SB

297

7-LS1939\G
Casey
2/14/92

CS FOR SENATE BILL NO. 297 (STATE AFFAIRS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to primary election ballots, nomination proceedings administered by political parties, and nomination for general elections."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 15.25.010 is amended to read:

Sec. 15.25.010. PROVISION FOR PRIMARY ELECTION. Candidates for the elective state executive and state and national legislative offices **who state an affiliation with a political party in a declaration of candidacy under AS 15.25.030 may** [SHALL] be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter **or nominated as otherwise prescribed in AS 15.25.065**.

*** Sec. 2.** AS 15.25.060 is amended to read:

Sec. 15.25.060. PREPARATION AND DISTRIBUTION OF **PRIMARY ELECTION** BALLOTS. **There shall be only one ballot for a primary election.** 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. **Except as provided**

in (b), the [THE] director shall place the names of all candidates who have properly filed **under AS 15.25.030** in groups according to offices filed for, without regard to party affiliation. The names for each office shall be rotated as provided for the general election ballot. No blank spaces shall be provided on the ballot for the writing or pasting in of names.

* **Sec. 3.** AS 15.25.060 is amended by adding a new subsection to read:

(b) A candidate declaring affiliation, under AS 15.25.030(a), with a political party choosing to conduct an alternative nomination proceeding under AS 15.25.065 may not be placed on a primary election ballot.

* **Sec. 4.** AS 15.25 is amended by adding a new section to read:

Sec. 15.25.065. ALTERNATIVE NOMINATION PROCEEDING CONDUCTED BY A POLITICAL PARTY. (a) A political party may choose to nominate one candidate for an office in a proceeding other than a primary election administered by the director. A party that chooses to nominate a candidate under this subsection shall serve written notice of its decision to do so no later than 180 days before the date of the primary election.

(b) A political party that chooses to nominate a candidate under (a) of this section is responsible to conduct the political party's nomination proceedings and to determine the political party's own nomination procedures. A political party whose nomination procedures include polling by the party at the same times and locations as primary election pollings administered by the director shall include a description of the political party's polling procedure in the written notice required under (a) of this section.

(c) Except as otherwise provided in this subsection, a political party shall complete nomination under (a) of this section by delivering written notice identifying the political party's nominee to the director on or before five o'clock in the evening on the day of the primary election. A party whose alternative nominating proceeding consists of polling by the party at the same times and locations as primary election pollings administered by the director shall deliver written notice identifying the political party's nominee on or before five o'clock in the evening on the Thursday immediately following the primary election.

* **Sec. 5.** AS 15.25.090 is amended by adding new subsections to read:

(b) A person qualified to vote in a primary election may vote for a candidate whose name appears on the primary election ballot without regard to political party affiliation.

(c) A person registered as affiliated with a political party conducting an alternative

nominating proceeding under AS 15.25.065 may vote for a candidate in the primary election unless the party's alternative nominating proceeding includes polling by the party at the same times and locations as primary election pollings administered by the director.

* **Sec. 6.** AS 15.25.100 is repealed and reenacted to read:

Sec. 15.25.100. PLACEMENT OF NOMINEES ON GENERAL ELECTION BALLOT. (a) Except as provided under (b) if this section, a candidate receiving the highest number of votes in a primary election among all candidates for an office who declared affiliation with the same political party under AS 15.25.030 is nominated for the general election ballot.

(b) A candidate nominated by a political party under AS 15.25.065(a) is nominated for the general election ballot. A candidate declaring affiliation under AS 15.25.030(a) with a political party that chooses to conduct an alternative nomination proceeding under AS 15.25.065 may not be nominated for the general election ballot from the primary election ballot.

(c) A candidate who does not declare affiliation with a political party under AS 15.25.030(a) may be nominated for the general election ballot as provided in AS 15.25.140 - 15.25.190.

* **Sec. 7.** AS 15.25.150 is amended to read:

Sec. 15.25.150. DATE OF FILING PETITION. The petition is filed with the director by actual physical delivery in person at or before 5:00 p.m., prevailing time, **on the Friday immediately preceding the day of the primary election** [AUGUST 1 IN THE YEAR IN WHICH A GENERAL ELECTION IS HELD FOR THE OFFICE], or by actual physical delivery to the director by registered or certified mail, return receipt requested **that** [WHICH] is postmarked at or before 5:00 p.m., prevailing time, **on the Friday immediately preceding the day of the primary election** [AUGUST 1 IN THE YEAR IN WHICH A GENERAL ELECTION IS HELD FOR THE OFFICE], and received not more than 15 days after that time. If the postmark is illegible, a dated receipt from the post office where dispatched shall be acceptable as evidence of mailing. [IF AUGUST 1 IS A SUNDAY OR HOLIDAY, THE DEADLINES FOR POSTMARKING AND RECEIPT OF THE PETITION SHALL BE EXTENDED 24 HOURS IN EACH INSTANCE.]

ONE BALLOT FOR ALL

Proposed Draft: CSSB-297(STA)

ONE BALLOT System would provide one ballot for everyone regardless of political affiliation. Ballots should remain virtually the same as ballot style used in previous elections.

WHO IS ON THE BALLOT ? The names of all candidates affiliated with a recognized political party seeking nomination for partisan political office.

BALLOT WILL BE KEYED ACCORDING TO PARTY AFFILIATION. The poll worker will key your ballot according to your party affiliation (Alaska Independent Party, Democrat, Green, Republican, non-partisan). Your name will not appear on the ballot.

YOU MAY VOTE FOR THE CANDIDATE OF YOUR CHOICE REGARDLESS OF YOUR PARTY AFFILIATION. While political parties may adopt rules governing which votes may be counted in their primary Alaskans will be able to cast their vote for the candidate of their choice.

PARTY RULES WILL DETERMINE WHICH BALLOTS ARE TO BE COUNTED TO NOMINATE CANDIDATES. The Division of Elections will make every effort to educate voters about party rule changes which may result in limiting which ballots cast are counted in selecting partisan political nominees at the primary.

EXAMPLE. Joe and Jane seek the Republican nomination for a House seat. Joe receives 4,000 votes and Jane gets 3,500 vote after all the votes are counted. But REPUBLICAN PARTY RULES only permit counting votes cast by registered Republicans or non-partisans for the purpose of nominating a Republican candidate for partisan political office. Division of Elections runs the ballots again counting only Republican and non-partisan ballots. Now, Jane has 3,100 votes while Joe only has 2,800. Jane would be the Republican party nominee.

GOOD POINTS:

- ✔ Little or no increase in election costs
- ✔ Alaskans are free to vote for whom they wish
- ✔ Preserves simple, one ballot system
- ✔ Accommodates political parties wishing to limit or close their primary nominating process
- ✔ No objections with Division of Elections
- ✔ No initial objections from Law

QUESTIONS:

How will party rules be impacted by this system?

ALASKA INDEPENDENT PARTY : Rules permit counting votes from any source regardless of political affiliation as long as voter has not voted in another primary ballot.

DEMOCRATIC PARTY : Rules permit votes from any source regardless of political affiliation as long as voter has not voted in another primary ballot.

GREEN PARTY OF ALASKA : Permits only Greens and non-partisan registrants to participate in nominating their candidates. Greens spokespersons have indicated they would consider rule changes in the event an open ballot system was adopted.

REPUBLICAN PARTY: Permits counting only registered Republican and non-partisans ballots cast for Republican candidates.

Can voters cross party lines and vote for candidates of different parties?

Voters can vote for the candidates of their choice. Party rules will determine whether the vote counts toward the nominating process or not. A vote cast by a Democratic voter for a Republican candidate, for example, will not count towards the Republican candidate's nomination but the voter will certainly have made a statement.

I'm a Republican. Will my ballot be completely disqualified if I vote for just one candidate who is not a Republican?

Good question. Political parties have the right to establish their own rules with respect to who can vote for their candidates in the nominating process. This is a matter of interpretation. There are those who have suggested a political party could adopt rules that would disqualify counting any ballot that contains a vote for a candidate not affiliated with their party.

Prepared by: Senate State Affairs, M. Gifford, legislative aide x4522 2/21/92

Alaska State Legislature
Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

Date: Friday, February 14, 1992 - 1:15 p.m. Beltz

Senate State Affairs Committee

AGENDA

SB-336 PERS credit for certain seasonal employees (Duncan)
CS offered by sponsor **Fiscal Note (other funds)**

SCR-30 Support Open Primary (Cotten, Eliason, Rodey)
Fiscal Note ZERO

SB-297 Primary Election Law (St. Affairs) CS offered.....
New Fiscal Note to original 95.0

SB-338 PERS credit for temporary service (Duncan)
TELECONFERENCE

SB-282 PERS credit for BIA service (Adams)
TELECONFERENCE

HB-266 BIA School Contract Employment (Navarre)
TELECONFERENCE

Next Scheduled Meeting: Friday, February 21 1992 - 2 p.m. Beltz Room

Senators Rodey, (Chair), Duncan (V.Chair), Fischer, Uehling, Pourchot

Alaska State Legislature
Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

February 14, 1992

To: Members, Senate State Affairs

From: Senator Pat Rodey
Committee Chair

Subj: **CSSB-297(STA) / Primary Election Law**

The CS before you attempts to accommodate both the desire to maintain a single open primary ballot system for the voters while also offering an option to political parties that decide to limit participation in their candidate nominating process.

ONE BALLOT. (Sec. 2) Very simply, the state will provide one primary nominating ballot open to all candidates affiliated with legally recognized political parties. (A recognized political party is a party whose candidate for governor received at least 3% of the vote cast in the previous general election for governor; AS 15.60.010 (20).

CANDIDATES AFFILIATED WITH POLITICAL PARTIES NOT PARTICIPATING IN PRIMARY MAY NOT APPEAR ON THE PRIMARY ELECTION BALLOT (Sec. 3)

PARTIES MAY DECIDE TO NOT PARTICIPATE IN THE PRIMARY ELECTION. (Sec. 4) A political party may choose to not participate in the state primary election. They are responsible for conducting their own nominating system which may be by any method they choose (nominating convention(s), private ballot, other means). Political Parties nominating by means other than the open primary ballot must notify the Division of Elections of their intent not to use the state ballot 180 days before the date of the primary election. **(Sec. 4 (a)**

1) party may choose to hold a separate, limited or closed primary election simultaneously with the state primary election but is responsible for its conduct. (Party may use voter rosters, at the polling place, etc., but is responsible for ballots, and all other arrangements, including distribution, collection, and counting of ballots). **(Sec. 4 (b)**

2) if a party holds a separate, but simultaneous election, the party deliver notice of the nominees to the director by 5 p.m. on Thursday following the primary election. **(Sec. 4 (c)**

PERSONS MAY VOTE IN PRIMARY BALLOT WITHOUT REGARD TO PARTY AFFILICATION (Sec. 5 (b)

Note: Sec. 5 (c) states: a person can vote in the primary election unless the person's party elects to have a separate but simultaneous ballot as the primary election - they are then restricted to voting in their party's closed election. STA CS may want to provide the voter with an option - choose own ballot or be forced to take party ballot. (If Division allows same day reregistration that is a partial solution but there may be those who wish to vote in open ballot rather than on their parties closed/limited ballot.)

CANDIDATES NOMINATED AT OPEN PRIMARY ARE ON GENERAL ELECTION BALLOT (Sec. 6 (a)

CANDIDATE AFFILIATED WITH POLITICAL PARTY NOT PARTICIPATING IN PRIMARY BALLOT MAY NOT BE NOMINATED FOR GENERAL ELECTION FROM THE PRIMARY BALLOT (Sec. 6(b)

NON-PARTISAN CANDIDATES MAY PETITION FOR GENERAL ELECTION BALLOT (Sec. 6 c)

NON-PARTISAN CANDIDATES PETITIONING FOR GENERAL ELECTION BALLOT must submit their petition on the Friday **BEFORE** primary election (Division requested this date rather than primary election day to avoid confusion at election office on election day.) **(Sec. 7)**

- end -

Notes:

1) June 1st, is the deadline for primary ballot candidates to file with the division of elections. Committee may wish to consider requiring same deadline for candidates affiliated with political parties not participating in primary election.

2) Question: Can a candidate not nominated by a political party not participating in the primary election then re-register as non-partisan and petition to be on the general election ballot?

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 February 13, 1992

SUBJECT: Alternative draft of bill relating to primary elections (Work Order No. 7-LS1939)

TO: Senator Pat Rodey
Attention: Max Gifford

FROM: Robert Glennon Casey RGC 2-13-92
Legislative Counsel

The bill draft accompanying this memorandum is the alternative version containing the changes you requested. At present, it is not styled "CS TO SENATE BILL 297 (STATE AFFAIRS)," although I understand that it may become such a committee substitute.

The severability clause that we discussed is not included in the bill draft, since the following language from AS 01.10.030 provides automatic severability:

> Sec. 01.10.030. CONSTITUTIONALITY AND SEVERABILITY. Any law heretofore or hereafter enacted by the Alaska legislature which lacks a severability clause shall be construed as though it contained the clause in the following language, "If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of this Act and the application to other persons or circumstances shall not be affected thereby."

RGC:gc
92-125.glc

Enclosure

7-LS1939\D
Casey
2/13/92

SENATE BILL NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY

Introduced:
Referred:

A BILL

FOR AN ACT ENTITLED

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* Sec. 2. AS 15.25.060 is amended to read:

Sec. 15.25.060. PREPARATION AND DISTRIBUTION OF <u>PRIMARY ELECTION</u> BALLOTS. <u>There shall be only one ballot for a primary election.</u> 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. <u>Except as provided</u>

in (b), the [THE] director shall place the names of all candidates who have properly filed **under AS 15.25.030** in groups according to offices filed for, without regard to party affiliation. The names for each office shall be rotated as provided for the general election ballot. No blank spaces shall be provided on the ballot for the writing or pasting in of names.

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(b) A candidate declaring affiliation, under AS 15.25.030(a), with a political party choosing to conduct an alternative nomination proceeding under AS 15.25.065 may not be placed on a primary election ballot.

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Sec. 15.25.065. ALTERNATIVE NOMINATION PROCEEDING CONDUCTED BY A POLITICAL PARTY. (a) A political party may choose to nominate one candidate for an office in a proceeding other than a primary election administered by the director. A party that chooses to nominate a candidate under this subsection shall serve written notice of its decision to do so no later than 180 days before the date of the primary election.

(b) A political party that chooses to nominate a candidate under (a) of this section is responsible to conduct its own nomination proceedings to determine the political party's own nomination procedures.

(c) A political party shall complete nomination under (a) of this section by delivering written notice containing the name of the party's nominee to the director on or before five o'clock in the evening on the day of the primary election.

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* **Sec. 6.** AS 15.25.100 is repealed and reenacted to read:

Sec. 15.25.100. PLACEMENT OF NOMINEES ON GENERAL ELECTION BALLOT. (a) Except as provided under (b) if this section, a candidate receiving the highest number of votes in a primary election among all candidates for an office who declared affiliation with the same political party under AS 15.25.030 is nominated for the general election ballot.

(b) A candidate nominated by a political party under AS 15.25.065(a) is nominated for

the general election ballot. A candidate declaring affiliation under AS 15.25.030(a) with a political party that chooses to conduct an alternative nomination proceeding under AS 15.25.065 may not be nominated for the general election ballot from the primary election ballot.

(c) A candidate who does not declare affiliation with a political party under AS 15.25.030(a) may be nominated for the general election ballot as provided in AS 15.25.140 - 15.25.190.

Implementation plan for Primary Election for individual political parties.

Reference Senate Bill Number 297 and House Bill Number 327.

Submitted under the Employee Incentive Award Program,

by Steven Endorf, 465-4881.

Steven Endorf

Background:

In previous elections, the Candidate Ballot card, had each race, for an office, listed separately with the candidate's names rotated on top. The race with the most candidates determines the number of sequences. Each ballot card has an identifying sequence, a three-digit number, punched at the bottom of the card (See Figure 1.). This sequence is used by the ballot counting program to identify which punched hole goes with which candidate's name in which race.

The voter was allowed to select any candidate in a particular race. The Republican primary restriction rule and subsequent changes by the other political parties in Alaska has made a dramatic change in voting for candidates in a primary election. How these changes are implemented by the Legislature and the Division of Elections can be expensive burden or an efficient bargain.

Proposal:

I am proposing an alternative implementation to the one given by the Division of Elections, whose reported estimate of expenses is $633,000. Of that $633,000, Elections estimated about $64,000 to train additional election workers, $60,000 to educate voters and $180,000 to print multiple sets of ballots, among other costs (Juneau Empire, 2/11/92). One of the unreported costs is modifying the vote counting software.

The alternative I am proposing is simple and its implementation and continuous costs should be minimal. It basically consists of putting a fixed area at the top of each Candidate ballot listing

each recognized political party, with a punch spot next to the political party's name (See Figure 2.).

This punch spot would be punched, corresponding to the voter's party registration, by the election worker who hands the ballot to the voter. If the voter has not previously declared a party then the voter would specify a party to the election worker, who would punch the ballot, prior to the voter entering the voting booth.

The vote counting software would only count votes for the candidates' of the political party selected on the ballot, depending on the political party's primary rules. If more than one political party was selected then no votes on that ballot would be counted.

There should not be a need to have additional election workers. Educating the voter should not cost anywhere near the $60,000. All that would be needed would be a poster, in large type, that had wording very similar to the above italicized paragraph. In most cases, the number of different sequences would be reduced and there would be no need for multiple, separate ballots, so printing costs might actually be reduced. The only possible cost increase would be the modifications to the ballot counting software, which might run as much as ~~$15,000~~ $7,000 *. All the other costs should be severely reduced or eliminated. The estimated cost savings is approximately ~~$600,000~~ * $80,000+. Some small changes would have to be made to Senate Bill #297 and House Bill #327 to allow for the above method instead of forcing separate ballots for each political party.

* based on new estimates by Div. of Elections, Juneau Empire, 2-18-92.

Figure 1.
Example of the Current Ballot structure
(Five different sequences)

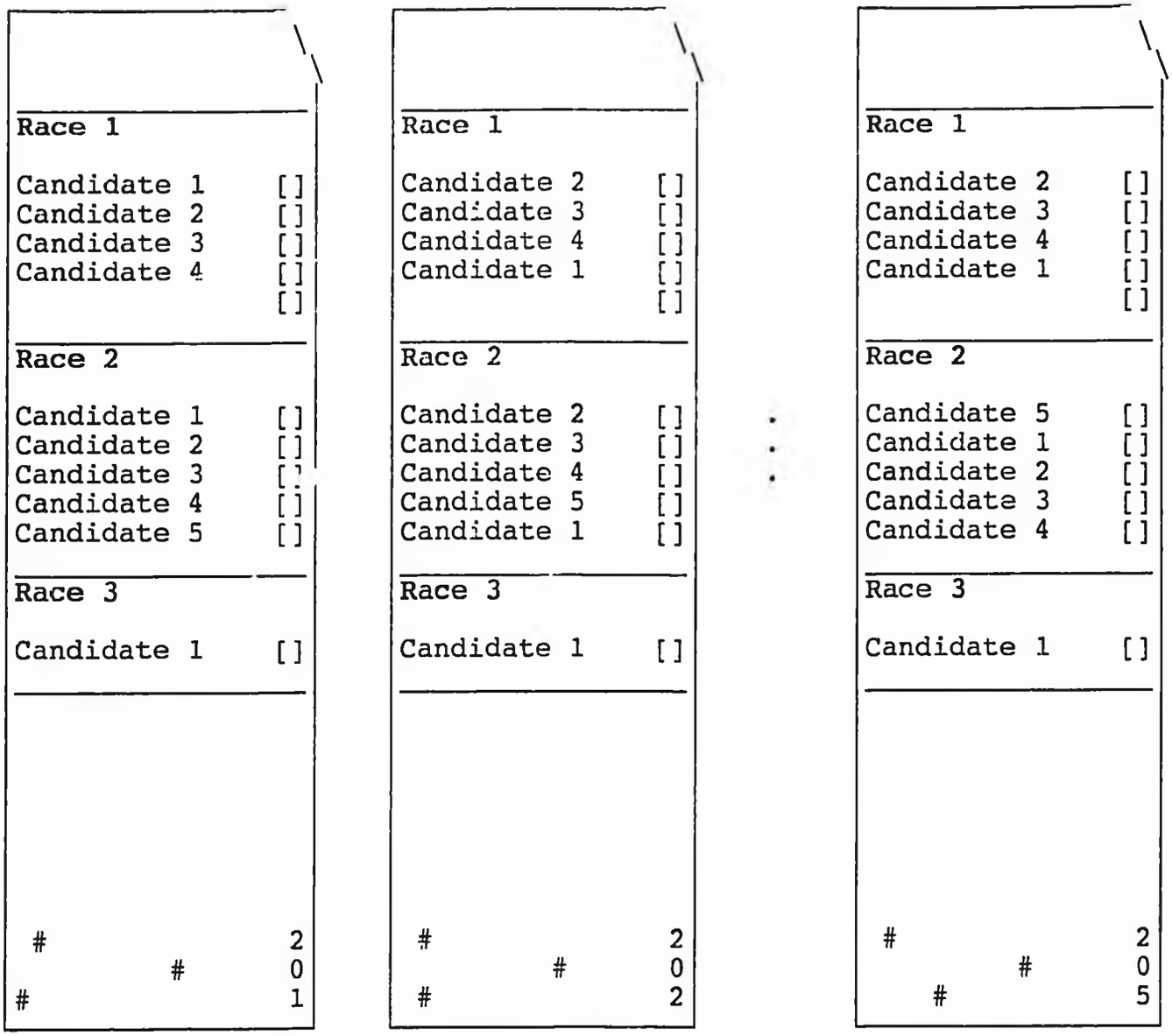
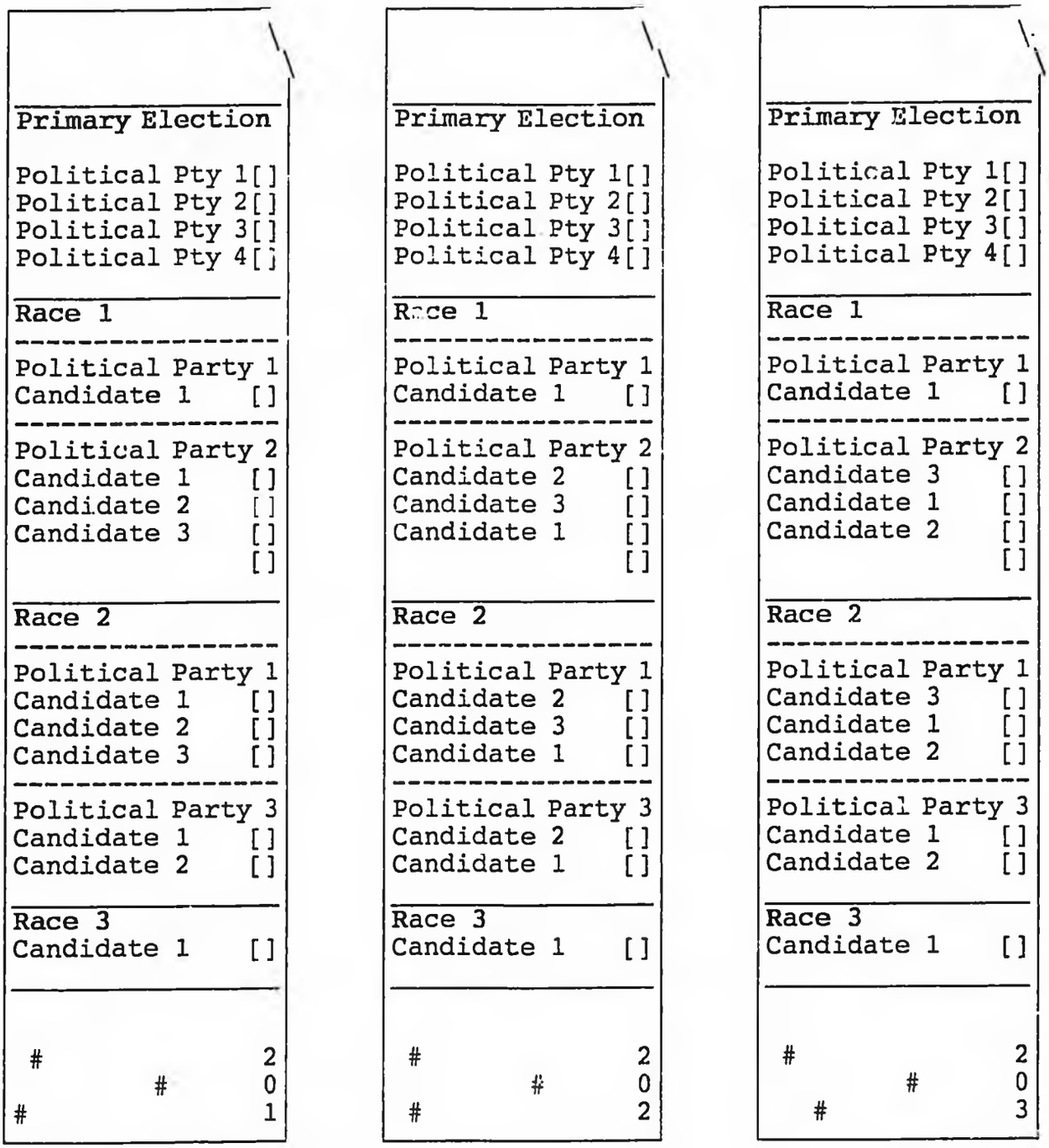


Figure 2.
Example of the Proposed Ballot structure
(Three different sequences)



STATE OF ALASKA

OFFICE OF THE GOVERNOR

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

M E M O R A N D U M

To: Senator Patrick Rodey, Chairperson
Senate State Affairs Committee
Alaska State Legislature

From: Charlot E. Thickstun, Director
Division of Elections
Office of the Governor

Subj: Status of Primary Rule Changes

Date: January 24, 1992

Since the last Senate State Affairs Committee hearing, the Division of Elections has been working closely with the political parties regarding implementation of the semi-closed primary system.

The Alaska Democratic Party (ADP) Alaska Independence Party (AIP) and the Green Party of Alaska (GPA) were sent letters requesting that they indicate to the Division how they would proceed regarding any primary rule changes. The Senate State Affairs Committee was sent copies of these letters.

The ADP informed the Division in late December that it would send its September primary rule changes to the Department of Justice for preclearance. As you recall the Democrats adopted a rule change which would allow any voter, regardless of registration to vote for its candidates in the primary as long as the voter had not voted in another primary or at a convention.

The Green Party contacted the Division last week. Its Chair, Joni Whitmore requested information on preclearance by Justice and the Division sent out the information that day. We expect the Green Party to also submit its rule changes for preclearance in the very near future. The Green Party adopted a rule change that would allow only registered Greens and nonpartisan and undeclared voters to vote for its candidates in the primary.

The Division has not heard from the AIPs as yet, but has been informed that the party will meet in February to discuss primary rule changes.

The Division still maintains that political parties should finalize any rule changes that affect the conduct of the primary

by March of this year. If possible, we would like this date to include preclearance by the Department of Justice.

In addition to working with the parties, the Division has been reviewing all its operations to determine what changes will need to be made to implement the new party rules.

The following is an analysis of what operational changes must occur to implement the party rule changes for the 1992 primary. These procedures have been designed with the intent to minimize confusion and election worker discretion at the polls.

ABSENTEE BALLOT APPLICATIONS

The Division is required by statute to send absentee ballot applications to all those who request one so that the voter can receive a ballot for all elections occurring in a calendar year. The Division has normally sent this form in January to all voters in our database who have sent in requests for application.

The primary rule changes will require the Division to ask the applicant to indicate which ballot type he or she wants in the primary election. Since only one election is scheduled in January for which we have already sent out the absentee ballots, and no elections are scheduled for February, the Division will postpone sending out its applications until late spring of 1992.

ELECTION WORKER TRAINING

The Division typically trains all of its 3,500 poll workers every two years in all precincts in the spring of an election year. This year the Division will add about 50 new precincts to its current total of 438 due to reapportionment. New instruction material will need to be developed to explain the differing procedures for the primary and general. This material will be color-coded for each election process. Additionally, election workers will be instructed not to discuss with voters who is on what ballot because this would constitute a form of electioneering at the polls. The workers will tell the voter which ballot type they are eligible to receive based on their current registration and then also instruct the voter that they may change their affiliation in the Questioned Ballot line and receive a different ballot type.

BALLOTS

Since the Democrats, Greens and Republicans have changed their primary rules and have either had them sent to DOJ or intend to, the Division anticipates that there will be four candidate ballots for the primary election. The AIP will receive a separate party ballot by default.

The addition of three extra ballots will cost the Division

$180,000 over its usual expense of ballot printing.

PRECINCT REGISTERS

The precinct registers used by the election workers at the polls will be redesigned to allow for accounting of ballot type given to the voter. An additional column will be added with the symbols, "AI," "D," "G" or "R." The election worker will circle the ballot type given the voter. The number of each type will be accounted for when the polls close.

Additionally, the Voter Registration and Election Management Systems (VREMS) will be reprogrammed to print out what ballot type each individual voter is eligible to receive based on their current registration and the political party rules. This should help alleviate election worker error when giving a particular party ballot to a voter.

VOTE COUNTING EQUIPMENT

The Division will need to modify its vote counting computer program to count multiple candidate ballots. This will increase the usual cost of programming by about $20,000.

VOTER EDUCATION

When the Division opposed the RPA's motion to implement its 1990 party rule change, the Division testified that rural voters would be disenfranchised because they would not know about the primary rule changes. This concern was also expressed to the Department of Justice. The Division will conduct a voter education program in order to inform voters about how the primary will be different. We anticipate that this will increase our usual advertising costs by about $25,000.

REGISTRATION FORM

The current registration form is being updated to inform voters that their party affiliation may effect who they can vote for in the primary election. Currently, party affiliation choice on the form is optional. About 45% of the 287,071 registered voters have indicated a party choice. Fifty-five percent are either nonpartisan or undeclared.

The Division will instruct voters to contact the political party of their choice to determine whether they can vote in the party's primary election.

Alaska State Legislature
Senate

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

SENATE STATE AFFAIRS COMMITTEE

Primary Election Law (SB-297, HB-327)

(Materials for Joint H/S State Affairs)

Attached Materials:

Feb. 4	**Gaguine (A.G.) to Coghill:** "Whether political parties can choose candidates through conventions"
Jan. 31	**Casey (Leg. Counsel) to Kubina:** "Political party's constitutional right to nominate candidates by means of party convention."
Jan. 24	**Sykes (Green Party) to Kubina:** Commentary on proposed legislation / suggests Austrailian System
Oct. 25 '91	**Harrison (Leg. Research) to Kubina:** Preferential Ballots (Australian systems and others)
Attached	**Procedures for Party Primaries in other States**
SB-297	**Bill file** from earlier committee meeting, 1/24/92
Bill File	**File from May 8, 1991,** Div. of Elections overview at end of last year's session

MEMORANDUM

State of Alaska

Department of Law

TO: Hon. J.B. Coghill
Lieutenant Governor

DATE: February 4, 1992

FILE NO:

TEL. NO: 465-3600

SUBJECT: Whether political parties can choose candidates through conventions

FROM: John B. Gaguine
Assistant Attorney General
Governmental Affairs - Juneau

You have asked whether a political party, as defined in AS 15.60.010(20) ("an organized group of voters that represents a political program and that nominated a candidate for governor who received at least three percent of the total votes cast at the preceding general election for governor"), can under current law choose to forego a primary election and instead choose its candidates by convention. We believe that the answer is no.

AS 15.25.010 - 15.25.130 clearly provides that political parties choose their candidates through the primary process. The question is whether the decision of the United States Supreme Court in Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 93 L.Ed.2d 514 (1986), gives the parties the right to override this law and opt for a convention. We believe that a court would answer this question in the negative.

In Tashjian, as you are aware, the Court held that a party's rules regarding who may vote in its primary override state laws specifying who may vote. It could be argued that Tashjian also gives the party the power to choose its nominating procedures altogether, and thus forego a statutorily mandated primary. However, we do not believe that a court would read Tashjian this broadly.

Cases like Tashjian require a balancing of the party's First Amendment interest in free association with the state's interest in prescribing nominating procedures. In Tashjian the State of Connecticut could not advance any interest in its law, which limited a party's primary to registered members of that party, sufficiently compelling to override the party's choice to open its primary to independents. However, no one in Tashjian was trying to do away with a primary altogether. If a party in Alaska did request to forego the primary, we believe that a court would probably find that the state's interest in insisting on a public primary election -- instead of allowing a small number of party members to choose its candidates in the proverbial "smoke-filled room" -- would be sufficiently compelling to override the party's wishes. The history of the United States clearly illustrates the potential evils of nomination by convention, and nearly all, if not

all, states now choose their party nominees by primary election. Since, however, there is no authority on this point, we are not prepared to say absolutely that the state would win a court case on this issue.

You also have asked whether the legislature could choose to abolish the primary election process, and leave parties to choose their nominees as they see fit (likely through a convention). We believe that the answer is yes. As a matter of federal constitutional law, Tashjian states that a state is under no obligation to hold a primary. 479 U.S. at 218, 93 L.Ed.2d at 526. And there is nothing in the state constitution that requires primary elections. It is possible that an Alaska court might interpret some provision of the state constitution as requiring a primary, but we think that this is highly unlikely, as we cannot think of a constitutional provision that the court could read as guaranteeing such a right.

Please let us know if we can be of further assistance.

cc: Charlot Thickstun, Director
Division of Elections

JBG:lmk

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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240 Main Street, Suite 500
Juneau, Alaska 99801-2101

MEMORANDUM January 31, 1992

SUBJECT: A political party's constitutional right to nominate candidates by means of party convention (Work Order No. 7-LS1920)

TO: Representative Gene Kubina
Attn: Annie

FROM: Robert Glennon Casey RGC 1-31-92
Legislative Counsel

I. INTRODUCTION

You have requested a discussion of three related constitutional issues surrounding control of nomination processes by political parties. This memorandum addresses those issues.

II. SUMMARY

Under the federal constitution, a political party has the right to determine the process by which its "nominees" are chosen. Thus a party would have the right to do so by party convention. The state constitution contains no conflicting provision. If there were conflict, however, between state and federal constitutional law, federal constitutional law would predominate.

On the other hand, this constitutional right is less potent than it might appear to be. Presence on a general election ballot of a party's "nominee" is a privilege conferred by statute, but it is not a right guaranteed under the state or federal constitution. This statutory privilege could probably be withdrawn under certain circumstances. That would leave a party with ability to "nominate" a candidate according to its own procedures but no particular ability to ensure that the candidate's name appeared on the general election ballot. Such difficulty is already faced by minor political parties in Alaska.

III. DISCUSSION

1. The federal constitutional right of association includes the right of a political party to nominate its candidates by party convention. The First Amendment includes the

right to "associate" with whomever one chooses. This is generally classified as a "fundamental right" under prevailing constitutional analysis. That means that a statute or state constitutional provision that compromised the right of association would probably be ruled unconstitutional.

Nomination of candidates by political parties was held to be an exercise of that right in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986). The U.S. Supreme Court ruled that a political party had discretion to design the mechanism for determining its "nominees." (Enclosed is a copy of the decision.)

A political party could apply the right observed in Tashjian in several different directions. For example, a party could open an otherwise closed primary election for its own candidates. That is what the Republican Party of Connecticut succeeded in doing in Tashjian. Alternatively, a party could close an otherwise open primary election for its candidates. Such a situation is brewing in Alaska. A major political party in Alaska could simply dispense with primary elections and nominate its candidates at a party convention. In any of these cases, a state law that interfered with a party's right to determine the manner of nominating its candidates would be declared unconstitutional.

Applying the constitutional right announced in Tashjian to AS 15.25.100, once a major political party (see definition of "political party" at AS 15.60.010(0)) selected a nominee at its own convention, Alaska's elections authorities would be required to place the nominee's name on the general election ballot.

2. Lack of Contrary Provision in the Alaska Constitution. I do not find any conflicting provision in the Alaska Constitution. The state constitution does not address party control of nominations.

If anything, the Alaska Constitution accords with the federal constitutional right described above. Several sections in Art. I probably affirm by implication the right of a political party to associate and thus determine by itself the manner of choosing its nominees for public office.

The most straightforward example of this would be Art I, § 6:

> The right of the people peaceably to assemble, and to petition the government shall never be abridged.

The right of Republicans to assemble, for example, would include their right to assemble with persons (including nominees selected at party convention) of their own choosing.

Other portions of the Alaska Constitution affirm the right of expression (which Tashjian used as an alternative ground for justifying its ruling) and natural rights of liberty, pursuit of happiness, and enjoyment of the fruits of one's own industry. A court would probably find a right of association implicit in these provisions and then follow the Tashjian's application of that right to the nomination process.

In sum, the Alaska Constitution accords with the federal constitution that a political party has the right to nominate its candidates by party convention.

3. Supremacy of Federal Constitutional Law in the Event of Conflict. If Alaska law (whether appearing in the Alaska Constitution or Alaska Statutes) conflicted with the federal constitutional right described in Tashjian, then federal law would prevail. That would be required by the supremacy doctrine based on Art. VI, § 2 of the federal constitution. Under the supremacy doctrine, the constitution and statutes of the United States are "the Supreme Law of the Land" and conflicting state laws must give way, McCulloch v. Maryland, 1859.

4. The Right of a Party to Determine Its Own Manner of Nominating a Candidate Does Not Necessarily Assure a Political Party's Ability to Place Its Nominee on the Ballot in the General Election. Under existing Alaska statute, nominees of major political parties go on to the general election. The highest vote-getter of each major political party is deemed to be "nominated" and placed on the run-off ballot, AS 15.25.100.

It is significant that this privilege is not shared by all political parties and that it arises by statute rather than by constitutional law. It is arguable that AS 15.25.100 is the only assurance that a candidate can run in a general election simply by virtue of being a major party's highest vote-getter.

According to this argument, AS 15.25.100 could be replaced by some other basis for determining which candidates were placed on general election ballots without violating the constitutional rights described above. For example, the two highest vote-getters from a primary election, regardless of party affiliation, could be placed on the run-off ballot.

Nothing in such a scheme would prevent a political party from announcing to the world who its "nominee" was. By the same token, nothing in such a scheme would assure that a party's nominee would qualify for a general election.

Such a scheme might seem to stifle the power of political parties, but the current law already manages to stifle the power of minor political parties. Since a major political party probably holds no greater constitutional right than a minor political party, the theory outlined in the three preceding paragraphs would probably be upheld in court.

The significance of that theory would be as follows: a political party's right to nominate a candidate and to choose the procedure for making such a nomination is no guarantee of a party's right to place such a nominee on the general election ballot.

There is a small possibility that a court would rule in the opposite direction. A court might rule that a political party's right to determine the manner of nominating a candidate included the right to have that candidate's name placed on the general election ballot. Although such a ruling would not be likely, it should be considered a remote possibility.

In sum, Tashjian's ruling empowers political parties in some ways but probably not all ways. Alaska's statutes have conferred a privileged position on major political parties that might not be constitutionally required.

IV. CONCLUSION

Under present circumstances, a major political party in Alaska would be constitutionally entitled to nominate a candidate by means of party convention and have that candidate's name placed on the general election ballot.

RGC:gc
92-078.glc

Enclosure

COVER TAB
TO: Annie
House State Affair
re: HB327 FAX 465-2287

GREEN PARTY OF ALASKA
P. O. Box 141474 Anchorage, AK 99514-1474 (907) 278-7436

Ecology
Responsibility
Nonviolence
Base Democracy

January 24, 1992

Ecological Wisdom
Grassroots Democracy
Personal and Social Responsibility
Nonviolence
Decentralization
Community-based Economics
Postpatriarchal Values
Respect for Diversity
Global Responsibility
Future Focus/Sustainability

Rep. Gene Kubina, and
House State Affairs Committee
Juneau, AK 99811-1182

Dear Chairman Kubina,

The Green Party of Alaska has been following two bills heard by your committee on Friday, HB327 and HJR45. After hearing the meeting I felt some comments and observations might be helpful.

First, regarding HB327, it seems the committee is struggling with a lot of mechanical details, including the structure of the gubernatorial election. It seems that the objectives of the primary election need to be clarified--why we are having it, who participates, and how they participate.

In preparation for Sykes v. State of Alaska in 1990, I learned that the constitutional right of all citizens to freely associate with the candidate of their choice is a highly held principle. It seemed like the committee was searching for a litigation-free quick fix. This particular issue is one that needs thorough thinking, understanding and consent of the citizens. If the legislature comes up with a sound concept for elections, I think the effect of the recent supreme court case, (Tashian?) may be overestimated.

Someone specifically mentioned a ballot for the nonpartisan voters. The Green Party rule at present specifically provides that Green candidates can appear on such a nonpartisan ballot if it becomes a reality.

Wednesday, I heard for the first time that the committee was taking a look at the "Louisiana system". It doesn't sound like it has much to offer over our present system. Louisiana is basically a two-party state, we are a four-party state and must make provisions to ensure equal opportunity for all existing and future parties.

It occurred to me that one way of holding an election without the primary would be to use the Australian ballot system. Voters would prioritize their vote, by number, and if no one achieved a majority, the lowest vote getter would be eliminated, and the second choice on those ballots would be recounted and added to the election results. This would happen until the 40 or 50% threshold were reached.

Such a system would to two things, it would give the voters maximum choice and freedom to associate with the candidate of their choice, and it would also allow the voters to have some say in who was elected even if it were their second or third choice.

It seems the two most moneyed parties (R & D) are still the most likely to end up in a runoff using the "Louisiana system". The legislature is charge with protecting all our rights, not just those of Republicans and Democrats. The Green Party would certainly like to be kept abreast of any future considerations, since our input might help resolve the problem.

Since there are many conceptual and structural problems with Title XV, you might also with to consider a 120 day campaign limit so that people don't start their campaigns as soon as the previous election is over.

I know that the Division of Elections wants to keep everything simple, however a bandaid won't do when there is needed major surgery. The required change in computer format and voter education would certainly be cheaper than runoff elections. Over the long term it would be a great deal less expensive.

In reference to HB32· CS dated 1/23/92 I see a few problems.

1) On page 1 line 1·, I think blocking write-ins is probably unconstitutional. The same with page 2 line 3.

2) Page 3 line 17, the notation of official endorsement by a political party may be giving unequal treatment to candidates who run by petition, since they theoretically have no party affiliation, but may have endorsements that may be better than that of a political party.

3) Page 4 line 5, appears to be in conflict with statements on page one and page 2 prohibiting write-ins.

5) Page 5 section (g). This section gives unequal treatment to other candidate provisions. This section would allow a candidate to choose a running mate without going through the primary or petition process, essentially avoiding the scrutiny of the voting public. It is vastly discriminatory to the petition candidate who must fill and file the petition with a Lieutenant Governor's name. This is still different than the candidates who win the primary, where two people are brought together after winning a party primary. This is also discriminatory against the petition candidates, since the petition canididates must be a team before they can even get petitions signed, before they campaign. While the court did not consider this aspect in Sykes v. State, it was raised in argument, and would be very ripe for litigation. The legal concept is that a petition is a selection process equal to that of the primary.

6) Page 5 line 26, seems to tell who the state will recognize. "any two members of the (central) committee" may or may not mean an adequate representation of party officials has been consulted. Remember the Republicans in 1990?

The above mentioned legal opinions are those of a lay person who has only been to court once, but has done some legal research. They may be more accurately only a lay person's observations.

I understand the packet of rather detailed information regarding the Australian ballot which was sent isn't available to the committee. We will try to put together another one soon and get it to you for your perusal and consideration. The Australian ballot system may have more to offer than previously contemplated.

Regarding HJR 45, the idea is good to get the reapportionment process out of the hands of the governor. The bill's stated goal is to depoliticize the process, however it is readily apparent that it simply allows the legislature to politicize it instead of the governor.

I cite specifically the paragraph on page three outlining the makup of the reapportionment board. If the goal is truly to depoliticize the process, why not a have representative from each party and five nonpartisans? Since the majority of voters are not registered to any party, why have not nine people who have records of not affiliating with any party?

You have some serious work ahead of you. The Green Party will be happy to answer any questions and work with the legislature, Division of Elections and other political parties to find a workable election system and reapportionment structure that assures everyone's rights. Please send a copy of this letter to all committee members. Thank you.

Most sincerely,

Jim Sykes

Jim Sykes, Spokesperson
Green Party of Alaska

cc: Elizabeth Ziegler, Division of Elections
Joni Whitmore, Green Party of Alaska Chair

Alaska State Legislature

Legislative Research Agency

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October 25, 1991

MEMORANDUM

TO: Representative Eugene Kubina

FROM: Gordon S. Harrison, Director

RE: **Preferential Ballots**
Research Request 92.064

You asked for information about the so-called preferential ballot that is used widely in Australia. This memorandum describes the system of preferential voting used in Australia as well as several other preferential systems that have been used from time to time in the United States and other western democracies.

Application of Preferential Voting

Preferential ballots allow voters to rank their preference for candidates standing for an office. It is applicable only to electoral systems that require the winning candidate to obtain a *majority* of the votes cast. Most elections in the United States are held under the *plurality* rule, according to which the candidate with the highest number of votes wins the seat, whether or not he has obtained a majority of the votes cast. When there are only two candidates standing for election, the plurality rule has the same effect as the majority rule. But when there are more than two candidates in a contest, the plurality system is likely to produce a winner who is not the first choice of a majority of the voters. Majority vote requirements are intended to produce a candidate who is an acceptable compromise candidate to a majority of the electorate.

Preferential voting techniques of the type described in this memorandum also apply only to elections with single-member districts (that is, in situations where residents of a district elect a single official to represent them, in contrast to situations where residents of a district elect several people to represent the district). There is a preferential voting technique applicable to multi-member district elections, but a description of it is beyond the scope of this memorandum.[1]

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[1]The technique is the "single transferable vote" system, also know as the Hare system, Hare-Andrae system, and Hare-Clarke system. It is used in Ireland and in the elections for the upper chamber in the Australian federal and some Australian state governments. A good explanation of it is found in Enid Lakeman and James D. Lambert, *Voting in Democracies* (London: Faber and Faber, 1959), pp. 98 - 131.

Rationale of Preference Ballot: Avoiding a Run-off Election

A conventional majority vote system calls for a run-off election if no candidate in the first round of voting obtains a majority of the votes cast. There are drawbacks to run-off elections, however. The most serious problem is retaining the interest of the electorate: where voting is voluntary, the turn-out for run-off elections typically declines from the first round of voting. Another problem with run-off elections is the continued burden of campaigning it imposes on candidates and voters alike. Also, from the perspective of the leading candidate, the hiatus between the first and second round of voting can spell disaster. Public sentiment is never static, and the front-runner cannot be sure that his support will remain solid until the run-off. Thus, the necessity for a run-off election introduces an additional element of uncertainty and instability in the polling process.

By allowing the voters to indicate their second or third choice as well as their first choice on the same ballot, the preferential system fulfills the function of the run-off election without the necessity of a second polling.

Types of Preference Ballots

There are several voting rules that allow the voter to express more than his first preference among candidates. Discussed below are two versions of the *alternative preference ballot*, the *second-choice ballot* (Bucklin rule), and the *Borda count*. Also, brief mention is made of the *exhaustive ballot* voting method.

Alternative Preference Ballot

There are two versions of the so-called alternative preference ballot (also referred to as the preference ballot, the alternative ballot, and sometimes the contingent ballot). The least complicated of these comes closest to duplicating the function of the run-off election. If there are more than two candidates, voters mark their ballots with their first preference and their second preference. In the first count, only first preference votes are scored. If one of the candidates receives a majority of these votes, he or she is declared the winner. However, if no candidate receives a majority on the first count, all candidates except the two with the highest number of first preference votes are declared defeated and their second preference votes are distributed to the two finalists as if they were first choices.

The purpose of a run-off election is to give those voters whose candidate(s) were defeated in the first round a chance to express their preference between the two most popular candidates. This preference ballot has the same effect.

A slightly more complicated version of the alternative preference ballot is the one used in Australia.[2] In this case, when any candidate fails to obtain a majority in the first count, the candidate with the fewest first preference votes is declared defeated and the second preference votes on that candidate's ballot are distributed to the remaining candidates. If this distribution fails to produce a majority winner, the remaining candidate with the fewest number of votes is declared defeated and the second preference indicated on that candidate's first preference ballots are distributed, and so on until a candidate receives a majority of the vote.[3]

In cases were there are only three candidates for a seat, both versions of the alternative preference ballot will produce the same outcome. In situations with more than three candidates, however, the Australian version may produce a different result from the simplified version. The potential difference is the treatment of the third-ranking candidate after the first count: with the simplified version, the third-ranking candidate is dropped from the running, while the Australian version gives that candidate a chance to win through the distribution of the lowest ranking candidate's second preferences. In a close contest among the top three candidates, the fourth's second-choice votes could easily result in victory for the candidate in third place after the first count.

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[2]The alternative preference ballot is used to elect the lower house of the federal government and the lower houses of most of the state legislatures in Australia.

[3]It is not clear from the information at hand about the alternative preference ballot whether, in the case of four or more candidates, voters are to indicate a third, fourth, etc. preference, and if so, whose are to be counted at what point. Presumably preferences beyond first and second are asked for on the ballot, as it is possible that the redistribution of second preference votes only from defeated candidates will not produce a majority winner. Suppose, for example, four candidates are standing for election. In the first count (the count of first-choice votes), candidate A receives 10,000 votes, candidate B 9,000, candidate C 8,000, and candidate D 2,000. Candidate D is declared defeated. In the second count (the distribution of second preferences shown on first-choice ballots for D), candidate D's votes are evenly split between candidate B and C. This outcome fails to produce a majority winner. Therefore, candidate C is declared defeated. In the third count (the distribution of second preferences shown on C's first-place ballots), candidate C's votes are distributed evenly between A and B. Now, candidate A has 14,000 votes and candidate B has 14,000 votes, and 14,501 constitute a majority. At this point it would seem reasonable to conduct a fourth count that distributes the third choice indicated on ballots originally cast for C and D, and presumably that is the rule. However, we have not found a sufficiently detailed description of the system to be sure of this point.

Second-Choice Ballot

Another voting rule that allows second preferences to be scored when a clear majority does not result from the first count in a multi-candidate contest is the Bucklin rule, or "second-choice ballot." In this case, voters indicate their first and second preference on the same ballot, regardless of the number of candidates. In the absence of a majority winner of first choice ballots in the first count, all first and second choice votes are tallied in the second count for the two candidates receiving the most votes in the first count. The candidate receiving the highest number of first and second choice votes in the second count is the winner.

This system differs from the alternative preference ballot discussed above because the second choices on the ballots cast for the two top candidates also enter into the final scoring. In the alternative preference ballot (and the conventional run-off election), it is the second choice only of the voters for the defeated candidates that are decisive in the second and subsequent counts.

As a means of producing an acceptable compromise candidate, this system has much to recommend it. However, an objection to the scoring rule used above is that the most acceptable compromise candidate could easily be one excluded from the second count. It is possible, for example, that Senator Arliss Sturgulewski was the preferred compromise candidate in the 1990 Alaska general election for governor, but she would have been excluded if first and second preference votes were scored only for the two front runners. However, this objection could be met by scoring all of the candidates' first and second preferences in the second count. In this case, a candidate with strong second preference support who was not among the top two finishers could win.

Borda Count

An objection to all the foregoing preference voting arrangements is that second preferences have the same relative value as first preferences. This objection is dealt with by the voting scheme proposed in the eighteenth century by the French philosopher Borda. According to Borda's method, usually referred to as the Borda count, voters award points to the candidates according to their preference ranking. Thus, for example, in a contest with three candidates, the voters would assign three points to their favorite candidate, two to their second choice, and one to their third choice (or two, one, zero points, for example). The candidate with the highest total number of points is declared the winner.

It should be noted that the point system used can influence the outcome of the election. Lakeman and Lambert illustrate this characteristic of the Borda count with the example of three candidates whose first choice preferences among voters are as follows: candidate A, 14; candidate B, 2; and candidate C, 15. If candidate B were the second choice of voters for A and C (candidate Sturgulewski in our example above), and the Borda point scale were three, two,

one, candidate B wins. But if the Borda point scale were a geometrical progression such as four, two, one, candidate C wins.[4]

Exhaustive Ballot Method

To round out this discussion of majoritarian, single-member constituency voting methods, mention should be made of the so-called exhaustive ballot. In this case, with *n* candidates, voters cast ballots for *n-1* candidates, *n-1* times, and the surviving candidate is the winner. Thus, for example, if there are four candidates standing for election, in the first round voters cast one ballot for three of the four. The candidate with the fewest votes is declared defeated. In the second round, with three surviving candidates, voters cast ballots for two. The lowest ranking is eliminated, and finally the voters against cast a ballot for one of the two remaining candidates. The candidate with the most votes wins. This method is impractical for legislative elections where voters would have to return to the polls again and again. However, it is an effective technique used at conventions, for example, to elect presiding officers or leaders of an organization.

Use of Preferential Ballots in the United States

We found little information about the use of preferential voting in the United States. The following statement is from a reference work: "Preferential voting has been tried on and off in the United States. At least 50 cities and counties have adopted it at one time, but very few continue to use it."[5]

Apparently a type of second-choice voting was used for primary elections in North Dakota for a few years in the early 1900s, and it was used in Wisconsin around the same time.[6]

I hope this information is helpful to you. We would happy to provide more detailed description and analysis of any of these systems if you wish to pursue the matter.

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[4]Lakeman and Lambert, *Voting in Democracies*, op. cit., pp. 288 - 289.

[5]Michael D. Young, *The American Dictionary of Campaigns and Elections*, (New York: Hamilton Press, 1987), p. 202.

[6]Personal communication, Dan Rylance, Editorial Page editor, Grand Forks Herald (North Dakota), October 23, 1991. Mr. Rylance has promoted the concept of second-choice ballots for North Dakota primaries in recent newspaper columns.

Packet

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.

Alaska State Legislature

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 l[illegible] in states that have not done so will be unenforceable in the face o[illegible]arty 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, 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.

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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.

[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 ... (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

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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.

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

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

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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 (1961).

[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]

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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]

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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.

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.

[479 US 220]

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 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 (1936); 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).

pellant

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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]

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 deminated 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

[479 US 237]

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.

[479 US 238]

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.

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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FAX (907) 465-2029

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Court Plaza, Room 500
Mail Stop 3101

MEMORANDUM March 11, 1991

SUBJECT: Closed Republican primary (Work Order No. 7LS0949)

TO: Representative Fran Ulmer

FROM: John B. Gaguine
Legislative Counsel

You have asked several questions regarding the effect of the Alaska Republican Party's vote recently to close its party to all but registered Republicans and independents. This memorandum will try to answer those questions.

1. You first ask whether the Republican Party's action will allow Republican and independent voters to vote twice, once in the Republican primary and once in the "open" primary where all other parties' candidates will appear (assuming that no other party changes its party rules). I think the answer is clearly no. AS 15.15.230, applicable to primary elections under AS 15.25.090, provides that when a voter has qualified to vote, the election judge shall give the voter an official ballot. AS 15.15.410, also applicable to primaries, provides that if the director of elections determines that a person has voted more than once in the same election, he or she shall notify the attorney general. I think that this clearly implies that a voter may vote only once. This is not stated in either AS 15 or in Article V of the constitution, but probably because it was considered so obvious. Of course, it certainly could not hurt to add a section to AS 15.25 stating that a person may vote in only one primary election.

Let me note, though, that unless other parties change their rules, or the legislature amends the primary election laws, a registered Republican would still have the right to forego the Republican primary and vote in the "open" one. Independents would also have this choice.

2. You next ask whether Alaska's primary election could be changed to a system such as Wisconsin's, where a person must select a ballot at the time of the primary, but where a person registered in one party may choose to vote in the primary of another. The answer is yes, if no party objected. However, such a system would be inconsistent with the recently adopted Republican rule, since it would allow registered

Democrats, Libertarians, etc. to vote in the Republican primary. And in the recent case of Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 55 U.S.L.W. 4057 (1986), the U.S. Supreme Court ruled that the First Amendment associational rights of a party override state election laws, absent exceptional circumstances. I cannot imagine any arguments that the state could put forth to justify a Wisconsin-type system that was inconsistent with party rules.

Indeed, Tashjian involved a situation where the party's First Amendment claim was nowhere near as clear as it would be under a Wisconsin-type primary. In Tashjian state law restricted voting in the Republican primary to registered Republicans, and the party wanted to open its primary to independents as well. The majority of the Court rejected the argument that the party had no First Amendment rights to extend its primary to independents, since state law already ensured that Republican candidates would be chosen only by Republicans. (Three dissenters, in a dissent by Justice Scalia, found this argument persuasive.) Here, by contrast, a Wisconsin-type primary would allow those who are registered members of other parties to assist in the selection of Republican candidates. Even Justice Scalia's dissent found that such a scheme would impair the party's associational rights: "The ability of the members of the Republican Party to select their own candidate, on the other hand, unquestionably implicates an associational freedom." 55 U.S.L.W. at 4065. Thus, Tashjian would clearly be controlling here.

Ideally, state election law should be amended to reflect the rules of each party. However, if it is not so amended, the party rules would, as noted, override the election laws. In that case I assume that those rules would be implemented either by regulations issued by the lieutenant governor or by court order. (Tashjian is not instructive on this matter because the district court stayed its injunction pending appeal. According to the Alaska Attorney General (in a pleading in Doyle v. State, No. A90-248 Civil (U.S. Dist. Ct. D.Alaska), where the Republican party tried unsuccessfully last year to close the 1990 primary), Connecticut was allowed an additional year after the U.S. Supreme Court's decision to implement the party rule, and was only in 1990 beginning to implement that rule. However, since Tashjian has made the law on this question clear, a court today likely would not be as lenient toward Alaska.)

3. Your final question is whether the state election laws can be changed to require that an individual file for an office prior to the primary election, so that it would be impossible for late filers to wait until they knew the results of the primary before deciding whether to enter the race. The answer to this question is no, based on a recent Anchorage Superior Court decision which the state did not appeal.

The current filing date for independents, under AS 15.25.150, is August 1. This date was established by the legislature in 1989 instead of the former June 1, which the superior court had ruled unconstitutionally impeded ballot access. Last year, in Sykes

v. State, Judge Dana Fabe ruled that even the new date was unconstitutional: since the Division of Elections had acknowledged that it would have no problem with processing a third party or independent petition filed after the date of the primary, the state had no compelling reason to justify a filing deadline as early as August 1 (over three months before the election). The state did not appeal, since, in light of the division's acknowledgement, it felt it had no grounds for a successful appeal.

Of course, what occurred in the last gubernatorial election was not an independent candidate filing a late petition, but rather the resignation of the candidates of a party chosen in a primary, and the replacement of those candidates by the party officers with Governor Hickel and Lieutenant Governor Coghill. AS 15.25.110 provides that if a candidate nominated in a primary election resigns no less than 48 days before the general election, the party may replace the resigned candidate. Since the Division of Elections can apparently handle a replacement within 48 days, it seems unlikely that that deadline could constitutionally be moved back. Indeed, it would seem that the deadline for independent filing should be the same as that for replacement of candidates - namely, the minimum amount of time necessary for the Division of Elections to place a new candidate's name on the ballot before the general election.

I hope that this has satisfactorily answered your questions. If I may be of further assistance, please let me know.

JBG:mi
91-049.mai

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
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Mail Stop 3101

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.

PARTY RULES / St. Elections Laws
Gaguine to Pourchot 4/3/91

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.

FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. SB 297

Revision Date: 01/14/92
Title: Relating to Primary Elections

Sponsor: Senate State Affairs
Requestor: Senate State Affairs

Department Affected: Office of the Governor-Elections
BRU: Primary and General
Component: Primary and General

COMPONENT SERIAL NO. 0 0 2 2

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	41.7	41.7	0	41.7	0	41.7
CONTRACTUAL	581.8	60.0	531.8	60.0	531.8	60.0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	633.5	101.7	531.8	101.7	531.8	101.7
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND	633.5	101.7	531.8	101.7	531.8	101.7
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	633.5	101.7	531.8	101.7	531.8	101.7

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year impact:

ANALYSIS: (Attach a separate page if necessary.)
See attached.

Prepared by: Elizabeth Ziegler, Deputy Director
Division: Elections
Phone: 465-4611
Date: 01/14/92

Approved by Commissioner: Edward B. Rhinehart
Agency: Office of the Governor
Date: 01/15/92

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

Rev 10/07/91
SB297.FN

FISCAL NOTE Elections $633.5

ANALYSIS: (continued)

Semi-Closed Primary Costs:

Travel:

72240	Field Travel	6.5
72270	Administrative Travel (To Train Review Boards and Poll Workers For New Precincts)	33.6
72250	Per Diem (To Cover Additional Travel To New Precincts)	1.6
	Total Travel	41.7

Contractual Services:

73100	Professional Services	
	Voter Education Program	60.0
	DGA Contract	12.0
	Voting Rights Act Program	51.2
	Additional Poll Workers\ Review Boards	73.2
	Contracted Poll Worker Training	63.9
73300	Communications	
	Additional Postage	89.5
	Toll Charges	6.4
73400	Transportation	
	New Booth Set Up	13.3
73420	Transportation/State Equipment Fleet	
	Locating New Polling Places	1.3
73500	Advertising, Printing, and Binding	
	Statewide Advertising of Primary and Precinct Changes	39.0
	Ballot Printing for Semi-Closed Primary Party Ballots	180.0
73800	Rental For Land, Buildings, and Space	
	Rental of Additional Polling Places	2.0
	Total Contractual	531.8

Total Costs of Implemental Primary Changes 633.5

STATE OF ALASKA

OFFICE OF THE GOVERNOR

DIVISION OF ELECTIONS
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PHONE (907) 465-4611

November 14, 1991

Senator Patrick Rodey, Chair
Senate State Affairs Committee
3111 C Street, Ste. 510
Anchorage, Alaska 99503

Dear Senator Rodey:

Thank you for writing the Division of Elections regarding what has developed regarding the status of primary rule changes by Alaskan political parties. I am sorry that it has taken this long to respond to your letter, but we have been waiting for advice from the Attorney General's Office which we have now just received.

I have attached copies of our latest correspondence with the political parties and a memorandum we prepared for the House State Affairs Committee meeting of November 12, 1991. The Division is most concerned about the lack of certainty of what rules we are to implement for the parties. Presently, only the Republican Party has adopted a party rule change and has had it precleared with the Department of Justice (DOJ). The Alaska Democratic Party and the Green Party have adopted primary rule changes but have not had them precleared with the DOJ.

The Division would like to adopt regulations that encompass the substance of HB 327, as far as possible, so that we can modify our procedures to fit the new primary system. We want the parties to preclear their rule changes so that when the Division's regulations are in force we can proceed with the necessary language changes on our forms so that we can tell the voters what to expect at the polls. Also absentee voter applications must be totally redesigned and specifically instruct the voter to choose a party ballot type. The voters will be able to choose only one ballot type.

Presently, the Democratic and Green Party are not certain about how they want to proceed. You will see from the attached letters and memorandums that to implement primary changes and also prudently manage a statewide election in an area as vast as Alaska we need a great deal of advice notice. We have asked the parties to either preclear their rules or indicate to us that they do not want the rule changes implemented in 1992.

In response to your specific questions the answers are as follows:

1) There will be a separate ballot for each party that desires one or must have a separate ballot because of the effect of other party rule changes.

2) Based on the current state of the political party rule changes, every registered voter will be allowed to vote in the election.

3) A specific party ballot will be available at the polls. The election worker will check the precinct register and determine which party ballots are available to a voter, then ask which ballot he or she wants. Only one ballot per voter.

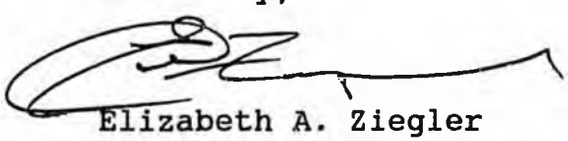
4) Candidates who file a declaration of candidacy representing a party will appear on the primary ballot just as they have been.

5) Based on the current political party rule changes, all nonpartisan voters can choose a party ballot of their choice.

6) Nonpartisans can vote for whoever they want. The poll worker will tell the voter which parties the voter can vote for. The voter must choose one ballot.

Thank you for your patience regarding this letter. If you need any information, please let me know.

Sincerely,



Elizabeth A. Ziegler
Deputy Director

STATE OF ALASKA

OFFICE OF THE GOVERNOR

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M E M O R A N D U M

To: Representative Eugene Kubina, Chair
House State Affairs Committee
Alaska State Legislature

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

Date: November 12, 1991

Subj: Effect of Primary Rule Changes on Elections

The Division of Elections has reviewed the changes made by the House State Affairs Committee to HB 327, Relating to primary elections. We are very pleased with the result and thank the committee for its response to the Division's prior testimony.

Since the committee last met in late September, the Division has asked the political parties to submit their party rule changes to the Department of Justice (DOJ) for preclearance. The DOJ preclearance process takes at least 60 days. Today the Division will be sending certified letters to the Democratic Party of Alaska and Green Party of Alaska requesting that they get their preclearance submission in by December 15, 1991. This will ensure that the state has the right to implement the rule changes. The Alaska Independence Party will also be sent a letter requesting that it indicate if their members will make any rule changes.

As the Division has continued to analyze the ramifications of changing elections operations to implement the party rule changes, we have found that some of our statutory requirements cannot be met without the ability to begin implementation of the rule changes as soon as possible. For example, under AS 15.20.081(b) and 6 AAC 25.650(b)(1) regarding absentee voting by mail and permanent absentee voters, the Division is required to send out its absentee ballot applications to absentee voters and allow the voter to request all ballots that are available during one calendar year. As you are aware, the Division conducts REAA and CRSA, municipal incorporation and local liquor option elections year round. The Division has met these requirements by sending out an absentee application in January for all elections. An absentee voter can direct the division to send him or her all ballots that the voter may vote on that year. With the primary changes, the Division would be required to inform the voter that a certain type of primary ballot is available to the voter because of his or her

party affiliation and ask the voter to make a ballot choice. We will not be able to give the voter this information on the application in January because two parties that have changed their rules and have not had them precleared in time for this deadline. Additionally, there is no legislation in place to allow the division to make needed regulatory changes in time.

As 15.20.207 requires the Division to train election workers in all precincts in even numbered years. The Division begins this training in early spring. The election workers have to know the rules of the election to effectively do their job and to alleviate chaos at the polls. When the Division was sued in 1990 by the Republican Party of Alaska over the implementation of its party rule changes, the Division staff testified that it was crucial that the election workers know the new primary rules during the election training session.

The four regional election supervisors are responsible for conducting the training. It is not prudent to have the supervisors out of their offices any later than June because of the need to manage the tasks necessary to conduct the primary in their regions. This management deadline cannot be changed especially in light of the additional duty to redraw precinct lines and educate voters as to their new districts and precincts due to reapportionment.

Because the Division must uphold the integrity of the election process and ensure that all types of voters be treated equally, the Division proposes that it promulgate regulations under its general authority granted by AS 15.15.010.

These regulations would adopt the procedures outlined HB 327, including one ballot per voter and the ability to change party affiliation at the polls, and would include the following addition:

Absentee voter applications would be sent to voters to coincide with parties precleared rule changes.

The Division has been advised by the Attorney General's Office that regulations can be implemented because the U.S. Supreme Court in Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) gives the parties the right to choose who can vote in their primaries. Once a political party decides to pass a rule which implements its associational rights, statutes to the contrary are void.

The Division requests that it work in tandem with both the House and Senate State Affairs Committees. Even though the Division will adopt procedural regulations necessary to effectively manage the primary election, statutory changes are still required to conform to the constitutional requirements imposed by the federal courts.

The Division will send these draft procedural regulations to both the House and Senate State Affairs Committees for review.

7-LS1188\D
Gaguine
10/31/91

CS FOR HOUSE BILL NO. 327 (STATE AFFAIRS)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

"An Act relating to primary elections and declarations of affiliation with a political party."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 15.07 is amended by adding a new section to read:

Sec. 15.07.062. DESIGNATION OF POLITICAL AFFILIATION. (a) The director shall provide a person registering to vote under this chapter with the opportunity to declare affiliation with a political party or to declare no affiliation with a party. The director shall explain that a person registering is not required to furnish information relating to party affiliation, and that the information furnished by the person, or the person's failure to furnish information, might affect the person's eligibility to vote in a primary election that has been limited under AS 15.25.060(b). The director may satisfy the requirement of this section by including the explanation on a voter registration form that the director may distribute.

(b) A person who has previously registered to vote under this chapter may declare an affiliation or nonaffiliation with a political party, or change a previously declared affiliation, at any time. The director shall provide an opportunity at every polling place for a registered voter

to declare or change an affiliation.

* **Sec. 2.** AS 15.25.060 is amended to read:

Sec. 15.25.060. PREPARATION AND DISTRIBUTION OF BALLOTS. 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. **Except when (b) of this section otherwise requires, the** [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. The names for each office shall be rotated as provided for the general election ballot. No blank spaces shall be provided on the ballot for the writing or pasting in of names.

* **Sec. 3.** AS 15.25.060 is amended by adding new subsections to read:

(b) If (1) the central committee or other governing body of a political party adopts a rule that, notwithstanding AS 15.25.010 - 15.25.130, nominees of the party may not be chosen by a primary election open to all voters, but rather shall be chosen by a primary election limited to voters whose political affiliation or nonaffiliation is designated by the party rules; and (2) the central committee or other governing body of the party delivers a copy of the rule to the director, no later than March 1 of the year in which a primary election is to take place, the director shall prepare a separate ballot listing only the candidates of that party, and shall authorize the distribution of that ballot only to the registered voters who are eligible to vote in that party's primary under the party rule. Candidates who are listed on a separate ballot under this subsection may not be listed on the ballot described in (a) of this section. The names of the candidates for each office shall be rotated as provided for the general election ballot, and no blank spaces shall be provided on the ballot for the writing or pasting in of names.

(c) If at a primary election under AS 15.25.010 there is more than one ballot available, a registered voter may choose which ballot the voter wishes to use. A voter may not be given more than one ballot, and may not be given a ballot of a political party if under the rules of that party, as delivered to the director under (b) of this section, the voter would not be eligible to vote in that party's primary election.

(d) If the director is required to prepare separate ballots for all political parties under (b) of this section, the director is not required to prepare a ballot under (a) of this section.

STATE OF ALASKA

OFFICE OF THE GOVERNOR

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DIVISION OF ELECTIONS

POSITION PAPER ON PRIMARY CHANGES

The United States Supreme Court has held that political parties have a Constitutional right to free association and can determine who can vote in their primaries.

The Division of Elections position is that this right must be tempered with the division's right to maintain the integrity and orderly conduct of state elections.

In light of the decisions of the Democratic, Green and Republican Parties, it appears that the voters of the state may be confused as to who can vote for what candidates. The Division's goal is to create a voting situation that makes it as easy as possible for people to vote in the primary and know that his/her vote will be counted.

The Division proposes that any legislation regarding the primary include the following language:

1. Parties must inform the Division of Elections of any party rule changes that impact the conduct of the primary by March 1 of any election year.
2. Voters may change their party affiliation at the polling place.
3. A voter may vote only one ballot in the primary election.

The Division has included a fiscal note which estimates that the primary changes will costs about $450,000 to the state. This

is only an estimate. When the Division prepared its affidavits for the 1990 lawsuit with the Republican Party, the costs were estimated at about one million dollars due to the fact that the party wanted the state to implement its primary in time for the 1990 elections. With proper notice, the state can plan more effectively, but the attached fiscal note is far from absolute. There may be additional costs due to the increased ballot order, printing and data programming that will not be apparent until we actually start the process.

In conclusion, while the Division will implement any parties rule changes, we are concerned about the costs. The burden to the voting public and the costs to the state may outweigh the benefits to the political parties. Frankly, we believe that if the parties desire to select their own candidates they should do so privately by the convention system.