ALASKA LEGISLATURE COMMITTEE FILES 2001-2002 8672

10244 HOUSE JUDICIARY

89

Pennock-Gravina
Saxman
Wacker
Ward Cove

HOUSE DISTRICT 2
10 Accu-Vote Precincts
Halibut Point No. 1 and No. 2
Jamestown Bay
Mt. Edgecumbe
Petersburg/Kupreanof
Sitka (4 precincts)
Wrangell

SENATE DISTRICT B:

HOUSE DISTRICT 3
11 Accu-Vote Precincts
Douglas
Juneau (5 precincts)
Juneau Airport
Lemon Creek
North Douglas
Salmon Creek
Switzer Creek

HOUSE DISTRICT 4
8 Accu-Vote Precincts
Auke Bay
Brotherhood Bridge
Fritz Cove
Lower Mendenhall No. 1 and No. 2
Lynn Canal
Upper Mendenhall No. 1 and No. 2

SENATE DISTRICT C:

HOUSE DISTRICT 5
9 Accu-Vote, 13 hand-count precincts
Accu-Vote:
Angoon
Peninsula / Chilkat
Craig
Haines Highway
Haines No. 1
Hoonah
Klawock
Metlakatla
Skagway

Hand Count:
Coffman Cove
Elfin Cove

Gustavus
Hydaburg
Kake
Kasaan
Klukwan
North Prince of Wales Island
Pelican
Port Alexander
Tenakee
Thorne Bay
Yakutat

HOUSE DISTRICT 6
5 Accu-Vote, 5 hand-count precincts
Accu-Vote:
Flats
Kodiak (3 precincts)
Mission Road

Hand Count:
Cape Chiniak
Kodiak Island South
Old Harbor
Ouzinkie
Port Lions

SENATE DISTRICT D:

HOUSE DISTRICT 7
10 Accu-Vote, 3 hand-count precincts
Accu-Vote:
Anchor Point
Diamond Ridge
Fritz Creek
Homer (3 precincts)
Kachemak Bay
Kasilof North
Kasilof South
Ninilchik

Hand Count:
English Bay
Port Graham
Seldovia

HOUSE DISTRICT 8
7 Accu-Vote, 3 hand-count precincts
Accu-Vote:
Bear Creek
Ridgeway
Seward
Soldotna No. 1 and No. 2

Sports Lake
Sterling

Hand Count:
Cooper Landing
Hope
Moose Pass

SENATE DISTRICT E:

HOUSE DISTRICT 9
7 Accu-Vote Precincts
K-Beach
Kenai (4 precincts)
Nikiski
Salamatof

REGION II
Senate Districts E - N
House Districts 10 - 28
Greater Anchorage & the Matanuska-Susitna Borough

HOUSE DISTRICT 10
9 Accu-Vote Precincts
Anchorage

SENATE DISTRICT F:

HOUSE DISTRICT 11
7 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 12
7 Accu-Vote Precincts
Anchorage

SENATE DISTRICT G:

HOUSE DISTRICT 13
10 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 14
4 Accu-Vote Precincts
Anchorage

SENATE DISTRICT H:

HOUSE DISTRICT 15
8 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 16
6 Accu-Vote Precincts

Anchorage

SENATE DISTRICT I:

HOUSE DISTRICT 17
7 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 18
10 Accu-Vote Precincts
Anchorage

SENATE DISTRICT J:

HOUSE DISTRICT 19
8 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 20
6 Accu-Vote Precincts
Anchorage

SENATE DISTRICT K:

HOUSE DISTRICT 21
8 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 22
7 Accu-Vote Precincts
Anchorage

SENATE DISTRICT L:

HOUSE DISTRICT 23
3 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 24
6 Accu-Vote Precincts
Anchorage

SENATE DISTRICT M:

HOUSE DISTRICT 25
6 Accu-Vote Precincts
Anchorage

HOUSE DISTRICT 26
7 Accu-Vote Precincts
Anchorage (2 precincts)
Fairview
Greater Wasilla
Pioneer Peak
Wasilla (2 precincts)

SENATE DISTRICT N:

HOUSE DISTRICT 27
9 Accu-Vote precincts
Accu-Vote:
Butte
Farm Loop
Fishhook
Greater Palmer
Lakes
Lazy Mountain
Palmer
Sheep Mountain
Sutton

HOUSE DISTRICT 28
11 Accu-Vote precincts
Accu-Vote:
Big Lake
Bogard
Houston
Knik/Goose Bay
Meadow Lakes
Schrock
Susitna
Talkeetna
Trapper Creek
Wasilla Fishhook
Willow

REGION III
Senate Districts O - R
House Districts 29 - 37
Greater Fairbanks, Interior Alaska, Valdez & Cordova

SENATE DISTRICT O

HOUSE DISTRICT 29
8 Accu-Vote Precincts
Chena
Ester
Farmer's Loop
Geist
Goldstream
University Campus
University Hills
University West

HOUSE DISTRICT 30
8 Accu-Vote Precincts
Airport
Aurora

Fairbanks (3 precincts)
Lemeta
Pike
Shanly

SENATE DISTRICT P:

HOUSE DISTRICT 31
7 Accu-Vote Precincts
Fairbanks

HOUSE DISTRICT 32
5 Accu-Vote Precincts
Badger No. 1 and No. 2
Fort Wainsright
Lakeview
Steese East

SENATE DISTRICT Q:

HOUSE DISTRICT 33
8 Accu-Vote Precincts
Chatanika
Chena Lakes
Fox
Newby
Plack
Steele Creek/Gilmore
Steese West
Two Rivers

District 34
6 Accu-Vote, 4 hand-count precincts
Accu-Vote:
Eielson
Healy
Moose Creek
North Pole
Richardson
Salcha
Hand Count:
Anderson
Cantwell
Clear
Denali Park

SENATE DISTRICT R:

HOUSE DISTRICT 35
7 Accu-Vote, 5 hand-count precincts
Accu-Vote:
Big Delta
Cordova
Delta Junction

Glennallen
Valdez (3 precincts)

Hand Count:
Gakona
Kenny Lake
Paxson
Tatitlek
Whittier

HOUSE DISTRICT 36
2 Accu-Vote, 49 hand-count precincts
Accu-Vote:
Copper Center
Tok

Hand Count:
Allakaket
Aniak
Anvik
Arctic Village
Beaver
Bettles
Central
Chalkyitsik
Chistochina
Chuathbaluk
Circle
Crooked Creek
Dot Lake
Eagle
Fort Yukon
Fortuna Ledge
Galena
Grayling
Holy Cross
Hughes
Huslia
Kalskag
Kaltag
Koyukuk
Livengood
Lower Kalskag
Manley Hot Springs
McGrath
Mentasta
Minto
Nenana
Nikolai
Northway
Nulato

Pilot Station
Rampart
Ruby
Russian Mission
Shageluk
Sleetmute
Stevens Village
Stony River
Takotna
Tanacross
Tanana
Tetlin
Tuluksak
Tyonek
Venetie

REGION IV
Senate Districts S - T
House Districts 37 - 40
Nome, Barrow, the North & West Coasts & the Aleutian Islands

SENATE DISTRICT S:

HOUSE DISTRICT 37
3 Accu-Vote, 20 hand-count precincts
Accu-Vote:
Barrow
Browerville
Kotzebue
Hand Count:
Ambler
Anaktuvuk Pass
Atqasuk
Buckland
Deering
Diomede
Kaktovik
Kiana
Kivalina
Kobuk
Noatak
Noorvik
Nuiqsut
Point Hope
Point Lay
Selawik
Shishmaref
Shungnak
Wainwright
Wales

HOUSE DISTRICT 38
2 Accu-Vote, 27 hand-count precincts
Accu-Vote:
Nome No. 1 and No. 2

Hand Count:
Alakanuk
Brevig Mission
Chevak
Elim
Emmonak
Gambell
Golovin
Hooper Bay
Kotlik
Koyuk
Mekoryuk
Mountain Village
Newtok
Nightmute
Pitka's Point
Savoonga
Scammon Bay
Shaktoolik
Sheldon Point
St. Mary's
St. Michael
Stebbins
Teller
Toksook Bay
Tununak
Unalakleet
White Mountain

SENATE DISTRICT T:

HOUSE DISTRICT 39
4 Accu-Vote, 23 hand-count precincts
Accu-Vote:
Bethel (3 precincts)
Dillingham

Hand Count:
Akiachak
Akiak
Aleknagik
Atmautluak
Chefornak
Clark's Point
Eek
Ekwok

Goodnews Bay
Kasigluk
Kipnuk
Koliganek
Kongiganak
Kwethluk
Kwigillingok
Manokotak
Napakiak
Napaskiak
New Stuyahok
Nunapitchuk
Quinhagak
Togiak
Tuntutuliak

HOUSE DISTRICT 40
1 Accu-Vote, 18 hand-count precincts
Accu-Vote
Aleutians No. 2 (Unalaska)

Hand-Count:
Akutan
Aleutians No. 1
Chigniks
Cold Bay
Egegik - Pilot Point
Iliamna - Newhalen
King Cove
King Salmon
Kokhanok - Igiugig
Levelock
Naknek
Nondalton
Pedro Bay
Port Heiden
Sand Point
South Naknek
St. George Island
St. Paul Island

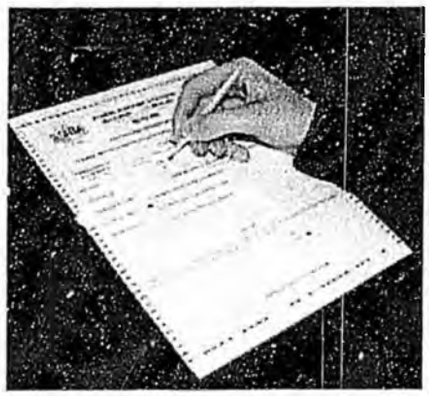
Alaska 1998 Elections Results Index

Alaska Division of Elections Home Page

To comment on this page, contact Barbara Whiting at the Alaska Division of Elections.

Alaska Division of Elections

Accu-Vote ELECTIONS' NEW VOTING TECHNOLOGY



The State of Alaska introduced a new ballot tabulation system for the 1998 elections. Punch cards are gone, and in their place is optical scanning. This means that Alaska voters pick up only one ballot at their polling places, and fill in ovals next to the names of candidates and issues they support. They insert the ballot into a small computer that looks like a fax machine. The computer -- called an Accu-Vote -- scans the ballot, tabulates the results, and deposits the ballot into a ballot box below. When the polls close at 8 p.m., precinct workers transmit results, immediately, by modem to a central accumulation site, where they are released.

Click on the links that follow for details. You'll learn why the state introduced the new system. You'll learn more about the system itself. Please note that in some precincts, ballots are still counted by hand.

If you have questions, please give any Division of Elections Office a call or send an e-mail to Virginia Breeze. We'll be happy to answer your questions. Educating voters is one of our major goals. When you go to the polls to vote in the August 22, 2000 Primary Election and the November 7 General Election we want you to feel comfortable with the new voting system and as pleased as we are that the State of Alaska made this purchase.

✓ **Accu-Vote Fact Sheet**

✓ **How will your precinct's ballots be counted?**

Alaska Division of Elections Home Page

Anchorage Daily News 17 Feb 2001 p B-3

Alaska Digest

Edited by Larry Campbell, 257-4321, alaskadigest@adn.com

JUNEAU

Panel studies proposed changes to Alaska primary elections

A task force will look at ways to make Alaska's primary election comply with a recent U.S. Supreme Court ruling.

Lt. Gov. Fran Ulmer, who oversees the state Division of Elections, has named a panel of four former lieutenant governors, a representative of the League of Women Voters and two former attorneys general to come up with recommendations.

The task force will try to come up with a bill that can be introduced and acted upon during the current legislative session, Ulmer said.

The high court ruled last June that California's primary was unconstitutional. Alaska's primary was similar to California's, listing all candidates on a single ballot that was open to all voters.

As a result of that ruling, Alaska's August 2000 primary was held under emergency regulations, and voters had to choose a ballot with either the Repbulican candidates or with all other candidates.

Joining Ulmer on the panel are former Lt. Govs. Lowell Thomas Jr., H.A. Red Boucher, Stephen McAlpine and Jack Coghill, Joyce Anderson of the League of Women Voters, and former attorneys general Doug Baily and Avrum Gross.

— The Associated Press

CHUKOTKA PENINSULA

Russian helicopter crashes in Arctic region

A Russian Mi-8 helicopter crashed Wednesday in the Arctic, killing all 11 people aboard, an emergency official said.

The helicopter went down in a remote area of Russia's Chukotka Peninsula near Alaska, said Andrei Rulyov, a spokesman for the Ministry of Emergency Situations.

The craft, used by communities in Russia's Arctic region, was carrying eight passengers and three crew members when it crashed into the tundra, he said.

— The Associated Press

WASHINGTON, PA.

Soldotna man accuses judge of ethical violation

A Washington County judge is accused of acting unethically by filing and then withdrawing a criminal charge against his wife's ex-husband, who lives in Alaska.

Mark Pearson of Soldotna filed the ethics complaint in November against Judge Paul Pozonsky with the state Judicial Conduct Board, a copy of which was obtained by the Pittsburgh Post-Gazette.

Pearson claims the judge filed a criminal harassment complaint against him with a district justice who is a friend of Pozonzky. He said Pozonzky eventually withdrew the charge, but only after Pearson twice traveled from Alaska to Pennsylvania for court dates.

case against Pearson.

Pozonsky referred questions to his attorney, Samuel J. Davis of Uniontown, who said Judicial Conduct Board rules prevent the parties from discussing active complaints.

Pearson's complaint to the conduct board

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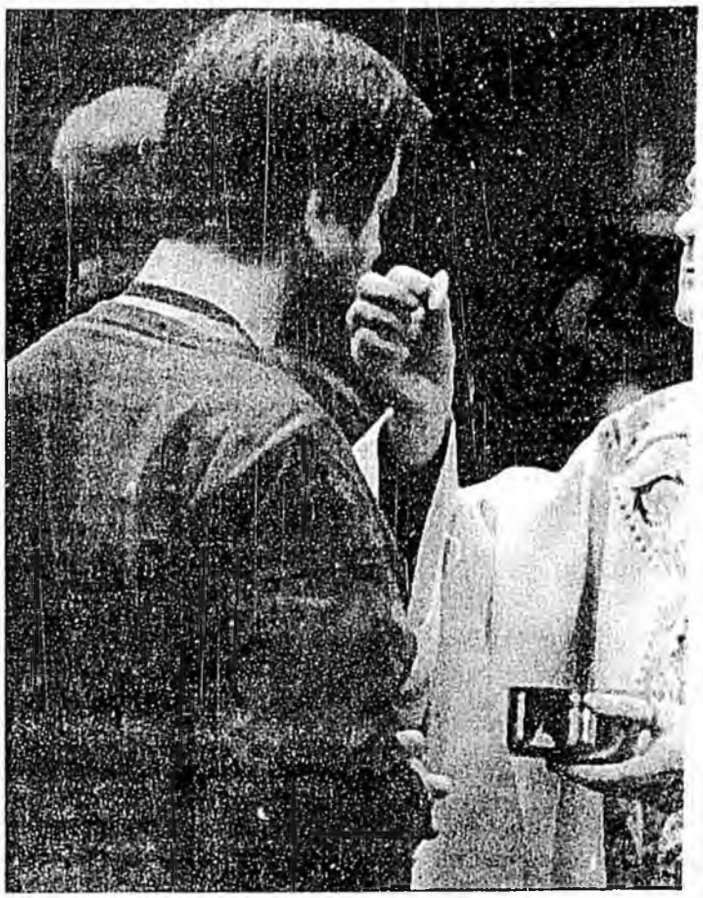

The Most Rev. Roger Schwietz, coadjutor archbishop of the Cathc communion during midday Mass at Holy Family Cathedral on We earthquake-ravaged India on Saturday night as an envoy for Cath Catholic Conference of Bishops. Schwietz is a member of the ag Schwietz will assure people in India that they the have support o Archbishop Francis Hurley said. A Sunday special collection at lo earmarked for India earthquake relief. Anyone who wants to con Relief, Archdiocese of Anchorage, 225 Cordova St., Anchorage 9

SUPREME COURT OF THE UNITED STATES

No. 99–401

CALIFORNIA DEMOCRATIC PARTY, ET AL., PETITIONERS *v.* BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2000]

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the State of California may, consistent with the First Amendment to the United States Constitution, use a so-called "blanket" primary to determine a political party's nominee for the general election.

I

Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. He may receive the nomination of a qualified political party by winning its primary,[1] see Cal. Elec. Code Ann. §§15451, 13105(a)

[1] A party is qualified if it meets one of three conditions: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party. See Cal. Elec. Code Ann. §5100 (West 1996

(West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, see §8400.

Until 1996, to determine the nominees of qualified parties California held what is known as a "closed" part i-san primary, in which only persons who are members of the political party—*i.e.*, who have declared affiliation with that party when they register to vote, see Cal. Elec. Code Ann. §§2150, 2151 (West 1996 and Supp. 2000)— can vote on its nominee, see Cal. Elec. Code Ann. §2151 (West 1996). In 1996 the citizens of California adopted by initi a-tive Proposition 198. Promoted largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers," App. 89–90 (reproducing ballot pamphlet distributed to voters), Proposition 198 changed California's partisan primary from a closed pr i-mary to a blanket primary. Under the new system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affili a-tion." Cal. Elec. Code Ann. §2001 (West Supp. 2000); see also §2151. Whereas under the closed primary each voter received a ballot limited to candidates of his own party, as a result of Proposition 198 each voter's primary ballot now lists every candidate regardless of party affiliation and allows the voter to choose freely among them. It remains the case, however, that the candidate of each party who wins the greatest number of votes "is the nominee of that party at the ensuing general election." Cal. Elec. Code Ann. §15451 (West 1996).[2]

— — — — —

and Supp. 2000).

[2]California's new blanket primary system does not apply directly to

Petitioners in this case are four political parties— the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party— each of which has a rule prohibiting persons not members of the party from voting in the party's primary. [3] Petitioners brought suit in the United States District Court for the Eastern District of California against respondent California Secretary of State, alleging, *inter alia*, that California's blanket primary violated their First Amendment rights of association, and seeking declaratory and injunctive relief. The group Californians for an Open Primary, also respondent, intervened as a party defendant. The District Court recognized that the new law would inject into each party's primary substantial numbers of voters unaffiliated with the party. 984 F. Supp. 1288, 1298–1299 (1997). It further recognized that this might result in selection of a nominee different from the one party members would select, or at the least cause the same nominee to commit himself to different positions. *Id.*, at 1299. Nevertheless, the District Court held that the burden on petitioners' rights of association was not a severe one, and was justified by state interests ultimately reducing to this: "enhanc[ing] the democratic

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the apportionment of presidential delegates. See Cal. Elec. Code Ann. §§15151, 15375, 15500 (West Supp. 2000). Instead, the State tabulates the presidential primary in two ways: according to the number of votes each candidate received from the entire voter pool and according to the amount each received from members of his own party. The national parties may then use the latter figure to apportion delegates. Nor does it apply to the election of political party central or district committee members; only party members may vote in these elections. See Cal. Elec. Code Ann. §2151 (West 1996 and Supp. 2000).

[3] Each of the four parties was qualified under California law when they filed this suit. Since that time, the Peace and Freedom Party has apparently lost its qualified status. See Brief for Petitioners 16 (citing Child of the 60s Slips, Los Angeles Times, Feb. 17, 1999, p. B–6).

nature of the election process and the representativeness of elected officials." *Id.*, at 1301. The Ninth Circuit, adopting the District Court's opinion as its own, affirmed. 169 F. 3d 646 (1999). We granted certiorari. 528 U. S. 1133 (2000).

II

Respondents rest their defense of the blanket primary upon the proposition that primaries play an integral role in citizens'selection of public officials. As a consequence, they contend, primaries are public rather than private proceedings, and the States may and must play a role in ensuring that they serve the public interest. Proposition 198, respondents conclude, is simply a rather pedestrian example of a State's regulating its system of elections.

We have recognized, of course, that States have a major role to play in structuring and monitoring the election process, including primaries. See *Burdick* v. *Takushi,* 504 U. S. 428, 433 (1992); *Tashjian* v. *Republican Party of Conn.,* 479 U. S. 208, 217 (1986). We have considered it 'too plain for argument," for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. *American Party of Tex.* v. *White,* 415 U. S. 767, 781 (1974); see also *Tashjian, supra,* at 237 (SCALIA, J., dissenting). Similarly, in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate "a significant modicum of support" before allowing their candidates a place on that ballot. See *Jenness* v. *Fortson,* 403 U. S. 431, 442 (1971). Finally, in order to prevent "party raiding"— a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary— a State may require party registration a reasonable period of time before a primary election. See *Rosario* v. *Rockefeller,* 410

U. S. 752 (1973). Cf. *Kusper* v. *Pontikes,* 414 U. S. 51 (1973) (23-month waiting period unreasonable).

What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States may regulate freely.[4] To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. See, *e.g., Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214 (1989); *Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107 (1981). In this regard, respondents' reliance on *Smith* v. *Allwright,* 321 U. S. 649 (1944), and *Terry* v. *Adams,* 345 U. S. 461 (1953), is misplaced. In *Allwright,* we invalidated the Texas Democratic Party's rule limiting participation in its primary to whites; in *Terry,* we invalidated the same rule promulgated by the Jaybird Democratic Association, a "self-governing voluntary club," 345 U. S., at 463. These cases held only that, when a State prescribes an election process that gives a special role to political parties, it "endorses, adopts and enforces the discrimination against Negroes," that the parties (or, in the case of the Jaybird Democratic Association, organizations that are "part and parcel" of the parties, see *id.,* at 482 (Clark, J., concurring)) bring into the process— so that the parties' discriminatory action becomes state action under the Fifteenth Amendment. *Allwright, supra,* at

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[4]On this point, the dissent shares respondents' view, at least where the selection process is a state-run election. The right not to associate, it says, "is simply inapplicable to participation in a state election." "[A]n election, unlike a convention or caucus, is a public affair." *Post,* at 6 (opinion of STEVENS, J.). Of course it is, but when the election determines a party's nominee it is a party affair as well, and, as the cases to be discussed in text demonstrate, the constitutional rights of those composing the party cannot be disregarded.

664; see also *Terry,* 345 U. S., at 484 (Clark, J., concurring); *id.*, at 469 (opinion of Black, J.). They do not stand for the proposition that party affairs are public affairs, free of First Amendment protections— and our later holdings make that entirely clear.[5] See, *e.g., Tashjian, supra.*

Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U. S. Political Parties 239, 241 (A. Schlesinger ed., 1973). Consistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs," *Tashjian, supra,* at 214–215, which 'necessarily presupposes the freedom to

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[5]The dissent is therefore wrong to conclude that *Allwright* and *Terry* demonstrate that '[t]he protections that the First Amendment affords to the internal processes of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election." *Post,* at 6 (internal quotation marks and citation omitted). Those cases simply prevent exclusion that violates some independent constitutional proscription. The closest the dissent comes to identifying such a proscription in this case is its reference to 'the First Amendment associational interests" of citizens to participate in the primary of a party to which they do not belong, and the 'fundamental right"of citizens 'to cast a meaningful vote for the candidate of their choice." *Post,* at 13. As to the latter: Selecting a candidate is quite different from voting for the candidate of one's choice. If the 'fundamental right" to cast a meaningful vote were really at issue in this context, Proposition 198 would be not only constitutionally permissible but constitutionally required, which no one believes. As for the associational 'interest"in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest. It has been described in our cases as a 'desire"— and rejected as a basis for disregarding the First Amendment right to exclude. See *infra,* at 16.

identify the people who constitute the association, and to limit the association to those people only," *La Follette,* 450 U. S., at 122. That is to say, a corollary of the right to associate is the right not to associate. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' " *Id.*, at 122, n. 22 (quoting L. Tribe, American Constitutional Law 791 (1978)). See also *Roberts* v. *United States Jaycees,* 468 U. S. 609, 623 (1984).

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. See *Timmons* v. *Twin Cities Area New Party,* 520 U. S. 351, 372 (1997) (STEVENS, J., dissenting) ('But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support'). Some political parties— such as President Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968— are virtually inseparable from their nominees (and tend not to outlast them). See generally E. Kruschke, Encyclopedia of Third Parties in the United States (1991).

Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu, supra,* at 224 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is 'the crucial

juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian,* 479 U. S., at 216; see also *id.*, at 235–236 (SCALIA, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom"); *Timmons,* 520 U. S., at 359 ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer" (internal quotation marks omi t-ted)); *id.*, at 371 (STEVENS, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

In *La Follette*, the State of Wisconsin conducted an open presidential preference primary.[6] Although the voters did not select the delegates to the Democratic Party's National Convention directly— they were chosen later at caucuses of party members— Wisconsin law required these delegates to vote in accord with the primary results. Thus allowing nonparty members to participate in the selection of the party's nominee conflicted with the Democratic Party's rules. We held that, whatever the strength of the state interests supporting the open primary itself, they could not justify this "substantial intrusion into the associ a-tional freedom of members of the National Party."[7] 450

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[6]An oper. primary differs from a blanket primary in that, although as in the blanket primary any person, regardless of party affiliation, may vote for a party's nominee, his choice is limited to that party's nominees *for all offices.* He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.

[7]The dissent, in attempting to fashion its new rule— that the right not to associate does not exist with respect to primary elections, see *post*, at 6— rewrites *Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107 (1981), to stand merely for the proposition that a political party has a First Amendment right to "defin[e] the organization and composition of its governing units," *post*, at 3. In fact, however, the state-imposed burden at issue in *La Follette* was the "intrusion by those

U. S., at 126.

California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with— to have their nominees, and hence their positions, determined by— those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to

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with adverse political principles'" upon the selection of the party's nominee (in that case its presidential nominee). 450 U. S., at 122 (quoting *Ray* v. *Blair*, 343 U. S. 154, 221–222 (1952) *(per curiam)*). See also 450 U. S., at 125 (comparing asserted state interests with burden created by the 'imposition of voting requirements upon" delegates). Of course *La Follette* involved the burden a state regulation imposed on a national party, but that factor affected only the weight of the State's interest, and had no bearing upon the existence *vel non* of a party's First Amendment right to exclude. 450 U. S., at 121–122, 125–126. Although JUSTICE STEVENS now considers this interpretation of *La Follette* 'specious", see *post*, at 4, n. 3, he once subscribed to it himself. His dissent from the order dismissing the appeals in *Bellotti* v. *Connolly* described *La Follette* thusly: 'There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State . . . did not justify its substantial intrusion into the associational freedom of members of the National Party. . . . Wisconsin *required* convention delegates to cast their votes for candidates who might have drawn their support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted." 460 U. S. 1057, 1062–1063 (1983) (emphasis in original).

Not only does the dissent's principle of no right to exclude conflict with our precedents, but it also leads to nonsensical results. In *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208 (1986), we held that the First Amendment protects a party's right to invite independents to participate in the primary. Combining *Tashjian* with the dissent's rule affirms a party's constitutional right to allow outsiders to select its candidates, but denies a party's constitutional right to reserve candidate selection to its own members. The First Amendment would thus guarantee a party's right to lose its identity, but not to preserve it.

change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a member of the party;* and once he does so, he is limited to voting for candidates of that party.[8]

The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote— indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. Tr. 668–669. Those figures are comparable to the results of studies in other States with blanket primaries. One expert testified, for example, that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent, *id.,* at 511, and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot, App. 136. The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes

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[8]In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra,* in which the voter is limited to one party's ballot. See *La Follette, supra,* at 130, n. 2 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. . . . The situation might be different in those States with 'blanket' primaries— *i.e.*, those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office"). This case does not require us to determine the constitutionality of open primaries.

cast for party candidates in some races was more than *double* the total number of *registered party members*. California Secretary of State, Statement of Vote, Primary Election, June 2, 1998, http://primary98.ss.ca.gov/Final/Official_Results.htm; California Secretary of State, Report of Registration, May 1998, http://www.ss.ca.gov/elections/elections_u.htm.

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who "crossed over" from another party. Pl. Exh. 8 (Addendum to Mervin Field Report). One expert went so far as to describe it as "inevitable [under Proposition 198] that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." Tr. 421 (expert testimony of Bruce Cain).

In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters were significant, they would be determinative in only a small number of races.[9] 169 F. 3d, at 656–657. But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party. In the 1860 presidential election, if opponents of the fledgling

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[9]The Ninth Circuit defined a crossover voter as one "who votes for a candidate of a party in which the voter is not registered. Thus, the cross-over voter could be an independent voter or one who is registered to a competing political party." 169 F. 3d 646, 656 (1999).

Republican Party had been able to cause its nomination of a pro-slavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs. See generally, 1 Political Parties & Elections in the United States: An Encyclopedia 398–408, 587 (L. Maisel ed. 1991). Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. '[R]egulating the identity of the parties' leaders," we have said, 'may . . . color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu*, 489 U. S., at 231, n. 21.

In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions— and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated. As respondents' own expert concluded, '[t]he policy positions of Members of Congress elected from blanket primary states are . . . more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." App. 109 (expert report of Elisabeth R. Gerber). It is unnecessary to cumulate evidence of this phenomenon, since, after all, the whole *purpose* of Proposition 198 was to favor nominees with 'moderate" positions. *Id.*, at 89. It encourages candidates— and officeholders who hope to be renominated— to curry favor with persons whose views are more 'centrist" than those of the party base. In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the 'basic function" of choosing their own leaders. *Kusper*, 414 U. S., at 58.

Nor can we accept the Court of Appeals' contention that the burden imposed by Proposition 198 is minor because petitioners are free to endorse and financially support the candidate of their choice in the primary. 169 F. 3d, at 659. The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu*, we recognized that party-leadership endorsements are not always effective—for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo. 489 U. S., at 228, n. 18. One study has concluded, moreover, that even when the leadership-endorsed candidate has won, the effect of the endorsement has been negligible. *Ibid.* (citing App. in *Eu* v. *San Francisco County Democratic Central Comm.*, O. T. 1988, No. 87–1269, pp. 97–98). New York's was a closed primary; one would expect leadership endorsement to be even less effective in a blanket primary, where many of the voters are unconnected not only to the party leadership but even to the party itself. In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders.

We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns. The accuracy of this assertion is highly questionable, at least as to the first two activities. That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems

to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system "'will lead to the election of more representative problem solvers' *who are less beholden to party officials.*'" Brief for Respondents 41 (emphasis added) (quoting 169 F. 3d, at 661). In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. See, *e.g., Spence* v. *Washington,* 418 U. S. 405, 411, n. 4 (1974) *(per curiam); Kusper,* 414 U. S., at 58. There is simply no substitute for a party's selecting its own candidates.

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process— the 'basic function of a political party," *ibid.*— by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome— indeed, in this case the *intended* outcome— of changing the parties'message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons*, 520 U. S., at 358 ('Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest'). It is to that question which we now turn.

III

Respondents proffer seven state interests they claim are compelling. Two of them— producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns— are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in 'represe n-

tativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." *Id.*, at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.

We have recognized the inadmissibility of this sort of "interest" before. In *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557 (1995), the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . . [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.*, at 578.

Respondents' third asserted compelling interest is that

the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election— the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected— recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "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." *Tashjian*, 479 U. S., at 215–216, n. 6 (citing *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), and *Nader* v. *Schaffer*, 417 F. Supp. 837 (Conn.), summarily aff'd, 429 U. S. 989 (1976)). The voter's desire to participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.

Respondents' remaining four asserted state interests— promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy— are not, like the others, automatically out of the running; but

neither are they, *in the circumstances of this case*, compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.

The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene— the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme— indeed, its avowed purpose— is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *favored by the majority*— but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appoint-

ment to certain offices. See, *e.g.*, 47 U. S. C. §154(b)(5) ("[M]aximum number of commissioners [of the Federal Communications Commission] who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission"); 47 U. S. C. §396(c)(1) (1994 ed., Supp. III) (no more than five members of Board of Directors of Corporation for Public Broadcasting may be of same party); 42 U. S. C. §2000e–4(a) (no more than three members of Equal Employment Opportunity Commission may be of same party).

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot— which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"— all without severely burdening a political party's First Amendment right of association.

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Respondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate

with those who do not share their beliefs. And it has done this at the "crucial juncture" at which party members traditionally find their collective voice and select their spokesman. *Tashjian*, 479 U. S., at 216. The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary. The judgment for the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 99–401

CALIFORNIA DEMOCRATIC PARTY, ET AL., PETITIONERS *v.* BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2000]

JUSTICE KENNEDY, concurring.

Proposition 198, the product of a statewide popular initiative, is a strong and recent expression of the will of California's electorate. It is designed, in part, to further the object of widening the base of voter participation in California elections. Until a few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics. Fewer still participate in the direction and control of party affairs, for most voters consider the internal dynamics of party organization remote, partisan, and of slight interest. Under these conditions voters tend to become disinterested, and so they refrain from voting altogether. To correct this, California seeks to make primary voting more responsive to the views and preferences of the electorate as a whole. The results of California's blanket primary system may demonstrate the efficacy of its solution, for there appears to have been a substantial increase in voter interest and voter participation. See Brief for Respondents 45–46.

Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process. In short, there is much to be said in favor of California's

law; and I might find this to be a close case if it were simply a way to make elections more fair and open or addressed matters purely of party structure.

The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to change the party's doctrinal position on major issues. *Ante*, at 14. From the outset the State has been fair and candid to admit that doctrinal change is the intended operation and effect of its law. See, *e.g.*, Brief for Respondents 40, 46. It may be that organized parties, controlled— in fact or perception— by activists seeking to promote their self-interest rather than enhance the party's long term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. Political parties advance a shared political belief, but to do so they often must speak through their candidates. When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates and wresting the choice between moderation and partisanship away from the party itself, the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment. For these reasons I agree with the Court's opinion.

I add this separate concurrence to say that Proposition 198 is doubtful for a further reason. In justification of its statute California tells us a political party has the means at hand to protect its associational freedoms. The party, California contends, can simply use its funds and resources to support the candidate of its choice, thus defending its doctrinal positions by advising the voters of its own preference. To begin with, this does not meet the parties' First Amendment objection, as the Court well

explains. *Ante*, at 13. The important additional point, however, is that, by reason of the Court's denial of First Amendment protections to a political party's spending of its own funds and resources in cooperation with its preferred candidate, see *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604 (1996), the Federal Government or the State has the power to prevent the party from using the very remedy California now offers up to defend its law.

Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. See 90 Stat. 488, 2 U. S. C. §441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate"). Though we invalidated limits on independent party expenditures in *Colorado Republican*, the principal opinion did not question federal limits placed on coordinated expenditures. See 518 U. S., at 624–625 (opinion of BREYER, J.). Two Justices in dissent said that "all money spent by a political party to secure the election of its candidate" would constitute coordinated expenditures and would have upheld the statute as applied in that case. See *id.*, at 648 (opinion of STEVENS, J.). Thus, five Justices of the Court subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.

In my view, as stated in both *Colorado Republican*, *supra*, at 626 (opinion concurring in judgment and dissenting in part), and in *Nixon* v. *Shrink Missouri Government PAC*, 528 U. S. ___, ___ (2000) (dissenting opinion),

these recent cases deprive political parties of their First Amendment rights. Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election. Our unfortunate decisions remit the political party to use of indirect or covert speech to support its preferred candidate, hardly a result consistent with free thought and expression. It is a perversion of the First Amendment to force a political party to warp honest, straightforward speech, exemplified by its vigorous and open support of its favored candidate, into the covert speech of soft money and issue advocacy so that it may escape burdensome spending restrictions. In a regime where campaign spending cannot otherwise be limited— the structure this Court created on its own in *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam)*—restricting the amounts a political party may spend in collaboration with its own candidate is a violation of the political party's First Amendment rights.

Were the views of those who would uphold both California's blanket primary system and limitations on coordinated party expenditures to become prevailing law, the State could control political parties at two vital points in the election process. First, it could mandate a blanket primary to weaken the party's ability to defend and maintain its doctrinal positions by allowing nonparty members to vote in the primary. Second, it could impose severe restrictions on the amount of funds and resources the party could spend in efforts to counteract the State's doctrinal intervention. In other words, the First Amendment injury done by the Court's ruling in *Colorado Republican* would be compounded were California to prevail in the instant case.

When the State seeks to regulate a political party's

nomination process as a means to shape and control political doctrine and the scope of political choice, the First Amendment gives substantial protection to the party from the manipulation. In a free society the State is directed by political doctrine, not the other way around. With these observations, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 99–401

CALIFORNIA DEMOCRATIC PARTY, ET AL., PETITIONERS *v.* BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to Part I, dissenting.

Today the Court construes the First Amendment as a limitation on a State's power to broaden voter participation in elections conducted by the State. The Court's holding is novel and, in my judgment, plainly wrong. I am convinced that California's adoption of a blanket primary pursuant to Proposition 198 does not violate the First Amendment, and that its use in primary elections for state offices is therefore valid. The application of Proposition 198 to elections for United States Senators and Representatives, however, raises a more difficult question under the Elections Clause of the United States Constitution, Art. I, §4, cl. 1. I shall first explain my disagreement with the Court's resolution of the First Amendment issue and then comment on the Elections Clause issue.

I

A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the

State.[1] The United States Constitution imposes constraints on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

The blanket primary system instituted by Proposition 198 does not abridge 'the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ante,* at 6.[2] The Court's contrary conclusion rests on the premise that a political

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[1]See *Tashjian* v. *Republican Party of Conn.,* 479 U. S. 208, 217 (1986) (observing that the United States Constitution grants States a broad power to prescribe the manner of elections for certain federal offices, which power is matched by state control over the election process for state offices). In California, the Secretary of State administers the provisions of the State Elections Code and has some supervisory authority over county election officers. Cal. Govt. Code Ann. §12172.5 (West 1992 and Supp. 2000). Primary and other elections are administered and paid for primarily by county governments. Cal. Elec. Code Ann. §§13000–13001 (West 1996 and Supp. 2000). Anecdotal evidence suggests that each statewide election in California (whether primary or general) costs governmental units between $45 million and $50 million.

[2]Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is 'unimaginable" without political parties, *ante,* at 6, though their anti-party thought ultimately proved to be inconsistent with their partisan actions. See, *e.g.,* R. Hofstadter, The Idea of a Party System 2–3 (1969) (noting that 'the creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic'). At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. *Id.,* at 16–17, 24. Indeed, parties ranked high on the list of evils that the Constitution was designed to check. *Id.,* at 53; see The Federalist No. 10 (J. Madison).

party's freedom of expressive association includes a 'right not to associate," which in turn includes a right to exclude voters unaffiliated with the party from participating in the selection of that party's nominee in a primary election. *Ante*, at 6–7. In drawing this conclusion, however, the Court blurs two distinctions that are critical: (1) the distinction between a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects. *Timmons* v. *Twin Cities Area New Party,* 520 U. S. 351, 354–355, n. 4, 359 (1997) (recognizing party's right to select its own standard-bearer in context of minor party that selected its candidate through means other than a primary); *id.,* at 371 (STEVENS, J., dissenting); *Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214 (1989); *Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107, 124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"); *Cousins* v. *Wigoda,* 419 U. S. 477, 491 (1975) ("*Illinois'* interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the *National* Party Con-

vention" (emphasis added)).[3] A political party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted

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[3]The Court's disagreement with this interpretation of *La Follette* is specious. *Ante*, at 8–9, n. 7 (claiming that state-imposed burden actually at issue in *La Follette* was intrusion of those with adverse political principles into party's primary). A more accurate characterization of the nature of *La Follette*'s reasoning is provided by Justice Powell: 'In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins* v. *Wigoda*, 419 U. S. 477 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights." *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 128 (1981) (dissenting opinion). Indeed, the *La Follette* Court went out of its way to characterize the Wisconsin law in this manner in order to avoid casting doubt on the constitutionality of open primaries. *Id.*, at 121 (majority opinion) (noting that the issue was not whether an open primary was constitutional but 'whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party'). The fact that the *La Follette* Court also characterizes the Wisconsin law at one point as a law 'impos[ing] . . . voting requirements' on delegates, *id.*, at 125, does not alter the conclusion that *La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections. State-mandated intrusion upon either delegate selection or delegate voting would surely implicate the affected party's First Amendment right to define the organization and composition of its governing units, but it is clear that California intrudes upon neither in this case. *Ante*, at 2–3, n. 2.

La Follette and *Cousins* also stand for the proposition that a State's interest in regulating at the *national* level the types of party activities mentioned in the text is outweighed by the burden that state regulation would impose on the parties' associational rights. See *Bellotti* v. *Connolly*, 460 U. S. 1057, 1062–1063, and n. 3 (1983) (STEVENS, J., dissenting) (quoted in part *ante*, at 9, n. 7). In this case, however, California does not seek to regulate such activities at all, much less to do so at the national level.

its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line.

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F. 3d 646, 654–655 (1999); cf. *Timmons*, 520 U. S., at 360 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational activities, regulation of access to election ballot does not); *La Follette*, 450 U. S., at 120–121 (noting that it 'may well be correct" to conclude that party associational rights are not unconstitutionally infringed by state open primary); *id.*, at 131–132 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties'lack of defined ideological orientation and political mission). I think it clear— though the point has never been decided by this Court— 'that a State may require parties to use the primary format for selecting their nominees." *Ante*, at 4. The reason a State may impose this significant restriction on a party's ass o-ciational freedoms is that both the general election and the primary are quintessential forms of state action.[4] It is because the primary is state action that an organization— whether it calls itself a political party or just a 'Jaybird" association— may not deny non-Caucasians the right to participate in the selection of its nominees. *Terry* v. *Adams,* 345 U. S. 461 (1953); *Smith* v. *Allwright,* 321 U. S.

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[4]Indeed, the primary serves an essential public function given that, '[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 205–206 (1996) (opinion of STEVENS, J.); see also *United States* v. *Classic,* 313 U. S. 299, 319 (1941).

649, 663–664 (1944). The Court is quite right in stating that those cases "do not stand for the proposition that party affairs are [*wholly*] public affairs, free of First Amendment protections." *Ante*, at 6. They do, however, stand for the proposition that primary elections, unlike most "party affairs," are state action. [5] The protections that the First Amendment affords to the "internal processes" of a political party, *ibid.*, do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

The so-called "right not to associate" that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow non-members to participate in the party's decisions when it is conducting its own affairs; [6] California's blanket primary system does not infringe this principle. *Ante*, at 2–3, n. 2. But an election, unlike a convention or caucus, is a public affair. Although it is true that we have extended First Amendment protection to a party's right to invite independents to participate in its primaries, *Tashjian* v. *Republican Party of Conn.*, 479

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[5] Contrary to what the Court seems to think, I do not rely on *Terry* and *Allwright* as the basis for an argument that state accommodation of the parties' desire to exclude nonmembers from primaries would necessarily violate an independent constitutional proscription such as the Equal Protection Clause (though I do not rule that out). Cf. *ante*, at 6, n. 5. Rather, I cite them because our recognition that constitutional proscriptions apply to primaries illustrates that primaries— as integral parts of the election process by which the people select their government— are state affairs, not internal party affairs.

[6] "The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all of those interests go to the conduct of the Presidential preference primary— not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates." *La Follette*, 450 U. S., at 124–125.

U. S. 208 (1986), neither that case nor any other has held or suggested that the "right not to associate" imposes a limit on the State's power to open up its primary elections to all voters eligible to vote in a general election. In my view, while state rules abridging participation in its elections should be closely scrutinized,[7] the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.

Although I would not endorse it, I could at least understand a constitutional rule that protected a party's associational rights by allowing it to refuse to select its candidates through state-regulated primary elections. See *Marchioro* v. *Chaney,* 442 U. S. 191, 199 (1979) ("There can be no complaint that [a] party's [First Amendment] right to govern itself has been substantially burdened by [state regulation] when the source of the complaint is the party's own decision to confer critical authority on the [party governing unit being regulated]"); cf. *Tashjian,* 479 U. S., at 237 (SCALIA, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice [of candidates] to a Republican Convention [rather than a primary] can be proscribed [by the State], but its delegation of that choice to nonmembers of the Party cannot"). A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where non-members could be excluded. In

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[7] See *Timmons* v. *Twin Cities Area New Party,* 520 U. S. 351, 370 (1997) (STEVENS, J., dissenting) (general election ballot access restriction); *Bullock* v. *Carter,* 405 U. S. 134 (1972) (primary election ballot access restriction).

the real world, however, anyone can 'join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to 'associate" with an unwelcome new member. See 169 F. 3d, at 655, and n. 20. There is an obvious mismatch between a supposed constitutional right 'hot to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. See *La Follette*, 450 U. S., at 133 (Powell, J., dissenting) ("As Party affiliation becomes . . . easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance").

The Court's reliance on a political party's 'right not to associate" as a basis for limiting a State's power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways. Assuming that a registered Democrat or independent who wants to vote in the Republican gubernatorial primary can do so merely by asking for a Republican ballot, the Republican Party's constitutional right 'hot to associate" is pretty feeble if the only cost it imposes on that Democrat or independent is a loss of his right to vote for non-Republican candidates for other offices. Cf. *ante*, at 10, n. 8. Subtle distinctions of this minor import are grist for state legislatures, but they demean the process of constitutional adjudication. Or, as JUSTICE SCALIA put the matter in his dissenting opinion in *Tashjian:*

> 'The . . . voter who, while steadfastly refusing to register as a Republican, casts a vote in [a non-closed] 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." 479 U. S., at 235.

It is noteworthy that the bylaws of each of the political parties that are petitioners in this case unequivocally state that participation in partisan primary elections is to be limited to registered members of the party only. App. 7, 15, 16, 18. Under the Court's reasoning, it would seem to follow that conducting anything but a closed partisan primary in the face of such bylaws would necessarily burden the parties'" freedom to identify the people who constitute the association.'" *Ante*, at 6–7. Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "harrow" as nonpartisan primaries, *ante*, at 14–18, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

By the District Court's count, 3 States presently have blanket primaries, while an additional 21 States have open primaries and 8 States have semi-closed primaries in which independents may participate. 169 F. 3d, at 650. This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others at the parties' behest is, as the District Court rightly observed, "an extraordinary intrusion into the complex and changing election laws of the States [that] . . . remove[s] from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance." *Id.*, at 654.[8]

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[8]When coupled with our decision in *Tashjian* that a party may re-

In my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work— party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials— that are held by the litigants in this case. *O'Callaghan* v. *State*, 914 P. 2d 1250, 1263 (Alaska 1996); see also *Tashjian*, 479 U. S., at 222–223; *Luther* v. *Borden*, 7 How. 1, 40–42 (1849). That choice belongs to the people. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 795 (1995).

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. See, *e.g.*, 169 F. 3d, at 656–659, and n. 23. Moreover, that conclusion rests substantially upon the

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quire a State to open up a closed primary, this intrusion has even broader implications. It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a "nonpartisan primary"— a system presently used in Louisiana— in which candidates previously nominated by the various political parties and independent candidates compete. *Ante*, at 18. These two options are the same in practice because the latter is not actually a "primary" in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process that led the Court to declare the State's ability to require nomination by primary "too plain for argument." *Ante*, at 4; see *Lightfoot* v. *Eu*, 964 F. 2d 865, 872–873 (CA9 1992) (explaining state interest in requiring direct partisan primary).

Court's claim that '[t]he evidence before the District Court" disclosed a 'clear and present danger" that a party's nominee may be determined by adherents of an opposing party. *Ante*, at 10. This hyperbole is based upon the Court's liberal view of its appellate role, not upon the record and the District Court's factual findings. Following a bench trial and the receipt of expert witness reports, the District Court found that 'there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants." 169 F. 3d, at 656. While the Court is entitled to test this finding by making an independent examination of the record, the evidence it cites— including the results of the June 1998 primaries, *ante*, at 10–11, which should not be considered because they are not in the record— does not come close to demonstrating that the District Court's factual finding is clearly erroneous. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 498–501 (1984).

As to the Court's concern that benevolent crossover voting impinges on party associational interests, *ante*, at 11, the District Court found that experience with a blanket primary in Washington and other evidence 'suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting . . . although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states." 169 F. 3d, at 657. In my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief pre-registration requirement, is too thin a reed to support a credible First Amendment distinction. See *Tashjian*, 479 U. S., at 219 (rejecting State's interest in

keeping primary closed to curtail benevolent crossover voting by independents given that independents could easily cross over even under closed primary by simply registering as party members).

On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." 169 F. 3d, at 662;[9] cf. *Timmons*, 520 U. S., at 364 ("[W]e [do not] require elaborate, empirical verification of the weightiness of the State's asserted justifications"). The Court's glib rejection of the State's interest in increasing voter participation, *ante*, at 17, is particularly regrettable. In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. See Brief for Respondents 46 (noting that study presented to District Court showed higher voter turnout levels in blanket primary states than in open or closed primary states); *ante*, at 1 (KENNEDY, J., concur-

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[9]In his concurrence, JUSTICE KENNEDY argues that the State has no valid interest in changing party doctrine through an open primary, and suggests that the State's assertion of this interest somehow irrevocably taints its blanket primary system. *Ante*, at 2. The *Timmons* balancing test relied upon by the Court, *ante*, at 14, however, does not support that analysis. *Timmons* and our myriad other constitutional cases that weigh burdens against state interests merely ask whether *a* state interest justifies the burden that the State is imposing on a constitutional right; the fact that one of the asserted state interests may not be valid or compelling under the circumstances does not end the analysis.

ring). I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process,[10] to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, *Burdick* v. *Takushi,* 504 U. S. 428, 445 (1992) (KENNEDY, J., dissenting), and to the preference of almost 60% of California voters— including a majority of registered Democrats and Republicans— for a blanket primary. 169 F.3d, at 649; see *Tashjian*, 479 U. S., at 236 (SCALIA, J., dissenting) (preferring information on whether majority of rank-and-file party members support a particular proposition than whether state party convention does so). In my view, a State is unquestionably entitled to rely on this combination of interests in deciding who may vote in a primary election conducted by the State. It is indeed strange to find that the First Amendment forecloses this decision.

II

The Elections Clause of the United States Constitution, Art. I, §4, cl. 1, provides that '[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof" (emphasis added). This broad constitutional grant of power to state legislatures is 'matched by state control over the election process for state offices." *Tashjian,* 479 U. S., at 217. For the reasons given in Part I, *supra*, I believe it would be a proper exercise of these powers and would not violate the First Amendment for the

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[10]See *La Follette,* 450 U. S., at 135–136 (Powell, J., dissenting); cf. *Tashjian,* 479 U. S., at 215–216, n. 6 (discussing cases such as *Rosario* v. *Rockefeller,* 410 U. S. 752 (1973), in which nonmembers' associational interests were overborne by state interests that coincided with party interests); *Bellotti* v. *Connolly*, 460 U. S., at 1062 (STEVENS, J., dissenting) (discussing associational rights of voters).

California Legislature to adopt a blanket primary system. This particular blanket primary system, however, was adopted by popular initiative. Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.

The California Constitution empowers the voters of the State to propose statutes and to adopt or reject them. Art. 2, §8. If approved by a majority vote, such "initiative statutes" generally take effect immediately and may not be amended or repealed by the California Legislature unless the voters consent. Art. 2, §10. The amendments to the California Election Code that changed the state primary from a closed system to the blanket system presently at issue were the result of the voters' March 1996 adoption of Proposition 198, an initiative statute.

The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state "Legislature[s]." It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the California Legislature . . ., but the people reserve to themselves the powers of initiative and referendum." Art. 4, §1. The vicissitudes of state nomenclature, however, do not necessarily control the meaning of the Federal Constitution. Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to "the Legislature" is not so broad as to encompass the general

'legislative power of the State." [11] Under that view, California's classification of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause. Arguably, therefore, California's blanket primary system for electing United States Senators and Representatives is invalid. Because the point was neither raised by the parties nor discussed by the courts below, I reserve judgment on it. I believe, however, that the importance of the point merits further attention.

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For the reasons stated in Part I of this opinion, as well as those stated more fully in the District Court's excellent opinion, I respectfully dissent.

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[11] *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866) ("[Under the Elections Clause,] power is conferred upon the *legislature*. But what is meant by the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country? The [C]ommittee [of Elections for the U. S. House of Representatives] have adopted the latter construction").

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA DEMOCRATIC PARTY ET AL. *v.* JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99–401. Argued April 24, 2000— Decided June 26, 2000

One way that candidates for public office in California gain access to the general ballot is by winning a qualified political party's primary. In 1996, Proposition 198 changed the State's partisan primary from a closed primary, in which only a political party's members can vote on its nominees, to a blanket primary, in which each voter's ballot lists every candidate regardless of party affiliation and allows the voter to choose freely among them. The candidate of each party who wins the most votes is that party's nominee for the general election. Each of petitioner political parties prohibits nonmembers from voting in the party's primary. They filed suit against respondent state official, alleging, *inter alia,* that the blanket primary violated their First Amendment rights of association. Respondent Californians for an Open Primary intervened. The District Court held that the primary's burden on petitioners' associational rights was not severe and was justified by substantial state interests. The Ninth Circuit affirmed.

Held: California's blanket primary violates a political party's First Amendment right of association. Pp. 4–19.

(a) States play a major role in structuring and monitoring the primary election process, but the processes by which political parties select their nominees are not wholly public affairs that States may regulate freely. To the contrary, States must act within limits imposed by the Constitution when regulating parties' internal processes. See, *e.g., Eu* v. *San Francisco County Democratic Central Comm.,* 489 U. S. 214. Respondents misplace their reliance on *Smith* v. *Allwright,* 321 U. S. 649, and *Terry* v. *Adams,* 345 U. S. 461, which held not that party affairs are public affairs, free of First Amendment protections, see, *e.g., Tashjian* v. *Republican Party of Conn.,* 479 U. S.

Syllabus

208, but only that, when a State prescribes an election process that gives a special role to political parties, the parties' discriminatory action becomes state action under the Fifteenth Amendment. This Nation has a tradition of political associations in which citizens band together to promote candidates who espouse their political views. The First Amendment protects the freedom to join together to further common political beliefs, *id.*, at 214–215, which presupposes the freedom to identify those who constitute the association, and to limit the association to those people, *Democratic Party of United States* v. *Wisconsin ex rel. La Follette,* 450 U. S. 107, 122. In no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views. The First Amendment reserves a special place, and accords a special protection, for that process, *Eu, supra,* at 224, because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power, *Tashjian, supra,* at 216. California's blanket primary violates these principles. Proposition 198 forces petitioners to adulterate their candidate-selection process— a political party's basic function— by opening it up to persons wholly unaffiliated with the party, who may have different views from the party. Such forced association has the likely outcome— indeed, it is Proposition 198's intended outcome— of changing the parties' message. Because there is no heavier burden on a political party's associational freedom, Proposition 198 is unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons* v. *Twin Cities Area New Party,* 520 U. S. 351, 358. Pp. 4–14.

(b) None of respondents' seven proffered state interests— producing elected officials who better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy— is a compelling interest justifying California's intrusion into the parties' associational rights. Pp. 14–18.

169 F. 3d 646, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part I.

RECORDS CERTIFICATION

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OVERVIEW INDIAN LAW & STATE/ TRIBAL

Indian Law Issues
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- § 1302 of Indian Civil Rights Act
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  Native Entities Within the State of Alaska Recognized by the U.S. Bureau of Indian Affairs
  News release from the U.S. Department of the Interior
- 25 CFR Part 151, Department of Interior, Bureau of Indian Affairs, Acquisition of Title to Land in Trust
  Memo to Assistant Secretary-Indian Affairs from the Solicitor
  Letter to Director Virden from Attorney General Bruce Botelho
- Public Law 280 (Criminal) § 1162
  Public Law 280 (Civil) § 1360
- The Governor's Administrative Order No. 186
- Draft of the Millennium Agreement

Other Material:

- State-Tribal Relations Team Web-site
- Letter to Governor from Sen. Stevens, Sen. Murkowski and Congressman Young Regarding Administrative Order
- Governor's Response to Letter from Alaska's Congressional Delegation
- Press Release from Governor
- Memo from Joe Williams to Tribal Leaders
- State-Tribal Relations Team
- *Achieving Alaska Native Self-Governance*, Executive Summary From Final Report, The Economics Resource Group, Inc.
- *Urban Rural Unity Study*, Commonwealth North
- Other available articles

INDIAN LAW BRIEFING

Joint Meeting of the House State Affairs and Judiciary Committees

February 12, 2001

Department of Law presentation by:

Attorney General Bruce Botelho
Deputy Attorney General (Civil) Barbara Ritchie
Deputy Attorney General (Criminal) Cynthia Cooper
Chief Assistant Attorney General D. Rebecca Snow

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§ 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall—

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(As amended Pub.L. 99-570, Title IV, § 4217, Oct. 27, 1986, 100 Stat. 3207-146.)

HISTORICAL AND STATUTORY NOTES

1986 Amendment

Par. (7). Pub.L. 99-570, § 4217, substituted "for a term of one year and a fine of $5,000" for "for a term of six months or a fine of $500".

Enhancement of Ability of Tribal Governments to Prevent Traffic of Illegal Narcotics

Section 4217 of Pub.L. 99-570 provided in part that amendment of par. (7) of this section was "To enhance the ability of tribal governments to prevent and penalize the traffic of illegal narcotics in Indian reservations".

Legislative History

For legislative history and purpose of Pub.L. 99-570 see 1986 U.S. Code Cong. and Adm. News, p. 5393.

Federal Forms

11 Federal Procedural Forms L Ed, Indians and Indian Affairs § 41:135.

WEST'S FEDERAL PRACTICE MANUAL

Reverse discrimination, see West's Federal Administrative Practice § 15873.

LAW REVIEW AND JOURNAL COMMENTARIES

Bothersome need for asymmetry in any federally dicta d rule of recognition for the enforcement of money judgments across Indian reservation boundaries. Robert Laurence, 27 Conn. L.Rev. 979 (1995).

EPA and Indian Reservations: Justice Stevens' Factual Approach. Peter W. Sly, 20 Envtl.L.Rep. 10429 (1990).

Fighting over Indian children: The uses and abuses of jurisdictional ambiguity. Barbara Ann Atwood, 36 UCLA L.Rev. 1051 (1989).

Geographically-based and membership-based views of Indian tribal sovereignty: The Supreme Court's changing vision. Allison v. Dussias, 55 U.Pitt.L.Rev. 1 (1993).

Memory and misrepresentation: Representing Crazy Horse. Nell Jessup Newton, 27 Conn.L.Rev. 1003 (1995).

Quest for a principled theory of tribal sovereignty: Fueling the fires of tribal/state conflict. N. Bruce Duthu, 21 Vt.L.Rev. 47 (1996).

Sentencing and cultural differences: Banishment of the American Indian robbers. Note, 20 J. Marshall L.Rev. 239 (1995).

Supreme Court removal of Tribal Court jurisdiction over crimes by and against Reservation Indians. (1984-1985) 20 New Eng.L.Rev. 247.

The status of Indian tribes in American law today. Honorable William C. Canby, Jr., 62 Wash.L.Rev. 1 (1987).

STATE-TRIBAL RELATIONS TEAM

A Short History of the Federal Recognition of Tribes in Alaska and the Evolution of the State's Position

Prepared by Alaska Department of Law, 2000

Federally recognized tribes are independent political entities with inherent powers of self-government subject to the plenary power of Congress. The power to recognize tribes and to regulate the scope of their powers is exclusively federal.

Until recently there was great uncertainty about the status of Alaska Tribes. When Governor Knowles assumed office the Alaska Supreme Court had only accepted the federally recognized status of Metlakatla through its 1977 decision in Atkinson v. Haldane. The Atkinson decision adopted the U.S. Supreme Court's rule that once the political branches of the federal government have recognized a tribe, both federal and state courts must do the same. This rule has been in place since 1865 and reflects the U.S. Constitution's commitment of Indian affairs to the federal government through the "Indian Commerce Clause," U.S. CONST art. I, § 8, cl. 3.

While it has long been clear that tribal status determinations are within the sole authority of the federal government, the federal government was not clear with respect to Alaska Tribes until the mid-Nineties. It was not until 1978 that the Interior Department developed regulations governing the tribal recognition process. In 1979, when Interior published its first list of tribes, no Alaska Tribes were included. Throughout the eighties, Interior's lists treated Alaska Native entities in a confusing and conflicting manner. The 1988 list, for example, included ANCSA corporations that clearly were not tribes. In early 1993, Interior Solicitor Sansonetti issued a comprehensive legal opinion that specifically declined to identify which Alaska entities qualified as tribes. Against this backdrop, and in the absence of unequivocal recognition by the federal government, the State was unwilling to accept assertions of tribal status.

Then, in October of 1993, the Interior Department issued a new tribal entities list. The list's preamble set out the confusing history of prior efforts to list Alaska Tribes and claimed that the new list was intended to "eliminate any doubt" that the Native communities listed enjoy the "same status as tribes in the contiguous 48 states." This executive branch recognition of Alaska Tribes was the first in a series of clarifying federal actions.

The next clarifying action was the enactment, with the support of the Alaska delegation, of the Federally Recognized Indian Tribe List Act of 1994. Through the Act, Congress confirmed the Interior Department's 1993 list, restored the Central Council of Tlingit and Haida Tribes to it, and specifically acknowledged the "government-to-government relationship between the United States and other federally recognized Alaska Native tribes."
Finally, in 1995, on the strength of Interior's 1993 and 1995 lists and Congress' 1994 List Act, federal district court Judge Russel Holland recognized the tribal status of the Native Village of Fort Yukon. It was clear that Judge Holland's decision was equally applicable to all Alaska Tribes appearing on the Secretary's list.

At this point, Governor Knowles concluded that it was no longer appropriate to contest the status of Alaska's federally recognized Tribes. All three branches of the federal government had spoken on this uniquely federal law question. At the Governor's direction, the Department of Law did not appeal Judge Holland's tribal status ruling. The Knowles administration has since respected and supported the federal recognition of Alaska Tribes.
Though Governor Knowles was sharply criticized for accepting the tribal status of Fort Yukon, that position was by then firmly grounded in the law. Just as ANCSA reflected Congress' intent that ANCSA lands would not constitute Indian country as finally determined by the United States Supreme Court in the Venetie case, so the List Act confirmed Congress' intent that Interior's list would be conclusive of tribal status.

After Venetie, the Knowles administration supported the authority of tribal courts to adjudicate the custody of member children in the landmark John v. Baker case. The Alaska Supreme Court agreed with the State's arguments and, in so doing, also settled state law on the question of tribal status. The

court, including the two dissenting justices, held that it was obliged to defer to the federal government's recognition of Alaska tribes.

Even before the John v. Baker decision came down in September of 1999, the State filed another brief in the Alaska Supreme Court supporting the federal recognition of Alaska Tribes. Through its friend of the court brief the State urged reversal of the lower court's refusal to recognize the tribal status of the Native Village of Mekoryuk and, by extension, all Tribes on Interior's list. Though the legal debate over the status of Alaska tribes should be over, legal challenges persist. In addition to the Mekoryuk case, one of the parties to John v. Baker has sought review of the Alaska Supreme Court's decision in the U.S. Supreme Court. The State supported the respondent's opposition to that effort through another friend of the court brief.

In the meantime, Governor Knowles is implementing the Rural Governance Commission's recommendation that the State formally acknowledge the federally recognized status of Alaska tribes. On January 7, 2000, the Governor appointed a cabinet level negotiating team to undertake government-to-government negotiations with representatives of Alaska's federally recognized tribes. The Governor has said that he hopes the negotiations will forge "an enduring and positive relationship between the state and the tribes."

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4310-02

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

INDIAN ENTITIES RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS

AGENCY: Bureau of Indian Affairs.

ACTION: Notice.

SUMMARY: Notice is hereby given of the current list of tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes. This notice is published pursuant to Section 104 of the Act of November 2, 1994 (Pub. L. 103-454; 108 Stat. 4791, 4792).

FOR FURTHER INFORMATION CONTACT: Daisy West, Bureau of Indian Affairs, Division of Tribal Government Services, MS-4631-MIB, 1849 C Street, NW, Washington, D.C. 20240. Telephone number: (202) 208-2475.

SUPPLEMENTARY INFORMATION: This notice is published in exercise of authority delegated to the Assistant Secretary - Indian Affairs under 25 U.S.C. 2 and 9 and 209 DM 8.

Published below are lists of federally acknowledged tribes in the contiguous 48 states and in Alaska. The list is updated from the last such list published in October 23, 1997 (62 FR 55270), to include name changes or corrections. There have been no new tribal entities added to the list. The listed entities are acknowledged to have the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes. We have continued the practice of listing the Alaska Native entities separately solely for the purpose of facilitating identification of them and reference to them given the large number of complex Native names.

NATIVE ENTITIES WITHIN THE STATE OF ALASKA RECOGNIZED AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS

FOR INDIAN TRIBAL ENTITIES WITHIN THE CONTIGUOUS 48 STATES CLICK HERE

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A

- Village of Afognak
- Native Village of Akhiok
- Akiachak Native Community
- Akiak Native Community
- Native Village of Akutan
- Village of Alakanuk
- Alatna Village
- Native Village of Aleknagik
- Algaaciq Native Village (St. Mary's)
- Allakaket Village
- Native Village of Ambler
- Village of Anaktuvuk Pass
- Yupiit of Andreafski
- Angoon Community Association
- Village of Aniak
- Anvik Village
- Arctic Village (See Native Village of Venetie Tribal Government)
- Native Village of Atka
- Asa'carsarmiut Tribe (formerly Native Village of Mountain Village)
- Atqasuk Village (Atkasook)
- Village of Atmautluak

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B

- Native Village of Barrow Inupiat Traditional Government (formerly Native Village of Barrow)
- Beaver Village
- Native Village of Belkofski
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- Birch Creek Tribe (formerly listed as Birch Creek Village)
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- Native Village of Buckland

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C

- Native Village of Cantwell
- Native Village of Chanega (aka Chenega)
- Chalkyitsik Village
- Village of Chefornak
- Chevak Native Village
- Chickaloon Native Village
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- Native Village of Chignik Lagoon
- Chignik Lake Village

- Chilkat Indian Village (Klukwan)
- Chilkoot Indian Association (Haines)
- Chinik Eskimo Community (Golovin)
- Native Village of Chistochina
- Native Village of Chitina
- Native Village of Chuathbaluk (Russian Mission, Kuskokwim)
- Chuloonawick Native Village
- Circle Native Community
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H

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I

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- Village of Kalskag
- Village of Kaltag
- Native Village of Kanatak
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- Organized Village of Kasaan
- Native Village of Kasigluk
- Kenaitze Indian Tribe
- Ketchikan Indian Corporation
- Native Village of Kiana
- Agdaagux Tribe of King Cove
- King Island Native Community
- Native Village of Kipnuk
- Native Village of Kivalina

- Klawock Cooperative Association
- Native Village of Kluti Kaah (aka Copper Center)
- Knik Tribe
- Native Village of Kobuk
- Kokhanok Village
- New Koliganek Village Council (formerly Koliganek Village)
- Native Village of Kongiganak
- Village of Kotlik
- Native Village of Kotzebue
- Native Village of Koyuk
- Koyukuk Native Village
- Organized Village of Kwethluk
- Native Village of Kwigillingok
- Native Village of Kwinhagak (aka Quinhagak)
- Native Village of Larsen Bay
- Levelock Village
- Lesnoi Village (aka Woody Island)
- Lime Village
- Village of Lower Kalskag

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L

- Native Village of Larsen Bay
- Levelock Village
- Lesnoi Village (aka Woody Island)
- Lime Village
- Village of Lower Kalskag

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M

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- Manokotak Village
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- McGrath Native Village
- Native Village of Mekoryuk
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N

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- Native Village of Nelson Lagoon
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- Newhalen Village
- Newtok Village
- Native Village of Nightmute
- Nikolai Village
- Native Village of Nikolski
- Ninilchik Village
- Native Village of Noatak
- Nome Eskimo Community
- Nondalton Village
- Noorvik Native Community
- Northway Village
- Native Village of Nuiqsut (aka Nooiksut)
- Nulato Village
- Nunakauyarmiut Tribe (formerly Native Village of Toksook Bay)
- Native Village of Nunapitchuk

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O

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P

- Native Village of Paimiut
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S

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T

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- Wrangell Cooperative Association

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Y

- Yakutat Tlingit Tribe

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March 3, 2000 (Sgnd) Kevin Gover

Date Assistant Secretary - Indian Affairs

telst00a.html was last modified on Tuesday, April 18, 2000.

NEWS
U.S. DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

FOR IMMEDIATE RELEASE
January 3, 2001

CONTACT: Marilyn Heiman
907-271-5485
Nedra Darling
202-208-3710

Assistant Secretary Gover Reaffirms Federal Trust Relationship for the King Salmon Tribe and Shoonaq' Tribe of Kodiak in Alaska and the Lower Lake Rancheria in California

Action Corrects Oversight to Federally Recognized Tribes List

Assistant Secretary – Indian Affairs Kevin Gover has reaffirmed the federal trust relationship between the United States and the King Salmon Tribe and the Shoonaq' Tribe in Alaska and the Lower Lake Rancheria in California after finding that their government-to-government relationship with the U.S. has never been severed. "The King Salmon Tribe, the Shoonaq' Tribe of Kodiak, and the Lower Lake Rancheria have been officially overlooked for many years by the Bureau of Indian Affairs even though their government-to-government relationship with the United States was never terminated," Gover stated in his finding dated December 29, 2000, "I am pleased to correct this egregious oversight."

Due to administrative error, the BIA had for several years failed to place the three tribes on the list of federally recognized tribes it is required to publish annually in the Federal Register under the Federally Recognized Indian Tribes List Act (Pub. L. 103-454, 108 Stat. 4791, 4792). The list, entitled "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs," was last published on March 13, 2000.

The Assistant Secretary found that the King Salmon Tribe of Alaska has existed and maintained a continuous Indian community from historic times, and that present-day tribal members are descendants of a group that had been forced to leave an earlier homesite destroyed during an eruption of Mount Katmai.

The Assistant Secretary also found that the Shoonaq' Tribe of Kodiak, Alaska, has maintained a continuous political organization since European contact, that the Council of the Shoonaq' Tribe of Alaska has governed the historical Native community in and around the contemporary community of Kodiak, and that no other tribe has claimed the territory or the tribe's membership. Congress acknowledged Kodiak as an historic Native village possessing claims to aboriginal title in the Alaska Native Claims Settlement Act (ANCSA). In 1987, the Kodiak Tribal Council learned it had not been included on a list of federally recognized tribes

published by the BIA in the Federal Register and requested the Secretary of the Interior to correct the list.

In the case of the Lower Lake Rancheria of California, the Assistant Secretary found that the tribe had not been made subject to the Rancheria Act (Pub. L. 85-671, 72 Stat. 619, as amended by Pub. L. 88-419, 78 Stat. 390), by which Congress terminated the federal government's trust responsibility for dozens of California tribes during the 1950s, and that its tribal status has been continuously maintained by tribal members to the present day.

With the Assistant Secretary's action the number of federally recognized tribes now stands at 561, which also includes two tribes recognized under H.R. 5528, the Omnibus Indian Advancement Act (Pub. L. 106-568, 114 Stat. 2868) signed by President Clinton on December 28, 2000. The Loyal Shawnee Tribe of Oklahoma, which since 1869 has been a culturally and linguistically separate entity within the Cherokee Nation of Oklahoma, was accorded federal recognition as an independent tribe. The Graton Rancheria of California, which had been terminated by the Rancheria Act, was restored to federal recognition status.

Contact information for the three reaffirmed tribes: The King Salmon Village Council, P.O. Box 68, King Salmon, Alaska 99613-0068, the Honorable Ralph Angasan, Sr., President; The Shoonaq' Tribe of Kodiak, 713 East Rezanof Drive "B", Kodiak, Alaska 99615, the Honorable Kenneth Parker, Chairman; and The Lower Lake Rancheria, 131 Lincoln Street, Healdsburg, California 95448, the Honorable Daniel D. Beltran, Chairman.

For more information, contact Marilyn Heiman, Special Assistant to the Secretary for Alaska, U.S. Department of the Interior, at (907) 271-5485, fax: (907) 271-4102, or Nedra Darling, Director, Office of Public Affairs, Bureau of Indian Affairs, at (202) 208-3710, fax: (202) 501-1516.

-BIA-

2. Review of a Department of Energy remedial order:

Amount in controversy

$0–9,999. (18 CFR 381.303(b)): $100.
$10,000–29,999. (18 CFR 381.303(b)): $600.
$30,000 or more. (18 CFR 381.303(a)): $23,010.

3. Review of a Department of Energy denial of adjustment:

Amount in controversy

$0–9,999. (18 CFR 381.304(b)): $100.
$10,000–29,999. (18 CFR 381.304(b)): $600.
$30,000 or more. (18 CFR 381.304(a)): $12,060.

4. Written legal interpretations by the Office of General Counsel. (18 CFR 381.305(a)): $4,520.

Fees Applicable to Natural Gas Pipelines

1. Pipeline certificate applications pursuant to 18 CFR 284.22. (18 CFR 381.207(b)): $1,000.

Fees Applicable to Cogenerators and Small Power Producers

1. Certification of qualifying status as a small power production facility. (18 CFR 381.505(a)): $13,550.
2. Certification of qualifying status as a cogeneration facility. (18 CFR 381.505(a)): $15,340.
3. Applications for exempt wholesale generator status. (18 CFR 381.801): $1,310.

List of Subjects in 18 CFR Part 381

Electric power plants, Electric utilities, Natural gas, Reporting and recordkeeping requirements.

Thomas R. Herlihy,

Executive Director and Chief Financial Officer.

In consideration of the foregoing, the Commission amends Part 381, Chapter I, Title 18, *Code of Federal Regulations*, as set forth below.

PART 381—FEES

1. The authority citation for Part 381 continues to read as follows:

Authority: 15 U.S.C. 717–717w; 16 U.S.C. 791–828c, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352; 49 U.S.C. 60502; 49 App. U.S.C. 1–85.

§ 381.302 [Amended]

2. In § 381.302, paragraph (a) is amended by removing "$14,710" and inserting "$15,760" in its place.

§ 381.303 [Amended]

3. In § 381.303, paragraph (a) is amended by removing "$21,470" and inserting "$23,010" in its place.

§ 381.304 [Amended]

4. In § 381.304, paragraph (a) is amended by removing "$11,260" and inserting "$12,060" in its place.

§ 381.305 [Amended]

5. In § 381.305, paragraph (a) is amended by removing "$4,220" and inserting "$4,520" in its place.

§ 381.403 [Amended]

6. Section 381.403 is amended by removing "$7,320" and inserting "$7,840" in its place.

§ 381.505 [Amended]

7. In § 381.505, paragraph (a) is amended by removing "$12,650" and inserting "$13,550" in its place and by removing "$14,320" and inserting "$15,340" in its place.

§ 381.801 [Amended]

8. Section 381.801 is amended by removing "$1,530" and inserting "$1,310" in its place.

[FR Doc. 01–1149 Filed 1–12–01; 8:45 am]
BILLING CODE 6717–01–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Part 151

RIN 1076–AD90

Acquisition of Title to Land in Trust

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Final rule.

SUMMARY: This rule revises and clarifies the procedures used by Indian tribes and individuals to request the Secretary of the Interior to acquire title to land into trust on their behalf. It describes the criteria that the Secretary will use in determining whether to exercise his or her authority to accept title to land to be held in trust for the benefit of Indian tribes and individuals. This rule also describes the procedure for mandatory acquisitions of title and establishes a process to address the difficulties encountered by Indian tribes which have no reservation, have no trust land or have trust land the character of which renders it incapable of being developed.

DATES: Effective February 15, 2001.

FOR FURTHER INFORMATION CONTACT: Questions concerning this rule should be directed to: Terry Virden, Director, Office of Trust Responsibilities, Mail Stop: 4513–MIB, 1849 C Street NW., Washington, DC 20240; telephone: 202–208–5831; electronic mail: TerryVirden@BIA.GOV.

SUPPLEMENTARY INFORMATION: The regulation makes more clear the process that is followed by the Secretary in the exercise of this discretionary authority. The regulation also makes clear that we will follow a process which reflects (1) a presumption in favor of the acquisition of trust title when an application involves title to lands located inside the boundaries of a reservation ("on-reservation lands"), and (2) a more demanding standard for the acquisition of title when the application involves title to lands located outside the boundaries of a reservation ("off-reservation lands"). The delineation of these differing processes will better enable the Secretary to carry out the responsibility for assisting Indian tribes in re-establishing jurisdiction over land located within their own reservations. It also creates a framework that more adequately addresses concerns non-Indian governments may have about the potential ramifications of placing off-reservation lands into trust.

This regulation also describes the procedure for mandatory acquisitions of title. The general statutory authority giving the Secretary discretion to acquire title to lands in trust is found in section 5 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. 465. Occasionally, Congress enacts more narrow legislation granting the Secretary discretionary authority to acquire title to land into trust for some specific purpose. Acquisitions of trust title under the IRA and other more narrow statutes that grant discretionary authority to the Secretary are referred to as "discretionary acquisitions" of title. Mandatory acquisitions of title are those that Congress has directed the Secretary to complete by removing any discretion in the administrative decision making process. The processing of these mandated acquisitions has not always been well-understood. The rule identifies the types of acquisitions that we consider mandatory and defines the process by which we acquire the title.

Finally, this regulation establishes a process to address the unique difficulties encountered by Indian tribes which have no reservations, have no trust land or have trust land the character of which renders it incapable of being developed. The process enables such tribes to designate a "Tribal Land Acquisition Area" (TLAA) in which it plans to acquire land. The TLAA requires approval of the Secretary and, when approved, will enable the tribe to acquire title to the lands within the TLAA into trust under the on-reservation provision of this regulation for a prescribed period of time.

On April 12, 1999, the proposed rule for the acquisition of title to land in trust was published in the Federal

Register (Vol. 64, No. 69, pages 17574–17588). The initial deadline for receipt of comments was July 12, 1999, but extensions to the comment period were granted to allow additional time for comments on the proposed rule. The comment period expired on December 29, 1999. Comments were received from a wide variety of Indian tribes and individuals, tribal groups, local and state governments and other interested groups and individuals. The development of this final rule making was achieved through formal consultation on the record with affected tribal governments. A panel discussion meeting with federal, state and local governments, Indian tribes and various organizations was held in Washington, DC in May, 1999. Panel members included persons from California Indian Lands Office, attorneys representing various tribal and municipal clients, Minority Staff Director and Counsel of House Resources Committee for Indian Affairs, Majority Staff Director of Senate Committee on Indian Affairs, two tribal chairpersons, Deputy Attorney General of South Dakota and National Association of Convenience Stores. In addition, in accordance with the government-to-government relationship with Indian tribes, formal consultations were held throughout the United States during the comment period to explain and provide interested parties with an opportunity to understand and comment on the final rule. Five nationwide consultation meetings with Indian tribes and individuals were conducted during the comment period. These meetings were held in Albuquerque, New Mexico in May 1999; St. Paul, Minnesota in May 1999; Sacramento, California in June 1999; Mesa, Arizona in June 1999 and Portland, Oregon in August 1999. In total, comments were received from 342 Indian tribes, 335 individuals, 65 state and local governments, 9 congressional offices and 7 federal agencies. Tribal participation was also achieved by consultation with the National Congress of American Indians (NCAI) for its member tribes. NCAI established a working group to assist in the development of the comments on the proposed regulations.

This notice is published in exercise of the authority delegated by the Secretary of the Interior to the Assistant Secretary—Indian Affairs pursuant to Part 290, Chapter 8, of the Departmental Manual.

Summary of Regulations and Comments Received

The following narrative and discussion of comments is keyed to specific subparts of the rule.

Subpart A—Purpose, Definitions, General

Summary of Subpart

This subpart addresses the purpose and scope of the regulation and provides interpretation for the key terms of the regulation. Subpart A also addresses the types of transactions affecting this regulation, how to apply to have title to land placed in trust, how requests are processed, what occurs after a decision is made on a request, when title to land attains trust status and the taking of fractional interests of land into trust.

Comments

Comments were received regarding the implementation of the proposed regulation, with some comments requesting that the rule be withdrawn. The suggestion was not accepted because the Secretary must ensure that his authority over the acquisition of title to land into trust is implemented in an orderly and fair manner.

There were several comments concerning the definition of "reservation." One suggestion was that term the "reservation" should be defined the same as the statutory term "Indian country." Another suggestion was that the definition of "reservation" should remain the same as in the existing regulation. Other comments suggested that "reservation" include a provision for Pueblo grant lands, others suggested that it include hunting and fishing treaty areas. The comments were duly considered and accepted to clarify that Pueblo lands within the exterior boundaries of lands granted or confirmed to, or acquired by, the Pueblo as reported by the Pueblo Lands Board under section 2 of the Act of June 7, 1924, ch. 331, 43 Stat. 636, plus any other lands reserved, set aside, or held in trust by the United States for the use of the Pueblo or its members are reservation lands for purposes of this regulation. Also, the term "reservation" is clarified to include lands created by federal agreement, Secretarial proclamation or final judicial determination. Further, the term "reservation" is clarified to include lands established by Executive or Secretarial proclamation in the State of Oklahoma. These changes to the definition of reservation appear in § 151.2 of the rule.

There were many comments suggesting that lands contiguous to a reservation should be treated as on-reservation acquisitions. To define contiguous lands as on-reservation lands would enable applicants to use the less burdensome process which reflects a presumption in favor of the acquisition of trust title to on-reservation lands. The comments were considered but rejected and the rule remains as proposed that land(s) contiguous to reservation land will be treated as off-reservation acquisitions for purposes of this regulation, although because of their proximity to an existing reservation, the tribe will receive more favorable consideration than if the lands were more remote.

There were several comments regarding the type of acquisition transactions covered by the regulation. Comments suggested that only those acquisitions of title from fee simple to trust or restricted fee to trust or exchanges involving fee simple to trust should be governed by this regulation. The proposed rule included trust to trust, restricted fee to restricted fee, restricted fee to trust and land exchange acquisitions. The comments have been accepted and the rule is amended in § 151.3 to provide that the requirements of the rule only apply to conveyances from fee simple to trust, fee simple to restricted fee and land exchanges involving fee simple land. The rationale for excluding the other types of acquisitions from the regulation is that trust to trust and restricted fee to restricted fee, restricted fee to trust and land exchanges not involving fee land do not have an impact on the local governments because these lands are not already under their jurisdiction. We accepted the comments and have revised § 151.3(b) of the regulation to exclude these transfers.

There were comments suggesting that the final rule should establish special treatment for government-to-government trust transfers, because these lands already are exempt from local taxation and jurisdiction and because the federal transfer process involves similar criteria as the Part 151 process, and requiring another regulatory review would be duplicative and burdensome. These comments were accepted and § 151.3(b) has been amended to exempt federal agency transfers of title of land from one federal agency to the BIA or tribe.

There were numerous comments suggesting that a time frame should be established for issuance of a decision to accept title to land in trust. The comments were accepted and the rule amended to provide that the applicant will be notified when an application is

complete. Once an applicant is notified that their application is complete, the BIA will issue a decision on the request within 120 working days. Subsection (f) has been added to § 151.5 to reflect this change.

There were several comments seeking clarification regarding the treatment of applications that are pending when the regulation becomes final. The comments were considered and the regulation now provides a definition of "Complete application" in § 151.2. A new subsection (e) is added to § 151.5 that establishes the standard for a request to be considered a complete application. Applications that satisfy the definition of complete application at the time this rule becomes final, will be processed under the previous rule. If it is determined that an application is not complete at the time the rule becomes final, the application will be processed in accordance with the requirements of this rule.

There were several comments concerning the authority to take land into trust in Alaska. The preamble to the proposed rule addressed in some detail the question of whether to continue the bar in the existing regulations to the acquisition of trust title in land in Alaska (other than for the Metlakatla Indian Community or its members). See 64 FR 17577–78 (1999). As the discussion there indicated, the Department had earlier received, and invited public comment on (See 60 FR 1956(1995)), a petition by Native groups in Alaska which requested that the Department initiate a rulemaking to remove the prohibition in the regulations on taking Alaska land in trust. That discussion also noted that the Associate Solicitor for Indian Affairs had concluded, in a brief September 15, 1978 Opinion, that the Alaska Native Claims Settlement Act (ANSCA) precluded the Secretary from taking land into trust for Natives in Alaska (except for Metlakatla).

The Solicitor has considered the comments and legal arguments submitted by Alaska Native governments and groups and by the State of Alaska and two leaders of the Alaska State Legislature on whether the 1978 Opinion accurately states the law. The Solicitor has concluded that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion. Among other things, the Associate Solicitor found "significant" that in 1976 Congress repealed section 2 of the Indian Reorganization Act (IRA). That section had extended certain provisions of the IRA to Alaska, and had given the Secretary the authority to designate certain lands in Alaska as Indian reservations. See 43 U.S.C. 704(a), 90 Stat. 2743, repealing 49 Stat. 1250, 25 U.S.C. 496. The 1978 Opinion gave little weight to the fact that Congress has not repealed section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936. See 25 U.S.C. 473a. The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act, raises a serious question as to whether the authority to take land in trust in Alaska still exists. Accordingly, the Solicitor has signed a brief memorandum rescinding the 1978 Opinion.

At the same time, the position of the Department has long been, as a matter of law and policy, that Alaska Native lands ought not to be taken in trust. Therefore, the Department has determined that the prohibition in the existing regulations on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands into trust. If the Department determines that the prohibition on taking lands into trust in Alaska should be lifted, notice and comment will be provided.

Subpart B—Discretionary Acquisitions of Title On-Reservation

Summary of Subpart

This subpart describes the information that must be included in a request involving land located inside a reservation boundary or an approved TLAA. This subpart also establishes the criteria that will be used to evaluate requests for the acquisition of title to lands located inside the reservation or an approved TLAA. Further, this subpart defines the consent needed of the recognized governing body when an Indian tribe or individual acquires land inside another tribe's reservation or approved TLAA.

Comments

One comment suggested that the regulation require applicants to address potential impacts to local governments when the land being acquired is located on-reservation. The comment was rejected because state and local governments already are invited to submit comments on a proposed acquisition and may address such impacts in their comments. One comment suggested that the final rule clarify the distinction between on-reservation and off-reservation land. We believe the regulation already clearly defines the terms of "reservation" and "TLAA" which are used for on-reservation acquisitions. There were a few comments concerning appropriate land use of a proposed acquisition. Comments suggested that the rule should require clarification of anticipated future uses after acquisition in trust, describe how appropriate use will be enforced and propose strict criteria for future uses of the land. These comments were rejected because the IRA allows Indian tribes to manage and control their lands in accordance with tribal policy. Therefore, the regulation provides that anticipated future uses are those identified that are reasonably foreseeable and achievable. There were a few comments suggesting that the regulation should allow acquisitions for cultural, religious, or ceremonial uses. The proposed regulation continues the existing practice of accepting applications for the acquisition of title to lands in trust for these purposes. There were comments suggesting that the Secretary more thoroughly consider the impact on the state and local governments by the taking of title to land into trust, loss of tax revenue, and that he resolve jurisdictional issues and impact to municipal and local services prior to deciding to take land into trust. The regulation provides state and local governments with the opportunity to comment on potential impacts of the proposed acquisition, and the Secretary may fully consider the potential impacts prior to making a decision to take title to land into trust.

There were numerous comments suggesting that the final rule should require objective standards for the Secretary to use in making decisions to take on-reservation land into trust. The comments were accepted and the regulation has been amended to provide clearer standards to evaluate on-reservation requests. Section 151.10 is amended to provide that once an application is complete, we will accept title to land into trust on-reservation or inside a TLAA if the application facilitates tribal self-determination, economic development, Indian housing, land consolidation or natural resource protection. We will deny applications to accept on-reservation lands in trust if the acquisition will result in severe negative impact to the environment or severe harm to the local government. Evidence of such harm must be clear

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

JAN 1 6 2001

Memorandum

To: Assistant Secretary - Indian Affairs

From: Solicitor

Subject: Rescinding the September 15, 1978, Opinion of the Associate Solicitor for Indian Affairs entitled "Trust Land for the Natives of Venetie and Arctic Village"

In the referenced Opinion, the Associate Solicitor for Indian Affairs concluded that the Alaska Native Claims Settlement Act (ANCSA) precludes the Secretary from taking land in trust for Alaska Natives except for members of the Metlakatla Indian Community. On April 12, 1999, the Department published proposed amendments to the regulations found at 25 C.F.R. Part 151, which govern the Secretary's authority to take land into trust. 64 Fed. Reg. 17574. The preamble to the proposed rule observed that the regulatory bar to the acquisition of trust lands in Alaska in the original version of the Part 151 regulations was predicated upon the 1978 Opinion. It acknowledged that "there is a credible legal argument that ANCSA did not supersede the Secretary's authority to take land into trust in Alaska" under the Indian Reorganization Act. Id. at 17577-78. It also noted that the Secretary had been petitioned to undertake a rulemaking to remove the prohibition on taking land in trust in Alaska. Ibid. See also 60 Fed. Reg. 1956 (1995). The preamble invited comments on these issues.

Comments and legal arguments have been submitted by Alaska Native governments and groups and by the State of Alaska and two leaders of the Alaska State Legislature on whether the Associate Solicitor's Opinion accurately states the law. After considering those comments, I have concluded that there is substantial doubt about the validity of the conclusion reached in the 1978 Opinion. Among other things, the Associate Solicitor found "significant" that in 1976 Congress repealed section 2 of the Indian Reorganization Act (IRA). That section had extended certain provisions of the IRA to Alaska, and had given the Secretary the authority to designate certain lands in Alaska as Indian reservations. See 43 U.S.C. § 704(a), 90 Stat. 2743, repealing 49 Stat. 1250, 25 U.S.C. § 496. The 1978 Opinion gave little weight to the fact that Congress had not repealed section 5 of the IRA, which is the generic authority by which the Secretary takes Indian land into trust, and which Congress expressly extended to Alaska in 1936. See 25 U.S.C. § 473a. The failure of Congress to repeal that section, when it was repealing others affecting Indian status in Alaska, five years after Congress enacted the Alaska Native Claims Settlement Act in 1971, raises a serious question as to whether the authority to take land into trust in Alaska still exists.

The Department has, in its final Part 151 regulations being published today, decided in its sound discretion to continue in place the bar against taking Native land in Alaska into trust (other than Metlakatla). 25 C.F.R. § 151.3(c). The preamble to these regulations expresses the Department's determination to continue this prohibition in place for three years, "during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition," and to provide notice and an opportunity to comment on any decision to remove it. Because of my substantial doubt about the validity of the conclusion in the 1978 Opinion, and in order to clear the record so as not to encumber future discussions over whether the Secretary can, as a matter of law, and should, as a matter of policy, consider taking Native land in Alaska into trust, I am hereby rescinding the Associate Solicitor's 1978 Opinion.

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STATE OF ALASKA

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX 110300
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600
FAX: (907) 465-2075

September 8, 1999

Terry Virden, Director
Office of Trust Responsibilities
Bureau of Indian Affairs
Department of the Interior
MS-4513-MIB
1849 C Street N. W.
Washington, D.C. 20240

VIA FAX TO 202-219-1065
Hard copy to follow

Re: Comments of the State of Alaska regarding proposed regulations retaining the prohibition against the acceptance of lands in trust in Alaska

Dear Director Virden:

On April 12, 1999, the Department of the Interior formally solicited comments regarding proposed regulations that, among other things, would continue the existing federal policy barring the Secretary of the Interior from acquiring title to land in Alaska in trust, except for the Metlakatla Indian Community or its members. 64 Fed. Reg. 17574 – 17578 (1999). In addition, in 1995, three Alaska tribes filed a petition asking that the regulatory prohibition be removed. 60 Fed. Reg. 1956 (1995). The Department requested comments regarding the continued validity of a 1978 opinion of the Associate Solicitor holding that the Alaska Native Claims Settlement Act (ANCSA) precluded the Secretary from taking lands in Alaska (except Metlakatla) into trust. *See* Opinion of Assoc. Solicitor, *Trust Lands for Natives of Venetie and Arctic Village*, Sept. 15, 1978. Specifically, the Department requested comments regarding the continued validity of the Associate Solicitor's opinion and issues raised in the petition in light of the Supreme Court's recent decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 118 S. Ct. 948 (1998). The State of Alaska respectfully submits the following comments.

It is Alaska's view that the Associate Solicitor's Opinion is strongly supported by the law and is correct. The Supreme Court's recent decision in *Venetie* confirms the continued validity of the Associate Solicitor's opinion.

1. The Associate Solicitor's opinion correctly concludes that ANCSA prohibits the Secretary from accepting land in trust.

In his opinion, Associate Solicitor Thomas W. Fredericks observed that in adopting ANCSA, Congress intended to "permanently remove all Native lands in Alaska from trust status." Op. at 1. The Associate Solicitor correctly noted Congress' policy in adopting ANCSA:

> The settlement should be accomplished . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges.

Id., quoting ANCSA, § 2(b). The Associate Solicitor reasoned that the policy goals, substantive provisions and legislative history of ANCSA preclude the restoration of former reservations, reservations that had been extinguished by ANCSA, to trust status. Op. at 2. Finally, the Associate Solicitor concluded that Congress' repeal, by section 704 of the Federal Land Policy and Management Act of 1976, of the Secretary's authority to designate certain lands in Alaska as reservations, confirms congressional intent to prohibit the acquisition of land in trust, notwithstanding the omission of language amending section 5 of the Indian Reorganization Act (IRA).[1]

Alaska agrees with the Associate Solicitor's reasoning and conclusions. Congress' express desire not to create any reservation system or lengthy wardship or trusteeship, to extinguish all reservations in Alaska save one, and to repeal all authority of the Secretary to designate new reservations in Alaska, all belie any intent to preserve the authority of the Secretary to acquire Alaska land in trust. In short, the adoption of regulations permitting the acquisition of title to Indian land in trust in Alaska would contravene the clear intent of Congress in adopting ANCSA, and the Associate Solicitor's opinion is, therefore, well grounded in the law.

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[1] In general language applicable nationwide, section 5 of the IRA authorizes the Secretary to acquire title to lands for Indians in trust. 25 U.S.C. § 465.

2. The Supreme Court's *Venetie* decision confirms the validity of the associate solicitor's opinion.

In *Venetie* the Supreme Court ruled that lands conveyed under ANCSA to Native groups do not constitute Indian country under the "dependent Indian community" provision of 18 U.S.C. § 1151. The Court ruled that the lands that the tribes received under ANCSA had not been "validly set apart for the use of the Indians as such, nor are they under the superintendence of the federal government." 118 S. Ct. at 955.

In reaching this conclusion, the Court reasoned that by revoking all reservations in Alaska, whether created by legislation or the Executive, Congress had "departed from its traditional practice of setting aside Indian lands." *Id.* Perhaps even more significantly, the Court ruled that "ANCSA *ended* federal supervision over the Tribe's lands," and that Congress had "stated explicitly that ANCSA's settlement provisions were intended to avoid a lengthy wardship or trusteeship." *Id.* at 955 – 956 (emphasis added) (internal quotations omitted).

As the Associate Solicitor correctly concluded in 1978, a reading of section 5 of the IRA in a way that authorizes the Secretary to acquire trust title to land in Alaska would undermine the fundamental policy goals of ANCSA, contravene the essential holding in *Venetie*, and permit the Secretary to "undo" what Congress has already done. Authorizing the Secretary to acquire lands in trust is categorically contrary to the congressional policy of *ending* federal supervision over Native lands in Alaska.

3. ANCSA Supercedes Section 5 of the IRA as Applied to Alaska.

The claim that the Secretary retains authority to acquire title to lands in Alaska in trust is incorrect for the following additional reason. Where a potential statutory conflict exists, statutes must, nevertheless, be construed to give effect to the will of Congress. *Negonsott v. Samuels*, 507 U.S. 99, 113 S. Ct. 1119 (1992). Section 5 of the IRA, as applied to Alaska, was enacted in 1936. 48 Stat. 985. By contrast, the substantive and policy provisions of ANCSA, enacted in 1971, constitute the most recent congressional directive regarding the status of Native lands in Alaska. Furthermore, ANCSA's specific statutory declarations concerning the treatment of lands in Alaska must control over a potentially conflicting provision of the IRA that addresses the Secretary's general authority to take land into trust status. *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 458 F.2d 295 (9th Cir. 1992) (later and more specific statute normally controls over

earlier more general statute where statutes are inconsistent). Any other interpretation would promote the perpetuation of a "wardship" or "trusteeship" over lands, in clear contravention to the will of Congress specifically and more recently expressed in ANCSA.

The foregoing compels the conclusion that ANCSA must be read to control over a potentially conflicting reading of section 5 of the IRA. The adoption of regulations permitting the Secretary to acquire title to land in Alaska in trust would necessarily be contrary to the essential policy goals and substantive provisions of ANCSA, Congress' most recent directive regarding the status of Alaska Native lands.

Accordingly, the April 12, 1999, proposed regulations correctly adhere to the Department's longstanding policy against taking Native land in Alaska into trust other than for the Metlakatla Indian Community and its members.

Very truly yours,

Bruce M. Botelho
Attorney General

cc: John Katz