Smothering Freedom of Association: The Alaska Supreme Court Errs in Upholding the State's Blanket Primary Statute

This Note analyzes the Alaska Supreme Court's decision in O'Callaghan v. State *that upheld the constitutionality of the state's blanket primary law. The Note first describes the factual background of the case, then discusses United States Supreme Court jurisprudence regarding freedom of association and election law challenges. It next applies this jurisprudence to test the validity of the blanket primary law in Alaska and compares the result with the Alaska Supreme Court's reasoning in the O'Callaghan decision. The Note finds that the blanket primary statute severely burdens freedom of association, cannot be justified by a compelling state interest, and therefore should have been held unconstitutional.*

I. INTRODUCTION

Striking a severe blow to the associational rights of political party members, the Alaska Supreme Court, in *O'Callaghan v. State*,[1] upheld as constitutional the state's blanket primary law. At issue in the case was whether a state statute providing for a blanket primary election unconstitutionally violates the associational rights of the state Republican party and its members by requiring them to include members of other political parties in the Republican primary.

This Note contends that it was error for the *O'Callaghan* court to uphold the statute on the basis of merely "legitimate and important" state interests.[2] Instead, in light of United States Supreme Court precedent which has established the test to be applied to election laws burdening associational rights, the Alaska Supreme

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1. 914 P.2d 1250 (Alaska 1996), *cert. denied*, 117 S. Ct. 1690 (1997).
2. *See id.* at 1262-63.

Court should have required the state to justify the statute by showing that it was narrowly tailored to advance compelling state interests. This Note also argues that the interests asserted by Alaska to justify the blanket primary are insufficient to withstand strict scrutiny.

The *O'Callaghan* majority further erred by disregarding controlling United States Supreme Court precedent, the holdings of which resolve the issue in *O'Callaghan*. This controlling precedent includes *Tashjian v. Republican Party of Connecticut*,[3] which established that political parties have the right to determine who may participate in their candidate selection process, and *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*,[4] which held that a political party may not be compelled to abide by the results of an open primary.

Part II of this Note recounts the facts and holding of *O'Callaghan*. Part III discusses the development of United States Supreme Court jurisprudence regarding freedom of association and election law challenges. Finally, Part IV applies this jurisprudence to the facts of *O'Callaghan* to argue that *O'Callaghan* was wrongly decided.

It is instructive to preface this discussion by distinguishing among the three types of primary election systems. In a closed primary, only members of the sponsoring political party may participate in the party's primary election. Within the class of primaries that are closed, some require affiliation with the party for a period of time prior to the primary election, while others permit voters to declare an affiliation at the time of primary voting. The vast majority of states use closed primaries of some variety.[5]

In an open primary, any voter may vote for candidates for any party's nomination, but the voter may vote only for candidates running for *one* party's nomination. In a blanket primary, any voter may vote for candidates for any party's nomination, but — in contrast to an open primary — the voter may vote for candidates for the nomination of *different* political parties for various offices.[6] For example, in a blanket primary such as the one envisioned by the statute at issue, a registered Republican could vote for an independent for Governor, a Democrat for the U.S. House, and a Republican for the state Senate.

3. 479 U.S. 208 (1986).

4. 450 U.S. 107 (1981).

5. *See O'Callaghan*, 914 P.2d at 1254-55.

6. *See id.* For further description of closed, open, and blanket primaries, see JOHN F. BIBBY, POLITICS, PARTIES, AND ELECTIONS IN AMERICA 133-37 (3d ed. 1996).

In addition to Alaska, Louisiana[7] and Washington[8] have blanket primaries. California voters recently approved a voter initiative authorizing a blanket primary,[9] though it has yet to go into effect and is being challenged in federal court.[10]

It is also worthwhile at the outset to consider Alaska's unique electoral composition, characterized by its unusually large number of undeclared and non-partisan voters relative to the number of party-affiliated voters. In August 1997, there were 431,976 registered voters in Alaska.[11] Of these, 16,895 were registered independents, 72,916 were registered Democrats, 106,983 were registered Republicans, and 3,157 were registered Green party members.[12] At the same time, there were 142,244 undeclared and 84,780 non-partisan registered voters.[13]

II. *O'CALLAGHAN V. STATE*

Alaska Statutes section 15.25.060 provides for a primary wherein all primary candidates are listed on a single ballot "without regard to their party affiliation."[14] Any voter may vote for any of the candidates, regardless of the party affiliation of the voter or of the candidate. Known as a blanket primary, this type of primary election was first enacted in Alaska in 1947 after a referendum.[15]

In 1990, the Republican Party of Alaska ("RPA") enacted a

7. *See* LA. REV. STAT. ANN. § 18:401 (West 1997). At press time, the Supreme Court of the United States was reviewing a Fifth Circuit decision which held that Louisiana's election scheme violates federal laws that set a uniform federal election day for members of Congress. *See* Love v. Foster, 90 F.3d 1026 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997). In a subsequent clarification of its decision, the Fifth Circuit observed that Louisiana could conform with federal law, without necessarily abandoning its open primary system, by rescheduling the elections. *See* Love v. Foster, 100 F.3d 413 (5th Cir. 1996).

8. *See* WASH. REV. CODE § 29.18.200 (1996).

9. *See* Cal. Prop. 198 (1996) (to be codified at CAL. ELEC. CODE § 2001 (West 1997)).

10. *See infra* notes 194-98 and accompanying text.

11. *See* STATE OF ALASKA DIVISION OF ELECTIONS, NUMBER OF REGISTERED VOTERS BY PARTY WITHIN DISTRICT (Aug. 4, 1997).

12. *See id.*

13. *See id.* As of November 1994, there were 340,464 registered voters in Alaska. Of these, 12,936 were registered independents, 59,782 were registered Democrats, 78,212 were registered Republicans, and 2,558 were registered Green party members. At the same time, there were 94,282 undeclared and 88,099 non-partisan registered voters. *See* Supplemental Brief of Appellee State at App. 1, O'Callaghan v. State, 914 P.2d 1250 (Alaska 1996) (No. S-6249, 4338).

14. ALASKA STAT. § 15.25.060 (Michie 1996).

15. *See* O'Callaghan v. State, 914 P.2d 1250, 1254-56 (Alaska 1996).

party rule that provided that only registered Republicans, registered independents, and registered voters who state no preference of party affiliation may vote in Republican primaries.[16] Due to the obvious conflict between this party rule and the blanket primary statute, the Republican Party sued the State in federal court, challenging the statute's constitutionality.[17] Agreeing with the RPA, Judge James K. Singleton orally announced his "tentative decision"[18] that Alaska's blanket primary statute infringed on the RPA's right to free political association in violation of the United States Supreme Court's opinion in *Tashjian*.[19]

Subsequent to the judge's announcement, but prior to his entry of judgment in the matter, the RPA and the State agreed to certain stipulations and to dismissal of the suit. The district court approved the stipulations and dismissed the case without prejudice. The stipulations provided for two separate ballots for primary elections, the effect of which was that the 1992 Republican primary was conducted in accord with the Party rule, not the blanket primary law.[20] One ballot listed only Republican candidates, and was available only to Republican, non-partisan, and undeclared voters. The other ballot listed all other candidates, and was available to all voters. Voters, of course, could vote only one of these ballots.

Following the stipulation, and before the 1992 primary, the Director of Elections adopted emergency temporary regulations, implementing the two-ballot system described in the stipulation.[21] The Director adopted identical permanent regulations prior to the 1994 primary.[22] The 1992 and 1994 elections were conducted pursuant to these regulations.[23]

Then, a voter in the 1992 primary election, Mike O'Callaghan, filed a complaint against the Lieutenant Governor in Alaska Supe-

16. *See* REPUBLICAN PARTY OF ALASKA, RPA RULES XIV § 1 (1996).

17. *See* Zawacki v. State, No. A92-414-CV (D. Alaska filed May 26, 1992).

18. Judge Singleton explained his practice of announcing tentative decisions as follows:

> The important thing about a tentative decision is to alert you to the conclusions that I have reached legally and factually after reviewing your materials and the factual materials you have submitted . . . . So, again by announcing tentative decisions I am not suggesting that my find is fixed in stone or that I am absolutely invulnerable to persuasion but only to suggest to you any factual or legal errors I may be laboring under so that in the course of your argument you can correct them.

O'Callaghan, 914 P.2d at 1253 n.2.

19. *See id.* at 1252-53.

20. *See id.* at 1253.

21. *See* ALASKA ADMIN. CODE tit. 6, §§ 28.010-.050 (1992).

22. *See id.* §§ 28.100-.150 (1993).

23. *See O'Callaghan*, 914 P.2d at 1253.

rior Court challenging the legality of the 1992 primary election. O'Callaghan asserted that the stipulated regulations providing for a two-ballot primary were inconsistent with state election law. The State argued that the regulations were valid because of the clear unconstitutionality of the blanket primary statute under *Tashjian*.[24] The court granted summary judgment for the State, and O'Callaghan appealed to the Alaska Supreme Court.

The Alaska Supreme Court, in *O'Callaghan v. Coghill*,[25] invalidated the stipulation because, through the stipulation, the state had effectively declared a law unconstitutional. The court noted that "a stipulation or consent judgment declaring a law unconstitutional is not valid" except in cases of clear unconstitutionality.[26] The clear unconstitutionality of the blanket primary statute had not been established, the court concluded.[27] Although the court declined to decide the constitutionality of the blanket primary statute, it invited the submission of briefs addressing the question.[28]

Following the election of a Democratic governor, the state abruptly changed course and argued that the statute was constitutional. It was only at this point that the RPA became involved in the *O'Callaghan* suit. The court granted the RPA's motion to intervene, and the RPA argued against the statute's constitutionality. Alaskan Voters for an Open Primary were also allowed to intervene. The Alaska Federation of Natives filed an amicus curiae brief, and the Alaskan Independence Party filed a submission in lieu of an amicus curiae brief. Of these groups, only the RPA argued that the blanket primary was unconstitutional.

Deciding the issue in *O'Callaghan v. State*,[29] the Alaska Supreme Court held that Alaska's statute providing for a single blanket primary election is constitutional.[30] The court declined to apply strict scrutiny to the blanket primary statute and instead upheld the law on the basis of state interests that were only "legitimate and important."[31]

The majority conceded that under Alaska's blanket primary system, political parties' association rights are burdened in two ways: the potential for "raiding"[32] is increased and the potential for

24. *See* O'Callaghan v. Coghill, 888 P.2d 1302, 1304 (Alaska 1995).
25. *Id.*
26. *Id.* at 1303.
27. *See id.* at 1305.
28. *See id.*
29. 914 P.2d 1250 (Alaska 1996).
30. *See id.* at 1263.
31. *Id.* at 1262-63.
32. Party raiding has been defined as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other

a loss of accountability of candidates to party principles and platform is heightened.[33] But whatever the burden, the *O'Callaghan* majority reasoned, it is outweighed by the state's interests in (1) encouraging voter turnout, (2) maximizing voters' choices of candidates, and (3) ensuring that elected officials have broad-based constituencies.[34] The court stopped short of describing these interests as "compelling," instead calling them "legitimate and important."[35] The court ordered that the 1996 primary be a blanket primary, but refused O'Callaghan's request to order new elections for 1992 and 1994, which had been conducted pursuant to the stipulation.[36]

Justice Rabinowitz, dissenting, argued that the blanket primary statute impermissibly burdens the RPA's political rights of association in violation of the First and Fourteenth Amendments.[37] Relying on several United States Supreme Court cases, Justice Rabinowitz concluded that the blanket primary law should be subjected to strict scrutiny because the statute significantly interfered with the right of a political party to nominate candidates of its choice.[38]

On June 14, 1996, the RPA filed an application in the United States Supreme Court, seeking a stay of the Alaska Supreme Court's *O'Callaghan* opinion. The stay was not granted, and Alaska's 1996 primary was conducted as a blanket primary election.[39]

Also in June 1996, the RPA, seeking reversal of *O'Callaghan*, filed a petition for a writ of certiorari to the United States Supreme Court.[40] Nearly a year after the filing of the certiorari peti-

party's primary election." Anderson v. Celebrezze, 460 U.S. 780, 789 n.9 (1983).

33. *See O'Callaghan*, 914 P.2d at 1263.

34. *See id.*

35. *Id.* at 1262-63.

36. *See id.* at 1263.

37. *See id.* at 1264 (Rabinowitz, J., dissenting).

38. *See id.* (Rabinowitz, J., dissenting) (citing Burdick v. Takushi, 504 U.S. 428 (1992); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989); Tashjian v. Republican Party of Conn., 379 U.S. 208 (1986); Democratic Party of the United States v. Wisconsin *ex. rel.* LaFollette, 450 U.S. 107 (1981)).

39. *See* Republican Party of Alaska v. O'Callaghan, 116 S. Ct. 2582 (1996) (denying application for stay).

40. The questions presented in the petition for certiorari were

> (1) Whether this decision conflicts with prior free political association decisions of [the Supreme Court] such as Burdick v. Takushi, Eu v. San Francisco County Democratic Central Committee, Tashjian v. Republican Party of Connecticut, and Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette.
>
> (2) Whether it is a violation of the First Amendment right of free political association for the State of Alaska to require the Republican Party to participate in a blanket primary election, in which registered Demo-

tion, the Court on May 12, 1997, denied cert.[41] However, in other jurisdictions, including the District of Alaska, legal challenges to blanket and open primaries continue.[42]

III. THE UNITED STATES SUPREME COURT'S FREEDOM OF ASSOCIATION JURISPRUDENCE

A. The Right to Associate

Political parties and their "adherents enjoy a constitutionally-protected right of political association."[43] This right grants parties and their members "'the freedom to associate with others for the common advancement of political beliefs and ideas . . . .'"[44]

In the first case to enunciate formally the right to freedom of association,[45] Justice Harlan, writing for a unanimous Court, stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[46] This seminal case, *NAACP v. Alabama ex rel. Patterson*,[47] established freedom of association as a separate constitutional right emanating from the First Amendment's guarantees of speech, press, petition, and as-

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> crats and members of other political parties may vote on Republican nominees, as a condition of placing Republican candidates on the Alaska general election ballot.

Petition for Writ of Certiorari at i, Republican Party of Alaska v. O'Callaghan, 117 S. Ct. 1690 (1997) (No. 95-1962).

41. *See Republican Party of Alaska*, 117 S. Ct. at 1690.

42. *See infra* notes 194-213 and accompanying text.

43. Cousins v. Wigoda, 419 U.S. 477, 487 (1975) (holding that state election law governing selection of delegates to a national party convention would not be accorded primacy over the rules of a national political party).

44. *Id.* (quoting Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)).

45. The Court subsequently recognized two distinct types of freedom of association. One, the freedom of intimate, or intrinsic, association encompasses personal choices to enter into and maintain close human relationships, and is protected as a fundamental element of personal liberty. *See* Roberts v. Unites States Jaycees, 468 U.S. 609, 617-18 (1984) (concluding that a Minnesota statute that compelled Jaycees, a traditionally all-male organization, to accept women into membership did not abridge the Jaycees's right to free association). The other type of freedom of association, and the one implicated here, is freedom of expressive association, or the right to associate for the purpose of engaging in activities protected by the First Amendment, such as speech, assembly, worship, and petition for redress of grievances. *See id.* at 622.

46. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (citation omitted).

47. *Id.*

sembly.[48] It also made this protection applicable to the states through the due process clause of the Fourteenth Amendment.[49]

With respect to this right, the Court observed, "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends."[50] Significantly, the Court went on to state that "[f]reedom of association . . . plainly presupposes a freedom not to associate [with those not sharing the views of the group's members]."[51] Similarly, the Court has stated that "the freedom to associate for the 'common advancement of political beliefs,' necessarily presupposes the freedom to identify the people who constitute the association, *and to limit the association to those people only*."[52]

B. The Supreme Court's Test for Election Laws that Affect the Right to Associate

Although the Supreme Court has yet to address specifically the constitutionality of blanket primaries, it has nonetheless developed a test that may be used to analyze the constitutional validity of Alaska's blanket primary statute, and of other election laws that abridge associational rights. In *Anderson v. Celebrezze*,[53] the Supreme Court first articulated the test to be used in assessing constitutional challenges to election laws.[54] A court

> must first consider the *character and magnitude* of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the *legitimacy and strength* of each of those interests, it also must consider the extent to which those interests make it *necessary* to burden

48. *See id; see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907-08 (1982) (quoting *Patterson*, 357 U.S. at 460); Buckley v. Valeo, 424 U.S. 1, 15 (1976) (quoting *Patterson*, 357 U.S. at 460) (reiterating that the First Amendment protects political association and political expression). It is self-evident that the effective exercise of the freedoms of speech, press, petition and assembly often requires associational activity.

49. *See Patterson*, 357 U.S. at 460.

50. *Roberts*, 468 U.S. at 622 (citations omitted).

51. *Id.* at 623.

52. Democratic Party of United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 (1981) (quoting Kusper v. Pontikes, 414 U.S. 51, 56 (1973) (citation omitted) (emphasis added).

53. 460 U.S. 780 (1983).

54. *See id.* at 789.

> the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[55]

The test, then, weighs the asserted state interests against the injury alleged and considers the fit between the asserted interests and the regulation at issue.

The petitioner in *Anderson* was independent presidential candidate John Anderson who, along with three voters, challenged an Ohio statute that required independent candidates to file in March to appear on the general election ballot in November.[56] Applying its test, the Court began by assessing the burden imposed by the statute. The Court found that setting such an early filing deadline simultaneously precluded independent candidates from entering the presidential race after March and limited the effectiveness of independent candidates who attempted to meet the March deadline.[57] Therefore, the Court found that the law burdened the associational and voting rights of Anderson's supporters and other "independent-minded voters."[58] The Court characterized the burden imposed by the early filing deadline as one that "may have a substantial impact on independent-minded voters."[59]

The Court then assessed the legitimacy of Ohio's asserted interests in voter education, equal treatment for all candidates, and political party stability, as well as the extent to which the challenged law serves these interests.[60] Although the Court found the first interest to be "important and legitimate," it was not convinced that the regulation was sufficiently related to achieving that interest.[61] Similarly, the Court concluded that the state's interest in equal treatment of partisan and independent candidates "simply is not achieved by imposing the March filing deadline on both."[62] Finally, the Court rejected the interest in political stability because "the early filing deadline is not precisely drawn to protect the parties from 'intraparty feuding,' whatever legitimacy that state goal may have in a [p]residential election."[63] In short, the law failed rational-basis review. The Court ultimately invalidated the election provision because its burden "unquestionably outweigh[ed] the

55. *Id.* (citations omitted) (emphasis added).
56. *See id.* at 782-83.
57. *See id* at 792.
58. *Id.* at 790-92.
59. *Id.* at 790-91.
60. *See id.* at 796-806.
61. *See id* at 796.
62. *Id.* at 801.
63. *Id.* at 805.

[s]tate's minimal interest in imposing a March deadline."[64]

In *Tashjian v. Republican Party of Connecticut*,[65] the Supreme Court applied the *Anderson* test to invalidate Connecticut's closed primary statute, which required voters in any political party primary to be registered members of that party.[66] The state Republican Party, seeking to allow unaffiliated voters to participate in the Republican primary, challenged the validity of Connecticut's closed primary system. Because the Connecticut law required voters in any party primary to be registered members of that party, it precluded registered voters who were not affiliated with any party from voting in the Republican primary. The Republican Party, which had previously adopted a party rule permitting unaffiliated, or "independent," voters to vote in its primary, argued that the law deprived the Party of its right under the First and Fourteenth Amendments to enter into political association with individuals of its own choosing.[67] The District Court, Court of Appeals for the Second Circuit, and Supreme Court each agreed, holding that the statute impermissibly interfered with the Republican Party's freedom of association rights.[68]

The Court began its analysis by quoting its earlier opinions for the proposition that "'[c]onstitutional challenges to specific provisions of a [s]tate's election laws . . . cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions.'"[69] Instead, the Court must follow the test previously stated in *Anderson v. Celebrezze*.[70]

Applying the *Anderson* test, the Court found that the challenged laws burdened the right of the Party and its members to associate freely, noting that "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the

64. *Id*. at 806.

65. 479 U.S. 208 (1986).

66. *See id*. at 210-11.

67. *See id*. at 213.

68. *See id*. at 213, 224-25.

69. *Id*. at 213 (quoting *Anderson*, 460 U.S. at 789 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974))).

70. The Court must

> "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the [s]tate as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. at 214 (quoting *Anderson*, 460 U.S. at 789).

freedom to identify the people who constitute the association.'"[71] The statute "limit[ed] the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[72] Apparently this burden was sufficiently weighty to justify strict scrutiny review, for the Court went on to apply this most stringent standard, in which the issue is whether the state law is "narrowly tailored . . . [to advance] the [s]tate's compelling interests."[73]

Connecticut had asserted four interests, which it characterized as compelling: minimizing the administrative burden of the primary system; preventing raiding; avoiding voter confusion and providing for informed voter decisions; and protecting the responsibility of party government.[74] The Court ultimately concluded that each of these interests was "insubstantial," and consequently strict scrutiny was not satisfied.[75]

The Court found that the first asserted interest — that of administrative burden — was "not a sufficient basis . . . for infringing appellees' First Amendment rights."[76] The interest in preventing party raiding, while legitimate, was not implicated, because the election code did not prevent raids but actually "assist[ed] a raid by independents," who, under the law, could register as Republicans at the last minute and thus implement an eleventh-hour raid.[77] The Court classified as merely "legitimate" the state's interest in preventing voter confusion and providing for educated and responsible voter decisions.[78] Finally, the Court disposed of the fourth asserted interest — that of promoting responsiveness of elected officials and strengthening the effectiveness of parties — by noting that, even if these interests were served, a state "'may not constitutionally substitute is own judgment for that of the Party.'"[79] Connecticut was attempting to justify its law on the ground that it protected the integrity of the Party against the Party itself; this the state may not do.[80]

71. *Id.* (quoting Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 (1981)).

72. *Id.* at 216.

73. *Id.* at 217.

74. *See id.*

75. *Id.* at 225.

76. *Id.* at 218.

77. *Id.* at 219.

78. *Id.* at 221-22.

79. *Id.* at 224 (quoting Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 123-24 (1981)).

80. *See id.*

After *Tashjian* it is clear that political parties have a constitutional right to permit unaffiliated voters to participate in their primaries, even in states with election statutes restricting voting in primaries to registered party members. Insofar as closed primary statutes bar participation of unaffiliated voters in party primaries despite party rules permitting the participation of such voters, these statutes are unconstitutional. Pursuant to party rules, then, a state must permit independent/unaffiliated voters as well as party members to vote in the party primary, even if state law establishes a closed primary.[81]

Then in *Eu v. San Francisco County Democratic Central Committee*,[82] the Court articulated a stricter test for assessing the constitutionality of state election laws.[83] This iteration of the *Anderson* test would apply strict scrutiny whenever associational rights are burdened, apparently without regard to the degree of the burden imposed. The now familiar first step entails determining whether the law burdens rights protected by the First and Fourteenth Amendments.[84] Citing *Tashjian* and *Anderson*, the Court then outlined the next step of the inquiry: "[i]f the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and is narrowly tailored to serve that interest."[85] Later, the Court emphasized "[b]ecause the challenged laws burden the associational rights of political parties and their members, the question is whether they serve a compelling state interest."[86]

The plaintiffs in *Eu* challenged provisions of California's election code, which banned primary endorsements by the official governing bodies of political parties and imposed various restrictions on the internal governance of parties.[87] Specifically, the latter group of restrictions dictated the organization and composition of party governing bodies, limited the term of office of party chairs, and required that the chair rotate between residents of northern and southern California.[88]

81. Whether the present-day Court would reach the same result in *Tashjian*, however, is an open question. Of the five justices forming the *Tashjian* majority, none remain on the Court, while all of the *Tashjian* dissenters remain. Nonetheless, at this time *Tashjian* remains good law.

82. 489 U.S. 214 (1989).

83. *See id.* at 222.

84. *See id.* (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

85. *Id.* at 222 (citations omitted).

86. *Id.* at 231.

87. *See id.* at 216.

88. *See id.*

Applying the modified *Anderson* test first to the endorsement ban, the *Eu* Court found that the state election code provisions barring primary endorsements by parties burdened First and Fourteenth Amendment rights, namely political parties' freedom of speech and freedom of association.[89] Moving to the second step of the analysis, the Court applied strict scrutiny to the provision.[90] The Court held that the law was not narrowly tailored to serve a compelling governmental interest.[91]

The State had offered two interests, stable government and protection of voters from confusion and undue influence.[92] As to the first, the Court concluded that California had failed to show the nexus between stable government and a ban on party endorsements.[93] In rejecting the argument that an interest in stable government includes an interest in party stability, the Court cited prior cases in which it had drawn a distinction between interparty and intraparty feuds. Quoting *Tashjian*, the Court wrote, "a [s]tate may enact laws 'to prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'"[94] Moreover, it is not for the state to attempt to save a political party "from pursuing self-destructive acts," as this would entail substituting the state's judgment for that of the party.[95] In conclusion, the Court stated, "preserving party unity during a primary is not a compelling state interest."[96]

Turning to the second and only remaining interest asserted by the State, the Court noted that the state has a "legitimate interest in fostering an informed electorate."[97] But, the Court reasoned, this interest was not served by a ban on party endorsements, a rule which actually *restricts* the flow of information to voters.[98]

The Court then turned to the other challenged code provisions and found that the provisions regulating internal governance of party organizations burdened political parties' freedom of association rights by "prevent[ing] the political parties from governing

89. *See id.* at 222-25.
90. *See id.* at 225-26.
91. *See id.* at 229.
92. *See id.* at 226.
93. *See id.*
94. *Id.* at 227 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986)).
95. *Id.*
96. *Id.* at 228.
97. *Id.*
98. *See id.* at 228-29 (emphasis added).

themselves with the structure they think best."[99] Significantly, given the character of the RPA's claim in *O'Callaghan*, the Court observed that

> the associational rights at stake are much stronger than those we credited in *Tashjian*. There, we found that a party's right to free association embraces a right to allow registered voters who are not party members to vote in the party's primary. Here, party members do not seek to associate with nonparty members, but only with one another in freely choosing their party leaders.[100]

Because the laws burdened associational rights, the Court strictly scrutinized the provisions and the interests they were intended to serve.[101] The State asserted that its regulation of internal party governance served to preserve the integrity of the election process.[102] The Court found that California had failed to show that these regulations were necessary to ensure a fair and orderly election process, a process which is, the Court observed, most directly impacted by a party's external — not internal — affairs.[103] Thus, none of the challenged election code provisions in *Eu* survived strict scrutiny review.[104]

In *Norman v. Reed*,[105] the Court applied strict scrutiny to strike down election laws that limited the right of political association. The Illinois election laws at issue restricted ballot access by prohibiting use by a new political party of the name of an established party[106] and effectively requiring more signatures to get on the ballot in a multidistrict political subdivision than required to get on the statewide ballot.[107]

Noting that it had "required any severe restriction to be narrowly drawn to advance a state interest of compelling importance,"[108] the Court apparently deemed these restrictions severe, for it proceeded to apply strict scrutiny to both measures. Addressing the first challenged law — the prohibition against the use of the party's name — the Court stated that it was "far broader than necessary to serve the [s]tate's asserted interests."[109] Rather, the state's interest in preventing misrepresentation and electoral

99. *Id.* at 230.
100. *Id.* at 230-31.
101. *See id.* at 231.
102. *See id.*
103. *See id.* at 232.
104. *See id.* at 233.
105. 502 U.S. 279 (1992).
106. *See id.* at 285.
107. *See id.* at 282-83.
108. *Id.* at 289 (citing Illinois Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184, 186 (1979)).
109. *Id.* at 290.

confusion could be served "merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent."[110]

As for the signature requirement, the Court stated that "Illinois has not chosen the most narrowly tailored means of advancing" its interest in ensuring that the electoral support for new parties in a multidistrict political subdivision extends to every district.[111] The Court observed that there were other, less restrictive means of advancing this interest.[112] Thus, strict scrutiny was not satisfied and the Court struck down the contested laws.

In *Burdick v. Takushi*,[113] the Court synthesized the test laid out in *Anderson* with its subsequent applications of that test in the following formulation:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the [s]tate's important regulatory interests are generally sufficient to justify" the restrictions.[114]

In *Burdick*, Alan Burdick, a registered voter in Honolulu, challenged Hawaii's prohibition on write-in voting as unconstitutional under the First and Fourteenth Amendments.[115] Burdick sought to require the state to provide for the casting, tallying, and publication of write-in votes.[116] Significantly, however, Hawaii's election code already provided three distinct means through which a voter's chosen candidate may appear on the primary ballot.[117] One of these mechanisms was a designated nonpartisan primary ballot on which any nonpartisan may be placed by filing nominating papers containing between fifteen and twenty-five signatures, depending on the office sought, sixty days before the primary.[118]

The Court found the prohibition on write-in voting to be "a

110. *Id.*
111. *Id.* at 294.
112. *See id.* at 293-94.
113. 504 U.S. 428 (1992).
114. *Id.* at 434 (quoting Norman v. Reed, 502 U.S. 279, 289 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)).
115. *See id.* at 430.
116. *See id.*
117. *See id.* at 435-36.
118. *See id.* at 436.

very limited"[119] burden on voters' rights. Given the multiple other ways Hawaii allowed candidates to appear on the ballot, "any burden on voters' freedom of choice and association is borne only by those who fail to identify their candidate of choice until days before the primary."[120]

Turning next to the interests asserted by Hawaii, the Court stated that "[b]ecause we have already concluded that the burden is slight, the [s]tate need not establish a compelling interest to tip the constitutional scales in its direction."[121] Hawaii asserted two interests in barring write-in votes: guarding against the possibility of unrestrained factionalism at the general election and preventing party raiding.[122] The Court deemed both interests "legitimate" and determined that the ban was "a reasonable way of accomplishing [the] goal" of preventing party raiding.[123] Thus, the minimal level of review was satisfied. *Burdick* illustrates that not all state election laws necessarily impose so high a burden as to warrant the application of strict scrutiny. Where the burden is judged to be quite modest, the Court will apply considerably less scrutiny to the challenged laws.

Most recently, in *Timmons v. Twin Cities Area New Party*,[124] the Court applied the *Anderson* test to Minnesota election laws that prohibited a candidate from appearing on the ballot as the candidate of more than one party.[125] This practice of "nomination by more than one political party of the same candidate for the same office in the same general election" is known as "fusion."[126] The Supreme Court determined that the burdens imposed by the fusion ban "though not trivial — are not severe."[127] Therefore, because strict scrutiny was not warranted, the Court applied only a minimal level of review, and the fusion ban survived.[128]

The *Timmons* Court drew a distinction between the burden of a fusion ban and the more weighty burden of state laws such as those at issue in *Eu* and *Tashjian*.[129] The Court reiterated that "regulation of political parties' internal affairs and core associa-

119. *Id.* at 437.
120. *Id.* at 436-37.
121. *Id.* at 439.
122. *See id.*
123. *Id.* at 440.
124. 117 S. Ct. 1364 (1997).
125. *See id.* at 1370.
126. Twin Cities Area New Party v. McKenna, 73 F.3d 196, 197-98 (8th Cir. 1996).
127. *See Timmons*, 117 S. Ct. at 1372.
128. *See id.* at 1372, 1375.
129. *See id.* at 1370-71.

tional activities," such as that found in *Eu* and *Tashjian*, imposed too great a burden to withstand constitutional scrutiny.[130] The Court contrasted those regulations with ones that merely preclude a candidate who is already on the ballot from being nominated by a second political party.[131] A regulation of the latter variety, the Court noted, simply limits candidates to a single nomination, but does not preclude their nomination by any one party, so long as they are not already the nominee of another party.[132] Therefore, it is only a question of whether a candidate's name may appear on the ballot once or more than once, not whether the candidate's name may appear once or not at all.[133] The burden of such a regulation, the Court concluded, is "not severe."[134]

Because of the nature of the burden imposed, "the [s]tate's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the Party's rights."[135] Minnesota's interests in preserving the integrity of its election processes and maintaining the stability of their political system were sufficient to withstand this minimal review. The fusion ban was upheld.[136]

The foregoing review of United States Supreme Court jurisprudence thus makes clear that the balancing test first articulated in *Anderson*, and consistently applied by the Court since *Anderson*, is the appropriate standard by which to assess the validity of state laws infringing on the freedom of association.

C. State Law Versus Party Rule: The United States Supreme Court Establishes the Primacy of Party Rules

In addition to the Supreme Court precedent establishing the appropriate test for laws burdening the right to associate, precedent also exists that specifically pertains to conflicts between state law and party rules. Given the conflict between Alaska's blanket primary law and the RPA's rule, such precedent is of obvious relevance. The United States Supreme Court has twice before been confronted with state laws that conflict with party rules, and, in each instance, has upheld the validity of the party rules.

In *Cousins v. Wigoda*,[137] the first case upholding party rules

130. *Id.* at 1370.
131. *See id.*
132. *See id.* at 1372.
133. *See id.*
134. *Id.*
135. *Id.* (citing Norman v. Reed, 502 U.S. 279, 288-89 (1992); Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983))).
136. *See id.* at 1373, 1375.
137. 419 U.S. 477 (1975).

despite contrary provisions of the state election code, the Court invoked a political party's constitutionally-protected right of political association to hold that state election law governing selection of delegates to a national party convention would not be accorded primacy over the rules of a national political party.[138] Instead, delegates selected in private caucuses, not the delegates selected in the state-run primary election, were permitted to represent voters at the national party convention.[139]

Later, in *Democratic Party of the United States v. Wisconsin* ex rel. *LaFollette*,[140] the Court upheld the right of national political parties to refuse to seat delegates at their conventions who were chosen through state selection processes that violated party rules. The Wisconsin election code allowed voters not affiliated with the Democratic party to vote in the Democratic primary.[141] The rules of the National Democratic Party, however, provided that only persons willing to affiliate publicly with the party could participate in the process of selecting delegates to the party's national convention.[142] The conflict arose because the Wisconsin law required delegates to vote at the National Convention in accordance with the results of the primary election.[143] Thus, the party rules were violated not by the open nature of the primary, but rather by the state mandate that party delegates be bound by the results of that primary.[144]

In holding that states may not force a party to honor the results of an open primary by requiring delegates to vote in accord with those primary results,[145] the Court made clear that it was *not* deciding the constitutional validity of open primaries; rather its de-

138. *See id.* at 487-91.

139. *See id.* at 478-79. The 59 delegates elected pursuant to the Illinois election code had sued to prevent the 59 delegates chosen according to party rules from being seated at the convention. The Illinois Appellate Court agreed with the position of the former group of delegates, declaring that the "right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code" and, further, that "[t]he interest of the state in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect." Wigoda v. Cousins, 302 N.E.2d 614, 626, 629 (Ill. App. Ct. 1973). The Supreme Court reversed, finding that this position violated the associational rights of the latter group of delegates and of the National Democratic Party, and undermined the Party's effectiveness in selecting candidates. *See Cousins*, 419 U.S. at 489-90.

140. 450 U.S. 107 (1981).

141. *See id.* at 110-11.

142. *See id.* at 109.

143. *See id.* at 112.

144. *See id.*

145. *See id.* at 126.

cision addressed only whether a state, once it has chosen an open primary format in which non-party members may vote, may force a national political party to honor the results of that primary, when those results were reached in violation of national party rules.[146] Relying on its decision in *Cousins*, the Court found this violation of party rules to be impermissible under the First and Fourteenth Amendments.[147] The Supreme Court made the observation, now particularly relevant in evaluating *O'Callaghan*, that it has "recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions — thus impairing the party's essential functions — and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'"[148] The Court also recalled that

> the freedom to associate for the "common advancement of political beliefs" necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only. "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[149]

The Court in *Democratic Party* never reached the application of any standard of review, since it found all of the asserted interests to be unrelated to the imposition of voting requirements on party delegates.[150] Although it did not specifically state that strict scrutiny applied, the Court did refer to "compelling interest[s]," suggesting that strict scrutiny would have been the appropriate standard of review in such a case.[151]

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146. *See id.* at 120.

147. *See id.* at 121-24. The Court in *Democratic Party* framed the issue as "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party" and noted that "this issue was resolved, we believe, in *Cousins v. Wigoda*." *Id.* at 121 (citation omitted).

148. *Id.* at 122 (quoting Ray v. Blair, 343 U.S. 214, 221-22 (1952)).

149. *Id.* (quoting Kusper v. Pontikes, 414 U.S. 51, 56 (1973); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

150. The Court wrote,

> 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 . . . all [of which] . . . go to the conduct of the Presidential preference primary — not to the imposition of voting requirements upon . . . delegates.

Id. at 124-25.

151. *Id.*

IV. THE ALASKA SUPREME COURT ERRED IN *O'CALLAGHAN V. STATE*

A. The Majority Opinion

Before discussing the errors of the *O'Callaghan* majority, it is useful to recount briefly the reasoning of the majority opinion. The Alaska Supreme Court began its opinion by outlining the background of the litigation and then turned to the standard of review it would apply. The court correctly identified the *Anderson* balancing test, as reiterated in *Burdick*, as the standard by which election laws abridging freedom of association must be judged. The court quoted at great length, and almost without comment, the United States Supreme Court's opinion in *Burdick*.[152]

Then the *O'Callaghan* majority described the three major types of primary elections and discussed the history of the blanket primary law in Alaska.[153] Next, the court began a section that it curiously termed "Relevant Case Law."[154] The court first cited a pre-*Tashjian*, Washington state case, which had facts similar to those of *O'Callaghan*.[155] In that case, a challenge to Washington's blanket primary law, the Washington court had relied upon two Supreme Court cases in which the Court had upheld closed primary statutes that had been challenged by excluded voters.[156] The outcome of one of these cases, *Nader v. Schaffer*,[157] which the Supreme Court had affirmed without comment, was effectively reversed by the Court when it subsequently decided *Tashjian*.[158]

Then, turning to, and ultimately discounting, the relevant precedent from the United States Supreme Court, the majority acknowledged that in *Democratic Party* a party rule prevailed over contrary state law. Nonetheless, the majority attempted to distinguish the holding of *Democratic Party* "because the Court did not invalidate the state open primary."[159] Next, the court focused on

152. *See* O'Callaghan v. State, 914 P.2d 1250, 1252-54 (Alaska 1996).

153. *See id.* at 1254-56.

154. *Id*. at 1256.

155. *See id.* (citing Heavey v. Chapman, 611 P.2d 1256 (1980)).

156. *See Heavey*, 611 P.2d at 1258 (citing Rosario v. Rockefeller, 410 U.S. 752 (1973); Nader v. Schaffer, 429 U.S. 989 (1976)).

157. 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989 (1976).

158. Surprisingly, this fact is all but ignored by the majority in *O'Callaghan*. While the *Heavey* court, at the time of its decision, may well have been correct in its reliance on *Nader*, the same cannot be said of the Alaska Supreme Court's reliance on *Nader* after *Tashjian* had preempted *Nader*.

159. *O'Callaghan*, 914 P.2d at 1259. But, of course, the validity of the state's open primary was not the issue decided by the Court in *Democratic Party*; indeed the *Democratic Party* Court expressly declined to consider the issue of the constitu-

Tashjian, emphasizing that the *Tashjian* holding "does not confer per se validity on party rules which conflict with a state's primary election laws."[160] Then, shifting from the Supreme Court cases, the majority cited two California cases, one from a state court and one from a federal appellate court, both upholding state laws against contrary party rules.[161]

Turning to the assessment of the interests involved, the majority noted that the blanket primary statute burdens political parties' association rights in two ways: the potential for raiding is increased and the potential for a loss of accountability of candidates to party principles and platform is heightened.[162] The court concluded, however, that these risks were not considerably greater than they would be in the closed primary that the RPA wished to conduct. It reached this conclusion without the benefit of the RPA's evidence on the matter.[163]

Finally, the majority considered the state's interests in encouraging voter turnout, maximizing voters' choices of candidates, and ensuring that elected officials have broad-based constituencies.[164] The court characterized these interests as "legitimate and important."[165] Though the court never articulated which level of scrutiny it would apply pursuant to the *Anderson* test, it apparently did not choose strict scrutiny since these "legitimate and important" state interests were sufficient to uphold the blanket primary statute. The majority concluded by declaring that the 1992 and 1994 primaries were conducted illegally.[166]

B. The *O'Callaghan* Majority Erred in its Application of the *Anderson* Test

As the preceding review of United States Supreme Court jurisprudence illustrates, the *Anderson* balancing test must be applied to any state regulation infringing on rights of free association. The Court has utilized this test to assess the constitutionality of challenged election laws in *Anderson*, *Tashjian*, *Eu*, *Norman*,

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tional validity of an open primary statute.

160. *Id*.

161. *See id*. at 1260 (citing Green Party of Cal. v. Jones, 31 Cal. App. 4th 747 (Ct. App. 1995); Lightfoot v. Eu, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993)).

162. *See id*. at 1263.

163. In a footnote, the court declined the RPA's suggestion that the case be remanded to allow the RPA to submit evidence, which it had previously been unable to do as a consequence of joining the litigation late as an intervenor. *See id*. at 1261 n.16.

164. *See id*.

165. *Id*. at 1262-63.

166. *See id*. at 1263.

Burdick, and *Timmons*. The test, as previously noted, weighs the character and magnitude of the injury to association rights against the asserted state interests, while considering the necessity of the regulation for achieving those interests.

1. *Assessment of the burden imposed by the blanket primary statute*. Application of the *Anderson* test begins with an assessment of the burden imposed by the challenged law. To comprehend fully the burden imposed by Alaska's blanket primary statute, we must first consider the role of the primary election in Alaska's political system. Under Alaska's statutory scheme, the only way a political party[167] may have candidates in the general election is for the candidates to be selected through the primary election.[168] Furthermore, the party has no role, under the election statute, in selecting candidates for the primary election.[169] Indeed, the only required affiliation between a primary candidate and the party he purports to represent in the primary is that he be registered to vote as a member of that party.[170] The statute requires no other connection between primary candidates and their parties.[171]

Since a party has no means of selecting who can represent it in the primary, the primary election itself is the party's only opportunity to express its collective preference for a nominee for the general election. But because voting in the primary election is open to non-party members, the party cannot use the primary election to select the nominee of its choice, free of the influence of non-party members. Consequently, the party never has the opportunity to select a candidate by a process in which only its members or others with whom the party wishes to associate participate.

167. A political party is statutorily defined as "an organized group of voters that represents a political program and that nominated a candidate for governor who received at least 3% of the total votes cast at the preceding general election for governor." ALASKA STAT. § 15.60.010(20) (Michie 1996).

168. *See id*. § 15.25.010.

169. *See id*. § 15.25.030. Any member of a political party who conforms with the statutory requirements pertaining to filing procedure, age, citizenship, and residency may "file a declaration of candidacy." *Id.*

170. *See id*. § 15.25.030(a)(16).

171. Justice Rabinowitz, in his *O'Callaghan* dissent, highlighted one way a party might have some control over who represents it in a primary:

> If, for example, only those candidates who received a certain percentage of votes at a party convention or caucus could run in the primary under the party's name, then the party would be assured that the nominees have received at least some affirmative approval from the party. As it stands, the party has no control over which candidates use its name.

O'Callaghan v. State, 914 P.2d 1250, 1265 n.4 (Alaska 1996) (Rabinowitz, J., dissenting).

The burden imposed by Alaska's blanket primary, then, is to prevent political parties and their members from selecting a nominee of their choice to represent the party in the general election. As Justice Rabinowitz stated in his dissenting opinion in *O'Callaghan*, "Taken together, these laws mandate that any organization which wins more than three percent in the prior election for governor [the defining characteristic of a "party" under the statute] loses the right to nominate the candidate of its choice."[172] This is a substantial burden. Indeed, it goes to the heart of the constitutional right of freedom of association. When a political party is denied the opportunity to select a candidate through a process in which the only participants are those with whom the party wishes to associate, the party has effectively lost its constitutional right of association.

A fundamental aspect of the right of association, as well as a central function of political parties, is choosing the person who will represent the party and its members in the general election. Surely the matter of who will carry the party name in the general election is a significant one. Voters in the general election will ascribe certain positions or beliefs to candidates who are nominees of the Democratic party and will ascribe other positions or beliefs to candidates who are nominees of the Republican party. Voters likely will also assume certain things about the parties and party members based on the positions and conduct of the nominees who carry the parties' names. Consequently, parties and their adherents have a substantial interest in retaining the opportunity to choose their nominee by means of a process in which only they participate. The denial of such an opportunity constitutes a severe abridgement of the associational rights of parties and their members.

Furthermore, the blanket primary law has ramifications beyond political parties and their members. Because the law forces the opening of the nominee selection process to persons who are not party members, voters in the general election will rightly wonder if candidates bearing the labels of Democratic nominee, Republican nominee, or Libertarian nominee have actually garnered majority support from the parties they purport to represent. Indeed, under current law, it would be possible for the "Republican" nominee to receive more votes from registered Democrats than from Republican party members and for the "Democratic" nominee to receive more votes from registered Republicans than from Democratic party members.[173] Because this potentiality exists, per-

172. *Id.* at 1266 (Rabinowitz, J., dissenting).

173. This may be the result of intentional raiding, or it simply may be caused by the failure of party members to participate in the primary in numbers sufficient to outnumber votes cast by well-intentioned non-party members. Regardless of

sons voting in a general election for nominees selected through a blanket primary have less reliable information than they would have absent the blanket primary. These voters no longer know, for example, whether or not the nominee bearing the "Republican" appellation actually has the support of most Republicans. Thus, the party nomination loses much of its meaning and its ability to impart information to voters in the general election.

2. *Strict scrutiny of Alaska's interests in a blanket primary.* Because of the severe burden the blanket primary places on associational rights, *Anderson* and its progeny mandate the application of strict scrutiny to Alaska's blanket primary statute. Therefore, it was erroneous for the *O'Callaghan* court to uphold the statute on the basis of merely "legitimate and important" state interests.[174] Instead, the Alaska Supreme Court should have required the state to justify the statute by showing that it was narrowly tailored to advance compelling state interests.

Had the court utilized the appropriate level of scrutiny, it would have struck down the blanket primary law, for Alaska's interests in a blanket primary cannot survive strict scrutiny. Indeed, rarely, if ever, can any interest survive strict scrutiny.[175] None of the interests asserted by the states in *Tashjian*, *Eu*, or *Norman* were sufficient to survive this most intense level of review by the United States Supreme Court.

Alaska argued that three interests were served by the blanket primary: maximizing voters' freedom of choice among candidates, encouraging voter turnout, and ensuring that elected officials are representative of the people they govern by forcing parties to have a broad cross-section of support from the voters. To be sure, none of these interests is illegitimate. However, to survive strict scrutiny more is required. The interests must be compelling and the statute must be narrowly tailored to serve those interests.

First, Alaska asserted its interest in maximizing voters' freedom of choice. The state, however, has not utilized the least restrictive means of serving this interest. For example, Alaska could more effectively maximize voter choice, without infringing on associational rights of parties and their members, simply by permitting write-in voting in a separate, non-partisan primary. Under

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the cause, it is the prospect that this could occur, that is of import.

174. *O'Callaghan*, 914 P.2d at 1262-63.

175. The Supreme Court has observed, "Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact." Bernal v. Fainter, 467 U.S. 216, 219 n.6 (1984) (citing Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

such a system, all voters not participating in a party's primary would vote a ballot containing the names of all unaffiliated candidates and space to write in the name of any person of the voter's choice. Thereby, voter choice would be truly maximized, as voters would not be limited to persons whose names appear on the ballot. The person receiving the most votes in this contest would become the "write-in/unaffiliated nominee" in the general election. Because the state has failed to utilize the most narrowly tailored means of furthering this interest, strict scrutiny is not satisfied.

The State also asserted an interest in encouraging voter participation. The State did not specify whether its interest is in encouraging participation of party voters or unaffiliated voters.[176] Assuming, *arguendo*, that the state's interest is in encouraging the participation of unaffiliated voters, and further assuming the merits of this interest, strict scrutiny is not satisfied. This interest is just as effectively served by the less restrictive method of permitting write-in voting in a non-partisan primary, as described above. In that system, virtually every registered voter would be able to participate and to cast a ballot for his candidate of choice, whether or not his choice appeared in print on a ballot. In this way, the associational rights of parties and their members would not be abridged, but voter turnout would be maximized. Thus, the means Alaska has utilized is not necessary to further this state interest, and strict scrutiny is not satisfied.

Finally, Alaska asserted an interest in ensuring that the "officers elected are representative of the people to be governed" and that the blanket primary "forces the major political parties to have a broad cross-section of support from the voters."[177] There is not even a rational relation between the blanket primary and this interest. A primary, whether open or closed, does not "elect representatives of the people to be governed"; that is the function of the general election. Rather, a primary determines party nominees; these nominees, of course, later face off in the general election in which representatives are elected. The time for rallying "a broad cross-section of support from the voters" is the general election campaign, after party nominees have been chosen by party

176. If the interest is in encouraging the participation of voters who are party members, then even rational basis review is not satisfied. Such an interest is not rationally related to the blanket primary statute. This is so because party members actually will be less inclined to participate in a selection process that is adulterated by the participation of members of opposing parties, and more inclined to participate in the selection of a nominee when the process is more meaningful and the nominee selected actually is their choice and their choice alone.

177. *O'Callaghan*, 914 P.2d at 1262.

members.[178] Thus rational basis review, much less strict scrutiny, is not satisfied.

Moreover, the interests asserted by Alaska fare poorly when considered in light of the substantial burden imposed by the statute on the right to associate of political parties and their members. The blanket primary operates to bar political parties and their members from selecting a nominee of their choice for the general election, which is a fundamental function of political parties and one that is integral to the right to associate.

C. The *O'Callaghan* Majority Disregarded Controlling Supreme Court Precedent

Beyond misapplying the test for assessing the constitutionality of election laws, the *O'Callaghan* court disregarded United States Supreme Court precedent indicating that the blanket primary statute should be struck down. First there is *Tashjian*. Significantly, the *Tashjian* Court acknowledged the critical importance to a political party of the selection of a party nominee.[179] State regulations, such as those challenged in *Tashjian* and *O'Callaghan*, which infringe on a party's freedom to determine who may vote in its primaries "limit the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[180]

More than this, the holding in *Tashjian* establishes that freedom of association affords political parties the right to determine who may participate in their nominee selection process, and insofar as state law conflicts with the party's determination in this regard, the law is invalid. In striking down state law limits upon who may participate in party primaries, the Court wrote that "the Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."[181] The Court affirmed the Second Circuit's holding that a state law which "'substantially interferes with the Republican Party's [F]irst [A]mendment right to define its

178. Besides, with or without a blanket primary, party members have a strong and obvious incentive to select a nominee for the general election who can attract "a broad cross-section of support from the voters." If a party fails to choose such a nominee, it likely will lose the general election, especially in a state such as Alaska where the number of undeclared and non-partisan voters significantly exceeds the membership of the "major" political parties. Therefore, the blanket primary statute is not necessary to achieve this asserted interest.

179. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 215-16 (1986).

180. *Id.* at 216.

181. *Id.* at 224.

associational boundaries . . . and engage in effective political association'" is unconstitutional.[182] Thus, while *Tashjian* dealt with a closed rather than an open primary, it plainly established the right of parties to define their associational boundaries, a right which includes the determination of who may participate in the party's selection of a nominee. In this way, *Tashjian* controls the outcome in *O'Callaghan*.

Democratic Party is also directly pertinent to the issue in *O'Callaghan*. In *Democratic Party*, of course, state law opened the Democratic primary to voters not affiliated with the Democratic party; the party wished to restrict participation to party members only. There the Court held that the state may not control the process whereby a political party selects delegates for its national convention.[183] Justice Rabinowitz correctly observed in his *O'Callaghan* dissent that "[d]elegates select candidates, and therefore interference in the delegate selection process is interference in the candidate selection process."[184] Thus, *Democratic Party* compels the conclusion that state interference in a party's nominee selection process, like state interference in a party's selection of delegates, is impermissible.[185] And so, in both *Tashjian* and *Democratic Party*, party rules ultimately prevailed over the state laws which attempted to close and open, respectively, the selection process.

The Court in *Eu*, as well, made several observations that are useful in evaluating *O'Callaghan*. First, the Court noted that "[a] [s]tate's broad power to regulate the time, place, and manner of elections 'does not extinguish the [s]tate's responsibility to observe the limits established by the First Amendment rights of the [s]tate's citizens.'"[186] Continuing, the Court wrote,

> Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to "'identify the people

182. *Id.* at 229 (quoting Republican Party of Conn. v. Tashjian, 770 F.2d 265, 283 (2d Cir. 1985)).

183. *See* Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 126 (1981).

184. O'Callaghan v. State, 914 P.2d 1250, 1266 (Alaska 1996) (Rabinowitz, J., dissenting).

185. *Cf.* Cousins v. Wigoda, 419 U.S. 477, 491 (1975) (upholding party rules over contrary provisions of state election code). It also warrants mention that the *Democratic Party* Court cited with approval Professor Lawrence Tribe who wrote, "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." *Democratic Party*, 450 U.S. at 122 n.22.

186. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (quoting *Tashjian*, 479 U.S. at 217).

> who constitute the association,'" and to select a "standard bearer who best represents the party's ideologies and preferences."[187]

The *Burdick* majority arguably expressed a dim view of blanket primaries.[188] In a footnote, the majority addressed the dissent's argument that because primary voters are required to opt for a specific partisan or nonpartisan ballot — as is the case in both closed and traditional open primaries — they are foreclosed from voting in those races in which no candidate appears on their chosen ballot. But, noted the majority, "this is generally true of primaries; voters are required to select a ticket, rather than choose from the universe of candidates running on all party slates."[189] The Court went on to quote an earlier case in which it had held that "'the [s]tate may determine that it is essential to the integrity of the nominating [petition] process to confine voters to supporting one party and its candidates in the course of the same nominating process.'"[190]

Subsequent to the *O'Callaghan* decision, the Supreme Court in *Timmons* made the following highly pertinent observations:

> The New Party's claim that it has a right to select its own candidate is uncontroversial . . . . *See, e.g., Cousins v. Wigoda* . . . (Party, not [s]tate, has right to decide who will be [s]tate's delegates at party convention.). That is, *the New Party, and not someone else*, has the right to select the New Party's "standard bearer."[191]

Finally, the Court's comments in an earlier case, *Rodriguez v. Popular Democratic Party*,[192] are also instructive. In this case, the Court was reviewing a Puerto Rico statute that gave a political party the authority to appoint an interim replacement for a party member who vacated a position in the legislature. When the appointing party excluded nonmembers of the party from the selection process, the nonmembers alleged a violation of their right of association. The Court, however, disagreed, writing, "The Party was entitled to adopt its own procedures to select this replacement; *it was not required to include non-members in what can be analogized to a party primary election*."[193]

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187. *Id.* at 224 (quoting *Tashjian*, 479 U.S. at 214 (quoting *Democratic Party*, 450 U.S. at 122); Ripon Soc'y, Inc. v. National Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975)) (citations omitted).

188. *See* Burdick v. Takushi, 504 U.S. 428, 437 n.7 (1992).

189. *Id.*

190. *Id.* (quoting American Party of Tex. v. White, 415 U.S. 767, 786 (1974)).

191. Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1370 (1997) (emphasis added).

192. 457 U.S. 1 (1982).

193. *Id.* at 14 (emphasis added).

V. CONCLUSION

In upholding Alaska's blanket primary statute, the Alaska Supreme Court committed two substantial errors, the result of which has been a significant diminution of the associational rights of political parties and their members in Alaska. The Court erred first by misapplying the *Anderson* test and second by disregarding controlling United States Supreme Court precedent. In so doing, the court has commenced the erosion of an important First Amendment right.

It warrants mention that other jurisdictions, including California and Virginia, have recently grappled with the constitutionality of blanket and open primary statutes. In March 1996, California voters approved Proposition 198, the "Open Primary Act,"[194] providing for a blanket primary election in that state.[195] The measure, which goes into effect in 1998, provides that "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation."[196] Like Alaska's blanket primary statute, Proposition 198 squarely raises the issue of whether political parties have a constitutionally-protected right to prevent political opponents from participating in the selection of party candidates. The major political parties in California oppose the law, and the Republican, Democratic, Libertarian, and Peace & Freedom parties have challenged the new blanket primary law in a lawsuit filed in federal court in Sacramento's Eastern District.[197] The case was heard by Judge David Levi in July 1997, and the judge considered further arguments in September 1997.[198]

Also, a challenge to Virginia's open primary law was brought recently in federal court in Virginia by two state Republican Party members, including the chairman of the state party. The law provides that "[a]ll persons qualified to vote . . . may vote at the primary. No person shall vote for the candidates of more than one

194. The appellation "Open Primary Act" is, in fact, a misnomer, for the primary system it adopts is actually a blanket, not open, primary.

195. *See* Cal. Prop. 198 (1996) (to be codified at CAL. ELEC. CODE § 2001 (West 1997)).

196. *Id.*

197. *See* California Democratic Party v. Jones, No. CIV-S-96-2038 (E.D. Cal. filed Nov. 21, 1996).

198. *See* Telephone Interview with George Waters, of Olson, Hagel, Fong, Leidigh, Waters & Fishburn, L.L.P., counsel of record for the Democratic, Libertarian, and Peace & Freedom Parties of California (Aug. 19, 1997) At the time this Note went to press in November 1997, the court had not yet issued its decision.

party."[199] This, then, establishes an open primary.

The plaintiffs in *Marshall v. Meadows*[200] alleged that the open primary law is an unconstitutional infringement on their right to associate freely with other citizens for the advancement of shared political objectives, a right guaranteed by the First and Fourteenth Amendments. Plaintiffs objected to the ability of Democrats and independents, under the law, to participate in the selection of the Republican nominee for United States Senate.[201]

The district court dismissed the action on procedural grounds and did not address the merits of the case. The basis of the dismissal was a lack of standing on the part of the plaintiffs,[202] and laches because the suit was commenced only ninety-five days before the scheduled primary.[203] On January 24, 1997, the Fourth Circuit agreed that the plaintiffs lacked standing, declined to address whether an open primary injures a political party and its members, and dismissed the appeal.[204]

Alaska's blanket primary law also continues to face legal challenge. In February 1995, as the Alaska Supreme Court prepared to consider *O'Callaghan v. State*, the Republican Party of Alaska filed suit in federal district court in Alaska[205] seeking declaratory and injunctive enforcement of the same Party rule at issue in *O'Callaghan*, the rule that would limit participation in the Republican primary election to registered Republicans, registered independents, and persons who state no party preference when registering to vote.[206]

After the Alaska Supreme Court's April 1996 decision in *O'Callaghan*, the District Court in July 1996 denied the plaintiffs' motions for a preliminary injunction and for partial summary judgment.[207] District Judge H. Russel Holland denied the motion for preliminary injunctive relief because, although "there is a strong likelihood of plaintiffs' success on the merits of the underlying constitutional issue,"[208] there is also a "serious question" as to whether the *res judicata* doctrine will preclude the plaintiffs from

199. VA. CODE ANN. § 24.2-530 (Michie 1997).

200. 921 F. Supp. 1490 (E.D. Va. 1996), *aff'd*, 105 F.3d 904 (4th Cir. 1997).

201. *See id.* at 1491, 1493.

202. The State Republican Party was not a plaintiff in the action; only its chairman was involved. *See id.* at 1492-93.

203. *See id.* at 1491, 1494.

204. *See* Marshall v. Meadows, 105 F.3d 904, 906-07 (4th Cir. 1997).

205. *See* Ross v. State, No. A95-0053-CV (D. Alaska filed Feb. 16, 1995).

206. *See* Plaintiffs' Second Amended Complaint for Declaratory and Injunctive Relief at 6-7, Ross v. State (No. A95-0053-CV).

207. *See* Order of July 17, 1996 at 2, Ross v. State (No. A95-0053-CV).

208. *Id.*

relitigating the constitutionality of the blanket primary law.[209] The summary judgment motion was denied because "[t]he court has not yet decided whether the plaintiffs' associational rights which are at issue in this case are to be subject to a strict scrutiny analysis, or whether some less demanding test will apply."[210]

Subsequently, likely in an effort to remedy the *res judicata* problem noted by Judge Holland, plaintiffs filed a Third Amended Complaint on July 31, 1997,[211] alleging that Alaska's blanket primary violates not just the state party rule at issue in *O'Callaghan* but also Rule 34(f) of the National Republican Party. This national party rule was enacted on August 12, 1996 and provides, in pertinent part:

> On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention . . . unless a state party rule provides specifically to the contrary.[212]

In addition, the Alaska Libertarian Party, the Alaskan Independence Party, and former Lieutenant Governor John B. Coghill, now the chairman of the Alaskan Independence Party, joined the suit as plaintiffs.[213]

The continuing litigation surrounding open and blanket primaries means that the United States Supreme Court likely will again have the opportunity to rule definitively on the constitutionality of such primary elections. It should do so, in the interest of settling this significant question of constitutional law.

Brian M. Castro

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209. *Id*. at 8. *Res judicata* applies to state court determinations of federal constitutional issues. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 96 (1980).

210. Order of July 31, 1996 at 1, Ross v. State (No. A95-0053-CV).

211. Plaintiffs' Third Amended Complaint for Declaratory, Injunctive and Other Relief at 8, Ross v. State (No. A95-0053-CV).

212. *Id.*

213. *See id*. at 3-4.