



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

March 13, 2017

Representative Dan Rayfield
900 Court Street NE H286
Salem OR 97301

Re: Constitutional limitations on letting 17-year-olds vote in primary elections

Dear Representative Rayfield:

As noted in your request, several states allow an otherwise qualified individual who is 17 years old (qualified 17-year-old) to vote in a primary election if the individual will turn 18 years old on or before the date of the general election. You asked for our analysis regarding the ability of Qualified 17-year-olds to participate in primary elections held in Oregon.

As detailed below, while uncertainties exist, we believe that a major political party would likely be able to enact a rule permitting qualified 17-year-olds to participate in the primary election of the political party for the purpose of nominating candidates of the political party. We also believe that the Legislative Assembly could likely enact a law permitting qualified 17-year-olds to vote on state measures on the primary election ballot. In contrast, we believe that a law permitting qualified 17-year-olds to vote for nonpartisan candidates at the primary election would likely violate Article II, section 2, of the Oregon Constitution.

Article II, section 2, of the Oregon Constitution states, in relevant part:

(1) Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution if such citizen:

(a) Is 18 years of age or older[.]

While in recent years the Oregon Supreme Court has had few opportunities to interpret this aspect of Article II, section 2, of the Oregon Constitution, in earlier cases the court was consistent regarding its meaning. For example, the court has held that the "[e]ligibility to vote in elections [in this state] is defined in Oregon Constitution, article II, section 2,"¹ meaning that this provision does not permit the Legislative Assembly to broaden voter access to individuals who do not meet the criteria set forth in Article II, section 2.²

The court has also held that the reference to "elections" in Article II, section 2, of the Oregon Constitution, is limited in scope and only applies to the election of public officials:

¹ *State ex rel. Sajo v. Paulus*, 297 Or. 646, 653 (1984).

² See also *Oregon-Wisconsin Timber Holding Co. v. Coos County*, 71 Or. 462, 467 (1914) ("The obvious purpose of the builders of the Constitution was to prescribe the general qualifications which citizens throughout the state were required to possess in order to entitle them to vote for public officers.").

The length and breadth of the word “election” must be measured by the concept intended by the fathers of the organic law, as the meaning the term conveyed to them necessarily marks the limit of its application. . . . [W]e find that the word was understood in a sense more restricted than at the present time.

. . .

In our judgment the word “election,” as used in the Constitution, should not be given a general or comprehensive signification, including all acts of voting, choice, or selection, but rather in a restricted sense, as election of public officers.³

Combining these early Oregon Supreme Court decisions with contemporary case law from the United States Supreme Court yields several likely conclusions. The first is that the requirements set forth in Article II, section 2, of the Oregon Constitution, almost certainly apply to primary elections.⁴ This means that a qualifying 17-year-old may not cast a vote for the “election of public officers” at the primary election. As a result, we believe that a law permitting a qualifying 17-year-old to vote for nonpartisan candidates for public office at the primary election would likely violate Article II, section 2, of the Oregon Constitution.

In contrast, we believe that since the Oregon Supreme Court has consistently held that the requirements set forth in Article II, section 2, apply only to the election of public officers, the Legislative Assembly likely has authority to enact a law permitting a qualifying 17-year-old to vote on ballot measures at the primary election.

The situation with respect to a qualifying 17-year-old participating in a primary election for the purpose of selecting nominees of a major political party is slightly more complicated. With respect to the Oregon Constitution, it involves analyzing whether voting for the *nomination* of a candidate for public office constitutes voting for the “election of public officers” as described by the Oregon Supreme Court in *Oregon-Wisconsin Timber Holding Co.* While uncertainty exists, we believe that a court would likely hold that voting for the nomination of a candidate for public office is not an election within the meaning of Article II, section 2, of the Oregon Constitution.

At the time the original language of Article II, section 2, was drafted, political party candidates were selected at local and statewide conventions, rather than by statewide election. This changed in Oregon in 1904 with the introduction of direct primary elections.⁵ We believe that a court would therefore be likely to conclude that the 1904 creation of direct primary elections was one of the ways in which the term “election” expanded between the time the Constitution was adopted and the 1914 case of *Oregon-Wisconsin Timber Holding Co.*, and that the “choice, or selection” of the nominee of a political party does not constitute an “election” within the meaning of Article II, section 2.

While it may be permissible under Article II, section 2, of the Oregon Constitution, for the Legislative Assembly to enact a law granting qualified 17-year-olds the explicit right to

³ *Oregon-Wisconsin Timber Holding Co. v. Coos County*, 71 Or. 462, 466, 467 (1914). See also *Beirl v. Columbia County*, 73 Or. 107, 114 (1914) (Noting that *Oregon-Wisconsin Timber Holding Co.* “holds, also, that Article II, section 2, of the Constitution applies only to elections of public officers. We approve and follow that case[.]”).

⁴ See also *Harris v. Burr*, 32 Or. 348, 368 (1898) (Holding that Article II, section 2, of the Oregon Constitution, applies “in all general and special elections not otherwise provided for by the constitution, and applies to the election of all officers known to the constitution, as well as to such as may be provided for thereunder[.]”).

⁵ Richard A. Clucas, “The Oregon Constitution and the Quest for Party Reform,” 87 Or. L. Rev. 1061, 1072-1073 (2008).

participate in the selection of major political party candidates at the primary election, we believe that passing any such law could raise additional issues under the United States Constitution. This is because a court would likely find that the United States Constitution gives political parties themselves the ultimate right to determine whether to permit qualified 17-year-olds to participate in selecting candidates for that political party, regardless of any limitations imposed by state law or the Oregon Constitution.⁶

The United States Supreme Court has issued a series of decisions stating that members of political parties have extensive rights under the First and Fourteenth Amendments to the United States Constitution to decide how to organize and with whom to associate.⁷ Under these cases the Court has made clear that, absent a compelling state interest, a political party's determination of the boundaries of its own association and of the structure that best allows it to pursue its political goals is protected under the United States Constitution. We are currently unaware of any state interest that could be used to justify restricting a political party's associational right to either affiliate or refuse to affiliate with qualified 17-year-olds at the primary election. As a result, we believe that a law *requiring* major political parties to associate with qualified 17-year-olds, or *prohibiting* major political parties from associating with qualified 17-year-olds, has the potential to violate the First and Fourteenth Amendments to the United States Constitution.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel



By
Daniel R. Gilbert
Deputy Legislative Counsel

⁶ According to at least one source we have located, party rules are a common method by which qualified 17-year-olds have been enabled to participate in primary elections in other states. See "Facts: 17 Year-Old Primary Voting," *Fairvote* http://www.fairvote.org/facts_17_year_old_primary_voting (visited March 10, 2017).

⁷ *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) (holding that state cannot deny political parties opportunity to allow nonaffiliated electors to participate in party primaries); *Cousins v. Wigoda*, 419 U.S. 477 (1975) (holding that political party rules regarding selection and seating of delegates must be afforded primacy over contrary state law); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (holding that state may not substitute its own judgment for seating of convention delegates in manner that violates rules of political party); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that state law compelling parties to allow electors affiliated with other political parties to participate in political party primary was unconstitutional, as it placed heavy burden on political party's associational freedom).