10-1972

Rosario v. Rockefeller

Lewis F. Powell Jr.

Conf 5/24/72

Court ....CA - 2........ Voted on................, 19...

Argued ...., 19... Assigned ...., 19... No. 71-1371

Submitted ...., 19... Announced ...., 19...

PEDRO J. ROSARIO, ET AL., Petitioners

vs.

NELSON ROCKEFELLER, GOVERNOR OF THE STATE OF NEW YORK, ET AL.

4/24/72 Cert. filed.

Marshall says covered by ~~[illegible]~~ Dunn v Blumstein, White agrees with him

Grant + Reverse Summarily.

(Marshall will write P/C.

Chief will dissent

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.			✓										
Powell, J.		✓											
Blackmun, J.			✓										
Marshall, J.		✓											
White, J.		✓											
Stewart, J.		✓											
Brennan, J.		✓											
Douglas, J.		✓											
Burger, Ch. J.			✓										

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 26, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. A-1126 (71-1371) - Rosario v. Rockefeller
Application for stay pending cert. to CA2

The attached memorandum which we have prepared in this case might be of interest in considering the application which has been referred by me to the full Court.

T.M.

Attachment

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 26, 1972

Petrs - Reg - Dec 1971
Can't Vote until Nov 1972

No. A-1126 (71-1371)

Rosario v. Rockefeller - Application for stay pending cert. to CA2

Petitioners challenge the provision of New York's election law that bars them from voting in the N. Y. presidential primary on June 20, 1972. That provision defers every registration, for primary purposes only, until after the next general election. Thus petitioners, who registered to vote for the first time in December 1971, will not be eligible to vote in a primary until after November 1972. They claim this statute bears a heavy burden of justification, since it curtails the right to vote, and that it is not narrowly tailored to serve a compelling state interest, citing Dunn v. Blumstein. They also claim it is in effect a durational residence requirement, with respect to those people who move into the state after a general election and before a primary -- those people must wait out the prescribed time (i.e., until after the next general election) before becoming eligible to vote in a primary. (But it does not appear that any of the petitioners is in this category--it seems, though it is not clear, that petitioners all belong to the class of people who were in fact eligible to register in October, i.e., before the last general election, but who simply and inadvertently failed to do so.)

The DC agreed with petitioner and issued a declaratory judgment striking the statute as unconstitutional. The CA2 (Lumbard, Mansfield, Mulligan) reversed. Petitioners have filed their Petition for Writ of Certiorari and seek a stay of the mandate pending cert.

On the merits, petitioners have a substantial claim. The only interest advanced by the state is the prevention of cross-over fraud in the primaries -- the idea is that people have to declare their party affiliation for primary purposes

before the primary or the general election has gathered steam -- indeed, they have to declare their party affiliation prior to the next previous general election, which does not at all involve the issues presented by the primary and its associated general election. No doubt that is a valid state interest. But that interest is not at all served by a requirement that governs not only cross-overs, i.e., changes in party affiliation, but also initial registrations, like petitioners'. As applied to first-time voters, the statute simply means all new voters have to sit out one primary. The statute thus curtails the right of those new voters to vote in primaries, for no apparent state interest at all.

If the Court acts on the cert. petition before June 20, then the matter of the stay is unimportant; otherwise, of course, it is critical, and should be granted (perhaps with some special provision for keeping segregated the votes of the voters whose eligibility is in question).

4/28/72 CEP

Held for May 15 Conference

J. Marshall will Report

APPLICATION TO STAY THE MANDATE OF CA 2 PENDING ACTION ON PETITION FOR CERTIORARI

DISCUSS

No. A-1126 OT 1971 (No. 71-1371)

Rosario v. Rockefeller

Cert to CA 2 (Lumbard, Mansfield & Mulligan)

cert. petition filed 4/24/72

Marshall has referred this stay application to the Conference, with a recommendation that the stay be granted. We have not yet received the moving papers; the only thing we have is the attached memorandum. The obvious solution to this problem is to consider the petition for certiorari before the end of May. We have already received for the May 12 Conference petitions numbered as high as 71-1283; 71-1371 cannot be far off. In any event, I agree with Marshall's recommendation that the stay be granted.

CEP

5/27/72 CEP

Await J. Marshall's recommendation

N.Y. Primary Law Case

SUPPLEMENTAL ON RELISTING

No. 71-1371

DISCUSS

Rosario v. Rockefeller

Cert to CA 2 (Lumbard, Mansfield & Mulligan)

It seems to me that summary disposition is in the offing. You notes indicate that TM is to "report" on this case. His memo fully describing the case is attached.

CEP

5/29/72 CEP

MEMORANDUM TO MR. JUSTICE POWELL

Re: Rosario v. Rockefeller, No. 71-1371

While the opinion could be clearer, it is narrowly written, and its result seems compelled by Dunn v. Blumstein. You should join.

CEP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 29, 1972

Re: No. 71-1371 - Rosario v. Rockefeller

MEMORANDUM TO THE CONFERENCE:

Byron White's memorandum makes a fourth vote (to grant cert) in the above case, which alters the situation substantially. As a result of this Thurgood has sent a message through Bill Brennan asking that it not go on the Order List Tuesday. Meanwhile Bill Rehnquist and I have been collaborating on a dissent and would have it complete before five o'clock today.

Thurgood's point -- and it is an important one -- is the posture of the case in view of the granting of cert and requests that a conference be held immediately after the Tuesday sitting in order to consider what action should be taken, if any.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 29, 1972

Re: No. 71-1371 Rosario v. Rockefeller

Dear Thurgood:

Please join me in your Per Curiam.

Sincerely,

Lewis

Mr. Justice Marshall

cc: The Conference

5/29/72 CEP

MEMORANDUM TO MR. JUSTICE POWELL

Re: Dunn v. Blumstein

This case involved Tennessee's durational residency requirement. There were two conditions to eligibility to vote in Tennessee. One was that you had to be a bona fide resident of the state. The other was that you had to have been a resident for one year in the state and three months in the county. This latter condition was the durational residency requirement; only its validity was at issue. It is undisputed that a requirement that a prospective voter be a bona fide resident is constitutional.

The first part of the opinion deals with the standard of review. After extensive discussion, the Court concludes that the exacting standard of equal protection review is appropriate: to withstand constitutional scrutiny, a statute placing a condition on the right to vote must be necessary to promote a compelling governmental interest. (Emphasis in opinion). This standard is appropriate, the Court concludes, because voting is a fundamental right & because durational requirements impinge on the constitutional right to travel. The Court then notes that under this standard of review, a heavy burden rests with the state to justify the restriction, and the statute will be closely scrutinized in light of its asserted purpose. The purpose must be served by the least drastic means - the state must further its interest by a means that least interferes with constitutionally protected rights. In other words, the statute must be narrowly tailored to serve the state

interest, with the minimum possible burden on the protected rights.

With respect to the offerred justification that the durational residency requirement maintained the purity of the ballot box and prevented election fraud, the Court held that the waiting period was not the least restrictive means necessary for preventing fraud, noting that the criminal law could accomplish this purpose.

With respect to the offerred justification that the durational residency requirement was essential to assure "knowledgable voters," the Court held that this device was simply too crude to accomplish the goal.

In this case, the vice of the statute is that it reaches too far. In seeking to prevent "raiding" and "cross-overs" by imposing its own "durational" requirement, this statute denies the right to vote to people who are incapable of crossing-over simply because they have never before registered to vote (or because they just moved into the state).

I think that the case is clear. It is indistinguishable in principle from Dunn. You asked me, however, how the Court will decide it. That I cannot predict. There has been a disquieting tendency this Term to distinguish precedents on ephemeral grounds that have nothing to do with the principles for which they stand. This could happen to Dunn. White was in the Dunn majority, and his adherence to precedent in the area of voting law is minimal.

CEP

May 29, 1972

MEMORANDUM TO THE CONFERENCE

Re: No. 71-1371 - Rosario v. Rockefeller

I am changing my vote in this case to note probable jurisdiction and hear argument. Unless one of the other three who voted this way changes his mind, my vote makes the fourth to hear argument rather than to decide the merits summarily.

B.R.W.

May 29, 1972

MEMORANDUM TO THE CONFERENCE

Re: 71-1371 - Rosario v. Rockefeller

Although it is probably implicit from our discussion at Conference this morning, in view of Byron's change of his vote in this case I would now vote to grant certiorari and hear argument on the merits, rather than voting to deny certiorari.

Sincerely,

/s/ William H. Rehnquist

No. 71-1371 ROSARIO v. ROCKEFELLER Argued 12/13/72

Tentative view after argument:

Neuborne (Petrs)

This case does not involve "party cross-overs" — as Petrs are new registrants, seeking to reg. for first time.

→ Ct. may frame a decision narrowly to apply only to registrants for first time. We need not address cross-over issue in this case.

Law operates as a durational residency requirement — N.Y. virtually concedes this. (N.Y.'s answer is that petitioners have lack standing to rely on this point as they are long time residents). Counsel cites various case (Bullock v. Carter) as holding that petitioners have class action standing.

Newborne (cont)

N.Y. statute also violates rights of long time residents: 8 t. operates to deny rights to vote in primaries (e.g. a new voter who attained voting age on Nov. after general election)

No-law provides exception for this.

Greenwald (Asst A/G N.Y.) { defends "deferred enrollment system")

Q re what N.Y. validly may do to prevent raiding. (Sec 186)

The named Pls could have enrolled prior to general election - but failed to do so. They had never previously been enrolled. But they could be used for "raiding" purposes. (How?)

N.Y. Primary was June 20, 1972 - nominations for state & fed offices.

N.Y. has closed primary system.

Compelling interest test not appropriate - but statute meets this test.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 4, 1973

Dear Chief:

As respects No. 71-1371, Rosario v. Rockefeller -- the opinion you assigned to Potter -- I have talked with Lewis and he will undertake the dissent.

WOD
William O. Douglas

The Chief Justice

cc: Conference
Law Clerks

Memo to: Jay Wilkinson

From: Lewis F. Powell, Jr. January 4, 1973

No. 71-1371 Rosario v. Rockefeller

Mr. Justice Douglas, the senior among the four dissenting Justices, has requested that I write the dissent in this case.

As this was one of your cases, I would appreciate your drafting a dissent - which you and I had in mind anyway. Justice Stewart is writing for the Court.

L. F. P., Jr.

LFP, Jr.:pls
cc: Larry Hammond
Bill Kelly

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 8, 1973

Re: No. 71-1371 - Rosario v. Rockefeller

Dear Potter:

Please join me.

Sincerely,

WHR

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 10, 1973

Re: No. 71-1371 - ROSARIO v. ROCKEFELLER

Dear Potter:

Please join me.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

File copy

Memo to: Jay Wilkinson

From: Lewis F. Powell, Jr. January 10, 1973

Re: No. 71-1371 Rosario v. Rockefeller

These are a few random comments on Justice Stewart's opinion, which I have just read rather hurriedly for the first time.

The opinion describes quite vaguely the alleged grounds of unconstitutionality. At page 4 it states that petitioners rely on "their right to vote" and abridgement of their "freedom to associate with the political party of their choice." I have not looked at any of the authorities recently, although I am generally familiar with Dunn and Carter. In Dunn, a durational residence requirement was held invalid under the Equal Protection Clause - the class being persons who had moved into the state and were caught by a one-year residence requirement. Also in Dunn, the Court applied the compelling state interest test on the ground that a classification that interfered with the right to vote is "suspect."

Justice Stewart does not use equal protection analysis in his opinion, although on page 5 he refers to the "class to which petitioner belongs" as being "newly registered voters who were eligible to enroll in a party before the previous general election."

He does not discuss - as I read his opinion - the issue as to whether the test is compelling or simply rational basis. He is of course keenly aware of what was held in Dunn, as he was with the majority. I have been a bit puzzled as to why this question was not addressed specifically. He does characterize the state's purpose as serving "an important state goal," and as being "a legitimate and valid state goal." (Page 9.)

I am personally not enthusiastic about extending the compelling state interest test beyond the present scope of our decisions. It may be that Dunn is - or fairly may be considered - controlling authority that where the right to vote (including right to vote in a primary) is restricted - the compelling interest test applies. I would prefer, however, to write this case in that "intermediate zone" which we applied in Weber and Strange - if we can conclude that this is a principled basis.

A few additional observations:

I agree with Justice Stewart (note 8) that petitioners lack standing to raise the "right to travel" issue.

The gut issue - which prompted me to vote as I did - is addressed by Justice Stewart on page 7: that the time limitation is so severe as itself to constitute an unconstitutionally onerous burden on petitioners' exercise of the right to vote. This period is eight months in a presidential primary and eleven months in a non-presidential primary. I personally

see no reason, rational or otherwise, for such lengthy periods. Yet, I have a reluctance to say that there is no rational basis for a law which New York has had on its books for sixty years. I would recognize a state interest in imposing reasonable limitations on party "cross-overs," but eight to eleven months preregistration provisions seem quite unreasonable.

I have not checked petitioners' briefs, but I hope they contain information as to whether any other states have such onerous restrictions on party registration. As you know, in Virginia we have none - and until recently managed to get along fairly well. Virginia's experience the last few years is, however, suggestive of the need for some sort of registration law.

I wonder if the library here at the Court, or the Library of Congress, would respond to an inquiry on my behalf for an analysis of state election laws with respect to how far in advance of a party primary must party affiliation be declared by registration.

L. F. P., Jr.

LFP, Jr.:pls

P.S. I have just looked at Justice Blackmun's concurring opinion in Dunn v. Bloomstein. It rather suggests that it is unnecessary to apply the compelling state interest test - although I am not entirely clear as to where his opinion comes down.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1973

Re: No. 71-1371 - Rosario v. Rockefeller

Dear Potter:

Unless Lewis persuades me mightily to the contrary, I am with you.

Sincerely,

H.A.B.

Mr. Justice Stewart

Copies to the Conference

jhw/ss 1/18/73 1cc

Wilkinson - 1st Draft

Done

No. 71-1371 ROSARIO v. ROCKEFELLER

MR. JUSTICE POWELL, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a Presidential primary and eleven months before a non-Presidential one.[1] The Court recognizes, as it must, that the period between the enrollment deadline and the primary election is a "lengthy" one.[2] Indeed, no other state has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York concedes that only one other State - Kentucky -, has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the state has decided to make it available to some, becomes a basic one under the Constitution. Dunn v. Blumstein, 405 U. S. 330 (1972); Kramer v. Union Free School District, 395 U. S. 621 (1969); Carrington v. Rash, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. Reynolds v. Sims, 377 U. S. 533 (1964). A citizen without a vote is to a large extent

Rider A, p. 2 (Rosario) 1/21/73

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See Williams v. Rhoads, 393 U. S. 23 (1968); NAACP v. Alabama, 357 U. S. 449 (1958); United States v. Robel, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months

right to associate with the party of their choice. See Williams v. Rhodes, 393 U.S. 23, [illegible] (1968); NAACP v. Alabama, 357 U. S. 449 (1958); United States v. Robel, 389 U. S. 258 (1967).

We are told repeatedly that petitioners "clearly could have registered and [illegible] enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement [illegible] resulted from "their own failure to take timely steps to effect their enrollment." [5] If the cutoff date were a less severe one, I could agree. Certainly, the state is justified in imposing a reasonable regist ration cutoff [illegible] prior to any primary or general election, beyond which a citizen's failure to register is a negligent act may be presumed [illegible] or wilful forfeiting his right to vote in a particular election. But a [illegible] it is difficult to perceive [illegible] persuasive [illegible] for a registration or party enrollment deadline eight or eleven months prior to election [illegible] failure to comply with such an [illegible] deadline cannot [illegible] hardly be used [illegible] to justify omission justifying denial of constitutional rights. [illegible] a basic right. Numerous prior decisions impose on us the obligation to protect the

continuing availability of the franchise for all citizens, not to sanction its prolonged infringement or deprivation. [redacted] Ex Parte Siebold, 100 U. S. 37 (1879), Nixon v. Herndon, 273 U. S. 536 (1927); Lane v. Wilson, 307 U. S. 268 (1939); Baker v. Carr, 369 U. S. 189 (1962); Gray v. Sanders, 372 U. S. 368 (1963);

Rider A, p. 4 (Rosario) 1/21/73

The majority (apparently) accepts the state's contention that this is "not a disenfranchising statute", [6 [or 7]] as it does not absolutely disenfranchise petitioners or impose any absolute ban on their freedom of association. It is true, of course, that the thrust of the statute is to postpone [redacted] rather than disenfranchise altogether. Yet deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be serious enough to equate denial. The deferral, compelling registration and choise of party affiliation eight months or more in advance of a primary, can have an inhibiting - indeed a disenfranchising effect - on those who for quite legitimate reasons may wish to

~~and that failure to do so did not eliminate, but merely postponed, their voting and associational rights. I cannot agree.~~

And Any statute which ~~poses an absolute freeze~~ imposes (an absolute freeze) for eight or eleven months on party enrollment and voting registration ~~has an obvious and serious disenfranchising effect~~ does disenfranchise those who, for quite legitimate reasons, decide to register closer than eight months to the primary date and ~~an inhibiting effect~~ those who, for equally legitimate reasons, ~~may wish~~ wish to choose or alter ~~their~~ party affiliation. Our decisions have never required an absolute ban on the exercise of constitutional rights before a constitutional breach is incurred. Rather, they have uniformly recognized that a serious burden or infringement on "constitutionally protected activity" is sufficient to establish a constitutional violation, Dunn v. Blumstein, supra at ___; NAACP v. Button, 371 U. S. 419, 438 (1963); Harper v. Virginia Board of Elections, supra at ___, for the ~~obvious~~ reason that ~~the danger of~~ a partial impairment of constitutional rights is as (often) real a danger as ~~is frequently more real than~~ their outright ~~elimination~~ denial.

II

The majority ~~fails to make clear what~~ does not identify the standard of scrutiny it applies to New York's ~~lengthy cutoff date for party enrollment and primary voting~~ statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal;"[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not ... what ~~possible~~ precedents

Rider A, p. 6 (Rosario) 1/21/73

This language resembles, though the terminology is somewhat stronger, the traditional equal protection "rational basis" test. In some cases we have elected, where dealing with state action not previously identified with either of the frequently applied standards, to judge the validity of a challenged act or classification without categorizing the standard or test applied. * But here the prior decisions of the Court have firmly identified the right to vote as fundamental in a constitutional sense, requiring the applicability of strict

What cases? What state action? Confusing

No! Confusing & Unnecessary

application

in preventing party raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Reynolds v. Sims, supra, at 561-562. See also Yick Wo v. Hopkins, 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. Bullock v. Carter, supra, at ___; Terry v. Adams, 345 U. S. 461 (1953); United States v. Classic, 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are necessary to promote a compelling state interest.'" Dunn v. Blumstein, supra, at ___ (1972) quoting Kramer v. Union Free School District, supra, at 627. See also Cipriano v. City of Houma, supra, at

~~The inquiry the~~

The inquiry thus becomes whether the instant statute, burdening as it does fundamental political rights, is necessary to advance a compelling state interest. The court below correctly identified this as the applicable ~~controlling~~ standard — F2d —.

Insert #1

~~A The typical~~ ~~The typical~~ example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A state does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process — its usefulness in providing a unity of divergent factions in an alliance for power — be seriously impaired." — F2d —. The court below ~~stated~~ flatly that ~~the court below found stated flatly~~ ~~that the state interest was compelling. Id. at~~ ~~in preventing "raiding" was "compelling.~~ the state interest in deterring "raiding" was a "compelling" one. Id. at

704 (1969); City of Phoenix v. Kolodziejski, supra, at 205, 209 (1970). Likewise, in ~~Though in the area of political association~~, the Court has asserted that ~~been made explicit as to the standard of review~~, "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms" Williams v. Rhodes, 393 U. S. (supra) 30-31 (1968) and must be carefully protected from state encroachment. NAACP v. Alabama, supra, at 449 (1958). Bates v. Little Rock, 361 U. S. 516 (1960); Gibson v. Florida Legislative Investigations Committee, 372 U. S. 539 (1963).

~~as the court below recognized, [illegible]~~

The inquiry thus becomes whether the instant statute, burdening as it does ~~basic and important~~ fundamental political rights, is ~~The court below correctly identified this as the applicable standard.~~ necessary to advance a compelling state interest. The asserted state interest in this case is the prevention of party "raiding", which consists of members ~~in sympathy with~~ the movement or "swap-over" by one party ~~going~~ into another's primary to "defeat a candidate who is adverse to the interests they care to advance." 11 The matter is not so easily disposed of. The compelling nature of any ~~state~~ such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the state to protect it and

Insert #1

and the constitutionally sensitive activity it operates to impede.

The state interest here ~~This interest~~ is ~~not so~~ hardly compelling enough to sustain the presumption, upon which the statute appears to be based,

~~rebuttable upon a showing~~ established by ~~the statute~~, that ~~anyone~~ persons who changes or declares

party affiliation nearer than eight ~~or~~ to eleven months to a party

Any such presumption assumes a needlessly sinister and complex view of our voting citizens.

primary does so with intent to raid that primary. ~~Political parties~~ Political parties in this country have traditionally been characterized by a fluidity ~~in this country have traditionally been characterized by a fluidity and overlap of philosophy and membership.~~ and overlap of philosophy and membership. And ~~some~~ citizens generally declare

or alter party affiliation for reasons quite unconnected with ~~and even contrary to~~ any desire to damage the interests of ~~raid~~ a party with which they are

not in sympathy. Citizens ~~may vote in a primary of one party~~ may often choose a party and vote in its primary simply ~~party~~ because it ~~presents~~ presents candidates and issues more

responsive to their ~~most intimate~~ immediate concerns and aspirations, ~~because~~ ~~the general views of that party are more in line with their own~~ ~~the control of other parties might be assumed by persons inimical to their beliefs.~~ Yet ~~such patterns might not, and indeed often do not, emerge clearly~~ such candidates or issues, and even the complexion of the dominant philosophy of a party often are not apparent eight to eleven months before a primary.

Jay - There we not clear to me. Try rewriting & polishing the last few sentences in this ¶

That a citizen should ~~be absolutely precluded so far in advance from~~ be absolutely precluded from declaring his party affiliation, in response ~~voting in a party primary or attorney~~ To a sympathetic candidate, a meaningful and important ~~or~~ charging party philosophies in this state, choice and which

But whatever state interest exists for preventing cross-overs
~~Finally, any compelling state interest in preventing raiding~~
from one party to another
appreciably
is lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no previous
~~declared no previous expression~~
party commitment at all.
~~of party sympathy at all.~~ Certainly, the danger falls short of the compelling state interest needed to justify denying petitioners, so far in advance, the right to declare an initial party affiliation and vote in the party primary of their choice.

III

In Dunn, supra, at ____, the Court emphasized that the state, in pursuing its legitimate interests,

> "cannot chose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision', NAACP v. Button, 371 U. S. 419, 438 (1963); United States v. Robel, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U. S. at 631. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means." Shelton v. Tucker, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails, to address the crucial question of whether that interest may be adequately protected by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. The other states, with varied and complex party systems, have well maintained them without the advanced enrollment deadline imposed by New York. Political

activities do not constantly engage the attention of Ame ricans.

Many certain even do not vote: far fewer subtly calculate ~~out of sympathy with one party~~ to enter another party's primary to affect adversely that party's interest especially in a day when party labels and loyalties generally are said to hold less sway over voters. Insert #1

Though a shortened enrollment deadline may not screen out every "raider" that the present deadline does, ~~not, judging from the experience of other States,~~ a "raiding" would remain a ~~quite~~ manageable problem. What is most important, a "less drastic" enrollment deadline would make available the franchise and opportunities for legitimate party participation to those who constitutionally have the right to exercise them.[13] ~~In this direction, the constitutional balance must be struck.~~

(and political parties would maintain their distinctive character and distinctiveness)

to not able

Insert #1

To the extent that ~~such behavior~~ ~~"raiding" actually~~ "raiding" does occurs, it is most often a last-minute, ~~random raiding is largely a last-minute in large party a last-minute phenomenon~~ impulsive phenomenon. It is quite ~~extraordinarily to~~ difficult ~~to organize or manage successfully two or three months~~ ~~large-scale raiding mass raiding~~ ~~one or two months before an election.~~

~~rare for raiding~~

unlikely that ~~mass~~ raiding would ~~ever~~ occur ~~in any with frequency~~ ~~on any mass scale as even~~ ~~on any~~ with any substantial ~~frequency~~ any frequency ~~one or two months before an election~~

under a ~~party enrollment study~~ ~~primary registration~~ party enrollment deadline ~~at~~ either one or two months in advance of a party primary. ~~The organizational difficulties with voters and voter inertia would~~

~~Organizing mass party switches in the face of~~

Organizing "raiding" ~~in the face of~~ activity ~~Overcoming~~ ~~Organizing to overcome voter inertia for such a~~ ~~before such a~~

~~deadline would pose as a considerable obstacle.~~ ~~pose a considerable obstacle.~~

before such a deadline in the face of voter inertia would be a difficult task.

FOOTNOTES

1. October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In non-presidential years, the cut-off runs from early October until the following September.

2. Court opinion, p. 8.

3. The state does not dispute this point. See Tr. of Oral Arg., p. 34.

4. Tr. of Oral Arg., p. 34.

5. Court opinion, pp. 5, 6. See also p. 10 where the Court refers to section 186 as merely imposing "a legitimate time limitation on their (petitioners') enrollment, which they chose to disregard."

6. See the Court's opinion at p. 5:

Similarly at p. 6:

and p. 10:

In all these instances, the majority seeks to distinguish what it chooses to call a mere "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

7. Tr. of Oral Arg., p. 35.

8. Court opinion, p. 7.

9. Court opinion, p. 8.

10. Id. p. 9.

11. Tr. of Oral Arg. p. 29.

12. Court Opinion, p. 9.

13. Petitioners also suggest other "less drastic" means of protecting the state's interest: greater reliance on the summary disenrollment procedures of Section 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with preexisting party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg. pp. 13-21. I made no judgment either on the efficacy of these alternatives in protecting the state's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques which might be less destructive of constitutional rights.

Yet the Court today approves the New York statutory scheme which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See Williams v. Rhoads, 393 U. S. 23 (1968); NAACP v. Alabama, 357 U. S. 449 (1958); United States v. Robel, 389 U. S. 258 (1967). The majority opinion justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as permitted by New York law, eight months prior to the presidential primary.

(Note to Jay: I am not sure that this rider is expressed in the best possible way. It is a substitute for the first sentence in the paragraph beginning at the bottom of page 2, which seems to me to require a revision. Perhaps you can come up with a better alternative.)

The majority accepts the state's contention that this is "not a disenfranchising statute" [6 or 7] as it does not absolutely disenfranchise petitioners or impose any absolute ban on their freedom of association. It is true, of course, that the thrust of the statute is to postpone rather than disenfranchise altogether. Yet deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be serious enough to equate denial. The deferral, compelling registration and choise of party affiliation eight months or more in advance of a primary, can have an inhibiting - indeed a disenfranchising effect - on those who for quite legitimate reasons may wish to defer choosing or changing their party affiliation.

This language resembles, though the terminology is somewhat stronger, the traditional equal protection "rational basis" test. In some cases we have elected, where dealing with state action not previously identified with either of the frequently applied standards, to judge the validity of a challenged act or classification without categorizing the standard or test applied. * But here the prior decisions of the Court have firmly identified the right to vote as fundamental in a constitutional sense, requiring the applicability of strict judicial review:

*Jay: Cite James v. Strange, Weber and the Harvard Law Review article discussing the intermediate type standard.

MEMORANDUM

TO: Mr. J. Harvie Wilkinson, III DATE: January 21, 1973

FROM: Lewis F. Powell, Jr.

No. 71-1371 Rosario v. Rockefeller

Sally will deliver to you your first draft, which I have reviewed rather hurriedly today. I did not have an opportunity to take a look at it previously.

I have suggested some tentative changes, including several [redacted] riders.

The draft is quite good, certainly in substance. As you cautioned me, you have not had an opportunity to "polish" its form - both from the viewpoint of style and clarity. I have not undertaken to do this either, in view of pressures of my getting off to Delray.

There are two matters of substance which I think require your thought:

1. Constitutional violation. Nowhere do we specifically identify the constiutional violation. Is it equal protection or due process or something else? You and I discussed, briefly, whether this was an equal protection case, and - if so - how does one identify the disadvantaged class?

I have not had time to reexamine the briefs or the opinion below with any care. I do note that petitioner's brief states four questions,

now being applied by the Court, namely, strict scrutiny where a fundamental right or a suspect class is involved, and only the need for some rational basis in other situations.

My suggested rider on page 6 moves cautiously into this area. Justice Stewart may well be trying to occupy the middle ground identified by Prof. Gunther. I personally like the middle ground and do not want to mold deeper into "concrete" the present dichotomy between the two established standards. See what you can do with a footnote as well as the text on page 6 that would tie in with the Gunther article idea, leaving our options open. In this case, we are bound by precedent to apply the strict standard test. My thought is that we might simply - in a note - indicate that the two prevailing tests need not always be applied, as we demonstrated in James v. Strange and Weber.

* * * * *

My suggestion is that you make such revisions, and do such pblishing as you think necessary. Then have the printer do a half a dozen "chambers copies" of a first draft, and mail it to me airmail. I will then clear it with you on the telephone, so that you can print and circulate during my absence.

I think you have done a splendid piece of work, especially considering the handicap of your illness.

L. F. P., Jr.

as being involved in the case, without making it at all clear as to what section of the Constitution is violated.

I think the analysis in our opinion should be more specific. I would guess that a reexamination of some of the prior precedents would give you appropriate guidance. This is not a major revision task, but merely one of identification.

2. Judge Lumbard's opinion. As you know, Judge Lumbard is widely regarded as one of the ablest judges in the country. As we would reverse his opinion, I would like - at least - to address fairly the arguments he makes. You might reread his opinion and consider what additions, if any, should be make to ours.

I think, also, you should note - perhaps in the Section of our opinion discussing the failure of Justice Stewart to identify the applicable standard - that Judge Lumbard assumes that the "compelling state interest" test must be applied. He then goes on to find that New York's interest is compelling! I know of no precedent for such a finding, and wonder whether he has cited any.

3. Professor Gunther's analysis. You directed my attention to Professor Gunther's analysis in the November Harvard Law Review, in which he commented favorably on what he perceived to be a trend away from the rigidity and perhaps artificiality of the two standards

L.F.P.

Circulated 2/5/73
(First circulation)

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1371

Pedro J. Rosario et al., Petitioners, *v.* Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1973]

MR. JUSTICE POWELL, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5-30; 7-43 – 7-45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [5]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a basic constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

---

[5] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this statute as postponing rather than denying altogether peti-

---

[6] See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourthteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

tioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote does disenfranchise those who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to change or alter party affiliation. Our decisions, however, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that a serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein, supra,* at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims, supra,* at 561–562, for the reason that a partial impairment of these rights is often as real a danger as their outright denial.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and con-

[8] Court opinion, p. 7.
[9] Court opinion, p. 8.
[10] *Id.*, p. 9.

fusion as to how we will approach future significant burdens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a compelling state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state

encroachment. *NAACP* v. *Alabama, supra,* at 449 (1958); *Bates* v. *Little Rock,* 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee,* 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental political rights, is necessary to advance a compelling state interest. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired," *Rosario* v. *Rockefeller,* — F. 2d — (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.,* at —.

The matter, however, is not so easily resolved. The compelling nature of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly compelling enough to sustain the presumption, upon which the statute appears to be based, that all persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

substantial numbers of

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not ~~apparent~~ identifiable as such eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the basic rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the compelling state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra,* at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button,* 371 U. S. 419, 438

(1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra,* 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lessser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Political activities do not constantly engage the attention of Americans. Many citizens do not even vote: far fewer subtly calculate to enter another party's primary to affect adversely that party's interest, especially in a day when party labels and loyalties generally are said to hold less sway over voters. To the extent that "raiding" does occur, it is most often a last-minute impulsive phenomenon. It is quite unlikely that raiding would occur with any frequency were New York to reduce its enrollment deadline to one or two months in advance of a primary. Organizing "raiding" activity before such a deadline in the face of voter inertia still would be a difficult task. Though a shortened enrollment deadline may not screen out every "raider" that

[12] Court opinion, p. 9.

prescribe a more reasonable enrollment deadline, say, 30 to 60 days.

would be appreciably facilitated if New York were to

the present deadline does, "raiding" would remain a manageable problem and political parties would maintain their distinctive character. What is most important, a "less drastic" enrollment deadline would make the franchise and opportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[18]

[18] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with preexisting party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1371

Pedro J. Rosario et al., Petitioners, v. Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1973]

MR. JUSTICE POWELL, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5-30; 7-43 – 7-45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [3]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a basic constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

[3] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this stat-

---

[6] See the Court's opinion, at p. 6:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

ute as postponing rather than denying altogether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote does disenfranchise those who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, however, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that a serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein*, *supra*, at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims*, *supra*, at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

[8] Court opinion, p. 7.
[9] Court opinion, p. 8.
[10] *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra,* at 449

(1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental political rights, is necessary to advance a compelling state interest. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired," *Rosario* v. *Rockefeller*, — F. 2d — (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at —.

The matter, however, is not so easily resolved. The compelling nature of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly compelling enough to sustain the presumption, upon which the statute appears to be based, that all persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

---

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the basic rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the compelling state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra*, at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button*, 371 U. S. 419, 438

(1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson*, *supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lessser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Political activities do not constantly engage the attention of Americans. Many citizens do not even vote: far fewer subtly calculate to enter another party's primary to affect adversely that party's interest, especially in a day when party labels and loyalties generally are said to hold less sway over voters. To the extent that "raiding" does occur, it is most often a last-minute impulsive phenomenon. It is quite unlikely that raiding would occur with any frequency, were New York to reduce its enrollment deadline to one or two months in advance of a primary. Organizing "raiding" activity before such a deadline in the face of voter inertia still would be a difficult task. Though a shortened enrollment deadline may not screen out every "raider" that

[12] Court opinion, p. 9.

the present deadline does, "raiding" would remain a manageable problem and political parties would maintain their distinctive character. What is most important, a "less drastic" enrollment deadline would make the franchise and opportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[13]

---

[13] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with preexisting party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 6, 1973

RE: No. 71-1371 - Rosario v. Rockefeller

Dear Lewis:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 7, 1973

Re: No. 71-1371 - Rosario v. Rockefeller

Dear Lewis:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 7, 1973

Dear Lewis:

Please join me in your dissent in 71-1371, Rosario v. Rockefeller.

William O. Douglas

Mr. Justice Powell

cc: The Conference

Circulated 2/8/73
(Some further changes were made)

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1371

Pedro J. Rosario et al., Petitioners, v. Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5–30; 7–43 – 7–45; New Jersey Statutes Annotated,

Circulated 2/8/73
(Some further changes were made)

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-1371

Pedro J. Rosario et al., Petitioners, v. Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5-30; 7-43 – 7-45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [6]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a basic constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

[6] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this stat-

---

[6] See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourthteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

ute as postponing rather than denying altogether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote does disenfranchise those who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, however, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein, supra*, at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims, supra*, at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

[8] Court opinion, p. 7.
[9] Court opinion, p. 8.
[10] *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra,* at 449

(1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental political rights, is necessary to advance a compelling state interest. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired," *Rosario* v. *Rockefeller*, — F. 2d — (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at —.

The matter, however, is not so easily resolved. The compelling nature of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly compelling enough to sustain the presumption, upon which the statute appears to be based, that all persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

---

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the basic rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing cross-overs from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the compelling state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn*, *supra*, at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button*, 371 U. S. 419, 438

> (1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lessser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If new York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be pro-

[12] Court opinion, p. 9.

tected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and oportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[13]

[13] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

PP 1, 9, 10.

FILE COPY
PLEASE RETURN
TO FILE

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1371

Pedro J. Rosario et al., Petitioners, v. Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

FEB 8 1973

[February —, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5-30; 7-43–7-45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [5]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a basic constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

[5] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this stat-

---

[6] See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"The petitioners do not say why they did not enroll prior to the cutoff date, but it is clear that they could have done so, but chose not to. Hence, if their plight can be characterized as disenfranchisement at all, it was not caused by § 186, but by their own failure to take timely steps to effect their enrollment.

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourthteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

ute as postponing rather than denying altogether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote does disenfranchise those who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, however, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein*, *supra*, at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims*, *supra*, at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

[8] Court opinion, p. 7.
[9] Court opinion, p. 8.
[10] *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra,* at 449

(1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental political rights, is necessary to advance a compelling state interest. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired." *Rosario* v. *Rockefeller*, —— F. 2d —— (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at ——.

The matter, however, is not so easily resolved. The compelling nature of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly compelling enough to sustain the presumption, upon which the statute appears to be based, that all persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

---

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the basic rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the compelling state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra,* at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button,* 371 U. S. 419, 438

(1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson*, *supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lessser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If new York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be pro-

[12] Court opinion, p. 9.

tected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and oportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[13]

[13] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13-21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 15, 1973

Re: No. 71-1371 - Rosario v. Rockefeller

Dear Potter:

Your memorandum to Lewis in No. 71-1332, Rodriguez, suggests to me that pending further discussion I should withdraw my agreement with your opinion in Rosario and ask you merely to note that I concur in the result.

Sincerely,

Byron

Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 20, 1973

Re: No. 71-1371 - Pedro J. Rosario v. Nelson Rockefeller, Governor of the State of New York

Dear Potter:

Please join me.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

PP 3, 4, 5, 7, 8.

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1371

Pedro J. Rosario et al., Petitioners, *v.* Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March —, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5–30; 7–43 – 7–45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [5]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a fundamental constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

[5] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this statute as a mere "time deadline" on petitioners' enrollment that disadvantages no identifiable class and that postpones through the next primary rather than denies alto-

---

[6] See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

gether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote totally disenfranchises a class of persons who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, moreover, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation, *Dunn* v. *Blumstein*, *supra*, at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims*, *supra*, at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

[8] Court opinion, p. 5 and n. 6 *supra*.

[9] Court opinion, p. 8.

[10] *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra,* at 449

(1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental constitutional rights, can withstand the strict judicial scrutiny called for by our prior cases. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired," *Rosario* v. *Rockefeller*, —— F. 2d —— (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at ——.

The matter, however, is not so easily resolved. The importance or significance of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly substantial enough to sustain the presumption, upon which the statute appears to be based, that most persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

---

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the fundamental rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the overriding state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra*, at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button*, 371 U. S. 419, 438

> (1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson, supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If New York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be pro-

[12] Court opinion, p. 9.

tected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and oportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[12]

---

[12] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

SUPREME COURT OF THE UNITED STATES

No. 71–1371

Pedro J. Rosario et al., Petitioners, *v.* Nelson Rockefeller, Governor of the State of New York, et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[March 21, 1973]

MR. JUSTICE POWELL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

It is important at the outset to place New York's cutoff date for party enrollment in perspective. It prevents prospective voters from registering for a party primary some eight months before a presidential primary and 11 months before a nonpresidential one.[1] The Court recognizes, as it must, that the period between the enrollment and the primary election is a "lengthy" one.[2] Indeed, no other State has imposed upon voters previously unaffiliated with any party restrictions which even approach in severity those of New York.[3] And New York

[1] October 2, 1971, was the last day on which petitioners' enrollment could have been effective. June 20, 1972, was the date of New York's presidential primary. Thus the deadline was actually some eight and one-half months before the primary. In nonpresidential years, the cutoff runs from early October until the following September.

[2] Court opinion, p. 8.

[3] The State does not dispute this point. See Tr. of Oral Arg., p. 34. Massachusetts, Illinois, Ohio, New Jersey, and Texas permit previously unaffiliated voters to declare their initial party affiliation immediately prior to voting in the primary of their choice. See Annotated Laws of Massachusetts, c. 53, §§ 37, 38; Illinois Annotated Statutes, §§ 5–30; 7–43 – 7–45; New Jersey Statutes Annotated,

concedes that only one other State—Kentucky—has imposed as stringent a primary registration deadline on persons with prior party affiliations.[4] Confronted with such a facially burdensome requirement, I find the Court's opinion unconvincing.

The right of all persons to vote, once the State has decided to make it available to some, becomes a basic one under the Constitution. *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); *Carrington* v. *Rash*, 380 U. S. 89 (1965). Self-expression through the public ballot equally with one's peers is the essence of a democratic society. *Reynolds* v. *Sims*, 377 U. S. 533 (1964). A citizen without a vote is to a large extent one without a voice in decisions which may profoundly affect him and his family. Whatever his disagreement may be with the judgments of public officials, the citizen should never be given just cause to think that he was denied an equal right to elect them.

Yet the Court today upholds a statute which imposes substantial and unnecessary restrictions on this right, as well as on the closely related right to associate with the party of one's choice. See *Williams* v. *Rhodes*, 393 U. S. 23 (1968); *NAACP* v. *Alabama*, 357 U. S. 449

19:23–45; Vernon's Annotated Texas Statutes, Tit. 9, Art. 13.01a; Ohio Revised Code, § 3513.19.

California and Pennsylvania permit previously unaffiliated voters to declare an initial party preference up to the close of registration immediately preceding the primary. California Election Code, §§ 22, 203, 311–312 (registration closes in California 53 days before a primary); Purdon's Pennsylvania Statutes Annotated, Tit. 25, §§ 291 *et seq.* (registration closes in Pennsylvania 50 days before a primary).

Michigan permits any registered voter to participate in the primary of his choice. Michigan Compiled Laws Annotated, §§ 168.570, 168.575–168.576. See Petitioners' Brief, pp. 32–33.

[4] Tr. of Oral Arg., p. 34.

(1958); *United States* v. *Robel*, 389 U. S. 258 (1967). The Court justifies this holding by placing the responsibility upon petitioners for their failure to enroll, as required by New York law, eight months prior to the presidential primary. We are told that petitioners "clearly could have registered and enrolled in the party of their choice" before the cutoff date and been eligible to vote in the primary, but for undetermined reasons "chose not to," and that their disenfranchisement resulted from "their own failure to take timely steps to effect their enrollment." [5]

If the cutoff date were a less severe one, I could agree. Certainly, the State is justified in imposing a reasonable registration cutoff prior to any primary or general election, beyond which a citizen's failure to register may be presumed a negligent or wilful act forfeiting his right to vote in a particular election. But it is difficult to perceive any persuasive basis for a registration or party enrollment deadline eight to 11 months prior to election. Failure to comply with such an extreme deadline can hardly be used to justify denial of a fundamental constitutional right. Numerous prior decisions impose on us the obligation to protect the continuing availability of the franchise for all citizens, not to sanction its prolonged deferment or deprivation. *Ex parte Siebold*, 100 U. S. 37 (1879); *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Baker* v. *Carr*, 369 U. S. 189 (1962); *Gray* v. *Sanders*, 372 U. S. 368 (1963); *Wesberry* v. *Sanders*, 376 U. S. 1 (1964); *Reynolds* v. *Sims*, *supra*; *Carrington* v. *Rash*, *supra*; *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966); *Kramer* v. *Union Free School District*, *supra*; *Cipriano* v. *City*

[5] Court opinion, pp. 5, 6. See also p. 10 where the Court refers to § 186 as merely imposing "a legitimate time limitation on their [petitioners'] enrollment, which they chose to disregard."

of Houma, 395 U. S. 701 (1969); *Evans* v. *Cornman*, 398 U. S. 419 (1970); *City of Phoenix* v. *Kolodziejski*, 399 U. S. 204 (1970); *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Dunn* v. *Blumstein*, *supra*.

The majority excuses the challenged statute because it does not "absolutely" disenfranchise petitioners or impose any absolute ban on their freedom of association.[6] The State likewise contends this is "not a disenfranchising statute."[7] The Court apparently views this statute as a mere "time deadline" on petitioners' enrollment that disadvantages no identifiable class and that postpones through the next primary rather than denies alto-

---

[6] See the Court's opinion, at p. 5:

"Section 186 of New York's Election Law, however, is quite different. It did not absolutely disenfranchise the class to which the petitioners belong—newly registered voters who were eligible to enroll in a party before the previous general election. Rather, the statutes merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."

Similarly at p. 6:

"For the same reason, we reject the petitioners' argument that § 186 violated their First and Fourthteenth Amendment right of free association with the political party of their choice. Since they could have enrolled in a party in time to participate in the June 1972 primary, § 186 did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary."

And p. 10:

"New York did not prohibit the petitioners from voting in the 1972 primary election or from associating with the political party of their choice. It merely imposed a legitimate time limitation on their enrollment, which they chose to disregard."

In all these instances, the majority seeks to distinguish a "time limitation" from an absolute disenfranchisement of petitioners or an absolute ban on their associational rights.

[7] Tr. of Oral Arg., p. 35.

gether petitioners' voting and associational rights.[8] I cannot agree. Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial. And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote totally disenfranchises a class of persons who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation. Our decisions, moreover, have never required a permanent ban on the exercise of voting and associational rights before a constitutional breach is incurred. Rather, they have uniformly recognized that any serious burden or infringement on such "constitutionally protected activity" is sufficient to establish a constitutional violation. *Dunn* v. *Blumstein, supra*, at 343; *NAACP* v. *Button*, 371 U. S. 419, 438 (1963); *Reynolds* v. *Sims, supra*, at 561–562.

II

The majority does not identify the standard of scrutiny it applies to the New York statute. We are told only that the cutoff date is "not an arbitrary time limit unconnected to any important state goal";[9] that it is "tied to a particularized legitimate purpose and is in no sense invidious or arbitrary."[10] The Court does not explain why this formulation was chosen, what precedents support it, or how and in what contexts it is to be applied. Such nebulous promulgations are bound to leave the lower courts and state legislatures in doubt and confusion as to how we will approach future significant bur-

[8] Court opinion, p. 5 and n. 6 *supra*.

[9] Court opinion, p. 8.

[10] *Id.*, p. 9.

dens on the right to vote and to associate freely with the party of one's choice.

The Court's formulation, though the terminology is somewhat stronger, resembles the traditional equal protection "rational basis" test. One may agree that the challenged cutoff date is rationally related to the legitimate interest of New York in preventing party "raiding." But this Court's prior decisions simply do not permit such an approach. Rather, they recognize that:

> ". . . the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims, supra,* at 561–562.

See also *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886).

Voting in a party primary is as protected against state encroachment as voting in a general election. *Bullock* v. *Carter, supra; Terry* v. *Adams,* 345 U. S. 461 (1953); *United States* v. *Classic,* 313 U. S. 299 (1941). And the Court has said quite explicitly that "if a challenged statute grants the right to vote to some citizens and denies the franchise to others, 'the Court must determine whether the exclusions are *necessary* to promote a *compelling* state interest.'" *Dunn* v. *Blumstein, supra,* at 337 (1972), quoting *Kramer* v. *Union Free School District, supra,* at 627. See also *Cipriano* v. *City of Houma, supra,* at 704 (1969); *City of Phoenix* v. *Kolodziejski, supra,* at 205, 209 (1970). Likewise, the Court has asserted that "the right of individuals to associate for the advancement of political beliefs" is "among our most precious freedoms," *Williams* v. *Rhodes,* 393 U. S., *supra,* 30–31 (1968), and must be carefully protected from state encroachment. *NAACP* v. *Alabama, supra,* at 449

(1958); *Bates* v. *Little Rock*, 361 U. S. 516 (1960); *Gibson* v. *Florida Legislative Investigations Committee*, 372 U. S. 539 (1963).

The inquiry thus becomes whether the instant statute, burdening as it does fundamental constitutional rights, can withstand the strict judicial scrutiny called for by our prior cases. The asserted state interest in this case is the prevention of party "raiding," which consists of the movement or "cross-over" by members of one party into another's primary to "defeat a candidate who is adverse to the interests they care to advance." [11] The typical example is a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election. A State does have an interest in preventing such behavior, lest "the efficacy of the party system in the democratic process—its usefulness in providing a unity of divergent factions in an alliance for power—be seriously impaired." *Rosario* v. *Rockefeller*, — F. 2d — (CA2). The court below held flatly that the state interest in deterring "raiding" was a "compelling" one. *Id.*, at —.

The matter, however, is not so easily resolved. The importance or significance of any such interest cannot be determined in a vacuum, but rather in the context of the means advanced by the State to protect it and the constitutionally sensitive activity it operates to impede. The state interest here is hardly substantial enough to sustain the presumption, upon which the statute appears to be based, that most persons who change or declare party affiliation nearer than eight to 11 months to a party primary do so with intent to raid that primary. Any such presumption assumes a willingness to manipulate the system which is not likely to be widespread.

---

[11] Tr. of Oral Arg., p. 29.

Political parties in this country traditionally have been characterized by a fluidity and overlap of philosophy and membership. And citizens generally declare or alter party affiliation for reasons quite unconnected with any premeditated intention to disrupt or frustrate the plans of a party with which they are not in sympathy. Citizens customarily choose a party and vote in its primary simply because it presents candidates and issues more responsive to their immediate concerns and aspirations. Such candidates or issues often are not apparent eight to 11 months before a primary. That a citizen should be absolutely precluded so far in advance from voting in a party primary in response to a sympathetic candidate, a new or meaningful issue, or changing party philosophies in his State, runs contrary to the fundamental rights of personal choice and expression which voting in this country was designed to serve.

Whatever state interest exists for preventing crossovers from one party to another is appreciably lessened where, as in the case of petitioners, there has been no previous affiliation with any political party. The danger of voters in sympathy with one party "raiding" another party is insubstantial where the voter has made no prior party commitment at all. Certainly, the danger falls short of the overriding state interest needed to justify denying petitioners, so far in advance, the right to declare an *initial* party affiliation and vote in the party primary of their choice.

III

In *Dunn, supra*, at 343, the Court emphasized that the State, in pursuing its legitimate interest,

> "cannot choose means which unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision' *NAACP* v. *Button*, 371 U. S. 419, 438

> (1963); *United States* v. *Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro* v. *Thompson*, *supra*, 394 U. S., at 631. And if there are other, reasonable ways to achieve these goals with a lessser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960).

The Court states that placing the enrollment deadline before the preceding general election serves well the state interest in discouraging party "raiding."[12] This fails to address the critical question of whether that interest may be protected adequately by less severe measures. A foreshortening of the challenged period in this case would not leave the party structure of New York helpless and vulnerable to "raiding" activities. Other States, with varied and complex party systems, have maintained them successfully without the advanced enrollment deadline imposed by New York.

Partisan political activities do not constantly engage the attention of large numbers of Americans, especially as party labels and loyalties tend to be less persuasive than issues and the qualities of individual candidates. The crossover in registration from one party to another is most often impelled by motives quite unrelated to a desire to raid or distort a party's primary. To the extent that deliberate raiding occurs, it is usually the result of organized effort which depends for its success upon some relatively immediate concern or interest of the voters. This type of effort is more likely to occur as a primary date draws near. If New York were to adopt a more reasonable enrollment deadline, say 30 to 60 days, the period most vulnerable to raiding activity would be pro-

[12] Court opinion, p. 9.

tected. More importantly, a less drastic enrollment deadline than the eight or 11 months now imposed by New York would make the franchise and oportunities for legitimate party participation available to those who constitutionally have the right to exercise them.[18]

[18] Petitioners also suggest other "less drastic" means of protecting the State's interest: greater reliance on the summary disenrollment procedures of § 332 of the State's election law and loyalty oaths, restrictive party affiliation rules optional for those parties who wish them, limitation of the statute's operation to persons with pre-existing party affiliations, and criminal sanctions for fraudulent participation in the electoral process. Tr. of Oral Arg., pp. 13–21. I make no judgment either on the efficacy of these alternatives in protecting the State's interest or on their potential infringement of constitutionally protected rights. Their presence, however, points to the range and variety of other experimental techniques available for New York to consider.

[n.d.]

No. 71-1371 Rosario v. Rockefeller

PER CURIAM.

The State of New York provides in its Election Law for a closed primary system, in which only duly enrolled members of a political party may vote in that party's primary election. Section 186 of the Election Law further provides that after a registered voter enrolls in a political party, he must wait until after the next general election before he may vote in a primary election.[1] Petitioners are New York residents who registered to vote and enrolled in a political party in December 1971, one month after a general election. Consequently they are barred by the waiting period of Section 186 from voting in a political primary until after the November 1972 general election; in particular, they are barred from voting in the primary scheduled to take place on June 20, 1972, in which the political parties will select, inter alia, delegates to the national conventions that will in turn nominate candidates for President and Vice-President of the United States.[2]

Petitioners filed these complaints, pursuant to 42 U.S.C. § 1983, seeking a declaratory judgment that Section 186 violates federal constitutional requirements.[3] The District Court granted declaratory relief, ___ F.Supp. ___ (1972), but the Court of Appeals reversed, ___ F.2d ___ (1972).[4] Because we regard our recent decision in Dunn v. Blumstein, ___ U.S. ___ (1972) as controlling, we grant certiorari and reverse.

Dunn v. Blumstein was not the first case to hold that

a compelling state interest and . . . it does so in a manner calculated to impinge minimally in First and Fourteenth Amendment rights." ___ F.2d ___, ___ n.4. We cannot agree, however, that Section 186 satisfies that test.

In Dunn we sustained a challenge to a statute that prohibited otherwise eligible persons from voting until they had been residents of the State for one year and residents of the county for three months prior to the election. Recognizing the State's interest in confining the vote to bona fide residents, we held that interest could not justify a statute confining the vote to persons who had been residents for the prescribed periods. The vice of the statute was that it was not narrowly tailored: duration of residence was an impermissibly crude test of bona fide residence. Thus the statute denied recent arrivals the right to vote, even if they were bona fide residents, without any compelling justification for distinguishing them from other bona fide residents.

The New York statute at issue here suffers from a similar defect. New York argues that it has a valid interest in confining the right to vote in primary elections to bona fide members of the party in which they vote. The State claims the statute is designed to prevent a phenomenon it describes as "raiding", whereby voters whose political loyalty is to one party fraudulently designate themselves as members of another party, in order to influence the results of their adversary's primary. The Court of Appeals

in accordance with their bona fide party loyalties; accordingly, the statute puts the would-be raider "in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another." ___ F.2d. at ___.

We assume for purposes of this case that the State has a legitimate interest in restricting the primary vote to bona fide members of the party in which they vote. Moreover, we recognize that Section 186 may have some tendency to promote that interest. Nevertheless, it is clear that the waiting period of Section 186, like the durational residence requirement in Dunn, is not narrowly tailored to promote that objective.

This case does not present the question whether a State may impose such a waiting period on voters who change their allegiance from one party to another. Cf. Lippett v. Cipollone, ___ U.S. ___ (1972).5/ New York has not confined its restriction to that group, and petitioners do not fall in that class. The waiting period of Section 186 is triggered by first-time enrollment in a political party, and not by past membership in another party. It applies to petitioners and their class, who have never before registered to vote or enrolled in any political party, and it also applies to new residents of the State of New York, who may enroll in a political party in order to continue a party affiliation of many years' duration.6/ In such cases, the mere fact that party enrollment is recent casts no special doubt

We agree with the District Court's conclusion that Section 186 fails to satisfy constitutional requirements. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded with instructions to reinstate the judgment of the District Court.

1/ § 186. Opening of enrollment box and completion of enrollment. All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration, provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. . . .

Section 187 exempts certain classes of voters from the waiting period of Section 186. These exceptions include persons who have moved from one place to another within a single county, and persons who attained voting age after the last general election. Petitioners do not fall within any of the excepted classes.

2/ The individual petitioners had each attained voting age shortly before the last general election, and hence were eligible to register and enroll in a political party in time to permit them to vote in the June 1972 primary election. (Had they attained voting age after the general election, they would be eligible for late party enrollment pursuant to § 187, see note ___ supra.) Having failed to do so, whether through inadvertence, lack of interest in the essentially local 1971 election, or for other reasons, they sought to participate in the first Presidential primary and election for which they were eligible. We agree with the District Court that this sequence of events cannot be treated as a waiver of the right to vote, see ___ F.Supp. at ___.

3/ The cases originated in two complaints, which were consolidated by the district court. One of the complaints (that of petitioner Rosario) stated a cause of action on behalf of a class, as well as on behalf of the named plaintiffs, and the district judge treated the case as a class action. Petitioners originally sought injunctive as well as declaratory relief, but they abandoned their request for injunctive relief; accordingly the case was not required to be heard by a three-judge court under 28 U.S.C. § 2281. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 152-55 (1

4/ The Court of Appeals denied rehearing en banc, Judges Feinberg and Oakes dissenting.

5/ Lippett involved a state statute that imposed a waiting period on would-be candidates for office who changed their allegiance from one party to another. We summarily

the party enrollment of a voter may be challenged by any fellow party member and cancelled by a Justice of the State Supreme Court upon the determination of the Chairman of the County C Committee of the party in the county in which the challenged voter is enrolled that the voter is not in sympathy with the principles of the party. This provision has been successfully invoked on several occasions, see Matter of Zuckman v. Donohue, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup.Ct.), aff'd 274 A.D. 216, 80 N.Y.S.2d 698, aff'd 298 N.Y. 627, 81 N.E.2d 371, 86 N.Y.S.2d ___ (1948); Matter of Werbel v. Gernstein, 191 Misc. 274, 78 N.Y.S.2d 440 (Sup.Ct. 1948); Matter of Newkirk, 144 Misc. 765, 259 N.Y.S. 434 (Sup.Ct. 1931).

Welkmeir

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
			12/15/72				dissent	
join PS 2/20/73	~~join~~ join 2/7/73	join I7P 2/6/73	Circulated 1/4/73 3rd draft 3/8/73	join ~~PS~~ 1/10/73	join I7P 2/7/73	Majfl 1/17/73	circulated 4th draft 2/8/73	join PS 1/8/73
				Concur in result 2/15/73			6th Draft 3/6/73	
					No. 71-1371 Rosario v. Rockefeller			

Richmond Times Dispatch, March 28, 1973

An Unusual Foursome

For the first time since he went on the Supreme Court 15 months ago, Richmonder Lewis F. Powell Jr. has written an opinion in which he has been joined by the three staunch liberals on the court but by none of the other conservatives.

Powell and Justices Douglas, Brennan and Marshall dissented last week from a ruling upholding a New York law which requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. Under the law, the cut-off date for enrollment occurs about eight months before a presidential primary and 11 months before a nonpresidential primary.

Powell

The three other Nixon appointees — Burger, Blackmun and Rehnquist — and Stewart and White held that New York had a valid reason for requiring party enrollment prior to a general election in order to inhibit party "raiding." In "raiding," the court explained, "voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."

The majority quoted, approvingly, a lower court opinion which said that "few persons have the effrontery or the foresight to enroll as, say, Republicans so that they can vote in a primary some seven months hence, when they full well intend to vote Democratic in only a few weeks." On the other hand, after the general election, and close to the time of the primary, voters might be inclined to cross over and try to upset the primary of the party they really don't favor, according to the majority's opinion.

But Powell and the three liberals saw it differently.

"Deferment of a right, especially one as sensitive and essential as the exercise of the first duty of citizenship, can be tantamount to its denial," wrote Powell. "And any statute which imposes for eight or 11 months an absolute freeze on party enrollment and the consequent right to vote totally disenfranchises a class of persons who, for quite legitimate reasons, decide to register closer than eight months to the primary date and those who, for equally legitimate reasons, wish to choose or alter party affiliation."

Virginia does not have voter enrollment by parties, so the New York opinion has no direct application here, and we have no strong feelings as to the rightness or wrongness of the decision. But Powell did make one important point, and that is that many people switch parties because of the individual candidates involved, rather than party principles, and that candidates — and issues, too — "often are not apparent eight to 11 months before a primary."

The signficant fact about this case, at least as far as Virginia is concerned, is not the court's finding but, rather, the fact that conservative Powell lined up with the court's three all-out liberals. In his career as a Supreme Court justice, Powell obviously is not going to be doctrinaire; he is not going to have a knee-jerk conservative reaction to issues before the court. The evidence is that he is following the policy of attempting to decide issues solely on the basis of the law and the Constitution. And nothing more could be asked of any person occupying a judicial bench.