CONSTITUTIONAL LAW — ELECTIONS — STATE-MANDATED CLOSED PRIMARY VIOLATES ASSOCIATIONAL RIGHTS OF POLITICAL PARTY AND ITS MEMBERS—*Tashjian v. Republican Party of Connecticut*, 107 S. Ct. 544 (1986).

The American electoral process historically has implicated several diverse liberty interests. Indeed, the freedom afforded to Americans by the right of political association is "a necessary guarantee against the tyranny of the majority."[1] At the same time, "[i]t is clear that preservation of the integrity of the electoral process is a legitimate and valid state goal."[2] These two ideals became the center of the conflict presented to the United States Supreme Court in *Tashjian v. Republican Party of Connecticut*.[3] That controversy represented the first time a political party challenged a state's closed primary law on first amendment grounds.[4] Specifically, the issue presented in *Tashjian* was whether a state political party's first amendment right of political association entitled that party to define its own associational boundaries and structure.[5] In upholding the lower courts, the Supreme Court held that Connecticut's closed primary statute impermissibly burdened a political party's first amendment rights.[6]

The State of Connecticut adopted its present political primary system in 1955.[7] That system requires that each major party[8] hold a statewide convention of its delegates to select can-

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[1] A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 194-95 (H. Reeve ed. 1984). *See* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (first amendment freedom also "entitled under the Fourteenth Amendment to the same protection from infringement by the States.").

[2] Rosario v. Rockefeller, 410 U.S. 752, 761 (1973).

[3] 107 S. Ct. 544 (1986).

[4] Republican Party of the State of Connecticut v. Tashjian, 599 F. Supp. 1228, 1230 (D. Conn. 1984), *aff'd*, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

[5] *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 281 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The first amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[6] *Tashjian*, 107 S. Ct. at 554.

[7] *Id.* at 547.

[8] A "major party" is statutorily defined as "a political party or organization whose candidate for governor at the last-preceding election for governor re-

didates for federal and state offices, and a district convention for selection of candidates for the state legislature.[9] The candidates ultimately selected by the major parties are automatically placed on the general election ballot.[10] When primary elections are necessary, their costs are paid out of public funds.[11]

The Republican Party of Connecticut (the Party), a major party under Connecticut law, is a collection of individuals who "associate for the common advancement of political beliefs and ideas."[12] To forward this objective, the Party attempts to nominate candidates with the "broadest spectrum of popular support" or, in other words, those who appear most likely to prevail at the general elections.[13] For a long time, however, the Connecticut Republican Party did not enjoy great success at the polls.[14] In addition, both registered Democratic voters and registered but unaffiliated voters far outnumbered registered Republican voters in the state.[15] In August 1983, the State Central Committee of the Republican Party appointed a subcommittee to study the existing rules of the Party, and to devise a strategy in order to en-

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ceived. . .at least twenty per cent of the whole number of votes cast for all candidates for governor." CONN. GEN. STAT. ANN. § 9-372(5)(B) (West Supp. 1987). Under this definition, the Democratic and Republican parties are the only major parties in Connecticut. *Tashjian*, 107 S. Ct. at 547 n.2.

9 *Tashjian*, 107 S. Ct. at 547. Under this system, any person who receives more than 20% of the votes cast at a roll-call vote at the convention may be certified as a party-endorsed candidate. The endorsed candidate may be challenged in a primary election by any unendorsed candidate who has also received more than 20% of the vote. The candidate receiving the plurality of votes in the primary election will become the nominee of the party. *See* CONN. GEN. STAT. ANN. §§ 9-382 (West 1966), 9-400, 9-444 (West Supp. 1987).

10 *See* CONN. GEN. STAT. ANN. § 9-379 (West Supp. 1987).

11 *Tashjian*, 107 S. Ct. at 547. *See also* CONN. GEN. STAT. ANN. § 9-441 (West 1966) (compensation for registrars and municipal clerks paid by municipality).

12 Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 268 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

13 *Id.* at 269.

14 *Id.* From 1958 to 1984, the Republican Party captured just four of 16 statewide elections for Governor and United States Senator. During the same period, the Party prevailed in only 25 of 84 elections for United States Representative. *Id.* at 269 n.4 (citing State of Connecticut Register and Manual 72-82 (1983); 42 Cong. Q. 2923 (Nov. 10, 1984)).

15 *Id.* at 269 n.4 (citing The Hartford Courant, Jan. 4, 1985, at A6). When this action was commenced, Connecticut had 659,268 registered Democrats, 532,723 registered but unaffiliated voters, and 425,695 registered Republicans. *Tashjian*, 107 S. Ct. at 547 n.3. In August 1985, there were 718,772 registered Democrats, 608,613 registered but unaffiliated voters, and 477,749 registered Republicans in the State of Connecticut. M. BARONE & G. UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1986, 237 (1985).

sure a likelihood of future electoral success.[16] Eventually, the subcommittee decided that the Party's chances at the general elections would improve if unaffiliated voters were allowed to participate in the Republican primary elections.[17] The subcommittee believed that such participation would not only ensure that candidates with greater bipartisan support were nominated, but also would involve registered but unaffiliated voters to a greater extent in these elections.[18] In September 1983, the Central Committee recommended calling a convention to consider implementation of the subcommittee's suggestion.[19]

On January 14, 1984, the delegates to the state Republican Convention approved an amendment to its party rules (the Party Rule) which permitted unaffiliated individuals to vote in Republican Party primaries.[20] The Party Rule, however, directly contravened the closed primary law encompassed in § 9-431 of the Connecticut General Statutes which prevented registered but unaffiliated voters from voting in any party primary.[21] As a result, Republican legislators attempted to amend § 9-431 during the 1984 session of the Connecticut General Assembly.[22] Represen-

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16 *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 269 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

17 *See id.*

18 *See id.* An open primary "allows relatively independent voters to cast their lot with the party that speaks to their present concerns. By attracting participation by relatively independent-minded voters, the [open primary] arguably may enlarge the support for a party at the general election." Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 132-33 (1981) (Powell, J., dissenting).

19 *Tashjian*, 107 S. Ct. at 547.

20 *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 269 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The Party Rule provided that "[a]ny elector enrolled as a member of the Republican Party and any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of candidates for the offices of United States Senator, United States Representative, Governor, Lieutenant Governor, Secretary of State, Attorney General, Comptroller and Treasurer." *Id.* The Party Rule would not affect qualifications for voting in other Republican Party primary elections, such as those for seats in the Connecticut State Senate and House of Representatives. *See id.* at 269 n.5.

21 *Id.* at 269-70. Section 9-431 provides in pertinent part: "No person shall be permitted to vote at a primary of a party unless he is on the last-completed enrolment [sic] list of such party in the municipality or voting district. . . ." CONN. GEN. STAT. ANN. § 9-431 (West Supp. 1987).

22 *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 270 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). If amended, § 9-431 would have provided, in pertinent part: "EXCEPT AS OTHERWISE PROVIDED BY STATE PARTY RULES, no person shall be permitted to vote at a primary of a party unless he is on the last-completed enrollment list of such party in the municipality or voting district. . . ." *Id.* at 270.

tative Mae Schmidle introduced a bill (the Schmidle bill) which was referred to the Committee on Governmental Administration and General Elections.[23] On February 28, 1984, Albert Lenge, the Director and Elections Attorney in the Office of the Secretary of State, testified before the Committee that implementation of the Party Rule would be "workable."[24] Despite this testimony, the Schmidle bill was unable to overcome strong Democratic opposition in the General Assembly.[25]

Republican legislators next attempted to implement the provisions of the Party Rule through two amendments to a bill concerning time limits upon enrollment of unaffiliated voters.[26] On April 11, 1984, both amendments were convincingly defeated in the Connecticut House of Representatives, substantially along party lines.[27] One week later, in similar partisan fashion, the Connecticut Senate voted down an amendment containing the provisions of the Schmidle bill.[28] Confronted with the futility of attempting to implement the Party Rule through the legislative process, the Republicans turned instead to the courts.[29]

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23 *See id.*

24 *See id.*

25 *See id.*

> On March 7, 1984, the Committee on Governmental Administration and Elections voted 13 to 8 against the Schmidle Bill. The Committee further voted 12 to 9 against reporting the bill out of committee with an unfavorable report, thereby preventing the proposed legislation from being considered by the entire General Assembly. On March 15, the Committee reconsidered its earlier vote and reported unfavorably on the bill to the [Connecticut] House of Representatives, indicating the Committee's opposition. Burdened with an unfavorable report, the bill languished in the House and was never presented for a vote.

Id. at 270 n.6.

26 *See id.* at 270. These amendments provided that "[w]here state party rules so provide, an elector whose name does not appear on any enrollment list shall be entitled to vote in a primary conducted by such party for nomination for election to the office of governor, lieutenant governor, secretary of the state, treasurer, comptroller, attorney general, senator or representative." *Id.*

27 *See id.* At the time of the vote, the Democrats enjoyed an 87 to 63 edge over Republicans in the Connecticut House of Representatives. The first amendment considered was defeated by a count of 92 to 54, with all 83 Democrats who cast votes opposing the bill. The second amendment considered was voted down 93 to 54, with Democrats voting 85 to zero against passage. *See id.* at 270 n.7.

28 *See id.* at 270. The amendment was opposed by all 23 Democratic senators, and supported by all 13 Republican senators. *See id.*

29 *Id.* The Republican Party had taken control of the State Senate (24-12) and the State House of Representatives (85-66) as a result of the 1984 elections. M. BARONE & G. UJIFUSA, *supra* note 15, at 237. However, Connecticut Governor William A. O'Neill, a Democrat, had promised to veto any legislation that would lead to implementation of the Party Rule. Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 270 n.7 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) (cit-

On May 10, 1984, the Party and four other plaintiffs instituted an action in the United States District Court for the District of Connecticut.[30] The Party alleged that § 9-431 infringed its first and fourteenth amendment right to associate for the advancement of common political objectives, and, accordingly, sought to enjoin its continued application as unconstitutional.[31] Applying the test set forth by the United States Supreme Court,[32] the district court recognized that the statute should only be upheld if it advanced legitimate state interests and if, in advancing these interests, it did so in a way that least restricted the Party's ability to shape freely its candidate selection process.[33]

In response to the Party's allegations, the State of Connecticut maintained that § 9-431 only incidentally burdened the Party's right of political association; hence, the statute need only be rationally related to the advancement of a legitimate state interest to be upheld.[34] The State also asserted that the Party Rule violated the United States Constitution by permitting unaffiliated voters to partake in primary elections for congressional seats while denying them the right to vote in primary elections for the Connecticut legislature.[35]

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ing The Hartford Courant, Jan. 4, 1985, at 1). Governor O'Neill upheld his promise on June 28, 1985, by vetoing Senate Bill No. 5, Public Act No. 85-320, which would have allowed unaffiliated voters to participate in certain primary elections. *Id.*

30 Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 270 n.8 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The other plaintiffs named in the complaint were Thomas J. D'Amore, J., chairman of the Connecticut Republican State Central Committee, and the State Party's principal elected officeholders on the federal level: United States Senator Lowell P. Weicker and United States Representatives Stewart R. McKinney and Nancy L. Johnson. *Id.* The named defendant was Connecticut Secretary of State, Julia H. Tashjian, who in that capacity was responsible for administration of § 9-431. *Id.*

31 *Tashjian*, 107 S. Ct. at 548.

32 *See* Cousins v. Wigoda, 419 U.S. 477, 489 (1975) (state's interest must be compelling in order to justify abridgment of Party's exercise of constitutionally protected right of association). *See also* Kusper v. Pontikes, 414 U.S. 51, 58-59 (1973); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968).

33 Republican Party of the State of Connecticut v. Tashjian, 599 F. Supp. 1228, 1231 (D. Conn. 1984), *aff'd*, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

34 *Id.* at 1236.

35 The state specifically referred to the Qualifications Clauses of Article I, § 2 and the seventeenth amendment of the United States Constitution. Article I, § 2 provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several states, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

On December 5, 1984, the district court granted the Republican Party's motion for summary judgment and denied the State's motion to dismiss the complaint.[36] The court found that § 9-431 substantially interfered with the Party's first amendment right of political association,[37] and that the State's purported justifications in support of its mandatory closed primary were not compelling.[38] The district court thus held that "[the] party's decision to permit unaffiliated voters to participate in its primaries [was] constitutionally permitted."[39] Accordingly, the district court enjoined enforcement of § 9-431 as applied to the Party Rule.[40]

On August 8, 1985, the United States Court of Appeals for the Second Circuit affirmed the judgment of the district court.[41] Circuit Judge Irving R. Kaufman opined that no constitutional impediment to the Party Rule existed[42] and that, absent compelling interests, the function of the selection of candidates by a political party is a matter properly for the party and not the state.[43]

On December 10, 1986, the United States Supreme Court affirmed the judgment of the lower courts and held that the state's enforcement of its closed primary system, as implemented through § 9-431, was an impermissible burden on the first and fourteenth amendment rights of the Republican Party and its

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U.S. CONST., art. I, § 2. The seventeenth amendment provides, in pertinent part:

> The Senate of the United States shall be composed of two Senators from each State, elected by the People thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

U.S. CONST. amend. XVII. The seventeenth amendment was styled after Article I, § 2, and the two are interpreted similarly. *See* Phillips v. Rockefeller, 435 F.2d 976, 979 (3d Cir. 1971).

36 Republican Party of the State of Connecticut v. Tashjian, 599 F. Supp. 1228, 1241 (D. Conn. 1984), *aff'd*, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

37 *Id.* at 1241. The district court explained that § 9-431 had allowed Connecticut's legislature to "substitute its judgment for that of the party on . . . the question of who is and [who] is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process. . . ." *Id.* at 1238.

38 *Id.* The interests offered by the state were the prevention of raiding, the avoidance of voter confusion, and the promotion of a stable two-party system. *Id.*

39 *Id.* at 1231.

40 *Id.*

41 Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 286 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

42 *Id.* at 274-75.

43 *Id.* at 281.

members.[44] The Court also deemed that the interests asserted by the state in defense of the statute were insubstantial.[45] The Court also rejected the State's claim that implementation of the Party Rule violated the clauses in Article I, § 2 and the seventeenth amendment to the United States Constitution pertaining to voter qualifications for federal and state elections (the Qualifications Clauses).[46]

Although the text of the United States Constitution does not expressly provide for the right of freedom of association, a series of relatively recent Supreme Court opinions has recognized such a right as implicit in the several provisions of the first amendment.[47] Two distinct aspects of the associational right have been recognized in these opinions—one individualistic and one collective.[48] While a number of earlier cases upheld an individual's right to associate on a transient basis[49]—for "quasi-associational" acts[50]—the right to associate formally became a right of constitutional dimensions in the 1958 decision of *NAACP v. Ala-*

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44 *Tashjian*, 107 S. Ct. at 556-57.

45 *Id.*

46 *Id.* at 556.

47 *See, e.g.*, Cousins v. Wigoda, 419 U.S. 477 (1975); Kusper v. Pontikes, 414 U.S. 51 (1973); Rosario v. Rockefeller, 410 U.S. 752 (1973); Williams v. Rhodes, 393 U.S. 23 (1968); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). For an analysis of these opinions, see *infra* notes 51-88 and accompanying text.

48 *E.g.*, Roberts v. United States Jaycees, 468 U.S. 609 (1984). In discussing the development of the dual nature of the right of freedom of association, the *Roberts* Court observed that:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State. . . .In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. . . .[W]hen the State interferes with individuals' selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated.

Id. at 617-18. *See also* Note, *Primary Elections and the Right of Freedom of Association*, 94 YALE L.J. 117, 122 (1984) (right of freedom of association has both individualistic and collective aspects).

49 *E.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (as applied to parade); Hague v. CIO, 307 U.S. 496 (1939) (demonstration); De Jonge v. Oregon, 299 U.S. 353 (1937) (holding of public meeting).

50 *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 276 n.19 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) (Court afforded first amendment protection to these activities).

bama ex rel. Patterson.[51] At issue in *NAACP* was the validity of an Alabama statutory requirement that the NAACP disclose its membership list in that state to the Attorney General of Alabama.[52] The argument advanced by the NAACP was that the statutory requirement would result in a substantial restraint upon the right of the members to exercise their freedom of association.[53] Accepting the NAACP's position, the Court unanimously held that the NAACP could not be compelled to disclose the names and addresses of its members and agents in Alabama.[54] Writing for the Court, Justice Harlan declared that the independent right of association was constitutionally protected through the Due Process Clause of the fourteenth amendment.[55] Furthermore, the Court acknowledged the "vital relationship between the freedom to associate and privacy in one's associations"—the individual aspect of the associational right.[56] The Court also observed the existence of the collective aspect of the right—namely, that the protection of privacy in group associations might, in many circumstances, be essential for the protection of freedom of association, "particularly where a group espouse[d] dissident beliefs."[57] Addressing the ability of an association to advocate the beliefs of its members, the Court asserted that an association might be able to attain objectives that are different in quality from those attainable by individuals.[58] Thus, the Court implicitly recognized that dual aspects of the associational right enabled individuals and associations alike to avail themselves of first amendment protection.[59]

Ten years after the *NAACP* Court articulated the contours of the associational right, a series of decisions transformed political

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51 357 U.S. 449 (1958).

52 *Id.* at 453.

53 *Id.* at 462.

54 *Id.* at 466.

55 *Id.* at 460. *See also* Note, *supra* note 48, at 122.

56 *NAACP*, 357 U.S. at 462. The Court has subsequently applied the individual aspect of freedom of association to various types of intimate relationships as a major component of individual liberty. *See* Zablocki v. Redhail, 434 U.S. 374, 384-85 (1978) (right of privacy protects personal decisions such as right to marry); Smith v. Organization of Foster Families, 431 U.S. 816, 842 (1977) (freedom of personal choice in matters of family life—as applied here to educating children—is protected liberty); Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977) (co-habitation with relatives is matter deserving constitutional recognition).

57 *NAACP*, 357 U.S. at 462.

58 *Id.* at 463. The collective right referred to the ability of NAACP members "to pursue their collective effort to foster beliefs. . . ." *Id.*

59 *See id.* at 462-66. *See also* Note, *supra* note 48, at 122-23 (association is protected by Constitution in carrying out members' first amendment activities).

association "from abstract theory into an effective right."[60] The Supreme Court first addressed the right of political association in the 1968 case of *Williams v. Rhodes*.[61] In *Williams*, the Court reviewed a challenge to the Ohio election laws.[62] These laws provided that, in order to be placed on the general election ballot, new political parties had to file nominating petitions signed by fifteen per cent of the registered voters in the last gubernatorial election.[63] In *Williams*, the plaintiff party did satisfy the numerical requirement, but it did not do so by the date specified in the election law; hence, the party was barred from inclusion on the ballot.[64]

The Court reviewed its traditional protection of associational freedom,[65] and concluded that the statutory scheme at issue burdened individuals' rights for the advancement of political ideas.[66] The *Williams* Court reasoned that new political parties would be seriously disadvantaged by the statutory scheme and that established parties would benefit—an effect that would result in "substantially unequal burdens on both the right to vote and the right to associate."[67] The Court further commented that "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an opportunity to win votes."[68] Utilizing the fourteenth amendment to apply the first amendment's protection of associational rights from infringement by the states,[69] the *Williams*

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60 *See* Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 278 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The court of appeals summarized this transformation, explaining that "[b]ecause political advocacy and participation in partisan politics are lodged at the heart of the first amendment, freedom of association necessarily includes a right of political association. Concomitantly, freedom of association protects the right to form a political party for the advancement of partisan political beliefs." *Id.*

61 393 U.S. 23 (1968).

62 *Id.* at 24.

63 *Id.* at 24-25. This requirement, along with substantial additional burdens, made it very unlikely that any party would qualify on the ballot except for the Republican and Democratic parties, which had much easier requirements to satisfy. *Id.* at 25-26. For a list of the additional statutory burdens, see *id.* at 25 n.1.

64 *Id.* at 26-27.

65 *See id.* at 30-31.

66 *Id.* at 34.

67 *Id.* at 31. In striking down a law that gave a virtual monopoly to the Republicans and Democrats, the Court, however, did not denigrate mere promotion of the "two-party system." *Id.* at 32. Such promotion is advanced in *Tashjian* as a compelling state interest. *See infra* notes 141-146 and accompanying text.

68 *Williams*, 393 U.S. at 31.

69 The fourteenth amendment to the United States Constitution provides, in pertinent part:

Court struck down the Ohio election law.[70]

In 1973, the Supreme Court decided both *Rosario v. Rockefeller*[71] and *Kusper v. Pontikes*.[72] In these cases, the Court examined the constitutionality of durational affiliation requirements.[73] In so doing, the Court turned its attention to individuals seeking to vote in primary elections.[74] In *Rosario*, the Court addressed the validity of a New York statute that required individuals who wanted to vote in a particular party's primary to register with that party thirty days prior to the preceding general election.[75] The petitioners had been barred from voting in the 1972 presidential primary because they failed to register before the cutoff date in 1971.[76] The *Rosario* Court rejected the petitioner's challenge to the statute and held that the statute at issue "did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."[77] Applying a minimal level of scrutiny to the statute, the Court ruled that the legitimate state interest in preventing party raiding outweighed the burden of having to comply with the time limitation.[78]

The *Kusper* Court, however, refused to uphold a similar durational affiliation requirement, striking down an Illinois statute that prevented persons from voting in a party primary if they had participated in the primary of another party within the preceding twenty-three months.[79] The Court noted that "freedom to asso-

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> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV § 1.

70 *Williams*, 393 U.S. at 34-35. While the Court also found that the Ohio laws constituted a violation of the fourteenth amendment's Equal Protection clause, *id.* at 34, Justice Harlan based his concurrence solely on the first amendment right to political association. *See id.* at 41-48 (Harlan, J., concurring).

71 410 U.S. 752 (1973).

72 414 U.S. 51 (1973).

73 L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-24, at 791 (1978).

74 *Id.*

75 *Rosario*, 410 U.S. at 754.

76 *Id.* at 755. The cutoff date in 1971 was October 2, but the plaintiff did not register until early December 1971. *Id.* None of the petitioners offered an explanation for their failure to make a timely enrollment. *Id.* at 755 n.4.

77 *Id.* at 758.

78 *See id.* at 760-61. "Raiding" is the practice "whereby voters in sympathy with one part designate themselves as voters of another party so as to influence or determine the results of the other party's primary. *Id.* at 760.

79 *See Kusper*, 414 U.S. at 52-53, 61.

ciate with others for the common advancement of political beliefs and ideas" was protected by the first and fourteenth amendments.[80] The Court also found that the aggrieved voter was impermissibly bound by statute to a party although she no longer wished to be.[81] The Court distinguished its holding in *Kusper* from *Rosario* stating that "[u]nlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that [the plaintiff] could have taken to make herself eligible to vote in the 1972 Democratic primary."[82] The *Kusper* Court concluded that while the statute did not absolutely preclude the plaintiff from associating with the party of her choice, it did deny her a voice in the selection of candidates for public office—a prime objective of most voters in choosing to associate themselves with a particular party.[83]

In 1978, the Supreme Court again articulated and strengthened the right of political association in *Cousins v. Wigoda*.[84] In *Cousins*, the Supreme Court examined the conflict between party rules and their regulation by the state.[85] The appeal to the Supreme Court stemmed from an appellate court's decision to uphold an order preventing the 1972 Democratic National Convention from replacing certain delegates.[86] The election of the delegates whom the Democratic party sought to replace was valid under Illinois law but violated a Democratic party rule.[87] In reversing the appellate court's ruling, the Supreme Court reasoned that the injunction served no compelling state interest that could "justify the injunction's abridgement" of the rights held by the petitioners and the National Democratic Party.[88]

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80 *Id.* at 56-57.

81 *Id.* at 57.

82 *Id.* at 60.

83 *Id.* at 58.

84 419 U.S. 477 (1978).

85 *Id.* at 487-89.

86 *Id.* at 479-82.

87 *Id.*

88 *Id.* at 489 (citing NAACP v. Alabama, 357 U.S. 449, 463 (1958)). *Cousins* has recently been analyzed as follows:

> Although the *ratio decidendi* of the case was that a state possesses a meager interest in preserving the integrity of a national nominating convention, the Court's language suggests that it is the party that has an associational interest in deciding who may participate in its activities. Indeed, the opinion suggests that a party's right to associate may even protect a more generalized right of group self-governance.

Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 279 (2d

In deciding this recent series of cases, the Supreme Court has attempted to reconcile the "tensions among a political party's right to self-determination [with] an individual's right to participate in primary elections and the state's interest in regulating such elections."[89] The interest of an individual in the right to vote in primary elections was considered in *Nader v. Schaffer*.[90] In *Nader*, the plaintiffs were unaffiliated voters who wanted to vote in Republican primaries against the wishes of the Connecticut Republican Party.[91] They brought a challenge against the State of Connecticut's closed primary law, and the district court refused to recognize the existence of an explicit right to vote in primary elections.[92] Accordingly, the district court upheld the provisions of the Connecticut General Statutes governing primary elections.[93] Justifying its determination, the court noted that "party members are entitled to affirmative protection of their associational rights"[94] and that the state may legislate to protect the party "from intrusion by those with adverse political principles."[95]

A state's assertion of its interest in the electoral process was presented in the 1981 case of *Democratic Party of United States v. Wisconsin ex rel. La Follette*.[96] When the National Democratic Party (National Party) objected to a state-mandated open primary because it included voters who lacked the right to participate in the primary election, the state of Wisconsin brought an action against the National Party for its refusal to sit the Wisconsin delegation.[97] This delegation had been chosen under a selection sys-

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Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) (citing Cousins v. Wigoda, 419 U.S. 477, 490-91 (1978)).

89 Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 279 (2d Cir. 1985), *aff'd*, 107 S.Ct. 544 (1986). *See also* Note, *supra* note 48, at 117 (if federal courts are to establish doctrine concerning state regulation of who may participate in primary elections, it must be able to resolve challenges from individual voters, the state, and the political party).

90 417 F. Supp. 837 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976).

91 *Id.* at 840.

92 *Id.*

93 *Id.* at 850.

94 *Id.* at 845. *See also* Note, *Primary Elections: The Real Party in Interest*, 27 RUTGERS L. REV. 298, 304 (1974) (associational right does not exist if group's aims diverge greatly from those of individual).

95 *Nader*, 417 F. Supp. at 845 (quoting Ray v. Blair, 343 U.S. 214, 221-22 (1952)). The district court's disposition of *Nader* indicates that associational rights do not extend to independent voters who are excluded from a primary. Note, *supra* note 48, at 118.

96 450 U.S. 107 (1981).

97 *Id.* at 114-15. *See also* Note, *supra* note 48, at 118.

tem that expressly violated the rules of the National Democratic Party.[98]

Addressing the *Democratic Party* controversy, the Supreme Court framed the issue as whether the state could force the National Party, a national political organization, to accept a delegation at its convention that was chosen in a way that violated Party rules.[99] Ultimately, the Court answered this question in the negative.[100] The Court held that a political party's freedom of association had to include the freedom to determine the scope of the association and the concomitant ability to restrict its membership.[101] While the state claimed "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,"[102] the Court nonetheless held that the substantial intrusion into the National Party's associational freedom was not justified.[103]

As a result of the decisions in *Nader* and *Democratic Party*, political parties may successfully assert the right of freedom of political association in order to conduct its internal affairs free from the input of others. In *Tashjian v. Republican Party of Connecticut*, however, the Republican Party determined to expand the right of freedom of political association to include nonmembers in its primary selection process, but was prevented from doing so by the state.[104]

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98 *Democratic Party*, 450 U.S. at 112-13. The National Party held that only those persons who made a public declaration of affiliation to the Democratic Party could participate in the selection of delegates to the National Convention. *Id.* at 109. Wisconsin election laws, however, included no such requirement. *Id.*

99 *Id.* at 121.

100 *Id.* at 126. The *Democratic Party* Court cited as controlling precedent the holding of the *Cousins* Court that "[a state's] 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 Convention." *Id.* at 121 (citing Cousins v. Wigoda, 419 U.S. 477, 491 (1978)). Like *Cousins*, *Democratic Party* concerned "the binding effect of [state] law on the freedom of the national party to define its own eligibility standards." *Id.* at 123 n.24.

101 *Id.* at 122. One author has observed that "[f]reedom 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, *supra* note 73, at 791).

102 *Id.* at 124-25.

103 *Id.* at 125-26. The Court declared that "the stringency and wisdom of membership requirements is for the association and its members to decide." *Id.* at 123 n.25.

104 *See Tashjian*, 107 S. Ct. at 549 n.6.

Justice Marshall, writing for the *Tashjian* majority,[105] began his analysis by reviewing the applicable standard of review when examining the constitutionality of a specific provision of a state election law.[106] The Justice asserted that, first, a court must evaluate the character and magnitude of an alleged injury to first and fourteenth amendment rights.[107] Next, a court must identify and assess the proffered state interest which seeks to justify the burden imposed by the law.[108] Finally, Justice Marshall stated that "the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights."[109] The *Tashjian* Court, addressing the Republican Party's claim of injury, noted that political organizations are undeniably encompassed within the associational right protected by the first and fourteenth amendments, and declared that the Party's attempts "to broaden the base of public participation in and support for its activities" was central to its exercise of the associational right.[110]

The Court perceived that the Connecticut closed primary statute placed limits upon the group of registered voters that the Party could potentially invite to participate in the candidate selection process.[111] The Court declared that, from the Republican Party's perspective, the formal act of enrollment or affiliation with the Party was but one manifestation of Party involvement, and not necessarily the most important.[112] The Court explained that a political party may rely upon many individuals performing different roles and tasks such as the furthering of political or organizational goals, providing substantial financial support, or

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105 *Id.* at 546. Justice Marshall, writing for the majority, was joined by Justices Brennan, White, Blackmun, and Powell. *Id.* Justice Stevens filed a dissenting opinion in which Justice Scalia joined. *Id.* Justice Scalia also filed a dissenting opinion in which Chief Justice Rehnquist and Justice O'Connor joined. *Id.*

106 *Id.* at 548.

107 *Id.* (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

108 *Id.*

109 *Id.*

110 *Id.* at 549.

111 *Id.*

112 *Id.* Justice Marshall reasoned that, under circumstances in which public knowledge of one's affiliation with a political organization might subject that person to public hostility or discrimination, such an association would have a constitutional right to protect the privacy of its membership rolls. *Id.* at 549 n.5 (citing Bates v. Little Rock, 361 U.S. 516, 523-24 (1960); NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

simply voting for some or all of the Party's candidates.[113] It hypothesized that if the state were to statutorily require Party membership as a prerequisite for making a campaign contribution, or to limit the Party's pool of prospective nominees for public office to Party members, the resulting prohibition of nonmembers from potential association with members would infringe upon party members' rights "to organize with like-minded citizens in support of common political goals."[114] Accordingly, the majority concluded that the Republican Party's opportunities for association were limited "at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[115]

The *Tashjian* Court next acknowledged that the states have a broad constitutional power to prescribe the "Times, Places, and Manner of holding Elections for Senators and Representatives,"[116] together with the power already retained by the states to regulate elections for state offices.[117] The majority also asserted, however, that such authority did not permit the state to disregard the limits imposed by the first amendment upon the authority it might exercise over its citizens.[118] The Court posited that the state's power to regulate the time, place and manner of elections, by itself, did not justify the abridgement of a fundamental right such as the right to vote or the freedom of political association.[119]

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113 *Id.*

114 *Id.* The Court noted its comment in an earlier case that " '[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' " *Id.* (citing Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 122 (1981) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

115 *Id.* at 549-50. The State argued that a recently implemented amendment to § 9-56 of the Connecticut General Statutes, permitting unaffiliated voters to register with a party until the last business day preceding the primary election, made any infringement upon the Republican Party's associational rights *de minimus*. *Id.* at 550 n.7. In rejecting this contention, however, the majority noted that the Party was still powerless to increase its associational opportunities through an act of its own. *Id.* Moreover, the State's requirement, as interpreted by the Court, required the public action of affiliation, regardless of a voter's actual belief, in order to permit an exercise of the associational right. *Id.*; *cf.* Wooley v. Maynard, 430 U.S. 705, 714-15 (1977).

116 U.S. CONST. art. I, § 4, cl. 1.

117 *Tashjian*, 107 S. Ct. at 550.

118 *Id.*

119 *Id.* *See* Wesberry v. Sanders, 376 U.S. 1, 6-7 (1964) (right to vote is too important to allow interpretation of Article I, § 4 to immunize state congressional apportionment laws from judicial review).

The Court next considered each of the interests offered by the State of Connecticut in its attempt to justify the closed primary statute's burden on the first amendment right at issue.[120] The state contended that § 9-431 was narrowly tailored, and that it advanced the compelling interests of the state.[121] The state first forwarded the argument that the administrative burden imposed upon the state by the Party Rule was sufficient to justify the continued enforcement of § 9-431.[122] The state specifically declared that the Party Rule would require it to purchase extra voting machines, train additional poll workers, and possibly print additional ballot materials for the benefit of individuals voting in a Republican primary. Accordingly, the state asserted that the implementation of the Party Rule would be too costly.[123] The Court rejected this claim, even under the presumption that the state's contentions were accurate.[124] The majority drew an analogy between increased costs stemming from implementation of the Party Rule, and a similar increase which would occur if a third major party were to arise in Connecticut, thereby requiring a third party primary.[125] The Court emphasized that the state could not use increased administrative costs as a pretext for maintaining only two major parties.[126] Similarly, the Court determined that the state could not cite administrative convenience to justify restraint upon the Republican Party's freedom of association.[127]

The Court next assessed the merits of the state's purported interest in preventing party raiding through the statute.[128] While acknowledging that the concern regarding raiding was legitimate in some contexts, the Court found little merit in the state's position.[129] The Court reasoned that the state's present closed primary law did not impede a raid on the Republican Party by independent voters, as independents could simply register as

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120 *Tashjian*, 107 S. Ct. at 550.

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 551.

125 *Id.* For a discussion of major parties in Connecticut, see *supra* notes 8-11 and accompanying text.

126 *Tashjian*, 107 S. Ct. at 551; *cf.* Anderson v. Celebrezze, 460 U.S. 780 (1983); Williams v. Rhodes, 393 U.S. 23 (1968).

127 *Tashjian*, 107 S. Ct. at 551. The Court did, however, intone that the state might take administrative and financial concerns into account in deciding whether to have a party system. *Id.*

128 *Id.* *See supra* note 78 (definition of raiding).

129 *Id.*

Republicans and vote in the primary.[130] Indeed, the Court noted that the amendment found in § 9-56[131] of the Connecticut General Statutes actually facilitated such raiding by independents, and accordingly, dismissed the alleged interest in party raiding as an inadequate justification for enforcement of § 9-431.[132]

The appellant next proffered its interest in preventing voter confusion.[133] The state contended that the public would have difficulty understanding a candidate's true position when that candidate was nominated by anyone other than a Party member.[134] In response, the Court agreed that the state does have a valid interest in "informed and educated expressions of the popular will," but opined that case law "reflect[s] a greater faith in the ability of individual voters to inform themselves about campaign issues."[135] The majority also criticized the state's argument, in support of this purported interest, that the Party Rule interfered with educated decision-making by voters.[136] The Court theorized that in Connecticut the question of how to attract the state's large group of independent voters was of legitimate concern to the Republican Party.[137] The *Tashjian* Court noted that the Party's decision to invite independents to select among its primary candidates was their chosen method to achieve this goal.[138] While the state claimed that the closed primary statute avoided voter confusion, the Court considered this argument to be a deprivation of an opportunity by the Party to ascertain how much support its candidates have among a considerable portion of the electorate.[139] The Court concluded that the

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130 *Id.* The Court also commented that the hypothetical raiding situation with which the state was concerned was a "curious concept only distantly related to the type of raiding discussed in *Kusper* and *Rosario*." *Id.*

131 In Connecticut, any unaffiliated elector who wishes to vote in a party's primary may do so by making a written and signed application for enrollment in that party, no later than twelve noon on the last business day before the primary. *See* CONN. GEN. STAT. ANN. § 9-56 (West Supp. 1987).

132 *Tashjian*, 107 S. Ct. at 551.

133 *Id.*

134 *Id.*

135 *Id.* at 552 (quoting Anderson v. Celebrezze, 460 U.S. 780, 796 (1983)). In rejecting the state's contention, the court of appeals had previously declared that this so-called "interest" would effectively encourage voters to engage in "unthinking and Pavlovian reliance on party labels." Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 284 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

136 *Tashjian*, 107 S. Ct. at 552.

137 *Id.*

138 *Id.*

139 *Id.* The *Tashjian* Court observed that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information

state's interest in both preventing voter confusion and ensuring the existence of an informed electorate did not necessitate the burden imposed by § 9-431.[140]

The state's final contention was that § 9-431 "furthers the State's compelling interest in protecting the integrity of the two-party system and the responsibility of party government."[141] The majority noted that no consensus had yet emerged *vis-a-vis* the relative merits of open and closed primaries.[142] Furthermore, the Court declined to second-guess either the state legislature in enacting the closed primary system in 1955, or the Republican Party in attempting to depart from it.[143] The Court posited that the legitimate protection a state affords its party system is for the purpose of preventing the parties from disruptions from the outside, not to prevent parties from affecting their own candidate selection process.[144] The majority completed its discussion of this purported state interest by stressing that a party's determination of its own associational boundaries and structure is protected by the first amendment, and may not be interfered with by a state or court which "view[s] a particular expression as unwise or irrational."[145] Accordingly, the Court held that none of the interests proffered as compelling by the state, which to a

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to them must be viewed with some skepticism." *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 798 (1983)).

140 *Tashjian*, 107 S. Ct. at 552.

141 *Id.*

142 *Id.* at 553. A brief to the court of appeals compared the two types of primaries. For example, a closed primary may be preferable when a party perceives a need to clarify its policies and make them clearly distinguishable from those of rival parties. Brief of Amici Curiae (political scientists) Seeking Affirmance at 6, Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) (citing V.O. KEY, AMERICAN STATE POLITICS 165-96 (1956)). Such a primary and nomination process will be shaped by a party's so-called "true believers", and will present the general electorate with a clear (and sometimes extreme) ideological choice. *Id.* at 6-7 (citing W. GOODMAN, THE PARTY SYSTEM IN AMERICA 183-228 (1980)).

On the other hand, an open primary presents a broader scope that is an appropriate choice when seeking either to increase competition in the face of one-party dominance, or present a more moderate position as an alternative to an extremist ideology. A relatively greater segment of the public participates in such political decisionmaking. *Id.* at 7 (citing Crotty, *In Favor of the Status Quo*, in PRESIDENTIAL SELECTION 15 (F. Havelick ed. 1981)). "[T]here is a time and a place for different strategies regarding who should vote in a primary and therefore how the party's political agenda will be shaped." *Id.* at 6.

143 *Tashjian*, 107 S. Ct. at 553.

144 *Id.* at 553-54.

145 *Id.* at 554 (citing Democratic Party of the United States v. Wisconsin, 450 U.S. 107, 124 (1981)).

degree represented the interests of the political party then in the majority, justified continued enforcement of § 9-431.[146]

The majority next addressed the state's claim that the Party Rule, by its terms, was unconstitutional.[147] The state's argument centered on the qualifications clauses of Article I, § 2, and the seventeenth amendment of the United States Constitution (the Qualifications Clauses).[148] This objection to the Party Rule was based on its establishment of differing voter qualifications for federal and state legislative offices.[149] In analyzing this contention, the Court first determined whether the qualifications clauses applied to primaries as well as general elections.[150] The Court asserted that it was not possible for the Framers to have contemplated the effects of the Qualifications Clauses on the modern primary system.[151] The majority added, however, that the Constitution was designed to address then unforeseeable developments in human affairs, while carrying out the "fundamental purposes" espoused in that document.[152] The *Tashjian* Court described the fundamental purpose of the provisions regarding voter qualifications as applying to the entire process for the selection of federal legislators.[153] Justice Marshall opined that a state's decision to integrate the primary into its electoral process

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146 *Id.*

147 *Id.* at 554-55.

148 *See supra* note 35 for the language of these two constitutional provisions.

149 *Tashjian*, 107 S. Ct. at 554. The Party Rule permitted independents to vote in primaries to determine United States Senators and Representatives, but was silent with regard to primary voter qualifications for state legislative seats. Appellant argued that the Qualifications Clauses required "absolute symmetry of qualifications. . . ." *Id.* at 554-55. *See also supra* note 20 (language of Party Rule).

150 *See Tashjian*, 107 S. Ct. at 555. The majority acknowledged that the court of appeals rejected appellant's argument outright, and held that the provisions did not apply to primary elections. *Id.* (citing Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 274 (2d Cir. 1985)). The concurrence viewed the issue differently, analyzing the provision as only requiring that anyone permitted to vote for seats in the more numerous state legislative branch must be made eligible to vote in elections for United States Congress. *Id.* (citing *Republican Party*, 770 F.2d at 286 (Oakes, J., concurring)). The majority expressed its agreement with the latter interpretation. *Id.* at 555.

151 *Id.*

152 *Id.* As the Court noted in an earlier case:

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

Id. (quoting United States v. Classic, 313 U.S. 299, 315-16 (1941)).

153 *Id.*

effectively made the requirements of Article I, § 2 and the seventeenth amendment applicable to that primary as well.[154] The Court thus held that the Qualifications Clauses applied to primary elections just as they did to general elections.[155]

The majority continued its consideration of the Qualifications Clauses with an examination of Article I, § 2, and the purpose of the framers in enacting it.[156] The majority explained that the different states represented at the constitutional convention already had their respective voter qualification provisions in place.[157] The Court explained that the framers feared that a uniform federal voter qualification would have disenfranchised some previously eligible state voters.[158] As James Madison would later observe, the language of the first Qualifications Clause appeased every state, allowing each to establish the qualifications by which its resident voters could participate in both state and federal elections.[159] The *Tashjian* Court noted that the provision was not intended to limit the availability of the federal franchise, but instead was implemented to preclude problems that would arise if state voters were barred from federal elections.[160] The majority opined that this objective did not, therefore, require "absolute symmetry" between qualifications for the federal franchise and those of a given state.[161] The Court concluded that the fun-

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154 *Id.* (citing *Classic*, 313 U.S. at 318. *See also* Smith v. Allwright, 321 U.S. 649, 659-60 (1944)). To hold that the provisions were not applicable to every stage of the selection process, stated the Court, would subject the opportunity for free electoral choice "to the sort of erosion that these prior decisions were intended to prevent." *Tashjian*, 107 S. Ct. at 555.

155 *Tashjian*, 107 S. Ct. at 555.

156 *Id. See also supra* note 35 (text of Article I, § 2).

157 *Tashjian*, 107 S. Ct. at 555-56.

158 *Id.* The delegates to the Convention were specifically concerned that the people would not support a new Constitution which would render them ineligible to vote. *Id.* at 556 (citing J. MADISON, JOURNAL OF THE FEDERAL CONSTITUTION 467, 468, 471 (E. Scott ed. 1893) (hereinafter MADISON'S JOURNAL)). The Court recalled Oliver Ellsworth's prediction that "[t]he people will not readily subscribe to a National Constitution, if it should subject them to be disenfranchised." *Id.* (citing MADISON'S JOURNAL at 468).

159 *Id.* at 556. *See* THE FEDERALIST No. 52, p.354 (J. Cooke ed. 1961) (reducing different state qualifications to uniform rule would have caused problems to states as well as Convention. Resulting provision conforms to state standards).

160 *Tashjian*, 107 S. Ct. at 556.

161 *Id.* The Court adopted the rationale initially put forth by the Party, and which had been succinctly summarized by the court of appeals:

> The Party. . .argue[d] that Art. I, § 2 and the seventeenth amendment should be interpreted consistent with the intentions that animated the Framers' inclusion of the qualifications language—a compromise provision permitting suffrage to be determined by reference to state law, but

damental purpose of both Article I, § 2 and the seventeenth amendment is satisfied when persons qualified to vote for the most numerous branch of their state's legislature may also vote for federal legislative offices.[162]

The majority next declared that there had been no requirement of "absolute symmetry" in past situations where federal voter qualifications had been expanded.[163] It found support for this declaration in *Oregon v. Mitchell*,[164] in which the Supreme Court held, in a plurality opinion, that the 1970 amendments to the Voting Rights Act could constitutionally establish a minimum age of eighteen for the federal franchise.[165] The *Mitchell* Court, however, concluded that Congress was not empowered to so limit the age for state and local elections.[166] Accordingly, the *Tashjian* majority found the appellant's reading of the Qualifications Clauses, requiring absolute symmetry, to be inconsistent with prior holdings.[167]

The *Tashjian* Court thus concluded that the Party Rule was constitutional because it did not deny the federal franchise to those who were eligible to vote for members of the Connecticut House of Representatives.[168] Having found earlier that the closed primary law unconstitutionally burdened the Republican Party and its members, and the defenses asserted by the State of Connecticut in support of the statute to be inadequate, the majority affirmed the judgment of the court of appeals.[169]

In his dissenting opinion, Justice Stevens addressed only the applicable provisions of Article I, § 2 of the United States Constitution, and the portions of the majority opinion pertaining to the

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> insuring that the state could not establish stricter voting requirements for the selection of federal representatives than they had for state legislators. Essentially, we are urged to hold that a state's qualifications merely set the minimum standard by which federal voter requirements in that state must be measured, rather than determine the only acceptable standard. An electoral scheme that establishes a broader franchise for federal elections than state races would, therefore, be perfectly permissible.

Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 272 n.11 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

162 *Tashjian*, 107 S. Ct. at 556.

163 *Id.*

164 400 U.S. 112 (1970).

165 *Id.* at 117-18 (Black, J., plurality opinion)).

166 *Id.* at 124-25.

167 *Tashjian*, 107 S. Ct. at 556.

168 *Id.*

169 *Id.* at 556-57.

Qualifications Clauses.[170] He denounced the Party Rule as unconstitutional, because it created a class of voters who could participate in federal elections, while simultaneously barring them from participation in certain state elections.[171] Like the majority, Justice Stevens' dissent recognized that the Qualifications Clauses applied to primaries as well as general elections.[172] Justice Stevens, however, criticized the majority's "freewheeling interpretation" of the plain language of the Qualifications Clauses.[173] The Justice believed that the language of the Qualifications Clauses was clear on its face and would indeed have required absolute symmetry between federal and state voter qualifications, were it not for the Court's erroneous interpretation.[174]

In analyzing the majority's explanation of the framers' purpose,[175] the dissent countered that the excerpts from the framers' debate quoted by the majority were in response to a proposed amendment to the first Qualifications Clause, which was already part of the draft.[176] Justice Stevens determined that since the language quoted by the majority was amendatory, rather than language used in formulation of the Clause, the majority's interpretation of the framers' intent was misplaced.[177]

Justice Stevens also found the Court's reliance on the plurality opinion in *Oregon v. Mitchell* to be misguided.[178] Justice Stevens emphasized that in *Mitchell* four Justices had found that Congress had no power to extend the voting franchise in any respect,[179] while four other Justices would have permitted Con-

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170 Justice Stevens was joined in his dissent by Justice Scalia. *Id.* at 557 (Stevens, J., dissenting).

171 *Id. See also supra* note 20 (provisions of Party Rule).

172 *Tashjian*, 107 S. Ct. at 557 (Stevens, J., dissenting) (citing United States v. Classic, 313 U.S. 299, 315 (1941)). *See supra* notes 156-162 and accompanying text for the majority's discussion of the applicability of the Qualifications Clauses to primaries.

173 *Tashjian*, 107 S. Ct. at 557 (Stevens, J., dissenting).

174 *Id.*

175 *See supra* notes 156-162 and accompanying text (majority's discussion of framers' purpose in enacting Article I, § 2).

176 *Id.* at 558 (Stevens, J., dissenting). The proposed amendment would have given Congress the power to prescribe electoral qualifications or to impose a property qualification upon the federal franchise. *Id.* (Stevens, J., dissenting). As explained by the majority earlier, a property qualification would have rendered many voters who were able to participate in state elections ineligible for corresponding federal elections. *Id.* at 556.

177 *See id.* at 557 (Stevens, J., dissenting).

178 *See id.* at 558 (Stevens, J., dissenting).

179 *Id.* (Stevens, J., dissenting). Chief Justice Burger and Justices Harlan, Stewart,

gress to regulate federal, state, and local elections.[180] The dissent asserted that the various opinions of these eight Justices were "consistent with the proposition that the Constitution requires the same qualifications for state and federal elections."[181] Additionally, Justice Stevens contended that Justice Black, the author of the *Mitchell* plurality, found favor with a literal reading of the Qualifications Clauses "in the absence of a federal statute prescribing a different rule for federal elections."[182] Justice Stevens thus claimed to have found no applicable federal statute permitting two different sets of electoral qualifications.[183] He concluded his dissent by denying the existence of any justification for "the Court's refusal to honor the plain language of the Qualifications Clauses."[184]

Justice Scalia, in a separate dissent, discussed the Party's right of political association as articulated by the majority.[185] Justice Scalia's dissent framed the conflict as a struggle between the right of political association afforded to the Republican Party, and the state's authority in regulating the electoral process to assure "fair and effective party participation."[186] While Justice Scalia declared that the resolution of this struggle depended upon the facts of each particular case,[187] he nonetheless believed

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and Blackmun held that Congress had no such power. *See Mitchell*, 400 U.S. at 152, 212-13 (Harlan, J., concurring in part and dissenting in part), and *id.* at 281, 287-89 (Stewart, J., concurring in part and dissenting in part, joined by Burger, C.J., and Blackmun, J.).

180 *Tashjian*, 107 S. Ct. at 558 (Stevens, J., dissenting). In *Mitchell*, Justices Douglas, Brennan, White and Marshall would have allowed extension of the franchise to both federal and state elections. *See Mitchell*, 400 U.S. at 135, 141-44 (Douglas, J.) and *id.* at 229, 280-81 (joint opinion of Brennan, White, and Marshall, JJ.).

181 *Tashjian*, 107 S. Ct. at 558 (Stevens, J., dissenting). For examples of this viewpoint, see *Mitchell*, 400 U.S. at 210-11 (Harlan, J., concurring in part and dissenting in part), and *id.* at 287-90 (Stewart, J., concurring in part and dissenting in part). However, the opinion of Justice Douglas and the joint opinion of Justices Brennan, White, and Marshall did not address the subject. *Tashjian*, 107 S. Ct. at 558 n.6 (Stevens, J., dissenting).

182 *Tashjian*, 107 S. Ct. at 559 (Stevens, J., dissenting). Justice Stevens explained that Justice Black had relied upon Article I, § 4, which "empowers Congress to alter a State's regulations concerning the times, places and manner of holding elections for Senators and Representatives." *Id.* (citing *Mitchell*, 450 U.S. at 119-24) (Black, J., plurality opinion)).

183 *Id.* at 559 (Stevens, J., dissenting).

184 *Id.* (Stevens, J., dissenting).

185 *Id.* at 559 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice O'Connor joined in Justice Scalia's dissent. *Id.*

186 *Id.* (Scalia, J., dissenting).

187 *Id.* (citing Anderson v. Celebrezze, 460 U.S. 780, 788-90 (1983); Storer v. Brown, 415 U.S. 724, 730 (1974)).

that the majority had set an undesirable precedent through its overexpansion of first amendment restrictions upon state regulation of elections.[188]

Justice Scalia next opined that the Republican Party's claim of an infringement of its associational right was exaggerated.[189] He declared that § 9-56 of the Connecticut General Statutes prevented the Republican Party from being restricted from recruiting and enrolling members.[190] He described the real complaint of the Party as its inability to leave its candidate selection process to outsiders who were unwilling to become members.[191] The Justice considered freedom of association to be a useless concept when so liberally applied.[192]

Justice Scalia acknowledged the right of a party to seek and put forth candidates capable of obtaining support from both party members and independents.[193] He found, however, that the state was not obligated to let its primary system be used to further this objective.[194] Instead, the Justice asserted that a party-funded opinion poll could accomplish this purpose.[195] Moreover, Justice Scalia asserted that the state could insist that the choice of independent voters be determined separately, and then be considered by the party membership, rather than by allowing such outsiders to dilute or dominate the vote.[196]

The Justice also disputed the majority's characterization of the state's interest as an attempt to protect Party integrity against the Party itself.[197] Mindful that the decision to implement the Party Rule was made at a state convention,[198] he expressed his uncertainty that the decision was actually favored by the Party at large.[199] He continued that even if the majority of the Party's

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188 *Id.*

189 *Id.* (Scalia, J., dissenting).

190 *Id. See supra* note 131 and accompanying text (majority's discussion of § 9-56, which now permits unaffiliated voters to register with party until last business day preceding primary election).

191 *Tashjian*, 107 S. Ct. at 559 (Scalia, J., dissenting).

192 *Id.* at 560 (Scalia, J., dissenting). *See* Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 130-31 (Powell, J., dissenting) ("[N]ot every conflict between state law and party rules concerning participation in the nominating process creates a burden on associational rights.").

193 *Tashjian*, 107 S. Ct. at 560 (Scalia, J., dissenting).

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.*

198 *See supra* note 20 and accompanying text.

199 *Tashjian*, 107 S. Ct. at 560 (Scalia, J., dissenting). The dissent pointed out that

members was in favor of the Party Rule, the state is no more required to honor this desire than it would if the members wished to abandon the primary system altogether.[200] The Justice summarized his point by exclaiming that a valid primary requirement presupposes that the state may indeed protect a Party against itself.[201] Connecticut, he declared, may lawfully require that "significant elements of the democratic process be *democratic*—whether the Party wants it that way or not."[202]

Unimpeded by constitutional and statutory provisions, the Republican Party is now free to implement the Party Rule. The state's interests, legitimate as they might have been, could not be considered compelling within the context of the Connecticut statutory scheme. The revision of § 9-56 of the Connecticut General Statutes,[203] for example, contradicted the state's expressed fear that raiding posed a threat to the two-party system.[204] Moreover, even if the statute were not in place, the ability of a party to effectively "raid" an open primary has been questioned.[205] Lastly, there are less restrictive means of preventing raiding than to sustain enforcement of the closed primary law.[206]

Similarly, the fear of "voter confusion" did not mandate a

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the convention, which made the decision to allow "ultimate selection of [the Party's] candidates for federal and statewide office to be determined by persons outside the Party," might have significantly different views from those of the Party rank and file concerning the advancement of candidates faithful to the Party philosophy. *Id.* Justice Scalia noted that primary requirements imposed by states are supposed to protect the membership against this sort of minority control. *Id.* (citing Nader v. Schaffer, 417 F. Supp. 837, 843 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976)).

200 *Id.*

201 *Id.* The dissent further commented that the validity of a primary requirement had previously been considered by the Court to be "too plain for argument." *Id.* (citing American Party of Texas v. White, 415 U.S. 767, 781 (1974)).

202 *Id.* (emphasis added).

203 *See supra* note 131 and accompanying text.

204 *See* Appellees' Brief at 47, Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986).

205 *See* Note, *Developments in the Law—Elections*, 88 HARV. L. REV. 1111, 1173 (1975); A. Ranney, *Turnout and Representation in Presidential Primary Elections*, 66 AM. POL. SCI. REV. 21, 35-36 (1972). Traditionally, the Supreme Court has not involved itself in the dispute over raiding. *See* Democratic Party of the United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 118-19 (1981) (Court defers to Party's study of raiding).

206 Appellees' Brief, *supra* note 204, at 50. For example, the state could increase the statutory period of ineligibility to vote in one party's primary after having left the other party. It could require recently unaffiliated voters to sign a statement under oath that they did not leave the primary for fraudulent purposes. The state could also impose greater criminal sanctions upon those found to be voting fraudu-

rejection of the Party Rule.[207] The fact that some voters may link a political party with a particular ideology neither justifies a state's interference with a political party's constitutionally protected associational right, nor imposes upon that party a duty to adhere to the ideology with which it has been identified.[208] Hence, "[n]o such remote danger [as feared by the state] can justify the immediate and crippling impact on the basic constitutional rights involved in this case."[209]

The *Tashjian* decision is consistent with the Court's holdings in *Nader v. Schaffer* and *Democratic Party of United States v. Wisconsin ex rel. La Follette* in that independents may now take part in a primary, against the wishes of the state, but only if the party permits them to participate.[210] The Court did not extend the right to freedom of political association to independent voters themselves, but to the political parties, which became the arbiters of voter eligibility.[211] The *Tashjian* decision is thus an extension of the collective aspect of the right of political association.[212]

The State of Connecticut had claimed that the Party Rule would dilute the effect of the Republican voters upon the outcome of future party primaries, an opinion echoed by Justice

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lently. *Id.* The Connecticut statutory provision governing fraudulent voting provides in pertinent part:

> Any person not legally qualified who fraudulently votes in any town meeting, primary or election in which he is not qualified to vote, and any legally qualified person who, at such meeting, primary or election, fraudulently votes more than once at the same meeting, primary or election, shall be fined not less than three hundred dollars nor [more] than five hundred dollars and shall be imprisoned not less than one year nor more than two years and shall be disenfranchised.

CONN. GEN. STAT. ANN. § 9-360 (West Supp. 1987). *But cf.* Nader v. Schaffer, 417 F. Supp. 837, 847 (D. Conn.), *aff'd mem.*, 429 U.S. 989 (1976) ("Unless the deterrent aspect of the criminal law were totally effective, such a law would apply only after the damage had been done to the electoral process and would be in the nature of punishment *not remedy*." (emphasis by the court)).

207 *See supra* notes 136-140 and accompanying text.

208 *See* Rosario v. Rockefeller, 410 U.S. 752, 769 (1973) (Powell, J., dissenting) ("Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. . . .Citizens customarily choose a party and vote in a primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations.").

209 Williams v. Rhodes, 393 U.S. 23, 33 (1968).

210 *See* Note, *supra* note 48, at 120-22.

211 *See id.* This rationale led the *Tashjian* majority to reject the state's contention that the Connecticut law permitting independents to register up until the last business day preceding the primary, *see supra* note 115, rendered the associational infringement *de minimus*. *Tashjian*, 107 S. Ct. at 550 n.7.

212 *See supra* note 48 and accompanying text.

Scalia in his dissent.[213] Indeed, it may be argued that the outcome of an open primary might not be consistent with the actual goals of a political party, and that the party's right to determine the consensus of its members may thus be compromised to some degree.[214] It is therefore noteworthy that, in Connecticut, statutes other than the closed primary law act to preserve the inherent "Republican" identity of the Party once the Party Rule is implemented.[215] The input of party adherents into the selection of the candidates is thus preserved, and the participation of unaffiliated voters ensures that the candidate with the greatest likelihood of bipartisan support emerges from the primary victoriously.[216]

The *Tashjian* decision demonstrates the peculiar problems that arise when considering state interests in the context of partisan politics.[217] In such cases, the holders of positions in state government do so by means of the very system that they seek to regulate. Arguments advanced on behalf of "the state" can be deceptive because they necessarily parallel the viewpoint of a particular party. In the court of appeals, Judge Kaufman had determined that the state's control of its electoral process through § 9-431 had the effect of enabling one party to maintain a dominant position in state government.[218] Judge Kaufman further reflected upon the unsuccessful attempts by the Republican Party

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213 Defendant-Appellant's Reply Brief at 20, Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The state argued that individual Democratic votes would have proportionately greater significance than corresponding Republican votes for those offices covered by the Rule, and that Republican votes would also be diluted as compared to the votes of registered members of both parties for those offices not covered by the Party Rule. *Id.*

214 *See* Note, *supra* note 48, at 128 n.54.

215 *See* CONN. GEN. STAT. ANN. § 9-372, *et seq.* (West Supp. 1987). Under these state rules, a candidate who wishes to be placed on the Republican Party ballot is required both to be a registered voter with the party, and to receive at least 20% of the vote at the Republican nominating convention. *Id.* Delegates to the convention, as well as those who select them, must be members of the Republican Party. *Id.*

216 *See* Appellees' Brief, *supra* note 204, at 42. Unaffiliated voters may now contribute to the candidate selection process to an unprecedented degree, as there have only been statewide primaries in Connecticut since 1970. For a long time, Connecticut's political machines used conventions for the nomination of both statewide and congressional candidates. These outdated mechanisms did not encourage "uncontrollable" voters to partake in the relatively few primaries then in existence. M. BARONE & G. UJIFUSA, *supra* note 15, at 236.

217 *See Tashjian*, 107 S. Ct. at 554 (views of state represent, to some extent, those of party presently in majority).

218 Republican Party of the State of Connecticut v. Tashjian, 770 F.2d 265, 282

to implement the Party Rule, which were repeatedly obstructed by the Democratic majority in the state legislature and the governor's office, thus having the effect of regulating the structure of the State's Republican organization.[219] The court below thought that these events, at the very least, suggested an attempt by a temporary majority to prolong its stay in power, ensure protection against challenges from its rival party, and isolate itself from accountability to the general public.[220]

The merit of the *Tashjian* decision is somewhat offset by the manner in which the Court disposed of the constitutional challenge to the Party Rule. In refuting the state's argument that the Qualifications Clauses required absolute symmetry between state and federal voter qualifications, the Court did not address several of its earlier proclamations to the contrary.[221] Upon close inspection, the opinion of the Court in *Oregon v. Mitchell*—the only decision relied upon by the *Tashjian* majority in its interpretation of the Qualifications Clauses—does not support the *Tashjian* Court's rationale, suggesting instead that absolute symmetry is

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(2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986). The appellate court had urged that § 9-431 prevented the Party from making itself more politically competitive. *Id.*

219 *Id.* at 283.

220 *Id.* "[P]ermitting a government with partisan ties arising from the electoral campaign to govern the structure of the party out of power threatens to reduce [the latter's] ability to offer the public an alternative." Brief of Amici Curiae, *supra* note 142, at 16. After all, the "primary function of a political party is the direction and control of the struggle for political power among men who may have contradictory interests and often mutually exclusive hopes of securing them." Irish v. Democratic-Farmer-Labor Party of Minnesota, 287 F. Supp. 794, 805 (D. Minn.), *aff'd*, 399 F.2d 119 (8th Cir. 1968).

221 The Court described the operation of the qualifications provision in Ex Parte Yarbrough, 110 U.S. 651 (1884):

> The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress.

Id. at 663. This declaration has found support in Katzenbach v. Morgan, 384 U.S. 641 (1966):

> Under the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators.

Id. at 647 (citations omitted).

required unless Congress directs otherwise.[222] In a broader sense, the disagreement between the majority and the dissent on the reading of the Qualifications Clauses exemplifies the Supreme Court's lack of consensus as to how literally the terms of the United States Constitution are to be read.[223]

In rejecting the constitutional challenge to the specific provisions of the Party Rule, the majority expanded the scope of the right to freedom of political association beyond a party's mere right to choose between an open or closed primary. In doing so, however, the Court established no future guidelines for ascertaining acceptability of newly-drawn party rules. As the *Tashjian* decision calls into question the structure of the primary systems of thirty-six other states,[224] this extension of the right to freedom of political association may open the floodgates for more litigation—specifically, challenges to closed primary laws, challenges to other variations of party rules, and calls for a settled interpretation of the Qualifications Clauses.

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[222] *See Mitchell*, 400 U.S. at 125 (Black, J., plurality opinion). Addressing the first Qualifications Clause, Justice Black stated that

> Art. I, § 2, is a clear indication that the Framers intended the States to determine the qualifications of their own voters for state offices, because those qualifications were adopted for federal offices unless Congress directs otherwise under Art. I, § 4.

Id. The ability of a state political party to so direct otherwise was not addressed.

[223] In Premier Elec. Constr. Co. v. N.E.C.A., Inc., 814 F.2d 358 (7th Cir. 1987), this "difficult question" was considered:

> [W]hen is the rule of law to be found in the words (plus their structure and history), and when are the words just evidence of the "real" rule, which is to be teased out of the purposes of those who wrote and approved the rule and their expectation about the rule's consequences? Questions of this sort continue to divide the Supreme Court (citing *Tashjian*).

Id. at 364-65.

[224] *Tashjian*, 107 S. Ct. at 553 n.11. At the time of the opinion, 20 states besides Connecticut had a classical "closed" primary, requiring participants to have been a member of the party for some duration of time: Arizona, California, Colorado, Delaware, Florida, Kansas, Kentucky, Maine, Maryland, Nebraska, Nevada, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, South Dakota, West Virginia, and Wyoming. *Id.*

Sixteen states allowed a voter, with no prior affiliation with a party, to vote in the party primary, if registering at that time or for that purpose: Alabama, Arkansas, Georgia, Illinois, Indiana, Iowa, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Rhode Island, South Carolina, Tennessee, and Texas. *Id.* The *Tashjian* decision would impact only these 36 states. *Id.*

Four states had non-partisan primaries, allowing all registered voters to take part: Alaska, Louisiana, Virginia, and Washington. *Id.*

Lastly, 9 states had classic "open" primaries, permitting registered voters to choose a party primary in which to vote: Hawaii, Idaho, Michigan, Minnesota, Montana, North Dakota, Utah, Vermont, and Wisconsin. *Id.*

The *Tashjian* decision clearly established that the first amendment right of freedom of political association protects rules that a state political party wishes to enact, provided that such rules are otherwise constitutional. While such rules may, as in this case, lend a degree of transiency to the voter rolls of a given party, they are preferable to the alternative: the allowance of a political party to use electoral victories to its advantage by taking steps to ensure self-succession, under the guise of the "interests of the state." Yet by deciding to validate the Party Rule, while contravening its traditional analysis of the Qualifications Clauses, the *Tashjian* majority compromised the precedential value of its holding. To have merely established a state party's right to choose between open and closed primaries would have been a more reasonable and potentially enduring legacy of the *Tashjian* Court.

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