OLR RESEARCH REPORT

May 13, 2013 2013-R-0229

STATE REGULATION OF MAJOR AND MINOR POLITICAL PARTIES

By: Michael Csere, Legislative Fellow

You asked to what extent the state can regulate minor political parties (i.e., third parties). Specifically, you are interested in the constitutionality of statutory provisions that govern major and minor parties separately, including provisions that regulate the internal organization and nominating procedures of political parties.

SUMMARY

Two constitutional provisions are directly implicated by the regulation of political parties. The First Amendment protects the "freedom to engage in association for the advancement of beliefs and ideas," while the Fourteenth Amendment protects against state-sponsored discrimination through the right to equal protection of the laws (Rotunda & Nowak, *Treatise on Constitutional Law* § 20.41(a) (2012) (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958))).

The U.S. Supreme Court has held that states may regulate certain aspects of political parties, including their internal government structure and nominating process, if they can demonstrate an interest in the regulation that corresponds to the severity of the burden imposed. Usually, the regulation must promote electoral integrity or political stability. But a more substantial burden on the parties requires the state's interest in that regulation to be correspondingly more compelling. For example, the most severe type of burden requires a state to demonstrate that that regulation is *necessary* to ensure electoral fairness, which can be a difficult standard for a state to meet.

Sandra Norman-Eady, Director
Phone (860) 240-8400
FAX (860) 240-8881
http://www.cga.ct.gov/olr

Connecticut General Assembly
Office of Legislative Research

Room 5300
Legislative Office Building
Hartford, CT 06106-1591
Olr@cga.ct.gov

The Court has also held that states may regulate major and minor parties differently, and may do so in a way that favors the two-party system to promote political stability. However, substantial or "invidious" discrimination between political parties may violate the Equal Protection Clause. A state may not enact regulations so severely burdensome that they make ballot access or party formation "virtually impossible" (*Williams v. Rhodes*, 393 U.S. 23, 25 (1968)).

FREEDOM OF ASSOCIATION AND INTERNAL PARTY GOVERNANCE

Like most constitutional rights, the freedom to associate is not absolute. Generally, states may regulate political parties, including matters of internal party governance, if the regulation is "necessary to the integrity of the electoral process." If a law imposes only "reasonable, nondiscriminatory restrictions" upon the constitutional rights of parties and voters, and the burden is not substantial or severe, "the State's important regulatory interests are generally sufficient to justify the restrictions" (*Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). If a law substantially or severely burdens the rights of political parties and their members, it is nonetheless constitutional if it advances a compelling state interest and is narrowly tailored to serve that interest (*Id.*).

Substantial Burden

If a law substantially burdens the rights of political parties but does not serve a compelling interest, it may not be constitutional. The Supreme Court invalidated a California law that (1) banned party endorsements in primary elections, (2) controlled the size and composition of state committees, (3) set forth the rules governing the selection and removal of committee members, (4) set the maximum term of office for the chair of the state central committee, and (5) required that the committee chair rotate between residents of northern and southern California. The Court found the state could not (1) demonstrate that its restrictions were necessary to ensure that an election was orderly and fair and (2) "substitute its judgment for that of the party as to the desirability of a particular internal party structure" (*Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 232-33 (1989)).

Permissible Party Regulations

The Court has suggested that a statutory requirement that parties have a central or county committee with a specified number of representatives from each district does not violate the Constitution, and that a state can entrust such a committee with authorization to (1) fill

vacancies on the party ticket, (2) provide for the nomination of delegates to national conventions, and (3) call statewide conventions. The Court found that these regulations were not substantial burdens, and they promoted the legitimate state interest in fair, honest, and orderly elections (*Marchioro v. Chaney*, 442 U.S. 191 (1979)).

DISCRIMINATION BETWEEN MAJOR AND MINOR PARTIES

The Court has held that a state can seek to encourage political stability and help preserve the two-party system. States may enact "reasonable elections regulations that may, in practice, favor the traditional two parties" and "that temper the destabilizing effects of party-shattering and excessive factionalism" (*Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997)). States may not prevent third parties from forming, but they "need not remove all of the many hurdles third parties face in the American political arena" (*Id.* at 366 & n.10).

Anti-Fusion Laws

In *Timmons*, the Court, in upholding a Minnesota law that prohibited candidates from appearing on the ballot for more than one political party (i.e., "fusion"), held that anti-fusion laws did not violate a political party's First or Fourteenth Amendment associational rights. The burden that the anti-fusion laws imposed on minor parties was "not severe" and was justified by "correspondingly weighty valid state interests in ballot integrity and political stability" (*Id.* at 363, 369-70).

Invidious Discrimination

State laws may be successfully challenged on equal protection grounds if they are found to "invidiously discriminate" against minor parties (*Am. Party of Texas v. White*, 415 U.S. 767, 781 (1974)). To assert an equal protection violation, a political party must demonstrate a discrimination against it "of some substance" (*Id.*). In *Am. Party of Texas*, the Court upheld the constitutionality of a statute that required "small parties" to hold a nominating convention and major parties to hold a primary. The Court noted that although the state required different nominating procedures for small and major parties, the Equal Protection Clause did not necessarily forbid one in preference to the other because the convention process was not "invidiously more burdensome than the primary election" (*Id.* at 780-81).

Other Cases

The Ninth Circuit U.S. Court of Appeals held that a California law requiring political parties to nominate candidates by direct primary rather than convention did not violate the Libertarian Party's freedom of association. The court concluded that the state's interest in enhancing the democratic character of the election process overrode whatever interest the party had in designing its own rules for candidate nomination (*Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992)).

On the other hand, the Supreme Court has invalidated restrictions so substantial that it was "virtually impossible" for new or minor parties to gain access to the ballot. The Ohio law that was struck down in the case required parties to obtain 15% of the vote in the last gubernatorial election, among other severely restrictive requirements, to gain ballot access. Ohio argued that its law served various compelling interests, including political compromise and stability, electoral fairness and integrity, and an orderly election process. But the Court responded that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly" (*Williams v. Rhodes*, 393 U.S. 23, 24, 32 (1968)).

CONNECTICUT POLITICAL PARTIES

A recent court decision involved the Connecticut Green and Libertarian parties' constitutional challenge to aspects of Connecticut's Campaign Finance Reform Act and Citizens' Election Program. The U.S. Court of Appeals for the Second Circuit

1. upheld the Act's qualification and grant distribution provisions;

2. struck down the independent and excess expenditure provisions ("trigger provisions");

3. upheld the ban on contributions by state contractors, principals, and their spouses and children;

4. struck down the ban on contributions by lobbyists, their spouses and children, and political committees they establish or control; and

5. struck down, for both lobbyists and contractors, the ban on soliciting contributions (Green Party of Connecticut v. Garfield, 616 F.3d 213 (2d Cir. 2010)).

For further discussion of this case, see OLR Report 2010-R-0320.

For a comparison of major and minor parties under Connecticut law, including party formation and rules, ballot access, and nominating procedures, see OLR Report 2013-R-0145.

HYPERLINKS

OLR Report 2013-R-0145, Comparison of Major and Minor Parties, http://www.cga.ct.gov/2013/rpt/2013-R-0145.htm (February 26, 2013).

OLR Report 2010-R-0320, Second Circuit's Decisions in Green Party of Connecticut v. Garfield, http://www.cga.ct.gov/2010/rpt/2010-R-0320.htm (July 28, 2010).

MC:ro