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In Defense of the Closed Primary

Bethany Dixon

The unprecedented inflammatory rhetoric of the 2016 Presidential election catapulted what would have already been the top news story of the year into something that appeared to be more like a sensational reality show than an election. This past year election news was the biggest news story. It is not surprising, because the country faced contentious primary elections followed by the most talked about general election in recent history.

The Supreme Court has held that states must allow independent voters to vote in primaries if the party wishes to allow independents to do so.¹ As stated by the U.S. Supreme Court, “the representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting electoral candidates who espouse the citizens’ political views.”² Prior to 1902, political parties used conventions and caucuses to decide which candidates would run in the general election.³ In 1902, Wisconsin passed the first primary law and within 15 years 46 states followed suit.⁴ The primary system meant to put the decision in the hands of the general public rather than just the party elite.⁵ The Supreme Court has recognized that when there is not an indication that a party wants to open its primary to voters other than those in the party, the closed primary does not violate the constitutional rights of non-party voters.⁶

THE AMERICAN PRIMARY SYSTEM

Today we have three categories of primaries: closed, open and blanket.⁷ In 29 states, primaries are closed.⁸ Closed primaries require that voters declare a party affiliation and only vote in that party’s primary.⁹ In some states voters

¹ Guy Danilowitz, *The Party or the People: Whose Ballot Choice Does the Constitution Protect?*, 41 U.C. DAVIS L. REV. 713, 715 (2007).

² Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R.5th 125 (2004).

³ Danilowitz, *supra* note 1, at 719.

⁴ *Id.*

⁵ *Id.*

⁶ Miller, *supra* note 2.

⁷ Danilowitz, *supra* note 3.

⁸ Closed primary - Ballotpedia, CLOSED PRIMARY - BALLOTPEDIA, https://ballotpedia.org/closed_primary (last visited Nov 12, 2016).

⁹ *Id.* at 720

must declare party affiliation far before the primary while other states allow voters to declare a party affiliation very close to the election.¹⁰ Anyone who is not registered prior to the primary cannot participate in the primary.¹¹ Closed primaries, are the most basic of the categories.¹² In open primaries however, voters can vote in any single primary.¹³ Essentially, the voter forms no party affiliation until receiving the ballot.¹⁴ The blanket primary is not currently in use by any state.¹⁵ “In blanket primaries the voters may vote for candidates of different parties for different offices on the same ballot.”¹⁶ In a blanket primary the voter doesn’t have to have a party affiliation until casting their vote.¹⁷

The Court invalidated the blanket primary in *California Democratic Party v. Jones*.¹⁸ The Court held that the blanket primary interfered with the party’s right of association by allowing non-party members to “interfere” with the party’s choice.¹⁹ Justice Stevens stated in his dissent that under the Court’s analysis in the case, a semi-closed primary would likely survive the Court’s thinking but an open primary likely would not.²⁰

The semi-closed primary is like the closed primary in that voters are required to register with the party they want to vote for prior to the primary. However registration can be easier.²¹ In states with a semi-closed primary, unaffiliated voters can either register with the party for the duration of the primary, or the act of participating in the party is considered to be a registration with that party.²² In some states there are primary hybrids allowing unaffiliated voters to vote in a primary only if they have never voted in a primary.²³

There is a growing sense of dissatisfaction among voters with the current system, particularly from the closed primary system in place in many states. In May 2016, a federal judge dismissed a lawsuit regarding Montana’s closed pri-

¹⁰ *Id.*

¹¹ Charles E. Borden, *Primary Elections*, 38 HARV. J. ON LEGIS. 263, 264 (2001).

¹² *Id.* at 265.

¹³ Danilowitz, *supra* note 7, at 720

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Borden, *supra* note 11, at 264.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 265

²² *Id.*

²³ *Id.*

mary system.²⁴ The *Post Register* stated “U.S. District Judge Brian Morris dismissed the lawsuit by the Montana Republican Party and 10 GOP county central committees that claimed open primaries allow Democrats and independent voters to influence the outcome of their elections.”²⁵ Montana’s Secretary of State, Linda McCulloch argued that closing the primaries would shift the power the voters hold to party leaders.²⁶

After losing the New York primary, Senator Bernie Sanders criticized the New York primary system saying: “Today, 3 million people in the state of New York who are independents have lost their right to vote in the Democratic or Republican primary. That’s wrong.”²⁷ Where Senator Sanders sees voter disenfranchisement, Secretary Clinton favors closed primaries. Interestingly, Sanders does better with voters registered as independents while Clinton does better with voters who strictly identify as Democrats.²⁸

Proponents of closed primaries argue that it gives independents an incentive to register with one of the two parties and rewards becoming a “team player.”²⁹ A loyal member of the party can develop resentment over the idea of someone with no party loyalty getting a say in who will represent the party in the most important election.³⁰ Some critics worry that people who only turn out to vote every four years will not be committed to the smaller state and local elections: “It takes party members to win critical down-ballot seats, and party leaders want to do what they can to turn interested voters into loyal partisans.”³¹

The Supreme Court has upheld the constitutionality of closed primaries.³² States may prevent voters registered in other parties from voting in their primary.³³ The Court has also upheld the constitutionality of open primaries.³⁴

²⁴ Matt Volz, *Judge tosses Montana closed primary lawsuit*, POST REGISTER, (May 3, 2016), <http://www.postregister.com/articles/west/2016/05/03/judge-tosses-montana-closed-primary-lawsuit>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Dan Hopkins, *Why Sanders Does Better with Independents*, FIVETHIRTYEIGHT, (Apr. 18, 2016), <http://fivethirtyeight.com/features/why-sanders-does-better-with-independents>.

²⁸ *Id.*

²⁹ Jeff Stein, *Bernie Sanders says Democrats should get rid of closed primaries. Is he right?* VOX, (Apr. 28, 2016), <http://www.vox.com/2016/4/28/11469468/open-primaries-closed-primaries-sanders>.

³⁰ *Id.*

³¹ *Id.*

³² Danilowitz, *supra* note 7.

³³ *Id.*

³⁴ *Id.*

DEADLINES AND PARTY RAIDING

New York law has come under fire more than once.³⁵ In *Rosario v. Rockefeller* the Court held that New York's closed primary deadline was constitutional.³⁶ The Court stated: "It did not absolutely disenfranchise the class to which the petitioners belong – newly registered voters who were eligible to enroll in a party before the previous election. Rather, the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."³⁷

A minority of states require voters to affiliate with a party in advance of a primary to participate.³⁸ Jonathan Brater of the Brennan Center for Justice at New York University School of Law explained that in New York "we have a particularly restrictive system for participating in primaries."³⁹ New York requires that voters register with their party about six months prior to the primary.⁴⁰ This led to a number of voters ineligible to vote in the New York primary, which Senator Sanders lamented after the election.⁴¹ However, it was not just prospective Democratic voters who were shut out.⁴² Republican candidate Donald Trump's son, Eric and daughter, Ivanka, were not registered with the Republican party prior to the New York primary and were unable to participate.⁴³ As Brater explained, "This year that [deadline] resulted in lots of New Yorkers including the children of one of the presidential candidates not being able to participate, so states should be looking at in the very least moving the affiliation deadline closer to the election so that people aren't shut out because they weren't paying attention six months before the election was held."⁴⁴

³⁵ *Rosario v. Rockefeller*, 410 U.S. 752, 752 (1973).

³⁶ *Id.* at 762.

³⁷ *Id.* at 757.

³⁸ Telephone interview with Jonathan Brater, Counsel for the Brennan Center for Justice at NYU School of Law, Democracy Program (Sept. 29, 2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Editorial Board, *Donald Trump's kids can't vote for their dad. That's no laughing matter.* THE WASHINGTON POST, (Apr. 14, 2016), http://www.washingtonpost.com/opinions/donald-trumps-kids-cant-vote-for-their-dad-thats-no-laughing-matter/2016/04/14/5cc603dc-0272-11e6-9203-7b8670959b88_story.html.

⁴³ *Id.*

⁴⁴ *Supra* note 38.

New York law does not lock someone into a particular party forever.⁴⁵ As the Court pointed out in *Rosario*, a voter can vote in a different primary every year;⁴⁶ they would just need to abide by the deadline and register for a different primary by that deadline.⁴⁷ The Court explained: “The purpose of New York’s delayed-enrollment scheme, we are told, is to inhibit ‘raiding’ whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party’s primary.”⁴⁸ It is often argued that closed primaries prevent that party’s opponents voting for the weakest opponent.⁴⁹ Early in the 2016 election, liberals strategically voted against Donald Trump in the Virginia primaries.⁵⁰ In that primary many Democrats felt that the anti-Trump votes was more important than voting in their own primary.⁵¹ This is reminiscent of the 2008 election when Rush Limbaugh encouraged his listeners to vote strategically for Hillary Clinton in order to prolong the Democratic Primary in an initiative he called “Operation Chaos.”

POLITICAL PARTIES AS PRIVATE ORGANIZATIONS

In *Nader v. Schaffer* two registered voters who were not affiliated with a party brought suit stating that Connecticut’s closed primary violated their right of association because they were not permitted to participate in the closed primary.⁵² In using a balancing test the Court decided that the rights of the party to keep nonparty members from participating in the closed primary outweighed the voters’ desire to participate in the party by voting in the primary.⁵³ The Court made specific note of the fact that voters had not made any effort to participate in the party activities prior to trying to vote in the party’s primary.⁵⁴

⁴⁵ *Rosario v. Rockefeller*, 410 U.S. 752, 759 (1973).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 760.

⁴⁹ Stein, *supra* note 29

⁵⁰ David Weigel, *Liberals explain why they’re strategically voting as Republicans*, THE WASHINGTON POST, (Mar. 1, 2016), <http://www.washingtonpost.com/news/post-politics/wp/2016/03/01/liberals-explain-why-theyre-strategically-voting-as-republicans/>.

⁵¹ *Id.*

⁵² Lauren Hancock, *The Life of the Party: Analyzing Political Parties’ First Amendment Associational Rights When the Primary Election Process Is Construed Along A Continuum*, 88 MINN. L. REV. 159, 174 (2003).

⁵³ *Id.*

⁵⁴ *Id.*

Political parties are inherently private organizations that believe they should be able to determine the criteria for membership and eligibility for running for office and voting. Allowing voters affiliated with one political party to choose to vote in the primaries of other parties sets up a potential contest between the voter's party loyalty and her desire to support a very attractive candidate in another party.⁵⁵ The current support for open primaries is representative of a growing population that dislikes partisanship.⁵⁶ There is a type of voter in modern America who votes "for the man and not the party." This is in direct conflict with political parties' goal for primaries. For parties, the primary is meant to resolve "ideological struggles within a political party."⁵⁷

CONCLUSION

Closed primaries require that voters declare a party affiliation and only vote in that party's primary. Proponents of closed primaries argue that it gives independents an incentive to register with one of the two parties and rewards becoming a "team player." A minority of states, including New York, require voters to affiliate with a party in advance of a primary to participate. In *Rosario v. Rockefeller*, the Supreme Court explained: "The purpose of New York's delayed-enrollment scheme, we are told, is to inhibit 'raiding' whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." In *Nader v. Schaffer* the Court held that the rights of the party to keep nonparty members from participating in the closed primary outweighed the voters' desire to participate in the party by voting in the primary. Political parties are inherently private organizations that believe they should be able to determine the criteria for membership and eligibility for running for office and voting.

⁵⁵ Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 TULSA L.J. 59, 64 (2000).

⁵⁶ *Id.*

⁵⁷ *Id.* at 70.