IPO TESTIMONY ON HB 3500

April 8, 2015

HB 3500

Relating to elector affiliation with political parties.

Chair Hoyle, members of the committee,

My name is Sal Peralta. I am here today to offer testimony on HB 3500, which would allow a form of same day registration for voters who want to participate in a major party primary election by mailing the ballots of all major political parties to non-affiliated voters along with a form that allows them to register for the major political party.

Although we agree with the legislative intent to:

- **Provide alternative opportunities for people to join political parties.**
  The state's new "Motor Voter" law will decrease the opportunities for voters to join political parties in Oregon by replacing the most commonly used method of joining a political party – filling out a voter registration card at the prompting of the DMV – with a direct mail scheme that is likely to have a much lower participation rate (see addendum #1).

- **Give non-affiliated voters an opportunity to help select candidates for the November election.**
  Under current law, there is no path for non-affiliated voters to help select candidates for the November election, meaning that 450,000 people under the current system and 1,200,000 people under the "motor voter" system will have no voice in who appears on the November ballot.

- **Preserve the rights of political parties to make their own decisions about who can participate in their elections.**

However, the proposed solution is flawed in some important ways:

- It provides a state funded voter registration service for major parties but not for minor parties at a time when there will be fewer state sponsored opportunities to register with a political party.

- It appears to contradict current law because it does not provide a mechanism for the delivery of ballots for political parties that choose to open their primaries to non-affiliated voters without requiring those voters to join the political party. This is relevant to the IPO, as the party has already

INDEPENDENT PARTY OF OREGON

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declared its intention to open its primary to non-affiliated voters.

(1) Accept a friendly amendment to the bill (HB3500-5) that achieves the following framework:

- Continue to allow political parties to choose whether or not to allow non-affiliated voters to participate in their primary election.

- Require clerks to include a form in the ballots of nonaffiliated voters that allows them to join a political party of their choosing.

  You are currently registered as non-affiliated. To join a political party, check one box below.

  ☐ Americans Elect Party
  ☐ Constitution Party
  ☐ Democratic Party
  ☐ Independent Party
  ☐ Libertarian Party
  ☐ Pacific Green Party
  ☐ Progressive Party
  ☐ Republican Party
  ☐ Working Families Party

  Or you can join a party by going to tiny.cc/votereg.

Legal Considerations

A concern has been raised about the validity of such a procedure under the U.S. Constitution. Laws allowing parties the option to allow NAVs to vote in their primaries already exist in 28 states: Alabama, Alaska, Arkansas, Connecticut, Georgia, Hawaii, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin.

The United States Supreme Court has not struck down any law allowing parties the option to allow NAVs to vote in their primaries. In California Democratic Party v. Jones (2000), the Court invalidated a law requiring the major parties to allow NAVs to vote in their primaries. We are suggesting that each major party have the option to open its primary to NAVs under the HB 3500 mechanism, without requiring party membership.

Please see attached legal references in addendum 3-5.

From the Desk of Sal Peralta

April 8, 2015
ADDENDUM #1

Re: Implementation of State's "Motor Voter" law / Open Primaries

Dear House Rules Committee member,

HB 3500 affords the legislature an opportunity to address an issue that was, perhaps, not adequately addressed when the state's new "Motor Voter" legislation was adopted.

It was estimated that the new law would bring in an additional 800,000 new voters into the Oregon system, and that this would have some diluting effect on political party membership. **However, an issue that the legislature did not significantly discuss in the Motor Voter debate is whether the new process of registering voters would significantly alter the number of people joining political parties.**

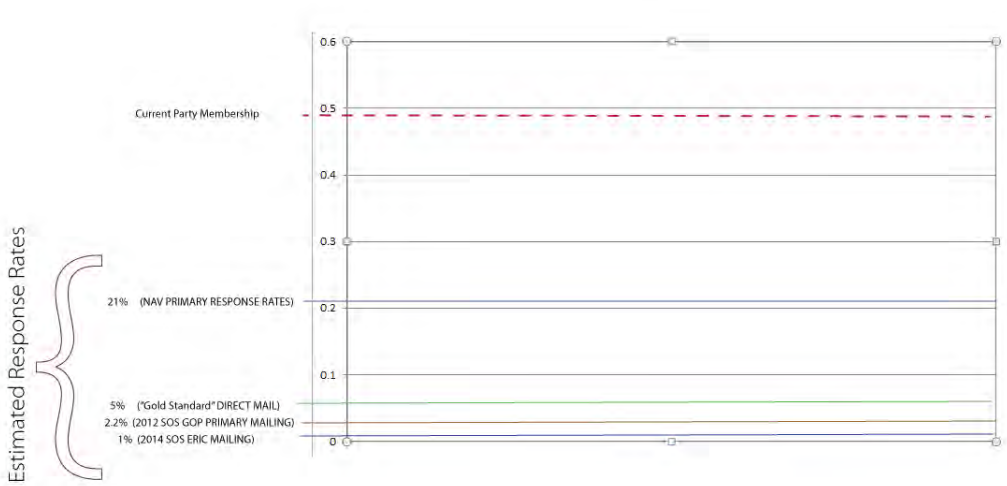
Currently, 48 percent of eligible Oregonians are members of political parties. In rough terms, 60 percent of eligible voters are currently registered and 80 percent of those voters join a political party.

The reason for that is that the state provides voter registration cards as mandated by the current federal motor voter act that are distributed at the DMV locations, post offices, county clerk offices etc.

Those cards give voters the opportunity to join political parties at the time of registration.

We have written confirmation from DMV of their intention to seek a waiver from the federal government from the requirement to ask people to fill out a voter registration card at the DMV. We also have confirmation that DMV does not currently have the ability to register people for a political party using the DMV system.

Under the DMV's proposed implementation of the new system (attached), voters will **only** register for political parties by responding to a card sent by the Secretary of State some weeks after they have visited the DMV. Based on our experience with direct mail, and past direct mail efforts by the secretary of state to encourage voters to register, we anticipate a **very** low response rate.



The net effect of these changes are likely to be significantly reduced numbers of people registering for political parties, and over time, a massive erosion of political party membership in Oregon.

That may have been the governor's intent and the legislature's intent, but I doubt it.

HB 3500 affords us the opportunity to provide an alternate mechanism for encouraging non-affiliated voters to join a political party and we encourage the legislature to avail themselves of a mechanism that allows for the broadest possible opportunity for nonaffiliated voters to join **any** political party of their choosing.

ADDENDUM 2

SUBJECT: Email chain indicating DMV's intention to seek a waiver of federal law requiring voter registration cards be made available to voters at the DMV.

From: HOUSE David J [mailto:David.J.HOUSE@odot.state.or.us]

Sent: Monday, March 30, 2015 2:22 PM

To: Robert Harris

Subject: RE: Motor Voter process

Hi,

Yes, that will save us customer service time and printing costs. I'm not sure whether we'll still keep registration cards at our offices – that is an open question. But under an automated system, they would not be necessary.

From: Robert Harris [mailto:RHarris@harrislawsite.com]

Sent: Monday, March 30, 2015 2:01 PM

To: HOUSE David J

Subject: RE: Motor Voter process

OK. So if you get the exemption, will you then be discontinuing that face to face process?

I assume that means your staff wouldn't even bring the issue up with face to face clients?

Will there still be the registration cards available at DMV?

From: HOUSE David J [mailto:David.J.HOUSE@odot.state.or.us]

Sent: Monday, March 30, 2015 1:50 PM

To: Robert Harris

Subject: RE: Motor Voter process

Hi,

We are still obliged to follow the procedure to ask applicants under the federal Motor Voter Act of 1993. We need to ask for an exemption from that requirement from the federal government once Oregon's automatic registration process is in place. Sorry, I wasn't clear that the procedure will stay in place because of federal, not state, law.

David

From: Robert Harris [mailto:RHarris@harrislawsite.com]

Sent: Monday, March 30, 2015 1:36 PM

To: HOUSE David J

Subject: Re: Motor Voter process

Thanks. So your staff will still be using the same procedure as they do now for face to face interactions at DMV offices as far as asking people to register filling out and taking cards? Because the Oregon Motor Voter statute eliminated that statutory language

Sent from my iPhone

On Mar 30, 2015, at 1:04 PM, HOUSE David J <David.J.HOUSE@odot.state.or.us> wrote:

Hi,

I received your voice message – simple answer to your question. Our current procedure is to ask applicants if they would like to register to vote, and if they say yes, we pre-fill a voter registration form using the data we just entered from their driver license or ID card application form. The customer then needs only choose a party affiliation and sign the card, then give it back to us, and we deliver the cards to the Secretary of State's Office. They can also take the card and send it to their county or the Secretary of State themselves, but most leave it with us.

Under the new law, the data will automatically be sent to Secretary of State. We still need to follow our current procedure but will ask the federal government for an exception to the federal Motor Voter law because our process makes it moot. We don't know how long it will take to get an answer on that exception request.

Let me know if you have more questions.

David House

DMV Public Affairs

State Primary Election Systems (2012)

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
Alabama		x		Ala. Code § 17-13- 7	No party affiliation required at registration.	Open
Alaska	R	D		Alaska Stat. §§ 15.25.014, 15.25.060	Parties select who may vote in their primaries. To vote in the GOP primary, a voter must be registered as a Republican 30 days before Election Day.	Open
Arizona			x	Ariz. Att'y Gen. Op. No. I99-025 (R99-049)	Arizona uses a "Presidential Preference" system instead of a traditional primary system. Voters must be registered for a party in order to receive a ballot.	Closed
Arkansas		x		Ark. Code Ann. § § 7-7-306-308	No party affiliation required at registration.	Open
California	N/A	N/A	N/A	Proposition 14; CA S.B. 28	California uses the "Top Two" Plan. On June 8, 2010 voters passed Prop. 14 to create a nonpartisan blanket primary system in which all candidates are listed on the same primary ballot and the top two vote recipients face off in the general election.	R: Closed; D: Semi-Closed
Colorado	x			Colo. Rev. Stat. § 1-7-201	Only voters affiliated with a particular party may vote in its primary.	Closed
Connecticut	x			Conn. Gen. Stat. §§ 9-431, 9-59	Parties may choose to allow for semi-closed elections if they make a change to their party rules; however, as of now, the primaries remain closed.	Closed
District of Columbia	x			D.C. Code Ann. § 1-1001.09(g)(1)	Closed primary for D.C. elected officials such as Delegate, Mayor, Chairman, members of	Closed

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
				; 1-1001.05(b)(1)	Council, and Board of Education.	
Delaware	x			Del. Code Ann. § 3110	Only voters affiliated with a particular party may vote in its primary.	Closed
Florida	x			Fla. Stat. Ann. § 101.021	Only voters affiliated with a particular party may vote in its primary.	Closed
Georgia		x			No party affiliation required at registration. However, on Election Day, voters must declare an oath of intent to affiliate with the particular party for whom they are voting on Election Day.	Open
Hawaii		x		Haw. Rev. Stat § 12-31	No party affiliation required at registration. In the presidential caucuses, any person may vote in the Republican caucus as long as he or she fills out a Republican Party card on that day; only registered Democrats may participate in the Democratic caucus.	R: Open; D: Closed
Idaho	R		D	Idaho Code Ann. § 34-904A	Until 2011, all Idaho primaries were open. After the GOP obtained a declaratory judgment that mandating open primaries violated freedom of association and was thus unconstitutional in Idaho *Republican Party v. Ysura*, the legislature passed a bill allowing parties to choose which type of primary they use. Democrats have chosen a semi-closed primary; unaffiliated voters may register a party at the polls on election day, but they are bound to that party affiliation at the next election.	R: Closed; D: Semi-Closed

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
Illinois			x	10 Ill. Comp. Stat. 5/7-43, -45	No party affiliation required at registration. Voters declare their party affiliation at the polling place to a judge who must then announce it "in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place." If there is no "challenge," the voter is given the primary ballot for his or her declared party.	Semi-Closed
Indiana		x		Ind. Code §§ 3-10- 1-6, 1-9	No party affiliation required at registration. Classified as a "modified open" primary." A voter must have voted in the last general election for a majority of the nominees of the party holding the primary, or if that voter did not vote in the last general election, that voter must vote for a majority of the nominees of that party who is holding the primary. However, there is really no way to enforce this, and cross-over occurs often. The same modified open primary is used for the presidential primary.	Open
Iowa	x				Voters may change party on the day of the primary election.	Closed
Kansas	R		D	Kan. Stat. Ann. §§ 25-3301	Federal courts declared KS law unconstitutional and now the parties decide who will vote in their primaries. In 2012, Republicans will hold closed primaries; however, they will allow unaffiliated voters to register Republican on election day. Democrats will allow both affiliated and unaffiliated voters to vote.	Closed
Kentucky	x			Ky. Rev. Stat.	Only voters affiliated with a	Closed

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
				Ann. § 116.055	particular party may vote in its primary.	
Louisiana		x		Act 570	Voters do not have to register by party affiliation. The congressional primaries changed from a closed system to an open system with the passage of Act 570, effective January 1, 2011	Closed
Maine	x			Me. Rev. Stat. Ann. tit. 21, §§ 111, 340	Only voters affiliated with a particular party may vote in its primary.	Closed
Maryland	x			Md. Code Ann., Elec. Law §§ 3-303, 8-202	Parties may choose to hold open primaries, but must notify the State Board of Elections 6 months prior.	Closed
Massachusetts			x	Mass. Gen. Laws ch.53 §37	Affiliated voters must vote in the primary of their party; however, unaffiliated voters may vote in either primary.	Semi-Closed
Michigan		x		Mich. Comp. Laws § 168.575; Public Act 163	Voters do not have to declare a political party to vote; but must vote for all one party once they enter the voting booth.	Open
Minnesota		x		Minn. Stat. § 204D.08	No party affiliation required at registration.	Open
Mississippi		x		Miss. Code Ann. § 23-15-575	No registration by party affiliation. However, in order to participate in the primary, a voter must support the nominations made in that primary.	Open
Missouri		x		Mo. Rev. Stat. § 115.397	No party affiliation required at registration.	Open
Montana		x		Mont. Code	No party affiliation required at	Open

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
				Ann. § 13-10-301	registration. Each voter has the choice which ballot to use on Election Day.	
Nebraska			x	Neb. Rev. Stat. § 32-912	For federal elections, affiliated voters must vote in the primary of their party; however, unaffiliated voters may vote in either primary. For partisan state-level elections, unaffiliated voters may vote in the Democratic primary but may not vote in the Republican primary.	Semi-Closed
Nevada	x			Nev. Rev. Stat. §§ 293.287, 293.518	Only voters affiliated with a particular party may vote in its primary.	Closed
New Hampshire	x			N.H. Rev. Stat. Ann § 659:14	Closed primaries in effect; but the statute allows for semi-closed primary if that party's rules allow for it.	Semi-Closed
New Jersey	x			N.J. Stat. Ann. § 19:31-13.2	Only voters affiliated with a particular party may vote in its primary.	Closed
New Mexico	x			N.M. Stat. §1-12-7.2	Parties may choose to allow for semi-closed elections if they make a change to their party rules; however, as of now, the primaries remain closed.	Closed
New York	x			N.Y. Elec. Law § 5-304	Only voters affiliated with a particular party may vote in its primary.	Closed
North Carolina			x	N.C. Gen. Stat. §§ 163-59, -119	State law provides for closed primaries, but both parties have opened them up to unaffiliated voters, who may choose on Election Day.	Semi-Closed

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
North Dakota		x		N.D. Cent. Code, § 40-21-06	The only state without voter registration. To vote in the Republican caucus you must have affiliated with the Republican Party in the last general election or intend to do so in the next election.	R: Closed; D: Open
Ohio		x		Ohio Rev. Code Ann. § 3513.19	Voters' right to vote in the primary may be challenged on the basis that they are not affiliated with the party for whom they are voting in the primary.	Open
Oklahoma	x			Okla. Stat. §26-1-104	Only voters affiliated with a particular party may vote in its primary.	Closed
Oregon	x			Or. Rev. Stat. §§ 247.203, 254.365	As of February 2012, the Oregon Republican Party voted to partially open the Republican primary. The primary remains closed for the presidential and legislative elections; however, unaffiliated voters may vote in the Republican primary for the offices of secretary of state, attorney general, and treasurer.	Closed
Pennsylvania	x			25 Pa. Stat. Ann. § 2812	Only voters affiliated with a particular party may vote in its primary.	Closed
Rhode Island			x	R.I. Gen. Laws §§ 17-9.1-23	An unaffiliated voter for the past 90 days may designate his or her party affiliation on election day by voting for that party in the primary.	Semi-Closed
South Carolina		x		S.C.Code Ann. §§ 7-11-10	No party affiliation required at registration.	Open
South Dakota	R		D	S.D. Codified Laws § 12-6-26	Parties may choose to allow for semi-closed elections. Democrats	R: Closed; D: Open

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
					have opened up their primaries to allow unaffiliated voters to vote.	
Tennessee		x		Tenn. Code Ann. § 2-2-102	No party affiliation required at registration.	Open
Texas		x		Tex Elec. Code Ann. § 172.086	No registration by party; voters are not held to affiliation of past election. Each year, voters have a clean slate and must choose on primary day whether to vote by a party affiliation or as unaffiliated; voters are held to that affiliation in the runoff. For the presidential primary, it is the same system as of December 19, 2011.	Open
Utah	R	D		Utah Code Ann. §§ 20A-2-107.5	Parties may choose to open up the primary. Currently, Republicans have a closed primary while Democrats have opened up the primary.	R: Closed; D: Open
Vermont		x		Vt. Stat. Ann. tit. 17, § 2363	No registration by party. For presidential primary, voters must declare which ballots they want.	Open
Virginia		x		Va. Code Ann. § 24.2-530	No party affiliation required at registration.	Open
Washington	N/A	N/A	N/A	Wash. Rev. Code § 29A.52.112, 29A.36.171	Similar to California's Top Two system.	R: Closed; D: Semi-Closed
West Virginia			x	W. Va. Code § 3-5- 4	Technically a closed system, but all parties allow any voter who is not registered with an official party to request their ballot for the Primary Election.	Semi-Closed
Wisconsin		x		Wis. Stat. § 6.80	No party affiliation required at registration.	Open

State	Closed	Open	Semi-Closed	Source	Remarks	President Primary or Caucus
Wyoming	x			Wyo. Stat. Ann. § 22-5-212	A voter can change his or her party affiliation on election day.	Closed

Source: Fairvote.org

KeyCite Yellow Flag - Negative Treatment

Declined to Extend by Alaskan Independence Party v. Alaska, 9th Cir.(Alaska), October 6, 2008

120 S.Ct. 2402
Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, et al., Petitioners,
v.
Bill JONES, Secretary of State of California, et al.
No. 99–401. | Argued April 24, 2000. | Decided June 26, 2000.

Action was brought challenging constitutionality of California proposition which converted State's primary election from closed to blanket primary in which voters could vote for any candidate regardless of voter's or candidate's party affiliation. The United States District Court for the Eastern District of California, David F. Levi, J., 984 F.Supp. 1288, upheld proposition. On appeal, the United States Court of Appeals for the Ninth Circuit, 169 F.3d 646, affirmed. Certiorari was granted. The Supreme Court, Justice Scalia, held that California's blanket primary violated political parties' First Amendment right of association.

Reversed.

Justice Kennedy filed concurring opinion.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined in part.

West Headnotes (6)

[1] Election Law
Recognized party status

In order to avoid burdening general election ballot with frivolous candidacies, State may require parties to demonstrate significant modicum of support before allowing their candidates a place on that ballot.

11 Cases that cite this headnote

[2] Election Law
Time for registration

In order to prevent "party raiding," a process in which dedicated members of one party formally switch to another party to alter outcome of that party's primary, State may require party registration a reasonable period of time before primary election.

6 Cases that cite this headnote

[3] Constitutional Law
Nominations; primary elections
Election Law
Closed or open primary

California's "blanket primary," in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, violated political parties' First Amendment right of association; blanket primary forced political parties to associate with those who, at best, had refused to affiliate with the party, and, at worst, had expressly affiliated with a rival, and state interests in producing elected officials who better represented electorate, expanding candidate debate beyond scope of partisan concerns, ensuring that disenfranchised persons enjoyed right to effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy, were illegitimate or not sufficiently compelling to justify California's intrusion into parties' associational rights. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

93 Cases that cite this headnote

[4] **Constitutional Law**
Nominations; primary elections
Election Law
Closed or open primary

California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, could not be justified by state's interests in producing elected officials who better represented electorate and expanding candidate debate beyond scope of partisan concerns; such "interests" reduced to nothing more than stark repudiation of freedom of association. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

42 Cases that cite this headnote

[5] **Constitutional Law**
Nominations; primary elections
Election Law
Closed or open primary

California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, could not be justified by state's interests in ensuring that disenfranchised persons enjoyed right to effective vote; nonmember's desire to participate in party's affairs was overborne by countervailing and legitimate associational right of party to determine its own membership qualifications. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

28 Cases that cite this headnote

[6] **Constitutional Law**
Nominations; primary elections
Election Law
Closed or open primary

State interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy were not sufficiently compelling to justify intrusion into political parties' associational rights through California's blanket primary, in which voters could vote for any candidate regardless of voter's or candidate's party affiliation, and even if interests were compelling, blanket primary was not narrowly tailored means of furthering them. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Elec.Code §§ 2150, 2151.

51 Cases that cite this headnote

West Codenotes

Prior Version Held Unconstitutional
West's Ann.Cal.Elec.Code §§ 2151, 3006, 13102, 13203, 13206, 13230, 13300, 13301, 13302.

*****2404 *567 Syllabus**[*]

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

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

Held: California's blanket primary violates a political party's First Amendment right of association. Pp. 2406–2414.

(a) States play a major role in structuring and monitoring the primary election process, but the processes by which political parties select their nominees are not wholly public affairs that States may regulate freely. To the contrary, States must act within limits imposed by the Constitution when regulating parties' internal processes. See, *e.g., Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271. Respondents misplace their reliance on *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, and *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, which held not that party affairs are public affairs, free of First Amendment protections, see, *e.g., Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514, but only that, when a State prescribes an election process that gives a special role to political parties, the parties' discriminatory action becomes state action under the Fifteenth Amendment. This Nation has a tradition of political associations in which citizens band together to promote candidates who espouse their political views. The First Amendment protects the freedom to join together to further common political beliefs, *id.,* at 214–215, 107 S.Ct. 544, which presupposes the freedom to identify those who constitute the ***568** association, and to limit the association to those people, *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82. In no area is the political association's right to exclude more important than in its candidate-selection process. That process often determines the party's positions on significant public policy issues, and it is the nominee who is the party's ambassador charged with winning the general electorate over to its views. The First Amendment reserves a special place, and accords a special protection, for that process, *Eu, supra,* at 224, 109 S.Ct. 1013, because the moment of choosing the party's nominee is the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power, *Tashjian, supra,* at 216, 107 S.Ct. 544. California's blanket primary violates these principles. Proposition 198 forces petitioners ****2405** to adulterate their candidate-selection process—a political party's basic function—by opening it up to persons wholly unaffiliated with the party, who may have different views from the party. Such forced association has the likely outcome—indeed, it is Proposition 198's intended outcome—of changing the parties' message. Because there is no heavier burden on a political party's associational freedom, Proposition 198 is unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589. Pp. 2406–2412.

(b) None of respondents' seven proffered state interests—producing elected officials who better represent the electorate, expanding candidate debate beyond the scope of partisan concerns, ensuring that disenfranchised persons enjoy the right to an effective vote, promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—is a compelling interest justifying California's intrusion into the parties' associational rights. Pp. 2412–2414.

169 F.3d 646, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, *post,* p. 2414. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined as to Part I, *post,* p. 2416.

Attorneys and Law Firms

George Waters, for petitioners.

Thomas F. Gede, Sacramento, CA, for respondents.

Opinion

***569** Justice SCALIA delivered the opinion of the Court.

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

I

Under California law, a candidate for public office has two routes to gain access to the general ballot for most state and federal elective offices. He may receive the nomination of a qualified political party by winning its primary,[1] see Cal. ***570** Elec.Code Ann. §§ 15451, 13105(a) (West 1996); or he may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest, see § 8400.

1 A party is qualified if it meets one of three conditions: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party. See Cal. Elec.Code Ann. § 5100 (West 1996 and Supp.2000).

Until 1996, to determine the nominees of qualified parties California held what is known as a "closed" partisan primary, in which only persons who are members of the political party—*i.e.,* who have declared affiliation with that party when they register to vote, see Cal. Elec.Code Ann. §§ 2150, 2151 (West 1996 and Supp.2000)—can vote on its nominee, see Cal. Elec.Code Ann. § 2151 (West 1996). In 1996 the citizens of California adopted by initiative Proposition 198. Promoted largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers," App. 89–90 (reproducing ballot pamphlet distributed ****2406** to voters), Proposition 198 changed California's partisan primary from a closed primary to a blanket primary. Under the new system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... for any candidate regardless of the candidate's political affiliation." Cal. Elec.Code Ann. § 2001 (West Supp.2000); see also § 2151. Whereas under the closed primary each voter received a ballot limited to candidates of his own party, as a result of Proposition 198 each voter's primary ballot now lists every candidate regardless of party affiliation and allows the voter to choose freely among them. It remains the case, however, that the candidate of each party who wins the greatest number of votes "is the nominee of that party at the ensuing general election." Cal. Elec.Code Ann. § 15451 (West 1996).[2]

2 California's new blanket primary system does not apply directly to the apportionment of Presidential delegates. See Cal. Elec.Code Ann. §§ 15151, 15375, 15500 (West Supp.2000). Instead, the State tabulates the Presidential primary in two ways: according to the number of votes each candidate received from the entire voter pool and according to the amount each received from members of his own party. The national parties may then use the latter figure to apportion delegates. Nor does it apply to the election of political party central or district committee members; only party members may vote in these elections. See Cal. Elec.Code Ann. § 2151 (West 1996 and Supp.2000).

***571** Petitioners in this case are four political parties—the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party—each of which has a rule prohibiting persons not members of the party from voting in the party's primary.[3] Petitioners brought suit in the United States District Court for the Eastern District of California against respondent California Secretary of State, alleging, *inter alia,* that California's blanket primary violated their First Amendment rights of association, and seeking declaratory and injunctive relief. The group Californians for an Open Primary, also respondent, intervened as a party defendant. The District Court recognized that the new law would inject into each party's primary substantial numbers of voters unaffiliated with the party. 984 F.Supp. 1288, 1298–1299 (1997). It further recognized that this might result in selection of a nominee different from the one party members would select, or at the least cause the same nominee to commit himself to different positions. *Id.,* at 1299. Nevertheless, the District Court held that the burden on petitioners' rights of association was not a severe one, and was justified by state interests ultimately reducing to this: "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials." *Id.,* at 1301. The Ninth Circuit, adopting the District Court's opinion as its own, affirmed. 169 F.3d 646 (1999). We granted certiorari. 528 U.S. 1133, 120 S.Ct. 977, 145 L.Ed.2d 926 (2000).

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

***572 II**

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

[1] [2] We have recognized, of course, that States have a major role to play in structuring and monitoring the election process, including primaries. See ****2407** *Burdick v. Takushi,* 504 U.S. 428, 433, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992); *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986). We have considered it "too plain for argument," for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. *American Party of Tex. v. White,* 415 U.S. 767, 781, 94 S.Ct. 1296, 39 L.Ed.2d 744 (1974); see also *Tashjian, supra,* at 237, 107 S.Ct. 544 (SCALIA, J., dissenting). Similarly, in order to avoid burdening the general election ballot with frivolous candidacies, a State may require parties to demonstrate "a significant modicum of support" before allowing their candidates a place on that ballot. See *Jenness v. Fortson,* 403 U.S. 431, 442, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Finally, in order to prevent "party raiding"—a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary—a State may require party registration a reasonable period of time before a primary election. See *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). Cf. *Kusper v. Pontikes,* 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) (23–month waiting period unreasonable).

What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States ***573** may regulate freely.[4] To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. See, *e.g., Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). In this regard, respondents' reliance on *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), is misplaced. In *Allwright,* we invalidated the Texas Democratic Party's rule limiting participation in its primary to whites; in *Terry,* we invalidated the same rule promulgated by the Jaybird Democratic Association, a "self-governing voluntary club," 345 U.S., at 463, 73 S.Ct. 809. These cases held only that, when a State prescribes an election process that gives a special role to political parties, it "endorses, adopts and enforces the discrimination against Negroes" that the parties (or, in the case of the Jaybird Democratic Association, organizations that are "part and parcel" of the parties, see *id.,* at 482, 73 S.Ct. 809 (Clark, J., concurring)) bring into the process—so that the parties' discriminatory action becomes state action under the Fifteenth Amendment. *Allwright, supra,* at 664, 64 S.Ct. 757; see also *Terry,* 345 U.S., at 484, 73 S.Ct. 809 (Clark, J., concurring); *id.,* at 469, 73 S.Ct. 809 (opinion of Black, J.). They do not stand for the proposition that party affairs are public affairs, free of First Amendment protections—and our later holdings make that entirely clear.[5] See, *e.g., Tashjian, supra.*

4 On this point, the dissent shares respondents' view, at least where the selection process is a state-run election. The right not to associate, it says, "is simply inapplicable to participation in a state election." "[A]n election, unlike a convention or caucus, is a public affair." *Post,* at 2419 (opinion of STEVENS, J.). Of course it is, but when the election determines a party's nominee it is a party affair as well, and, as the cases to be discussed in text demonstrate, the constitutional rights of those composing the party cannot be disregarded.

5 The dissent is therefore wrong to conclude that *Allwright* and *Terry* demonstrate that "[t]he protections that the First Amendment affords to the internal processes of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election." *Post,* at 2419 (internal quotation marks and citation omitted). Those cases simply prevent exclusion that violates some independent constitutional proscription. The closest the dissent comes to identifying such a proscription in this case is its reference to "the First Amendment associational interests" of citizens to participate in the primary of a party to which they do not belong, and the "fundamental right" of citizens "to cast a meaningful vote for the candidate of their choice." *Post,* at 2422. As to the latter: Selecting a candidate is quite different from voting for the candidate of one's choice. If the "fundamental right" to cast a meaningful vote were really at issue in this context, Proposition 198 would be not only constitutionally permissible but constitutionally required, which no one believes. As for the associational "interest" in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it can even fairly be characterized as an interest. It has been described in our cases as a "desire"—and rejected as a basis for disregarding the First Amendment right to exclude. See *infra,* at 2413.

****2408 *574** Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U.S. Political Parties 239, 241 (A. Schlesinger ed. 1973). Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," *Tashjian, supra,* at 214–215, 107 S.Ct. 544, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," *La Follette,* 450 U.S., at 122, 101 S.Ct. 1010. That is to say, a corollary of the right to associate is the right not to associate. " 'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.' " ***575** *Id.,* at 122, n. 22, 101 S.Ct. 1010 (quoting L. Tribe, American Constitutional Law 791 (1978)). See also *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 372, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (STEVENS, J., dissenting) ("But a party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support"). Some political parties—such as President Theodore Roosevelt's Bull Moose Party, the La Follette Progressives of 1924, the Henry Wallace Progressives of 1948, and the George Wallace American Independent Party of 1968—are virtually inseparable from their nominees (and tend not to outlast them). See generally E. Kruschke, Encyclopedia of Third Parties in the United States (1991).

Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." *Eu, supra,* at 224, 109 S.Ct. 1013 (internal quotation marks omitted). The moment of choosing the party's nominee, we have said, is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian,* 479 U.S., at 216, 107 S.Ct. 544; see also *id.,* at 235–236, 107 S.Ct. 544 (SCALIA, J., dissenting) ("The ability of the members of the Republican Party to select their own candidate ... unquestionably implicates an associational freedom"); *Timmons,* 520 U.S., at 359, 117 S.Ct. 1364 ("[T]he New Party, and not someone ***576** else, has the right to select the ****2409** New Party's standard bearer" (internal quotation marks omitted)); *id.,* at 371, 117 S.Ct. 1364 (STEVENS, J., dissenting) ("The members of a recognized political party unquestionably have a constitutional right to select their nominees for public office").

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

National Party."[7] 450 U.S., at 126, 101 S.Ct. 1010.

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

7 The dissent, in attempting to fashion its new rule—that the right not to associate does not exist with respect to primary elections, see *post,* at 2418–2419—rewrites *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981), to stand merely for the proposition that a political party has a First Amendment right to "defin[e] the organization and composition of its governing units," *post,* at 2417. In fact, however, the state-imposed burden at issue in *La Follette* was the " 'intrusion by those with adverse political principles' " upon the selection of the party's nominee (in that case its presidential nominee). 450 U.S., at 122, 101 S.Ct. 1010 (quoting *Ray v. Blair,* 343 U.S. 214, 221–222, 72 S.Ct. 654, 96 L.Ed. 894 (1952)). See also 450 U.S., at 125, 101 S.Ct. 1010 (comparing asserted state interests with burden created by the "imposition of voting requirements upon" delegates). Of course *La Follette* involved the burden a state regulation imposed on a national party, but that factor affected only the weight of the State's interest, and had no bearing upon the existence *vel non* of a party's First Amendment right to exclude. *Id.,* at 121–122, 125–126, 101 S.Ct. 1010. Although Justice STEVENS now considers this interpretation of *La Follette* "specious," see *post,* at 2418, n. 3, he once subscribed to it himself. His dissent from the order dismissing the appeals in *Bellotti v. Connolly,* 460 U.S. 1057, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983), described *La Follette* thusly: "There this Court rejected Wisconsin's requirement that delegates to the party's Presidential nominating convention, selected in a primary open to nonparty voters, must cast their convention votes in accordance with the primary election results. In our view, the interests advanced by the State ... did not justify its substantial intrusion into the associational freedom of members of the National Party .... Wisconsin *required* convention delegates to cast their votes for candidates who might have drawn their support from nonparty members. The results of the party's decisionmaking process might thereby have been distorted." 460 U.S., at 1062–1063, 103 S.Ct. 1510 (emphasis in original).
Not only does the dissent's principle of no right to exclude conflict with our precedents, but it also leads to nonsensical results. In *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), we held that the First Amendment protects a party's right to invite independents to participate in the primary. Combining *Tashjian* with the dissent's rule affirms a party's constitutional right to allow outsiders to select its candidates, but denies a party's constitutional right to reserve candidate selection to its own members. The First Amendment would thus guarantee a party's right to lose its identity, but not to preserve it.

[3] ***577** California's blanket primary violates the principles set forth in these cases. Proposition 198 forces political parties to associate with—to have their nominees, and hence their

positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally *become a* *****2410*** *member of the party;* and once he does so, he is limited to voting for candidates of that party.[8]

8 In this sense, the blanket primary also may be constitutionally distinct from the open primary, see n. 6, *supra,* in which the voter is limited to one party's ballot. See *La Follette,supra,* at 130, n. 2, 101 S.Ct. 1010 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party .... The situation might be different in those States with 'blanket' primaries—*i.e.,* those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to vote in with respect to each individual elective office"). This case does not require us to determine the constitutionality of open primaries.

***578** The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. Tr. 668–669. Those figures are comparable to the results of studies in other States with blanket primaries. One expert testified, for example, that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent, *id.,* at 511, and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot, App. 136. The impact of voting by nonparty members is much greater upon minor parties, such as the Libertarian Party and the Peace and Freedom Party. In the first primaries these parties conducted following California's implementation of Proposition 198, the total votes cast for party candidates in some races was more than *double* the total number of *registered party members.* California Secretary of State, Statement of Vote, Primary Election, June 2, 1998, http://primary98.ss.ca.gov/Final/Official_Results.htm; California Secretary of State, Report of Registration, May 1998,http:// www.ss.ca.gov/elections/elections_u.htm.

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. The 1997 survey of California voters revealed significantly different policy preferences between party members and primary voters who "crossed over" from another party. Pl. Exh. 8 ***579** Addendum to Mervin Field Report). One expert went so far as to describe it as "inevitable [under Proposition 198] that parties will be forced in some circumstances to give their official designation to a candidate who's not preferred by a majority or even plurality of party members." Tr. 421 (expert testimony of Bruce Cain).

In concluding that the burden Proposition 198 imposes on petitioners' rights of association is not severe, the Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of "benevolent" crossover voters were significant, they would be determinative in only a small number of races.[9] 169 F.3d, at 656–657. But a single election in which the party nominee is selected by nonparty members could be enough to destroy the party. In the 1860 Presidential election, if opponents of the fledgling Republican Party had been able to cause its nomination of a proslavery candidate in place of Abraham Lincoln, the coalition of intraparty factions forming behind him likely would have disintegrated, endangering the party's ****2411** survival and thwarting its effort to fill the vacuum left by the dissolution of the Whigs. See generally 1 Political Parties & Elections in the United States: An Encyclopedia 398–408, 587 (L. Maisel ed. 1991). Ordinarily, however, being saddled with an unwanted, and possibly antithetical, nominee would not destroy the party but severely transform it. "[R]egulating the identity of the parties' leaders," we have said, "may ... color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu,* 489 U.S., at 231, n. 21, 109 S.Ct. 1013.

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

In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even ***580** when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions—and, should he be elected, will continue to take somewhat different positions in order to be *re*nominated. As respondents' own expert concluded: "The policy positions of Members of Congress elected from blanket primary states are ... more moderate, both in an absolute sense and relative to the

other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." App. 109 (expert report of Elisabeth R. Gerber). It is unnecessary to cumulate evidence of this phenomenon, since, after all, the whole *purpose* of Proposition 198 was to favor nominees with "moderate" positions. *Id.,* at 89. It encourages candidates—and officeholders who hope to be renominated—to curry favor with persons whose views are more "centrist" than those of the party base. In effect, Proposition 198 has simply moved the general election one step earlier in the process, at the expense of the parties' ability to perform the "basic function" of choosing their own leaders. *Kusper,* 414 U.S., at 58, 94 S.Ct. 303.

Nor can we accept the Court of Appeals' contention that the burden imposed by Proposition 198 is minor because petitioners are free to endorse and financially support the candidate of their choice in the primary. 169 F.3d, at 659. The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee. In *Eu,* we recognized that party-leadership endorsements are not always effective—for instance, in New York's 1982 gubernatorial primary, Edward Koch, the Democratic Party leadership's choice, lost out to Mario Cuomo. 489 U.S., at 228, n. 18, 109 S.Ct. 1013. One study has concluded, moreover, that even when the leadership-endorsed candidate has won, the effect of the endorsement has been negligible. *Ibid.* (citing App. in *Eu v. San Francisco County Democratic Central Comm.,* O.T.1988, No. 87–1269, pp. 97–98). New York's was a closed primary; one ***581** would expect leadership endorsement to be even less effective in a blanket primary, where many of the voters are unconnected not only to the party leadership but even to the party itself. In any event, the ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with the party leadership, but do not want the party's choice decided by outsiders.

We are similarly unconvinced by respondents' claim that the burden is not severe because Proposition 198 does not limit the parties from engaging fully in *other* traditional party behavior, such as ensuring orderly internal party governance, maintaining party discipline in the legislature, and conducting campaigns. The accuracy of this assertion is highly questionable, at least as to the first two activities. That party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful seems to us improbable. Respondents themselves suggest as much when they assert that the blanket primary system " 'will lead to the election of more representative "problem solvers" *who are less beholden to* *****2412*** *party officials.' "* Brief for Respondents 41 (emphasis added) (quoting 169 F.3d, at 661). In the end, however, the effect of Proposition 198 on these other activities is beside the point. We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired. See, *e.g., Spence v. Washington,* 418 U.S. 405, 411, n. 4, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) *(per curiam); Kusper,* 414 U.S., at 58, 94 S.Ct. 303. There is simply no substitute for a party's selecting its own candidates.

In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process—the "basic function of a political party," *ibid.*—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome— ***582** of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. See *Timmons,* 520 U.S., at 358, 117 S.Ct. 1364 ("Regulations imposing severe burdens on [parties'] rights must be narrowly tailored and advance a compelling state interest"). It is to that question which we now turn.

III

[4] Respondents proffer seven state interests they claim are compelling. Two of them—producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns—are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in "representativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." *Id.,* at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not

be congenial to the majority.

We have recognized the inadmissibility of this sort of "interest" before. In *Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), the South Boston Allied War Veterans Council refused to allow an organization of openly gay, lesbian, and bisexual persons (GLIB) to participate in the council's annual ***583** St. Patrick's Day parade. GLIB sued the council under Massachusetts' public accommodation law, claiming that the council impermissibly denied them access on account of their sexual orientation. After noting that parades are expressive endeavors, we rejected GLIB's contention that Massachusetts' public accommodation law overrode the council's right to choose the content of its own message. Applying the law in such circumstances, we held, made apparent that its "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. ... [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Id.,* at 578, 115 S.Ct. 2338.

[5] Respondents' third asserted compelling interest is that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; ****2413** they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, because under a closed primary they are unable to participate in what amounts to the determinative election—the majority party's primary; the only way to ensure they have an "effective" vote is to force the party to open its primary to them. This also appears to be nothing more than reformulation of an asserted state interest we have already rejected—recharacterizing nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." *Tashjian,* 479 U.S., at 215–216, n. 6, 107 S.Ct. 544 (citing *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), and *Nader v. Schaffer,* 417 F.Supp. 837 (D.Conn.), summarily aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976)). The voter's desire to ***584** participate does not become more weighty simply because the State supports it. Moreover, even if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.

[6] Respondents' remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but neither are they, *in the circumstances of this case,* compelling. That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant. And for all four of these asserted interests, we find it not to be.

The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene—the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme—indeed, its avowed purpose—is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices *favored by the majority*—but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will ***585** produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. If such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices. See, *e.g.,* 47 U.S.C. § 154(b)(5) ("[M]aximum number of commissioners [of ****2414** the Federal Communications Commission] who may be members of the same political party shall be a number equal to the least number of commissioners which constitutes a majority of the full membership of the Commission"); 47 U.S.C. § 396(c)(1) (1994 ed., Supp. III) (no

more than five members of Board of Directors of Corporation for Public Broadcasting may be of same party); 42 U.S.C. § 2000e–4(a) (no more than three members of Equal Employment Opportunity Commission may be of same party).

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the ***586** constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.

* * *

Respondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs. And it has done this at the "crucial juncture" at which party members traditionally find their collective voice and select their spokesman. *Tashjian,* 479 U.S., at 216, 107 S.Ct. 544. The burden Proposition 198 places on petitioners' rights of political association is both severe and unnecessary. The judgment for the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

Justice KENNEDY, concurring.

Proposition 198, the product of a statewide popular initiative, is a strong and recent expression of the will of California's electorate. It is designed, in part, to further the object of widening the base of voter participation in California elections. Until a few weeks or even days before an election, many voters pay little attention to campaigns and even less to the details of party politics. Fewer still participate in the direction and control of party affairs, for most voters consider the internal dynamics of party organization remote, partisan, and of slight interest. Under these conditions voters tend to become disinterested, and so they refrain from voting altogether. To correct this, California seeks to make primary voting more responsive to the views and preferences of the electorate as a whole. The results of California's blanket primary system may demonstrate the efficacy ***587** of its solution, for there appears to have been a substantial increase in voter interest and voter participation. See Brief for Respondents 45–46.

Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process. In short, there is much to be said in favor of California's law; and I might find this to be a close case if it were simply a way to make elections more fair and open or addressed matters purely of party structure.

The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to ****2415** change the party's doctrinal position on major issues. *Ante,* at 2411–2412. From the outset the State has been fair and candid to admit that doctrinal change is the intended operation and effect of its law. See, *e.g.,* Brief for Respondents 40, 46. It may be that organized parties, controlled—in fact or perception—by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. Political parties advance a shared political belief, but to do so they often must speak through their candidates. When the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates and wresting the choice between moderation and partisanship away from the party itself, the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment. For these reasons I agree with the Court's opinion.

I add this separate concurrence to say that Proposition 198 is doubtful for a further reason. In justification of its statute***588**

California tells us a political party has the means at hand to protect its associational freedoms. The party, California contends, can simply use its funds and resources to support the candidate of its choice, thus defending its doctrinal positions by advising the voters of its own preference. To begin with, this does not meet the parties' First Amendment objection, as the Court well explains. *Ante,* at 2411–2412. The important additional point, however, is that, by reason of the Court's denial of First Amendment protections to a political party's spending of its own funds and resources in cooperation with its preferred candidate, see *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996), the Federal Government or the State has the power to prevent the party from using the very remedy California now offers up to defend its law.

Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. See 90 Stat. 488, 2 U.S.C. § 441a(a)(7)(B)(i) ("[E]xpenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate"). Though we invalidated limits on independent party expenditures in *Colorado Republican,* the principal opinion did not question federal limits placed on coordinated expenditures. See 518 U.S., at 624–625, 116 S.Ct. 2309 (opinion of BREYER, J.). Two Justices in dissent said that "all money spent by a political party to secure the election of its candidate" would constitute coordinated expenditures and would have upheld the statute as applied in that case. See *id.,* at 648, 116 S.Ct. 2309 (opinion of STEVENS, J.). Thus, five Justices of the Court subscribe to the position that Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office.

***589** In my view, as stated in both *Colorado Republican, supra,* at 626, 116 S.Ct. 2309 (opinion concurring in judgment and dissenting in part), and in *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 405–406, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000) (dissenting opinion), these recent cases deprive political parties of their First Amendment rights. Our constitutional tradition is one in which political parties and their candidates make common cause in the exercise of political speech, which is ****2416** subject to First Amendment protection. There is a practical identity of interests between parties and their candidates during an election. Our unfortunate decisions remit the political party to use of indirect or covert speech to support its preferred candidate, hardly a result consistent with free thought and expression. It is a perversion of the First Amendment to force a political party to warp honest, straightforward speech, exemplified by its vigorous and open support of its favored candidate, into the covert speech of soft money and issue advocacy so that it may escape burdensome spending restrictions. In a regime where campaign spending cannot otherwise be limited—the structure this Court created on its own in *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) *(per curiam)*—restricting the amounts a political party may spend in collaboration with its own candidate is a violation of the political party's First Amendment rights.

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

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

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

Today the Court construes the First Amendment as a limitation on a State's power to broaden voter participation in elections conducted by the State. The Court's holding is novel and, in my judgment, plainly wrong. I am convinced that California's adoption of a blanket primary pursuant to Proposition 198 does not violate the First Amendment, and that its use in primary elections for state offices is therefore valid. The application of

Proposition 198 to elections for United States Senators and Representatives, however, raises a more difficult question under the Elections Clause of the United States Constitution, Art. I, § 4, cl. 1. I shall first explain my disagreement with the Court's resolution of the First Amendment issue and then comment on the Elections Clause issue.

I

A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the State.[1] The ****2417** United States Constitution imposes constraints ***591** on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

1 See *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (observing that the United States Constitution grants States a broad power to prescribe the manner of elections for certain federal offices, which power is matched by state control over the election process for state offices). In California, the Secretary of State administers the provisions of the State Elections Code and has some supervisory authority over county election officers. Cal. Govt.Code Ann. § 12172.5 (West 1992 and Supp.2000). Primary and other elections are administered and paid for primarily by county governments. Cal. Elec.Code Ann. §§ 13000–13001 (West 1996 and Supp.2000). Anecdotal evidence suggests that each statewide election in California (whether primary or general) costs governmental units between $45 million and $50 million.

The blanket primary system instituted by Proposition 198 does not abridge "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ante,* at 2408.[2] The Court's contrary conclusion rests on the premise that a political party's freedom of expressive association includes a "right not to associate," which in turn includes a right to exclude voters unaffiliated with the party from participating in the selection of that party's nominee in a primary election. *Ante,* at 2408. In drawing this conclusion, however, the Court blurs two distinctions that are critical: (1) the distinction between ***592** a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.

2 Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is "unimaginable" without political parties, *ante,* at 2408, though their antiparty thought ultimately proved to be inconsistent with their partisan actions. See, *e.g.,* R. Hofstadter, The Idea of a Party System 2–3 (1969) (noting that "the creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic"). At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. *Id.,* at 16–17, 24. Indeed, parties ranked high on the list of evils that the Constitution was designed to check. *Id.,* at 53; see The Federalist No. 10 (J. Madison).

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 354–355, n. 4, 359, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (recognizing party's right to select its own standard-bearer in context of minor party that selected its candidate through means other than a primary); *id.,* at 371, 117 S.Ct. 1364 (STEVENS, J., dissenting); *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 124, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"); *Cousins v. Wigoda,* 419 U.S. 477, 491, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975) ("*Illinois*' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the *National* Party Convention" (emphasis added)).[3] A political ****2418 *593** party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line.

3 The Court's disagreement with this interpretation of *La Follette* is specious. *Ante,* at 2409, n. 7 (claiming that state-imposed burden actually at issue in *La Follette* was intrusion of those with adverse political principles into party's primary). A more accurate characterization of the nature of *La Follette's* reasoning is provided by Justice Powell: "In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins v. Wigoda,* 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights." *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 128, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) (dissenting opinion). Indeed, the *La Follette* Court went out of its way to characterize the Wisconsin law in this manner in order to avoid casting doubt on the constitutionality of open primaries. *Id.,* at 121, 101 S.Ct. 1010 (majority opinion) (noting that the issue was not whether an open primary was constitutional but "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party"). The fact that the *La Follette* Court also characterizes the Wisconsin law at one point as a law "impos[ing] ... voting requirements" on delegates, *id.,* at 125, 101 S.Ct. 1010, does not alter the conclusion that *La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections. State-mandated intrusion upon either delegate selection or delegate voting would surely implicate the affected party's First Amendment right to define the organization and composition of its governing units, but it is clear that California intrudes upon neither in this case. *Ante,* at 2406, n. 2.
La Follette and *Cousins* also stand for the proposition that a State's interest in regulating at the *national* level the types of party activities mentioned in the text is outweighed by the burden that state regulation would impose on the parties' associational rights. See *Bellotti v. Connolly,* 460 U.S. 1057, 1062–1063, and n. 3, 103 S.Ct. 1510, 75 L.Ed.2d 938 (1983) (STEVENS, J., dissenting) (quoted in part *ante,* at 2409, n. 7). In this case, however, California does not seek to regulate such activities at all, much less to do so at the national level.

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F.3d 646, 654–655 (1999); cf. *Timmons,* 520 U.S., at 360, 117 S.Ct. 1364 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational activities, ***594** regulation of access to election ballot does not); *La Follette,* 450 U.S., at 120–121, 101 S.Ct. 1010 (noting that it "may well be correct" to conclude that party associational rights are not unconstitutionally infringed by state open primary); *id.,* at 131–132, 101 S.Ct. 1010 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties' lack of defined ideological orientation and political mission). I think it clear—though the point has never been decided by this Court—"that a State may require parties to use the primary format for selecting their nominees." *Ante,* at 2407. The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action.[4] It is because the primary is state action that an organization—whether it calls itself a political party or just a "Jaybird" association—may not deny non-Caucasians the right to participate in the selection of its nominees. *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); *Smith v. Allwright,* 321 U.S. 649, 663–664, 64 S.Ct. 757, 88 L.Ed. 987 (1944). The Court is quite right in stating that those cases "do not stand for the proposition that party affairs are *[wholly]* public affairs, free of First Amendment protections." *Ante,* at 2407. They do, however, ****2419** stand for the proposition that primary elections, unlike most "party affairs," are state action.[5] The protections that the First ***595** Amendment affords to the "internal processes" of a political party, *ibid.,* do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

4 Indeed, the primary serves an essential public function given that, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse v. Republican Party of Va.,* 517 U.S. 186, 205–206, 116 S.Ct. 1186, 134 L.Ed.2d 347 (1996) (opinion of STEVENS, J.) (internal quotation marks omitted); see also *United States v. Classic,* 313 U.S. 299, 319, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

5 Contrary to what the Court seems to think, I do not rely on *Terry* and *Allwright* as the basis for an argument that state accommodation of the parties' desire to exclude nonmembers from primaries would necessarily violate an independent constitutional proscription such as the Equal Protection Clause (though I do not rule that out). Cf. *ante,* at 2407–2408, n. 5. Rather, I cite them because our recognition that constitutional proscriptions apply to primaries illustrates that primaries—as integral parts of the election process by which the people select their government—are state affairs, not internal party affairs.

The so-called "right not to associate" that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may

refuse to allow nonmembers to participate in the party's decisions when it is conducting its own affairs;[6] California's blanket primary system does not infringe this principle. *Ante,* at 2406, n. 2. But an election, unlike a convention or caucus, is a public affair. Although it is true that we have extended First Amendment protection to a party's right to invite independents to participate in its primaries, *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), neither that case nor any other has held or suggested that the "right not to associate" imposes a limit on the State's power to open up its primary elections to all voters eligible to vote in a general election. In my view, while state rules abridging participation in its elections should be closely scrutinized,[7] the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic ***596** process, it is acting not as a foe of the First Amendment but as a friend and ally.

6 "The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates." *La Follette,* 450 U.S., at 124–125, 101 S.Ct. 1010.

7 See *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 370, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (STEVENS, J., dissenting) (general election ballot access restriction); *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (primary election ballot access restriction).

Although I would not endorse it, I could at least understand a constitutional rule that protected a party's associational rights by allowing it to refuse to select its candidates through state-regulated primary elections. See *Marchioro v. Chaney,* 442 U.S. 191, 199, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979) ("There can be no complaint that [a] party's [First Amendment] right to govern itself has been substantially burdened by [state regulation] when the source of the complaint is the party's own decision to confer critical authority on the [party governing unit being regulated]"); cf. *Tashjian,* 479 U.S., at 237, 107 S.Ct. 544 (SCALIA, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice [of candidates] to a Republican Convention [rather than a primary] can be proscribed [by the State], but its delegation of that choice to nonmembers of the Party cannot"). A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where nonmembers could be excluded. In the real world, however, anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by ****2420** registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member. See 169 F.3d, at 655, and n. 20. There is an obvious mismatch between a supposed constitutional right "not to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. See *La Follette,* 450 U.S., at 133, 101 S.Ct. 1010 (Powell, J., dissenting) ("As Party affiliation becomes ... easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance").

***597** The Court's reliance on a political party's "right not to associate" as a basis for limiting a State's power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways. Assuming that a registered Democrat or independent who wants to vote in the Republican gubernatorial primary can do so merely by asking for a Republican ballot, the Republican Party's constitutional right "not to associate" is pretty feeble if the only cost it imposes on that Democrat or independent is a loss of his right to vote for non-Republican candidates for other offices. Cf. *ante,* at 2410, n. 8. Subtle distinctions of this minor import are grist for state legislatures, but they demean the process of constitutional adjudication. Or, as Justice SCALIA put the matter in his dissenting opinion in *Tashjian:*

"The ... voter who, while steadfastly refusing to register as a Republican, casts a vote in [a nonclosed] Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." 479 U.S., at 235, 107 S.Ct. 544.

It is noteworthy that the bylaws of each of the political parties that are petitioners in this case unequivocally state that participation in partisan primary elections is to be limited to registered members of the party only. App. 7, 15, 16, 18. Under the Court's reasoning, it would seem to follow that conducting anything but a closed partisan primary in the face

of such bylaws would necessarily burden the parties' " 'freedom to identify the people who constitute the association.' " *Ante,* at 2408. Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "narrow" as nonpartisan primaries, ***598** *ante,* at 2412–2414, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

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

8 When coupled with our decision in *Tashjian* that a party may require a State to open up a closed primary, this intrusion has even broader implications. It is arguable that, under the Court's reasoning combined with *Tashjian,* the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a "nonpartisan primary"—a system presently used in Louisiana—in which candidates previously nominated by the various political parties and independent candidates compete. *Ante,* at 2414. These two options are the same in practice because the latter is not actually a "primary" in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process that led the Court to declare the State's ability to require nomination by primary " 'too plain for argument.' " *Ante,* at 2407; see *Lightfoot v. Eu,* 964 F.2d 865, 872–873 (C.A.9 1992) (explaining state interest in requiring direct partisan primary).

****2421** In my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work—party autonomy and discipline versus progressive inclusion of the entire electorate in ***599** the process of selecting their public officials—that are held by the litigants in this case. *O'Callaghan v. State,* 914 P.2d 1250, 1263 (Alaska 1996); see also *Tashjian,* 479 U.S., at 222–223, 107 S.Ct. 544; *Luther v. Borden,* 7 How. 1, 40–42, 12 L.Ed. 581 (1849). That choice belongs to the people. *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, 795, 115 S.Ct. 1842, 131 L.Ed.2d 881 (1995).

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard-bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. See, *e.g.,* 169 F.3d, at 656–659, and n. 23. Moreover, that conclusion rests substantially upon the Court's claim that "[t]he evidence [before the District Court]" disclosed a "clear and present danger" that a party's nominee may be determined by adherents of an opposing party. *Ante,* at 2410. This hyperbole is based upon the Court's liberal view of its appellate role, not upon the record and the District Court's factual findings. Following a bench trial and the receipt of expert witness reports, the District Court found that "there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants." 169 F.3d, at 656. While the Court is entitled to test this finding by making an independent examination of the record, the evidence it cites—including the results of the June 1998 primaries, *ante,* at 2410, which should not be considered because they are not in the record—does not come close to demonstrating that the District Court's factual finding is clearly erroneous. *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 498–501, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

As to the Court's concern that benevolent crossover voting impinges on party associational interests, *ante,* at 2410, the ***600** District Court found that experience with a blanket primary in Washington and other evidence "suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting ... although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states." 169 F.3d, at 657. In my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief preregistration requirement, is too thin a reed to support a credible First Amendment distinction. See ****2422** *Tashjian,* 479 U.S., at 219, 107 S.Ct. 544 (rejecting State's interest in keeping primary closed to curtail

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

On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." 169 F.3d, at 662;[9] cf. *Timmons,* 520 U.S., at 364, 117 S.Ct. 1364 ("[W]e [do not] require elaborate, empirical verification of the weightiness of the State's asserted justifications"). The Court's glib rejection of the ***601** State's interest in increasing voter participation, *ante,* at 2413, is particularly regrettable. In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. See Brief for Respondents 46 (noting that study presented to District Court showed higher voter turnout levels in blanket primary States than in open or closed primary States); *ante,* at 2414 (KENNEDY, J., concurring). I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process,[10] to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, *Burdick v. Takushi,* 504 U.S. 428, 445, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (KENNEDY, J., dissenting), and to the preference of almost 60% of California voters—including a majority of registered Democrats and Republicans—for a blanket primary. 169 F.3d, at 649; see *Tashjian,* 479 U.S., at 236, 107 S.Ct. 544 (SCALIA, J., dissenting) (preferring information on whether majority of rank-and-file party members support a particular proposition than whether state party convention does so). In my view, a State is unquestionably entitled to rely on this combination of interests in deciding who may vote in a primary election conducted by the State. It is indeed strange to find that the First Amendment forecloses this decision.

9 In his concurrence, Justice KENNEDY argues that the State has no valid interest in changing party doctrine through an open primary, and suggests that the State's assertion of this interest somehow irrevocably taints its blanket primary system. *Ante,* at 2414–2415. The *Timmons* balancing test relied upon by the Court, *ante,* at 2412, however, does not support that analysis. *Timmons* and our myriad other constitutional cases that weigh burdens against state interests merely ask whether *a* state interest justifies the burden that the State is imposing on a constitutional right; the fact that one of the asserted state interests may not be valid or compelling under the circumstances does not end the analysis.

10 See *La Follette,* 450 U.S., at 135–136, 101 S.Ct. 1010 (Powell, J., dissenting); cf. *Tashjian,* 479 U.S., at 215–216, n. 6, 107 S.Ct. 544 (discussing cases such as *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), in which nonmembers' associational interests were overborne by state interests that coincided with party interests); *Bellotti v. Connolly,* 460 U.S., at 1062, 103 S.Ct. 1510 (STEVENS, J., dissenting) (discussing associational rights of voters).

***602 II**

The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof." (Emphasis added.) This broad constitutional grant of power to state legislatures is "matched by state control over the election process for state offices." *Tashjian,* 479 U.S., at 217, 107 S.Ct. 544. For the reasons given in Part I, *supra,* I believe it would be a proper exercise of these powers and would not violate the First Amendment for the California Legislature to ****2423** adopt a blanket primary system. This particular blanket primary system, however, was adopted by popular initiative. Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.

The California Constitution empowers the voters of the State to propose statutes and to adopt or reject them. Art. 2, § 8. If approved by a majority vote, such "initiative statutes" generally take effect immediately and may not be amended or repealed by the California Legislature unless the voters consent. Art. 2, § 10. The amendments to the California

Election Code that changed the state primary from a closed system to the blanket system presently at issue were the result of the voters' March 1996 adoption of Proposition 198, an initiative statute.

The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state "Legislature[s]." It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the California ***603** Legislature ..., but the people reserve to themselves the powers of initiative and referendum." Art. 4, § 1. The vicissitudes of state nomenclature, however, do not necessarily control the meaning of the Federal Constitution. Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to "the Legislature" is not so broad as to encompass the general "legislative power of this State."[11] Under that view, California's classification of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause. Arguably, therefore, California's blanket primary system for electing United States Senators and Representatives is invalid. Because the point was neither raised by the parties nor discussed by the courts below, I reserve judgment on it. I believe, however, that the importance of the point merits further attention.

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

* * *

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

Parallel Citations

120 S.Ct. 2402, 147 L.Ed.2d 502, 68 USLW 4604, 00 Cal. Daily Op. Serv. 5083, 2000 Daily Journal D.A.R. 6777, 2000 CJ C.A.R. 3867, 13 Fla. L. Weekly Fed. S 479

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125 S.Ct. 2029
Supreme Court of the United States

Michael CLINGMAN, Secretary, Oklahoma State Election Board, et al., Petitioners,
v.
Andrea L. BEAVER et al.
No. 04–37. | Argued Jan. 19, 2005. | Decided May 23, 2005.

Synopsis
Background: Political party and registered members of two other political parties brought action challenging constitutionality of Oklahoma statute creating a semiclosed primary election system. The United States District Court for the Western District of Oklahoma, Stephen P. Friot, J., 2003 WL 745562, upheld that statute, and plaintiffs appealed. The Court of Appeals, 363 F.3d 1048, reversed, and certiorari was granted.

Holdings: The Supreme Court, Justice Thomas, held that:

[1] Oklahoma's primary system did not severely burden the associational rights of the state's citizenry, so as to require application of strict scrutiny;

[2] system did not violate First Amendment right to freedom of political association; and

[3] court would not address whether Oklahoma's ballot access and voter registration laws, taken together, severely burdened voters' associational rights.

Reversed and remanded.

Justice O'Connor filed opinion concurring in part and concurring in judgment in which Justice Breyer joined in part.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined and Justice Souter joined in part.

West Headnotes (11)

[1] Election Law
Power to Regulate Conduct

Constitution grants States broad power to prescribe the time, places, and manner of holding elections for Senators and Representatives, which power is matched by state control over the election process for state offices. U.S.C.A. Const. Art. 1, § 4, cl. 1.

4 Cases that cite this headnote

[2] Constitutional Law
Political Rights and Discrimination

First Amendment, among other things, protects the right of citizens to band together in promoting among the electorate candidates who espouse their political views. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[3] Constitutional Law
Freedom of Association

Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest; however, when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. U.S.C.A. Const.Amend. 1.

22 Cases that cite this headnote

[4] **Constitutional Law**
Nominations; primary elections
Election Law
Closed or open primary

Oklahoma's semiclosed primary system, under which a political party could invite only its own registered members and voters registered as Independents to vote in its primary, did not severely burden the associational rights of the state's citizenry, so as to require application of strict scrutiny when the system was challenged as unconstitutionally burdening First Amendment right to freedom of political association. U.S.C.A. Const.Amend. 1; 26 Okl.St.Ann. § 1–104.

28 Cases that cite this headnote

[5] **Constitutional Law**
Freedom of Association

Strict scrutiny is appropriate only if burden on right of association is severe. U.S.C.A. Const.Amend. 1.

7 Cases that cite this headnote

[6] **Election Law**
Power to Restrict or Extend Suffrage

States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.

9 Cases that cite this headnote

[7] **Constitutional Law**
Elections in general

When a state electoral provision places no heavy burden on associational rights, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. U.S.C.A. Const.Amend. 1.

13 Cases that cite this headnote

[8] **Constitutional Law**
Nominations; primary elections
Election Law
Closed or open primary

Oklahoma's semiclosed primary system, under which a political party could invite only its own registered members and voters registered as Independents to vote in its primary, did not violate First Amendment right to freedom of political association of political party or registered members of other parties; system imposed only minor burden on associational rights of the state's citizenry and advanced important regulatory interests in preserving political parties as viable and identifiable interest groups, aiding in parties' electioneering and party-building efforts, and in preventing party raiding. U.S.C.A. Const.Amend. 1; 26 Okl.St.Ann. § 1–104.

23 Cases that cite this headnote

[9] **Election Law**
Primary Election Voters

Purpose of party registration is to provide a minimal demonstration by the voter that he has some commitment to the party in whose primary he wishes to participate.

2 Cases that cite this headnote

[10] **Federal Courts**
Presentation of Questions Below or on Review; Record; Waiver

Supreme Court would not address issue of whether Oklahoma's ballot access and voter registration laws, taken together, severely burdened voters' associational rights by effectively preventing them from changing their party affiliations in advance of a primary election, where argument was raised for the first time in brief on the merits to the Supreme Court, and there was virtually no evidence in the record on how those laws operated in tandem with challenged semiclosed primary statute, whether those laws actually burdened associational rights, and whether they advanced important or even compelling state interests. U.S.C.A. Const.Amend. 1; 26 Okl.St.Ann. §§ 1–104, 1–108, 1–109, 1–110, 4–112, 4–119.

15 Cases that cite this headnote

[11] **Federal Courts**
Presentation of Questions Below or on Review; Record; Waiver

Supreme Court ordinarily does not consider claims neither raised nor decided below.

2 Cases that cite this headnote

West Codenotes

Negative Treatment Reconsidered
26 Okl.St.Ann. § 1–104

2031 *581 Syllabus[*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Under Oklahoma's semiclosed primary law, a political party may invite only its own registered members and voters registered as Independents to vote in its primary. When the Libertarian Party of Oklahoma (LPO) notified the State Election Board it wanted to open its upcoming primary to all registered voters regardless of party affiliation, the board agreed as to Independents, but not as to other parties' members. The LPO and several Oklahomans registered as Republicans and Democrats then sued for equitable relief, alleging that Oklahoma's statute unconstitutionally burdens their First Amendment right to freedom of political association. The District Court upheld the statute on the grounds that it did not severely burden respondents' associational rights and that any burden imposed was justified by Oklahoma's asserted interests in preserving parties as viable and identifiable interest groups and in ensuring that primary results accurately reflect party members' voting. Reversing, the Tenth Circuit concluded that the statute imposed a severe burden on respondents' associational rights and was not narrowly tailored to serve a compelling state interest.

Held: The judgment is reversed, and the case is remanded.

363 F.3d 1048, reversed and remanded.

Justice THOMAS delivered the opinion of the Court except as to Part II–A, concluding that Oklahoma's semiclosed primary system does not violate the right to freedom of association. Any burden it imposes is minor and justified by legitimate state interests. Pp. 2035, 2037–2042.

(a) The First Amendment protects citizens' right "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones,* 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502. Regulations imposing severe burdens on associational rights must be narrowly tailored to serve a compelling state interest, but when they impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons* ***2032** *v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589. In *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 224, n. 13, 107 S.Ct. 544, 93 L.Ed.2d

514, the Court ***582** left open the question whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary. P. 2035.

(b) Oklahoma's system does not severely burden associational rights. The Court disagrees with respondents' argument that the burden Oklahoma imposes is no less severe than the burden at issue in *Tashjian,* and thus the Court must apply strict scrutiny as it did in *Tashjian. Tashjian* applied strict scrutiny without carefully examining the burden on associational rights. Not every electoral law burdening associational rights is subject to strict scrutiny, which is appropriate only if the burden is severe, *e.g., Jones, supra,* at 582, 120 S.Ct. 2402. Requiring voters to register with a party before participating in its primary minimally burdens voters' associational rights. Moreover, *Tashjian* is distinguishable. Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian.* Unlike that law, Oklahoma's system does not require Independent voters to affiliate publicly with a party to vote in its primary, 479 U.S., at 216, n. 7, 107 S.Ct. 544. Although, like the earlier law, Oklahoma's statute does not allow parties to "broaden opportunities for joining ... by their own act," but requires "intervening action by potential voters," *ibid.,* this burden is not severe, since many electoral regulations require that voters take some action to participate in the primary process. Such minor barriers between voter and party do not compel strict scrutiny. See *Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result. Pp. 2037–2039.

(c) Oklahoma's primary advances a number of regulatory interests this Court recognizes as important: It "preserv[es] [political] parties as viable and identifiable interest groups," *Nader v. Schaffer,* 417 F.Supp. 837, 845 (Conn.), aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602; enhances parties' electioneering and party-building efforts, 417 F.Supp., at 848; and guards against party raiding and "sore loser" candidacies by spurned primary contenders, *Storer v. Brown,* 415 U.S. 724, 735, 94 S.Ct. 1274, 39 L.Ed.2d 714. Pp. 2039–2041.

(d) The Court declines to consider respondents' expansion of their challenge to include several of Oklahoma's ballot access and voter registration laws. Those claims were neither raised nor decided below, see, *e.g., Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 168–169, 125 S.Ct. 577, 160 L.Ed.2d 548, and respondents have pointed to no unusual circumstances warranting their consideration now, see *Taylor v. Freeland & Kronz,* 503 U.S. 638, 645–646, 112 S.Ct. 1644, 118 L.Ed.2d 280. Pp. 2041–2042.

***583** Justice THOMAS, joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY, concluded in Part II–A that a voter unwilling to disaffiliate from another party in order to vote in the LPO's primary forms little "association" with the LPO—nor the LPO with him. See *Tashjian, supra,* at 235, 107 S.Ct. 544. But even if Oklahoma's system burdens an associational right, the burden is less severe than others this Court has upheld as ****2033** constitutional. The reasons underpinning *Timmons, supra,* show that Oklahoma's system burdens the LPO only minimally. As in *Timmons,* Oklahoma's law does not regulate the LPO's internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public. And just as in *Timmons,* in which a Minnesota law conditioned a party's ability to nominate the candidate of its choice on the candidate's willingness to disaffiliate from another party, Oklahoma conditions a party's ability to welcome a voter into its primary on the voter's willingness to dissociate from his current party of choice. If a party may be prevented from associating with its desired standard bearer because he refuses to disaffiliate from another party, it may also be prevented from associating with a voter who refuses to do the same. Oklahoma's system imposes an even slighter burden on voters than on the LPO. Disaffiliation is not difficult: Other parties' registered members who wish to vote in the LPO primary simply need to file a form changing their registration. Voters are not "locked in" to an unwanted party affiliation, see *Kusper v. Pontikes,* 414 U.S. 51, 60–61, 94 S.Ct. 303, 38 L.Ed.2d 260, because with only nominal effort they are free to vote in the LPO primary. Pp. 2035–2037.

Justice O'CONNOR, joined by Justice BREYER except as to Part III, agreed with most of the Court's reasoning, but wrote separately to emphasize two points. First, the Libertarian Party of Oklahoma (LPO) and voters registered with another party have constitutionally cognizable interests in associating with one another through the LPO's primary, and these interests should not be minimized to dispose of this case. Second, while the Court is correct that only Oklahoma's semiclosed primary law is properly under review, that standing alone it imposes only a modest, nondiscriminatory burden on respondents' associational rights, and that this burden is justified by the State's legitimate regulatory interests, there are some grounds for concern that other Oklahoma laws governing party recognition and changes in party affiliation may unreasonably restrict voters' ability to participate in the LPO's primary. A realistic assessment of regulatory burdens on associational

rights would, in an appropriate case, require examination of the cumulative effects of the State's overall primary scheme; and any finding of a more severe burden would trigger more probing review of the State's justifications. Pp. 2042–2047.

THOMAS, J., delivered an opinion, which was for the Court except as to Part II–A. REHNQUIST, C.J., and SCALIA and KENNEDY, JJ., joined that opinion in full, and O'CONNOR and BREYER, JJ., joined except as to Part II–A. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined except as to Part III, *post,* p. 2042. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which SOUTER, J., joined as to Parts I, II, and III, *post,* p. 2047.

Attorneys and Law Firms

Gene C. Schaerr, for South Dakota, et al., as amicus curiae, by special leave of the Court, supporting the petitioners.

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Opinion

Justice THOMAS delivered the opinion of the Court, except as to Part II–A.

***584** Oklahoma has a semiclosed primary system, in which a political party may invite only its own party members and voters registered as Independents to vote in the party's primary. The Court of Appeals held that this system violates the right to freedom of association of the Libertarian Party of Oklahoma (LPO) and several Oklahomans who are registered members of the Republican and Democratic Parties. We hold that it does not.

I

Oklahoma's election laws provide that only registered members of a political party may vote in the party's primary, ***585** see Okla. Stat. Ann., Tit. 26, § 1–104(A) (West 1997), unless the party opens its primary to registered Independents as well, see § 1–104(B)(1). In May 2000, the LPO notified the secretary of the Oklahoma State Election Board that it wanted to open its upcoming primary to all registered Oklahoma voters, without regard to their party affiliation. See § 1–104(B)(4) (requiring notice when a party opens its primary to Independents). Pursuant to § 1–104, the secretary agreed as to Independent voters, but not as to voters registered with other political parties. The LPO and several Republican and Democratic voters then sued for declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma, alleging that Oklahoma's semiclosed primary law unconstitutionally burdens their First Amendment right to freedom of political association. App. 20.

After a hearing, the District Court declined to enjoin Oklahoma's semiclosed primary law for the 2000 primaries. After a 2–day bench trial following the primary election, the District Court found that Oklahoma's semiclosed primary system did not severely burden respondents' associational rights. Further, it found that any burden imposed by the system was justified by Oklahoma's asserted interest in "preserving the political parties as viable and identifiable interest groups, [and] insuring that the results of a primary election ... accurately reflect the voting of the party members." Memorandum Opinion, Case No. CIV–00–1071–F, 2003 WL 745562 (W.D.Okla., Jan. 24, 2003), App. to Pet. for Cert. 55–56 (hereinafter Memorandum Opinion) (internal quotation marks omitted). The District Court therefore upheld the semiclosed primary statute as constitutional. *Id.,* at 72–73.

On appeal, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court. The Court of Appeals concluded that the State's semiclosed primary statute imposed a severe burden on respondents' associational rights, and thus was constitutional only if the statute was ***586** narrowly tailored to serve a compelling state interest. 363 F.3d 1048, 1057–1058 (2004). Finding none of Oklahoma's interests compelling, the Court of Appeals enjoined Oklahoma from using its semiclosed primary law. *Id.,* at 1060–1061. Because the Court of Appeals' decision not only prohibits Oklahoma from using its primary system but also casts doubt on the semiclosed primary laws of 23 other States,[1] we ****2035** granted certiorari. 542 U.S. 965, 125 S.Ct. 27, 159 L.Ed.2d 857 (2004).

1 Ariz.Rev.Stat. Ann. § 16–241(A) (West 1996); Cal. Elec.Code Ann. § 13102 (West 2003); Colo.Rev.Stat. § 1–3–101(1) (Lexis 2004); Conn. Gen.Stat. § 9–431(a) (2005); Del.Code Ann., Tit. 15, § 3110 (Lexis 1999); Fla. Stat. § 101.021 (2003); Iowa Code §§ 43.38, 43.42 (2003); Kan. Stat. Ann. § 25–4502 (2000); Ky.Rev.Stat. Ann. § 116.055 (Lexis 2004); La. Stat. Ann. § 18:1280.25 (West Supp.2005); Mass. Gen. Laws Ann., ch. 53, § 37 (West Supp.2005); Neb.Rev.Stat. § 32–312 (2004); Nev.Rev.Stat. § 293.287 (2003); N.H.Rev.Stat. Ann. § 659:14 (West 1996); N.J. Stat. Ann. § 19:23–45.1 (West Supp.2004); N.M. Stat. Ann. § 1–12–7 (1995); N.Y. Elec. Law Ann. § 1–104.9 (West 2004); N.C. Gen.Stat. § 163–59 (Lexis 2003); Pa. Stat. Ann., Tit. 25, § 292 (Purdon 1994); R.I. Gen. Laws §§ 17–9.1–24, 17–15–24 (Lexis 2003); S.D. Codified Laws § 12–6–26 (West 2004); W. Va.Code § 3–1–35 (Lexis 2002); Wyo. Stat. § 22–5–212 (Lexis 1977–2003).

II

[1] [2] [3] The Constitution grants States "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986); *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997) (quoting *Tashjian*). We have held that the First Amendment, among other things, protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones,* 530 U.S. 567, 574, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Timmons,* 520 U.S., at 358, 117 S.Ct. 1364. However, ***587** when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Ibid.* (internal quotation marks omitted).

In *Tashjian,* this Court struck down, as inconsistent with the First Amendment, a closed primary system that prevented a political party from inviting Independent voters to vote in the party's primary. 479 U.S., at 225, 107 S.Ct. 544. This case presents a question that *Tashjian* left open: whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary. *Id.,* at 224, n. 13, 107 S.Ct. 544. As *Tashjian* acknowledged, opening a party's primary "to all voters, including members of other parties, ... raise[s] a different combination of considerations." *Ibid.* We are persuaded that any burden Oklahoma's semiclosed primary imposes is minor and justified by legitimate state interests.

A

At the outset, we note that Oklahoma's semiclosed primary system is unlike other laws this Court has held to infringe associational rights. Oklahoma has not sought through its electoral system to discover the names of the LPO's members, see *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 451, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); to interfere with the LPO by restricting activities central to its purpose, see *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 895, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982); *NAACP v. Button,* 371 U.S. 415, 423–426, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); to disqualify the LPO from public benefits or privileges, see *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 595–596, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967); or to compel the LPO's association with unwanted members or voters, see *Jones, supra,* at 577, 120 S.Ct. 2402. The LPO is free to canvass the electorate, enroll or exclude potential members, nominate the candidate of its choice, and engage in the same electoral activities as every other political party in Oklahoma. Oklahoma merely prohibits the LPO from leaving the selection of its candidates to people who are members of ***588** another political party. Nothing in § 1–104 prevents members of other parties ****2036** from switching their registration to the LPO or to Independent status.[2] The question is whether the Constitution requires that voters who are registered in other parties be allowed to vote in the LPO's primary.

2 Respondents argue, for the first time before this Court, that Oklahoma election statutes other than § 1–104 make it difficult for voters to disaffiliate from their parties of first choice and register as Libertarians or Independents (either of which would allow them to vote in the LPO primary). Brief for Respondents 13–19. For reasons we explain fully in Part III, we decline to consider this aspect of respondents' challenge. See *infra,* at 2041–2042.

In other words, the Republican and Democratic voters who have brought this action do not want to associate with the LPO, at least not in any formal sense. They wish to remain registered with the Republican, Democratic, or Reform parties, and yet to assist in selecting the Libertarian Party's candidates for the general election. Their interest is in casting a vote for a Libertarian candidate in a particular primary election,[3] rather than in banding together with fellow citizens committed to the

LPO's political goals and ideas. See *Jones, supra,* at 573–574, n. 5, 120 S.Ct. 2402 ("As for the associational 'interest' in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it ***589** can even fairly be characterized as an interest"). And the LPO is happy to have their votes, if not their membership on the party rolls.

[3] Respondents who are members of the Republican and Democratic Parties alleged before the District Court that they wished to have the right to participate in the 2000 LPO primary. See Amended Complaint 4, Record Doc. 23; Complaint 3, *id.,* Doc. 1. The only evidence respondents submitted on this point was a pair of affidavits from respondents Mary Burnett (a registered Republican) and Floyd Turner (a registered Democrat), asserting that each might have wished to vote in the 2000 LPO primary. See Plaintiffs' Motion for Preliminary Injunction, *id.,* Doc. 9 (attached affidavits). Based on Turner's affidavit, the parties stipulated that there were "a number of voters" "registered in political parties other than the [LPO] who wish[ed] to vote" in the 2000 LPO primary. See Supplemental Joint Stipulations of Fact ¶ 32, *id.,* Doc. 17. Respondents have never claimed that they are prevented from associating with the LPO in any way, except that they are unable to vote in the LPO's primary and run-off elections.

However, a voter who is unwilling to disaffiliate from another party to vote in the LPO's primary forms little "association" with the LPO—nor the LPO with him. See *Tashjian, supra,* at 235, 107 S.Ct. 544 (SCALIA, J., dissenting). That same voter might wish to participate in numerous party primaries, or cast ballots for several candidates, in any given race. The issue is not "dual associations," *post,* at 2043 (O'CONNOR, J., concurring in part and concurring in judgment), but seemingly boundless ones. "If the concept of freedom of association is extended" to a voter's every desire at the ballot box, "it ceases to be of any analytic use." *Tashjian, supra,* at 235, 107 S.Ct. 544 (SCALIA, J., dissenting); cf. *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 130, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) (Powell, J., dissenting) ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights").

But even if Oklahoma's semiclosed primary system burdens an associational right, the burden is less severe than others this Court has upheld as constitutional. For instance, in *Timmons,* we considered a Minnesota election law prohibiting multiparty, or "fusion," candidacies in which a candidate appears on the ballot as the nominee of more than one ****2037** party. 520 U.S., at 353–354, 117 S.Ct. 1364. Minnesota's law prevented the New Party, a minor party under state law, from putting forward the same candidate as a major party. The New Party challenged the law as unconstitutionally burdening its associational rights. *Id.,* at 354–355, 117 S.Ct. 1364. This Court concluded that the burdens imposed by Minnesota's law—"though not trivial—[were] not severe." *Id.,* at 363, 117 S.Ct. 1364.

The burdens were not severe because the New Party and its members remained free to govern themselves internally and to communicate with the public as they wished. *Ibid.* ***590** Minnesota had neither regulated the New Party's internal decisionmaking process, nor compelled it to associate with voters of any political persuasion, see *Jones,* 530 U.S., at 577, 120 S.Ct. 2402. The New Party and its members simply could not nominate as their candidate any of "those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." *Timmons, supra,* at 363, 117 S.Ct. 1364.

The same reasons underpinning our decision in *Timmons* show that Oklahoma's semiclosed primary system burdens the LPO only minimally. As in *Timmons,* Oklahoma's law does not regulate the LPO's internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public. And just as in *Timmons,* in which Minnesota conditioned the party's ability to nominate the candidate of its choice on the candidate's willingness to disaffiliate from another political party, Oklahoma conditions the party's ability to welcome a voter into its primary on the voter's willingness to dissociate from his current party of choice. If anything, it is "[t]he moment of choosing the party's nominee" that matters far more, *Jones,* 530 U.S., at 575, 120 S.Ct. 2402, for that is " 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community,' " *ibid.* (quoting *Tashjian,* 479 U.S., at 216, 107 S.Ct. 544). If a party may be prevented from associating with the candidate of its choice—its desired " 'standard bearer,' " *Timmons, supra,* at 359, 117 S.Ct. 1364; *Jones, supra,* at 575, 120 S.Ct. 2402—because that candidate refuses to disaffiliate from another political party, a party may also be prevented from associating with a voter who refuses to do the same.

Oklahoma's semiclosed primary system imposes an even slighter burden on voters than on the LPO. Disaffiliation is not difficult: In general, "anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or

(at most) by registering within a state-defined reasonable period of time before an election." ***591** *Jones, supra,* at 596, 120 S.Ct. 2402 (STEVENS, J., dissenting). In Oklahoma, registered members of the Republican, Democratic, and Reform Parties who wish to vote in the LPO primary simply need to file a form with the county election board secretary to change their registration. See Okla. Stat. Ann., Tit. 26, § 4–119 (West Supp.2005). Voters are not "locked in" to an unwanted party affiliation, see *Kusper v. Pontikes,* 414 U.S. 51, 60–61, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), because with only nominal effort they are free to vote in the LPO primary. For this reason, too, the registration requirement does not unduly hinder the LPO from associating with members of other parties. To attract members of other parties, the LPO need only persuade voters to make the minimal effort necessary to switch parties.

B

[4] Respondents argue that this case is no different from *Tashjian.* According to ****2038** respondents, the burden imposed by Oklahoma's semiclosed primary system is no less severe than the burden at issue in *Tashjian,* and hence we must apply strict scrutiny as we did in *Tashjian.* We disagree. At issue in *Tashjian* was a Connecticut election statute that required voters to register with a political party before participating in its primary. 479 U.S., at 210–211, 107 S.Ct. 544. The State's Republican Party, having adopted a rule that allowed Independent voters to participate in its primary, contended that Connecticut's closed primary infringed its right to associate with Independent voters. *Ibid.* Applying strict scrutiny, this Court found that the interests Connecticut advanced to justify its ban were not compelling, and thus that the State could not constitutionally prevent the Republican Party from inviting into its primary willing Independent voters. *Id.,* at 217–225, 107 S.Ct. 544.

[5] Respondents' reliance on *Tashjian* is unavailing. As an initial matter, *Tashjian* applied strict scrutiny with little discussion of the magnitude of the burdens imposed by Connecticut's closed primary on parties' and voters' associational ***592** rights. *Post,* at 2045–2046 (O'CONNOR, J., concurring in part and concurring in judgment). But not every electoral law that burdens associational rights is subject to strict scrutiny. See, *e.g., Nader v. Schaffer,* 417 F.Supp. 837, 849 (D.Conn.1976) ("There must be more than a minimal infringement on the rights to vote and of association ... before strict judicial review is warranted"), aff'd, 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976). Instead, as our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe. *Jones, supra,* at 582, 120 S.Ct. 2402; *Timmons,* 520 U.S., at 358, 117 S.Ct. 1364. In *Tashjian* itself, Independent voters could join the Connecticut Republican Party as late as the day before the primary. 479 U.S., at 219, 107 S.Ct. 544. As explained above, *supra,* at 2037, requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights.

Nevertheless, *Tashjian* is distinguishable. Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian.* In *Tashjian,* this Court identified two ways in which Connecticut's closed primary limited citizens' freedom of political association. The first and most important was that it required Independent voters to affiliate publicly with a party to vote in its primary. 479 U.S., at 216, n. 7, 107 S.Ct. 544. That is not true in this case. At issue here are voters who have *already* affiliated publicly with one of Oklahoma's political parties. These voters need not register as Libertarians to vote in the LPO's primary; they need only declare themselves Independents, which would leave them free to participate in any party primary that is open to registered Independents. See Okla. Stat. Ann., Tit. 26, § 1–104(B)(1) (West 1997).

The second and less important burden imposed by Connecticut's closed primary system was that political parties could not "broaden opportunities for joining ... by their own act, without any intervening action by potential voters." *Tashjian,* 479 U.S., at 216, n. 7, 107 S.Ct. 544. Voters also had to act by registering themselves in a particular party. *Ibid.* That is ***593** equally true of Oklahoma's semiclosed primary system: Voters must register as Libertarians or Independents to participate in the LPO's primary. However, *Tashjian* did not characterize this burden alone as severe, and with good reason. Many electoral regulations, including voter registration generally, require that voters take some action to participate in the primary process. See, *e.g.,* ****2039** *Rosario v. Rockefeller,* 410 U.S. 752, 760–762, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973) (upholding requirement that voters change party registration 11 months in advance of the primary election). Election laws invariably "affec[t]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze,* 460 U.S. 780, 788, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).

[6] These minor barriers between voter and party do not compel strict scrutiny. See *Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972). To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper

the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons, supra,* 520 U.S., at 358, 117 S.Ct. 1364; *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Oklahoma's semiclosed primary system does not severely burden the associational rights of the state's citizenry.

C

[7] [8] When a state electoral provision places no heavy burden on associational rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons, supra,* at 358, 117 S.Ct. 1364 (internal quotation marks omitted); *Anderson, supra,* at 788, 103 S.Ct. 1564. Here, Oklahoma's semiclosed primary advances a number of regulatory interests that this Court recognizes as important: It ***594** "preserv[es] [political] parties as viable and identifiable interest groups," *Nader,* 417 F.Supp., at 845; enhances parties' electioneering and party-building efforts, *id.,* at 848; and guards against party raiding and "sore loser" candidacies by spurned primary contenders, *Storer, supra,* at 735, 94 S.Ct. 1274.

First, as Oklahoma asserts, its semiclosed primary "preserv[es] the political parties as viable and identifiable interest groups, insuring that the results of a primary election, in a broad sense, accurately reflec[t] the voting of the party members." Amended and Supplemental Trial Brief of Defendants 10, Record Doc. 63 (quoting without attribution *Nader, supra,* at 845). The LPO wishes to open its primary to registered Republicans and Democrats, who may well vote in numbers that dwarf the roughly 300 registered LPO voters in Oklahoma. See Memorandum Opinion 31–32 (at least 95% of voters in LPO's 1996 primary were independents, not Libertarians). If the LPO is permitted to open its primary to all registered voters regardless of party affiliation, the candidate who emerges from the LPO primary may be "unconcerned with, if not ... hostile to," the political preferences of the majority of the LPO's members. *Nader, supra,* at 846. It does not matter that the LPO is willing to risk the surrender of its identity in exchange for electoral success. Oklahoma's interest is independent and concerns the integrity of its primary system. The State wants to "avoid primary election outcomes which would tend to confuse or mislead the general voting population to the extent [it] relies on party labels as representative of certain ideologies." Brief for Petitioners 12 (quoting without attribution *Nader, supra,* at 845); *Eu v. San Francisco County Democratic Central* ****2040** *Comm.,* 489 U.S. 214, 228, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989).

[9] Moreover, this Court has found that " '[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations.' " *Nader, supra,* at 845–846 (quoting *Ray v. Blair,* 343 U.S. 214, 226, n. 14, 72 S.Ct. 654, 96 L.Ed. 894 (1952)). But for that ***595** classification to mean much, Oklahoma must be allowed to limit voters' ability to roam among parties' primaries. The purpose of party registration is to provide "a minimal demonstration by the voter that he has some 'commitment' to the party in whose primary he wishes to participate." *Nader, supra,* at 847. That commitment is lessened if party members may retain their registration in one party while voting in another party's primary. Opening the LPO's primary to all voters not only would render the LPO's *imprimatur* an unreliable index of its candidate's actual political philosophy, but it also "would make registered party affiliations significantly less meaningful in the Oklahoma primary election system." Memorandum Opinion 59. Oklahoma reasonably has concluded that opening the LPO's primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process. Cf. *Jones,* 530 U.S., at 574, 120 S.Ct. 2402.

Second, Oklahoma's semiclosed primary system, by retaining the importance of party affiliation, aids in parties' electioneering and party-building efforts. "It is common experience that direct solicitation of party members—by mail, telephone, or face-to-face contact, and by the candidates themselves or by their active supporters—is part of any primary election campaign." *Nader, supra,* at 848. Yet parties' voter turnout efforts depend in large part on accurate voter registration rolls. See, *e.g., Council of Alternative Political Parties v. State Div. of Elections,* 344 N.J.Super. 225, 231–232, 781 A.2d 1041, 1045 (2001) ("It is undisputed that the voter registration lists, with voter affiliation information, ... provide essential information to the [party state committees] for other campaign and party-building activities, including canvassing and fundraising").

When voters are no longer required to disaffiliate before participating in other parties' primaries, voter registration rolls cease to be an accurate reflection of voters' political preferences. And without registration rolls that accurately ***596** reflect likely or potential primary voters, parties risk expending precious resources to turn out party members who may have decided to cast their votes elsewhere. See Brief for State of

South Dakota et al. as *Amici Curiae* 20–21. If encouraging citizens to vote is an important state interest, see *Jones, supra,* at 587, 120 S.Ct. 2402 (KENNEDY, J., concurring), then Oklahoma is entitled to protect parties' ability to plan their primaries for a stable group of voters. Tr. of Oral Arg. 26.

Third, Oklahoma has an interest in preventing party raiding, or "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson,* 460 U.S., at 788–789, n. 9, 103 S.Ct. 1564; *Jones, supra,* at 572, 120 S.Ct. 2402. For example, if the outcome of the Democratic Party primary were not in doubt, Democrats might vote in the LPO primary for the candidate most likely to siphon off votes from the Republican candidate in the general election. Or a Democratic primary contender who senses defeat might launch a "sore loser" candidacy by defecting to the LPO primary, taking with him loyal Democratic voters, and thus undermining the Democratic Party in the ****2041** general election.[4] *Storer,* 415 U.S., at 735, 94 S.Ct. 1274. Oklahoma has an interest in "temper[ing] the destabilizing effects" of precisely this sort of "party splintering and excessive factionalism." ***597** *Timmons,* 520 U.S., at 367, 117 S.Ct. 1364; cf. *Davis v. Bandemer,* 478 U.S. 109, 144–145, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (O'CONNOR, J., concurring in judgment). Oklahoma's semiclosed primary system serves that interest by discouraging voters from temporarily defecting from another party to vote in the LPO primary. While the State's interest will not justify "unreasonably exclusionary restrictions," *Timmons,* 520 U.S., at 367, 117 S.Ct. 1364, we have "repeatedly upheld reasonable, politically neutral regulations" like Oklahoma's semiclosed primary law, *id.,* at 369, 117 S.Ct. 1364 (internal quotation marks omitted).

4 To be most effective, a spurned candidate would have to defect in advance of the primary election. Before a candidate may file for nomination by a political party to any state or county office in Oklahoma, generally the candidate must have been a registered member of the party for six months prior to filing. See Okla. Stat. Ann., Tit. 26, § 5–105(A) (West 1997). However, the registration period is only 15 days for candidates from parties, like the LPO, whose lack of electoral support means that they must regularly petition to be recognized as political parties. *Ibid.;* see also §§ 1–108, 1–109 (West Supp.2005) (Oklahoma's ballot access requirements). But even though candidates may defect up to two weeks before the primary, registered Republican and Democratic voters may not change their party affiliation after June 1, roughly eight weeks before the primary. See § 4–119; see also § 1–102 (setting primary on last Tuesday of July).

III

[10] Beyond their challenge to Oklahoma's semiclosed primary law, § 1–104, respondents have expanded their challenge before this Court to include other Oklahoma election laws. Respondents contend that several of the State's ballot access and voter registration laws, taken together, severely burden their associational rights by effectively preventing them from changing their party affiliations in advance of a primary election. Brief for Respondents 15–18 (discussing the joint operation of Okla. Stat. Ann., Tit. 26, §§ 1–108, 1–109, 1–110, 4–112, and 4–119 (West Supp.2005)).

[11] Though the LPO has unsuccessfully challenged one of these provisions before, see *Rainbow Coalition of Okla. v. Oklahoma State Election Bd.,* 844 F.2d 740 (C.A.10 1988) (rejecting First Amendment challenge by LPO and other political parties to Oklahoma's ballot access provision, § 1–108 (West 1981 and Supp.1987)), respondents raise this argument for the first time in their brief on the merits to this Court. Before the District Court and the Court of Appeals, the only associational burden of which respondents complained was that imposed by § 1–104 (West 1997), *i.e.,* the need to disaffiliate from one party in order to vote in another party's primary. See, *e.g.,* Appellants' Opening Brief in No. 03–6058 (CA10), pp. 5, 8–10, 30 (challenging only § 1–104 as applied to respondents); Plaintiffs' Amended Trial Brief ***598** 9–25, Record Doc. 65 (same); Amended Complaint 6–9, *id.,* Doc. 23 (same). As a result, there is virtually no evidence in the record on how other electoral regulations operate in tandem with § 1–104, whether these other laws actually burden respondents' associational rights, and whether these laws advance important or even compelling state interests. We ordinarily do not consider claims neither raised nor decided below, *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 168–169, 125 S.Ct. 577, 585, 160 L.Ed.2d 548 (2004) (citing *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 109, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) *(per curiam)*), and respondents have pointed ****2042** to no unusual circumstances that would warrant considering other portions of Oklahoma's electoral code this late in the day, see *Taylor v. Freeland & Kronz,* 503 U.S. 638, 645–646, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). We therefore decline to consider this aspect of their challenge.

* * *

Oklahoma remains free to allow the LPO to invite registered

voters of other parties to vote in its primary. But the Constitution leaves that choice to the democratic process, not to the courts. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

Justice O'CONNOR, with whom Justice BREYER joins except as to Part III, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part II–A. Although I agree with most of the Court's reasoning, I write separately to emphasize two points. First, I think respondents' claim implicates important associational interests, and I see no reason to minimize those interests to dispose of this case. Second, I agree with the Court that only Oklahoma's semiclosed primary law is properly before us, that standing alone it imposes only a modest, nondiscriminatory burden on respondents' associational rights, and that this burden is justified ***599** by the State's legitimate regulatory interests. I note, however, that there are some grounds for concern that other state laws may unreasonably restrict voters' ability to change party registration so as to participate in the Libertarian Party of Oklahoma's (LPO) primary. A realistic assessment of regulatory burdens on associational rights would, in an appropriate case, require examination of the cumulative effects of the State's overall scheme governing primary elections; and any finding of a more severe burden would trigger more probing review of the justifications offered by the State.

I

Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections. See Galderisi & Ezra, Congressional Primaries in Historical and Theoretical Context, in Congressional Primaries and the Politics of Representation 11, 17, and n. 34 (P. Galderisi, M. Ezra, & M. Lyons eds.2001). Primaries constitute both a " 'crucial juncture' " in the electoral process, *California Democratic Party v. Jones,* 530 U.S. 567, 575, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (quoting *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 216, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986)), and a vital forum for expressive association among voters and political parties, see *Kusper v. Pontikes,* 414 U.S. 51, 58, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973) ("[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections[, and a] prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process"). It is here that the parties invite voters to join in selecting their standard bearers. The outcome is pivotal, of course, for it dictates the range of choices available at—and often the presumptive winner of—the general election.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), ***600** and "[t]he right to associate with the political ****2043** party of one's choice is an integral part of this basic constitutional freedom," *Kusper, supra,* at 57, 94 S.Ct. 303. The Court has repeatedly reaffirmed that the First and Fourteenth Amendments protect the rights of voters and parties to associate through primary elections. See, *e.g., California Democratic Party, supra,* at 574–575, 120 S.Ct. 2402; *Tashjian, supra,* at 214, 107 S.Ct. 544; *Kusper, supra,* at 56–57, 94 S.Ct. 303. Indeed, constitutional protection of associational rights is especially important in this context because the aggregation of votes is, in some sense, the essence of the electoral process. To have a meaningful voice in this process, the individual voter must join together with like-minded others at the polls. And the choice of who will participate in selecting a party's candidate obviously plays a critical role in determining both the party's message and its prospects of success in the electoral contest. See *California Democratic Party, supra,* at 575, 120 S.Ct. 2402; see also *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) ("[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association" (quoting *Kusper, supra,* at 56, 94 S.Ct. 303)).

The plurality questions whether the LPO and voters registered with another party have any constitutionally cognizable interest in associating with one another through the LPO's primary. See *ante,* at 2036. Its doubts on this point appear to stem from two implicit premises: first, that a voter forms a cognizable association with a political party only by registering with that party; and second, that a voter can only form a cognizable association with one party at a time. Neither of these premises is sound, in my view. As to the first, registration with a political party surely may signify an important personal commitment, which may be accompanied by faithful voting and even activism beyond the polls. But for many voters, registration serves principally as a mandatory (and perhaps even ministerial) prerequisite ***601** to participation in the

party's primaries. The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering. See *La Follette, supra,* at 130, n. 2, 101 S.Ct. 1010 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party"). The fact that voting is episodic does not, in my judgment, undermine its associational significance; it simply reflects the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials.

As to the question of dual associations, I fail to see why registration with one party should negate a voter's First Amendment interest in associating with a second party. We surely would not say, for instance, that a registered Republican or Democrat has no protected interest in associating with the Libertarian Party by attending meetings or making political contributions. The validity of voters' and parties' interests in dual associations seems particularly clear where minor parties are concerned. For example, a voter may have a longstanding affiliation with a major party that she wishes to maintain, but she may nevertheless have a substantial interest in associating with a minor party during particular election cycles or in elections for particular offices. The voter's refusal to disaffiliate from the major party may reflect her abiding commitment to that party (which is not necessarily inconsistent ****2044** with her desire to associate with a second party), the objective costs of disaffiliation, see, *e.g., infra,* at 2046–2047, or both. The minor party, for its part, may have a significant interest in augmenting its voice in the political process by associating with sympathetic members of the major parties.

None of this is to suggest that the State does not have a superseding interest in restricting certain forms of association. We have never questioned, for example, the States' ***602** authority to restrict voters' public registration to a single party or to limit each voter to participating in a single party's primary. But the fact that a State's regulatory authority may ultimately trump voters' or parties' associational interests in a particular context is no reason to dismiss the validity of those interests. As a more general matter, I question whether judicial inquiry into the genuineness, intensity, or duration of a given voter's association with a given party is a fruitful way to approach constitutional challenges to regulations like the one at issue here. Primary voting is an episodic and sometimes isolated act of association, but it is a vitally important one and should be entitled to some level of constitutional protection. Accordingly, where a party invites a voter to participate in its primary and the voter seeks to do so, we should begin with the premise that there are significant associational interests at stake. From this starting point, we can then ask to what extent and in what manner the State may justifiably restrict those interests.

II

As to the remainder of the constitutional analysis, I am substantially in accord with the Court's reasoning. Our constitutional system assigns the States broad authority to regulate the electoral process, and we have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). We have sought to balance the associational interests of parties and voters against the States' regulatory interests through the flexible standard of review reaffirmed by the Court today. See *ante,* at 2035. Under that standard, "the 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." *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992). Regulations ***603** imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997). Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests. *Ibid.*

This regime reflects the limited but important role of courts in reviewing electoral regulation. Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no ****2045** apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not

merely a pretext for exclusionary or anticompetitive restrictions.

Throughout the proceedings in the lower courts, respondents framed their suit as a facial challenge to Oklahoma's semiclosed primary law. The sum of their argument was that, by requiring voters to register either as Libertarians or Independents in order to participate in the LPO's primary, state law imposes a severe and unjustified burden on the LPO's and Oklahoma voters' associational rights. For the reasons explained by the Court, *ante,* at 2041–2042, that is the ***604** only claim properly before us. Assuming (as I believe we must under the circumstances) that Oklahoma provides reasonable avenues for voters to reregister as Independents or Libertarians, I agree with the Court that the semiclosed primary law imposes only a modest and politically neutral burden on associational rights. The burden is not altogether trivial: A voter with a significant commitment to a major party (for example) must forfeit registration with that party in order to participate in the LPO primary in any given election cycle, and the LPO cannot define the bounds of the association as broadly as it would like. See *post,* at 2048–2049, and n. 1 (STEVENS, J., dissenting); see also *supra,* at 2043–2044 (discussing the interest in dual associations). But neither is it severe or discriminatory.

Oklahoma's semiclosed primary law simply requires that voters wishing to participate in the LPO's primary do what they would have to do in order to participate in any other party's primary. By providing a reasonably fixed party-related electoral base from the close of registration until the date of the vote, this requirement facilitates campaign planning. And assuming the availability of reasonable reregistration procedures, a party's inability to persuade a voter to disaffiliate from a rival party would suggest not the presence of anticompetitive regulatory restrictions, but rather the party's failure to win the voter's allegiance. The semiclosed primary law, standing alone, does not impose a significant obstacle to participation in the LPO's primary, nor does it indicate partisan self dealing or a lockup of the political process that would warrant heightened judicial scrutiny.

For essentially the reasons explained by the Court, see *ante,* at 2039–2041, I agree that Oklahoma has a legitimate interest in requiring voters to disaffiliate from one party before participating in another party's primary. On the record before us, I also agree that the State's regulatory interests are adequate to justify the limited burden the semiclosed primary law imposes on respondents' freedom of association. ***605** And finally, I agree that this case is distinguishable from *Tashjian.* See *ante,* at 2037–2039. I joined the dissent in that case, and I think the Court's application of strict scrutiny there is difficult to square with the flexible standard of review articulated in our more recent cases, see *supra,* at 2044. But *Tashjian* is entitled to respect under principles of *stare decisis,* and it can be fairly distinguished on the grounds that the closed primary law in that case imposed a greater burden on associational interests than does Oklahoma's semiclosed primary law, see *ante,* at 2038, while the State's regulatory interests in *Tashjian* were weaker than they are here, compare *ante,* at 2039–2041, with ****2046** *Tashjian,* 479 U.S., at 217–225, 107 S.Ct. 544.

III

In briefing and oral argument before this Court, respondents raise for the first time the claim that Oklahoma's semiclosed primary law severely burdens their associational rights not through the law's own operation, but rather because *other* state laws make it quite difficult for voters to reregister as Independents or Libertarians so as to participate in the LPO primary. See Brief for Respondents 12–24. Respondents characterize Oklahoma's regulatory scheme as follows.

Partisan primaries in Oklahoma are held on the last Tuesday in July of each even-numbered year. Okla. Stat. Ann., Tit. 26, § 1–102 (West Supp.2005). To field a party candidate in an election, the LPO must obtain "recognized" party status. See *ibid.;* see also §§ 1–107, 5–104 (West 1997 and Supp.2005). This requires it to submit, no later than May 1 of any even-numbered year (*i.e.,* any election year), a petition with the signatures of registered voters equal to at least five percent of the total votes cast in the most recent gubernatorial or Presidential election. § 1–108 (West Supp.2005). The State Election Board then has 30 days to determine whether the petition is sufficient. § 1–108(3). The LPO has attained recognized party status in this fashion in every Presidential ***606** election year since 1980. However, unless the party's candidate receives at least 10 percent of the total votes cast for Governor or President in the general election (which no minor party has been able to do in any State in recent history), it loses recognized party status. § 1–109. To regain party status, the group must go through the petition process again. *Ibid.*

When a party loses its recognized status, as the LPO has after every general election in which it has participated, the affiliation of any voter registered with the party is changed to Independent. § 1–110. As the District Court noted, "it is highly likely that the ranks of independents, and, indeed, of registered Republicans and Democrats, contain numerous voters who

sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls." Memorandum Opinion, Case No. CIV–00–1071–F, 2003 WL 745562 (W.D.Okla., Jan. 24, 2003), App. to Pet. for Cert. A–48. And the Republican and Democratic Parties in Oklahoma, as it turns out, do not permit voters registered as Independents to participate in their primaries.

Most importantly, according to respondents, the deadline for changing party affiliation makes it quite difficult for the LPO to invite voters to reregister in order to participate in its primary. Assuming the LPO submits its petition for recognized party status on the May 1 deadline, the State has until May 31 to determine whether party status will be conferred. See Okla. Stat. Ann., Tit. 26, § 1–108 (West Supp.2005). But in order to participate in the LPO primary, a voter registered with another party must change her party affiliation to Independent or Libertarian no later than June 1. See § 4–119. Moreover, no candidate for office is permitted officially to declare her candidacy with the State Election Board until the period between the first Monday in June and the next succeeding Wednesday. § 5–110.

If this characterization of state law is accurate, a registered Democrat or Republican sympathetic to the LPO or to ***607** an LPO candidate in a given election year would seem to face a genuine dilemma. On the one hand, she may stick with her major party registration and forfeit the ****2047** opportunity to participate in the LPO primary. Alternatively, she may reregister as a Libertarian or Independent, thus forfeiting her opportunity to participate in the major party primary, though no candidate will have officially declared yet and the voter may not yet know whether the LPO will even be permitted to conduct a primary. Moreover, she must make this choice roughly eight weeks before the primaries, at a time when most voters have not yet even tuned in to the election, much less decided upon a candidate. See *California Democratic Party,* 530 U.S., at 586, 120 S.Ct. 2402 (KENNEDY, J., concurring). That might pose a special difficulty for voters attracted to minor party candidates, for whom support may not coalesce until comparatively late in the election cycle. See *Anderson v. Celebrezze,* 460 U.S. 780, 791–792, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983) (discussing emergence of independent candidacies late in the election cycle).

Throughout the proceedings in the lower courts, which included a full bench trial before the District Court, respondents made no attempt to challenge these other electoral requirements or to argue that they were relevant to respondents' challenge to the semiclosed primary law. The lower courts, accordingly, gave little or no consideration to how these various regulations interrelate or operate in practice, nor did the State seek to justify them. Given this posture, I agree with the Court that it would be neither proper nor prudent for us to rule on the reformulated claim that respondents now urge. See *ante,* at 2041–2042.

Nevertheless, respondents' allegations are troubling, and, if they had been properly raised, the Court would want to examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate through primary elections. A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely ***608** restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms. Oklahoma's requirement that a voter register as an Independent or a Libertarian in order to participate in the LPO's primary is not itself unduly onerous; but that is true only to the extent that the State provides reasonable avenues through which a voter can change her registration status. The State's regulations governing changes in party affiliation are not properly before us now. But if it were shown, in an appropriate case, that such regulations imposed a weighty or discriminatory restriction on voters' ability to participate in the LPO's or some other party's primary, then more probing scrutiny of the State's justifications would be required.

Justice STEVENS, with whom Justice GINSBURG joins, and with whom Justice SOUTER joins as to Parts I, II, and III, dissenting.

The Court's decision today diminishes the value of two important rights protected by the First Amendment: the individual citizen's right to vote for the candidate of her choice and a political party's right to define its own mission. No one would contend that a citizen's membership in either the Republican or the Democratic Party could disqualify her from attending political functions sponsored by another party, or from voting for a third party's candidate in a general election. If a third party invites her to participate in its primary election, her right to support the candidate of her choice merits constitutional protection, whether she elects to make a speech, to donate funds, or to cast a ballot. ****2048** The importance of vindicating that individual right far outweighs any public interest in punishing registered Republicans or Democrats for acts of disloyalty. The balance becomes even more lopsided

when the individual right is ***609** reinforced by the right of the Libertarian Party of Oklahoma (LPO) to associate with willing voters.

In concluding that the State's interests override those important values, the Court focuses on interests that are not legitimate. States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties. While States do have a valid interest in conducting orderly elections and in encouraging the maximum participation of voters, neither of these interests overrides (or, indeed, even conflicts with) the valid interests of both the LPO and the voters who wish to participate in its primary.

In the final analysis, this case is simple. Occasionally, a political party's interest in defining its platform and its procedures for selecting and supporting its candidates conflicts with the voters' interest in participating in the selection of their elected representatives. If those values do conflict, we may be faced with difficult choices. But when, as in this case, those values reinforce one another a decision should be easy. Oklahoma has enacted a statute that impairs both; it denies a party the right to invite willing voters to participate in its primary elections. I would therefore affirm the Court of Appeals' judgment.

I

In rejecting the individual respondents' claims, the majority focuses on their associational interests. While the voters in this case certainly have an interest in associating with the LPO, they are primarily interested in voting for a particular candidate, who happens to be in the LPO. Indeed, I think we have lost sight of the principal purpose of a primary: to nominate a candidate for office. Cf. *Burdick v. Takushi,* 504 U.S. 428, 445, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (KENNEDY, J., dissenting) ("[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression").

***610** Because our recent cases have focused on the associational interest of voters, rather than the right to vote itself, it is important to identify three basic precepts. First, it is clear that the right to vote includes the right to vote in a primary election. See *United States v. Classic,* 313 U.S. 299, 318, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953). When the State makes the primary an "integral part of the procedure of choice," every eligible citizen's right to vote should receive the same protection as in the general election. *Classic,* 313 U.S., at 318, 61 S.Ct. 1031; see also, *e.g., Gray v. Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (invalidating primary system that diluted individual's vote in a primary). Second, the right to vote, whether in the primary or the general election, is the right to vote "for the candidate of one's choice." *Reynolds v. Sims,* 377 U.S. 533, 555, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Finally, in assessing burdens on that right—burdens that are not limited to absolute denial of the right—we should focus on the realities of the situation, not on empty formalism. See *Classic,* 313 U.S., at 313, 61 S.Ct. 1031 (identifying "the practical operation of the primary law"); *Terry,* 345 U.S., at 469–470, 73 S.Ct. 809 (noting that the Jaybird primary is "the only effective part" of the election process and examining "[t]he effect of the whole procedure" in determining ****2049** whether the scheme violated the Fifteenth Amendment).

Here, the impact of the Oklahoma statute on the voters' right to vote for the candidate of their choosing is not a mere "burden"; it is a prohibition.[1] By virtue of the fact that their preferred candidate is a member of a different party, respondents are absolutely precluded from voting for him or her in the primary election. It is not an answer that the ***611** voters could participate in another primary (*i.e.,* the primary for the party with which they are registered) since the individual for whom they wish to vote is not a candidate in that primary. If the so-called "white primary" cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election. Just as the "only election that has counted" in *Terry,* 345 U.S., at 469, 73 S.Ct. 809, was the Jaybird primary, since it was there that the public official was selected in any meaningful sense, the only primary that counts here is the one in which the candidate respondents want to vote for is actually running. See *Burdick,* 504 U.S., at 442, 112 S.Ct. 2059 (KENNEDY, J., dissenting) ("Because [petitioner] could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote").

1 It is not enough that registered members of other parties may simply change their registration. See *ante,* at 2037 (plurality opinion). Changing one's political party is not simply a matter of filing a form with the State; for many individuals it can be a significant decision. A view that party membership is merely a label demeans for many the personal significance of party identification and illustrates what little weight the majority actually gives to the associational interests in this case.

This is not to say that voters have an absolute right to

participate in whatever primary they desire. For instance, the parties themselves have a strong associational interest in determining which individuals may vote in their primaries, and that interest will normally outweigh the interest of the uninvited voter.[2] But in the ordinary case the State simply has no interest in classifying voters by their political party and in limiting the elections in which voters may participate as a result of that classification. Just as we held in *Reynolds* that all voters of a State stand in the same relation to the State regardless of where they live, and that the State must thus not make their vote count more or less depending ***612** upon that factor, 377 U.S., at 565, 84 S.Ct. 1362, so too do citizens stand in the same relation *to the State* regardless of the political party to which they belong. The State may thus not deny them participation in a primary of a party that seeks their participation absent a state interest of overriding importance.

2 The voters' interest may still prevail if, as was the case in *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), and *Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), the party primary is the *de facto* election. In part because of this Court's refusal to intervene in political gerrymandering cases, *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986), an increasing number of districts are becoming "safe districts" in which one party effectively controls the outcome of the election. See, *e.g.,* Courtney, Redistricting: What the United States Can Learn from Canada, 3 Election L.J. 488 (2004) (concluding that 400 of the 435 Members of the House of Representatives were elected in safe districts in the 2002 election, 81 of whom ran unopposed).

II

In addition to burdening the individual respondent's right to vote, the Oklahoma scheme places a heavy burden on the LPO's associational rights. While Oklahoma permits independent voters to participate in the LPO's primary elections, it ****2050** refuses to allow registered Republicans or Democrats to do so. That refusal has a direct impact on the LPO's selection of candidates for public office, the importance of which cannot be overstated. A primary election plays a critical role in enabling a party to disseminate its message to the public. *California Democratic Party v. Jones,* 530 U.S. 567, 575, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). It is through its candidates that a party is able to give voice to its political views, to engage other candidates on important issues of the day, and to affect change in the government of our society. Our cases "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.' " *Ibid.* (quoting *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 224, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989)).

The Oklahoma statute prohibits the LPO from associating with all of the voters it believes will best enable it to select a viable candidate. The ability to select those individuals with whom to associate is, of course, at the core of the First Amendment and goes to the heart of the associational interest itself. "Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association ...." ***613** *Ibid.* (internal quotation marks and citations omitted). See also *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 122, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981). While Libertarians can undoubtedly associate with Democrats and Republicans in other ways and at other times, the Oklahoma statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 216, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986).

In concluding that the Oklahoma statute is constitutional, the majority argues that associational interests between the LPO and registered members of other parties are either nonexistent or not heavily burdened by the Oklahoma scheme. The plurality relies on a single footnote in *Jones* to show that there are no associational interests between the LPO and registered Republicans and Democrats. See *ante,* at 2036 (citing 530 U.S., at 573–574, n. 5, 120 S.Ct. 2402). In *Jones,* of course, the political parties did not want voters of other parties participating in their primaries; the putative associational interest in this case, in which the LPO is actively courting voters of other parties, simply did not exist. More importantly, our decision in *Tashjian* rejected these arguments.

In *Tashjian* we held that the State could not prohibit Republicans from inviting voters who were not registered with a political party to participate in the Republican primary. We recognized that "[t]he Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." 479 U.S., at 214, 107 S.Ct. 544. Importantly, we rejected the notion that the associational interest was somehow diminished because the voters the party sought to include were not

formally registered as Republicans. *Id.,* at 215, 107 S.Ct. 544 ("[C]onsidered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in ***614** Party affairs, and need not be in any sense the most important"). We ****2051** reasoned that a State could not prohibit independents from contributing financial support to a Republican candidate or from participating in the party's events; it would be anomalous if it were able to prohibit participation by independents in the " 'basic function' " of the party. *Id.,* at 216, 107 S.Ct. 544. Because of the importance of those interests, we carefully examined the interests asserted by the State, and finding them lacking, struck down the prohibition on independents' participation in the Republican primary.

Virtually identical interests are at stake in this case. It is the LPO's belief that attracting a more diverse group of voters in its primary would enable it to select a more mainstream candidate who would be more viable in the general election. Like the Republicans in *Tashjian,* the LPO is cognizant of the fact that in order to enjoy success at the voting booth it must have support from voters who identify themselves as independents, Republicans, or Democrats.

The LPO's desire to include Democrats and Republicans is undoubtedly informed by the fact that, given the stringent requirements of Oklahoma law, the LPO ceases to become a formally recognized party after each election cycle, and its members automatically revert to being independents.[3] Because the LPO routinely loses its status as a recognized party, many voters who might otherwise register as Libertarians instead register as Democrats or Republicans.[4] Thus, the LPO's interest in inviting registered Republicans ***615** and Democrats to participate in the selection of its standard bearer has even greater force than did the Republican Party's desire to invite independents to associate with it in *Tashjian.*

3 See Okla. Stat. Ann., Tit. 26, § 1–109 (West Supp.2005) (requiring that a party's nominee for Governor, President, or Vice President receive 10% of the vote in a general election for the party to maintain its status).

4 See App. to Pet. for Cert. A–48 (District Court recognizing that "it is highly likely that the ranks of independents and, indeed, of registered Republicans and Democrats, contain numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls").

III

As justification for the State's abridgment of the constitutionally protected interests asserted by the LPO and the voters, the majority relies on countervailing state interests that are either irrelevant or insignificant. Neither separately nor in the aggregate do these interests support the Court's decision.

First, the Court makes the remarkable suggestion that by opening up its primary to Democrats and Republicans, the LPO will be saddled with so many nonlibertarian voters that the ultimate candidate will not be, in any sense, "libertarian." See *ante,* at 2039.[5] But the LPO is *seeking* the crossover voting of Republicans and Democrats. Rightly or wrongly, the LPO feels that the best way to produce a viable candidate is to invite voters from other parties to participate in its primary. That may dilute what the Court believes to be the core of the Libertarian philosophy, but it is no business of the State to tell a political party what its message should be, how it should select its candidates, or how it should form coalitions to ensure electoral success. See *Jones,* 530 U.S., at 581–582, 120 S.Ct. 2402 (rejecting state interests in producing candidates that are more centrist ****2052** than the nominee the party would have selected absent the blanket primary).[6]

5 Of course, as the majority recognizes, *ante,* at 2039, since the number of independent voters overwhelms the number of registered-LPO voters, that is already the case.

6 See also *Democratic Party of United States v. Wisconsin ex rel. La Follette,* 450 U.S. 107, 123–124, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981) (State may not substitute its own judgment for that of the party); *Jones,* 530 U.S., at 587, 120 S.Ct. 2402 (KENNEDY, J., concurring) ("A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, *this is an issue for the party to resolve, not for the State*" (emphasis added)). Such coalition building, and reaching out to other groups to ensure a candidate gets elected, is a vital part of the political process. Cf. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n,* 518 U.S. 604, 622–623, 116 S.Ct. 2309, 135 L.Ed.2d 795 (1996) (citing W. Keefe, Parties, Politics, and Public Policy in America 59–74 (5th ed.1988)).

***616** Second, the majority expresses concern that crossover voting may create voter confusion. This paternalistic concern

is belied by the District Court's finding that no significant voter confusion would occur. App. to Pet. for Cert. A–43 (noting that "very simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted").

Third, the majority suggests that crossover voting will impair the State's interest in properly classifying candidates and voters. As an empirical matter, a crossover voter may have a lesser commitment to the party with which he is registered if he votes in another party's primary. Nevertheless, the State does not have a valid interest in defining what it means to be a Republican or a Democrat, or in attempting to ensure the political orthodoxy of party members simply for the convenience of those parties. Cf. *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion ... "). Even if participation in the LPO's primary causes a voter to be a less committed "Democrat" or "Republican" (a proposition I reject[7]), the dilution of that commitment does not justify abridgment of the fundamental rights at issue in this case. While party identity is important in ***617** our political system, it should not be immunized from the risk of change.[8]

7 Allowing a potential crossover voter to vote in the LPO primary would not change the level of commitment he has toward his party of registration; it would simply give him an outlet to express the views he already holds.

8 If, of course, States were able to protect the incumbent parties in the name of protecting the stability of the two-party system in general, we might still have the Federalists, the Anti-federalists, or the Whigs. See generally J. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America (1995). In any event, we would not have the evolution of thought or policies that are occasioned through the change of political parties. While no such change has occurred in recent memory, that is no reason to ossify the status quo.

Fourth, the majority argues that opening up the LPO primary to members of the Republican and Democratic Parties might interfere with electioneering and party-building efforts. It is clear, of course, that the majority here is concerned only with the Democratic and Republican Parties, since party building is precisely what the LPO is attempting to accomplish. Nevertheless, that concern is misplaced. Even if, as the majority claims, the Republican and Democratic voter rolls, mailing lists, and phone banks are not as accurate as they would otherwise be,[9] the administrative ****2053** inconvenience of the major parties does not outweigh the right to vote or the associational interests of those voters and the LPO. At its core, this argument is based on a fear that the LPO might be successful in convincing Democratic or Republican voters to participate more fully in the LPO. Far from being a compelling interest, it is an impermissible one.***618** *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 367, 117 S.Ct. 1364, 137 L.Ed.2d 589 1997) (State may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence").

9 The majority's argument is that voters who would otherwise vote in the Republican or Democratic primaries would vote in the LPO primary, and that the Democratic and Republican lists would not be an accurate indicator of who is likely to vote in those primaries, and of which voters to spend party resources on. First, I find it doubtful that those voters who vote in the LPO primary would have voted in the Democratic or Republican primary; rather, they probably would not have been sufficiently motivated to vote at all. Further, this would actually give Republicans and Democrats additional information as to which of their voters have Libertarian leanings.

Finally, the majority warns against the possibility of raiding, *ante,* at 2040, by which voters of another party maliciously vote in a primary in order to change the outcome of the primary, either to nominate a particularly weak candidate, a "sore-loser" candidate, or a candidate who would siphon votes from another party. The District Court, whose factual findings are entitled to substantial deference, found as a factual and legal matter that the State's argument concerning raiding was "unpersuasive." App. to Pet. for Cert. A–61.

Even if raiding were a possibility, however, the state interests are remote. The possibility of harm to the LPO itself is insufficient to overcome the LPO's associational rights. See *Eu,* 489 U.S., at 227–228, 109 S.Ct. 1013 ("[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party"). If the LPO is willing to take the risk that its party may be "hijacked" by individuals who hold views opposite to their own, the State has little interest in second-guessing the LPO's decision.

With respect to the possibility that Democratic or Republican voters might raid the LPO to the detriment of their own or

another party, neither the State nor the majority has identified any evidence that voters are sufficiently organized to achieve such a targeted result.[10] Such speculation is not, in ***619** my view, sufficient to override the real and acknowledged interest of the LPO and the voters who wish to participate in its primary. See *Timmons,* 520 U.S., at 375, 117 S.Ct. 1364 (STEVENS, J., dissenting) (citing *Eu,* 489 U.S., at 226, 109 S.Ct. 1013; *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983); and *Norman v. Reed,* 502 U.S. 279, 288–289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)).[11]

10 To change the outcome of an election in a way that would benefit their own party, voters would have to be relatively certain that their preferred candidate in their own primary would win that primary and to vote in the LPO primary for a previously agreed-on candidate who is opposed to their own ideological preferences. Given that voters typically do not focus on an election until several days or weeks before an election, this prospect is unlikely. See *California Democratic Party v. Jones,* 530 U.S. 567, 586, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) (KENNEDY, J., concurring). Further, one would have expected to see some evidence of this in States where it is relatively easy to switch parties close to a primary.

11 The flimsy character of the state interests in this case confirms my view that today's decision rests primarily on a desire to protect the two-party system. In *Jones,* the Court concluded that the associational interests of the parties trumped state interests that were much more compelling than those asserted in this case. Here, by contrast, where the associational interests are being asserted by a minor party rather than by one of the dominant parties, the Court has reversed course and rejected those associational interests as insubstantial compared to the interests asserted by the State.

****2054** In the end, the balance of interests clearly favors the LPO and those voters who wish to participate in its primary. The associational interests asserted—the right to select a standard bearer that the party thinks has the best chance of success, the ability to associate at the crucial juncture of selecting a candidate, and the desire to reach out to voters of other parties—are substantial and undoubtedly burdened by Oklahoma's statutory scheme. Any doubt about that fact is clearly answered by *Tashjian.* On the other side, the interests asserted by the State are either entirely speculative or simply protectionist measures that benefit the parties in power. No matter what the standard, they simply do not outweigh the interests of the LPO and its voters.

IV

The Libertarian Party of Oklahoma is not the only loser in this litigation. Other minor parties and voters who have primary allegiance to one party but sometimes switch their support to rival candidates are also harmed by this decision. In my judgment, however, the real losers include all participants in the political market. Decisions that give undue deference ***620** to the interest in preserving the two-party system,[12] like decisions that encourage partisan gerrymandering,[13] enhance the likelihood that so-called "safe districts" will play an increasingly predominant role in the electoral process. Primary elections are already replacing general elections as the most common method of actually determining the composition of our legislative bodies. The trend can only increase the bitter partisanship that has already poisoned some of those bodies that once provided inspiring examples of courteous adversary debate and deliberation.

12 Examples are cases permitting lengthy registration periods, *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973), and cases approving bans on fusion candidates, *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), and write-in candidates, *Burdick v. Takushi,* 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992).

13 See, *e.g., Vieth v. Jubelirer,* 541 U.S. 267, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004); *Davis v. Bandemer,* 478 U.S. 109, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986).

The decision in this case, like the misguided decisions in *Timmons,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589, and *Jones,* 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502, attaches overriding importance to the interest in preserving the two-party system. In my view, there is over a century of experience demonstrating that the two major parties are fully capable of maintaining their own positions of dominance in the political marketplace without any special assistance from the state governments that they dominate or from this Court. Whenever they receive special advantages, the offsetting harm to independent voters may be far more significant than the majority recognizes.

In *Anderson,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, we considered the impact of early filing dates on small political parties and independent candidates. Commenting on election laws that disadvantage independents, we noted:

"By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions ****2055** threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside ***621** the two major

parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'—are served when election campaigns are not monopolized by the existing political parties." *Id.,* at 794, 103 S.Ct. 1564 (citations omitted).

Because the Court's holding today has little to support it other than a naked interest in protecting the two major parties, I respectfully dissent.

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