican Party of Connecticut's freedom of association rights enabled it to allow voters not registered as Party members to participate in its primary. 479 U.S. at 214. Despite State law requiring the parties to conduct registered members only (closed) primaries, the Party adopted a rule permitting independently registered voters to participate in its primaries. *Id.* at 210. Reasoning that the "Party's attempt to broaden the base of public participation for its activities is conduct undeniably central to the exercise of the right of association," the court held that Connecticut's enforcement of the closed primary system violated the Party's freedom of association rights. *Id.* at 214.

See also LaFollette, 450 U.S. at 107 (the National Democratic Party used its freedom of association rights to exclude those not registered as Democrats from participating in its primary despite a Wisconsin law mandating open primaries); *Cousins*, 419 U.S. at 487 (the National Democratic Party used its freedom of association rights to determine its delegate selection process to the National Convention despite an Illinois law asserting different delegate eligibility requirements); *Jones*, 530 U.S. at 581 (the court held that the freedom of association allowed state political parties to identify who constituted their associations by requiring those voting in their primaries to be registered members despite contrary California law).

A political party may associate with 17-year olds by allowing them to vote in its primary election. A political party allowing 17-year olds to vote in its primary is similar to *Tashjian*. In *Tashjian* the Republican Party of Connecticut wanted to allow individuals who were not

registered Republicans to vote in its primary election despite a State law requiring closed primaries. 479 U.S. at 210. In the case of 17-year old primary voting, a political party wants to allow 17-year olds to vote in its primary despite a state law requiring voters to be 18 years of age. These cases are the same because each involves a political party wanting to create a party rule despite contradictory state law. Just as the court in *Tashjian* determined that the Republican Party's attempt to broaden the base of its participation by including independent voters was undeniably central to its exercise of the freedom to associate with whomever it desires, in the case of 17-year old primary voters, a court should determine that a party attempting to broaden its base of participation by including younger voters is undeniably central to its exercise of the freedom to associate with whomever it desires. 479 U.S. at 224. Thus, prohibiting a political party from permitting 17-year olds to vote in its primary is a violation of that party's freedom to associate with whomever it desires.

i. The freedom of association grants political parties the right to define the boundaries of its association.

Political parties define their own boundaries as granted under the First Amendment. The freedom of association gives political parties the right to determine the “boundaries of its own association” *Tashjian*, 479 U.S. at 224.

A political party permitting 17-year olds to vote in its primary is an exercise of its freedom of association right to define the boundaries of its association. Determining the age at which its members may vote in primary elections certainly falls within the category of defining the boundary of the association of a political party. By lowering the age at which its members may vote in primary elections to 17-years, a political party is merely re-defining the age boundary of its association. Therefore, since *Tashjian* granted political parties the right to define their own boundaries, a party may define such boundaries by allowing 17-year olds to be voting

members. 479 U.S. at 224. Accordingly, any state law regulating the age of primary voters may not take precedent over a party rule that lowers such age, as the state law would be an unlawful definition of a party's associational boundaries.

ii. The freedom of association grants political parties the right to determine the structure that best allows it to pursue its political goals.

The structure of political parties may change according to its objectives. A political party has the right to determine “the structure which best allows it to pursue its political goals.”

Tashjian, 479 U.S. at 224.

A party's decision to allow 17-year olds to vote in its primary is a change in the structure that best allows it to pursue its political goals. Research conveys that voting in a preceding election may increase the probability of voting in the next election by up to forty-seven percent. Gerber, Green, and Shachar. *Voting may be habit-forming: Evidence from a randomized field experiment*. *American Journal of Political Science* v. 47, pp. 540-550. 2003. Accordingly, if an individual votes in a party's primary election, then that individual may be 47% more likely to vote for that party in the general election. Thus, if the political goals of a party are to encourage civic engagement and voter participation at a younger age in an effort to create long-term party membership, then lowering the age at which its members can vote is a natural approach to meeting such goals. Since the court in *Tashjian* determined that a party has the constitutional right to decide “the structure which best allows it to pursue its political goals,” decreasing the minimum age at which its members can vote in primaries to effectuate such goals should be permitted. *Id.* at 224.

iii. The freedom of association grants political parties the right to decide who selects the standard bearer that best represents the party's ideologies and preferences.

Political parties possess the right to decide who selects the party's standard bearer. The right of political parties to "select a standard bearer who best represents the party's ideologies and preferences," necessarily presupposes the right to determine who is able to participate in the selection of such standard bearer. *Eu*, 489 U.S. at 224.

If a political party believes that including younger demographics in its primary will allow it to select a candidate that best represents its ideologies and preferences, then it should be able to use its freedom of association rights to enable 17-year olds to vote in its primary elections. Since the court in *Eu v. San Francisco County Democratic Central Committee* held that political parties have the right to select its standard bearer, which necessarily presupposes the right to determine who will participate in selecting that standard bearer, a party should be able to permit 17-year olds to participate in its primary. *Id.*

Moreover, given that the right to choose the standard bearer necessarily presupposes the right to determine who will participate in its selection, any interference by the state in that selection process may limit the "[p]arty's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action" *Tashjian*, 479 U.S. at 216. Since primaries determine the standard bearer who best represents the party's ideologies and preferences, primaries are a crucial juncture at which political parties mobilize its members in preparation for the general election. Thus, prohibiting a party from permitting 17-year olds from selecting its standard bearer would be to allow the state to strip the party of its freedom of association at the very juncture at which its standard bearer is determined.

- B. Just because a State believes that the conduct of a political party is unwise, irrational, or destructive to party interests, does not permit it to substitute its judgment for that of the party.

A State may not substitute its judgment for a political party's, even if it believes that the party's conduct is unwise, irrational, or destructive to party interests. In *Tashjian*, the issue was whether the Republican Party of Connecticut's freedom of association rights enabled it to allow voters not registered as Party members to participate in its primary. 479 U.S. at 214. The State argued that by restricting voting rights to party members only, its closed primary law was designed to save the Republican Party from engaging in conduct destructive to party interests. *Id.* at 224. The court held that even if the State was correct in believing that permitting non-party members to vote in the primary would be destructive to the party, that it had no constitutional right to "substitute its judgment for that of the Party's" *Id.* "[A]s is true of all expressions of First Amendment freedoms," the court reasoned that it "may not interfere on the ground that [it] [views] a particular expression as unwise or irrational." *Id.* Therefore, a political party may use its freedom of association to engage in conduct, regardless of whether a state believes that conduct to be unwise or irrational.

Political parties should be able to permit 17-year olds to vote in their primaries even if the State feels that to do so would be unwise, irrational, or destructive to party interests. A State arguing that it is unwise, irrational, or destructive to the interests of a party to lower the age at which its members may vote is similar to *Tashjian*. In *Tashjian*, the State of Connecticut argued that its statute requiring political parties to conduct member-only closed primaries was designed to protect the Republican Party from engaging in conduct destructive to its interests. 479 U.S. at 224. A state may argue that its law preventing 17-year olds from voting in primary elections is for the good of the political parties. These cases are the same because each involves a state law preventing a party from engaging in conduct that it feels would be unwise, irrational, or destructive to the party. The court in *Tashjian* determined that the State could not prevent the

Republican Party from allowing non-members from voting in its primary because a state may not substitute its judgment for that of party's, regardless of whether the state feels that the conduct of the party is unwise, irrational, or even destructive of its own interests. 479 U.S. at 224.

Likewise, in the case of 17-year old primary voting, a court should determine that a state cannot substitute its judgment for that of a party by preventing it from allowing 17-year olds to vote in its primary election. Therefore, even if a state feels that a political party allowing 17-year olds to vote in its primary election is an unwise or irrational decision that is destructive to the interests of the party, it may not substitute its judgment for that of the party by preventing it from allowing 17-year olds to vote.

C. Maryland Test-Case

In the 2006 case *Lamone v. Capozzi*, 396 Md. 53, 912 A.2d 674 (2006), the highest court in the State of Maryland interpreted Article I, § 1 of the State Constitution to mean that the term "all elections" applied equally to both general and primary elections with respect to early voting. The Maryland Board of Elections then extended the court's interpretation to Maryland election law EL § 3-102(a), which previously allowed 17-year olds who would be attaining the age of 18 by the general election to vote in the primary. In doing so, EL § 3-102(a) became unconstitutional, such that 17-year olds could no longer vote in primary elections because primaries were now interpreted to be included in "all elections," and only those who have reached the age of 18 could vote in an election.

The Republican and Democratic Parties of Maryland, however, asserted their First Amendment freedom of association rights to allow 17-year olds who would be 18 by the time of the general election to vote in their primaries. After the Parties asserted their freedom of association rights, the Attorney General of Maryland determined that the State did not have a

sufficient enough interest in keeping 17-year olds from voting to override the First Amendment freedom of association rights of the Parties. Therefore, in Maryland, where both major political parties have already asserted their freedom of association rights as a manner in which to enfranchise 17-year olds for the primary election, the First Amendment interests in allowing the parties to do so takes precedent over any state interest to the contrary.

II. STATE LAW PROHIBITING POLITICAL PARTIES FROM DETERMINING THE AGE AT WHICH ITS MEMBERS MAY VOTE IN ITS PRIMARY IS SUBJECT TO STRICT SCRUTINY.

Courts use the strict scrutiny standard of review when a state law imposes a severe burden on the freedom of association rights of political parties. *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997); *Wash. State Grange v. Wash. State Republican Party*, 128 S.Ct. 1184, 1191 (2008). The analysis for strict scrutiny is that the severely burdensome state law must be narrowly tailored to serve a compelling state interest. *Tashjian*, 479 U.S. at 217; *Clingman*, 544 U.S. at 586; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Norman v. Reed*, 502 U.S. 279, 289 (1992).

A. A court applies strict scrutiny when a state law severely burdens the freedom of association rights of a political party.

The standard of review applied by a court depends upon the burden imposed by the state law in question. When a state law imposes a severe burden upon a political party's freedom of association rights, the court applies strict scrutiny. *Clingman*, 544 U.S. at 586; *Timmons*, 520 U.S. at 363; *Wash. State Grange*, 128 S.Ct. at 1184. In *Clingman v. Beaver*, the issue was whether the State of Oklahoma's semi-closed primary system severely burdened the freedom of association rights of the Libertarian Party of Oklahoma (LPO). 544 U.S. at 584. Unless registered as an independent, Oklahoma election law required individuals to be registered members of a party before they could vote in that party's primary. *Id.* at 584-585. The court

held that the LPO's freedom of association rights were not severely burdened because Oklahoma's semi-closed primary election laws did not regulate the LPO's internal processes. *Id.* at 590. It reasoned that a voter who was "unwilling to disaffiliate from another party to vote in the LPO's primary forms little 'association' with the LPO-nor the LPO with him." *Id.* at 589. *See also Timmons*, 520 U.S. at 363 (the court held that a Minnesota law preventing an individual from being the candidate for more than one party did not severely burden the freedom of association rights of political parties because it was "silent on the parties' internal structure, governance, and policymaking").

A party's freedom of association would be severely burdened by a state law prohibiting its ability to lower the age at which its members can vote in its primary. The case of 17-year old primary voting is distinguishable from *Clingman*. In *Clingman*, the court determined that the Libertarian Party of Oklahoma's (LPO) freedom of association rights were not severely burdened because the Oklahoma semi-closed primary law was not an attempt to regulate the LPO's internal party processes. *Id.* at 590. Enforcement of the semi-closed primary law in *Clingman* was not an attempt to regulate internal party processes because the law that the LPO took issue with did not concern the registered members of its Party. *Id.* at 589. Establishing the age at which its members can vote in its primary, however, is an internal party process because it concerns the qualifications of its members as determined by the party. As such, in the case of 17-year old primary voting, prohibiting a political party from determining the age at which it would like to allow its registered members to vote in its primary is an attempt to regulate internal party processes, making it a severe burden. Thus, since the state statute is a severe burden upon a party's freedom of association rights, a court should apply the strict scrutiny standard of review.

B. State law prohibiting a party from lowering the age at which its members can vote in its primary is not a narrowly tailored compelling state interest.

State law imposing severe burdens on the associational rights of parties must be narrowly tailored to serve a compelling state interest. *Tashjian*, 479 U.S. at 217; *Clingman*, 544 U.S. at 586; *Burdick*, 504 U.S. at 434; *Norman*, 502 U.S. at 289. In *Tashjian*, the issue was whether the State of Connecticut’s closed primary law was narrowly tailored to serve a compelling state interest. 479 U.S. at 217. The State of Connecticut contended that the law was narrowly tailored to serve the State’s compelling interest of ensuring the administrability of the primary system, which included minimizing the costs of conducting elections. *Id.* Despite the State’s argument that allowing the Republican Party of Connecticut to include independent voters in its primary would cost too much money, the court held that “the possibility of future increases in the cost of administering the election system is not a sufficient basis [] for infringing [the Party’s] First Amendment rights.” *Id.* at 218. The court reasoned that although the State was entitled to take administrative and financial considerations into account, it could not restrain the Republican Party’s freedom of association for reasons of its own administrative convenience. *Id.* Therefore, laws preventing an increase of expenditures relating to the costs of administering a primary election are not a narrowly tailored compelling state interest.

Cost is not a narrowly tailored compelling state interest that allows a state to prohibit political parties from allowing 17-year olds from voting in primaries. In *Tashjian*, the State of Connecticut contended that allowing independent voters to vote in the Republican Party primary required the “purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials specifically intended for independents voting in the Republican primary.” 479 U.S. at 218. When it comes to allowing 17-year olds to vote in primaries, a state may contend that it would cost too much money to modify its primary

election process, and that it may similarly have to purchase additional voting machines, hire additional poll workers, and print additional ballots to accommodate the increased number of voters resulting from 17-year old primary enfranchisement.

These cases are similar because in each instance a state contends that its interest in preventing additional primary election related costs is a narrowly tailored compelling state interest. But, just as the court in *Tashjian* determined that the possibility of future increases in the cost of administering elections was insufficient to allow the State of Connecticut to infringe upon the associational rights of the Republican Party, in the case of 17-year old primary voting, a court should determine that the possibility of future increases in the cost of administering primary elections is insufficient to allow a state to infringe upon the associational rights of the party at hand. 479 U.S. at 218. Moreover, the fiscal notes on legislation regarding 17-year old primary voting in the States of Maryland (SB 201) and Connecticut (HJ 21), respectfully, convey that enfranchising 17-year olds will not financially impact the State or the local election boards, or that if there is a financial impact, it will be minimal merely because it may increase the number of absentee ballots that need to be printed. Thus, the administrative and financial considerations relating to preventing 17-year olds from voting in a primary are not narrowly tailored to serve a compelling state interest.

III. CONDUCT THAT IS PERMISSIBLE BY A PARTY DURING A PRIMARY IS NECESSARILY PERMISSIBLE DURING A CAUCUS.

If a political party is allowed to engage in particular conduct during a state controlled primary election, then a political party is necessarily allowed to engage in that same conduct during a private party controlled caucus.

Caucuses, in this context, are meetings held simultaneously across the state in each neighborhood. Participants in each caucus select representatives, usually

chosen according to the presidential candidates they support, to a higher level caucus or convention. A pyramidal process eventuates in a statewide convention of representatives whose selection is ultimately traceable to the preferences expressed at the original caucuses. The statewide convention selects the actual presidential nominating delegation.”

Daniel Hays Lowenstein & Richard L. Hasen, *Election Law* 463 (2d ed., Carolina Academic Press 2001).

Primaries, on the other hand, are publicly funded and “allow the voters themselves, as distinguished from the party organization or a committee thereof, to choose their candidates. . . .” 29 C.J.S. *Elections* § 200 (2008). Thus, because party caucuses are inherently private party affairs, whereas primary elections are publicly funded and operated, whatever a court decides to be a valid exercise by a political party during a primary must necessarily be valid when exercised by a political party during a caucus. To find otherwise would be to disregard common sense given that privately conducted political party activities, such as caucuses, are subject to less government regulation than publicly conducted political party activities such as primaries.

If a political party can permit 17-year olds to vote in its primary, then a political party should also be able to permit 17-year olds to vote in its caucus. Since party caucuses are privately held meetings, with all rules and funds derived from the party itself, a party holding a caucus is naturally expected to exercise control over the caucus rules, inclusive of determining who may vote. A party who is holding a state-funded public primary election, however, is not as naturally expected to exercise complete control over the primary rules. Therefore, if a party is able to permit 17-year olds to vote during its primary, then a less government-regulated caucus should be permitted to allow 17-year olds to vote during its election as well.

CONCLUSION

A state preventing a political party from creating a party rule that permits it to allow 17-year old members to vote in its primary or caucus likely violates the U.S. Constitution. Since under the First and Fourteenth Amendments a political party has the right to freely associate with whomever it desires, a political party may include 17-year olds in its association. This includes setting the boundaries and structure of the party to include 17-year olds if the party believes that doing so will help it to best attain its goals and select the party's standard bearer. Even if a state believes that including 17-year olds in a primary is unwise, irrational, or destructive to the party, that state may not intervene and substitute its judgment for that of the party.

Moreover, a state law preventing a party from allowing 17-year olds from voting violates that party's freedom of association rights and thus the law will be subject to strict scrutiny. Under strict scrutiny the state will have to prove that its law is narrowly tailored to serve a compelling state interest, which it will likely be unable to prove since justifications such as minimizing election related costs are insufficient. As such, a court will likely determine that a political party may allow 17-year old members to vote in its primary, and since primaries are less private than caucuses, parties will be able to allow 17-year old members to vote in its caucuses as well. Therefore, regardless of state law to the contrary, a political party may assert its freedom of association rights to permit 17-year old members to vote in its primary or caucus.