HB

327

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 29, 1992 FURTHER REFERRALS: Finance

Date of Committee Action: 5/1/92

The JUDICIARY Committee considered: HB 327

HOUSE BILL NO. 327 PRIMARY ELECTIONS

"An Act relating to primary elections."

RECOMMENDATIONS: [✓] the same title
be replaced with CS HB 327 (JUD) [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[✓] no recommendations
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[ ] zero fiscal note _____ [✓] zero fiscal note(s) Elections (4.29)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
				✓	
				✓	
				X	
					✓
					—
				X	

CHAIRMAN'S SIGNATURE

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. CSHB 327

Revision Date: _____ **Department Affected:** Office of Gov.-Div. of Election

Title: Primary Elections **BRU:** _____

Component: _____

Sponsor: House State Affairs Committee

Requestor: House State Affairs Committee **COMPONENT SERIAL NO.** | | | | |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	0	0	0	0	0	0

POSITIONS: N/A

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year impact: 0

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact because the funding is included in the FY93 House budget.

Prepared By: House State Affairs Committee **Phone:** 465-4859

Division: _____ **Date:** 4/29/92

Approved by Commissioner: Representative Gene Kubina, Chairman Gene Kubina

Agency: House State Affairs Committee **Date:** 4/29/92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/7/91

Alaska State Legislature

Chairman
State Affairs
Committee

Legislative Council

Transportation
Committee

Representative Eugene Kubina

During Session:
State Capitol
P.O. Box V
Juneau, Alaska 99811
(907) 465-4859

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Valdez, Alaska 99686
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SPONSOR STATEMENT FOR CSHB 327

At the present time, the Alaska statutes regarding primary elections are not consistent with the federal constitutional requirements which govern a party's right to conduct primary elections. CSHB 327 has been introduced as a vehicle by which to correct these inconsistencies.

Under current state law, Alaska has an open primary in which a voter may vote for any candidate on the ballot, regardless of party affiliation. However, now that the Republican party has voted to close its primary, Alaska law must be amended to reflect a party's ability to restrict who votes in its primary. In a U.S. Supreme Court ruling, [Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986)], it was decided that a political party's First Amendment right of association overrides state law. Alaska law must be changed to reflect that ruling.

Section One of CSHB 327 describes the intent of the legislature to continue the open primary system when it is legally and constitutionally possible to do so.

Section Two of CSHB 327 provides for the open primary to continue for those parties that do not close their primaries. It requires the Director of the Division of Elections to prepare an open primary ballot containing the names of all candidates whose parties choose to remain in the open primary system. This ballot may be distributed to any qualified voter in the state.

In the event that a party chooses to close its primary, Section Three would require the Director of Elections to prepare a separate ballot for the candidates of that party. This ballot would be named after the party whose candidates appear on it and would be available only to those voters allowed access by that party's rules.

CSHB 327 would also require that a party notify the Division of Elections of any change in their primary by March 1st of an election year in order to give the Division time to implement the changes. In order to support the one person-one vote standard, CSHB 327 states clearly that a voter may only be given one ballot.

(7)

HOUSE COMMITTEE REPORT

Date Referred: May 14, 1991 FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 4/29/92

The STATE AFFAIRS Committee considered: HB 327

HOUSE BILL NO. 327 PRIMARY ELECTIONS

"An Act relating to primary elections."

RECOMMENDATIONS: [X] the same title
be replaced with CS HB 327 (STA) [ ] a new title
[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note House State Affairs Cmte. for Office of Gov. Div of Elections [ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Eugene M. Kubera CHAIRMAN		Mark Greenberg			✓
Tom Joyner	✓	Mike Miller		✓	
		Sam McDaniel BAKER		✓	
BRUCKMAN	✓	David McCaskill CROQUETTE		✓	

Eugene M. Kubera
CHAIRMAN'S SIGNATURE

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
P.O. BOX AF
JUNEAU, ALASKA 99811-0105
PHONE (907) 465-4611

POSITION PAPER ON CSHB 327 (STA)

The Administration's position is that we support the Open Primary and the current State law which provides for the Division to operate under that premise. We also recognize the Tashjian decision as the "Law of the Land," and we realize we may be forced to accommodate each party which chooses to restrict access to their nominating process.

The Lieutenant Governor has firmly stated that he will uphold and administer the law. As the Legislature is constitutionally recognized as the policy makers, whatever legislation is passed is the law which will prevail when addressing the question of how best to accommodate the parties' associational rights while establishing an election system which is accessible to Alaskan voters while not disenfranchising any Alaskan voter.

The Lieutenant Governor's position on how the Director of the Division of Elections will strike the ballot (under party rules currently submitted to the Division of Elections) was clearly explained in his April 22, 1992 letter which was requested by the Republican Party Chairman for their party's recently held convention. The Division notified the four party chairmen that it would accept rule changes (either withdrawal of current rules or the submission of rules cleared by the Department of Justice) by the parties until 5:00 pm May 1st, 1992. Only after 5:00pm May 1st, 1992 can there be a clear determination of the individual parties' rules and how the Director will strike the ballots accordingly.

Once again, the Administration supports an Open Primary. We acknowledge the associational rights of the parties and will work to accommodate their restrictions on voter access to their individual nominating process'. The Lieutenant Governor and the Division of Elections will abide by the law as it is currently written, or as created in legislation passed by the Alaska State Legislature, the true policy makers.

EXHIBIT A

GREEN PARTY OF ALASKA 92-17

ELECTION OPTIONS RESOLUTION

WHEREAS Alaska's structure for elections is uncertain at this time, and

WHEREAS the Green Party needs to get preclearance from the Federal Government,

THEREFORE BE IT RESOLVED that the Green Party of Alaska will participate in the open blanket primary as it has been run for the last 20 years, allowing any voter to choose to vote for any candidate in the primary election, and

BE IT STILL FURTHER RESOLVED that if there is a non-partisan ballot that Green Party candidates shall be allowed to appear on such a ballot, and if there is a Republican-only ballot and a ballot of everyone but Republicans, the Green Party shall allow its candidates to be listed on the Non-Republican Ballot Only, and

BE IT STILL FURTHER RESOLVED that if parties are limited to listing their candidates on their own ballot that the Green Party of Alaska allow any Alaska voter access to the Green Party Ballot, so long as that voter does not vote the ballot of another political party, and

BE IT STILL FURTHER RESOLVED that the Green Party of Alaska Statewide council shall have the power to adjust proposals to meet the needs of the 1992 election according to the above-listed priorities.

Approved by Consensus
Green Party of Alaska Convention
Fairbanks, Alaska
~~April~~ March 22, 1992

JOHN B. COGHILL
LIEUTENANT GOVERNOR

STATE OF ALASKA
P.O. BOX AA
JUNEAU 99811-0111
(907) 465-3520

April 22, 1992

Ms. Connie Zawacki, Chair
Republican Party of Alaska
P. O. Box 243732
Anchorage, Alaska 99524-3732

Dear Ms. Zawacki:

This letter is in response to your request to know what our current position is regarding the Primary Election. Secondly, you asked us to be specific about how the ballots would be printed.

The Alaska Statutes describe an open primary as being for the benefit of all the people of Alaska. If one party wishes to close their nomination process in the Primary Election, the logical position for us to take is to provide a separate ballot. If a second party wishes to close its nomination process, then we would provide them with their separate ballot. There would then be a third ballot for the parties who wish to remain with an open primary.

The ballots, then, would be as follows:

A. One ballot with only Republican candidates listed

B. One ballot with only Democratic candidates listed

C. One ballot with Alaskan Independence candidates and Green candidates listed.

Our desire is to provide the people of Alaska with the clearest balloting process possible to prevent disenfranchising the electorate. The open primary has been in effect in Alaska for 25 years, and the clearest way to change that process through the "open classic" approach is to have separate ballots.

If you have any further questions, please let me know.

Sincerely,

John B. Coghill

cc: Joe Vogler, Alaskan Independence Party
Rhonda Roberts, Democratic Party of Alaska
Ronnie Roberts, Green Party of Alaska

DRAFT INSTRUCTIONS TO VOTERS

BALLOT CHOICES AVAILABLE IN AUGUST 25, 1992 PRIMARY ELECTION

THE BALLOT EXAMPLES TO THE RIGHT DISPLAY THE BALLOTS AVAILABLE TO ALL ALASKA VOTERS, WHETHER REGISTERED TO SPECIFIC PARTIES, OR REGISTERED NON-PARTISAN, "OTHER," OR "UNDECLARED."

YOU MAY SELECT ONE BALLOT ONLY. YOU MAY VOTE FOR ONLY ONE CANDIDATE IN EACH CONTEST.

THE DEADLINE FOR VOTER REGISTRATION, INCLUDING AN ADDRESS CHANGE, IS 30 DAYS BEFORE ELECTION DAY, OR JULY 26, 1992, FOR THIS PRIMARY ELECTION.

AS 15.05.010

NOTICE:

ALASKA LAW PROHIBITS ELECTION BOARD WORKERS FROM DISCUSSING ANY POLITICAL PARTY, CANDIDATE OR ISSUE WHILE ON DUTY.

AS 15.15.160

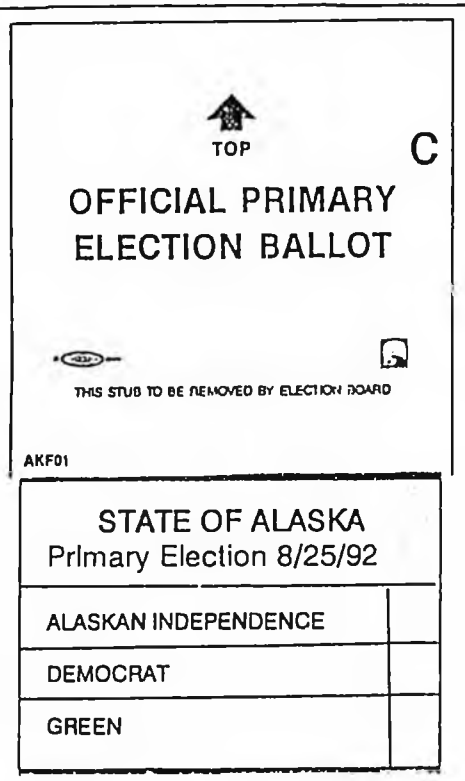
FURTHER, DURING THE HOURS THE POLLS ARE OPEN, A PERSON WHO IS IN THE POLLING PLACE OR WITHIN 200 FEET OF ANY ENTRANCE TO THE POLLING PLACE MAY NOT ATTEMPT TO PERSUADE A PERSON TO VOTE FOR OR AGAINST A CANDIDATE, PROPOSITION OR QUESTION.

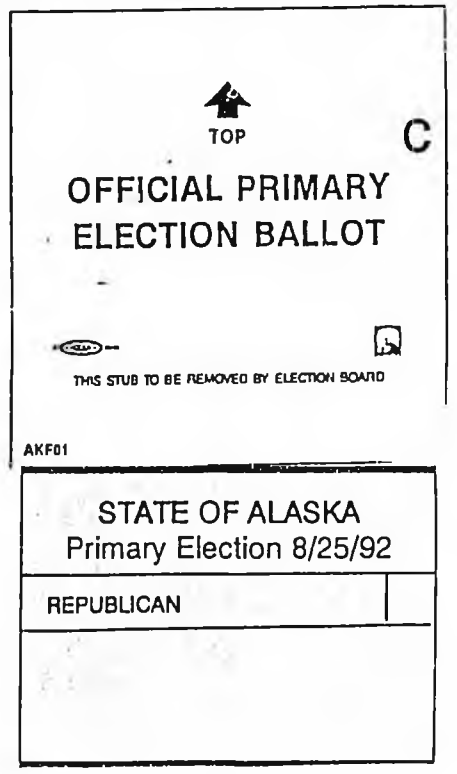
AS 15.15.170

ATTENTION VOTERS

PRIMARY ELECTION
TUESDAY, AUGUST 25, 1992

IF YOUR PARTY AFFILIATION ON YOUR VOTER REGISTRATION IS:	IF YOUR PARTY AFFILIATION ON YOUR VOTER REGISTRATION IS:
ALASKAN INDEPENDENCE DEMOCRAT GREEN REPUBLICAN UNDECLARED NON-PARTISAN OTHER	REPUBLICAN UNDECLARED NON-PARTISAN
YOU CAN VOTE A BALLOT WITH CANDIDATES FROM THE FOLLOWING PARTIES:	YOU CAN VOTE A BALLOT WITH CANDIDATES FROM THE FOLLOWING PARTIES:





7.251

The duties of a State Party Standing Committee shall be fixed by the State Committee and all Standing Committee Chairs shall work at the direction of the State Chair.

7.22

A Chair may appoint pro tem, or the membership of any Alaskan Independence Party organization may elect, a moderator to chair a meeting.

Article VIII. SEVERABILITY

The various rules of the Alaskan Independence Party, including those relating to the primary elections, are severable. Any invalidity or unenforceability of any rule or part thereof shall not effect the remainder of these Bylaws in any way.

8.01

Between conventions of the Alaskan Independence Party, the State Committee may adopt temporary rules or clarifications that are necessary to insure that the bylaws and actions of the Alaskan Independence Party are consistent with state and federal law.

Article IX. PRIMARY ELECTIONS

The Alaskan Independence Party (AIP), believing in the principle of voting for the individual, do establish an open primary election which lists all parties' candidates for office, consistent with applicable law.

9.01

Any registered voter who has not voted another primary ballot may vote in the Alaskan Independence Party primary.

9.02

The fact that a voter has voted in the Alaskan Independence Party Primary Election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of the Alaskan Independence Party is authorized or permitted by the rules of the other party, or by the statutes of the United States or the State of Alaska.

Article X. MISCELLANEOUS

7.26

Terms implying or denoting gender in these bylaws or in any other official correspondence of the Alaskan Independence Party, such as Chair, Vice Chair, his, him, himself, and he, are used solely for brevity and ease of reference and are not to be construed as referring to any particular gender, masculine or feminine.

ARTICLE XIV - PRIMARY ELECTIONS

Section 1. Eligible Voters

Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Section 2. Republican Designation

No person may use the word "Republican" on any ballot or in any campaign as part of a description of himself as a candidate unless that person is a candidate of the RPA, selected according to the Rules of the RPA.

Section 3. Maximize Voter Participation in Primary Elections

(a) Any voter qualified to vote in the Republican Party primary may vote in that election, regardless of whether or not that voter has voted in the primary election of any other party.

(b) The fact that a voter has voted in the Republican Party primary election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of other parties is authorized or permitted by the rules of the other party or parties, or the statutes of the United States or the State of Alaska.

Section 4. Implementation of Primary Election

The SCC, or the EC in the event that there is insufficient time to convene the SCC, may adopt any and all additional rules, regulations, interpretations, clarifications, and the like, which are necessary or desirable to implement the Republican primary election in accord with other rules adopted at this Special Convention (held March 2, 1991), and pursuant to Article XIV of the Rules of the RPA . Any action taken by the Central or Executive Committee under the provisions of this rule shall have the same force and effect as if adopted by this Convention.

Section 5. Prior Registration Requirement

In order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six (6) months immediately prior to the filing deadline for the primary election.

STATE OF ALASKA

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

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ANCHORAGE, ALASKA 99501-1994
PHONE: (907) 269-5100
FAX: (907) 276-3697

☐ *KEY BANK BUILDING*
100 CUSHMAN ST., SUITE 400
FAIRBANKS, ALASKA 99701-4679
PHONE: (907) 452-1568
FAX: (907) 456-1317

☒ *P. O. BOX 110300 - STATE CAPITOL*
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 463-5295

April 24, 1992

Senator Rick Halford
Chairman, Senate Judiciary Committee
State Capitol, Room 103
Juneau, Alaska 99811

Re: Composition of ballot under the party rules

Dear Senator Halford:

You have asked how the primary election ballot should be prepared if a) the Democratic and Republican party primary participation rules currently in effect are both still in effect on May 1, or b) if the Republican rule is still in effect, but not the Democratic rule.[1] A clear answer to this question cannot be given because of the ambiguous wording of the party rules, the lack of implementing statutes or regulations, and the prospect for litigation. However, in our opinion, if both rules remain in effect, it would be reasonable to implement the primary with the following three ballots:

- a Republican ballot containing the candidates of all four parties; only Republicans and independents (whether registered as independents or providing no designation at all) may cast this ballot;

- a Democratic ballot containing the Democratic, Alaska Independence, and Green candidates; any registered voter may cast this ballot;

- a third ballot (the "statutory primary" ballot) containing Alaska Independence and Green candidates; any registered voter could cast this ballot.

If the Democrats withdraw their rule, there should be two ballots -- the Republican ballot described above, and the statutory primary ballot, which would now also contain Democratic candidates. Regardless of the number of ballots, no one may vote more than one ballot.

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[1] Both parties' rules have been precleared by the U.S. Department of Justice, as required by Section 5 of the federal Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973c.

Both the Republican and Democratic party rules are poorly drafted and ambiguous, and could be given a different interpretation.[2] However, our interpretation involves the least possible departure from the primary election statutes (AS 15.25.010 - 15.25.130).

Adherence to the Republican and Democratic party rules, even when inconsistent with the state blanket primary laws, is required by the decision of the United States Supreme Court in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). See 1992 Inf. Op. Att'y Gen. (Feb 28.; 663-92-0407). However, Tashjian requires departure from state statutes only to the extent necessary to protect a party's associational rights under the First and Fourteenth Amendments to the United States constitution. Since all state officials are bound to uphold the laws of the state, it follows that ambiguities in party rules should be interpreted so as to be consistent with state statutes, rather than inconsistent.

The state's primary election laws, AS 15.25.010 -- 15.25.130, contemplate maximum participation by the electorate in a primary election: any qualified voter, regardless of party registration (or non-partisan status), can vote for any candidate of any party. Both parties' rules would require some modification of this principle. However, the modification should be minimized and harmonized with existing law. This means allowing voters the broadest choices possible consistent with party rules.

In the case of the Republican ballot, this reasoning requires that candidates of all parties appear on the Republican ballot. The Republican rule provides that voters registered as members of other parties may not vote for Republican candidates in the primary. The rule does not provide that persons wishing to vote in the Republican primary are restricted to voting only for Republican candidates. In Doyle v. State, A90-248 Civ. (D. Alaska), a lawsuit by the Republican Party of Alaska seeking to

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[2] Lieutenant Governor Coghill, who by statute appoints and supervises the director of the Division of Elections, interprets the rules differently. In a recent letter to Republican Party chair Connie Zawacki, he stated that there would be three separate ballots, one with only Republican candidates, one with only Democratic candidates, and one (the statutory primary ballot) with Alaska Independence and Green candidates. As our letter to you indicates, we do not agree with the lieutenant governor's construction of the party rules. We believe his interpretation may depart from the election code to a greater degree than is necessary to satisfy the associational rights of the political parties without ceding to them control over state election procedures.

have its rule instituted for the 1990 primary election, we argued that the rule should be implemented in the manner just discussed. Because U.S. District Judge Russell Holland dismissed the suit on procedural grounds, he did not reach the issue of whether the state's proposed implementation was correct.

The Democratic rule is even more vague than the Republican rule; it states only that there will be a Democratic primary. Nothing in this rule can be remotely read as restricting the Democratic ballot to candidates seeking the nomination of the Democratic Party.

With respect to the Democratic rules, the party chair, Rhonda Roberts, stated that the rules were adopted only to protect the party against the Republican party's expressed desire, in its rules, that qualified voters be able to vote both the Republican ballot and the ballot of any other party allowing Republicans and independents to vote. According to Ms. Roberts, if the Division of Elections will not allow a voter to cast more than one ballot in the primary election,[3] a separate Democratic ballot would be unnecessary; i.e., the Democrats would simply want to appear on the statutory primary ballot. However, the Democratic rule does state unequivocally, "There is established a Democratic Party primary in Alaska." In our opinion there must therefore be a separate Democratic ballot, even if it contains all candidates (except Republicans) and is open to all voters. If the Democratic Party wishes to have its candidates appear solely on the statutory primary ballot, it must rescind its rule.

In the absence of judicial intervention, the Division of Elections is the agency responsible by law for preparing the primary ballot. As discussed above, in note 2, the lieutenant governor has given notice of a different interpretation of the party rules than we have set out here. We will discuss the

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[3] Two Alaska statutes prohibit a voter from voting for more than one candidate when only one person can be elected. AS 15.15.360(a)(4) and 15.20.730(b)(5) (both made applicable to primary elections through AS 15.25.090). Two other statutes prohibit voters from voting more than once in an election. AS 15.15.210 (person whose right to vote is questioned must state in affidavit that person has not voted at same election); AS 15.15.410 (upon determining that person has voted more than once in same election, director of Division of Elections shall notify attorney general). Finally, the United States Supreme Court has stated that a state has a compelling interest in limiting a person to a single nominating act. Anderson v. Celebreeze, 460 U.S. 780, 802 n.29 (1983); American Party of Texas v. White, 415 U.S. 767, 785 (1973).

contents of the opinion with him and work toward a uniform application of the party rules to the procedures for primary elections set out in the election code.

Please feel free to contact us if we can be of further assistance.

Very truly yours,

CHARLES E. COLE
ATTORNEY GENERAL

By: James L. Baldwin
James L. Baldwin
Assistant Attorney General

cc: Lt. Gov. Coghill
Charlot Thickstun, Director, Division of Elections
Joe Vogler, Alaskan Independence Party
Rhonda Roberts, Democratic Party of Alaska
Ronnie Rosenberg, Green Party of Alaska
Connie Zawacki, Republican Party of Alaska

JLB:lmk

Alaska State Legislature From Gruenberg

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

April 22, 1992

Hon. John B. "Jack" Coghill
Lt. Governor
State of Alaska
Juneau, Alaska 99811

Dear. Lt. Governor Coghill:

Enclosed are two opinions from the Division of Legal Services discussing whether the lieutenant governor and the Division of Elections have the legal authority to adopt regulations implementing party rules closing the primary election. The opinions conclude that the lieutenant governor and the division lack the authority to do so under present law.

The legislature has before it two bills that would deal with the primary closure problem in very different ways. Both are constitutional under Tashjian. However we have not passed either of these proposals.

Unless and until the legislature passes legislation authorizing the implementation of restrictive party rules, we respectfully request you not to exceed your statutory authority.

Sincerely,

Rep. Max F. Gruenberg

Rep. Gene Kubina

Rep. Mike Miller

Sen. Patrick Rodey

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM March 13, 1992

SUBJECT: Present Ability of Lieutenant Governor to Promulgate Elections Rules That Complied With Tashjian Decision (Work Order No. 7-LS1188)

TO: Representative Max Gruenberg
Attention: Stan Robbins

FROM: Robert Glennon Casey RGC 3-13-92
Legislative Counsel

I. INTRODUCTION

You have asked for a discussion of the authority of the Lieutenant Governor of Alaska and the Division of Elections to adopt regulations to make Alaska's elections procedures comply with the U.S. Supreme Court's ruling in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

II. SUMMARY

The Lieutenant Governor and the Division of Elections probably lack authority to adopt regulations to make Alaska's primary election law comply with the Tashjian decision. No statute or constitutional provision appears to give the Lieutenant Governor or the Division of Elections the power to adopt regulations that make new election law.

The details behind this conclusion are provided in section IV of this memorandum.

III. FACTS

Alaska law currently provides for a "blanket" primary. In a blanket primary, all voters receive the same ballot and each voter may vote for any candidate regardless of party affiliation.

The Republican Party of Alaska, however, has adopted a conflicting rule that closes the voting for Republican candidates in primary elections to all voters except

Republicans and independents. Furthermore, the United States Supreme Court ruled in the Tashjian case that such a party rule is a constitutionally-protected exercise of the right of association. When such a party rule conflicts with a state election statute, it is the statute which must yield.

There had been some question as to whether the Tashjian case applied in Alaska, but a February 28, 1992 memorandum of Attorney General Charles E. Cole concluded that Tashjian was applicable and that "a court would hold that the Republican Party's rule limiting participation in the selection of the party's candidates must be implemented, notwithstanding its conflict with Alaska's blanket primary statutes."

IV. DISCUSSION

The difficult practical question is how to implement the Republican Party's rule. Neither the Lieutenant Governor nor the Division of Elections would appear to have the power to adopt regulations that would meet the participation requirements of the Republican Party rule.

1. The Requirement that Rule-Making Be Authorized. Under Alaska law, administrative rule-making requires a statutory or constitutional grant of authority. For example, Alaska's Administrative Procedure Act (APA) provides that "[t]o be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law," AS 44.62.-020.

Court decisions have been consistent with that formulation. For example, in Rutter v. State, 668 P.2d 1343, 1349 (1983) the Alaska Supreme Court ruled that "[a]dministrative agencies are creatures of statute, deriving from the legislature the authority for the exercise of any power they claim." In a similar vein, the decision of State v. Alyeska Pipeline Service Co., 723 P.2d 76, 78 (Alaska 1986) ruled that "[r]egulations promulgated by an executive department must be authorized by statute."

In sum, it would seem that the Lieutenant Governor or the Division of Elections could only adopt regulations accommodating the Republican Party rule if some provision of law gave the Lieutenant Governor or the Division of Elections the power to do so.

2. The Lieutenant Governor and the Division of Elections Lack Authorization. There does not appear, however, to be any provision in either the Alaska Constitution or the Alaska Statutes which would authorize the Lieutenant Governor or the Division of Elections to adopt regulations that essentially made new primary election law.

For example, art. III, § 7 of the Alaska Constitution only states that the lieutenant governor "shall perform such duties as may be prescribed by law and as may be

delegated to him by the governor." That provision does not authorize adoption of regulations that would change the essential nature of Alaska's primary election system.

Statutory provisions also would not authorize the lieutenant governor to adopt such regulations. AS 44.19.020 states that "[t]he lieutenant governor shall administer state election laws," and AS 15.10.105(a) provides that "[t]he lieutenant governor shall control and supervise the division of elections," but these statutes only authorize administrative functions of a ministerial nature. They would not authorize adoption of regulations that were inconsistent with Alaska's primary election statutes.

In this connection, the Alaska Supreme Court ruled in State v. Anderson, 749 P.2d 1342, 1344 (1988) that the validity of a regulation partly depends on "whether it directly conflicts with any other statute." Regulations from the lieutenant governor implementing a closed Republican primary would conflict with existing statutes. As Attorney General Cole noted in his February 28, 1992 memorandum:

> Alaska has a "blanket" primary, in which all voters select the nominees of all parties. Under AS 15.25.010 - 15.25.130, all candidates of all political parties run on one ballot, and any registered voters, regardless of party affiliation, can vote for any candidate. The only restriction is that voters may cast only one vote for each office on the ballot.

[footnote omitted]

A regulation that conflicted with AS 15.25's provision of an open primary would not be statutorily authorized.

The same principle would apply to regulations that the Division of Elections might adopt under AS 15.07.070, AS 15.10.020, 15.10.030, AS 15.15.010, 15.15.060, 15.15.350, 15.15.361, and 15.15.370. Regulations adopted pursuant to those enabling sections must be consistent with Alaska's existing statutory provision of a blanket primary. In any event, the subject matter of regulations authorized by those statutes does not include the qualification of a voter to vote for particular candidates in a primary election.

In sum, the lieutenant governor and Division of Elections lack constitutional or statutory authority to provide by regulation for a closed Republican primary election.

V. CONCLUSION

The lieutenant governor and the Division of Elections probably lack the authority to conform Alaska's primary elections to the Tashjian decision's requirements by means of regulation.

RGC:pl
92-171.plm

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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MEMORANDUM March 30, 1992

SUBJECT: Supplemental Discussion of Regulations Implementing Closed Primary Elections (Work Order No. 7-LS1188)

TO: Representative Max Gruenberg
Attention: Stan Robbins

FROM: Robert Glennon Casey RGC 3-30-92
Legislative Counsel

I. INTRODUCTION

This memorandum reconsiders the opinion expressed in an earlier memorandum from the Division of Legal Services, dated March 13, 1992. That earlier memorandum concluded that neither the Lieutenant Governor of Alaska nor the Division of Elections possessed the authority to adopt regulations that conflicted with the open (or "blanket") primary system provided in AS 15.25.010 - 15.25.130.

II. SUMMARY

The original opinion stands. Regulations would be unauthorized for reasons given in the previous memorandum and also for reasons given below.

III. DISCUSSION

The impetus for this discussion is a December 3, 1991 memorandum of the Department of Law. Pages 4 and 5 of that memorandum indicated that under Denardo v. State, 741 P.2d 1197 (Alaska 1987) the Division of Elections might possess authority to adopt regulations authorizing a closed primary. (Copies of the Denardo decision and the memorandum of the Department of Law accompany this memorandum.)

Denardo, however, seems to stand for the opposite conclusion. The Denardo ruling probably means that such regulations are unauthorized, if they conflict with either a currently effective statute or a currently effective statement of legislative intent.

In Denardo, a regulation was upheld, but it is important to examine the reasons why the court reached its result in that case. The Denardo court upheld the regulation because: (1) the regulation did not conflict with any statute in effect at the time the regulation was promulgated, (2) there were clear statements of legislative support for the substance of the regulation (thereby enabling the court to conclude that the regulation was within an express or implied delegation of rule-making authority under AS 15.15.010), and (3) the regulation was neither arbitrary nor unreasonable. The first two of these criteria would not attend an immediate adoption of regulations that facilitated closed primary elections.

First, the statute requiring an open (or "blanket") primary election, AS 15.25.060, continues to be in effect. Unlike the statute in Denardo, this statute has not been judicially invalidated. It is beside the point that a court would probably rule AS 15.25.060's mandate of open ("blanket") primary election balloting unconstitutional in certain factual settings. Statutes that are "probably unconstitutional" continue to be in effect until a court rules them unconstitutional. AS 15.25.060 is a currently effective statute, and "agency rules cannot amend a statute," Denardo, 741 P.2d at 1198.

Second, the Alaska Legislature has not stated any support for closed primary balloting. Absent such a statement of support, it is difficult to find in AS 15.15.010 an express or implied delegation of authority to adopt regulations that would conflict with AS 15.25.060.

There was legislative support for the regulation in Denardo, but the facts of that case differed from the current situation: (1) the legislature had passed a law that accorded with the regulation subsequently adopted by the Division of Elections, (2) the regulation merely filled the period prior to the statute's effective date, and (3) the regulation did not conflict with any currently-effective statute.

In the present case, by contrast, the Alaska Legislature has not enacted a law supportive of closed primaries. Instead, the legislature's only statement appears to be AS 15.25.060 - a statute opposed to closed primary balloting and certainly not a delegation of power to adopt a contrary regulation. So, the facts that enabled the Denardo regulation to be upheld are reversed in the present case, and regulations from the Division of Elections would be unauthorized.

IV. CONCLUSION

In conclusion, a regulation facilitating closed primary election balloting would conflict with a currently effective statute and would also lack any expression of legislative support. Under both Denardo and the authorities cited in this office's previous memorandum, such a regulation is not authorized.

RGC:pl
92-216.plm

Daniel R. DENARDO, Appellant,

v.

STATE of Alaska, Appellee.

No. S-1679.

Supreme Court of Alaska.

Sept. 11, 1987.

Independent gubernatorial candidate brought action challenging Alaska Division of Elections' refusal to place his name on the ballot. The Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., sustained Division's actions, and appeal was taken. The Supreme Court, Compton, J., held that: (1) Division's action, in promulgating rule regarding number of names needed on nominating petitions for independent candidates, did not constitute improper attempt to amend an unconstitutional statute, and (2) regulation as to number of names required on petitions was valid.

Affirmed.

1. Elections ⇐21
Statutes ⇐133

After state statute requiring independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least three percent of number of votes cast in preceding general election was declared unconstitutional, State Division of Elections' promulgation of a one percent rule did not constitute an impermissible attempt to amend an unconstitutional statute; three percent provision became null and void upon its being declared unconstitutional, and Division's action was taken when legislature did not act to amend statute until after nomination petition deadline for gubernatorial election had passed. AS 15.25.-160.

2. Elections ⇐21

After state statute requiring independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least one percent of those voting in previous general election was declared unconstitutional, State Division of Elections' promulgation of a one percent rule was consistent with delegating statute and reasonably necessary for administration of state elections; legislature did not immediately act to amend statute after three percent provision was declared unconstitutional, but had previously expressed its desire to place some limitation on access to the gubernatorial ballot. AS 15.25.160.

3. Action ⇐6

Superior court properly determined that issue of write-in gubernatorial candidate access to a voter information pamphlet was not ripe for decision; despite allegation that State Division of Elections had informally indicated that such candidates would not have access to the pamphlet, there was no indication that any attempt to wage a write-in campaign had actually been made.

Daniel R. DeNardo, Anchorage, pro se.

Susan D. Cox, Asst. Atty. Gen., Grace Berg Schaible, Atty. Gen., Juneau, for appellee.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

COMPTON, Justice.

Daniel R. DeNardo claims that the Alaska Division of Elections (Division) improperly refused to place his name on the ballot for the 1986 gubernatorial election. The division based its action on DeNardo's failure to comply with then 6 AAC 25.160 (Eff. 12/19/85), which required independent gubernatorial candidates to submit nominating petitions signed by qualified voters equal in number to at least one percent of those voting in the previous general election. DeNardo asserts that the regulation was invalid. The superior court sustained the actions of the division. We affirm.

I. VALIDITY OF 6 AAC 25.160.

Alaska Administrative Code Title 6, Section 25.160, was adopted pursuant to authority delegated to the director of elections by AS 15.15.010. That statute provides that the director "may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections." DeNardo does not claim that the director failed in any way to comply with the provisions of Alaska's Administrative Procedure Act (APA) in promulgating 6 AAC 25.160. Nor does DeNardo challenge the substance of the regulation or the *legislature's* power to enact such a rule.[1]

Instead, DeNardo claims that the division had no power "to make election laws." DeNardo argues that 6 AAC 25.160 was a void attempt by the division to amend former AS 15.25.160, which this court held unconstitutional in *Vogler v. Miller*, 651 P.2d 1, 5–6 (Alaska 1982) (*Vogler I*). AS 15.25.160 provided that a gubernatorial candidate who did not represent a political party[2] had to be nominated by petition signed by qualified voters equal in number to at least three percent of the number of votes cast in the preceding general election. Ch. 88, § 5.53, SLA 1960; ch. 100, § 188, SLA 1980; *see also Vogler I*, 651 P.2d at 2.

In *Vogler I*, we recognized as legitimate the state's justifications for the statute, including the desire to eliminate voter confusion that would result from having a multitude of candidates on the ballot. 651 P.2d at 4. We nevertheless found that none of these explanations justified the increase from the equivalent of a one percent[3] to a three percent signature requirement. Since the state failed to show that a one percent requirement would be any less effective in achieving the purported goals of the statute, we found that the state had not shown the compelling interest required to save the three percent provision. *Id.* at 5–6.

The statute was not amended to comport with the one percent rule implicitly approved in *Vogler I* until June 6, 1986, five days after the filing deadline for nonparty candidates' nomination petitions for the 1986 gubernatorial election. Chapter 85, § 46, SLA 1986; AS 15.25.160. When it became clear that the legislature would not act in time, the division of elections promulgated 6 AAC 25.160 to govern the 1986 election.

[1] DeNardo relies on *State v. Marshall*, 633 P.2d 227, 233–34 n. 19 (Alaska 1981,) in support of his argument that the division's adoption of 6 AAC 25.160 was in effect an attempt to amend an unconstitutional statute. This reliance is misplaced. It is clear, as DeNardo argues, that agency rules cannot amend a statute. *See id.* But, contrary to DeNardo's apparent position, the fact that the legislature has at some point enacted legislation dealing with a particular topic does not forever foreclose the legislature from delegating authority to an agency to make rules affecting the same topic.

This court has soundly rejected such an argument. In *Kelly v. Zamarello*, 486 P.2d 906 (Alaska 1971), we stated:

> When administrative rule-making is based upon clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect. We have held that, under proper standards, such delegations of legislative power to administrative agencies are constitutional. *Boskl v. Sabre Jet Room, Inc.*, 349 P.2d 585 (Alaska 1960).

Id. 489 P.2d at 909.

In *Boskl*, the following language appears:

1. Indeed, the legislature has since enacted a statutory one percent signature requirement. AS 15.25.160.

2. "Political party" is defined as an organized group of voters that had polled a certain percentage of votes in the preceding gubernatorial election. Prior to 1983, the statutory percentage was 10%. This was found to be an unconstitutional restriction on access to the ballot. *Vogler v. Miller*, 660 P.2d 1192, 1195–96 (Alaska 1983) (*Vogler II*). In 1986, the percentage was lowered to 3%. Ch. 85, § 34, SLA 1986.

3. The statute had previously required 1000 signatures, slightly less than 1% of the votes cast in 1978. *Vogler I*, 651 P.2d at 5 n. 10.

> [P]rovision is made [in the Alaska Constitution] for creation by the legislature of regulatory agencies that are not under the supervision of the executive. Alaska Constitution, Art. III, §§ 22, 24, 26. Such agencies would obviously have the function of exercising authority and control in places where the legislature has decided not to exercise all the authority and control itself. This would be a delegation of legislative power and the constitution provides for it.

Id. 349 P.2d at 588 (footnote integrated into text).

The three percent provision of former AS 15.25.160 became null and void upon this court's decision in *Vogler I*, 651 P.2d at 5–6. The division's subsequent regulatory enactments could not "amend" a void statute. Rather, the division stepped in to address a question regarding which the legislature implicitly decided not to exercise all of its authority and control.

Thus DeNardo's argument that the division generally has no power to make election laws is without merit. The legislature is constitutionally empowered to delegate legislative authority to regulatory agencies under certain circumstances.

[2] The question remains whether the specific regulation actually adopted by the division is valid. Resolution of this question involves a two-part inquiry: first, is the regulation consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency,[4] and second, is the regulation reasonable and not arbitrary. *Kelly*, 486 P.2d at 911.

> The relevant delegating statute provides: The director [of elections] shall provide general administrative supervision over the conduct of state elections, and may issue regulations under the Administrative Procedure Act ... necessary for the administration of state elections.

AS 15.15.010. The delegation of authority is further limited by the APA:

> If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. Thus, 6 AAC 25.160 was valid if it was consistent with relevant statutes and reasonably necessary for the administration of state elections. After *Vogler I*, there was no effective statute governing the number of signatures required for a nominating petition. Moreover, the legislature had previously expressed its desire to place some limitation on access to the gubernatorial ballot by enacting former AS 15.25.160. We recognized this as a legitimate concern in noting "[t]hat 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate." *Vogler I*, 651 P.2d at 5, *quoting Lubin v. Panish*, 415 U.S. 709, 715, 94 S.Ct. 1315, 1319, 39 L.Ed.2d 702, 708 (1974). In addition, the legislature has confirmed its continued approval of the policy of limiting access to the ballot by enacting the new AS 15.25.160, which is virtually identical to 6 AAC 25.160. Thus, 6 AAC 25.160 did not conflict with any statute in effect and was consistent with the expressed legislative intent.

Moreover, by implicitly approving a one percent voter signature requirement in *Vogler I*, we have already found the rule to be neither unreasonable nor arbitrary. *Vogler I*, 651 P.2d at 5–6.

6 AAC 25.160 was validly enacted. DeNardo failed to comply therewith and the division properly rejected his nominating petition.

II. ISSUES RELATING TO ACCESS OF WRITE-IN CANDIDATES TO VOTERS.

The superior court concluded that issues relating to the propriety of the division's

4. This aspect of review insures that the agency has not exceeded the power delegated by the legislature. *Kelly*, 486 P.2d at 911.

alleged refusal to include write-in candidates in voter information pamphlets were not ripe for decision. These issues were dismissed without prejudice. At the time of the hearing on DeNardo's "writ of mandamus," the pamphlet deadlines were still months away.

Apparently, the only pertinent information before the superior court was DeNardo's affidavit which stated: "Unofficially through the Division of Elections, Mr. DeNardo was informed that a write-in candidate would not have access to the election pamphlet." In its oral decision, the superior court deferred the issue of write-in candidate access to the voter information pamphlet, and invited each side to brief the question.

[3] DeNardo chose to appeal instead, arguing that the dismissal without prejudice was error because the access issue was "inextricably intertwined" with the nomination petition question. It cannot be determined from the record, however, whether DeNardo in fact attempted to wage a write-in campaign. It is thus impossible to discern the factual posture of this claim. The superior court wisely recognized this claim as unripe for judicial determination and declined to address it. We do likewise.

III. CONCLUSION.

The division of elections acted within the scope of the authority delegated to it by the legislature when it enacted 6 AAC 25.160. DeNardo failed to comply with its provisions and the division properly rejected his petition. The superior court correctly found that DeNardo's claims relating to his write-in candidacy were not ripe for review.[5]

The superior court's decision is AFFIRMED.

5. The division also argues that DeNardo's claim is moot. In view of our disposition regarding the validity of the regulation, we do not address the mootness issue.

Carlos RODRIQUEZ, Appellant,

v.

STATE of Alaska, Appellee.

No. A-228.

Court of Appeals of Alaska.

Aug. 7, 1987.

Defendant was convicted in the Superior Court, Third Judicial District, Ralph E. Moody, J., of lewd and lascivious acts toward children and contributing to delinquency of a minor. Defendant appealed. The Court of Appeals, Coats, J., held that: (1) testimony of expert on sexually exploited children was admissible; (2) testimony of police officers called by defendant was not admissible; (3) sentence for attempted rape was excessive; and (4) defense counsel was not ineffective.

Affirmed in part, and reversed and remanded in part.

1. Criminal Law ⇐469

Testimony by expert witness which provides useful background information to aid jury in evaluating testimony of another witness is admissible.

2. Criminal Law ⇐469

Testimony of social worker, to the effect that testimony of alleged sexual abuse victims was consistent with patterns exhibited by sexually exploited children he had observed while working with children who had been exploited through child pornography or prostitution and child sex rings, was admissible as background information.

3. Infants ⇐20

Testimony of police officers, who had been in defendant's home approximately five years before trial and who did not make thorough search of defendant's residence, to the effect that they had not seen drugs, pornography, or film-making equip-

MEMORANDUM

State of Alaska

Department of Law

TO: Elizabeth A. Ziegler
Deputy Director
Division of Elections
Office of the Governor

DATE: December 3, 1991

FILE NO: 663-92-0209

TEL. NO: 465-3600

SUBJECT: Implementation of closed primary procedures

FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

has sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

> The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

> prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S.767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

> If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashiian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denardo v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

DIVISION OF LEGAL SERVICES

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MEMORANDUM April 3, 1991

SUBJECT: Party rules and primary election laws

TO: Senator Pat Pourchot
Attn: Jeanne Larson

FROM: John B. Gaguine JBG
Legislative Counsel

You have asked about the relationship between party rules and the state's primary election laws. The question is easily answered: if there is a clash between party rules and election laws (e.g., the party rules call for a closed primary, and the election laws provide for an open one), the party rules prevail.

This answer derives from a recent decision of the United States Supreme Court, Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 55 U.S.L.W. 4057 (1986). In that case Connecticut law restricted voting in a party's primary to registered members of the party, and the Republican party wanted to open its primary to independents as well as registered Republicans. The Court ruled in favor of the Republicans, holding that the party's First Amendment's guarantee of freedom of association overrode the state law.

Ideally, state law should be amended to conform with party rules. (In Tashjian the Republicans in the legislature passed a bill to open primaries to independents, only to have the bill vetoed by the Democratic governor.) However, if that is not done the party rules nevertheless control. A court, I believe, would clearly have the power to order the Division of Elections to follow procedures consistent with party rules and inconsistent with the statutes. I also believe that even absent a lawsuit the lieutenant governor would be empowered to issue regulations reflecting the party rules, since the law is clear on this point.

However, I should note a significant difference between Alaska and Connecticut. Connecticut law required a closed primary, and the only effect of Tashjian would seem to be to require election officials to give Republican ballots to those independents who request them, as well as Republicans. In Alaska, however, implementation of the Republican party rules would require a total overhaul of the primary process.

There would seemingly have to be two separate ballots prepared - one with Republican candidates, and one with candidates of other parties. (If other parties changed their rules to parallel the Republican rules, there would seemingly have to be even more ballots prepared.) Thus, a court might allow the lieutenant governor to phase in a new system gradually. However, if the lieutenant governor decided to implement party rules without a statutory change, I do not think that a court would enjoin this, even given the magnitude of the procedural change that would be necessary. 1/

If I may be of further assistance, please advise.

JBG:pl
91-225.plm

1/ My research has disclosed no post-Tashjian cases on this point, so my conclusions must be tentative.

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. John B. "Jack" Coghill
Lieutenant Governor

DATE: February 28, 1992

FILE NO.: 663-92-0407

TEL. NO.: 465-3600

SUBJECT: Whether the Tashjian case requires implementation of the Republican Party rules

FROM: Charles E. Cole
Attorney General

You have asked whether the state must modify its primary election to implement rules adopted by the Alaska Republican Party. These rules conflict with state election law by limiting the voters who can participate in the selection of Republican nominees at the primary election. We believe that, in light of recent decisions of the United States Supreme Court, the First and Fourteenth Amendments to the United States Constitution require implementation of these rules.

I. State law and Republican Party rules

Alaska has a "blanket" primary, in which all voters select the nominees of all parties. 1/ Under AS 15.25.010 -- 15.25.130, all candidates of all political parties run on one ballot, and any registered voters, regardless of party affiliation, can vote for any candidate. The only restriction is that voters may cast only one vote for each office on the ballot. The party candidate receiving the most votes is placed on the general election ballot as the party's nominee for that office.

In 1990, the Republican Party of Alaska adopted a rule providing that

> [o]nly registered Republicans, registered Independents [sic], and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S.

1/ In a blanket primary, all voters receive the same ballot, and may vote for one candidate for each office, regardless of party. In an open primary, a voter may vote for candidates of only one party, but may choose which party regardless of affiliation. In a closed party, only voters affiliated with one party may participate in that party's primary. See Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 116, 117 n.2 (1984).

Representative, and members of the State Legislature. 2/

After the 1990 general election, the party adopted several related rules, and submitted all of its rules to the United States Department of Justice for preclearance, as required by the federal Voting Rights Act, 42 U.S.C. § 1973c. The Department of Justice approved them, and the party submitted the rules to you in May 1991.

These rules are obviously incompatible with the state blanket primary law. That incompatibility has given rise to your opinion request.

II. Tashjian and Democratic Party v. Wisconsin

In Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986), the Supreme Court recognized that the associational rights of political parties, as protected by the first amendment, can take priority over state election laws. In Tashjian, the Republican Party of Connecticut had adopted a party rule allowing nonaffiliated voters to vote in the party's primary. This rule conflicted with Connecticut statutes, which provided for a closed primary. Thus, those statutes limited the "group of voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates." 479 U.S. at 215-16 (citation omitted). The Court did not find the limitation justified by any compelling state interests. Accordingly, the Court held that the limitation constituted an unconstitutional burden on the Party's associational rights protected by the First and Fourteenth Amendments to the U.S. Constitution.

The Court rejected Connecticut's proferred justification that implementation of the rule would possibly result in greater administrative costs for purchase of voting machines, training of officials, and potentially for printing of additional ballot materials. Id. at 218. It further found that "[t]he State's legitimate interests in preventing voter confusion and providing

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2/ Because of the shortness of time between the party's adoption of the rule and the 1990 primary election, the state declined to implement the rule for that election. The state successfully defended a federal court lawsuit initiated by the party. Doyle v. State, No. A90-248 Civil. The district court denied the party's motion for a preliminary injunction, requiring the state to give effect to the party's rules. The case was subsequently dismissed by the party.

for educated and responsible voter decisions in no respect 'make it necessary to burden the [Party's] rights.'" Id. at 221-22.

The Party rules in question here are different from those in Tashjian, in that the Alaska Republican Party seeks to narrow the field of voters who may participate in choosing Republican nominees. However, Democratic Party v. Wisconsin, 450 U.S. 107 (1981) (one of the major underpinnings of Tashjian), did address a situation involving a party rule that was more restrictive than the state statute. Wisconsin concerned that state's presidential primary election. While Wisconsin law let the parties choose the method of selecting delegates to the national conventions of the national parties, it required that those delegates vote according to the outcome of the state's open presidential primary. This law conflicted with the National Democratic Party's rule that, "restricted participation in the delegate selection process in primaries or caucuses to 'Democratic voters only who publicly declare their party preference and have that preference publicly recorded.'" 450 U.S. at 118. Because of this conflict, the national party announced its intent not to seat the Wisconsin delegates. The state therefore brought suit in state court, seeking a declaratory judgment that the state law was constitutional and that the national party had to seat those delegates. See Democratic Party v. Wisconsin, 287 N.W.2d 312 (Wis. 1980) (upholding the state law).

The United States Supreme Court invalidated the provision of the state law that infringed on the party's nominating procedure. It held that the "First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected by the Fourteenth Amendment from infringement by any State," and that freedom of political association "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 121-22 (citations omitted).

III. Discussion

We believe, in light of Tashjian and Wisconsin, a court would hold that the Republican Party's rule limiting participation in the selection of the party's candidates must be implemented, notwithstanding its conflict with Alaska's blanket primary statutes. 3/ Indeed, Alaska's law impacts the Alaska

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3/ We have found no authority on point on this question. This lack of authority is not surprising, since only Alaska and Washington have blanket primaries. See generally Noe, North

(continued...)

Republican Party's associational interests to a far greater degree than did the Connecticut statutes at issue in Tashjian. 4/ Moreover, when Tashjian is read in conjunction with Wisconsin, where an open primary was at issue, the necessity to implement the Republican rule becomes even clearer. 5/

Moreover, in Tashjian the majority expressed concern that wide-open party rules might infringe on the rights of other parties: "Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes [upheld in other cases] were designed to prevent." 479 U.S. at 224 n.13. Alaska's blanket primary laws do precisely what the Court said that a party might not be able to do constitutionally.

As part of the debate surrounding this issue, it has been suggested that the modification of the blanket primary may infringe on a voter's constitutional right to vote. Voters not affiliated with a party, however, do not have constitutional rights to participate in that party's primary election if either state law or party rules provide for a closed primary. Nader v. Schaffer, 417

3/ (...continued)
Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters to Vote in Party Primaries, 66 N.C. L. Rev. 1208 (1988) ("there is a strong argument that both the open and blanket primary are unconstitutional").

4/ The dissent in Tashjian did not agree that Connecticut's law was unconstitutional. However, it observed that "[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom." 479 U.S. at 235-36 (Scalia, J., dissenting). This indicates to us that even the dissenters would not uphold Alaska's blanket primary law against a Republican Party challenge.

5/ We believe that both blanket primaries and open primaries impact a party's freedom of association claim. In both, members of one party may take part in the selection of another party's candidates.

F. Supp. 837 (D. Conn), aff'd mem., 429 U.S. 989 (1976); Ferency v. Secretary of State, 476 N.W.2d 417 (Mich. App. 1991). 6/

It has also been suggested that Tashjian would not apply in Alaska because our law, unlike Connecticut's, does not require registration by party. We do not believe that a court would find this argument convincing. First, nothing in Tashjian suggests that Connecticut's statutory registration requirement was essential to the Court's decision. Second, although Alaska law does not require, or even specifically authorize, voter registration by party, there has been a long-standing practice of allowing such registration; indeed, since at least 1968, the registration forms have provided a place to indicate party registration. Third, Alaska law does implicitly authorize party registration: AS 15.25.030(a)(16), enacted in 1980, requires that a "member of a political party" seeking to become a candidate of that party in the primary attest "that the candidate is registered to vote as a member of the political party whose nomination is being sought."

Nor is Tashjian inapplicable because Alaska law, unlike Connecticut's, does not regulate political parties. Although Alaska law does not regulate the parties, it recognizes them as viable entities and confers rights on them. See, e.g., AS 15.25.056 (authorizing party central committee or party district committee to replace unopposed incumbent candidate for renomination if candidate dies or is disqualified or incapacitated); AS 15.25.110 (authorizing same committees to certify party nominee on general election ballot as incapacitated); AS 15.25.130 (authorizing party, through same committees or as otherwise provided in party bylaws, to replace party nominees on general election ballot who have died, withdrawn, resigned, or become disqualified or incapacitated).

We wish to comment on one other aspect of the Republican Party rules. In our opinion the state does not have to enforce Article XIV, section 3, of those rules, "A Rule to Maximize Voter

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6/ Both Nader and Ferency involved primaries that were closed by state law, rather than by party rule. Tashjian makes it clear that this difference is without constitutional significance. The Court specifically states that "the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." 479 U.S. at 215 n.6. Significantly, the Court was distinguishing Nader and Rosario v. Rockefeller, 410 U.S. 752 (1973), where the restrictions on nonmembers were the product of state law, rather than party choices.

Participation in Primary Elections" (allowing Republicans and independents to participate in the Republican primary even if they have also voted in the blanket primary and/or some other party's primary).

The party apparently believes that it can validly extend its association to voters who meet the requirements of the 1990 rule regardless of whether those voters also participated in the selection of other party candidates. However, several U.S. Supreme Court decisions hold that the Party's federal constitutional interest in associating with those voters is outweighed by the compelling interest of the state in "confining each voter to a single nominating act." Storer v. Brown, 415 U.S. 724, 743 (1974); see also American Party of Texas v. White, 415 U.S. 767, 785 (1974), ("Electors may vote in only one party primary"). Given the well-established nature of the "one nominating act only" principle, and the absence, to our knowledge, of any jurisdiction allowing a voter to participate in multiple primaries, we feel quite confident that the Alaska Supreme Court would reach the same conclusion as a matter of Alaska constitutional law.

If we may be of further assistance, please let us know.

MEMORANDUM

State of Alaska

Department of Law

TO: Elizabeth A. Ziegler
Deputy Director
Division of Elections
Office of the Governor

DATE: December 3, 1991

FILE NO.: 663-92-0209

TEL. NO.: 465-3600

SUBJECT: Implementation of closed primary procedures

FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs-Juneau

- DEC - 1991

DIV OF ELECTIONS

You requested our advice concerning a number of issues that are related to proposals by the major political parties in the state to close their primaries to members of competing political parties. Because you need this memorandum to help prepare for a meeting of the House State Affairs Committee to be held on November 13, 1991, we limit our opinion to your question concerning the power of the director of the division of elections to implement a closed primary by administrative regulation. It is your intent to administer a primary election that is consistent with the right of free association accorded to political parties even if provisions of state law applicable to the administration of primary elections permit a voter to cast a ballot that sets out candidates without regard to party affiliation.

You propose to establish new primary election procedures at the earliest possible date. You would like to implement new primary procedures early in the 1992 general election year. However, your timetable may be too aggressive to assure that the new procedures are properly supported by statute and regulation. The legislature would be unable to convene, consider, and enact amendments to the election code if there is not sufficient authority to accomplish your goals.

Your concern is whether the director may proceed in the absence of amendments to the election code to change primary election procedures and prescribe the form of the ballot so that the political parties control who may nominate candidates. We believe that it is prudent for the division to expeditiously pursue a resolution of the closed primary question both legislatively and by administrative means. Unlike the previous administration, you wish to acquiesce in the desire of a political party to nominate candidates using a primary ballot that may be voted only by persons admitted by the party. While we believe that there remains some question as to the proper interpretation of the rules of the Republican Party of Alaska, you can clarify this interpretation through the adoption of administrative regulations. However, before this can be done, it must be determined whether the division

has sufficient authority to adopt regulations that establish a closed primary election.

Existing law requires the division to prepare the primary ballot in a certain manner. The election code provides:

> The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation.

AS 15.25.060 (emphasis added). The foregoing provision appears to preclude the use of separate ballots that are limited solely to the candidates of a single political party. It must be remembered that this provision was added to the election code to end the practice of presenting a ballot that required voters to vote only for the candidates of one political party. Elsewhere, the election code grants the director of the division elections the power to

> prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections.

AS 15.15.030. The code also grants the director the power to "determine the size of the ballot, the type of print, necessary additional instruction notes to voters, and other similar matters of form not provided by law." AS 15.15.030(1).

The provisions of the election code that are specific to the form of the primary election ballot are probably void when the members of a political party desire to restrict those who may associate with them for the purpose of nominating candidates for public office. The United States Supreme Court reaffirmed the First Amendment rights of political parties to be free from statutes that restrict their power to associate with whomever they wish when nominating candidates. Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

There appears to be no overriding state interest that can be articulated to perpetuate an open primary system when recognized political parties adopt conflicting rules. However, it is unclear how the Tashjian decision will be applied to the type of open "blanket" primary required by existing state law. It is possible, though not probable, that a court would find that an open "blanket"

primary does not burden associational rights. Until there is a federal case on point, this eventuality cannot be ruled out. It is also possible that AS 15.25.060 can be construed to apply only when political parties have not exercised their constitutional rights to limit access to the nominating process. One thing remains certain; it would be advisable to amend AS 15.25.060 to allow for the implementation of associational rules of political parties that do not infringe upon legitimate state interests in the administration of elections.

Even though Tashjian places heavy emphasis on the associational rights of political parties, we believe there may be an overriding state interest in having the parties act promptly and with clarity in the way they define who may associate with them. The U.S. Supreme Court has acknowledged that "it is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal." Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); see also, American Party of Texas v. White, 415 U.S.767, 779 (1973). State law may interfere with a political party's internal affairs when necessary to ensure that elections are fair and honest. Storer v. Brown, 415 U.S. 724, 730 (1973).

We reviewed a draft committee substitute currently under consideration by the House State Affairs Committee. This bill would require political parties to adopt and deliver any party rules that would materially affect the nominating process by March 1 of the primary election year. The purpose of imposing a deadline for action is to permit preclearance of the change in voting requirements by the U.S. Justice Department, allow for voter education, and give adequate time to the division of elections to implement the changes. While these interests appear to be compelling, it is possible that a minor, recognized political party could contest the validity of the March 1 date. There is precedent for the proposition that early deadlines for the declaration of candidacy improperly restrict free speech and associational rights of nonparty candidates. Sigler v. State, 3AN-88-8695 (Alaska Super. Mem. of Decision, Sept. 12, 1988). The harm encountered in Sigler was that the early declaration date improperly distanced nonparty candidates from the time of spirited public debate and the resultant attention of voters. Perhaps a minor recognized party could argue that it should be allowed to adopt rules which permit it to nominate candidates by convention held at or near the filing deadline for candidates for reasons similar to those advanced by Sigler. We believe that the concept of a deadline is supportable as a reasonable burden calculated to promote the electoral process. However, the division must fully document reasons for the cut-off date. The documentation will be essential in upholding the state's burden of proving that there is basis for the restriction.

Based on the foregoing, we conclude that existing provisions of the election code specifying the content of the primary election ballot are not operative when a political party opts to close its primary. In the absence of a specific statute, sufficient authority exists for the director to administratively implement new procedures for a closed primary. The basic standard applicable to the power of an administrative agency to adopt regulations is set out in the Administrative Procedure Act (APA). The APA provides:

> If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.

AS 44.62.030. The director is given broad legislative power to adopt administrative regulations. She may "adopt regulations under the Administrative Procedure Act (AS 44.62) necessary for the administration of elections." AS 15.15.010. Given our determination that Tashjian makes AS 15.25.060 inoperative under certain conditions, it appears that AS 15.15.010 grants sufficient authority to implement a closed primary by administrative regulation. See, e.g., Denardo v. State, 741 P.2d 1197 (Alaska 1987) (regulation requiring independent gubernatorial candidates to submit nominating petitions signed by one percent of qualified voters held to be valid when adopted after court found statutory requirement void).

We would be remiss in our duties if we did not point out that contrary legal arguments could be made. It could be argued that the existence of AS 15.25.060 makes it plain the legislature did not intend to commit the formulation of the primary ballot to agency discretion. Support for this argument can be found in AS 15.15.030(1), which allows the director to determine matters of ballot form "not provided by law." The intent to commit to agency discretion is a necessary element for determining whether a regulation is valid. Kelly v. Zamarello, 486 P.2d 906, 909 (Alaska 1971). We believe that a court would defer to the broad grant of legislative rule-making power conferred by AS 15.15.010, especially if the legislature fails to amend the election code after given a reasonable opportunity to do so. However, the fact that the regulations could be questioned justifies the effort to have the legislature take action to amend the election code.

We hope this memorandum will assist you in presenting your comments to the House State Affairs Committee.

JLB:ck

Alaska State Legislature

closed primary

Legislative Research Agency

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January 15, 1991

MEMORANDUM

TO: Representative Mike Navarre

FROM: Gordon S. Harrison, Director gsh

RE: **Alaska's Blanket Primary and the *Tashjian* Decision**
Research Request 91.080

You asked for a description of the various methods used throughout the country to conduct primary elections for state offices. You also asked for a review of the effect on state primaries of recent U.S. Supreme Court decisions that have given state parties substantial prerogatives to determine the rules for nominating their own candidates, notably the *Tashjian* decision [*Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986)]. Finally, you asked if there is a need to modify Alaska's primary election laws in the wake of the challenge last summer to those laws by the Republican Party of Alaska armed with the *Tashjian* decision (*Doyle v. State of Alaska*).

This memorandum will discuss these matters under the following five subject headings: 1) classification of state primaries, 2) legislative history of Alaska's blanket primary, 3) freedom of association and the *Tashjian* decision, 4) Alaska's primary and *Doyle v. State of Alaska*, and 5) revision of Alaska's primary election laws. The recommendation of the memorandum is that--presuming the legislature wants to retain the blanket primary--revision of Alaska's current statute should wait until after the courts have ruled on the constitutionality of the blanket primary. To modify Alaska's primary election laws prior to court action would prematurely, and perhaps unnecessarily, concede that the blanket primary has constitutional defects.

Classification of State Primaries

The direct primary is used to nominate party candidates for state office in virtually all of the states today.[1] It replaces nomination by party convention and caucus, methods prevalent throughout the country in the last century. Nomination of candidates by popular vote in a party primary was a key political reform of the progressive movement early in this century. It opened the

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[1] In a few states conventions are still used to nominate candidates for certain offices, or under special circumstances. See Council of State Governments, *Book of the States 1990-91*, Table 5.2. pp. 234-35.

nominating process to the voters and thereby undercut the influence of party bosses in determining who would stand for election.

Generally speaking, direct primaries are described as being either "closed", "open", or "blanket", although there is significant variation within these categories.

Closed Primary

In a closed primary system, voters must be registered party members to participate in the party primary election. A person registered as a Democrat, for example, may vote only in the Democratic primary. At the polling place, he or she will receive a ballot containing only candidates seeking the Democratic nomination. Voters who are registered as nonpartisans or who have not declared a party preference (unaffiliated voters), may not vote in the primary election.

Closed primaries are more or less closed, depending on the length of time that a voter must be registered prior to the primary. In the classic closed system, voters must be registered for 30 days or longer before the primary, and they may not change their party registration during that period. In semi-closed systems, voters may register or change their party registration as late as election day. According to a recent political science textbook, 27 states use a closed primary, including ten that allow voters to register or change party registration at the polling place.[2]

Open Primary

In an open primary system, voters do not have to be registered members of a party to vote in the primary of that party. A person registered as a Republican, for example, may choose to vote in the Democratic primary. Unaffiliated voters may vote in the primary of any party that qualifies for the ballot (normally only the two major parties do so).

Open primaries vary in their degree of openness: in the classic open primary, voters decide which party ballot to vote in the privacy of the voting booth (either they are given one ballot with party candidates in separate columns, and they vote only one column, or they are given separate ballots for each party and they return only one with voting marks). In semi-open primaries, the voters must publicly request a party ballot. Twenty states use an open

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[2]John F. Bibby, et al., "Parties in State Politics," *Politics in the American States*, Virginia Gray, Herbert Jacobs, Robert B. Albritton, eds. 5th Edition, 1989, p. 98.

primary, including 11 of the semi-open type that require voters to request a party ballot.[3]

Blanket Primary

In both the open and closed primary, voters may cast votes for candidates of only one party. In the blanket primary, all voters receive a single ballot that groups candidates of both parties by office, and they may cross from one party to the next as they move through the list of offices. That is, a voter may cast a ballot for a Republican candidate for governor, a Democratic candidate for state senator, a Republican candidate for state representative, and so on, regardless of the voter's own party affiliation (or lack thereof). This system is the most open of the conventional party primaries, as it is least constraining from the standpoint of the individual voter. Two states have a classic blanket primary: Washington and Alaska.

Louisiana has had since 1976 a unique nonpartisan primary which bears some resemblance to a blanket primary. The critical difference between the Louisiana primary and the blanket primaries of Alaska and Washington is that it is not designed to produce nominees from each of the contending parties. The ballot is organized like a blanket primary ballot (with all candidates for an office, regardless of their party, listed by office), but the two candidates who receive the highest number of votes advance to the general election, even if they are of the same party. Furthermore, if one of the candidates receives a majority (more than 50 percent) of the vote in the primary, he is the victor and does not have to stand at the general election.

Impact of the Primary System on Parties

The purpose of the direct primary was to reduce the influence of parties in the political life of the nation, and it has undeniably had that effect, together with other factors that have also contributed to the decline of parties in our society. It is interesting to note that a respectable body of opinion in the United States today laments the moribund state of the major parties and believes that revitalized parties could invigorate and animate American democracy.[4] While few observers or political practitioners advocate the return to party conventions and caucuses for nominating electoral candidates, many are critical of open, and especially blanket, primaries. The closed primary is preferred by many political scientists and party activists because it encourages party affiliation, gives meaning to party ties, and enhances the development and significance of party platforms. The popularity of open

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[3] *Ibid.*, p. 98.

[4] See, for example, Leon D. Epstein, *Political Parties in the American Mold*, University of Wisconsin Press, 1986, especially pp. 9-39.

primaries with voters, however, is usually to check the impulse of party officials to seek the closing of an open primary, and accounts for the fact that only 17 states have a classic closed system.

Legislative History of Alaska's Blanket Primary

Alaska first adopted the blanket primary in 1947, during territorial days. Prior to that time Alaska had an open primary: at the polls, voters were given a single ballot listing the party candidates in two separate columns. Voters could vote in only one column.

In the special legislative session of 1946, when both houses of the legislature were overwhelmingly dominated by Democrats, a conservative Juneau Democrat, Curtis Shattuck, introduced House Bill 4 which would have changed the open primary to a blanket primary. While the bill did not have sufficient support in the House of Representatives to pass, there was enough interest to keep it alive. The compromise was an amendment to put the question before the voters in a referendum at the next general election (October 8, 1946).[5] The amended bill passed the House of Representatives with no dissenting votes, and it passed the Senate with only three dissenting votes.

There was apparently little public discussion of the issue preceding the referendum, in part perhaps because it was overshadowed by a second referendum on the same ballot--a referendum on the hotly debated question of statehood. In any case, the question of a blanket primary seems not to have generated much controversy. The *Anchorage Daily Times* opined that the proposal "has received virtually no publicity and the vote on it will probably be unintelligent." The newspaper editorial said "nobody seems to know what it is all about." It continued:

> ...inasmuch as the two parties in Alaska are different only in leadership and in their position as "in" or "out" of power, it can be argued that the blanket ballot would be appropriate here.

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[5]Historian Bob DeArmond of Juneau wrote the following about the adoption of the blanket primary in his column "Days of Yore", published in *Info Juneau*, October 25, 1986. The blanket primary "was particularly pushed by Editor Sidney D. Charles of the *Alaska Fishing News* (now the *Ketchikan Daily News*) and a bill was introduced in the 1945 legislative session by Representative Curt Shattuck of Juneau. It was quickly batted down by the party stalwarts, but in 1946 there was a special session and Shattuck introduced it again. To get rid of it, the opponents turned it into a referendum for the 1946 general election."

> Both parties are interested in developing Alaska. Either one would follow a program very similar to the other should it be placed in power. It has been said that the voters, during the primary election, separate into two parties for the purpose of eliminating some candidates for public office and nominating others. The general election is a continuation of this process, only with the voters all using the same ballot with the candidates of the parties on the same list. Therefore, it is argued, there would be nothing lost by having a blanket ballot in the primary.
>
> We have heard no argument that is, by itself, convincing. We believe that Alaska will fare just as well no matter what form of ballot is used.[6]

While newspaper editors may have been indifferent, the voters clearly were not: the opportunity to vote for candidates from either party in the primary strongly appealed to Alaskans, who voted yes on the referendum to adopt a blanket primary by an extraordinary margin.[7] In the face of this unequivocal support by the electorate, members of the Eighteenth Legislature dutifully adopted a blanket primary in 1947. It passed without a dissenting vote in the House of Representatives, and with two Democrats and two Republicans casting no votes in the Senate.

Increasingly, however, the question of the blanket primary became a partisan issue. Democrats tended to oppose it, and Republicans to support it. Democrats feared that it would erode party loyalty and discipline,[8] and they thought that Republicans used it to their advantage by crossing party lines in the primary to nominate the weakest Democratic candidates. Republicans

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[6] *Anchorage Daily Times*, October 7, 1946.

[7] Unofficial returns from 46 of the 60 precincts reported in the *Anchorage Daily Times* on October 10, 1946, showed 4,225 in favor of the blanket primary and 878 opposed. DeArmond states "In the final tally . . . a whopping 78 percent [of the voters] wanted the [blanket] primary." DeArmond, "Days of Yore," *op. cit.*

[8] In a letter to Secretary of State Lew Williams in 1948, Alaska's Delegate in Congress Bob Bartlett (a Democrat) commented on the new blanket primary: "I still fail to appreciate whatever good qualities, if any, it may have. The good old party ballot was good enough for me. I still think that party responsibility will, to a large degree, be a thing of the past with this form of ballot." University of Alaska Archives, Bartlett Collection, Box 14, Personal File 1948.

supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and nonaligned voters.[9]

In the first session of the first state legislature in 1959, when Democrats firmly controlled both houses and the governor's office, the blanket primary was replaced by the single ballot open primary.[10] Adoption of the comprehensive election code in 1960 incorporated this change.[11]

Republicans led the opposition to the single-ballot open primary, although some Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democrat-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times*.[12] Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Ketchikan spoke in favor the bill. Senator Blodgett is reported to have said:

> The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill."

Senator Ziegler declared:

> The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this show of bipartisan support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both houses and Republican Walter Hickel was elected governor. The blanket primary was thereupon restored during the first session of the Fifth

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[9]Interview with Judge (Ret.) Thomas B. Stewart. See also Herman E. Slotnick, "Alaska: Empire of the North," in Frank H. Jonas, ed. *Politics in the American West* (Salt Lake City: University of Utah Press, 1970). Since the 1930s, the Republican party tended to be the minority party in Alaska, and it is the minority party that typically perceives partisan advantage in opening primaries.

[10]Chapter 41 SLA 1959 (HB 8).

[11]Chapter 83 SLA 1960 (CSHB 252).

[12]March 28, 1966.

Legislature.[13] The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.

The blanket primary seems to suit contemporary Alaska, where party ties and party organizations are weak.[14] Elected officials from both parties acquiesce to (and many benefit from) voter enthusiasm for the blanket primary.

Open primaries of all kinds, however, are often unpopular with party loyalists and party candidates because they allow nonparty members to "cross over" and influence the selection of party candidates. If done with mischievous intent--so-called strategic voting--the result may be the nomination of the weakest candidate. Even if not done mischievously, cross-over voting may sufficiently dilute the vote of party members to produce a nominee with little attachment to the party platform. Do parties have any rights to determine who may vote in their primary? A recent opinion of the U.S. Supreme Court says that they do, although the opinion was rendered in a case involving the efforts of a party to open (partially) its closed primary. That is the *Tashjian* decision.

Freedom of Association and the *Tashjian* Decision

Although the freedom of association is not explicitly guaranteed by the U.S. Constitution or the Bill of Rights, the U.S. Supreme Court has, through a series of cases that began in the late 1950s, conferred constitutional status upon it, declaring that the right to freedom of association is implicit in such constitutionally protected rights as speech, petition, and assembly. Although initially applied in civil rights cases, the doctrine of freedom of association has recently been invoked by the courts in disputes over state

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[13]Chapter 1 SLA 1967 (HB 1am).

[14]More than half of the voters in Alaska are unaffiliated with a party (at registration they decline to state a party preference or declare themselves nonpartisan). Information from the Division of Elections prior to the 1990 elections showed there were 285,219 people registered to vote in Alaska with the following party affiliation: Democrats, 56,074; Republicans, 59,107; Alaska Independence Party, 2,227; nonpartisan, 89,548; undeclared, 72,195; and other, 6,068. For a general discussion of parties in Alaska see Carl E. Shepro, "Alaska's Political Parties," Gerald A. McBeath and Thomas A. Morehouse, eds. *Alaska State Government and Politics* (Fairbanks: University of Alaska Press, 1987).

regulation of political parties. The U.S. Supreme Court has used it to uphold challenges by parties to state regulations that unduly interfere with internal party operations and the process by which the parties select their electoral candidates. The notable case involving state primaries is *Julia H. Tashjian, Secretary of State of Connecticut, Appellant v. Republican Party of Connecticut et al. [479 U.S. 208 (1986)]*.

The *Tashjian* Decision

Connecticut has a history of strong party organizations, and since 1955 it has had a classic closed primary. The state Republican party has fewer registered voters than the Democratic party, and there are a substantial number of unaffiliated voters in the state. In January, 1984, the state convention of the Republican party adopted a rule that allowed unaffiliated voters to participate in the Republican primary for certain offices (excluding state legislative office). This rule conflicted with the state's election law. After failing to obtain the necessary statutory amendment from the legislature (which was dominated by Democrats), the party sued on constitutional grounds in federal court to enjoin the state from enforcing the closed primary statute. The party prevailed in the U.S. district court and the circuit court of appeals, and the state appealed to the U.S. Supreme Court.

The Supreme Court sided with the Republican party, upholding the lower court decisions. It ruled that the Connecticut statute was unconstitutional because its infringement on the associational rights of the party was not justified by compelling state interests. Prohibiting unaffiliated voters from participating in the primary of a party that invites such participation "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."

The Implications of *Tashjian*

At a minimum, the *Tashjian* decision means that states with closed primaries may not prohibit unaffiliated voters from voting in the primary of a party that takes formal action to open its primary to these voters. A number of closed primary states with election laws similar to Connecticut's have made the necessary statutory amendments to bring their codes into compliance with *Tashjian*. The relevant laws in states that have not done so will be unenforceable in the face of party action to open a primary to unaffiliated voters.

Because few political parties have followed the precedent of the Connecticut Republicans in seeking to open, even partially, their closed primary, and because only the participation of unaffiliated voters is at stake (a small proportion of registered voters in most states), the *Tashjian* decision has not had a tumultuous impact. The big question about Tashjian, however, is what

the underlying logic of the decision implies for other forms of state regulation of parties and primaries. That is, how much freedom of association will the Supreme Court ultimately extend to political parties? Leon Epstein, a noted political scientist, has observed: "Only if parties were able, as well as willing, to use Tashjian as a precedent for broader challenges to state primaries would there be far-reaching political consequences."[15]

Open and blanket primaries are clearly suspect under an extension of the freedom-of-association reasoning in *Tashjian*. If prohibiting a party from allowing unaffiliated voters to participate in its primary amounts to an unconstitutional interference in a party's affairs, what of election laws that force a party to accept the participation of voters registered in opposition parties? More than one analysis of the *Tashjian* decision has pointed to the possible consequences for open and blanket primaries. For example, "*Tashjian* clearly indicates that great deference should be accorded to a party's determination of its affiliates. The open and blanket primary systems, however, limit the ability of parties to choose their affiliates by preventing parties from restricting their primaries to party members. . . . Thus, there is a strong argument that both the open and blanket primary systems are unconstitutional."[16]

The limits of the *Tashjian* decision in this regard have not been tested because no party in an open or blanket primary state has sought to close its primary by party rule and to enforce this closure through court action against contrary state laws. That is, no party had done so until June, 1990, when *Allen Grant Doyle, Jr. and the Republican Party of Alaska v. State of Alaska et al.* was filed in the U.S. District Court in Anchorage.

Alaska's Primary and Doyle v. State of Alaska

At its statewide convention in March, 1990, the Republican party of Alaska amended its rules by adopting the following provision:

> Only registered Republicans, regi[illegible]red Independents, and those who state no prefer[illegible]f [illegible]ty affiliation shall be allowed to vote in the [illegible] primary election for Governor, Lieutenant Gove[illegible], U.S. Senator, U.S. Representative, and members of the State Legislature.

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[15]Leon D. Epstein, "Will American Political Parties Be Privatized?" *Journal of Law and Politics*, Vol. 239, p. 240.

[16]Susan Yarborough Noe, "North Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters to Vote in Party Primaries," *North Carolina Law Review*, Vol. 66, No. 6 (September 1988).

The Republicans expected the Democratic party at its statewide convention in May to adopt a similar provision closing its primary to registered Republicans, but the Democratic party did not do so. Notwithstanding this development, the Republican party thereupon requested state election officials to honor the new rule in the up-coming primary (August, 1990). State officials protested that the request for a change in the method of holding the August primary was too ambiguous and made too late to be implemented. Furthermore, state officials demanded that the party rule be "precleared" by the U.S. Department of Justice under the federal Voting Rights Act of 1965 before they could begin to modify state election procedures (a process that would also require preclearance by the federal justice department).

Confronted with these objections, the Republican party filed suit asking the court to enjoin the state from conducting the August primary in a manner contrary to its new rule.

In its response to the plaintiff's motion, the state did not dwell at length on the merits of the Republican party's assertion that the doctrine of associational rights enunciated in *Tashjian* conferred upon the party the prerogative to close its primary to Democrats. Rather, confronted with the immediate threat of an injunction against the August primary, the state built its defense around the argument that a change in the election procedures at such a late date would cause confusion and uncertainty that would disadvantage minority voters, in violation of the federal Voting Rights Act of 1965.

The Democratic party of Alaska and the Alaska Federation of Natives (AFN) filed a joint *amicus curiae* brief in support of the state's opposition to the party's motion. The *amici* also stressed the harm that would be suffered by rural Native voters if electoral procedures were altered for the August primary. However, both the state and the *amici* argued that it was not clear, as averred by the Republican plaintiffs, that the party's suit would ultimately prevail on its merits, and they both offered several reasons why the blanket primary could survive constitutional scrutiny, notwithstanding the *Tashjian* doctrine.

Also, both the state and the *amici* suggested that the federal voting rights act may be a fundamental impediment to closing Alaska's primary. The *amici* brief stated:

> Any election procedure which abridges the opportunity for Native voters to enhance their political influence through bi-partisan coalitions fundamentally impairs voting prerogatives protected under the "no retrogression" provisions of the Act. (Indeed, AFN suspects that the Party Rule is specifically intended to frustrate the formation of bi-partisan coalitions

> and, in turn, to impair the influential role of legislators who represent Native voters).[17]

The brief warned that the Alaska Federation of Natives "intends to raise claims under Section 2 of the Act which allege that implementation of the Party Rule is violative of the substantive protection of the Act. (AFN notes that the State has indicated that it, too, may assert such claims as a counter-claim in the immediate litigation.)"[18]

On July 16, 1990, the district court denied the request for a preliminary injunction. However, the case is still active and will be decided on its merits unless the Republican party withdraws the action.

Revision of Alaska's Primary Election Law

Efforts of the Republican party in the summer of 1990 to partially close its primary were thwarted because its request to modify the ballot and voting procedures was deemed untimely, and because state officials and party leaders could not agree on an interpretation of the party rule.[19] Had the request been made earlier, the state may have acquiesced to it and not contested the merits of the Republican party's claim that the blanket primary is unconstitutional under the *Tashjian* doctrine. In anticipation of future requests by one or both parties to close their primaries to voters of other parties, should the legislature now establish procedures in law that will smooth the process? For example, should state statutory provisions specify deadlines for filing requests, and authorize the state Division of Elections to determine by administrative procedure the form of the ballot?

The legislature should not revise the blanket primary to facilitate future efforts by the parties to close their primaries unless it first decides as a matter of policy that the blanket primary should be abandoned (or, at a minimum, that the desire of a party to close its primary to some extent should take precedence over the protection of the integrity of the blanket primary). If the legislature favors the blanket primary, its constitutionality should be defended in court before any revision to the election laws is contemplated.

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[17] *Memorandum of Amicus Curiae in Opposition to Motion for Preliminary Injunction*, p. 18.

[18] *Ibid.*, p. 18.

[19] The state argued, for example, that it was not inconsistent with the party rule to include on the Republican ballot the names of Democratic candidates, in order that Republican and unaffiliated voters could continue to enjoy a blanket primary.

Despite the presumptive case against the blanket primary on the basis of rights of freedom of association of political parties, a plausible defense can by made on its behalf. In deciding cases such as these, the court weighs the severity of the infringement on the party against the interest of the state in imposing it. The U.S. Supreme Court recognizes the importance of regulations that strengthen the two-party system and preserve the integrity of the electoral process. Indeed, a footnote in the *Tashjian* decision cautioned that the reach of the decision may not be very far. It said that had the request of the Republican party of Connecticut been to open its primary to Democrats in addition to unaffiliated voters, the circumstances would have been much different because of the potential disruption to the party system.[20] Also, the defense of Alaska's blanket primary around the federal Voting Rights Act of 1965--and the compelling interest of the state in protecting the electoral participation of Alaska Natives--is also available.

Furthermore, the Republican party may decide not to pursue *Doyle v. State of Alaska*. The circumstances that prompted the suit may now make it moot.[21] In general, political parties have demonstrated caution in using the *Tashjian* doctrine to upset the status quo. The *Doyle* suit was improbable. Writing about the likelihood of such a suit, political scientist Epstein noted:

> It is hard to conceive of many electoral circumstances in which a party would find it expedient to exercise such a right [to close an open primary]. For one party in a competitive two-party state to require a previously unused party registration only for its primaries, thus excluding customary primary voters who remain unaffiliated, looks politically risky.[22]

The politics of the issue in Alaska are certainly complicated, if not risky. For example, the bill restoring the blanket primary in 1966 was introduced at the request of Governor Hickel. How his new administration will deal with the *Doyle* case is not yet clear.

I hope this overview of the primary situation in Alaska is helpful to you.

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[20] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) n. 13.

[21] Presumably, the conservative wing of the Republican party sought to close its primary to Democratic voters to forestall them from crossing over and casting ballots for Arliss Sturgulewski, a moderate Republican candidate for governor.

[22] Epstein, "Will American Political Parties Be Privatized?" p. 271.

Table 5.3
PRIMARY ELECTION INFORMATION

State or other jurisdiction	Dates of 1990 primaries for state officials: Primary	Runoff (a)	Party affiliation for primary voting: Voters must declare/change affiliation prior to election day	Voters select party on election day	Voters receive ballot of: One party (b)	All parties participating (c)
Alabama	June 5	June 26	...	★	★	...
Alaska	Aug. 28	...	...	(d)	...	★ (d)
Arizona	Sept. 11	...	At least 50 days before	...	★	...
Arkansas	May 29	June 12	...	★	★	...
California	June 5	...	At least 29 days before	...	★	...
Colorado	Aug. 14	...	At least 25 days before	(c)	★	...
Connecticut	Sept. 11	...	At least 6 months before (e)	(c)	★	...
Delaware	Sept. 8	...	By March 1 of election year	...	★	...
Florida	Sept. 4	Oct. 2	At least 30 days before	...	★	...
Georgia	July 17	Aug. 7	...	★	★	...
Hawaii	Sept. 22	...	...	★	...	★
Idaho	May 22	...	...	★	...	★
Illinois	March 20	...	...	★	★	...
Indiana	May 8	...	...	★	★	...
Iowa	June 5	...	...	★	★	...
Kansas	Aug. 7	...	At least 20 days before (e)	(e)	★	...
Kentucky	May 29	...	At least 30 days before	...	★	...
Louisiana	Sept. 29	Nov. 6 (f)	At least 24 days before (f)	...	...	(f)
Maine	June 12	...	At least 90 days before (e)	(e)	★	...
Maryland	Sept. 11	...	At least 84 days before (e)	...	★	...
Massachusetts	Sept. 18	...	At least 28 days before (e)	(e)	★	...
Michigan	Aug. 7	...	...	★	...	★
Minnesota	Sept. 11	...	...	★	...	★
Mississippi	June 5	June 26	...	★	★	...
Missouri	Aug. 7	...	...	★	...	★
Montana	June 5	...	...	★	...	★
Nebraska	May 15	...	By 2nd Friday before election	...	★	...
Nevada	Sept. 4	...	At least 30 days before	...	★	...
New Hampshire	Sept. 11	...	At least 10 days before	...	★	...
New Jersey	June 5	...	At least 50 days before (e)	(e)	★	...
New Mexico	June 5	...	By Jan. 25 of election year (g)	...	★	...
New York	Sept. 11	...	At least 1 year before (e)	...	★	...
North Carolina	May 8	June 5	At least 21 days before (h)	(c)	★	...
North Dakota	June 12	...	...	★	★	...
Ohio	May 8	...	...	★	★	...
Oklahoma	Aug. 28	Sept. 18	At least 10 days before (i)	(i)	★	...
Oregon	May 15	...	At least 20 days before (e)	...	★	...
Pennsylvania	May 15	...	At least 30 days before	...	★	...
Rhode Island	Sept. 11	...	At least 90 days before (e)	(e)	★	...
South Carolina	June 12	June 26	...	★	...	★
South Dakota	June 5	...	At least 15 days before	...	★	...
Tennessee	Aug. 2	...	...	★	...	★
Texas	March 13	April 10	...	★	★	...
Utah	Aug. 21	...	...	★	...	★
Vermont	Sept. 11	...	...	★	...	★
Virginia	June 12	...	...	★	...	★
Washington	Sept. 18	...	...	(d)	...	★ (d)
West Virginia	May 8	...	At least 30 days before	...	★	...
Wisconsin	Sept. 11	...	...	★	...	★
Wyoming	Aug. 21	...	...	★	★	...
Dist. of Columbia	Aug. 11	...	At least 30 days before	...	★	...
Guam	Sept. 1	...	...	★	...	★
U.S. Virgin Islands	Sept. 11	...	At least 30 days before	...	★	...

Sources: Federal Election Commission; League of Women Voters, *Vote! The First Step*; state election administration offices.

Key:

. . . — No provision

(a) A runoff election between the top two candidates is held if the leading candidate does not get a majority of the votes cast in the first primary.

(b) The type of primary in which voters receive only the ballot of their party choice in a primary (voters must declare their affiliation on, or prior to, election day) is generally referred to as a *closed* primary.

(c) The type of primary in which voters receive a ballot for all parties and select the party of their choice in the privacy of the voting booth is generally referred to as an *open* primary.

(d) Voters are not restricted to one party. In Alaska and Washington, voters participate in a *blanket* primary. As in regular open primaries, voters receive a ballot that contains the primary ballot for all parties. However, a voter in the blanket primary may pick and choose among the parties in moving through the lists of candidates for various offices. The only restriction is that the voter can indicate only one preference for each office.

(e) Applies to previously affiliated registered voters. In Connecticut, unaffiliated voters may now vote in some Republican primaries but not in Democratic primaries. In Colorado, Connecticut, Kansas, Louisiana, Maine, Massachusetts, New Hampshire, New Jersey (new voters) and Rhode Island, unaffiliated voters may declare party at the polls. North Carolina may choose Republican at the polls. In Maryland and Oregon, new registrants declare at time of registration. In New York, new voters declare affiliation at least 30 days before, while previously eligible voters declare at least 60 days before.

(f) Louisiana has an open primary which requires all candidates, regardless of party affiliation, to appear on a single ballot. If a candidate receives over 50 percent of the vote in the primary, he is elected to the office. If no candidate receives a majority vote, then a single election is held between the two candidates receiving the most votes.

(g) Previously affiliated voters may not change party affiliation after proclamation of primary.

(h) Business days.

(i) New registrants declare at time of registration; however, no changes in party affiliation are allowed between July 1 and Sept. 30 in an even-numbered year.

Pocket

PROCEDURES FOR PARTY PRIMARIES IN OTHER STATES

ALABAMA

as of: 5/11/90

TOTAL 2,294,193

Party primaries:

No record of party is kept by the State of Alabama Elections Division. A voter need only declare either Democrat or Republican at the polls and he will be given the corresponding ballot.

ARKANSAS

as of: 5/1/90

TOTAL 1,171,027

Party primaries:

In the state of Arkansas, voters are not required to indicate a party preference, however, the state has only two official parties: Democrat and Republican. There is no state-wide standard for holding party primaries-- each county is responsible for its own procedure. In counties where joint primaries are held, the voter must request to vote either Republican or Democrat.

CALIFORNIA

Democrat	49.94%
Republican	39.20%
American Independent	1.17%
Libertarian	.36%
Peace & Freedom	.34%

Party primaries:

At the primary the voter must request a ballot for the party with which he is affiliated. In the California primary there are five such parties which participate (see above). If a voter is not a member of one of these five parties, he may only vote for non-partisan candidates and for or against ballot propositions and other issues. Otherwise the non-partisan voter must wait until the general election. If a voter wishes to request a primary election ballot for a party of which he is not a member, he must change his affiliation at least 29 days prior to the state-wide election.

CONNECTICUT as of: 2/90

Democrat	681,306 - 39%
Republican	468,517 - 27%
Minor Parties	972
Unaffiliated	577,071 - 33%
TOTAL	1,727,866

Party primaries:

Only Democrats may vote in Democratic primaries; in Republican primaries for some offices, both Republicans and voters who are unaffiliated with any party may vote. These offices are: Governor, Lt. Governor, Secretary of State, Treasurer, Comptroller, Attorney General, U.S. Senator, and U.S. Representative. In Republican primaries for such offices as state legislator, city mayor, or city council member, only Republicans may participate.

DELAWARE as of: 11/88

Democrat	125,297 - 43%
Republican	110,301 - 38%
Other	58,095 - 20%
TOTAL	293,693

Party primaries:

Only Democrats may vote in Democratic primaries, only Republicans may vote in Republican primaries.

DISTRICT OF COLUMBIA

Democrat	214,283 - 79%
Republican	25,194 - 9%%
Statehood	2,054
Independent	33,695 - 12%
Other Parties	174
TOTAL	275,400

Party primaries:

In the District of Columbia primary, the Democratic, Republican, and Statehood parties each have a separate ballot. A voter must be a member of the party for which he requests a ballot. If not, he must change his affiliation at least 30 days prior to the election.

FLORIDA

Democrat	3,037,978 - 53%
Republican	2,312,735 - 40%
Other	400,441 - 7%
TOTAL	5,751,154

Party primaries:

A voter must be a member of the party for which he requests a ballot. If not, he must change his affiliation at least 30 days prior to the election. If a run-off election should occur, the voter may not cross parties. Voters affiliated with political parties other than Democrat and Republican may only vote in the general election.

GEORGIA as of: 11/88

TOTAL	2,941,339

Party primaries:

No record of party is kept by the Georgia Elections Division. A citizen need only be registered to participate in either primary.

KENTUCKY

Democrat	1,233,230 - 68%
Republican	538,859 - 30%
No Preference	41,151 - 2%
Other	13,259
TOTAL	1,826,499

Party primaries:

A voter in Kentucky must be a member of either the Republican or Democratic party in order to vote in the primary election. If he is not he may only vote in the general election. If he should wish to change his political affiliation after the general election, it will not become effective until **after** the following primary election; until then his status will be listed as non-partisan. However, if a voter chooses to change his affiliation between the dates of the primary and general elections, his party status will become effective by the date of the general election.

ILLINOIS

TOTAL 6,014,961

Party primaries:
No record of party is kept by the Illinois Board of Elections. However, voters must declare a party to vote in a primary election.

INDIANA as of: 1/90

TOTAL 2,839,561

Party primaries:
No record of party is kept by the Indiana State Election Board. Voters participate in primaries by requesting a ballot for either primary at the polls.

IOWA as of: 5/1/90

Democrat	549,176	37%
Republican	477,375	32%
No Party	475,861	32%
TOTAL	1,502,412	

Party primaries:
A registered voter may vote in any primary. However, if he is not already a member of the party in whose primary he wishes to vote, he must declare at the polls.

MASSACHUSSETTS as of: 2/90

Democrat	1,390,785	44.22%
Republican	424,800	13.50%
Unenrolled	1,328,863	42.26%
TOTAL (as of 10/89)	3,268,017	

Party primaries:
Voters may chose to vote in either primary regardless of their party affiliation.

MISSISSIPPI as of: 5/88

TOTAL 1,595,826

Party primaries:
No record of party is kept by the State of Mississippi Elections Division. In the first of the two Mississippi primaries a voter requests either a Republican or Democratic ballot. In the second primary the voter most vote the same way; he cannot cross parties.

NEVADA

Democrat	202,343 - 46%
Republican	192,155 - 43%
Non-Partisan	48,941 - 11%
TOTAL	443,439

Party primaries:
Only Democrats may vote in the Democratic primary, only Republicans may vote in the republican primary. Non-Partisans may not vote unless they change their affiliation at least 30 days prior to the primary.

NEW HAMPSHIRE as of: 5/24/90

Democrat	197,409 - 30%
Republican	252,720 - 39%
Undeclared	199,651 - 31%
TOTAL	649,780

Party primaries:
On the day of the primary, a voter, regardless of party declaration, may request a ballot for either primary. The voter then automatically becomes a member of that party in whose primary he participated.

NEW JERSEY

Democrat	1,199,098 - 32%
Republican	787,822 - 21%
Unaffiliated	1,727,107 - 46%
Independent	4,571
TOTAL	3,718,598

Party primaries:
Unaffiliated and independents cannot vote in party primaries.

NEW YORK

Democrat	3,904,183 - 47%
Republican	2,640,179 - 32%
Right-to-Life	23,973 - 1%
Conservative	113,756 - 2%
Liberal	61,101 - 1%
Non-in-Roll	1,502,641 - 18%
TOTAL	8,255,833

Party primaries:
If a candidate is running for an office unopposed, no primary for that office is held. If a party nominates no candidates for a specific office voters registered under that party will not participate in the primary for that office. If a voter wishes to change his affiliation, he must have done so prior to the previous general election.

OHIO

Democrat	1,802,977 - 31%
Republican	1,165,141 - 20%
Independent	2,814,895 - 49%
TOTAL	5,783,079

Party Primaries:
A voter must declare a party (either Democrat or Republican) at the polls on election day. Independents who don't declare a party may not vote.

RHODE ISLAND as of: 11/7/89

TOTAL: 536,406

Party primaries:
No official record of party is kept by the Rhode Island Division of Elections. However, while a voter may vote in either primary, whichever primary he participates in will act as a declaration of party. His party affiliation is then handwritten on the original voter registration form/card. If the voter wishes to vote in a party primary different from his affiliation, he must disaffiliate at least 90 days before that primary is held.

SOUTH CAROLINA as of: 4/4/90

TOTAL 1,290,869

Party primaries:
No record of party is kept by the South Carolina State Election Commission. A citizen need only be registered to participate in either primary.

TENNESSEE as of: 12/89

TOTAL 2,521,996

Party primaries:
No record of party is kept by the Tennessee Elections Division. A citizen need only be registered to participate in either primary.

TEXAS as of: 3/15/90

TOTAL 8,285,308

Party primaries:
No record of party is kept by the Texas Elections Division. On the day of the primary election a registered voter votes at either a Democratic poll or a Republican poll. These polls are either located together or at separate sites. Each party controls its own primary. In the event of a run-off election, voters may not cross parties when they vote in the second election.

See pg 287

MARCH FONG EU, Secretary of State of California, et al., Appellants

v

SAN FRANCISCO COUNTY DEMOCRATIC CENTRAL COMMITTEE et al.

489 US —, 103 L Ed 2d 271, 109 S Ct —

[No. 87-1269]

Argued December 5, 1988. Decided February 22, 1989.

Decision: California law banning endorsement of primary candidates by parties' governing bodies held to violate parties' speech and association rights under Federal Constitution's First Amendment.

SUMMARY

Provisions of the California Elections Code (1) forbade the official governing bodies of political parties from endorsing candidates in party primaries, (2) restricted the organization and composition of such official governing bodies, (3) limited the term of office for a party's state central committee chair, and (4) required that the chair rotate between residents of northern and southern California. Various county central committees of the Democratic and Republican parties, and other groups and individuals active in partisan politics in California, brought an action in the United States District Court for the Northern District of California against state officials responsible for enforcing the Code. The plaintiffs contended that the provisions in question deprived political parties and their members of the rights of free speech and free association guaranteed by the Federal Constitution's First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the United States Court of Appeals affirmed (792 F2d 802). On appeal, the United States Supreme Court vacated and remanded (479 US 1024, 93 L Ed 2d 820, 107 S Ct 864) for further consideration in light of its decision in Tashjian v Republican Party of Connecticut (1986) 479 US 208, 93 L Ed 2d 514, 107 S Ct 544. After supplemental briefing, the Court of Appeals concluded that its previous decision was supported by the Tashjian decision, supra, and accordingly reinstated its judgment affirming the District Court's decision (826 F2d 814).

On appeal, the United States Supreme Court affirmed. In an opinion by

MARSHALL, J., joined by BRENNAN, WHITE, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., it was held that (1) the provision concerning endorsement of primary candidates (a) infringed upon the free speech rights of parties and their members, because it directly hampered the ability of a party to spread its message and hamstrung voters seeking to inform themselves about the candidates and the campaign issues, (b) infringed upon political parties' freedom of association, because the provision prevented parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community, and (c) could not be justified as advancing the state's compelling interests in maintaining a stable political system, protecting primary voters from confusion and undue influence, or preserving party stability; and (2) the provisions regulating the parties' internal affairs (a) burdened the freedom of association of political parties and their members, because such provisions limited a party's discretion in how to organize itself, conduct its affairs, and select its leaders, and (b) could not be justified as serving compelling state interests in preserving the integrity of the election process, insuring the democratic management of a party's internal affairs, or preventing regional friction.

STEVENS, J., concurring, joined the court's opinion, but expressed the view that such phrases as "compelling state interest" were too convenient and result-oriented to be helpful for constitutional analysis.

REHNQUIST, Ch. J., did not participate.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 940.5 — freedom of speech and association — party endorsement of primary candidates

1a-1j. A state elections code provision that forbids the official governing bodies of political parties from endorsing candidates in party primaries violates the free speech rights, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because the provision, which affects speech that is at the core of the electoral process and of the First Amendment freedoms, directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues; such a provision infringes upon political parties' freedom of association protected by the First and Fourteenth Amendments, because the provision prevents parties from promoting candidates at the crucial juncture at which the appeal to common principles may be translated into concerted action and, hence, to political power in the community; such a provision may not be justified as advancing the state's compelling interests in maintaining a stable political system and protecting primary voters from confusion and undue influence, where the state does not adequately explain how the provision advances those interests; nor

may the provision be justified as serving a compelling state interest in party stability, since preserving party unity during a primary is not a compelling state interest.

Constitutional Law § 940.5 — freedom of association — regulation of party's internal structure

2a-2f. State statutory provisions that (1) restrict the organization and composition of the official governing bodies of political parties, (2) limit the term of office for a party's state central committee chair, and (3) require that the chair rotate between residents of northern and southern parts of the state burden the freedom of association, guaranteed by the Federal Constitution's First and Fourteenth Amendments, of political parties and their members, because such provisions limit a party's discretion in how to organize itself, conduct its affairs, and select its leaders; such provisions cannot be justified as serving a compelling state interest in preserving the integrity of the election process, where the state does not show that the provisions are necessary to insure the order and fairness of elections; such provisions cannot be justified as serving a compelling state interest in the democratic management of a party's internal affairs, where state intervention is not necessary to prevent the derogation of the civil rights of party adherents, because the state has no interest in protecting the integrity of the party against the party itself; the provisions regulating the party chair cannot be justified as preventing regional friction, because a state cannot substitute its judgment for that of a party as to the desirability of a particular internal party structure.

Constitutional Law § 940.5 — First Amendment — validity of state regulations

3. A state's broad power to regulate the time, place, and manner of elections does not extinguish the state's responsibility to observe the limits established by the rights of the state's citizens under the Federal Constitution's First Amendment; to assess the constitutionality of a state election law, a court first examines whether the law burdens rights protected by the First and Fourteenth Amendments; if the challenged law burdens the rights of political parties and their members, the law can survive constitutional scrutiny only if the state shows that the law advances a compelling state interest and is narrowly tailored to serve that interest.

Constitutional Law § 940.5 — freedom of speech — election campaigns — primaries

4. The Federal Constitution's First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office; for First Amendment purposes, free discussion about candidates for public office is no less critical before a primary than before a general election, since in both instances, the election campaign is a means of disseminating ideas as well as attaining political office.

Constitutional Law §§ 933, 940.5 — First Amendment — censorship — political speech

5. A state's highly paternalistic approach limiting what people may hear is generally suspect under the Federal Constitution's First Amendment, but it is particularly egregious where the state censors the political speech that a political party shares with its members.

Constitutional Law § 940.5 — freedom of association — political parties

6. Partisan political organizations enjoy freedom of association protected by the Federal Constitution's First and Fourteenth Amendments; such freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences.

Constitutional Law § 940.5 — right of association

7. Imposing limitations on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is a restraint on the federal constitutional right of association.

Constitutional Law § 940.5 — free speech and association — political stability — informed electorate

8a, 8b. For purposes of the rule that a state's burden on the rights to free speech and free association can survive constitutional scrutiny only if a compelling governmental interest is served, maintaining a stable political system is a compelling state interest, and a state has a legitimate interest in fostering an informed electorate.

Elections § 2 — flow of political information

9. A state may properly regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption.

Appeal § 1331.5 — what reviewable

10a, 10b. On appeal from a United States Court of Appeals decision that affirmed a United States District Court judgment holding that a state's election code provisions violated the free speech and associational rights of political parties, the United States Supreme Court will not disturb the District Court's ruling that the central committees of various political parties had authorization and capacity to bring and maintain the litigation, where the Court of Appeals did not disturb this ruling.

Constitutional Law § 940.5 — freedom of association — political parties

11. A political party's determination of the structure which best allows it to pursue its political goals is protected by the Federal Constitution; freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders.

Constitutional Law § 940.5 — associational rights — integrity of election process — regulation of parties

12a, 12b. For purposes of the federal constitutional requirement that laws burdening the associational rights of political parties and their members serve a compelling state interest, a state has a compelling interest in preserving the integrity of its election process; toward that end, a state may properly enact laws that interfere with a political party's internal affairs when necessary to insure that elections are fair and honest; for example, a state may properly impose certain eligibility requirements for voters in the general election, even though they limit

the ability of political parties to garner support and members, where such requirements are necessary to insure that elections are fair and honest; however, a state cannot justify regulating a party's internal affairs without showing that such regulation is necessary to insure an election that is orderly and fair.

Appeal § 1331.5 — what reviewable

13a, 13b. On appeal from a United States Court of Appeals decision holding that a state's election code provisions, purportedly designed to curb friction within political parties, violate the parties' free speech and associational rights, the United States Supreme Court need not address the contention that the challenged laws weaken rather than strengthen parties, where the Supreme Court finds that the state has no compelling interest in curbing intraparty friction as long as the electoral process remains fair and orderly.

SYLLABUS BY REPORTER OF DECISIONS

Section 11702 of the California Elections Code (Code) forbids the official governing bodies of political parties to endorse or oppose candidates in primary elections, while § 29430 makes it a misdemeanor for any candidate in a primary to claim official party endorsement. Other Code sections dictate the organization and composition of parties' governing bodies, limit the term of office for a party's state central committee chair, and require that the chair rotate between residents of northern and southern California. Various party governing bodies, members of such bodies, and other politically active groups and individuals brought suit in the District Court, claiming, inter alia, that these Code provisions deprived parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments. The District Court granted summary judgment for the plaintiffs as to the provisions in question, and the Court of Appeals affirmed.

Held: The challenged California election laws are invalid, since they burden the First Amendment rights of political parties and their members without serving a compelling state interest.

(a) The ban on primary endorsements in §§ 11702 and 29430 violates the First and Fourteenth Amendments. By preventing a party's governing body from stating whether a candidate adheres to the party's tenets or whether party officials believe that the candidate is qualified for the position sought, the ban directly hampers the party's ability to spread its message and hamstrings voters seeking to inform themselves about the candidates and issues, and thereby burdens the core right to free political speech of the party and its members. The ban also infringes a party's protected freedom of association rights to identify the people who constitute the association and to select a standard bearer who best represents the party's ideology and preferences, by preventing the party from promoting candidates at the crucial primary election juncture. Moreover, the ban does not serve a compelling governmental interest. The State has not adequately explained how the ban advances its claimed interest in a stable political system or what makes California so

peculiar that it is virtually the only State to determine that such a ban is necessary. The explanation that the State's compelling interest in stable government embraces a similar interest in party stability is untenable, since a State may enact laws to prevent disruption of political parties from without but not from within. The claim that a party that issues primary endorsements risks intraparty friction which may endanger its general election prospects is insufficient, since the goal of protecting the party against itself would not justify a State's substituting its judgment for that of the party. The State's claim that the ban is necessary to protect primary voters from confusion and undue influence must be viewed with skepticism, since the ban restricts the flow of information to the citizenry without any evidence of the existence of fraud or corruption that would justify such a restriction.

(b) The restrictions on the organization and composition of the official governing bodies of political parties, the limits on the term of office for state central committee chairs, and the requirement that such chairs rotate between residents of northern and southern California cannot be upheld. These laws directly burden the associational rights of a party and its members by limiting the party's discretion in how to organize itself, conduct its affairs, and select its leaders. Moreover, the laws do not serve a compelling state interest. A state cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure that elections are orderly, fair, and honest, and California has made no such showing. The State's claim that it has a compelling interest in the democratic management of internal party affairs is without merit, since this is not a case where intervention is necessary to prevent the derogation of party adherents' civil rights, and since the State has no interest in protecting the party's integrity against the party itself. Nor are the restrictions justified by the State's claim that limiting the term of the state central committee chair and requiring that the chair rotate between northern and southern California help to prevent regional friction from reaching a critical mass, since a State cannot substitute its judgment for that of the party as to the desirability of a particular party structure.

826 F2d 814, affirmed.

Marshall, J., delivered the opinion of the Court, in which all other Members joined, except Rehnquist, C.J., who took no part in the consideration or decision of the case. Stevens, J., filed a concurring opinion.

APPEARANCES OF COUNSEL

Geoffrey Lloyd Graybill argued the cause for appellants.

James J. Brosnahan argued the cause for appellees.

OPINION OF THE COURT

Justice Marshall delivered the opinion of the Court.

[1a, 2a] The California Elections Code forbids the official governing bodies of political parties from endorsing candidates in party primaries. It also dictates the organization and composition of those bodies, lim-

its the term of office of party chair, and requires that the chair rotate between residents of northern and southern California. The Court of Appeals for the Ninth Circuit held that these provisions violate the free speech and associational rights of political parties and their members guaranteed by the First and Fourteenth Amendments. 826 F2d 814 (1987). We noted probable jurisdiction, 485 US ——, 99 L Ed 2d 696, 108 S Ct 1466 (1988), and now affirm.

I

A

The State of California heavily regulates its political parties. Although the laws vary in extent and detail from party to party, certain requirements apply to all "ballot-qualified" parties.[1] The California Elections Code (Code) provides that the "official governing bodies" for such a party are its "state convention," "state central committee," and "county central committees," Cal Elec Code Ann § 11702 (West 1977), and that these bodies are responsible for conducting the party's campaigns.[2] At the same time, the Code provides that the official governing bodies "shall not endorse, support, or oppose, any candidate for nomination by that party for partisan office in the direct primary election." Ibid. It is a misdemeanor for any primary candidate, or a person on her behalf, to claim that she is the officially endorsed candidate of the party. § 29430.

Although the official governing bodies of political parties are barred from issuing endorsements, other groups are not. Political clubs affiliated with a party, labor organizations, political action committees, other politically active associations, and newspapers frequently endorse primary candidates.[3] With the official party organizations silenced by the ban, it has been possible for a candidate with views antithetical to

1. A "ballot-qualified" party is eligible to participate in any primary election because: (a) during the last gubernatorial election one of its candidates for state-wide office received two percent of the vote; (b) one percent of the State's voters are registered with the party; or (c) a petition establishing the party has been filed by ten percent of the State's voters. Cal Elec Code Ann § 6430 (West 1977).

In the interest of simplicity, we use the terms "ballot-qualified party" and "political party" interchangeably.

2. The Code requires the state central committee of each party to conduct campaigns for the party, employ campaign directors, and develop whatever campaign organizations serve the best interest of the party. Cal Elec Code Ann § 8777 (West Supp 1988) (Democratic Party); § 9276 (Republican Party); § 9688 (American Independent Party); § 9819 (Peace and Freedom Party). The county central committees, in turn, "have charge of the party campaign under general direction of the state central committee." § 8940 (Democratic Party); § 9440 (Republican Party); § 9740 (American Independent Party); § 9850 (Peace and Freedom Party). In addition, they "perform such other duties and services for th[e] political party as seem to be for the benefit of the party." § 8942 (Democratic Party); § 9443 (Republican Party); § 9742 (American Independent Party); § 9852 (Peace and Freedom Party).

3. For example, while voters cannot learn what the Democratic state and county central committees think of candidates, they may be flooded with endorsements from disparate groups across the State such as the Berkeley Democratic Club, the Muleskinners Democratic Club, and the District 8 Democratic Club. Addendum to Motion to Affirm or to Dismiss (Addendum) 39A ¶ 7 (declaration of Mary King, chair of the Alameda County Democratic Central Committee); Addendum 48 ¶ 7 (declaration of Linda Post, chair of San Francisco County Democratic Central Committee).

those of her party nevertheless to win its primary.[4]

In addition to restricting the primary activities of the official governing bodies of political parties, California also regulates their internal affairs. Separate statutory provisions dictate the size and composition of the state central committees;[5] set forth rules governing the selection and removal of committee members;[6] fix the maximum term of office for the chair of the state central committee;[7] require that the chair rotate between residents of northern and southern California;[8] specify the time and place of committee meetings;[9] and limit the dues parties may impose on members.[10] Violations of these provisions are criminal offenses punishable by fine and imprisonment.

B

Various 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 brought this action in federal court against state officials responsible for enforcing the Code. (State or California).[11] They contended that the ban on primary endorsements and the restrictions on internal party governance deprive political parties and their members of the rights of free speech and free association guaranteed by the First and Fourteenth Amendments of the

4. In 1980, for example, Tom Metzger won the Democratic Party's nomination for United States House of Representative from the San Diego area, although he was a Grand Dragon of the Ku Klux Klan and held views antithetical to those of the Democratic Party. Addendum 15a ¶ 2 (declaration of Edmond Costantini, member of the Executive Board of the Democratic state central committee).

5. For example, the Code dictates the precise mix of elected officials, party nominees, and party activists who are members of the state central committees of the Republican and Democratic parties as well as who may nominate the various committee members. Cal Elec Code Ann §§ 8660-8661, 8663 (West 1977 & Supp 1988) (Democratic Party); §§ 9160-9164 (Republican Party). Other parties are similarly regulated. See § 9640 (American Independent Party); §§ 9762, 9765 (Peace and Freedom Party) (West 1977).

6. §§ 8663-8667, 8669 (Democratic Party); §§ 9161-9164, 9168, 9170 (Republican Party); §§ 9641-9644, 9648-9650 (American Independent Party); §§ 9790-9794 (Peace and Freedom Party).

7. The Code limits the term of office of the chair of the state central committee to two years and prohibits successive terms. See § 8774 (Democratic Party); § 9274 (Republican Party); § 9685 (American Independent Party); § 9816 (Peace and Freedom Party).

8. § 8774 (West Supp 1988) (Democratic state central committee); § 9274 (West 1977) (Republican state central committee); § 9816 (Peace and Freedom state central committee).

9. §§ 8710-7811 (West Supp 1988) (Democratic state central committee); §§ 8920-8921 (West 1977 & Supp 1988) (Democratic county central committee); § 9210 (West Supp 1988) (Republican state central committee); §§ 9420-9421 (West 1977 & Supp 1988) (Republican county central committee); §§ 9730-9732 (American Independent county central committee); § 9800 (West 1977) (Peace and Freedom state central committee); §§ 9830, 9840-9842 (Peace and Freedom county central committee).

10. §§ 8775, 8945 (West 1977 & Supp 1988) (Democratic Party); § 9275 (West 1977) (Republican Party); §§ 9687, 9745 (American Independent Party); §§ 9818, 9855 (Peace and Freedom Party).

11. The plaintiffs sued March Fong Eu, Secretary of State of California; John K. Van de Kamp, Attorney General of California; Arlo Smith, District Attorney of San Francisco County; and Leo Himmelsbach, District Attorney of Santa Clara County.

United States Constitution.[12] The first count of the complaint challenged the ban on endorsements in partisan primary elections; the second count challenged the ban on endorsements in nonpartisan school, county, and municipal elections; and the third count challenged the provisions that prescribe the composition of state central committees, the term of office and eligibility criteria for state central committee chairs, the time and place of state and county central committee meetings, and the dues county committee members must pay.

The plaintiffs moved for summary judgment, in support of which they filed 28 declarations from the chairs of each plaintiff central committee, prominent political scientists, and elected officials from California and other States. The State moved to dismiss and filed a cross-motion for summary judgment supported by one declaration from a former state senator.

The District Court granted summary judgment for the plaintiffs on the first count, ruling that the ban on primary endorsements in § 11702 and § 29430 violated the First Amendment as applied to the States through the Fourteenth Amendment. The court stayed all proceedings on the second count under the abstention doctrine of Railroad Comm'n of Texas v Pullman Co., 312 US 496, 85 L Ed 971, 61 S Ct 643 (1941).[13] On the third count, the court ruled that the laws prescribing the composition of state central committees, limiting the committee chairs' term of office, and designating that the chair rotate between residents of northern and southern California violate the First Amendment.[14] The court denied summary judgment with respect to the statutory provisions establishing the time and place of committee meetings and the amount of dues. Civ No. C-83-5599 MHP (ND Cal, May 3, 1984).

The Court of Appeals for the Ninth Circuit affirmed. 792 F2d 802 (1986). This Court vacated that decision, 479 US 1024, 93 L Ed 2d 820, 107 S Ct 864 (1987), and remanded for further consideration in light of Tashjian v Republican Party of Connecticut, 479 US 208, 93 L Ed 2d 514, 107 S Ct 544 (1986).

After supplemental briefing, the Court of Appeals again affirmed. 826 F2d 814 (1987). The court first rejected the State's arguments based

12. The plaintiffs also asserted that the statutes violated the Equal Protection Clause of the Fourteenth Amendment. Because the District Court held that the statutes violate the First Amendment, it did not reach this claim.

13. An appeal was then pending in the California Supreme Court presenting a First Amendment challenge to a ban on endorsements by political parties of candidates in nonpartisan school, county, and municipal elections. The California Supreme Court ultimately decided that the Code did not prohibit such endorsements and so did not reach the First Amendment question. Unger v Superior Court, 37 Cal 3d 612, 692 P2d 238 (1984). A ban on party endorsements in nonpartisan elections subsequently was enacted by ballot initiative. A Federal District Court has ruled that this ban violates the First and Fourteenth Amendments. Geary v Renne, Civ No. C-87-4724 AJZ (ND Cal, April 27), stayed, 856 F2d 1456 (CA9 1988).

14. The District Court invalidated the following Code sections: Cal Elec Code §§ 8660-8661, 8663-8667, 8669 (Democratic state central committee); §§ 9160, 9160.5, 9161, 9161.5, 9162-9164 (West 1977 and Supp 1988) (Republican state central committee); § 9274 (Republican state central committee chair); and § 9816 (Peace and Freedom state central committee chair). In addition, it held that § 29102 was unconstitutional as applied.

on nonjusticiability, lack of standing, Eleventh Amendment immunity and Pullman abstention. 826 F2d, at 821-825. Turning to the merits, the court characterized the prohibition on primary endorsements as an "outright ban" on political speech. Id., at 833. "Prohibiting the governing body of a political party from supporting some candidates and opposing others patently infringes both the right of the party to express itself freely and the right of party members to an unrestricted flow of political information." Id., at 835. The court rejected the State's argument that the ban served a compelling state interest in preventing internal party dissension and factionalism: "The government simply has no legitimate interest in protecting political parties from disruptions of their own making." Id., at 834. The court noted, moreover, that the State had not shown that banning primary endorsements protects parties from factionalism. Ibid. The court concluded that the ban was not necessary to protect voters from confusion, stating, "California's ban on preprimary endorsements is a form of paternalism that is inconsistent with the First Amendment." Id., at 836.

The Court of Appeals also found that California's regulation of internal party affairs "burdens the parties' right to govern themselves as they think best." Id., at 827. This interference with the parties' and their members' First Amendment rights was not justified by a compelling state interest for a State has a legitimate interest "in orderly elections, not orderly parties." Id., at 831. In any event, the court noted, the State had failed to submit "'a shred of evidence,'" id., at 833 (quoting Civ No. C-83-5599 (ND Cal May 3, 1984)), that the regulations of party internal affairs helped minimize party factionalism. Accordingly, the court held that the challenged provisions were unconstitutional under the First and Fourteenth Amendments.

II

[3] A State's broad power to regulate the time, place, and manner of elections "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens." Tashjian v Republican Party of Connecticut, supra, at 217, 93 L Ed 2d 514, 107 S Ct 544. To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. 479 US, at 214, 93 L Ed 2d 514, 107 S Ct 544; Anderson v Celebrezze, 460 US 780, 789, 75 L Ed 2d 547, 103 S Ct 1564 (1983). If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, Tashjian, supra, at 217, 222, 93 L Ed 2d 514, 107 S Ct 544; Illinois State Bd. of Elections v Socialist Workers Party, 440 US 173, 184, 59 L Ed 2d 230, 99 S Ct 983 (1979); American Party of Texas v White, 415 US 767, 780, and n 11, 39 L Ed 2d 744, 94 S Ct 1296 (1974); Williams v Rhodes, 393 US 23, 31, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236 (1968), and is narrowly tailored to serve that interest. Illinois State Bd. of Elections, supra, at 185, 59 L Ed 2d 230, 99 S Ct 983; Kusper v Pontikes, 414 US 51, 58-59, 38 L Ed 2d 260, 94 S Ct 303 (1973); Dunn v Blumstein, 405 US 330, 343, 31 L Ed 2d 274, 92 S Ct 995 (1972).

A

[1b, 4] We first consider California's prohibition on primary endorsements by the official governing bodies of political parties. California concedes that its ban implicates the First Amendment, Tr of Oral Arg 17, but contends that the burden is "miniscule." Id., at 7. We disagree. The ban directly affects speech which "is at the core of our electoral process and of the First Amendment freedoms." Williams v Rhodes, supra, at 32, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236. We have recognized repeatedly that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Buckley v Valeo, 424 US 1, 14, 46 L Ed 2d 659, 96 S Ct 612 (1976) (per curiam); see also NAACP v Claiborne Hardware Co., 458 US 886, 913, 73 L Ed 2d 1215, 102 S Ct 3409 (1982); Carey v Brown, 447 US 455, 467, 65 L Ed 2d 263, 100 S Ct 2286 (1980); Garrison v Louisiana, 379 US 64, 74-75, 13 L Ed 2d 125, 85 S Ct 209 (1964). Indeed, the First Amendment "has its fullest and most urgent application" to speech uttered during a campaign for political office. Monitor Patriot Co. v Roy, 401 US 265, 272, 28 L Ed 2d 35, 91 S Ct 621 (1971); see also Mills v Alabama, 384 US 214, 218, 16 L Ed 2d 484, 86 S Ct 1434 (1966). Free discussion about candidates for public office is no less critical before a primary than before a general election. Cf. Storer v Brown, 415 US 724, 735, 39 L Ed 2d 714, 94 S Ct 1274 (1974); Smith v Allwright, 321 US 649, 666, 88 L Ed 987, 64 S Ct 757, 151 ALR 1110 (1944); United States v Classic, 313 US 299, 314, 85 L Ed 1368, 61 S Ct 1031 (1941). In both instances, the "election campaign is a means of disseminati ideas as well as attaining politi office." Illinois State Bd. of Electio supra, at 186, 59 L Ed 2d 230, 99 Ct 983.

[1c, 5] California's ban on prima endorsements, however, preven party governing bodies from stati whether a candidate adheres to tl tenets of the party or whether par officials believe that the candidate qualified for the position sough This prohibition directly hampe the ability of a party to spread i message and hamstrings voters see ing to inform themselves about th candidates and the campaign issue. See Tashjian, supra, at 220-222, 93 Ed 2d 514, 107 S Ct 544; Pacific Ga & Electric Co. v Public Utilitie Comm'n of California, 475 US 1, 8 89 L Ed 2d 1, 106 S Ct 903 (1986. Brown v Hartlage, 456 US 45, 60, 7 L Ed 2d 732, 102 S Ct 1523 (1982) First National Bank of Boston v Bellotti, 435 US 765, 791-792, 55 L Ed 2d 707, 98 S Ct 1407 (1978). A "highly paternalistic approach" limiting what people may hear is generally suspect, Virginia State Bd. of Pharmacy v Virginia Citizens Consumer Council, Inc., 425 US 748, 770, 48 L Ed 2d 346, 96 S Ct 1817 (1976); see also First National Bank of Boston, supra, at 790-792, 55 L Ed 2d 707, 98 S Ct 1407, but it is particularly egregious where the State censors the political speech a political party shares with its members. See Roberts v United States Jaycees, 468 US 609, 634, 82 L Ed 2d 462, 104 S Ct 3244 (1984) (O'Connor, J., concurring).

[1d, 6] Barring political parties from endorsing and opposing candidates not only burdens their freedom of speech but also infringes upon their freedom of association. It is

well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments. Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544; see also Elrod v Burns, 427 US 347, 357, 49 L Ed 2d 547, 96 S Ct 2673 (1976) (plurality opinion). Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544 (quoting Kusper, supra, at 57, 38 L Ed 2d 260, 94 S Ct 303), but also that a political party has a right to "'identify the people who constitute the association,'" Tashjian, supra, at 214, 93 L Ed 2d 514, 107 S Ct 544 (quoting Democratic Party of the United States v Wisconsin ex rel. La Follette, 450 US 107, 122, 67 L Ed 2d 82, 101 S Ct 1010 (1981)); cf. NAACP v Alabama, 357 US 449, 460-462, 2 L Ed 2d 1488, 78 S Ct 1163 (1958), and to select a "standard bearer who best represents the party's ideologies and preferences." Ripon Society, Inc. v National Republican Party, 173 US App DC 350, 384, 525 F2d 567, 601 (1975) (Tamm, J., concurring in result), cert denied, 424 US 933, 47 L Ed 2d 341, 96 S Ct 1147, 96 S Ct 1148 (1976).

[1e, 7] Depriving a political party of the power to endorse suffocates this right. The endorsement ban prevents parties from promoting candidates "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." Tashjian, supra, at 216, 93 L Ed 2d 514, 107 S Ct 544. Even though individual members of the state central committee and county central committees are free to issue endorsements, imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association." Citizens Against Rent Control/Coalition for Fair Housing v Berkeley, 454 US 290, 296, 70 L Ed 2d 492, 102 S Ct 434 (1981).

[1f, 8a] Because the ban burdens the appellees' rights to free speech and free association, it can only survive constitutional scrutiny if it serves a compelling governmental interest.[15] The State offers two: stable government and protecting vot-

15. California contends that it need not show that its endorsement ban serves a compelling state interest because the political parties have "consented" to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties, that the bylaws of some parties prohibit primary endorsements, and that parties continue to participate in state-run primaries.

This argument is fatally flawed in several respects. We have never held that a political party's consent will cure a statute that otherwise violates the First Amendment. Even aside from this fundamental defect, California's consent argument is contradicted by the simple fact that the official governing bodies of various political parties have joined this lawsuit. In addition, the Democratic and Libertarian Parties moved to issue endorsements following the Court of Appeals' invalidation of the endorsement ban.

There are other flaws in the State's argument. Simply because a legislator belongs to a political party does not make her at all times a representative of party interests. In supporting the endorsement ban, an individual legislator may be acting on her understanding of the public good or her interest in reelection. The independence of legislators from their parties is illustrated by the California Legislature's frequent refusal to amend the election laws in accordance with the wishes of political parties. See, e. g., Addendum 12a-13a ¶¶ 7-9 (declaration of Bert Coffey, chair of the Democratic state central committee). More-

ers from confusion and undue influence.[16] Maintaining a stable political system is, unquestionably, a compelling state interest. See Storer v Brown, 415 US, at 736, 39 L Ed 2d 714, 94 S Ct 1274. California, however, never adequately explains how banning parties from endorsing or opposing primary candidates advances that interest. There is no showing, for example, that California's political system is any more stable now than it was in 1963, when the legislature enacted the ban. Nor does the State explain what makes the California system so peculiar that it is virtually the only State that has determined that such a ban is necessary.[17]

[1g] The only explanation the State offers is that its compelling interest in stable government embraces a similar interest in party stability. Brief for Appellants 47. The State relies heavily on Storer v Brown, where we stated that because "splintered parties and unrestrained factionalism may do significant damage to the fabric of government," supra, at 736, 39 L Ed 2d 714, 94 S Ct 1274, States may regulate elections to ensure that "some sort of order, rather than chaos . . .

over, the State's argument ignores those parties with negligible, if any, representation in the legislature.

That the bylaws of some parties prohibit party primary endorsements also does not prove consent. These parties may have chosen to reflect state election law in their bylaws, rather than permit or require conduct prohibited by law. Nor does the fact that parties continue to participate in the state-run primary process indicate that they favor each regulation imposed upon that process. A decision to participate in state-run primaries more likely reflects a party's determination that ballot participation is more advantageous than the alternatives, that is, supporting independent candidates or conducting write-in campaigns. See Storer v Brown, 415 US 724, 745, 39 L Ed 2d 714, 94 S Ct 1274 (1974); Anderson v Celebrezze, 460 US 780, 799, n 26, 75 L Ed 2d 547, 103 S Ct 1564 (1983).

Finally, the State's focus on the parties' alleged consent ignores the independent First Amendment rights of the parties' members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members' rights.

16. The State also claims that the ban on primary endorsements serves a compelling state interest in "'confining each voter to a single nominating act.'" Tashjian v Republican Party of Connecticut, 479 US 208, 225, n 13, 93 L Ed 2d 514, 107 S Ct 544 (1986) (quoting Anderson, supra, at 802, n 29, 75 L Ed 2d 547, 103 S Ct [illegible]). This argument is meritless. It fails to distinguish between a nominating act—the vote cast at the primary election—and speech that may influence that act. The logic of the State's argument not only would support a ban on endorsements by every organization and individual, but also would justify a total ban on all discussion of a candidate's qualifications and political positions. Such a blanket prohibition cannot coexist with the constitutional protection of political speech.

The State's claim that the endorsement ban is necessary to serve any compelling state interest is called into question by its argument before the District Court and the Court of Appeals that this action is not justiciable because the State has never enforced the challenged election laws. 826 F2d 814, 821 (1987).

17. New Jersey also bans primary endorsements by political parties. NJ Stat Ann § 19:34-52 (West 1964); see Weisburd, Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods, 57 S Cal L Rev 213, 271-272, n 343 (1984). Florida's statutory ban on primary endorsements by political parties was held to violate the First Amendment. See Abrams v Reno, 452 F Supp 1166, 1171-1172 (SD Fla 1978), aff'd, 649 F2d 342 (CA5 1981), cert denied, 455 US 1016, 72 L Ed 2d 133, 102 S Ct 1710 (1982). Several States provide formal procedures for party primary endorsements. See, e. g., Conn Gen Stat § 9-390 (West 1967 & Supp 1988); RI Gen Laws § 17-12-4 (1988); see also Advisory Commission on Intergovernmental Relations, The Transformation in American Politics: Implications for Federalism 148 (1986).

accompan[ies] the democratic processes." 415 US, at 730, 39 L Ed 2d 714, 94 S Ct 1274. Our decision in Storer, however, does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism during a primary campaign. To the contrary, Storer recognized that "contending forces within the party employ the primary campaign and the primary election to finally settle their differences." Id., at 735, 39 L Ed 2d 714, 94 S Ct 1274. A primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them. Ibid.; American Party of Texas v White, 415 US, at 781, 39 L Ed 2d 744, 94 S Ct 1296. Tashjian recognizes precisely this distinction. In that case, we noted that a State may enact laws to "prevent the disruption of the political parties from without" but not, as in this case, laws "to prevent the parties from taking internal steps affecting their own process for the selection of candidates." 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544.

It is no answer to argue, as does the State, that a party that issues primary endorsements risks intraparty friction which may endanger the party's general election prospects. Presumably a party will be motivated by self-interest and not engage in acts or speech that run counter to its political success. However, even if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party. See ibid.; Democratic Party of United States, 450 US, at 124, 67 L Ed 2d 82, 101 S Ct 1010. Because preserving party unity during a primary is not a compelling state interest, we must look elsewhere to justify the challenged law.

[1h, 8b, 9, 10a] The State's second justification for the ban on party endorsements and statements of opposition is that it is necessary to protect primary voters from confusion and undue influence. Certainly the State has a legitimate interest in fostering an informed electorate. Tashjian, supra, at 220, 93 L Ed 2d 514, 107 S Ct 544; Anderson v Celebrezze, 460 US, at 796, 75 L Ed 2d 547, 103 S Ct 1564; American Party of Texas v White, supra, at 782, n 14, 39 L Ed 2d 744, 94 S Ct 1296; Bullock v Carter, 405 US 134, 145, 31 L Ed 2d 92, 92 S Ct 849 (1972); Jenness v Fortson, 403 US 431, 442, 29 L Ed 2d 554, 91 S Ct 1970 (1971). However, " '[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.' " Tashjian, supra, at 221, 93 L Ed 2d 514, 107 S Ct 544 (quoting Anderson v Celebrezze, supra, at 798, 75 L Ed 2d 547, 103 S Ct 1564).[18] While a State may regulate

18. It is doubtful that the silencing of official party committees, alone among the various groups interested in the outcome of a primary election, is the key to protecting voters from confusion. Indeed, the growing number of endorsements by political organizations using the labels "Democratic" or "Republican" has likely misled voters into believing that the official governing bodies were supporting the candidates.

The State makes no showing, moreover, that voters are unduly influenced by party endorsements. There is no evidence that an endorsement issued by an official party organization carries more weight than one issued by a newspaper or a labor union. In States where parties are permitted to issue primary endorsements, voters may consider the parties' views on the candidates but still exercise independent judgment when casting their

the flow of information between political associations and their members when necessary to prevent fraud and corruption, see Buckley v Valeo, 424 US, at 26-27, 46 L Ed 2d 659, 96 S Ct 612; Jenness v Fortson, supra, at 442, 29 L Ed 2d 554, 91 S Ct 1970, there is no evidence that California's ban on party primary endorsements serves that purpose.[19]

[1i] Because the ban on primary endorsements by political parties burdens political speech while serving no compelling governmental interest, we hold that § 11702 and § 29430 violate the First and Fourteenth Amendment.

B

[2b, 11] We turn next to California's restrictions on the organization and composition of official governing bodies, the limits on the term of office for state central committee chair, and the requirement that the chair rotate between residents of northern and southern California. These laws directly implicate the associational rights of political parties and their members. As we noted in Tashjian, a political party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution." 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders. See Democratic Party of the United States, supra, (State cannot dictate process of selecting state delegates to Democratic National Convention); Cousins v Wigoda, 419 US 477, 42 L Ed 2d 595, 95 S Ct 541 (1975) (State cannot dictate who may sit as state delegates to Democratic National Convention); cf. Tashjian, supra, at 235-236, 93 L Ed 2d 514, 107 S Ct 544 (Scalia, J., dissenting) ("The ability of the members of [a political p]arty to select their own candidate . . . unquestionably implicates an associational freedom").

[2c] The laws at issue burden these rights. By requiring parties to establish official governing bodies at the county level, California prevents the political parties from governing themselves with the structure they think best.[20] And by specifying who

vote. For example, in the 1982 New York Democratic gubernatorial contest, Mario Cuomo won the primary over Edward Koch, who had been endorsed by the party. That year gubernatorial candidates endorsed by their parties also lost the primary election to nonendorsed candidates in Massachusetts and Minnesota. Even where the party-endorsed candidate wins the primary, one study has concluded that the party endorsement has little, if any effect, on the way voters cast their vote. App 97-98 ¶¶ 10, 14-17 (declaration of Malcolm E. Jewell, Professor of Political Science, University of Kentucky).

19. [10b] The State suggested at oral argument that the endorsement ban prevents fraud by barring party officials from misrepresenting that they speak for the party. To the extent that the State suggests that only the primary election results can constitute a party endorsement, Tr of Oral Arg 8-9, it confuses an endorsement from the official governing bodies that may influence election results with the results themselves. To the extent that the State is claiming that the appellees are not authorized to represent the official party governing bodies and their members, the State simply is reasserting its standing claim which the District Court rejected. Civ No. C-83-5599 (ND Cal, June 1, 1984) ("the plaintiff central committees . . . have authorization and capacity to bring and maintain this litigation"). The Court of Appeals did not disturb this ruling, 826 F2d, at 822, n 17; nor do we.

20. For example, the Libertarian Party was forced to abandon its region-based organization in favor of the statutorily mandated county-based system.

shall be the members of the parties' official governing bodies, California interferes with the parties' choice of leaders. A party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.

Each restriction thus limits a political party's discretion in how to organize itself, conduct its affairs, and select its leaders. Indeed, the associational rights at stake are much stronger than those we credited in Tashjian. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders.[21]

[2d, 12a] Because the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest. A State indisputably has a compelling interest in preserving the integrity of its election process. Rosario v Rockefeller, 410 US 752, 761, 36 L Ed 2d 1, 93 S Ct 1245 (1973). Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest. Storer v Brown, 415 US, at 730, 39 L Ed 2d 714, 94 S Ct 1274. For example, a State may impose certain eligibility requirements for voters in the general election even though they limit parties' ability to garner support and members. See, e.g., Dunn v Blumstein, 405 US, at 343-344, 31 L Ed 2d 274, 92 S Ct 995 (residence requirement); Oregon v Mitchell, 400 US 112, 118, 27 L Ed 272, 91 S Ct 260 (1970) (age minimum); Kramer v Union Free School Dist No. 15, 395 US 621, 625, 23 L Ed 2d 583, 89 S Ct 1886 (1969) (citizenship requirement). We have also recognized that a State may impose restrictions that promote the integrity of primary elections. See, e.g., American Party of Texas v White, 415 US, at 779-780, 39 L Ed 2d 744, 94 S Ct 1296 (requirement that major political parties nominate candidates through a primary and that minor parties nominate candidates through conventions); id., at 785-786, 39 L Ed 2d 744, 94 S Ct 1296 (limitation on voters' participation to one primary and bar on voters both voting in a party primary and signing a petition supporting an independent candidate); Rosario v Rockefeller, supra (waiting periods before voters may change party registration and participate in another party's primary); Bullock v Carter, 405 US, at

21. By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message.

145, 31 L Ed 2d 92, 92 S Ct 849 (reasonable filing fees as a condition of placement on the ballot). None of these restrictions, however, involved direct regulation of a party's leaders.[22] Rather, the infringement on the associational rights of the parties and their members was the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections.

In the instant case, the State has not shown that its regulation of internal party governance is necessary to the integrity of the electoral process. Instead, it contends that the challenged laws serve a compelling "interest in the 'democratic management of the political party's internal affairs.'" Brief for Appellants 43 (quoting 415 US, at 781, n 15, 39 L Ed 2d 744, 94 S Ct 1296). This, however, is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents. Cf. Smith v Allwright, 321 US 649, 88 L Ed 987, 64 S Ct 757, 151 ALR 1110 (1944). Moreover, as we have observed, the State has no interest in "protect[ing] the integrity of the Party against the Party itself." Tashjian, 479 US, at 224, 93 L Ed 2d 514, 107 S Ct 544. The State further claims that limiting the term of the state central committee chair and requiring that the chair rotate between residents of northern and southern California helps "prevent regional friction from reaching a 'critical mass.'" Brief for Appellants 48. However, a State cannot substitute its judgment for that of the party as to the desirability of a particular internal party structure, any more than it can tell a party that its proposed communication to party members is unwise. Tashjian, supra, at 224, 93 L Ed 2d 514, 107 S Ct 544.

[12b, 13a] In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair. Because California has made no such showing here, the challenged laws cannot be upheld.[23]

III

[1], 2f] For the reasons stated above, we hold that the challenged California election laws burden the

22. Marchioro v Chaney, 442 US 191, 60 L Ed 2d 816, 99 S Ct 2243 (1979) is not to the contrary. There we upheld a Washington statute mandating that political parties create a state central committee, to which the Democratic Party, not the State, had assigned significant responsibilities in administering the party, raising and distributing funds to candidates, conducting campaigns, and setting party policy. Id., at 198-199, 60 L Ed 2d 816, 99 S Ct 2243. The statute only required that the state central committee perform certain limited functions such as filing vacancies on the party ticket, nominating Presidential electors and delegates to national conventions, and calling state-wide conventions. The party members did not claim that these *statutory* requirements imposed impermissible burdens on the party or themselves so we had no occasion to consider whether the challenged law burdened the party's First Amendment rights, and if so, whether the law served a compelling state interest. Id., at 197, n 12, 60 L Ed 2d 816, 99 S Ct 2243. Here, in contrast, it is state law, not a political party's charter, that places the state central committees at a party's helm and in particular assigns the statutorily-mandated committee responsibility for conducting the party's campaigns.

23. [13b] Because we find that curbing intraparty friction is not a compelling state interest as long as the electoral process remains fair and orderly, we need not address the appellees' contention that the challenged laws weaken rather than strengthen parties.

First Amendment rights of political parties and their members without serving a compelling state interest. Accordingly, the judgment of the Court of Appeals is affirmed.

Chief Justice Rehnquist took no part in the consideration or decision of this case.

SEPARATE OPINION

Justice Stevens, concurring.

Today the Court relies on its opinion in Illinois State Board of Elections v Socialist Workers Party, 440 US 173, 183-185, 59 L Ed 2d 230, 99 S Ct 983 (1979)—and, in particular, on a portion of that opinion that I did not join—for its formulation of the governing standards in election cases. In that case Justice Blackmun explained his acceptance of the Court's approach in words that precisely express my views about this case. He wrote:

"Although I join the Court's opinion . . ., I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy phrases as 'compelling [state] interest' and 'least drastic [or restrictive] means.' See, ante, at 184, 185, and 186 [59 L Ed 2d 230, 99 S Ct 983]. I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling,' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.

"I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to disassociate myself from them. Apart from their use, however, the result the Court reaches here is the correct one. It is with these reservations that I join the Court's opinion." Id., at 188-189, 59 L Ed 2d 230, 99 S Ct 983.

With those same reservations I join the Court's opinion today.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLEN GRANT DOYLE, JR., and the REPUBLICAN PARTY OF ALASKA, Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	No. A90-248 Civil O R D E R (Preliminary Injunction Denied)

The court has under consideration a motion for preliminary injunction, filed June 11, 1990, by plaintiffs Allen Grant Doyle, Jr., and the Republican Party of Alaska.[1] Doyle is state chairman of the Republican Party of Alaska ("Party"). The motion seeks an order restraining and enjoining the several defendants from conducting the Party's August 28, 1990, primary

[1] This action was originally filed in Fairbanks on June 11, 1990, and assigned to District Judge Kleinfeld. Judge Kleinfeld subsequently recused himself, and the case was transferred to Anchorage on June 22, 1990.

in any manner other than as provided by Article XIV of the Party's rules, which was adopted in March of 1990 at the Party's statewide convention. As part of the desired injunctive relief, plaintiffs additionally request the court to restrain and enjoin defendants from enforcing, in the Party's August primary, two state statutes: AS 15.25.060 (requiring a single primary election ballot containing the names of all candidates for each office, grouped by office, without regard to party affiliation) and AS 15.07.070(c) and (d) (which defendants interpret to require that voters designate their party affiliation, or non-affiliation, at least thirty days prior to the primary).

Defendants include the State of Alaska; the State's Division of Elections ("DOE"); David Koivuniemi, the director of the DOE; and Lieutenant Governor Stephen McAlpine, in his official capacity as supervisor of elections. Defendants oppose plaintiffs' motion. A joint amicus curiae brief has been filed by the Alaska Federation of Natives and the Alaska Democratic Party. The amici also oppose plaintiffs' motion for provisional relief.

Additionally, plaintiffs filed a motion on July 6, 1990, requesting the court to enter an order directing the State of Alaska to make certain submissions to the Voting Section, Civil Rights Division of the Department of Justice, Washington, D.C., (hereinafter referred to as "Voting Section"), pursuant to section 5 of the Voting Rights Act of 1965. On July 9, 1990,

defendants filed an opposition to plaintiffs' motion for an order directing submission.

A telephonic status conference was held on July 9, 1990. Counsel for plaintiffs, defendants, and amici participated, as well as an attorney from the Voting Section. The court heard oral argument on Thursday, July 12, 1990. For the reasons outlined hereinbelow, plaintiffs' motion for preliminary injunction and motion for an order directing the state to submit matters to the Department of Justice are denied.

Jurisdiction

The motion for preliminary injunction raises federal constitutional issues, as well as certain matters cognizable under the Voting Rights Act of 1965 (as amended), 42 U.S.C. §§ 1971-1974 (1981). Additionally, plaintiffs have moved for an order requiring defendants to submit matters to the Voting Section in accordance with regulations promulgated by the Department of Justice pursuant to the Voting Rights Act. Jurisdiction is, as a general proposition, appropriate under 28 U.S.C. § 1331.

Background

Since 1967, statewide primaries in Alaska have been conducted as "blanket, open" primaries, with respect to the nomination of candidates for elective statewide and federal political offices. AS 15.25.010, et. seq. Primary candidates are listed on a single ballot, grouped together by office sought

rather than party affiliation. AS 15.25.060. Primary voters are not restricted to voting for candidates who correspond with the individual voter's political party affiliation (or lack thereof). By statute, voters are not eligible to vote in a primary unless they have registered to vote at least thirty days in advance of the scheduled date for a primary. AS 15.07.070. A voter wishing to change his or her existing registration must also do so at least thirty days in advance. AS 15.07.060 lists the information required for registration, but does not include a requirement that a registrant's party affiliation be declared. However, by administrative interpretation, the State has determined that a registrant must declare party affiliation (or lack thereof) thirty days in advance of an election as part of the registration process.

The Party held its statewide convention in March of 1990. Shortly before the convention began, a delegate to the convention informed Linda Edgeworth, a key staff member at the DOE, that the Party was likely to adopt a rule change regarding the 1990 primary. On March 31, 1990, the convention adopted a party rule directly affecting the manner in which the Party's primary, which is scheduled to be held on August 28, 1990, would be conducted. The newly adopted rule, Article XIV, provided as follows:[2]

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[2] Although the rule is silent on the subject, the Party intended that any voter might change his designated party affiliation at the polls on the day of the primary election and

> Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

The Party clearly desired that its new rule be implemented by defendants in time for the August 1990 primary. A copy of the rule was hand-carried to Linda Edgeworth's office on April 2, 1990. Lieutenant Governor McAlpine's office was notified telephonically on April 9, 11, 12, and 16 regarding the newly adopted rule. On April 20, 1990, the Party wrote a letter to McAlpine's office. The full text of the new rule was set forth in the letter, and the Party requested McAlpine to revise the voting procedures for the August 1990 primary to properly implement the new rule change. The Lieutenant Governor's office received the letter on April 27. Defendant Koivuniemi received a telefaxed copy of the same letter on April 25, 1990, and James Baldwin of the state Attorney General's Office also received a copy in late April. By letter dated May 5, 1990, Ken Jacobus advised Stephen McAlpine of certain case law authority upon which the Party relied in adopting the new rule. A copy of Jacobus' May 5 letter was also sent to defendant Koivuniemi.

After this initial flurry of activity, the Party waited for the outcome of the Alaska Democratic Party convention, held

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thereby qualify to vote in the Republican primary.

in Nome in mid-May. The Party apparently expected that the Democrats would adopt a similar rule change, but they did not.

After the Democratic convention, the Party began a series of earnest contacts with defendants to ensure that defendants would and could implement the rule change in time for the August primary. These contacts have been extensively briefed by the parties and the court only summarizes them herein.

On May 24, 1990, a telephone conference was held by defendant Koivuniemi. Participants included Ken and Cheri Jacobus, counsel for the State, and key State election officials. Among other things, Koivuniemi expressed concern regarding the State's ability to properly implement the new rule, given the short time remaining before the primary. He opined that the rule was ambiguously worded and requested clarification on the Party's proposal that voters be permitted to change their party registration as late as the day of polling. There was also discussion regarding the manner in which absentee ballots would have to be handled if the rule were implemented for the August 1990 primary. On May 28, 1990, Kenneth Jacobus, Party counsel, sent a follow-up letter to Koivuniemi addressing the aforementioned concerns.

A second telephone conference was held by Koivuniemi on June 5, 1990, with essentially the same participants as before. Again, the discussion centered on several specific logistical problems (preparation of primary ballots, mailing of

absentee ballots, and so forth) that the State felt must be resolved in order to properly implement the new rule.[3] During this telephone conference, the Party learned that it needed to "preclear" its rule change with the Voting Section. Nothing was resolved in the second telephone conference. The State firmly maintained that it would apply the thirty-day registration requirement with respect to changes of party affiliation in conjunction with implementing the new rule, and generally reiterated its belief that insufficient time remained for implementation. The Party then made a submission to the Voting Section, to which the State formally objected by its letter to the Department of Justice dated June 15, 1990, and in a follow-up letter dated June 25, 1990. The instant action was filed on June 11, 1990.

Applicability of the Voting Rights Act

The primary purpose of the Voting Rights Act ("Act") is to extend the protections of the fifteenth amendment to members of racial and language minorities, to prevent discrimination in the form of denial or abridgement of the right to vote. State of South Carolina v. Katzenbach, 383 U.S. 301 (1966). Of particular concern are voting qualifications, prerequisites, standards, practices, or procedures which might have a racially discriminatory effect. Section 5 of the Act

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[3] The extensive regulatory changes that the State believes necessary to implement the rule change for the August primary are thoroughly documented in the two affidavits of Linda Edgeworth filed in this action.

requires that any jurisdiction "covered" by the Act may not enforce any change pertaining to the manner in which elections are conducted without obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change is not discriminatory within the meaning of the Act. 42 U.S.C. § 1973c. Alternatively, a covered jurisdiction may satisfy the requirements of Section 5 by submitting the proposed change, along with certain supporting documents, to the Attorney General of the United States for "preclearance". See generally, 28 C.F.R. § 51 (1990); see also, Allen v. State Board of Elections, 393 U.S. 544, 549-50 (1969). The United States Supreme Court has consistently construed Section 5 to have the broadest possible scope. Perkins v. Matthews, 400 U.S. 379, 387 (1971). This has resulted in jurisdictions routinely submitting a plethora of proposed election changes to the Attorney General, some of which are very minor in nature. See, 28 C.F.R § 51.12. While most of the submissions are provided by states, political parties are subject to Section 5 of the Act and its preclearance requirements. 28 C.F.R. § 51.7 provides in part:

> Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. ....Changes with respect to the conduct of

> primary elections at which party nominees ... are chosen are subject to the preclearance requirement of section 5 ....

Submissions are made to the Voting Section. Under pertinent regulatory guidelines, the Attorney General has sixty days in which to review a submitted election change. 28 C.F.R § 51.9. However, if a submitting jurisdiction materially supplements its original submission, then a new sixty-day period of consideration may go into effect. 28 C.F.R § 51.39. If the Voting Section objects to the proposed change, the submitting party may request reconsideration. This, too, results in a new sixty-day period for review by the Voting Section. 28 C.F.R. § 51.45.

In this case, it is agreed that Alaska is a "covered" jurisdiction (see, 28 C.F.R. § 55 Appendix) and that the Party's new rule is subject to the preclearance requirement of Section 5 of the Act. Pursuant to 28 C.F.R. § 51.7, the Party made its submission on June 7, 1990, and requested expedited consideration. The party subsequently learned that defendants would also have to submit any new regulations and guidelines developed to implement the Party rule. See, 28 C.F.R. § 51.22. After contacting counsel for the Voting Section, the Party learned that the Voting Section would concurrently consider defendants' proposed implementation guidelines, notwithstanding that defendants are not required to submit such guidelines until the Party's rule had already been precleared. Counsel for the

Voting Section suggested to defendants that they prepare a submission for concurrent consideration. Plaintiffs filed a motion on July 6, 1990, requesting the court to order defendants to make their submission immediately. In the telephonic status conference held July 9, 1990, defendants averred that they have been working diligently to prepare the submission, and that it should be sent to the Voting Section, by express mail, on July 13, 1990. This was confirmed at oral argument on July 12, 1990.

In the July 9 status conference, counsel for the Voting Section indicated that the Voting Section had received several supplementations from the Party, the latest having been received that day. The court was also advised that the Voting Section would likely consider the latest supplementation to be a "material" one, such that a new sixty-day review period had begun to run; that the Voting Section viewed the Party rule as presenting a fairly substantive change which would require thorough review; and that it intended to obtain additional input from interested parties, particularly the Native voters in Alaska.

Thus, plaintiffs seek provisional relief from this court prior to any preclearance decision by the Voting Section. The parties are in agreement that the rule change cannot be validly employed in an election without preclearance from the Voting Section. The court's research shows this to be correct.

See, e.g., 28 C.F.R. § 51.1, 51.10. The Supreme Court has consistently so held. See, Connor v. Waller, 421 U.S. 656 (1975) (per curiam) (changes not precleared pursuant to Section 5 are "not effective as law"); Georgia v. United States, 411 U.S. 526, 538 (1973) (election laws are "frozen" until declaratory judgment or preclearance is obtained); City of Rome v. United States, 446 U.S. 156, 160-61, reh'g denied, 447 U.S. 916 (1980) (preclearance required); McDaniel v. Sanchez, 452 U.S. 130, 137 (1981) (laws not effective without preclearance).

The Party would have the court enter a prospective order enforcing the new rule for a Republican primary conditioned upon Voting Section clearance of the rule. To grant such an order, the court must necessarily evaluate the Party's alleged constitutional rights which, if established, would support implementation of the rule. In voting rights cases, it has been held that it is error for a court to adjudicate such constitutional claims until the Voting Section acts on the proposed change in voting rules.[4] This court concludes that it

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[4] See, e.g., McDaniel v. Sanchez, 452 U.S. 130, 146 (1981) (quoting Wise v. Lipscomb, 437 U.S. 535, 542 (1978)); United States v. Board of Supervisors, 429 U.S. 642, 646-47 (1977); and Connor v. Waller, 421 U.S. 656 (1975) (per curiam). Cf. Terrazas v. Clements, 537 F. Supp. 514 (N.D. Tex. 1982), wherein plaintiffs raised constitutional challenges both to the existing Texas voter apportionment scheme and to a new apportionment plan adopted by the state. The three-judge court struck down the existing scheme, but held that it could not adjudicate the constitutionality of the new plan which had failed to obtain Department of Justice preclearance. However, the court retained jurisdiction in order to fashion an emergency apportionment plan for upcoming statewide elections, and the plan

is presently foreclosed from ruling upon whether the Party's rule is constitutionally protected until the rule becomes operative and effective by virtue of Voting Section review and approval. To act sooner would amount to the court rendering an advisory decision in violation of article III, section 2, of the United States Constitution.

Preliminary Injunction Analysis

The foregoing discussion disposes of plaintiffs' motion for preliminary injunction and, indeed, suggests that plaintiffs' complaint is subject to dismissal on the theory that there is not presently any justiciable case or controversy. For the sake of completeness, and in order that the court's entire analysis of plaintiffs' motion may be available for possible appellate review, the following additional discussion of the matters before the court are included.

In a straightforward fashion, plaintiffs seek to have the court order the defendants to place the new Republican primary rule into effect. They claim that their decision to alter the primary is fully supported by constitutional case law construing the first amendment rights of association enjoyed by state political parties. Plaintiffs principally rely on the holdings in Tashjian v. Republican Party of Connecticut, 479 U.S.

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was ordered without preclearance. Id. at 525-526 n.14 (citing Conner v. Waller, 421 U.S. at 656-57 (inability to adjudicate constitutional claims regarding new plans does not divest district court of jurisdiction to order a temporary plan)).

208 (1986); and San Francisco County Democratic Central Committee v. Eu, 792 F.2d 802 (9th Cir. 1986), vacated & remanded, 479 U.S. 1024, on remand, 826 F.2d 814 (9th Cir 1987), affirmed, 489 U.S. 214 (1989). Plaintiffs see two primary benefits resulting from the new rule: a decreased opportunity for crossover voting ("raiding"), and a chance to strengthen the Party by nominating and electing Republican candidates who are more consistent in their party's ideology.

Defendants acknowledge the rights of association at issue here, but contend that the State of Alaska has certain compelling governmental interests which must be balanced against plaintiffs' alleged right to alter the primary. Specifically, defendants aver that the State has a duty to ensure the integrity and orderliness of elections, and that insufficient time remains before the August primary in which to properly implement the Party rule and still fulfill that duty. Within that duty, defendants express two major concerns: that the State must shoulder an unacceptable administrative burden to make all the necessary changes to implement the Republican primary, and that many voters (particularly rural voters, many of whom are Native and protected under the Voting Rights Act) will be confused and possibly disenfranchised due to the late change in the primary election procedures.

In addition to their Voting Rights Act arguments, amicus Alaska Federation of Natives expresses two concerns.

First, it argues that implementation cannot be smoothly carried out in the few weeks remaining until the primary election, which will result in confusion and disenfranchisement among Native voters who will not be properly and timely advised of the changes. Secondly, the Federation contends that Native voters have traditionally benefitted from being able to employ crossover voting to build political coalitions helpful to Native causes. In a related vein, the Alaska Democratic Party asserts that it still welcomes Republican voters crossing over in the primary.

The Ninth Circuit recently articulated and summarized the pertinent factors which a district court must consider in deciding whether to grant or deny injunctive relief. State of Alaska v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988). Those four factors are:

> (1) The likelihood of the plaintiff's success on the merits;
>
> (2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
>
> (3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,
>
> (4) the public interest.

Id. at 1388. The court went on to note that the four factors can really be condensed into two factors: the likelihood of success on the merits and the relative balance of potential hardships to the plaintiff, the defendant, and the public. Id. at 1389. Those two primary factors have been employed in a test framed in

the alternative, though the alternatives are really to be treated by the district court, for analytical purposes, as "extremes of a single continuum." Id., quoting Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978), cert. dismissed, 441 U.S. 937 (1979). The alternative test has been framed thusly:

> Basically, plaintiffs are entitled to preliminary injunctive relief if:
>
> 1) They demonstrate
>
> . a probable success on the merits, and
>
> . a possibility of irreparable injury;
>
> 2) or if they demonstrate
>
> . a fair chance of success on the merits (i.e., serious questions are raised), and
>
> . the balance of hardships tips sharply in their favor.

Native Village of Venetie, 856 F.2d at 1389.

Applying the foregoing, the court will first focus upon the issue of probable success on the merits. As discussed above, the court cannot say that plaintiffs will probably succeed on the merits. At the most, plaintiffs raise a serious question. The court accepts, and the defendants themselves appear to accept, plaintiffs' contention that first amendment rights of free association are substantially implicated in the rule change which the Party would put into effect. The United States Supreme Court has recognized this right in its decision in Tashjian v.

Republican Party of Connecticut, 479 U.S. 208 (1986). As important as these rights may be, however, there is little chance of plaintiffs prevailing on the merits of the present complaint because, as set out above, the Party seeks to enforce an inchoate rule--that is, a rule raising serious constitutional questions which this court does not presently have the power to reach due to the absence of Voting Rights Act preclearance.

The foregoing appraisal of the Party's chances of success on the merits calls into play that portion of the test for granting or denying preliminary injunctions which calls upon a plaintiff to demonstrate that the balance of hardships tips sharply in the plaintiff's favor. In this case, the court concludes that the hardships are substantially in equipoise.

The court's refusal to order implementation of the Party's primary election rule will result in the conduct of a "blanket" open primary in which registered members of other political parties can vote in the Republican Party primary. The court's decision forces the Republican Party to associate with those Democrats or Alaska Independence Party members who would cross party lines and vote for a Republican in the upcoming primary election. The harm is of a nature which is substantially irreparable.

On the other side, defendants and amici argue persuasively that rural Alaskans will be disenfranchised because of the complexity of regulatory changes which must take place in

order to implement the Party's new primary rule. While the State of Alaska is blessed with substantial means of communication between large cities and most of the very small villages in the state, the court is convinced, on the basis of defendants' showing, that there is inadequate time to formulate the rule changes, educate the rural election workers, and still provide time enough for the latter as well as others using public radio, television, and other means of communication to educate the public as to the options available to them in the upcoming primary election under the Party's new rule. Especially troubling to the court is the Party's suggestion that, under its rule, an individual voter might be entitled to vote in both the Republican primary and the "other" primary as well. The possibility of a voter having two votes (one in each primary) strikes the court as dramatic proof of the complexity (which the court did not initially perceive) of educating the electorate.

Similarly, the defendants' approach to structuring ballots, were the Party's rule to be implemented, suggests further complexities. The defendants suggest that the Republican Party ballot should list all candidates, of whatever party, such that Republicans could vote for whomever they wish; and that the "other" primary should list all candidates except Republican candidates. The court's initial reaction to this proposed implementation of the Party's rule was that it stood the rule on its head. On further reflection, the court is still of a view

that the State's suggestion for the ballot structure is disingenuous; but the mere fact that it is a plausible approach to implementation of the rule further underscores the complexity of conducting simultaneously two or more primary elections when the rules for all are not the same and where, as here, a certain amount of crossover voting is still allowed. Thus the court has concluded that there is a substantial risk that the defendants will be unable to adequately instruct the electorate in time for an August 28, 1990, primary election, and that some will be discouraged from voting and others will be at best confused, and at worst misled, despite everyone's best efforts as regards exercising their vote. The court views this type of hardship as irreparable also.

Understandably, neither the Party nor the defendants have attempted, nor is it likely that they would be able to quantify in a meaningful fashion the extent of hardship occasioned by the harm to which the court perceives each side to be exposed. Given the prospective nature of the analysis, it is not possible to say how many votes may be cast by Democrats in what should be a Republican rule primary, nor is it possible to say how many voters may be disenfranchised because of inadequate opportunity to construct a new primary election procedure and implement it. This much the court can say very readily: The balance of hardships certainly does not tip sharply in the Party's favor. In a very rough sense, the amount of harm to

which each is exposed is the same; and, in the absence of any other proof, the court concludes that the harm to the Party and to the voters who may be disenfranchised is roughly equal.

In addition, the public interest has a part in the balance of hardships which is not addressed by the foregoing. Native Village of Venetie, 856 F.2d at 1388. In this case, the court perceives there to be a substantial public interest in having elections conducted timely and in an orderly fashion. Coghill v. Boocher, 511 P.2d 1297 (Alaska 1973); Terrazas v. Clements, 537 F. Supp. 514, 527 (N.D. Tex. 1982).

The Party, on brief and in oral argument, has made fleeting reference to the possibility of deferring the primary election in order to afford more time for instruction to the voters and more time for the Department of Justice to clear the Party's new primary election rule. The foregoing authorities suggest that such action should not be taken except for very compelling reasons. The court perceives no compelling reason to disrupt the normal election process in this case. It takes no great amount of imagination, nor is it unduly speculative, for the court to suggest that a delay in the primary election risks changing the chemistry of the election itself. It is impossible to say what changes might occur between August 28, 1990, and some subsequent date to which an election might be postponed. Inevitably, a change in the election date will affect the ability or willingness of some voters to participate in the election.

Thus the public interest consideration adds weight on the defendants' side of the balance of hardships, not the plaintiffs.

Finally, and not a part of the general calculus for granting or denying preliminary injunctions, the court has given some small consideration and weight to the defendants' contention that the Party has delayed seeking to effect the rights which it would have the court order. Injunctive relief is equitable in nature, and the court has the discretion to consider whether or not the party seeking injunctive relief has timely moved to protect his or its interests. In this instance, there is an element of delay on the part of the Party. The Party might have sought preclearance from the Voting Section of the Department of Justice immediately upon adopting its rule for a Republican primary election. It did not do so. The Party delayed more than sixty days between the adoption of its rule and the presentation of the matter to the Department of Justice. At the conclusion of oral argument, the court suggested that the Party was accountable for some laches or delay in pursuing its rights. On further reflection, the court has come to doubt that the loss of sixty days' time for consideration of the Party's rule by the Department of Justice has any role in determining, as between the Party and the defendants, whether a preliminary injunction should issue. There was no delay on the part of the Party in its dealings with the defendants, and the Party has already been saddled with the effect of its delay before the Justice

Department when the court held that it was without power to consider the constitutional aspects of the Party's new primary election rule because the Voting Section had not acted.

For the foregoing reasons, the court would deny a preliminary injunction even if it had the power to consider the merits of plaintiffs' complaint.

Plaintiffs have also moved for an order requiring the State of Alaska to immediately make its submission to the Department of Justice, Voting Rights Section. This motion is now in substance moot in light of the fact that the plaintiffs' motion for preliminary injunction has been denied. More generally, the parties now seem in agreement that there is no regulatory requirement that the State file its procedures with the Department of Justice until after the Voting Section has acted upon the Party's presentation. See 28 C.F.R. § 51.22.

Accordingly, the plaintiffs' motion with regard to the State filing with the Department of Justice is denied.

Finally, the Party has suggested that the court must rule upon certain state law questions which it fears will be outside the purview of the Justice Department's Voting Section. Here the Party has reference to disagreements with the State as to (among other things) whether a voter's party designation may be changed on the day of election or whether it must be changed thirty days in advance. These matters present state law questions which are not necessarily raised by the motions

presently before the court, and the court declines to offer any opinion on these issues at this time.

DATED at Anchorage, Alaska, this 13th day of July, 1990.

United States District Judge

cc: W. Ross (ROSS)
K. Jacobus
AAG-K
J. Rubini (BIRCH)

[479 US 208]

JULIA H. TASHJIAN, Secretary of State of Connecticut, Appellant

v

REPUBLICAN PARTY OF CONNECTICUT et al.

479 US 208, 93 L Ed 2d 514, 107 S Ct 544

[No. 85-766]

Argued October 8, 1986. Decided December 10, 1986.

Decision: Connecticut prohibition of political party's choice to permit independents to vote in certain party primary elections held to violate freedom of association under First and Fourteenth Amendments.

SUMMARY

A Connecticut statute allowed only party members to vote in a primary election for a nomination to public office by a major political party. In 1983, one of the state's two major political parties adopted a rule (1) attempting to permit independents—registered voters not affiliated with any political party—to vote in the party's primaries for federal and statewide public offices, while (2) remaining silent as to the party's primaries for nominations for the state legislature. Then, challenging the state statute, the party, its federal officeholders, and its state chairperson filed suit in the United States District Court for the District of Connecticut against the Secretary of the State of Connecticut, who was charged with the administration of the state's election statutes. The District Court granted summary judgment in favor of the party and its members, expressing the view that the statute (1) imposed a substantial burden on their right of association under the First and Fourteenth Amendments to the United States Constitution, and (2) was not supported by any compelling state interests (599 F Supp 1228). On appeal, the United States Court of Appeals for the Second Circuit affirmed, expressing the view that (1) the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment to the United States Constitution, requiring that voters in elections for the United States House of Representatives and Senate have the same qualifications as voters in elections for the most numerous branch of the state legislature, did not apply to party primaries; and (2) the state statute prohibiting the party rule substantially interfered with the party's constitutional right of political association, by determining

Briefs of Counsel, p 1089, infra.

who was eligible to participate in the party's candidate selection process (770 F2d 265).

On appeal, the United States Supreme Court affirmed. In an opinion by MARSHALL, J., joined by BRENNAN, WHITE, BLACKMUN, and POWELL, JJ., it was held that (1) the state's statutory prohibition of the party's primary voting rule placed an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments, while the interests asserted by the state in defense of the statute were insubstantial, and (2) the party rule did not violate the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment, because the clauses did not require a perfect symmetry, even though the clauses did apply to congressional primary elections.

STEVENS, J., joined by SCALIA, J., dissented, expressing the view that, under the circumstances, allowing independents to vote in primary elections for the United States House of Representatives and Senate, while prohibiting such voters from participating in primary elections for the state house of representatives, violated the qualifications clauses of Art I, § 2, cl 1, and the Seventeenth Amendment.

SCALIA, J., joined by REHNQUIST, Ch. J., and O'CONNOR, J., dissented, expressing the view that the Connecticut restriction on a party's primary voting to party members was constitutional, and that the Supreme Court's opinion exaggerated the importance of the associational interest at issue, if indeed such an interest existed.

Constitutional Law § 940.5; Elections § 2 — party choice to allow independents to vote in primaries — freedom of association

1a-1g. A state statute which prohibits a political party from exercising its choice to permit independents —registered voters not affiliated with any party—to vote in the party's primary elections for federal and statewide offices places an unconstitutional burden on the fundamental freedom of political association guaranteed by the First and Fourteenth Amendments to the United States Constitution, where (1) any interference with the freedom of a political party is simultaneously an interference with the freedom of its adherents; (2) under the circumstances, there is no conflict between the associational interests of members and nonmembers over voting in such elections; (3) a state law which permits registration as a party member until noon of the last business day preceding a primary is not a satisfactory response, for it requires action by the voters rather than the party, and insists upon a public act of affiliation with the party as a condition of association; (4) the power of the state under the Constitution (Art I, § 4, cl 1) to prescribe the time, place, and manner of holding elections for United States Senators and Representatives, which power is matched by state control over the election process for state offices, does not extinguish the state's responsibility to observe the limits established by the First Amendment rights of the state's citizens; and (5) the interests which the state asserts in defense of the statute are insubstantial. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented from this holding.)

Elections §§ 2, 4 — primaries — different qualifications for federal congressional and state legislative voters

2a-2e. A political party's rule permitting independents—registered voters not affiliated with any party —to vote in the party's primary elections for the United States House of Representatives and Senate, while remaining silent as to voting by such independents in the party's primary elections for the state legislature, does not violate the Federal Constitution's clauses on qualifications of federal congressional electors (Art I, § 2, cl 1, and the Seventeenth Amendment), where (1) the two clauses apply to the state's primary elections in precisely the same fashion as they apply to general congressional elections, (2) the two clauses do not require perfect symmetry, and (3) the party rule does not disenfranchise any voter in a federal congressional election who is qualified to vote in a primary or general election for the more numerous house of the state's legislature. (Stevens and Scalia, JJ., dissented from this holding.)

Constitutional Law § 940.5; Elections § 1 — First Amendment — tests

3. Constitutional challenges to specific provisions of a state's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions; instead, a court must (1) consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that a plaintiff seeks to vindicate, and (2) identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule; a court must not only determine the legitimacy and strength of each of these state interests, but also consider the extent to which these interests make it necessary to burden the plaintiff's rights.

Constitutional Law § 36.3 — freedom of speech and association — due process

4. Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the due process clause of the Federal Constitution's Fourteenth Amendment, which embraces freedom of speech.

Constitutional Law § 940.5 — freedom of political association — extent

5a-5c. The freedom of association protected by the First and Fourteenth Amendments of the United States Constitution includes partisan political organization; the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom; freedom to join together in the furtherance of common political beliefs necessarily presupposes the freedom

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25 Am Jur 2d, Elections §§ 116-119, 129-131, 150-152, 159; 77 Am Jur 2d, United States § 23

USCS, Constitution, Article I § 2 cl 1, Article I § 4 cl 1, Amendments 1, 14, 17

US L Ed Digest, Constitutional Law § 940.5; Elections §§ 2, 4

Index to Annotations; Congress; Due Process; Elections and Voting; Freedom of Association; Legislature; States

VERALEX™: Cases and annotations referred to herein can be further researched through the VERALEX electronic retrieval system's two services, **Auto-Cite®** and **SHOWME™.** Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references. Use SHOWME to display the full text of cases and annotations.

ANNOTATION REFERENCES

Supreme Court's views regarding the First Amendment right of association as applied to the advancement of political beliefs. 67 L Ed 2d 859.

Supreme Court's views as to concept of "liberty" under due process clauses of Fifth and Fourteenth Amendments. 47 L Ed 2d 975.

What provisions of the Federal Constitution's Bill of Rights are applicable to the states. 18 L Ed 2d 1388, 23 L Ed 2d 985.

Fourteenth Amendment as affecting nomination or election to state office. 11 L Ed 2d 1057, 23 L Ed 2d 782.

to identify the people who constitute the association; a political party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.

Constitutional Law § 940.5 — political organization — privacy of members

6a, 6b. A political organization has a constitutional right to protect the privacy of its membership rolls, where acts of public affiliation may subject the members of the organization to public hostility or discrimination.

Elections § 3 — time, place, and manner — right to vote

7. The power of a state under the United States Constitution (Art I, § 4, cl 1) to regulate the time, place, and manner of holding elections for United States Senators and Representatives, which power is matched by state control over the election process for state offices, does not justify, without more, abridgment of the fundamental right to vote.

Constitutional Law § 940.5; Elections § 2 — party primary — freedom of association — administrative cost

8. Even assuming the factual accuracy of contentions as to the possibility of future increases in the cost of administering a state's primary election system due to a party rule permitting independents—registered voters not affiliated with any political party—to vote in the party's primary elections for federal and statewide office, such contentions do not form a sufficient basis for infringing the First Amendment right of freedom of political association by prohibiting such a party rule.

Elections § 2 — primaries — raiding by other party

9. A possible state interest in seeking to curtail "raiding"—a practice whereby voters in sympathy with one political party designate themselves as voters of another party so as to influence or determine the results of the other party's primary—is not implicated by the state's prohibition of one party's choice to permit independents (registered voters not affiliated with any political party) to vote in certain party primaries, where, under state law, (1) the independents need only register as party members to vote in the primary, and (2) the state permits such registration as late as noon on the business day preceding the primary.

Constitutional Law § 940.5; Elections §§ 1, 2 — primary and general elections — relation — freedom of association

10a, 10b. A state has a legitimate interest in fostering informed and educated expressions of the popular will in a general election, but this interest is not sufficient to justify, under the First and Fourteenth Amendments to the United States Constitution, the state's prohibition of a party rule permitting independents—registered voters not affiliated with any political party—to vote in certain party primaries, on the grounds that voters would be misled by party labels in the ensuing general election, where (1) the United States Supreme Court's cases reflect faith in the ability of individual voters to inform themselves about campaign issues, (2) in the state in question, to be listed on a primary ballot requires that a candidate have obtained at least 20% of the vote at a party convention which only party members may attend, and (3) the argument in favor of such a prohibition disregards the substantial benefit the party rule provides the party and its members in seeking to choose successful candidates, given the numerical strength of independent voters in that state. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented in part from this holding.)

Constitutional Law § 940.5; Elections § 2 — party primary — freedom of association — protecting integrity of party

11a, 11b. Even if a state is correct that its prohibition of a political party's rule permitting independents —registered voters not affiliated with any party—to vote in certain party primaries protects the integrity of the two-party system and the responsibility of party government, a state or court may not constitutionally substitute its own judgment for that of the party; under the freedom of association for the advancement of political beliefs, as is true of all First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. (Scalia, J., Rehnquist, Ch. J., and O'Connor, J., dissented from this holding.)

Elections § 2 — single nominations

12a, 12b. A state may adopt a policy of confining each voter to a single nominating act.

Constitutional Law § 9 — construction — new subject matter

13. In determining whether a provision of the United States Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar, for in setting up an enduring framework of government, they undertook to carry out for the indefinite future and in all the vicissitudes of changing human affairs, those fundamental purposes which the instrument itself discloses.

Elections §§ 2, 4 — constitutional voter qualifications — stages applicable

14. The goal—under Art I, § 2, cl 1, and the Seventeenth Amendment to the United States Constitution—of assuring that the members of the United States Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process; the constitutional voter qualifications of these clauses apply to primaries as well as to general elections (1) where the state law has made the primary an integral part of the procedure of choice, or (2) where in fact the primary effectively controls the choice.

SYLLABUS BY REPORTER OF DECISIONS

A Connecticut statute (§ 9-431), enacted in 1955, requires voters in any political party primary to be registered members of that party. In 1984, appellee Republican Party of Connecticut (Party) adopted a Party rule that permits independent voters —registered voters not affiliated with any party—to vote in Republican primaries for federal and statewide offices. The Party and the Party's federal officeholders and state chairman (also appellees) brought an action in Federal District Court challenging the constitutionality of § 9-431 on the ground that it deprives the Party of its right under the First

and Fourteenth Amendments to enter into political association with individuals of its own choosing, and seeking declaratory and injunctive relief. The District Court granted summary judgment in appellees' favor, and the Court of Appeals affirmed.

Held:

1. Section 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments.

(a) The freedom of association protected by those Amendments includes partisan political organization. Section 9-431 places limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community. The fact that the State has the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote or, as here, the freedom of political association.

(b) The interests asserted by appellant Secretary of State of Connecticut as justification for the statute—that it ensures the administrability of the primary, prevents voter raiding, avoids voter confusion, and protects the integrity of the two-party system and the responsibility of party government—are insubstantial. The possibility of increases in the cost of administering the election system is not a sufficient basis for infringing appellees' First Amendment rights. The interest in curtailing raiding is not implicated, since § 9-431 does not impede a raid on the Republican Party by independent voters; independent raiders need only register as Republicans and vote in the primary. The interest in preventing voter confusion does not make it necessary to burden the Party's associational rights. And even if the State were correct in arguing that § 9-431 in providing for a closed primary system is designed to save the Party from undertaking conduct destructive of its own interests, the State may not constitutionally substitute its judgment for that of the Party, whose determination of the boundaries of its own association and of the structure that best allows it to pursue its political goals is protected by the Constitution.

2. The implementation of the Party rule will not violate the Qualifications Clause of the Constitution—which provides that the House of Representatives "shall be composed of Members chosen . . . by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"—and the parallel provision of the Seventeenth Amendment, because it does not disenfranchise any voter in a federal election who was qualified to vote in a primary or general election for the more numerous house of the state legislature. The Clause and the Amendment are not violated by the fact that the Party rule establishes qualifications for voting in congressional elections that differ from the qualifications in elections for the state legislature. Where state law, as here, has made the primary an integral part of the election procedure, the requirements of the Clause and the Amendment apply to primaries as well as to general elections. The achievement of the goal of the Clause to prevent the mischief that would arise if state voters found themselves disqualified from participating in federal elections does not require that qualifications for exercise of the federal franchise be precisely equivalent to the qualifications for exercising the franchise in a given State.

770 F2d 265, affirmed.

Marshall, J., delivered the opinion of the Court, in which Brennan, White, Blackmun, and Powell, JJ., joined. Stevens, J., filed a dissenting opinion, in which Scalia, J., joined. Scalia, J., filed a dissenting opinion, in which Rehnquist, C. J., and O'Connor, J., joined.

APPEARANCES OF COUNSEL

Elliot F. Gerson argued the cause for appellant.

David S. Golub argued the cause for appellees.

Briefs of Counsel, p 1089, infra.

OPINION OF THE COURT

[479 US 210]

Justice **Marshall** delivered the opinion of the Court.

[1a, 2a] Appellee Republican Party of the State of Connecticut (Party) in 1984 adopted a Party rule which permits independent voters—registered voters not affiliated with any political party—to vote in Republican primaries for federal and statewide offices. Appellant Julia Tashjian, the Secretary of the State of Connecticut, is charged with the administration of the State's election statutes, which include a provision requiring voters in any party primary to be registered members

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of that party. Conn Gen Stat § 9-431 (1985).[1] Appellees, who in addition to the Party include the Party's federal officeholders and the Party's state chairman, challenged this eligibility provision on the ground that it deprives the Party of its First Amendment right to enter into political association with individuals of its own choosing. The District Court granted summary judgment in favor of appellees. 599 F Supp 1228 (Conn 1984). The Court of Appeals affirmed. 770 F2d 265 (CA2 1985). We noted probable jurisdiction, 474 US 1049, 88 L Ed 2d 762, 106 S Ct 783 (1986), and now affirm.

I

In 1955, Connecticut adopted its present primary election system. For major parties,[2] the process of candidate selection for federal and statewide offices requires a statewide convention of party delegates; district conventions are held to select candidates for seats in the state legislature. The party convention may certify as the party-endorsed candidate any person receiving more than 20% of the votes case in a roll-call vote at the convention. Any candidate not endorsed by the party who received 20% of the vote may challenge the party-endorsed candidate in a primary election, in which the candi-

1. The statute provides in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district . . . ."

2. A "major party" is defined as "a political party or organization whose candidate for governor at the last-preceding election for governor received . . . at least twenty per cent of the whole number of votes cast for all candidates for governor." Conn Gen Stat § 9-372(5)(B) (1985). The Democratic and Republican parties are the only major parties in the State under this definition.

date receiving the plurality of votes becomes the party's nominee. Conn Gen Stat §§ 9-382, 9-400, 9-444 (1985). Candidates selected by the major parties, whether through convention or primary, are automatically accorded a place on the ballot at the general election.

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§ 9-379. The costs of primary elections are paid out of public funds. See, e.g., § 9-441.

The statute challenged in these proceedings, § 9-431, has remained substantially unchanged since the adoption of the State's primary system. In 1976, the statute's constitutionality was upheld by a three-judge District Court against a challenge by an independent voter who sought a declaration of his right to vote in the Republican primary. Nader v Schaffer, 417 F Supp 837 (Conn), summarily aff'd, 429 US 989, 50 L Ed 2d 602, 97 S Ct 516 (1976). In that action, the Party opposed the plaintiff's efforts to participate in the Party primary.

Subsequent to the decision in Nader, however, the Party changed its views with respect to participation by independent voters in Party primaries. Motivated in part by the demographic importance of independent voters in Connecticut politics,[3] in September 1983 the Party's Central Committee recommended calling a state convention to consider altering the Party's rules to allow independents to vote in Party primaries. In January 1984 the state convention adopted the Party rule now at issue, which provides:

"Any elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of the State, Attorney General, Comptroller and Treasurer." App 20.

During the 1984 session, the Republican leadership in the state legislature, in response to the conflict between the newly enacted Party rule and § 9-431, proposed to amend the statute to allow independents to vote in primaries when permitted by Party rules. The proposed legislation was defeated,

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substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party.[4]

The Party and the individual appellees then commenced this action in the District Court, seeking a declaration that § 9-431 infringes the appellees' right to freedom of association for the advancement of common political objectives guaranteed by the First and Fourteenth Amendments, and injunctive relief against its further enforcement. After discovery, the parties submitted extensive stipulations of fact to the District Court, which granted summary judgment for appellees. The District Court concluded that "[a]ny effort by the state to substitute its judgment for that of the party on . . . the question of who is and is not sufficiently allied in interest with the

3. The record shows that in October 1983 there were 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered and unaffiliated voters in Connecticut. 2 App to Juris Statement 244.

4. In the November 1984 elections, the Republicans acquired a majority of seats in both houses of the state legislature, and an amendment to § 9-431 was passed, but was vetoed by the Democratic Governor.

party to warrant inclusion in its candidate selection process . . . substantially impinges on First Amendment rights." 599 F Supp, at 1238. Rejecting the state interests proffered by appellant to justify the statute, the District Court held that "as applied to the Republican Party rule permitting unaffiliated voters to participate in certain Republican Party primaries, the statute abridges the right of association guaranteed by the First Amendment." Id., at 1241.

The Court of Appeals affirmed, holding that § 9-431 "substantially interferes with the Republican Party's first amendment right to define its associational boundaries, determine the content of its message, and engage in effective political association." 770 F2d, at 283.

II

[3] We begin from the recognition that "[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions." Anderson v Celebrezze,

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460 US 780, 789, 75 L Ed 2d 547, 103 S Ct 1564 (1983) (quoting Storer v Brown, 415 US 724, 730, 39 L Ed 2d 714, 94 S Ct 1274 (1974)). "Instead, a court . . . must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 US, at 789, 75 L Ed 2d 547, 103 S Ct 1564.

[4, 5a] The nature of the appellees' First Amendment interest is evident. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." NAACP v Alabama ex rel. Patterson, 357 US 449, 460, 2 L Ed 2d 1488, 78 S Ct 1163 (1958); see NAACP v Button, 371 US 415, 430, 9 L Ed 2d 405, 83 S Ct 328 (1963); Bates v Little Rock, 361 US 516, 522-523, 4 L Ed 2d 480, 80 S Ct 412 (1960). The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization. Elrod v Burns, 427 US 347, 357, 49 L Ed 2d 547, 96 S Ct 2673 (1976) (plurality opinion); Buckley v Valeo, 424 US 1, 15, 46 L Ed 2d 659, 96 S Ct 612 (1976). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v Pontikes, 414 US 51, 57, 38 L Ed 2d 260, 94 S Ct 303 (1973).

[5b] The Party here contends that § 9-431 impermissibly burdens the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success. The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association. As we have said, the freedom to join together in furtherance of common political beliefs "necessarily presupposes the freedom to identify the people who constitute the associa-

tion." Democratic Party of
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United States v Wisconsin ex rel. La Follette, 450 US 107, 122, 67 L Ed 2d 82, 101 S Ct 1010 (1981).

[6a] A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities. Some of the Party's members devote substantial portions of their lives to furthering its political and organizational goals, others provide substantial financial support, while still others limit their participation to casting their votes for some or all of the Party's candidates. Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.[5]

[1b] Were the State to restrict by statute financial support of the Party's candidates to Party members, or to provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals. As we have said, "'[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.'" Democratic Party, supra, at 122, 67 L Ed 2d 82, 101 S Ct 1010 (quoting Sweezy v New Hampshire, 354 US 234, 250, 1 L Ed 2d 1311, 77 S Ct 1203 (1957)).[6] The statute here places limits upon the group of
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registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. Kusper v Pontikes, supra, at 58, 38 L Ed 2d 260, 94 S Ct 303. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.[7]

5. [6b] Indeed, acts of public affiliation may subject the members of political organizations to public hostility or discrimination; under those circumstances an association has a constitutional right to protect the privacy of its membership rolls. Bates v Little Rock, 361 US 516, 523-524, 4 L Ed 2d 480, 80 S Ct 412 (1960); NAACP v Alabama ex rel. Patterson, 357 US 449, 462, 2 L Ed 2d 1488, 78 S Ct 1163 (1958).

6. [1c] It is this element of potential interference with the rights of the Party's members which distinguishes the present case from others in which we have considered claims by nonmembers of a party seeking to vote in that party's primary despite the party's opposition. In this latter class of cases, the nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. See Rosario v Rockefeller, 410 US 752, 36 L Ed 2d 1, 93 S Ct 1245 (1973); Nader v Schaffer, 417 F Supp 837 (Conn), summarily aff'd, 429 US 989, 50 L Ed 2d 602, 97 S Ct 516 (1976). Similarly, the Court has upheld the right of national political parties to refuse to seat at their conventions delegates chosen in state selection processes which did not conform to party rules. See Democratic Party of United States v Wisconsin ex rel. La Follette, 450 US 107, 67 L Ed 2d 82, 101 S Ct 1010 (1981); Cousins v Wigoda, 419 US 477, 42 L Ed 2d 595, 95 S Ct 541 (1975). These situations are analytically distinct from the present case, in which the Party and its members seek to provide enhanced opportunities for participation by willing nonmembers. Under these circumstances, there is no conflict between the associational interests of members and nonmembers. See generally Note, Primary Elections and the Collective Right of Freedom of Association, 94 Yale LJ 117 (1984).

7. [1d] Appellant contends that any infringement of the associational right of the Party or its members is de minimis, because Connecticut law, as amended during the pendency of this litigation, provides that any previously unaffiliated voter may become eligible to vote in the Party's primary by enrolling as a Party member as late as noon on the last business day preceding the primary. Conn Gen Stat § 9-56 (1985). Thus, appellant contends, any independent voter wishing to participate in any Party primary may do so.

[1e] This is not a satisfactory response to the Party's contentions for two reasons. First, as the Court of Appeals noted, the formal affiliation process is one which individual voters may employ in order to associate with the Party, but it provides no means by which the members of the Party may choose to broaden opportunities for joining the association by their own act, without any intervening action by potential voters. 770 F2d, at 281, n 24. Second, and more importantly, the requirement of public affiliation with the Party in order to vote in the primary conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter. Cf. Wooley v Maynard, 430 US 705, 714-715, 51 L Ed 2d 752, 97 S Ct 1428 (1977); West Virginia Board of Education v Barnette, 319 US 624, 633-634, 87 L Ed 1628, 63 S Ct 1178, 147 ALR 674 (1943). As counsel for appellees conceded at oral argument, a requirement that independent voters merely notify state authorities of their intention to vote in the Party primary would be acceptable as an administrative measure, but "[t]he problem is that the State is insisting on a public act of affiliation . . . joining the Republican Party as a condition of this association." Tr of Oral Arg 40.

8. The District Court entered no findings of fact as to the potential administrative changes necessary to implement the Party rule. As appellant conceded at oral argument, the only evidence in the record before the District Court relating to the administration of the rule was a statement by the State's election attorney in testimony before the legislature that the system would be "workable." Id., at 20. Appellant relies here upon affidavits concerning potential administrative burden which were submitted to the Court of Appeals in support of appellant's request for a stay, entered after this Court noted probable jurisdiction.

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[1f, 7] It is, of course, fundamental to appellant's defense of the State's statute that this impingement upon the associational rights of the Party and its members occurs at the ballot box, for the Constitution grants to the States a broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," Art I, § 4, cl 1, which power is matched by state control over the election process for state offices. But this authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote, see Wesberry v Sanders, 376 US 1, 6-7, 11 L Ed 2d 481, 84 S Ct 526 (1964), or, as here, the freedom of political association. We turn then to an examination of the interests which appellant asserts to justify the burden cast by the statute upon the associational rights of the Party and its members.

III

Appellant contends that § 9-431 is a narrowly tailored regulation which advances the State's compelling interests by ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.

A

Although it was not presented to the Court of Appeals as a basis for the defense of the statute, appellant argues here that the administrative burden imposed by the Party rule is a sufficient ground on which to uphold the constitutionality of
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§ 9-431.[8]

Appellant contends that the Party's rule would require 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. In essence, appellant claims that the administration of the system contemplated by the Party rule would simply cost the State too much.

[8] Even assuming the factual accuracy of these contentions, which have not been subjected to any scrutiny by the District Court, the possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees' First Amendment rights. Costs of administration would likewise increase if a third major party should come into existence in Connecticut, thus requiring the State to fund a third major-party primary. Additional voting machines, poll workers, and ballot materials would all be necessary under these circumstances as well. But the State could not forever protect the two existing major parties from competition solely on the ground that two major parties are all the public can afford. Cf. Anderson v Celebrezze, 460 US 780, 75 L Ed 2d 547, 103 S Ct 1564 (1983); Williams v Rhodes, 393 US 23, 21 L Ed 2d 24, 89 S Ct 5, 45 Ohio Ops 2d 236 (1968). While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.

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B

[9] Appellant argues that § 9-431 is justified as a measure to prevent raiding, a practice "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." Rosario v Rockefeller, 410 US 752, 760, 36 L Ed 2d 1, 93 S Ct 1245 (1973). While we have recognized that "a State may have a legitimate interest in seeking to curtail 'raiding,' since that practice may affect the integrity of the electoral process," Kusper v Pontikes, 414 US, at 59-60, 38 L Ed 2d 260, 94 S Ct 303; Rosario v Rockefeller, supra, at 761, 36 L Ed 2d 1, 93 S Ct 1245, that interest is not implicated here.[9] The statute as applied to the Party's rule prevents independents, who otherwise cannot vote in any primary, from participating in the Republican primary. Yet a raid on the Republican Party primary by independent voters, a curious concept only distantly related to the type of raiding

9. As we have previously noted, a study commission established by the national Democratic Party concluded that "'the existence of "raiding" has never been conclusively proven by survey research.'" Democratic Party of United States v Wisconsin ex rel. La Follette, 450 US, at 122-123, n 23, 67 L Ed 2d 82, 101 S Ct 1010 (quoting Openness, Participation and Party Building: Reforms for a Stronger Democratic Party 68 (Feb. 17, 1978)). In view of our conclusion that § 9-431 is irrelevant to the question of raiding, we express no opinion as to whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice.

discussed in Kusper and Rosario, is not impeded by § 9-431; the independent raiders need only register as Republicans and vote in the primary. Indeed, under Conn Gen Stat § 9-56 (1985), which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, see n 7, supra, the State's election statutes actually *assist* a "raid" by independents, which could be organized and implemented at the 11th hour. The State's asserted interest in the prevention of raiding provides no justification for the statute challenged here.

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C

Appellant's next argument in support of § 9-431 is that the closed primary system avoids voter confusion. Appellant contends that "[t]he legislature could properly find that it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name." Brief for Appellant 59. Appellees respond that the State is attempting to act as the ideological guarantor of the Republican Party's candidates, ensuring that voters are not misled by a "Republican" candidate who professes something other than what the State regards as true Republican principles. Brief for Appellees 28.

[10a] As we have said, "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." Anderson v Celebrezze, 460 US, at 796, 75 L Ed 2d 547, 103 S Ct 1564. To the extent that party labels provide a shorthand designation of the views of party candidates on matters of public concern, the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise. Appellant's argument depends upon the belief that voters can be "misled" by party labels. But "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." Id., at 797, 75 L Ed 2d 547, 103 S Ct 1564. Moreover, appellant's concern that candidates selected under the Party rule will be the nominees of an "amorphous" group using the Party's name is inconsistent with the facts. The Party is not proposing that independents be allowed to choose the Party's nominee without Party participation; on the contrary, to be listed on the Party's primary ballot continues to require, under a statute not challenged here, that the primary candidate have obtained at least 20% of the vote at a Party convention, which only Party

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members may attend. Conn Gen Stat § 9-400 (1985). If no such candidate seeks to challenge the convention's nominee in a primary, then no primary is held, and the convention nominee becomes the Party's nominee in the general election without any intervention by independent voters.[10] Even assuming, however, that putative candidates defeated at the Party convention will have an increased incentive under the Party's rule to make primary challenges, hoping to attract more substantial support from independents than

10. The record does not disclose the proportion of Connecticut Republican Party nominations that are the result of primary contests.

from Party delegates, the requirement that such challengers garner substantial minority support at the convention greatly attenuates the convention greatly attenuates the State's concern that the ultimate nominee will be wedded to the Party in nothing more than a marriage of convenience.

[10b] In arguing that the Party rule interferes with educated decisions by voters, appellant also disregards the substantial benefit which the Party rule provides to the Party and its members in seeking to choose successful candidates. Given the numerical strength of independent voters in the State, one of the questions most likely to occur to Connecticut Republicans in selecting candidates for public office is how can the Party most effectively appeal to the independent voter? By inviting independents to assist in the choice at the polls between primary candidates selected at the Party convention, the Party rule is intended to produce the candidate and platform most likely to achieve that goal. The state statute is said to decrease voter confusion, yet it deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors. "A State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." Anderson v Celebrezze, supra, at 798, 75 L Ed 2d 547, 103 S Ct 1564. The State's legitimate interests in preventing voter confusion

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and providing for educated and responsible voter decisions in no respect "make it necessary to burden the [Party's] rights." 460 US, at 789, 75 L Ed 2d 547, 103 S Ct 1564.

D

[11a] Finally, appellant contends that § 9-431 furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government. Appellant argues vigorously and at length that the closed primary system chosen by the state legislature promotes responsiveness by elected officials and strengthens the effectiveness of the political parties.

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged." Ap-

11. At the present time, 21 States provide for "closed" primaries of the classic sort, in which the primary voter must be registered as a member of the party for some period of time prior to the holding of the primary election. See Ariz Rev Stat Ann § 16-467 (1984); Cal Elec Code Ann § 501 (West Supp 1986); Colo Rev Stat § 1-2-203 (Supp 1986); Conn Gen Stat § 9-431 (1985); Del Code Ann, Tit, 15 § 3161 (1981); Fla Stat § 101.021 (1985); Kan Stat Ann § 25-3301 (1981); Ky Rev Stat §§ 116.045, 116.055 (1982); Me Rev Stat Ann, Tit 21-A, § 141 et seq. (Supp 1986-1987); Md Ann Code, Art 33, § 3-8 et seq. (1985); Neb Rev Stat § 32-530 (1984); Nev Rev Stat § 293.287 (1985); NM Stat Ann § 1-4-16 (1985); NY Elec Law § 1-104.9 (McKinney 1978); NC Gen Stat § 163.74 (1982 and Supp 1985); Okla Stat, Tit 26, § 1-104 (1976); Ore Rev Stat § 247.201 (1985); Pa Stat Ann Tit 25, § 2832 (Purdon 1963); SD Codified Laws § 12-4-15 (1982); W Va Code § 3-1-35 (1979); Wyo Stat § 22-5-212 (1977). Sixteen States allow a voter previously unaffiliated with any party to vote in a party primary if he affiliates with the party at the time of, or for the purpose of, voting in the primary. See Ala Code § 17-16-14(b) (1985); Ark Stat Ann § 3-126 (1976); Ga Code Ann § 21-2-235 (1982); Ill Rev Stat, ch 46, § 7-43(a) (1986); Ind Code § 3-10-1-6 (Supp 1986); Iowa Code §§ 43.41, 43.42 (1985); Mass Gen Laws § 53:37 (1984); Miss Code Ann § 23-15-575 (1986 pamphlet); Mo Rev Stat § 115.397 (1978); NH Rev Stat Ann § 654:34II (1986); NJ Stat Ann § 19:23-45 (West Supp 1986); Ohio Rev Code Ann § 3513.19 (Supp 1985); RI Gen Laws § 17-9-26(c) (1981); SC Code §§ 7-5-120, 7-9-20 (1976 and Supp 1985); Tenn Code Ann § 2-7-115(b)(2) (1985); Tex Elec Code Ann § 162.003 (1986). Four States provide for nonpartisan primaries in which all registered voters may participate, Alaska Stat Ann §§ 15.05.010, 15.25.090 (1982); La Rev Stat Ann §§ 18:401B, 18:521B (West 1979 and Supp 1986); Va Code § 24.1-182 (1985); Wash Rev Code § 29.18.200 (1965), while nine States have adopted classical "open" primaries, in which all registered voters may choose in which party primary to vote. Haw Rev Stat § 12-31 (Supp 1984); Idaho Code §§ 34-402, 34-404, 34-904 (Supp 1986); Mich Comp Laws §§ 168.575, 168.576 (1967 and Supp 1986); Minn Stat § 204D.08(4) (1985); Mont Code Ann § 13-10-301(2) (1985); ND Cent Code § 16.1-11-22 (Supp 1985); Utah Code Ann § 20-3-19(2) (Supp 1986); Vt Stat Ann, Tit 17, § 2363 (1982); Wis Stat §§ 5.37, 6.80 (1983-1984).

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invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years.[12]

We have previously recognized the danger that "splintered parties and unrestrained factionalism may do significant damage to the fabric of government." Storer v Brown, 415 US, at 736, 39 L Ed 2d 714, 94 S Ct 1274. We upheld a California statute which denied access to the ballot to any independent candidate who had voted in a party primary or been registered as a member of a political party within one year prior to the immediately preceding primary election. We said:

> "[T]he one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late

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rather than an early decision to seek independent ballot status." Ibid.

The statute in Storer was designed to protect the parties and the party system against the disorganizing effect of independent candidacies launched by unsuccessful putative party nominees. This protection, like that accorded to parties threatened by raiding in Rosario v Rockefeller, 410 US 752, 36 L Ed 2d 1, 93 S Ct 1245 (1973), is undertaken to prevent the disruption of the political parties from without, and not, as in this case, to prevent the parties from taking internal steps affecting their own process for the selection of candidates. The forms of regulation upheld in Storer and Rosario imposed certain burdens upon the protected First and Fourteenth Amendment interests of some individuals, both voters and potential candidates, in order to protect the interests of others. In the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself.

[5c, 11b, 12a] Under these circumstances, the views of the State, which to some extent represent the views of the one political party tran-

12. We note that appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 States which have chosen to permit more substantial openness in their primary systems than Connecticut has permitted heretofore.

siently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point "even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party." Democratic Party of United States v Wisconsin ex rel. La Follette, 450 US, at 123-124, 67 L Ed 2d 82, 101 S Ct 1010 (footnote omitted). The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational." Id., at 124, 67 L Ed 2d 82, 101 S Ct 1010.[13]

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We conclude that the State's enforcement, under these circumstances, of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.

IV

[2b] Appellant argues here, as in the courts below, that implementation of the Party rule would violate the Qualifications Clause of the Constitution, Art I, § 2, cl 1, and the Seventeenth Amendment because it would establish qualifications for voting in congressional elections which differ from the voting qualifications in elections for the more numerous house of the state legislature.[14] The Party rule as adopted permits independent voters to vote in Party primaries for the offices of United States Senator and Member of the House of Representatives, and for statewide offices, but is silent as regards

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primaries held to contest nominations for seats in the state legislature. See supra, at 212, 93 L Ed 2d, at 522. Appellant contends that the Qualifications Clause and the Seventeenth Amendment require an absolute symmetry of qualifications to vote in elections for Congress and the lower house of the state legislature, and that the Party rule, if implemented according to its terms, would require lesser qualifications for voting in Party primaries for federal office than for state legislative office.

The Court of Appeals rejected appellant's argument, holding that the Qualifications Clause and the parallel provision of the Seventeenth Amendment do not apply to primary elections. 770 F2d, at 274. The concurring opinion took a different view, reaching the conclusion that these provisions require only that "anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote" in federal legislative elections. Id., at 286 (Oakes, J., concurring). We agree.

[13, 14] We recognize that the Federal Convention, in adopting the Qualifications Clause of Article I, § 2, was not contemplating the effects of that provision upon the modern system of party primaries. As we have said:

> "We may assume that the framers of the Constitution in adopting that section, did not have specifically in mind the selection and elimination of candidates for Congress by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it. But in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses." United States v Classic, 313 US 299, 315-316, 85 L Ed 1368, 61 S Ct 1031 (1941).

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The fundamental purpose underlying Article I, § 2, cl 1, that "[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several States," like the parallel provision of the Seventeenth Amendment, applies to the entire process by which federal legislators are chosen. "Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice," the requirements of Article I, § 2, cl 1, and the Seventeenth Amendment apply to primaries as well as to general elections. United States v Classic, supra, at 318, 85 L Ed 1368, 61 S Ct 1031; see Smith v Allwright, 321 US 649, 659-660, 88 L Ed 987, 64 S Ct 757 (1944). The constitutional goal of assuring that the Members of Congress are chosen by the people can only be secured if that principle is applicable to every stage in the selection process. If primaries were not subject to the requirements of the Qualifications Clauses contained in Article I, § 2 and the Seventeenth Amendment, the fundamental principle of free electoral choice would be subject to the sort of erosion these prior decisions were intended to prevent.

13. [12b] Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations. Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects which the statutes in Storer v Brown, 415 US 724, 39 L Ed 2d 714, 94 S Ct 1274 (1974), and Rosario v Rockefeller, 410 US 752, 36 L Ed 2d 1, 93 S Ct 1245 (1973), were designed to prevent. We have observed on several occasions that a State may adopt a "policy of confining each voter to a single nominating act," a policy decision which is not involved in the present case. See Anderson v Celebrezze, 460 US 780, 802, n 29, 75 L Ed 2d 547, 103 S Ct 1564 (1983); Storer v Brown, supra, at 743, 39 L Ed 2d 714, 94 S Ct 1274. The analysis of these situations derives much from the particular facts involved. "The results of this evaluation will not be automatic; as we have recognized, there is 'no substitute for the hard judgments that must be made.'" Anderson v Celebrezze, supra, at 789-790, 75 L Ed 2d 547, 103 S Ct 1564 (quoting Storer v Brown, supra, at 730, 39 L Ed 2d 714, 94 S Ct 1274).

14. Article I, § 2, cl 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment, which provides for the direct election of United States Senators, states in pertinent part that "[t]he electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[2c] Accordingly, we hold that the Qualifications Clauses of Article I, § 2, and the Seventeenth Amendment are applicable to primary elections in precisely the same fashion that they apply to general congressional elections. Our task is then to discover whether, as appellant contends, those provisions require that voter qualifications, such as party membership, in primaries for federal office must be absolutely symmetrical with those pertaining to primaries for state legislative office.

Our inquiry begins with an examination of the Framers' purpose in enacting the first Qualifications Clause. It is clear that the Clause was intended to avoid the consequences of declaring a single standard for exercise of the franchise in federal elections. The state governments represented at the Convention had established varying voter qualifications, and substantial concern was expressed by delegates as to the likely effects of a federal voting qualification which disenfranchised voters eligible to vote in the States. James

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Wilson argued that "[i]t would be very hard and disagreeable for the same persons, at the same time, to vote for representatives in the State Legislature, and to be excluded from a vote for those in the National Legislature." J. Madison, Journal of the Federal Convention 467 (E. Scott ed 1893) (hereinafter Madison's Journal). Oliver Ellsworth predicted that "[t]he people will not readily subscribe to a National Constitution, if it should subject them to be disfranchised." Id., at 468. Benjamin Franklin argued, in the same vein, that "[t]he sons of a substantial farmer, not being themselves freeholders, would not be pleased at being disfranchised, and there are a great many persons of that description." Id., at 471. James Madison later defended the resulting provision on similar grounds:

> "To have reduced the different qualifications in the different States, to one uniform rule, would probably have been as dissatisfactory to some of the States, as it would have been difficult to the Convention. The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." The Federalist No. 52, p 354 (J. Cooke ed 1961).

[2d] In adopting the language of Article I, § 2, cl 1, the Convention rejected the suggestion that a property qualification was necessary to restrict the availability of the federal franchise. See Madison's Journal 468-473; 2 M. Farrand, The Records of the Federal Convention of 1787, pp 200-216 (1966). Far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections. The achievement of this goal does not require that qualifications for exercise of the federal franchise be at all

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times precisely equivalent to the prevailing qualifications for the exercise of the franchise in a given State. The fundamental purpose of the Qualifications Clauses contained in Article I, § 2, and the Seventeenth Amendment is satisfied if all those qualified to participate in the selection of members of the more numerous branch of the state legislature are also qualified to participate in the election of Senators and Members of the House of Representatives.

[2e] Our conclusion that these provisions do not require a perfect symmetry of voter qualifications in state and federal legislative elections takes additional support from the fact that we have not previously required such absolute symmetry when the federal franchise has been expanded. In Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260 (1970), five Justices agreed that the Voting Rights Act Amendments of 1970 could constitutionally establish a minimum age of 18 for voters in federal elections, while a majority of the Court also concluded that Congress was without power to set such a minimum age in state and local elections. See id., at 117-118, 27 L Ed 2d 272, 91 S Ct 260 (Black, J., announcing the judgments of the Court). Appellant's reading of the Qualifications Clause, which would require identical voter qualifications in state and federal legislative elections, is plainly inconsistent with these holdings. We hold that the implementation of the Party rule does not violate the Qualifications Clause or the Seventeenth Amendment because it does not disenfranchise any voter in a federal election who is qualified to vote in a primary or general election for the more numerous house of the state legislature.

V

[1g] We conclude that § 9-431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments. The interests asserted by appellant in defense of the statute are insubstantial. The judgment of the Court of Appeals is affirmed.

SEPARATE OPINIONS

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Justice **Stevens**, with whom Justice **Scalia** joins, dissenting.

The threshold issue presented by this case is whether, consistently with the Constitution, a State may permit a voter to participate in elections to the Congress while preventing that same person from voting for candidates to the most numerous branch of the state legislature. If we respect the plain language of Article I, § 2, cl 1, of the Constitution and the Seventeenth Amendment, the intent of the Framers, and the reasoning of the opinions in Oregon v Mitchell, 400 US 112, 27 L Ed 2d 272, 91 S Ct 260 (1970), we must answer that question in the negative.

Every person who votes in a federal election for a Member of the House of Representatives or for a United States Senator must be qualified to vote for candidates to the most numerous branch of the state legislature. The Constitution has imposed this condition of voter eligibility on congressional elections since 1789[1] and on senatorial elections since the Seventeenth Amendment was ratified in 1913.[2]

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1. Article I, § 2, cl 1, provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

2. "The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

As the Court recognizes, ante, at 227, 93 L Ed 2d, at 531, a primary election is part of the process by which Members of the House and Senate are "chosen . . . by the People." US Const, Art I, § 2, cl 1. Cf. United States v Classic, 313 US 299, 315, 85 L Ed 1368, 61 S Ct 1031 (1941). In Connecticut one of the qualifications for voters in Republican Party primary elections for the lower house of the state legislature is that the person be "on the last-completed enrolment list of such party in the municipality or voting district . . . ." Conn Gen Stat § 9-431 (1985). Thus, only enrolled Republicans may vote in the Republican primary for the state legislature.

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The Court today holds, however, that pursuant to the Republican Party of Connecticut's rules, the State must permit independent, as well as enrolled Republican, electors to vote in the Republican primary for the House of Representatives and the Senate of the United States. This facial disparity between the qualifications for electors of House and Senate candidates and the more stringent qualifications for electors to the state legislature violates both Qualifications Clauses.

The Court does not dispute the fact that the plain language of the Constitution requires that voters in congressional and senatorial elections "shall have" the qualifications of voters in elections to the state legislature. The Court nevertheless separates the federal voter qualifications from their state counterparts, inexplicably treating the mandatory "shall have" language of the Clauses as though it means only that the federal voters "may but need not have" the qualifications of state voters. In support of this freewheeling interpretation of the Constitution, the Court relies on what it describes as the Framers' purpose in enacting the first Qualification Clause and on the judgment in Oregon v Mitchell, supra, 27 L Ed 2d 272, 91 S Ct 260. Neither of these arguments withstands scrutiny.

The excerpts from the debate among the Framers quoted by the Court, ante, at 227-229, 93 L Ed 2d, at 531-533, related to a motion made by Gouverneur Morris to amend a draft of proposed Art I, § 1, that had been prepared by the Committee on Detail. To understand the full significance of that debate it is necessary first to consider the provision that Gouverneur Morris wanted to change and then to consider the nature of his proposed amendment.

Justice Stewart accurately summarized that background in his opinion in Oregon v Mitchell, supra:

"An early draft of the Constitution provided that the States should fix the qualifications of voters in congressional elections subject to the proviso that these qualifications might 'at any Time be altered and superseded by the Legislature of the United States.' The records of

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the Committee on Detail show that it was decided to strike the provision granting to Congress the authority to set voting qualifications and to add in its stead a clause making the qualifications 'the same from Time to Time as those of the Electors, in the several States, of the most numerous Branch of their own Legislatures.' The proposed draft reported by the Committee on Detail to the Convention included the following:

"'The qualifications of the electors *shall be the same*, from time to time, as those of the electors in the several States, of the most numerous branch of their own legislatures.' Art IV, § 1." Id., at 289, 27 L Ed 2d 272, 91 S Ct 260 (concurring in part and dissenting in part) (footnotes omitted; emphasis added).

Thus, the draft that the Federal Convention of 1787 was considering when Gouverneur Morris made his motion was abundantly clear—the qualifications of the federal electors "shall be the same" as the electors of the legislatures of the several States. J. Madison, Journal of the Federal Convention 449-450 (E. Scott ed 1893). This provision would ensure uniformity of electors' qualifications within each State, but would not impose a uniform nationwide standard.[3]

It was this clause that Gouverneur Morris proposed to strike in order to substitute a clause permitting Congress to prescribe the electoral qualifications or to adopt a provision "which would restrain the right of suffrage to freeholders." Id., at 467. Not surprisingly, his proposal was defeated by a vote of 7-1 because it would have disenfranchised a large number of voters in States that did not impose a property qualification on the right to vote. Id., at 467, 468, 471-472. Despite the Court's reliance on the concerns that led the

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Framers to reject the Morris proposal, they shed absolutely no light on the reasons why the Committee on Detail had previously decided that the voters' qualifications in state and federal elections "shall be the same."

The Court's reliance on the holding in Oregon v Mitchell is equally misguided. That case tested the constitutionality of certain parts of the Voting Rights Act Amendments of 1970, 84 Stat 314, including the section that lowered the minimum age of voters in both state and federal elections from 21 to 18. Four Members of the Court concluded that Congress had no such power;[4] four other Members of the Court concluded that the entire statute was valid.[5] Thus, the conclusions of all eight of those Justices were consistent with the proposition that the Constitution requires the same qualifications for state and federal elec-

3. James Wilson referred to this part of the Report of the Committee on Detail as "well considered," and "he did not think it could be changed for the better. It was difficult to form any uniform rule of qualifications, for all the States." J. Madison, Journal of the Federal Convention 467 (E. Scott ed 1893).

4. See opinion of Justice Harlan, 400 US, at 152, 212-213, 27 L Ed 2d 272, 91 S Ct 260 (concurring in part and dissenting in part), and opinion of Justice Stewart, id., at 281, 287-289, 27 L Ed 2d 272, 91 S Ct 260 (joined by Burger, C. J., and Blackmun, J.).

5. See opinion of Justice Douglas, id., at 135, 141-144, 27 L Ed 2d 272, 91 S Ct 260, and the joint opinion, id., at 229, 280-281, 27 L Ed 2d 272, 91 S Ct 260 (opinion of Brennan, White, and Marshall, JJ.).

tions.[6] Only Justice Black concluded that the statute was invalid insofar as it applied to state elections but valid insofar as it applied to federal elections. 400 US, at 125-130, 27 L Ed 2d 272, 91 S Ct 260.

Even Justice Black's reasoning, however, supports a literal reading of the Qualifications Clause in the absence of a federal statute prescribing a different rule for federal elections. For he relied entirely on the provision in Art I, § 4, that empowers Congress to alter a State's regulations concerning the times, places, and manner of holding elections for Senators and Representatives. 400 US, at 119-124, 27 L Ed 2d 272, 91 S Ct 260. In Justice

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Black's opinion, the qualifications that the State prescribed for their own voters for state offices "were adopted for federal offices unless Congress directs otherwise under Art I, § 4." Id., at 125, 27 L Ed 2d 272, 91 S Ct 260.

In this case there is no federal statute that purports to authorize the State of Connecticut to prescribe different qualifications for state and federal elections. Thus, there is no authority whatsoever for the Court's refusal to honor the plain language of the Qualifications Clauses. An interpretation of that language linking federal voters' qualifications in each State to the States' existing qualifications exactly matches James Madison's understanding:

"The provision made by the Convention appears therefore, to be the best that lay within their option. It must be satisfactory to every State; because it is conformable to the standard already established, or which may be established by the State itself." The Federalist No. 52, p 354 (J. Cooke ed 1961).

I respectfully dissent.

Justice **Scalia**, with whom The **Chief Justice** and Justice **O'Connor** join, dissenting.

Both the right of free political association and the State's authority to establish arrangements that assure fair and effective party participation in the election process are essential to democratic government. Our cases make it clear that the accommodation of these two vital interests does not lend itself to bright-line rules but requires careful inquiry into the extent to which the one or the other interest is inordinately impaired under the facts of the particular case. See Anderson v Celebrezze, 460 US 780, 788-790, 75 L Ed 2d 547, 103 S Ct 1564 (1983); Storer v Brown, 415 US 724, 730, 39 L Ed 2d 714, 94 S Ct 1274 (1974). Even so, the conclusion reached on the individuated facts of one case sheds some measure of light upon the conclusion that will be reached on the individuated facts of the next. Since this is an area, moreover, in which the predictability of decisions is important,

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I think it worth noting that for me today's decision already exceeds the permissible limit of First Amendment restrictions upon the States' ordering of elections.

6. This was certainly the view of Justice Harlan, see id., at 210-211, 27 L Ed 2d 272, 91 S Ct 260, and of Justice Stewart and the two Justices who joined his opinion, see id., at 287-290, 27 L Ed 2d 272, 91 S Ct 260. As Justice Stewart observed: "The Constitution thus adopts as the federal standard the standard which each State has chosen for itself." Id., at 288, 27 L Ed 2d 272, 91 S Ct 260. The opinions of Justice Douglas and Justice Brennan are silent on the issue.

In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists. There is no question here of restricting the Republican Party's ability to recruit and enroll Party members by offering them the ability to select Party candidates; Conn Gen Stat § 9-56 (1985) permits an independent voter to join the Party as late as the day before the primary. Cf. Kusper v Pontikes, 414 US 51, 38 L Ed 2d 260, 94 S Ct 303 (1973). Nor is there any question of restricting the ability of the Party's members to select whatever candidate they desire. Appellees' only complaint is that the Party cannot leave the selection of its candidate to persons who are *not* members of the Party, and are unwilling to become members. It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an "association" with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use. See Democratic Party of United States v Wisconsin ex rel. La Follette, 450 US 107, 130-131, 67 L Ed 2d 82, 101 S Ct 1010 (1981) (Powell, J., dissenting) ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights"; one must "look closely at the nature of the intrusion, in light of the nature of the association involved, to see whether we are presented with a real limitation on First Amendment freedoms").

The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably

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implicates an associational freedom—but it can hardly be thought that that freedom is unconstitutionally impaired here. The Party is entirely free to put forward, if it wishes, that candidate who has the highest degree of support among Party members and independents combined. The State is under no obligation, however, to let its party primary be used, instead of a party-funded opinion poll, as the means by which the party identifies the relative popularity of its potential candidates among independents. Nor is there any reason apparent to me why the State cannot insist that this decision to support what might be called the independents' choice be taken *by the party membership in a democratic fashion*, rather than through a process that permits the members' votes to be diluted—and perhaps even absolutely outnumbered—by the votes of outsiders.

The Court's opinion characterizes this, disparagingly, as an attempt to "protec[t] the integrity of the Party against the Party itself." Ante, at 224, 93 L Ed 2d, at 529. There are two problems with this characterization. The first, and less important, is that it is not true. We have no way of knowing that a majority of the Party's members is in favor of allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party. That decision was not made by democratic ballot, but by

the Party's state convention—which, for all we know, may have been dominated by officeholders and office seekers whose evaluation of the merits of assuring election of the Party's candidates, vis-à-vis the merits of proposing candidates faithful to the Party's political philosophy, diverged significantly from the views of the Party's rank and file. I had always thought it was a major purpose of state-imposed party primary requirements to protect the general party membership against this sort of minority control. See Nader v Schaffer, 417 F Supp 837, 843 (Conn), summarily aff'd, 429 US 989, 50 L Ed 2d 602, 97 S Ct 516 (1976). Second and more important, however, *even if* it were the fact that the majority of the Party's members wanted its candidates to be

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determined by outsiders, there is no reason why the State is bound to honor that desire—any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather than by primary, or by the party's executive committee in a smoke-filled room. In other words, the validity of the state-imposed primary requirement itself, which we have hitherto considered "too plain for argument," American Party of Texas v White, 415 US 767, 781, 39 L Ed 2d 744, 94 S Ct 1296 (1974), presupposes that the State *has* the right "to protect the Party against the Party itself." Connecticut may lawfully require that significant elements of the democratic election process be democratic—whether the Party wants that or not. It is beyond my understanding why the Republican Party's delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.

In the case before us, Connecticut has said no more than this: Just as the Republican Party may, if it wishes, nominate the candidate recommended by the Party's executive committee, so long as its members select that candidate by name in a democratic vote; so also it may nominate the independents' choice, so long as its members select him by name in a democratic vote. That seems to me plainly and entirely constitutional.

I respectfully dissent.

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FEDERAL ELECTION COMMISSION, Appellant

v

MASSACHUSETTS CITIZENS FOR LIFE, INC.

479 US 238, 93 L Ed 2d 539, 107 S Ct 616

[No. 85-701]

Argued October 7, 1986. Decided December 15, 1986.

Decision: Ban on corporate election expenditures under § 316 of Federal Election Campaign Act (2 USCS § 441b) held to violate freedom of speech as applied to nonprofit corporation formed to promote "pro-life" causes.

SUMMARY

A nonprofit, nonstock corporation, formed to promote "pro-life" causes, used its general treasury funds to prepare and distribute a "special election edition" of its newsletter which (1) urged readers to "vote pro-life" in an upcoming primary election, (2) reported the positions of candidates on "pro-life" legislation, and (3) carried pictures of candidates who supported such legislation, but (4) disclaimed any endorsement of particular candidates. Investigating a complaint, the Federal Election Commission (FEC) found probable cause to believe that this publication violated the provision of § 316 of the Federal Election Campaign Act (2 USCS § 441b) which bars corporations from using treasury funds to make expenditures in connection with any election to any public office. After conciliation efforts failed, the FEC filed a complaint against the corporation in the United States District Court for the District of Massachusetts, seeking a civil penalty and other appropriate relief. The District Court dismissed the complaint, holding (1) that the special edition did not violate § 441b, and (2) that if § 441b did prohibit this publication, then it violated First Amendment freedoms of speech, press, and association as applied to this corporation (589 F Supp 646). The United States Court of Appeals for the First Circuit affirmed, holding (1) that § 441b was applicable to the special edition, but (2) that § 441b violated the First Amendment as so applied (769 F2d 13).

On appeal, the United States Supreme Court affirmed. In an opinion by BRENNAN, J., part of which (Parts I, II, III-B and III-C) constituted the opinion of the court, expressing in part (as to holding 1 below) the unani-

Briefs of Counsel, p 1091, infra.