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I Pledge Allegiance to the Party: Reclaiming the Associational Rights of Independent Voters in Open Primaries

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I Pledge Allegiance to the Party: Reclaiming the Associational Rights of Independent Voters in Open Primaries

*C. Alan Carrillo**

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I. Introduction

In December 2015, the Republican Party of Virginia proposed, and the Virginia State Board of Elections approved, a “statement of affiliation”¹ for voters to sign in order to cast their ballots for the

1. See *Virginia State Board of Elections GOP Statement of Affiliation*,

Republican Party in the Commonwealth's primary election on March 1, 2016.² The Commonwealth of Virginia is an open-primary state, which means it does not require its voters to register by party in order to vote in a party's primary election.³ State law also allows "a political party to request that voters sign a pledge or statement of party affiliation before casting primary ballots."⁴ John Findlay, Executive Director of the Republican Party of Virginia, characterized his party's statement of affiliation—"My signature below indicates that I am a Republican"—as a "very simple nine word statement."⁵ But its purpose was undisputed: if a voter did not sign the statement, the voter would not be permitted to vote.⁶

Republican presidential candidate Donald J. Trump (Trump) opposed the statement of affiliation, arguing that it would alienate and discourage the participation of voters previously unaffiliated

REPUBLICAN PARTY OF VA. (Dec. 17, 2015) [hereinafter REPUBLICAN PARTY OF VA.], <http://virginia.gop/vagop-statement-of-affiliation/> "The Republican Party of Virginia's State Central Committee (SCC) has set a reasonable threshold to participate in the 2016 Republican Presidential Primary, signing your name to a very simple nine word statement that reads: 'My signature below indicates that I am a Republican.'" (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

2. See Alana Austin, *Oath Required to Vote in Va. Republican Presidential Primary*, NBC29 (Dec. 16, 2015), <http://www.nbc29.com/story/30770194/oath-required-to-vote-in-va-republican-presidential-primary> ("In the commonwealth voters do not register by a political party, but in order to take part in the March 1 Republican presidential primary voters will have to sign an oath saying they are a Republican before casting a ballot.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

3. See Bill Bartel & Patrick Wilson, *Virginia Voters Must Sign Statement Saying They're Republican*, VIRGINIAN-PILOT (Dec. 16, 2015), https://pilotonline.com/news/government/politics/virginia/virginia-voters-in-gop-primary-must-sign-statement-saying-they/article_4bea8ea7-1e97-56a8-b48f-db62c80300f0.html ("Virginia voters do not register by party, and voting in primaries is open to anyone. However, state law allows a political party to request that voters sign a pledge or statement of party affiliation before casting primary ballots.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

4. *Id.*

5. REPUBLICAN PARTY OF VA., *supra* note 1.

6. See *Parson v. Alcorn*, 157 F. Supp. 3d 479, 486 (E.D. Va. 2016) ("Virginia Commissioner of Elections Edgardo Cortés testified in this Court that agency personnel added a notice that '[a]ny voter refusing to sign the statement form cannot vote in this Republican Party nominating process' in order to keep the form consistent with earlier forms created by the SBE.").

with the Republican Party—voters he presumed would cast their ballots for his campaign.⁷ Three Trump supporters filed a lawsuit in the Eastern District of Virginia in January 2016,⁸ claiming violations of their constitutional rights.⁹ In that case, *Parson v. Alcorn*,¹⁰ the federal court denied the plaintiffs’ motion seeking to enjoin the Republican Party’s use of the statement of affiliation.¹¹ But the Republican Party of Virginia unilaterally removed the statement of affiliation from the ballot before the primary election.¹² Although no longer on the primary ballot, the

7. See Jenna Portnoy, *Trump’s Objections to Va. Voter Pledge are Stirring Division in State GOP*, WASH. POST (Dec. 31, 2015), https://www.washingtonpost.com/local/virginia-politics/trump-objections-to-va-voter-pledge-is-stirring-divisions-in-state-gop/2015/12/30/180c9ade-af08-11e5-b820-eea4d64be2a1_story.html?utm_term=.4e173652eed5 (“All was relatively quiet until Sunday when Trump launched a five-tweet screed against the Virginia party, saying it ‘is working hard to disallow independent, unaffiliated and new voters.’ He called the pledge a ‘suicidal move’ and referred to Republican losses in elections for statewide offices in Virginia.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

8. See Antonio Olivo, *Federal Judge Rules in Favor of Republican Loyalty Pledge in Virginia*, WASH. POST (Jan. 14, 2016), https://www.washingtonpost.com/local/virginia-politics/federal-judge-rules-in-favor-of-republican-loyalty-oath-in-virginia/2016/01/14/b3a1e1f6-badf-11e5-b682-4bb4dd403c7d_story.html (“The lawsuit, filed this month in the Eastern District of Virginia on behalf of three pastors who support Trump, stems from the state Republican Party’s decision in September to require voters to sign a ‘statement of intent’ before taking part in the primary.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

9. See generally Complaint at 12, *Parson v. Alcorn*, 157 F. Supp.3d 479 (E.D. Va. 2016) (No. 3:16cv013) (praying for relief “declare the loyalty oath violates the first and fourteenth amendments to the Constitution as well as section 2 of the voting rights act and state law”).

10. See *Parson v. Alcorn*, 157 F. Supp. 3d 479, 501 (E.D. Va. 2016) (holding that Virginia’s law allowing a political party to require a pledge in a presidential primary does not impose “‘excessively burdensome requirements’ on any class of voters”) (citations omitted).

11. See Olivo, *supra* note 8 (“The testimony ‘does not support the extraordinary remedy of a preliminary injunction’ against including the requirement on instructions for ballots issued on election day or absentee ballots mailed to registered voters outside the state, [U.S. District Judge M. Hannah] Lauck ruled.”); see also *Parson*, 157 F. Supp. 3d at 501 (denying the plaintiffs’ motion for preliminary injunction).

12. See Antonio Olivo & Laura Vozzella, *Virginia GOP Drops Plan for Loyalty Pledge, But Maybe Too Late for Some Voters*, WASH. POST (Jan. 16, 2016), https://www.washingtonpost.com/local/virginia-politics/virginia-gop-drops-plan-for-loyalty-pledge-but-maybe-too-late-for-primary/2016/01/30/2c65d7a8-c799-11e5-a4aa-f25866ba0dc6_story.html?utm_term=.83271c943c3a (detailing that

Republican Party's proposed pledge of loyalty revived old and sparked new questions about the existence, protection, and burdens of parties' and voters' associational rights in open primary elections, particularly when these constitutional rights seem to conflict.

United States constitutional jurisprudence affirms the freedom of association for political parties and voters while also prescribing its limits.¹³ But there remain unanswered questions regarding the constitutional protections of and burdens on associational rights of parties and voters in an open primary. At the center of this conflict is one mechanism by which political parties attempt to preserve the freedom of association while still procuring the benefits of the open primary: party loyalty pledges on open primary election ballots.

A party loyalty pledge in an open-primary system either protects a party's freedom of association in an overly accommodating primary system, or it violates unaffiliated voters' freedom of association in a primary system that maximizes their freedom to associate through their vote. Although some federal courts have concluded that a party loyalty pledge in an open primary is a constitutional means to protect a party's associational rights,¹⁴ this Note disagrees with this legal conclusion and jurisprudential trend. This Note instead concludes that a state violates independent voters' freedom of association when it permits or prescribes political parties to limit voter participation through party loyalty pledges in open primaries.

Part I provides a background on the types of primary elections in the United States—specifically open primaries—and illustrates the historic and modern use of party loyalty pledges in open primary elections, focusing on the Republican Party of Virginia's attempted use of its party loyalty pledge in the 2016

the Republican Party of Virginia “scrapped plans to use a party loyalty pledge in the March 1 GOP presidential primary” on January 30, 2016) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

13. See *Right of Association*, JUSTIA US L., <https://law.justia.com/constitution/us/amendment-01/10-right-of-association.html#fn-642> (last visited April 17, 2018) (“The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom Of course, the right is not absolute.”).

14. See generally *Parson*, 157 F. Supp. 3d at 479.

Commonwealth Primary Election. Part II overviews election law and the First Amendment, explaining the unique nature of political parties, the limitations and expansions of parties' associational rights, and the framework by which the Supreme Court attempts to resolve conflicts between parties and voters' associational rights. Part III argues that the *Anderson/Burdick* balancing test—the Supreme Court's foundational framework used to resolve constitutional controversies involving election law—was applied incorrectly in *Parson*, and it recommends a new approach to applying the test to strike down party loyalty pledges in open primaries as unconstitutional. This Note concludes that party loyalty pledges in open primaries constitute state action that impermissibly burdens the freedom of association of a protected class of independent voters and are a means not narrowly tailored to further any of a state's compelling interests.

II. Background

A. General Primer on Primaries

The United States Constitution assigns to state legislatures the responsibility of determining the “times, places and manner of holding elections” for federal offices.¹⁵ Each state legislature has the duty to administer its state's primary elections, including determining “when primary elections will be held, whose name can go on a primary ballot . . . and who is allowed to vote in a primary.”¹⁶ Although there are several means by which a state legislature can permit parties to nominate candidates for general elections Congress and the presidency,¹⁷ all states except for California, Louisiana, and Washington conduct partisan party

15. U.S. CONST. art. I, § 4.

16. Kristin Kanthak & Eric Loepp, *Political Parties and Primaries: The Tension Between Free Association and the Right to Vote*, in LAW AND ELECTION POLITICS: THE RULES OF THE GAME 192 (Matthew J. Streb ed., 2013).

17. See Jamie Gregorian, *How Primary Election Laws Adversely Affect the Associational Rights of Political Parties in the Commonwealth of Virginia and How to Fix Them*, 18 GEO. MASON U. CIV. RTS. L.J. 135, 142 (2007) (explaining that while “primaries and conventions are the best-known methods of nomination, there are other means of nominating candidates,” including firehouse primaries, caucuses, and drawing candidates' names from a hat).

primary elections.¹⁸ Each state has two types of party primary elections: congressional primaries and presidential primaries. For the sake of simplicity, this Note will refer to these collectively as “primary elections” or “primaries.”

There are five general types of primary elections: “open, closed, semi-open, semi-closed, and non-partisan.”¹⁹ If a primary is closed, voters that are members of a party may only vote for candidates of the party of which they are members; if voters are not registered with a party, they cannot participate in that party’s primary election.²⁰ A semi-closed primary, like a closed primary, does not allow for voters registered with one party to vote in another party’s primary.²¹ However, a semi-closed primary generally allows for individuals who are unregistered voters or registered independents to vote in the primary of the party of their choice.²² A nonpartisan primary features candidates that do not run on party affiliation; instead “the top two voter-getters, *regardless of party*, face each other in the general election.”²³ Only California, Louisiana, and Washington administer nonpartisan primary elections, and only Louisiana’s election process does not feature a general election if one candidate receives a majority of the primary election vote.²⁴

18. Kanthak & Loepp, *supra* note 16, at 192.

19. *Id.* at 192.

20. *See id.* at 195 (explaining that in “a closed primary state, a registered Democrat could not decide to vote in the Republican primary on Election Day. Instead, voters must change their party affiliation long before the day they wish to cast their ballots”).

21. *See id.* (“Other states have *semi-closed* primary systems in which some, but not all, voters can vote on Election Day. In those states, people who are registered as members of one party may not vote in the primary of any other party.”).

22. *See id.* (“Depending on the state, voters who are independents may participate in any one primary, or voters who are unregistered may register and vote in any one primary. After that . . . the voter is registered as a member of the party associated with the primary in which he or she voted.”).

23. *Id.* at 194.

24. *See id.* at 194–95 (“Note that the top-two primary used in California and Washington differs from the Louisiana nonpartisan primary because the top two vote-getters in California and Washington always go to a general election, regardless of whether one candidate receives a majority of the vote.”).

B. The Nature, Use, Benefits, and Risks of Open Primaries

The pure open, and the semi-open, primary are the two types of the open primary, which does not require voters to be members of the parties for which they vote.²⁵ A pure open primary permits voters to participate without disclosing their party affiliation until they have cast their ballot; a semi-open primary requires voters to declare their party affiliation when they request a ballot.²⁶ Overall, an open primary's defining feature is that "voters do not have to declare their party affiliation until Election Day,"²⁷ either by requesting a party's ballot or by casting a party's ballot.

Twenty-six states hold variations of open primaries for one or both of the two major political parties in presidential primaries; thirty states have variations of open primaries for one or both of the two major political parties in congressional primaries.²⁸ Of these, fifteen states conduct pure open primaries for one or both major parties.²⁹

Open primaries often present benefits to candidates. Because open primaries expand the pool of potential voters beyond registered party members, candidates at odds with blocs of voters in their parties or incumbents that do not wish to be held accountable by their parties in upcoming elections often favor open primaries.³⁰ For example, in 2016, Republican candidate for

25. See *id.* at 192 ("Primaries vary on how *open* or *closed* they are to voter participation. Also, some states have different rules for each party. There are five primary types: open, closed, semi-open, semi-closed, and nonpartisan.") (emphasis in original).

26. See *id.* at 193 ("There are two types of open primaries. In a *pure open* primary, voters may vote in secret, so that not even poll workers know in which primary they participated. In a *semi-open* primary, voters must declare their party affiliation at the time they vote.").

27. *Id.*

28. *State Primary Election Types*, NAT'L CONF. ST. LEGIS. (July 21, 2016), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

29. *Id.*

30. See Patrick M. McSweeney, *Open Primaries Hurt the Parties*, DAILY PRESS (June 24, 2001), http://articles.dailypress.com/2001-06-24/news/0106210533_1_primary-democratic-party-democratic-candidate ("Strange as it may seem, the politicians who make the laws favor this open system because it greatly reduces their accountability to the political party that originally nominated them.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

president Trump performed substantially better in open-primary states than he did in closed-primary states.³¹ Political commentators speculated that Trump's success in open primaries was likely the result of votes from independent voters, registered Democrats, and new voters—all made possible or more convenient because of the use of open primaries.³²

But open primaries pose risks to parties. Like the Republican Party of Virginia acknowledged when it introduced its statement of affiliation for the 2016 primary election, political parties in open-primary states are at risk of unaffiliated voters affecting—if not determining—the outcomes of their primary elections.³³ This practice of “raiding” open primaries is not mere conjecture.³⁴ Examples of successful raids abound—particularly in Virginia, as Patrick M. McSweeney (McSweeney), former chairman of the Republican Party of Virginia, has identified.³⁵

McSweeney says that Henry Howell (Howell) defeated Andy Miller in the 1977 Democratic primary because “thousands of Republicans voted for Howell in the primary, believing that Howell would be the less imposing candidate in the general election contest against Republican John Dalton, the eventual winner.”³⁶ Similar interference occurred in the 1989 Republican primary: although three candidates collected more than 400,000 votes, the margin of victory was fewer than 7,000 votes and more than 30,000 votes had been cast by registered Democrats.³⁷ In the 1996

31. See Eric Chemi & Michael Fahey, *Trump's Big Advantage: Open Primaries*, CNBC (Mar. 22, 2016), <https://www.cnbc.com/2016/03/22/trumps-big-advantage-open-primaries.html> (“Political commentators noticed something interesting early on about Donald Trump’s surprising sweep through the Republican primaries—the mogul seems to do better in states that let almost any voter help pick the party nominee, not just those registered to a party.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

32. See generally *id.*

33. See *id.* (explaining that the “open’ primary system has frequently provided an opportunity for members of one party to ‘raid’ the primary of an opposing party to assure the nomination of a candidate who would otherwise not have won”).

34. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (explaining that “raiding” is “a process in which dedicated members of one party formally switch to another party to alter the outcome of that party’s primary”).

35. McSweeney, *supra* note 30.

36. *Id.*

37. *Id.*

Republican primary, an estimated thousands of Democratic voters cast votes for Republican U.S. Senate candidate John Warner—handing him the nomination—but then voted for his Democratic opponent, Mark Warner, in the general election.³⁸ In 2000, Republican presidential candidate John McCain actively invited Democrats and independents to vote for him in Virginia’s Republican primary, which he won.³⁹

As long as open primaries exist, candidates will exercise such strategies to benefit from open primary elections and states will employ methods—such as party loyalty pledges—to mitigate the risks of open primary elections.

C. The Historic and Modern Use of Party Loyalty Pledges in Primary Elections

In open-primary systems, political parties often adopt measures to diminish the risk of raiding and internal division costing the party an ideal nominee and a general election victory.⁴⁰ Although their use is not widespread, party loyalty pledges can be a mechanism by which parties attempt to limit open primary participation to its members or unregistered voters who are willing to publicly affiliate with the party. They currently exist in five states that statutorily mandate open primary elections: Alabama, Arkansas, South Carolina, Texas, and Virginia (see Table below).

38. *Id.*

39. *Id.*

40. See Alex Isenstadt, *GOP Circulates Loyalty Pledge to Box Trump In*, POLITICO (Sept. 2, 2015), <http://www.politico.com/story/2015/09/republican-national-committee-2016-campaign-pledge-213283> (explaining that in the case of the 2016 presidential election, Trump possessed the influence and affluence to mount an independent bid that “could be enough to sink the eventual Republican nominee,” and that this was a consideration of the Republican National Committee in circulating the pledge to all candidates) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

| Table: States Permitting or Requiring Party Loyalty Pledges in Open Primary Elections | |
|--|---|
| <i>State</i> | <i>Text of Statute</i> |
| Alabama | <p>“At the option of a political party at the bottom of the ballot and after the name of the last candidate shall be printed the following: ‘By casting this ballot I do pledge myself to abide by the result of this primary election and to aid and support all the nominees thereof in the ensuing general election.’</p> <p>“Should any voter scratch out, deface, or in any way mutilate or change the pledge printed on the ballot, the voter shall not be considered or held to have repudiated or to have refused to take the pledge, but shall, conclusively, be presumed and held to have scratched out, defaced, or mutilated or changed the same for the sole purpose of identifying the ballot; and, accordingly, such ballot shall be marked ‘spoiled ballot’ and shall not be counted.”⁴¹</p> |
| Arkansas | <p>“Party in its discretion may elect to require loyalty pledge and its discretion may waive such requirement, subject only to timely challenge by candidate or person with such relationship with political party so as to confer standing to challenge party’s action or inaction.”⁴²</p> |
| South Carolina | <p>“The managers at each box shall require every voter to take the following additional oath and pledge: ‘I do solemnly swear or affirm that I am duly qualified to vote at this primary election and that I have not voted before at this primary election or in any other party’s primary election or officially participated in the nominating convention for any vacancy for which this primary is being held.’”⁴³</p> |

41. ALA. CODE § 17-13-8 (2018).

42. ARK. CODE ANN. § 7-7-301 (West 2017).

43. S.C. CODE ANN. § 7-13-1010 (2017).

| | |
|-----------------|---|
| Texas | “The following pledge shall be placed on the primary election ballot above the listing of candidates’ names: ‘I am a (<u>insert appropriate political party</u>) and understand that I am ineligible to vote or participate in another political party’s primary election or convention during this voting year.’” ⁴⁴ |
| Virginia | “If the party has determined that it will hold a presidential primary, each registered voter of the Commonwealth shall be given an opportunity to participate in the presidential primary of the political party, as defined in § 24.2-101, subject to requirements determined by the political party for participation in its presidential primary. The requirements may include, but shall not be limited to, the signing of a pledge by the voter of his intention to support the party’s candidate when offering to vote in the primary. The requirements applicable to a party’s primary shall be determined at least 90 days prior to the primary date and certified to, and approved by, the State Board.” ⁴⁵ |

Party loyalty pledges are not new. State courts have upheld challenges to the constitutionality of party loyalty pledges—and voter participation requirements akin to them—for over one hundred years.⁴⁶ Of the five statutory schemes permitting the use

44. TEX. ELEC. CODE ANN. § 172.086 (West 2017).

45. VA. CODE ANN. § 24.2-545(A) (2017).

46. See Robin Miller, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5TH 125, at § 3 (2004) (listing past cases from various states where the court has upheld the party loyalty pledges as constitutional). Miller writes:

The courts in the following cases held constitutional, under either the federal or the state constitution, a requirement that a voter, before voting in a party’s primary election, pledge loyalty to the party.

U.S.

Jones v. Alabama, 2001 WL 303533 (S.D. Ala. 2001) (Alabama law required primary voters to sign a poll list containing a pledge to support the party’s nominees)

Ark.

McClain v. Fish, 159 Ark. 199, 251 S.W. 686 (1923) (recognizing rule)

Cal.

Rebstock v. Superior Court of City and County of San Francisco, 146 Cal. 308, 80 P. 65 (1905) (a voter at a political party’s primary election must declare a bona fide present intention of supporting the nominees)

of pledges in open primaries that exist today, Alabama and Virginia's provisions have been legally challenged; both have survived the constitutional scrutiny of federal courts.⁴⁷

of the party at the next ensuing election)

La.

State *ex rel.* Labauve v. Michel, 121 La. 374, 46 So. 430 (1908) (promise to support party's nominee)

N.D.

State v. Flaherty, 23 N.D. 313, 136 N.W. 76 (1912) (recognizing rule)

N.J.

Hopper v. Stack, 69 N.J.L. 562, 56 A. 1 (N.J. Sup. Ct. 1903) (if challenged, a voter is required to make an affidavit stating that, at the last general election at which he voted, he voted for a majority of the candidates of the party with which he is proposing to act)

Neb.

State v. Drexel, 74 Neb. 776, 105 N.W. 174 (1905) (no person shall "be entitled to vote at such primary election until he shall have first stated to the judges of said primary election what political party he affiliates with, and whose candidates he supported at the last election, and whose candidates he intends to support at the next election")

Nev.

Riter v. Douglass, 32 Nev. 400, 109 P. 444 (1910) (voter must affirm voter's "bona fide present intention to support the nominees of such political party or organization")

Or.

Ladd v. Holmes, 40 Or. 167, 66 P. 714 (1901) (test is that the elector "voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election")

S.D.

Morrow v. Wipf, 22 S.D. 146, 115 N.W. 1121 (1908) (primary law required primary voter, on being challenged, to swear that he is in good faith a member of the party, and that he intends to support the principles thereof and the candidates nominated at the primary)

Wash.

State v. Nichols, 50 Wash. 508, 97 P. 728 (1908) (challenged primary election voter must make oath or affirmation that he intends to affiliate with the party whose ballot he demands at the ensuing election, and that he intends to support generally the candidates of that party).

Id.

47. See Jones v. Alabama, No. 00-0442-RV-L, 2001 U.S. Dist. LEXIS 3909, at *16 (S.D. Ala. Mar. 7, 2001) (finding the Alabama Democratic Party's party loyalty pledge to be no more than a permissible minimal burden on the First and Fourteenth Amendment rights of voters); see also Parson v. Alcorn, 157 F. Supp. 3d 479, 497 (E.D. Va. 2016) (finding that the Virginia Republican Party's "statement of affiliation" did not impose a severe burden on the rights of voters and advanced the party's constitutional rights).

The Virginia Republican Party's statement of affiliation was intended as a threshold requirement for voters to participate in the Virginia Republican presidential primary election.⁴⁸ The notice to the voter on the Republican Party's primary ballots explained:

Section 24.2-545 of the Code of Virginia allows the political party holding a primary to determine requirements for voting in the primary. The [Republican Party of Virginia] has determined that the following statement shall be a requirement of your participation. Any voter refusing to sign the statement form cannot vote in this Republican Party nominating process.⁴⁹

Virginia Commissioner of Elections Edgardo Cortés confirmed the intent of the statement's presence on the ballot: if a voter did not sign the statement, the voter would not be permitted to vote.⁵⁰

Supporters of the statement said the Republican Party designed the pledge to "prevent Democrats and wishy-washy Republicans from choosing the party's nominee."⁵¹ Opponents of the statement, including members of the Republican Party, said the party had "no place excluding voters from a taxpayer-funded process and should focus instead on broadening their base."⁵² To assuage critics, John Findlay argued the statement of affiliation was not "an 'oath' or 'pledge' in any way" and "not targeting any candidate, group of voters or an unreasonable barrier to voting."⁵³ Instead, Findlay said that the "purpose of the statement is to build our party and prevent Democrats from voting in the March 1st

48. Patrick Wilson & Bill Bartel, *Virginia Voters in GOP Primary Must Sign Statement Saying They're Republican*, VIRGINIAN-PILOT (Dec. 16, 2015), https://pilotonline.com/news/government/politics/virginia/article_4bea8ea7-1e97-56a8-b48f-db62c80300f0.html ("GOP spokesman David D'Onofrio said that because Virginia doesn't require party registration, 'this is a very simple and low-threshold statement to affirm that you mean to be voting in a Republican primary.'") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

49. *See Parson*, 157 F. Supp. 3d at 487 (including the proposed form of the defendants).

50. *See id.* at 486 ("Virginia Commissioner of Elections Edgardo Cortés testified in this Court that agency personnel added a notice that '[a]ny voter refusing to sign the statement form cannot vote in this Republican Party nominating process' in order to keep the form consistent with earlier forms created by the SBE.").

51. Portnoy, *supra* note 7.

52. *Id.*

53. REPUBLICAN PARTY OF VA., *supra* note 1.

Republican presidential primary.”⁵⁴ In addition to ensuring only self-identifying Republicans would participate in the party’s primary election, the party intended to construct a Republican voter list based on the names and contact information provided as affirmations of the statement of affiliation.⁵⁵ As explained above, even though the Eastern District of Virginia found the statement of affiliation to be constitutionally permissible to survive an injunction, the Republican Party voluntarily rescinded it.

III. Election Law and the Constitution

The Supreme Court affirms that the “freedom of association protected by the First and Fourteenth Amendments includes partisan political organization,”⁵⁶ going so far as to say the question of a political party’s freedom of association is “well settled.”⁵⁷ But is it well settled? This section explores current Supreme Court jurisprudence on political parties’ freedom of association through a four-part framework: first, the characterization of the nature and functions of political parties and their freedom of association; second, the limitations the state action doctrine presents for political parties’ freedom of association; third, the evolution and expansion of political parties’ freedom of association in notable Supreme Court cases; and fourth, the historic resolution of the conflict between the associational rights of political parties and independent voters.⁵⁸

54. Andrew Cain, *Trump’s Va. Campaign Threatens Legal Action Against State GOP*, RICHMOND TIMES-DISPATCH (Dec. 30, 2015), http://www.richmond.com/news/virginia/government-politics/article_b289d3fe-e438-5941-85a1-1cd3c6138b43.html (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

55. *See id.* (“Findlay also asserted: ‘The fact is the Democrats are terrified that our new statement will give us an opportunity to develop a large statewide voter list for future party building.’”).

56. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (holding that Connecticut’s closed primary statute interfered with a political party’s right to define its associational boundaries).

57. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (holding that a ban on primary endorsements by a political party violates the first and fourteenth amendments).

58. *See* Nathaniel Persily, *Toward A Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 764 (2001) (“In most cases dealing with the freedom of expressive association, the inquiry requires both characterizing the

A. The Unique Nature of Political Parties

Political parties are traditionally characterized as private organizations deserving of First Amendment protections against the State.⁵⁹ Professor Daniel H. Lowenstein (Professor Lowenstein), an expert in election law, reasons that if a political party is a private organization, “it follows that a party and its members, like other private organizations and their members, enjoy the First Amendment right of freedom of association.”⁶⁰ Because “the First Amendment is centrally concerned with protection of political speech and association, the constitutional right of freedom of association enjoyed by a political party is especially strong in comparison with the rights of nonpolitical groups.”⁶¹ Since a political party’s freedom of association is grounded in a constitutional right “it follows that any substantial infringement of this freedom by government is unconstitutional unless the infringement is the least restrictive means by which a compelling state interest can be served.”⁶²

But political parties are also unlike nearly all other private organizations.⁶³ Parties assume different forms dependent upon their different functions, and each form deserves a unique constitutional protection.⁶⁴ A party’s form is determined by its

organization that claims the right and explaining how the law will affect organizational membership so as to burden severely the organization’s expression.”).

59. See Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1745 (1993) (“The doctrinal argument against regulation of political parties is simply, and within the conventional First Amendment framework, nearly irresistible. Its starting point, and only sticking point, is the premise that a political party is a private organization.”).

60. *Id.*

61. *Id.* at 1745–46.

62. *Id.* at 1746.

63. See *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1296 (E.D. Cal. 1997) (“[T]he analogy between the political parties and the myriad of private political, charitable, recreational, educational or religious associations at the center of American life, is imperfect at best.”).

64. See Lowenstein, *supra* note 59, at 1760 (“[T]he things parties do are done by different groups of people, varying enormously in number and in their relations with one another. In short, there is no simple way to describe what a party is, and the term ‘party’ can be and is used with greatly disparate referents.”).

function—whether it is public, private, or a combination of the two.⁶⁵ A party’s function may be classified on a spectrum between how much a party—independent of the government—manages its affairs to influence the government, and how much a government—dependent on the authority of parties—implements and enforces laws to influence the parties.⁶⁶

Renowned political scientist and professor V.O. Key identifies three forms of the modern political party: “party-in-the-electorate,”⁶⁷ the “party-in-the-government,”⁶⁸ and the professional political group.⁶⁹ For example, a “reference to ‘the Republicans’ or ‘the Democrats’ may refer to loyalties, affiliations, or voting tendencies among the electorate; to partisan-based structures and activities of elected officials; or to hierarchical party administrative structures consisting of persons who are not elected officials.”⁷⁰ Ultimately, the key distinction between political parties and all purely private associations is that “political parties routinely, pervasively, and legitimately exercise their influence from *within* the government.”⁷¹

This inherent, important public function of political parties frustrates the application of conventional constitutional doctrinal

65. See generally *id.* at 1747–48 (discussing how past writers have classified a party or their activities as “public” or “private”).

66. See *id.* at 1756 (explaining that “it [is] reasonable to say that when the government ‘regulates’ the parties, to a very large extent the parties are regulating themselves,” and that it “may be argued that the parties are no different in this regard from other private sector groups or that if they are, the difference is merely one of degree”); see also *id.* at 1759–60 (describing that “a political party is not something occupies a particular space at a particular time or that can be discerned with the senses” and that “there is no simply way to describe *what* a party is, and the term ‘party’ can be and is used with greatly disparate referents”).

67. See V.O. KEY, JR., *POLITICS, PARTIES, & PRESSURE GROUPS* 164 (1964) (“Within the body of voters as a whole, groups are formed of persons who regard themselves as party members Party in this sense of the ‘party-in-the-electorate’ is an amorphous group, yet it has a social reality.”).

68. See *id.* (explaining that “[a]t times party denotes groups within the government,” namely government officials “which could be held accountable for the conduct of the government”).

69. See *id.* (referring to “the group of more or less professional political workers” who “do the work of the political organization” more or less “separate and apart from the party-in-the-electorate, but not necessarily independent of it”).

70. Lowenstein, *supra* note 59, at 1764.

71. *Id.* at 1758 (emphasis added).

analysis to First Amendment claims.⁷² Professor Lowenstein argues the public functions of parties render a conventional doctrinal framework “inadequate for properly analyzing the relationship between parties and the government.”⁷³ He takes the view that political parties are state actors, not independent private organizations.⁷⁴ In fact, he says, parties’ major interactions with the government “are not as objects of government actions. To the contrary, parties operate upon, and actually constitute, the government.”⁷⁵ For example, any state statute is enacted by politicians “who have been elected to office as Republicans or Democrats, who in most instances have organized their legislative houses as Republicans and Democrats, and whose activities and decisions occur in a formal and informal structure fundamentally influenced by the fact that they are Republicans and Democrats.”⁷⁶ In sum, the unique purpose, functions, and activities of political parties make them unlike any other private organization possessing associational rights—their actions may be subject to constitutional scrutiny.

B. Constitutional Limitations on the Associational Rights of Political Parties

The foundation of understanding the constitutional rights and limitations of political parties is the unique nature and public function of political parties—and the conclusion that they are state actors. This subpart will introduce the state action doctrine—through the Supreme Court’s jurisprudence in the White Primary Cases—and demonstrate how political parties’ administration of primary elections is state action subject to constitutional scrutiny.

72. See *id.* at 1758–59 (“Conventional constitutional doctrine, because of its preoccupation with the state’s output—its active operations on the private sector—has been unable to take into account the parties’ domination from within of the state and its policies, which is much the more important relationship between parties and the state.”).

73. *Id.* at 1756.

74. *Id.* at 1759.

75. *Id.* at 1756.

76. *Id.*

1. Introduction to State Action Doctrine: The White Primary Cases

State action doctrine fundamentally limits a political party's right to association.⁷⁷ As a private organization, a political party will not invoke a court's constitutional scrutiny of its methods of internal regulation unless its activities constitute state action.⁷⁸ In general, state action will only be found when: "(1) the actor is an agent of the government;" (2) the actor performs a function "traditionally exclusively reserved to the State;" or (3) the government "jointly participates" with the private actor."⁷⁹ A brief survey of Supreme Court case law applying the state action doctrine to constitutional questions in primary election controversies demonstrates this.

The White Primary Cases constitute the Supreme Court's seminal jurisprudence on whether primary elections can be state action.⁸⁰ In particular, the White Primary Cases demonstrate that primary elections or pre-election processes "may possess all three qualifications for state action and certainly would satisfy at least one of them."⁸¹ Thus, the White Primary Cases provide helpful factors to consider when deciding whether a political party's actions—including the enforcement of a party loyalty pledge—within an open-primary system constitute state action and thus ought to be subject to constitutional review.⁸² A brief overview of the White Primary Cases is required to evaluate parties' attempts to preserve and protect their freedom of association within open-primary systems.

77. See generally Persily, *supra* note 58, at 754–55.

78. See generally *id.*

79. *Id.* at 759.

80. Kanthak & Loepp, *supra* note 16, at 192.

81. Persily, *supra* note 58, at 760.

82. See *id.* at 755 ("The White Primary Cases have provided a template for characterizing primary elections as state action and for setting constitutional limits on parties' power to define the bounds of their membership.").

a. Nixon v. Herndon: A State's Administration of Primary Elections is State Action

*Nixon v. Herndon*⁸³ is the first of the White Primary Cases. The plaintiff, L.A. Nixon, was an African-American citizen of the United States and the state of Texas, and a resident of El Paso.⁸⁴ Although otherwise legally qualified to vote in the Democratic Primary election,⁸⁵ a Texas statute—Article 3093a⁸⁶—prohibited African-Americans from voting in the Texas Democratic Party primary elections.⁸⁷ In 1927, the Supreme Court of the United States struck down Article 3093a under the Fourteenth Amendment, reasoning: “States may do a good deal of classifying that it is difficult to believe rational, but there are limits.”⁸⁸ Because the Texas Democratic Party’s unconstitutional exclusion of African-Americans was statutorily imposed, it was unquestionably state action:

While that mandate was in force, the Negro was shut out from a share in primary elections, not in obedience to the will of the party speaking through the party organs, but by the command of the State itself, speaking by the voice of its chosen representatives. At the suit of this petitioner, the statute was adjudged void as an infringement of his rights and liberties under the Constitution of the United States.⁸⁹

Herndon stands for the principle that when literal state action regulating primary elections violates the constitutional rights of individual voters, the government’s action will be subject to

83. See *Nixon v. Herndon*, 273 U.S. 536, 541 (1927) (holding that Texas’ white primary statute violated the fourteenth amendment because the statute discriminated against African Americans because of color alone).

84. *Id.* at 539.

85. *Id.*

86. Tex. Rev. Civ. Stat. (1925) art. 3107, *repealed by* Acts 1985, 69th Leg., ch. 480 § 26(1) (1985). This law was designated as Article 3093a. See *Herndon*, 273 U.S. at 540 (“[T]he denial was based upon a Statute of Texas enacted in May, 1923, and designated Article 3093a.”).

87. See *Herndon*, 273 U.S. at 540 (describing Texas Article 3093a as legislating: “in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas”).

88. *Id.* at 541.

89. *Nixon v. Condon*, 286 U.S. 73, 81 (1932).

constitutional review. Government action of this type is the most express form of state action.

b. Nixon v. Condon: A Political Party's State-Delegated Administration of Primary Elections is State Action

Nixon v. Condon,⁹⁰ the second of the White Primary Cases, was decided six years after *Herndon*. In *Condon*, Nixon attempted to vote in another Texas Democratic Party primary election and was again denied a ballot.⁹¹ In response to the Court's decision in *Herndon*, the Texas legislature repealed Article 3093a but replaced it with a new statute granting each political party's State Executive Committee the authority and discretion to prescribe membership qualifications:

[E]very political party in this State through its State Executive Committee shall have the power to prescribe the qualifications of its own members and shall in its own way determine who shall be qualified to vote or otherwise participate in such political party; provided that no person shall ever be denied the right to participate in a primary in this State because of former political views or affiliations or because of membership or non-membership in organizations other than the political party.⁹²

Granted this newfound statutory authority, the State Executive Committee of the Democratic Party "adopted a resolution 'that all white democrats who are qualified under the constitution and laws of Texas . . . be allowed to participate in the primary elections.'"⁹³ Thus, when Nixon "presented himself at the polls and requested that he be furnished with a ballot" the judges of the election declined "on the ground that the petitioner was a Negro and that

90. See *Nixon v. Condon*, 286 U.S. 73, 89 (1932) (holding that the decisions of a party's state executive committee qualify as state action when the committee is exercising power granted to it by the state legislature).

91. See *id.* at 81 ("This is not the first time that [the petitioner] has found it necessary to invoke the jurisdiction of the federal courts in vindication of privileges secured to him by the Federal Constitution.").

92. *Id.* at 82.

93. *Id.*

by force of the resolution of the Executive Committee only white Democrats were allowed to be voters at the Democratic primary.”⁹⁴

Unlike the State’s independent, express statutory exclusion of African-American voters in *Herndon*, the scheme under review in *Condon* was the Texas Democratic Party’s exclusion of African-American voters under the authority granted to it by the State.⁹⁵ In reviewing the Texas Democratic Party’s resolution under state law, the Court distinguished *Condon* from *Herndon* by explaining that the test for finding state action “is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal.”⁹⁶ Instead, the “test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.”⁹⁷

Applying this test, the Court determined that the decisions made by State Executive Committee, under the statutory authority granted by the State of Texas, qualified as state action.⁹⁸ The Court held:

The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. They are then the governmental instruments whereby parties are organized and regulated to the end that government itself may be established or continued. What they do in that relation, they must do in submission to the mandates of equality and liberty that bind officials everywhere.⁹⁹

94. *Id.*

95. *See id.* at 85 (“Power so entrenched is statutory, not inherent. If the State had not conferred it, there would be hardly color of right to give a basis for its exercise.”).

96. *Id.* at 89.

97. *Id.*

98. *See Smith v. Allwright*, 321 U.S. 649, 658 (1944) (explaining that the *Condon* Court “reversed the dismissal of the suit for the reason that the Committee action was deemed to be state action and invalid as discriminatory under the Fourteenth Amendment”).

99. *Nixon v. Condon*, 286 U.S. 73, 88 (1932).

In short, the government cannot delegate the administration of state functions to a private organization and not be ultimately responsible for the organization's actions if those actions violate constitutional law.¹⁰⁰ The scheme struck down in *Condon* represents state action comprising a private actor acting on behalf of the government, and the government acting jointly with a private actor.

c. *Smith v. Allwright: A Political Party's Administration of
Primary Elections is State Action*

The Court's reasoning and holding in *Condon* were affirmed in 1944 in *Smith v. Allwright*,¹⁰¹ the third of the White Primary Cases. In contrast to the state-mandated racial discrimination in *Herndon* and state-permitted racial discrimination of *Condon*, *Smith* presented an altogether different question: whether a political party's independent discriminatory membership requirements constituted state action.¹⁰²

In *Allwright*, the petitioner—an African-American citizen of the United States and the State of Texas—was refused a ballot and a vote in the 1940 Texas Democratic Party primary election.¹⁰³ The state Democratic Party's refusal was predicated on its resolution,¹⁰⁴ adopted on May 24, 1932: "Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to

100. See *id.* ("The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power.").

101. See *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (holding that the Texas' Democratic Party's rule conferring membership, and therefore the right to vote in primary elections, on only white citizens was covered by the state action doctrine and therefore violated the Fifteenth Amendment).

102. See *id.* at 662 ("We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation.").

103. See *id.* at 650–51 (describing the cause of action that led to the granting of certiorari).

104. See *id.* at 657 ("It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.").

participate in its deliberations.”¹⁰⁵ The Democratic Party of Texas defended its resolution on the ground that it was a “voluntary organization with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election.”¹⁰⁶ Arguing it was an independent, voluntary political organization, the party claimed it was “free to select its own membership and limit to whites participation in the party primary” since primaries are “political party affairs, handled by party, not governmental, officers.”¹⁰⁷ Furthermore, the party claimed, the Fourteenth, Fifteenth, and Seventeenth Amendments were “applicable only to general elections where governmental officers are actually elected,” not to primary elections since “officers of government cannot be chosen at primaries.”¹⁰⁸

In response, the Court affirmed that a political party generally possesses the right to determine membership requirements as a necessary element of the freedom of association.¹⁰⁹ The State has the right to “conduct her elections and limit her electorate as she may deem wise” within the constraints imposed by the Constitution.¹¹⁰ But the Court reasoned that when party membership is a requirement to vote in a primary election, and when “primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election.”¹¹¹

This landmark characterization of primary elections extended the Court’s conclusion in *United States v. Classic*:¹¹² Section IV of

105. *Id.* at 656–57.

106. *Id.* at 657.

107. *Id.*

108. *Id.*

109. *See id.* at 664 (“The privilege of membership in a party may be . . . no concern of a State.”).

110. *See id.* (“Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government.”).

111. *Id.*

112. *See United States v. Classic*, 313 U.S. 299, 320 (1941) (holding that “a primary election . . . is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding

Article I of the Constitution “authorized Congress to regulate primary as well as general elections ‘where the primary is by law made an integral part of the election machinery.’”¹¹³ Because primary elections and general elections were considered state functions requiring constitutional protections, the Court affirmed the fundamental right to vote in primary elections: “It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution.”¹¹⁴

Allwright represents the instances when state action takes the form of a private actor performing a function traditionally exclusively reserved to the State.¹¹⁵ Because the Court construed primary elections as state functions requiring constitutional scrutiny, a political party’s operation of the State’s primary election could be characterized as state action.¹¹⁶ In other words, while “no state law directed such exclusion,” the Court “pointed out that many party activities were subject to considerable statutory control.”¹¹⁷

d. Terry v. Adams: A Private Organization’s Administration of Primary Elections is State Action

*Terry v. Adams*¹¹⁸ is the fourth and final of the White Primary Cases. The Jaybird Association—a private political organization—

it”).

113. *Smith v. Allwright*, 321 U.S. 649, 659–60 (1944) (quoting *Classic*, 313 U.S. at 318).

114. *Id.* at 661–62 (citations omitted).

115. *See id.* (describing how primary elections are operated by private actors even though elections generally are traditional state functions).

116. *See id.* at 660 (“[T]he recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party’s action the action of the State.”); *see also id.* at 663 (“The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.”).

117. *Terry v. Adams*, 345 U.S. 461, 462 (1953).

118. *See Terry v. Adams*, 345 U.S. 461, 468–70 (1953) (holding that a white only “Jaybird primary,” where candidates were pre-selected to run in the official

managed a Texas county's elections independent of the local government, and it excluded qualified African-American voters from participating in the county's elections.¹¹⁹ The Jaybird Association argued that because it managed elections outside of state regulation, its discriminatory acts were not state action and could not violate the Fifteenth Amendment.¹²⁰ The Court disagreed, holding that the scheme "produce[d] the equivalent of the prohibited election"¹²¹ and explained:

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. The use of the county-operated primary to ratify the result of the prohibited election merely compounds the offense. It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.¹²²

Although the Jaybird Association was not a political party under direct state regulation, it effectively took on state functions by being the sole manager of Fort Bend County's elections.¹²³ Thus, its actions constituted state action as it performed a function traditionally exclusively reserved to the State.

Democratic primary, had become an integral part of Texas' electoral process and therefore violated the Fifteenth Amendment).

119. *See id.* at 465 (discussing the Jaybird Association). The Court stated that:

The district court found that the Jaybird Association was a political organization or party; that the majority of white voters generally abide by the results of its primaries and support in the Democratic primaries the persons endorsed by the Jaybird primaries; and that the chief object of the Association has always been to deny Negroes any voice or part in the election of Fort Bend County officials.

Id.

120. *See id.* at 462–63 ("Jaybirds deny that their racial exclusions violate the Fifteenth Amendment. They contend that the Amendment applies only to elections or primaries held under state regulation, that their association is not regulated by the state at all, and that it is not a political party but a self-governing voluntary club.")

121. *Id.* at 469.

122. *Id.*

123. *See id.* ("The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.")

2. *Primary Elections, and a Political Party's Efforts to Administer Them, Are State Action*

The White Primary Cases—and current primary election laws and regulations—establish that “primaries may possess all three qualifications for state action and certainly would satisfy at least one of them.”¹²⁴ First, primary elections can constitute state action “regardless of whether party organizations themselves constitute state actors” because the elections are run “by the government to serve governmental interests.”¹²⁵ Second, primary elections can constitute state action because even “if the party organization, rather than the state, operates the primary, the function it performs—namely, the administration of an election—is one ‘traditionally exclusively reserved to the State.’”¹²⁶ Third, primary elections can constitute state action because “the extensive regulatory scheme for primary elections amounts to state endorsement, encouragement, and entanglement, and thus, state action.”¹²⁷

By holding that a party’s primary elections unequivocally constitute state action, the Court established that a party conducting primaries must “conform to constitutional requirements in its treatment” of voters, and the party doing so generally lacks the protection of the Bill of Rights against the State.¹²⁸ This characterization of primary elections—and a party’s actions to administer primary elections—as state action is a vital part of the consideration of the constitutionality of party loyalty pledges in open primary elections. After all: party loyalty pledges in open primaries are either a constitutional means for parties to

124. Persily, *supra* note 58, at 760.

125. *Id.*

126. *Id.* at 761.

127. *Id.* at 762.

128. Lowenstein, *supra* note 59, at 1748. Lowenstein further writes:

[T]he public/private distinction is generally perceived as governing not only whether an entity must conform to constitutional requirements in its treatment of others, but also whether the entity itself enjoys constitutional rights against the government. Thus, by declaring parties to be ‘public,’ the *White Primary Cases* not only prohibited them from depriving racial minorities of the right to vote but also seemed to deprive the parties of the protections of the Bill of Rights.

Id.

protect its right to association or they are an unconstitutional burden on voters' right to association.¹²⁹ This conflict will be further informed by the next subpart, which surveys the Court's evolutionary and expansive development of the associational rights of political parties.

3. The Evolution and Expansion of the Associational Rights of Political Parties

A political party “has a right to ‘identify the people who constitute the association.’”¹³⁰ A political party's members have the right to “determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success” because such a determination is “undeniably central to the exercise of the right of association.”¹³¹ And in no area is the political party's right to exclude more important than in the process of selecting its nominee.¹³² When a party's members' associational rights conflict with the associational rights of non-member voters, the Supreme Court has historically sided with the interests of the party's members over the rights of non-member voters.¹³³ The Supreme Court has steadily refined and reaffirmed this core tenant of First Amendment jurisprudence through several landmark cases in the last half-century.

129. See *Smith v. Allwright*, 321 U.S. 649, 653 n.6 (1944) (highlighting that the loyalty pledge appears to be a morally rather than a legally enforceable pledge).

130. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (quoting *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 122 (1981)).

131. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

132. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (1986) (“That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.”).

133. See generally *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976) (rejecting a claim that Connecticut's closed-primary system is unconstitutional), *summarily aff'd*, 429 U.S. 989 (1976).

a. Nader v. Schaffer: The Constitutionality of Closed Primaries

In 1976, the Supreme Court summarily affirmed the Connecticut District Court's decision in *Nader v. Schaffer*.¹³⁴ The case featured a group of unregistered voters that refused to register as members of a political party but, contrary to the provisions of state law, still desired to participate in Connecticut's primary election.¹³⁵ The group's complaint against the defendant Secretary of State asserted three causes of action, one of which notably alleged:

[C]ompelling them either to enroll in a political party or forego a right to vote in a primary election impermissibly forces plaintiffs to choose between a right to vote, on the one hand, and the right freely to associate for the advancement of political ideas, on the other; the latter includes the right to associate with a particular candidate regardless of the candidate's party affiliation.¹³⁶

The plaintiffs furthered two arguments: first, that "participation in a primary election is an exercise of the constitutionally protected right to vote and of the constitutionally protected right to associate with others in support of a candidate";¹³⁷ second, that in addition to the right to associate "there is a constitutionally protected correlative right not to associate, and to be free from coerced associations."¹³⁸

The district court held that "in order to protect party members from 'intrusion by those with adverse political principles,' and to preserve the integrity of the electoral process, a state may legitimately condition one's participation in a party's *nominating*

134. See *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976) (holding that the Connecticut election laws governing the primaries are not in violation of the Constitution of the United States, that they provide for legitimate goals through constitutionally permissible means, and that there is no need or occasion for the judicial relief requested by the plaintiffs).

135. See *id.* at 840 ("Connecticut Gen. Stat. § 9-431 provides in pertinent part: '*Eligibility to vote at primary.* No person shall be permitted to vote at a primary of a party unless he is on the last completed enrolment list of such party in the municipality or voting district").

136. *Id.*

137. *Id.* at 842.

138. *Id.*

process on some showing of loyalty to that party”¹³⁹ In support of this holding, the court affirmed the nature of a political party as a “voluntary association, instituted for political purposes, with the goal of effectuating the will of its members.”¹⁴⁰ Because of a party’s nature and purpose, the “constitutionally protected associational rights of its members are vitally essential to the candidate selection process,”¹⁴¹ deserving “affirmative protection” from the courts.¹⁴² The court admitted that an “attempt to interfere with a party’s ability so to maintain itself is simultaneously an interference with the associational rights of its members.”¹⁴³ In this conflict of constitutional rights between party members and non-members, the “rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process.”¹⁴⁴

The plaintiffs argued the statute constituted state action and infringed on fundamental liberties, and that the court should apply a heightened level of scrutiny of review.¹⁴⁵ The Connecticut District Court disagreed, ultimately balancing the association rights of party members with the association and voting rights of non-members: “Not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.”¹⁴⁶ More specifically, a “state statute or policy must cause more than a minimal infringement of First Amendment rights before a state is called upon to provide a ‘compelling interest’ justification.”¹⁴⁷ In this case, the court did not identify more than minimal infringement, explaining that “enrollment in Connecticut imposes absolutely no affirmative party obligations on the voter,

139. *Id.* at 847.

140. *Id.* at 844.

141. *Id.*

142. *Id.* at 845.

143. *Id.*

144. *Id.*

145. *See id.* at 844 (citing *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)) (“The State, plaintiffs assert, may not force them to comply with § 9-431 unless the State establishes that it ‘serves a compelling state interest by the least drastic means available.’”).

146. *Id.* at 848 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

147. *Id.* at 848–49.

in terms of time or money, and it does not even obligate him to vote for the party's positions or candidates or to vote at all."¹⁴⁸ This lack of "coerced orthodoxy imposed by government officials"¹⁴⁹ caused the court to side with the party members' freedom of association to exclude unwanted participants from their primary election.¹⁵⁰

Nader represents the Supreme Court's affirmation of the constitutionality of a closed primary—the primary election scheme in which only members of a party may legally vote for candidates of their respective party.¹⁵¹ In sum, a political party's associational rights permit the categorical exclusion of non-members from primary election participation so long as the barriers to and obligations of party membership only minimally infringe the voter's freedom of association with the party.

*b. Democratic Party of U.S. v. Wisconsin: Parties' Rules Prevail
Against a State's Primary Election Scheme*

In 1981, the Supreme Court considered whether the State of Wisconsin could insist that its delegates to the Democratic National Convention be seated, even though the delegates were chosen through an open primary.¹⁵² The national Democratic Party's rules, which prescribed that the Democratic National Convention delegates be chosen through procedures in which only Democrats could participate,¹⁵³ directly conflicted with Wisconsin's open-primary process, which allowed "non-Democrats—including

148. *Id.* at 843.

149. *Id.* at 844.

150. *See id.* (distinguishing a fact from the cases plaintiffs cite to support their primary argument, from a fact in the current case, and noting the materiality of that fact to present freedom of association inquiry).

151. *See id.* at 850 (finding constitutional the statute that stated voters were not eligible to vote in a primary unless the voters were on the last completed enrollment list of the party in the municipality or the voting district).

152. *See Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 109 (1981) ("The question on this appeal is whether Wisconsin may successfully insist that its delegates to the Convention be seated, even though those delegates are chosen through a process that includes a binding state preference primary election in which voters do not declare their party affiliation.").

153. *See id.* ("The Charter of the appellant Democratic Party of the United States . . . provides that delegates to its National Convention shall be chosen through procedures in which only Democrats can participate.").

members of other parties and independents—to vote in the Democratic primary without regard to party affiliation and without requiring a public declaration of party preference.”¹⁵⁴ The national Democratic Party did not challenge Wisconsin’s open-primary process, conceding the State’s interests for conducting open primary elections.¹⁵⁵ Rather, the party challenged Wisconsin’s requirement that the party be bound by the results of the open primary election.¹⁵⁶

The Court clarified the issue on appeal by explaining the question presented was not “whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats.”¹⁵⁷ Instead the Court said the question was whether “once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules.”¹⁵⁸ Although the Court readily admitted that “[n]either the right to associate nor the right to participate in political activities is

154. *Id.* at 110–11.

155. *See id.* at 124–25 (discussing whether the State has compelling interests that justify the imposition of its will upon the appellants). The Court writes:

The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all those interests go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates.

Id.

156. *See id.* at 121 (discussing whether the State has compelling interests that justify the “open” feature of the state primary election law). The Court continues:

For the rules of the National Party do not challenge the authority of a State to conduct an open primary, so long as it is not binding on the National Party Convention. The issue is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party.

Id.

157. *Id.* at 120.

158. *Id.*

absolute,”¹⁵⁹ the Court explained that this right “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”¹⁶⁰ Ultimately, the Court concluded the National Party’s interest to preserve its freedom of association was not in conflict with the State’s interest “in the manner in which its elections are conducted.”¹⁶¹

The Court held that “a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party’s choice among the various ways of determining the makeup of a State’s delegation to the party’s national convention is protected by the Constitution.”¹⁶² *Democratic Party of United States v. Wisconsin*¹⁶³ does not hold that the open-primary process is unconstitutional; to the contrary, it reaffirms the State’s interest in conducting open primary elections while ruling that the party is not required to be bound by the State’s primary results if such a requirement violates the party’s rules.¹⁶⁴

c. *Tashjian v. Republican Party of Connecticut: Parties’ Rules Prevail Against a State’s Primary Election Type*

In 1984, the Republican Party of the State of Connecticut adopted a rule permitting “independent voters—registered voters not affiliated with any political party—to vote in Republican primaries for federal and statewide offices.”¹⁶⁵ The State’s election laws established a closed-primary system, and the

159. *Id.* at 124 (citing *CSC v. Letter Carriers*, 413 U.S. 548, 567 (1973)).

160. *Id.* at 122.

161. *Id.* at 126.

162. *Id.* at 123–24.

163. *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107, 125–26 (1981) (holding that the Wisconsin laws unconstitutionally infringed on the Democrats’ freedom of association, and Wisconsin did not show a compelling state interest in such infringement).

164. *See id.* at 126 (“The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules.”).

165. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210 (1986).

Democratic-controlled state legislature defeated Republican lawmakers' attempts to amend the state statute to allow for independents to vote in primaries when permitted by party rules.¹⁶⁶ In *Tashjian v. Republican Party of Connecticut*,¹⁶⁷ the Court granted certiorari to consider whether the State's enforcement of the closed-primary law, which contradicted the rules of the Republican Party, burdened the Republican Party's right to freedom of association.

The Court compared the conflicting rights and interests between the State of Connecticut and the state Republican Party.¹⁶⁸ Although the Court conceded the State's constitutional authority to administer elections, it said, "[T]his authority does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens."¹⁶⁹ More specifically, the "power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as the right to vote . . . or, as here, the freedom of political association."¹⁷⁰ The Court continued its tradition of reaffirming the freedom of association possessed by partisan political organizations.¹⁷¹ Citing *Wisconsin*, the Court recognized that the freedom of association includes the protection of a party's interest of broadening its base of public participation in and support for its activities.¹⁷² Applying the strict

166. See *id.* at 212–13 ("The proposed legislation was defeated, substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party").

167. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (holding that Connecticut's closed primary statute interfered with a political party's right to define its associational boundaries).

168. See *id.* at 214–25 (balancing appellees' interest in freedom to engage in association for the advancement of beliefs and ideas against the state's interest in ensuring the primary system is administrable in preventing raiding, avoiding voter confusion, and protecting the responsibility of party government).

169. *Id.* at 217.

170. *Id.* (citation omitted).

171. See *id.* at 214 (citing *Elrod v. Burns*, 427 U.S. 347, 357 (1976); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)) ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.").

172. See *id.* (explaining freedom of association). The Court explains:

The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise

scrutiny standard of review, the Court did not find any of the interests proffered by the State to be compelling or the means of preserving them—the closed primary—to be narrowly tailored.¹⁷³

The Court held “that the State’s enforcement, under these circumstances, of its closed-primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute, as applied to the Party in this case, is unconstitutional.”¹⁷⁴ *Tashjian* does not represent the Court’s repudiation of the closed primary but its disapproval of the State’s administration of a more closed primary election despite a state party’s preference for a more open primary election. Once again, the party’s right to associate prevails against the State’s competing interests.¹⁷⁵

d. California Democratic Party v. Jones: The State Cannot Force a Party to Associate with Non-Members

In *California Democratic Party v. Jones*,¹⁷⁶ the Supreme Court reviewed California’s Proposition 198, which in 1996 converted California’s closed primary to the blanket primary.¹⁷⁷ The Court reasoned that although the State has a “major role to play in structuring and monitoring the election process,” elections are not “wholly public affairs that States may regulate freely.”¹⁷⁸ In contrast to this proposition, Justice Scalia, writing for the

of the right of association. As we have said, the freedom to join together in furtherance of common political beliefs “necessarily presupposes the freedom to identify the people who constitute the association.”

Id.

173. *See id.* at 217–25 (reviewing and rejecting each of the State’s compelling interests).

174. *Id.* at 225.

175. *See id.* at 229 (“We conclude that § 9–431 impermissibly burdens the rights of the Party and its members protected by the First and Fourteenth Amendments.”).

176. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 589–90 (2000) (holding that California’s blanket primary violated First Amendment rights of the political parties).

177. *See id.* at 585–86 (explaining the changes California Proposition 198 made to the primary system).

178. *Id.* at 572–73.

majority, emphasized that in “no area is the political association’s right to exclude more important than in the process of selecting its nominee.”¹⁷⁹ The Court referenced its precedent, including *Tashjian* and *Wisconsin*, and concluded: “California’s blanket primary violates the principles set forth in these cases.”¹⁸⁰ More specifically, the Court said that “Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.”¹⁸¹

The Court invalidated California’s blanket primary, holding that the State’s proffered interests were not compelling, and, even if they were, a blanket primary was not narrowly tailored to achieve those interests.¹⁸² *California Democratic Party v. Jones* represents the Court’s affirmation of the associational rights of political parties, particularly when they come into conflict with a state’s election regulations.¹⁸³ Essentially, a state’s primary election scheme cannot force a party to associate with non-members.¹⁸⁴

179. *Id.* at 575.

180. *Id.* at 577.

181. *Id.*

182. *See id.* at 585 (“[W]e do not think that the State’s interest in assuring the privacy of this piece of information in all cases can conceivably be considered a “compelling” one . . . [E]ven if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them.”).

183. *See id.* at 586 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986)) (explaining how California hindered party members’ constitutional right to select their political party members). The Court states:

Respondents’ legitimate state interests and petitioners’ First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs. And it has done this at the “crucial juncture” at which party members traditionally find their collective voice and select their spokesman.

Id.

184. *See id.* (discussing how the California law forced political parties to associate with those who do not share their belief).

4. *The Resolution of the Conflict Between a Party and a Voter's Associational Rights*

The Supreme Court's decisions in *Anderson v. Celebrezze*¹⁸⁵ and *Burdick v. Takushi*¹⁸⁶ created the Court's definitive test for resolving constitutional challenges to a state's election laws.¹⁸⁷ The Court recognized that the fundamental rights of individuals to vote in elections and associate with political parties inevitably conflict with a state's legitimate interest in regulating elections.¹⁸⁸ But the Court also admitted the impossibility applying a "litmus paper test" that could automatically resolve every constitutional challenge to a state's election laws.¹⁸⁹ So the Court articulated and applied "a more flexible standard" that seeks to simultaneously affirm the power of states "to regulate their own elections" while recognizing that election laws "will invariably impose some burden upon individual voters."¹⁹⁰ Under this framework, a court hearing claims against a state's election laws must:

[F]irst consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

185. See *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (holding that the burdens Ohio placed on the "voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline").

186. See *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992) (holding that "Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters").

187. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring) ("To evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process—we use the approach set out in *Burdick* . . .").

188. See *Anderson*, 460 U.S. at 788 ("Each provision of [the state's election] schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.").

189. See *id.* at 789 (citations omitted) ("Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmuspaper test' that will separate valid from invalid restrictions. Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation.").

190. *Takushi*, 504 U.S. at 433–34.

Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.¹⁹¹

The *Anderson/Burdick* balancing test functions as a standard of review from which the Court may apply varying levels of scrutiny depending on the burden imposed by an election regulation and the interests allegedly pursued by the State.¹⁹² When First or Fourteenth Amendment rights of voters are burdened by severe restrictions, the Court applies a heightened standard of review resembling strict scrutiny, which requires the challenged regulation to be “narrowly drawn to advance a state interest of compelling importance.”¹⁹³ In contrast, when a state's election law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” the Court applies a form of rational basis review, which means “‘the State's important regulatory interests are generally sufficient to justify’ these restrictions.”¹⁹⁴

The Supreme Court has applied the *Anderson/Burdick* analysis in resolving myriad election law disputes, including, but not limited to, striking down filing deadlines for independent candidates¹⁹⁵ and a closed-primary system contrary to the rules of

191. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

192. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”).

193. *See id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

194. *See id.* (quoting *Anderson*, 460 U.S. at 788).

195. *See Anderson*, 460 U.S. at 805–06 (using the first formulation of the *Anderson/Burdick* test to “conclude that Ohio's March filing deadline for independent candidates for the office of President of the United States cannot be justified by the State's asserted interest in protecting political stability”).

a political party,¹⁹⁶ while upholding write-in vote bans,¹⁹⁷ fusion candidates prohibitions,¹⁹⁸ and voter photo identification requirements.¹⁹⁹ Although the Supreme Court has yet to consider a constitutional challenge to a state's law permitting party loyalty pledges in an open primary, lower courts have applied the *Anderson/Burdick* balancing test in upholding these types of pledges as constitutional.²⁰⁰

This Note argues that, although the *Anderson/Burdick* test is the appropriate means by which to evaluate the constitutionality of a party loyalty pledge in an open primary election, lower courts—notably the U.S. District Court for the Eastern District of Virginia in *Parson*—have misapplied the *Anderson/Burdick* test in finding these party loyalty pledges to be constitutional. This Note argues that an application of the test in accordance with the analysis modeled by and standards established in *Anderson* would likely—and ought to—render the opposite result.

196. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (using the *Anderson* test to “conclude that the State’s enforcement . . . of its closed primary system burdens the First Amendment rights of the Party. The interests which the appellant adduces in support of the statute are insubstantial, and accordingly the statute . . . is unconstitutional”).

197. See *Burdick*, 504 U.S. at 441 (applying the *Anderson/Burdick* test to “conclude that when a State’s ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourth Amendment rights—as do Hawaii’s election laws—a prohibition on write-in voting will be presumptively valid . . .”).

198. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997) (exercising the *Anderson/Burdick* test to evaluate Minnesota’s law prohibiting a candidate from appearing on the ballot for more than one party and concluding that “such a prohibition does not violate the First and Fourteenth Amendments to the United States Constitution”).

199. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (employing the *Anderson/Burdick* test to conclude that the “state interests identified as justifications for [Indiana’s voter photo identification law] are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute”).

200. See generally *Jones v. Alabama*, No. 00-0442, 2001 U.S. Dist. LEXIS 3909 (S.D. Ala. Mar. 7, 2001) (dismissing plaintiff’s equal protection clause claim because plaintiff did not show that there was a fundamental right to vote in a primary encompassed in the fundamental right to vote in an election); see generally *Parson v. Alcorn*, 157 F. Supp. 3d 479 (E.D. Va. 2016) (denying plaintiffs’ Motion for Preliminary Injunction for a Virginia primary).

IV. Argument

A. Independent Voters in Open Primaries Are a Protected Class of Voters

In *Parson*, the Eastern District of Virginia invoked the *Anderson/Burdick* framework to analyze the plaintiffs' First and Fourteenth Amendment challenges to Virginia's statutory provision allowing parties to use loyalty pledges in the Commonwealth's open primary elections, saying the test "applies to all of Plaintiffs' constitutional claims."²⁰¹ The court divided its analysis into three parts: First, the burden on the plaintiffs; second, the State's interests; third, the balancing of the two aforementioned elements.²⁰²

However, within the *Anderson/Burdick* framework, it is imperative for a court to first identify who is burdened by a state's regulations before considering the nature of the burdens imposed.²⁰³ The Supreme Court in *Anderson* began its analysis by identifying the class of voters whose fundamental rights were burdened by the State's election regulations;²⁰⁴ in that case, it was "an identifiable segment of Ohio's independent-minded voters."²⁰⁵ In *Parson*, the District Court inferred that the plaintiffs' alleged an equal protection claim on behalf of African-American voters but discounted the claim as unsubstantiated at worst or merely proof of an unintended discriminatory impact at best.²⁰⁶ What the plaintiffs in *Anderson* succeeded in demonstrating—and what the plaintiffs in *Parson* failed to argue—is the existence of another

201. *Parson*, 157 F. Supp. 3d at 492 n.20.

202. *Id.* at 493–97.

203. See *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) ("It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest [of] the State as justifications for the burden imposed by its rule.").

204. See *id.* at 792 (discussing the burden the March filing deadline has on independents who decide to run after the deadline, independents who decide to run before the deadline, and independent voters).

205. *Id.*

206. See *Parson v. Alcorn*, 157 F. Supp. 3d 479, 491 n.19 (E.D. Va. 2016) ("Notwithstanding the speculative nature of this claim, the Supreme Court has repeatedly held that proof of a discriminatory impact is not sufficient by itself to prove an equal protection violation.").

identifiable class of voters possessing the fundamental rights to vote and associate: “independent-minded voters.”²⁰⁷ Although unidentified and unconsidered in *Parson*, this segment of voters is particularly and unreasonably targeted by party loyalty pledges in open primary elections, which are in fact designed to accommodate the freedom of association of independent and unregistered voters.²⁰⁸

B. Party Loyalty Pledges in Open Primaries Burden Independent Voters’ Fundamental Liberties

In accordance with the *Anderson/Burdick* framework, the *Parson* court first considered “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” that the plaintiffs sought to vindicate.²⁰⁹ The court correctly identified the right to vote and the freedom to associate as fundamental liberties protected by the First and Fourteenth Amendments.²¹⁰ The court gave essentially two reasons why the plaintiffs’ fundamental liberties were not severely burdened: First, the court indicated that the voter’s right to vote and associate with a political party in a primary election may not be as fundamental or absolute as voting for or associating with a political party in a general election;²¹¹ second, the court categorized the plaintiffs’ three alleged burdens as speculative.²¹²

207. *Anderson*, 460 U.S. at 790.

208. *See id.* (discussing the First Amendment rights of independent voters).

209. *Parson*, 157 F. Supp. 3d at 493 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

210. *See id.* (quoting *Reynolds v. Sims*, 377 U.S. 533 (1964)) (“A voter’s right to vote ‘is a fundamental matter in a free and democratic society.’”); *see also id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973)) (“The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom [of the freedom to associate].”).

211. *See id.* at 493 n.22 (“That said, the Supreme Court seems to question whether the right to vote in a primary is *as* fundamental as exercising that right in a general election.”); *see also id.* at 493 (“The Supreme Court has neither articulated, nor repudiated, a voter’s right *not* to associate with a political party. However the Supreme Court has expressed that voters’ rights not to associate with a party cannot trump, or even equal, a political party’s right not to associate with some voters . . .”).

212. *See id.* at 494–95 (indicating that the lack of sufficient evidence to prove

The court concluded the latter for two primary reasons: First, the court viewed the claims as speculative due to the plaintiffs' failure to demonstrate substantial evidence in support of their claims;²¹³ second, the court deemed the Republican Party's loyalty pledge to be legally unenforceable, citing *Ray v. Blair*²¹⁴ and *Jones v. Alabama*,²¹⁵ and explaining that a "private, unenforceable pledge does not pose a severe burden."²¹⁶ The court admitted that the plaintiffs' claims of burden did not necessarily fail, but that they lacked support particularly needed in a motion for preliminary injunction.²¹⁷ The court's conclusions of the sufficiency of the evidence and efficacy of the pledge are likely accurate considering this particular case's claims and facts. But the plaintiffs failed to argue, and the court neglected to analyze, a severe burden present in this case and originally articulated in *Anderson* on behalf its "identifiable segment of Ohio's independent-minded voters."²¹⁸ It is a burden that, if identified, would likely invalidate party loyalty pledges imposed in open primary elections.

In *Anderson*, the Court affirmed that the rights at issue in that case, and eventually at issue in *Parson*—the "right of individuals to associate for the advancement of political beliefs" and "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"—are "among our most precious freedoms."²¹⁹ Like the court in *Parson*, the *Anderson* court

the plaintiffs' contentions makes the claims speculative in nature).

213. See *id.* (responding to each of the plaintiffs' three contentions as lacking sufficient evidence to constitute proof of severe burdens).

214. See *Ray v. Blair*, 343 U.S. 214, 231 (1952) (holding that "the Twelfth Amendment does not bar a political party form requiring the pledge to support the nominees of the National Convention").

215. See *Jones v. Alabama*, No. 00-0442-RV-L, 2001 WL 303533, at *2–6 (S.D. Ala. Mar. 7, 2001) (holding that the Alabama Democratic Party's party loyalty pledge did not implicate fundamental rights and was substantially related to the important state goal of reducing "raiding," defined as when "those antipathetic to a party nonetheless vote in its primary" in order to nominate a more vulnerable general election candidate).

216. *Parson v. Alcorn*, 157 F. Supp. 3d 479, 494 (E.D. Va. 2016).

217. See *id.* at 495 ("Although Plaintiffs' additional claims of burden do not necessarily fail, they lack support at this stage of the proceedings.").

218. *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983).

219. *Id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30–31 (1968)).

acknowledged that although “these rights of voters are fundamental, not all restrictions imposed by States” also “impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.”²²⁰ Justifying the balancing test that would eventually bear its name, the *Anderson* court admitted that each provision of a state’s election code “inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.”²²¹ Despite this concession, the court identified the fundamental right of “political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”²²² Although the court was speaking of a different issue—candidates’ ballot access—party loyalty pledges have the same effect on independent or unregistered voters in open primary elections—they deny “the ‘disaffected’ not only a choice of leadership but a choice on the issues as well.”²²³

The *Parson* court found the burdens imposed by the Republican Party of Virginia’s loyalty pledge on the plaintiffs’ associational and voting rights to be “neutral and reasonable.”²²⁴ Contrary to the *Parson* court’s conclusion, the *Anderson* court’s reasoning justifies the conclusion that the burden imposed on independent or unregistered voters’ fundamental liberties by party loyalty pledges in open primaries is severe.²²⁵ To borrow the language of *Anderson*: party loyalty pledges in open primary elections inherently “operate as a mechanism to exclude certain classes of candidates from the electoral process”²²⁶ by forbidding independent or unregistered voters to participate in a party’s primary unless they effectively register as a member of that party

220. *Id.* at 788.

221. *Id.*

222. *Id.* at 793.

223. *Id.* at 792 (quoting *Williams v. Rhodes*, 393 U.S. 23, 33 (1968)).

224. *Parson v. Alcorn*, 157 F. Supp. 3d 479, 497 (E.D. Va. 2016).

225. *See Anderson v. Celebrezze*, 460 U.S. 780, 793–94 (1983) (“A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.”).

226. *Id.* at 793.

by signing the pledge. A party loyalty pledge is a minimal burden, if a burden at all, to a voter in a closed-primary system or to a voter that already identifies as or is a registered member of the party in an open-primary system. To borrow *Anderson*'s language again: A party loyalty pledge "unfairly or unnecessarily burdens the 'availability of political opportunity'"²²⁷ of independent or unregistered voters in open-primary systems.²²⁸

This type of restriction is far from those that are "generally applicable and evenhanded" that are upheld by the Court.²²⁹ Similar to the filing deadline provision at issue in *Anderson*, party loyalty pledges in open primaries limit the opportunities of "independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group."²³⁰ If that burden was not severe enough alone, its effect is to "reduce diversity and competition in the marketplace of ideas,"²³¹ which nullifies the very purpose of primary elections.

C. Party Loyalty Pledges in Open Primaries Do Not Withstand Strict Scrutiny

Because party loyalty pledges in open primaries are class-based—placing severe burdens on independent and unregistered voters—it is necessary for parties wishing to impose such pledges to satisfy strict scrutiny to pass the *Anderson/Burdick* test.²³² The *Parson* court found the Republican Party of Virginia's party loyalty pledge only be a "reasonable, nondiscriminatory" restriction "upon the First and Fourteenth Amendment rights of voters," warranting intermediate scrutiny, which allows for the State's "important regulatory interests" to be "generally sufficient to justify the

227. *Anderson*, 460 U.S. at 793 (quoting *Clemens v. Fashing*, 457 U.S. 957, 964 (1982) (plurality opinion)).

228. *See id.* (highlighting that the burden falls unequally on new or small political parties or on independent candidates).

229. *Id.* at 788 n.9.

230. *Id.* at 794.

231. *Id.*

232. *See id.* at 805–06 (using the first formulation of the *Anderson/Burdick* test to "conclude that Ohio's March filing deadline for independent candidates for the office of President of the United States cannot be justified by the State's asserted interest in protecting political stability").

restrictions.”²³³ However, as the *Anderson* comparison requires, when “the plaintiffs’ rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.”²³⁴ Thus, the relevant inquiry is whether (1) the state has a compelling interest in permitting or prescribing party loyalty pledges in open primary elections; and, even if so, whether (2) that regulation is narrowly drawn.²³⁵

The state has no compelling interest for the enforcement of party loyalty pledges in open primary elections. The *Parson* court itself identified two interests offered by the Commonwealth of Virginia in defense of the party loyalty pledge: “[F]irst, the Commonwealth’s protection of the [Republican Party of Virginia]’s own constitutional rights, and second, the state’s interest in the order and integrity of the electoral process.”²³⁶ Under an intermediate scrutiny standard, the court found that these two interests were important regulatory interests sufficient to justify the party loyalty pledge within the open-primary scheme.²³⁷

But in accordance with the strict scrutiny standard extracted from the *Anderson* analysis,²³⁸ even if these two interests were compelling the enforcement of a party loyalty pledge in an open-primary system is not a means sufficiently narrowly tailored to further those interests. If the Republican Party of Virginia wants to ensure that only true Republicans will participate in its open primary, the most narrowly tailored approach the Commonwealth of Virginia can take is to pursue a closed primary—in which only registered voters may vote for their parties—or a semi-closed primary—in which independents and

233. *Parson v. Alcorn*, 157 F. Supp. 3d 479, 492 (E.D. Va. 2016) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

234. *Id.* (quoting *Sarvis v. Judd*, 80 F. Supp. 3d 692, 698 (E.D. Va. 2015)).

235. *See generally Anderson v. Celebrezze*, 460 U.S. 780 (1983).

236. *Id.* at 496.

237. *See id.* at 492 (quoting *Sarvis v. Judd*, 80 F. Supp. 3d 692, 698 (E.D. Va. 2015)) (“[W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.”).

238. *See Anderson*, 460 U.S. at 792–93 (“As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”).

unregistered voters may participate in the primary of the party of their choice.²³⁹ The Supreme Court in *Nader v. Schaffer* already upheld this closed-primary approach as constitutional, as explored above.²⁴⁰

Until the Republican Party of Virginia pushes for reform of the Commonwealth's primary election scheme, it cannot have it both ways: attempting to mitigate the risks of an open primary by enforcing a party loyalty pledge—and reaping all the rewards of an open primary—at the cost of the associational rights of independent voters. This practice does nothing more than disenfranchise an entire segment of the voting population that is not required by the Commonwealth to register by party in order to vote in its presidential primary.

V. Conclusion

The Eastern District of Virginia incorrectly applied *Anderson/Burdick* framework to decide *Parson*. A clearer reading and application of the *Anderson/Burdick* test in *Parson* would likely lead to the opposite result. Fundamentally, the court failed to identify the class of independent voters in Virginia's open-primary system. These voters' associational rights were impermissibly burdened by Virginia's statutory scheme and the state Republican Party's use of a party loyalty pledge, which constituted state action subject to constitutional review.

The theory and case law indicate that party loyalty pledges in open primaries constitute state action that impermissibly burdens a protected class of independent voters' freedom of association. These pledges are not narrowly tailored means to further any of the State's compelling interests, particularly when applied in primary election schemes that promote voters' independence. And every effort by parties or states to limit the associational rights of independent voters in open primary elections should be deemed unconstitutional. If a class of independent voters is more clearly

239. *See id.* (discussing how placing unequal burdens on small or independent political classes impinges on the First Amendment protections of the freedom to associate).

240. *Nader v. Schaffer*, 417 F. Supp. 837, 850 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976).

and readily identified in open-primary states that allow—or have parties that mandate—party loyalty pledges, future cases and controversies on the conflict of associational rights between parties and independent voters may lead to that very result.

It is time to reclaim the First Amendment associational rights of independent voters in open-primary states. Independent voters in open-primary states do not owe allegiance to any political party. They ought not be required to pledge it.