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North Carolina General Assembly Amends Election Laws To Allow Unaffiliated Voters to Vote in Party Primaries

> " 'What the closed primary law does is to say that Republicans will nominate Republicans, Democrats will nominate Democrats, and both parties will submit their best candidates in November. . . . That's a very rational scheme. But this, this will make the primaries wide open, taking away the discipline—and if there's anything we need to discipline, it's politics.' "[1]

In 1987 the North Carolina General Assembly amended the state's election laws to allow unaffiliated voters to vote in the primary elections of political parties that adopt resolutions permitting such participation.[2] Prior to these amendments, North Carolina was a strict closed primary state, requiring a voter in a particular party's primary to be registered as a member of that party prior to the primary election.[3] Unaffiliated voters—voters who registered without specifying a party affiliation and who were consequently not members of any organized political party—were prohibited from voting in the primaries.

The general assembly amended the election laws as a result of the United States Supreme Court's decision in *Tashjian v. Republican Party of Connecticut*,[4] which declared Connecticut's closed primary statute unconstitutional. The Court held that by denying political parties the right to choose whether unaffiliated voters could vote in their primaries, the statute infringed upon the parties' freedom of association.[5] Because of the similarity between the Connecticut statute and the corresponding North Carolina statutory provisions, *Tashjian* clearly mandated modification of North Carolina's primary election system.

This Note examines the changes to North Carolina's election laws in light of the Supreme Court's decision in *Tashjian*. It concludes that although the modifications comply with the basic holding of that case, the statutes may be open to challenge because they do not allow open primaries for individual offices. Once establishing general compliance with the *Tashjian* decision, the Note analyzes the decision and concludes that it is sound. Finally, the Note speculates as to the effects the election law amendments will have on elections and political parties in North Carolina and concludes that the effects should be minimal.

In seeking to comply with the decision in *Tashjian*, the North Carolina

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1. News & Observer (Raleigh, N.C.), Dec. 11, 1986, at 1, col. 1 (initial response to the United States Supreme Court decision in Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986) (holding Connecticut's closed primary statute unconstitutional) by Alex R. Brock, director of the North Carolina Board of Elections).

2. Act of June 18, 1987, ch. 408, 1987 N.C. Adv. Legis. Serv. 211 (codified at N.C. GEN. STAT. §§ 163-59, -74, -87, -150, -283 (1987)).

3. N.C. GEN. STAT. § 163-59 (1983) (amended by Act of June 18, 1987, ch. 408, 1987 N.C. Adv. Legis. Serv. 211).

4. 107 S. Ct. 544 (1986). Secretary of State Julia Tashjian was named as defendant because her duties included the administration of Connecticut's election laws. *Id.* at 546-47.

5. *Id.* at 556.

General Assembly modified five sections of the state's election laws. First, an enabling provision, section 163-74(a1), was added to allow explicitly unaffiliated voters to vote in a party's primary subject to the party's compliance with certain procedural requirements.[6] Specifically, the section provides that for a party to open its primary to unaffiliated voters, the state executive committee of the party must pass a resolution allowing unaffiliated voter participation and notify the State Board of Elections by the first day of December preceding the primary.[7] To accommodate this new optional opening procedure, the general assembly also had to modify existing sections that contained strict closed primary language. Most importantly, sections 163-59 and 163-283, the sections prohibiting unaffiliated voter participation in primary elections, required amendment. The modified versions of these sections still contain strict closed primary language, but new clauses were added limiting their applicability to unaffiliated voters.[8] In section 163-150(b) the general assembly placed an important limitation on the new rules, specifying that an unaffiliated voter cannot vote in more than one party's primary on a single day.[9] Finally, the general assembly added a contemporaneous affiliation provision to section 163-150(a) requiring that at the time an unaffiliated voter arrives at the place of voting he must specify "the name of the authorizing political party in whose primary he wishes to vote."[10]

Before analyzing these modifications in light of the Supreme Court's decision in *Tashjian*, it is helpful to examine the alternative types of primary systems. Commentators have categorized primaries into three general types—closed, open, and blanket.[11] Within the general type of primary denoted as

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6. N.C. GEN. STAT. § 163-74(a1) (1987).

7. *Id.* On November 8, 1987, the North Carolina Republican Party Executive Committee adopted such a resolution and filed it with the State Board of Elections prior to the deadline for allowing unaffiliated voters to vote in the 1988 primaries. As a result, unaffiliated voters were allowed to vote in the March 8, 1988, Presidential Preference Primary, the May 3, 1988, Primaries, and, in the counties where held, the May 31, 1988, Second Primary. State Board of Elections Memorandum, *Special Order Relating to the 1988 Primary Elections* (Nov. 20, 1987). The North Carolina Democratic Executive Committee chose not to allow unaffiliated voter participation. *Id.*

Section 163-74(a1) also specifies that a party's decision to allow unaffiliated voter participation is not permanent, but can be reversed by passing a resolution to that effect and submitting it to the State Board of Elections. N.C. GEN. STAT. § 163-74(a1).

8. N.C. GEN. STAT. §§ 163-59, -283 (1987). The amended sections read as follows:

> No person shall be entitled to vote or otherwise participate in the primary election of any political party unless he (1) Is a registered voter, and (2) Has declared and has recorded on the registration book or record the fact that he affiliates with the political party in whose primary he proposes to vote or participate, and (3) Is in good faith a member of that party.
>
> Notwithstanding the previous paragraph, any unaffiliated voter who is authorized under G.S. 163-74(a1) may also vote in the primary if the voter is otherwise eligible to vote in that primary except for subdivisions (2) and (3) of the previous paragraph.

Id.

9. *Id.* § 163-150(b).

10. *Id.* § 163-150(a).

11. H. GOSNELL & R. SMOLKA, AMERICAN PARTIES AND ELECTIONS 109 (1976). Although commentators agree that primaries can be divided into three types, they differ to some extent in their placement of particular states' primary laws within the categories. *Compare Tashjian*, 107 S. Ct. at 553 n.11 (categorizing state primary systems as follows: 21 strict closed, 16 closed, 9 open, 4 blanket) *with* Comment, *Setting Voter Qualifications for State Primary Elections: Reassertion of the Right of State Political Parties to Self-Determination*, 55 U. CIN. L. REV. 799, 810-11 (1987) [hereinafter

"closed" there are two identifiable subtypes. First is the strict or classical closed primary, in which a voter may vote in a party's primary only if within some prescribed time period prior to the day of the primary he has registered to vote as a member of that party.[12] Similarly, under this type of system, if a voter wishes to change his affiliation after he has registered, he must do so within some specified time period prior to a primary election in order to be eligible to vote in that election.[13] One commentator has observed that classical closed primary systems are "the most protective of party autonomy because they permit only party members to participate in the candidate selection process."[14] From its adoption of state-wide primary elections in 1915 until the 1987 election law amendments, North Carolina was a strict closed primary state.[15] At the time *Tashjian* was decided, twenty other states also had this type of closed primary.[16]

The second type of closed primary, sometimes referred to as the "same day registration system," allows previously unaffiliated voters to choose their party affiliation on the day of the primary election.[17] As a result of the 1987 amendments to North Carolina's election laws, North Carolina's primary system now falls within this subtype. Sixteen states had this type of closed primary at the time *Tashjian* was decided.[18]

The second general type of primary is the open primary.[19] In this type of primary registered voters can participate in whichever party primary they choose.[20] The voter is not required to specify publicly a party affiliation, but is given ballots for each party and selects the one he wishes to mark in the privacy of the polling booth.[21] According to one commentator: "[o]pen primary systems are least protective of party associational rights because they provide no safeguards against distortion of the candidate selection process by those who

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Setting Voter Qualifications] (categorizing state primary systems as follows: 24 strict closed, 14 closed, 9 open, 3 blanket). This discrepancy is due perhaps to the widely diverse and somewhat confusing language of the statutes. The classifications used in *Tashjian* are adopted for the purposes of this Note.

12. D. PRICE, BRINGING BACK THE PARTIES 130 (1984).

13. *Id.*

14. *Setting Voter Qualifications, supra* note 11, at 810. Proponents of this type of primary system argue that such primaries "help preserve the integrity of the party system." D. PRICE, *supra* note 12, at 132; *see also* AMERICAN POLITICAL SCIENCE ASS'N, TOWARD A MORE RESPONSIBLE TWO PARTY SYSTEM 71 (1950) ("The closed primary deserves preference because it is more readily compatible with the development of a responsible party system.").

15. Act of Mar. 9, 1915, ch. 101, § 5, 1915 N.C. Public Laws 154, 156 ("[N]o person shall be entitled to participate or vote in the primary election of any political party unless he . . . is in good faith a member thereof . . . .").

16. *Tashjian*, 107 S. Ct. at 553 n.11.

17. *Id.* One commentator has observed that:

> [The] contemporaneous affiliation requirements afford less protection to party associational rights than do durational requirements [of strict closed primaries] because they do not prevent persons who may be disloyal to the party from participating in the primary. Moreover, closed state primary systems that permit voters to declare their party preference on election day operate essentially the same as an open primary system.

Setting Voter Qualifications, supra note 11, at 811 (footnote omitted).

18. *Tashjian*, 107 S. Ct. at 553 n.11.

19. *Id.*

20. *Id.*

21. AMERICAN POLITICAL SCIENCE ASS'N, *supra* note 14, at 71.

may have no commitment to the goals and policies of the party."[22] Nine states had this type of primary system when *Tashjian* was decided.[23]

The third type of primary is the blanket primary, in which voters "may vote in the primaries of both political parties, with the restriction that they must not cast a vote for the same office in more than one political party."[24] Because of the permissiveness of this type of primary, commentators are even more adamant in their criticism than in the case of the open primary. For example, one commentator cites the following problems with the blanket primary:

> [The] . . . blanket primary corrupts the meaning of party even further [than the open primary] by permitting voters at the same primary to roam at will among the parties. The voter may, for example, support a Democrat for the nomination of United States Senator, and a Republican for that of Representative. Thus it is possible for a voter to consider himself both a Democrat and a Republican at one and the same moment.[25]

This type of primary system was in effect in four states when *Tashjian* was decided.[26]

Tashjian was the first case in which the United States Supreme Court addressed the issue of whether a state closed primary law unconstitutionally infringed upon a political party's freedom of association.[27] The controversy in *Tashjian* arose in 1984 when the Republican Party of Connecticut adopted a rule allowing unaffiliated voters to vote in its primaries for federal and state-wide offices.[28] The party's apparent motivation for passing the rule was to attempt to gain the support of some of the many unaffiliated voters registered in that state.[29] Because Connecticut had 659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered voters who were unaffiliated as of October 1983, this rule was clearly important to the Republican Party.[30] However, the party's rule was in conflict with Connecticut's closed primary statute.[31] After unsuccessful attempts to lobby the Connecticut General Assembly to adopt open primary legislation, the Republican party brought an action to have the

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22. *Setting Voter Qualifications*, *supra* note 11, at 812. Commentators have criticized open primaries on the grounds that they "dilute the impact of the parties' core constituencies and substantially reduce the role and influence of party leaders and organizations." D. PRICE, *supra* note 12, at 132; *see also* AMERICAN POLITICAL SCIENCE ASS'N, *supra* note 14, at 71 ("[T]he open primary tends to destroy the concept of membership as a basis of party organization.").

23. *Tashjian*, 107 S. Ct. at 553 n.11.

24. H. GOSNELL & R. SMOLKA, *supra* note 11, at 112.

25. AMERICAN POLITICAL SCIENCE ASS'N., *supra* note 14, at 72. Other commentators have observed that "[i]n many respects the blanket primary election is similar to a nonpartisan election, where the voters choose from among all candidates and the top two, regardless of party, are placed on the ballot of the general election." H. GOSNELL & R. SMOLKA, *supra* note 11, at 112.

26. *Tashjian*, 107 S. Ct at 553 n.11.

27. The Court, however, had previously considered whether the Connecticut closed primary statute struck down in *Tashjian* unconstitutionally infringed the rights of unaffiliated voters who wished to participate in party primaries and determined that it did not.

28. *Tashjian*, 107 S. Ct. at 546.

29. *Id.* at 547.

30. *Id.* at 547 n.3.

31. *Id.* at 548.

closed primary statute declared unconstitutional.[32] The party claimed that the statute deprived it "of its First Amendment right to enter into political association with individuals of its own choosing."[33] The district court granted summary judgment for the party, and the United States Court of Appeals for the Second Circuit affirmed.[34]

The Supreme Court began its examination of Connecticut's closed primary statute by observing that " '[c]onstitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.' "[35] Instead, the Court stated that its task was to examine " 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments' " and to balance such injury against the " 'interests put forward by the State as justifications for the burden imposed by its rule,' " in light of " 'the legitimacy and strength of each of [the State's] interests' " and " 'the extent to which those interests make it necessary to burden the plaintiff's rights.' "[36]

Therefore, the Court first looked to whether the statute substantially infringed upon the party's constitutionally protected rights. The Court concluded that because "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization,"[37] and the Connecticut statute limited the party's ability to choose whom to allow "to participate in the 'basic function' of selecting the Party's candidates,"[38] the statute did impinge upon the party's constitutionally protected rights.[39] The Court also determined that although the United States Constitution gives the states power to regulate the time, place, and manner of elections, this power "does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens."[40]

The Court then looked to the state's purported interests in "ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government" to determine if these interests "justif[ied] the burden cast by the statute upon the associational

32. *Id.*

33. *Id.* at 547.

34. *Id.*

35. *Id.* at 548 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

36. *Id.* (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)). "A state regulation that substantially burdens first amendment rights of political association may be upheld only if it is necessary to advance compelling state interests and only if it is tailored to advance those interests in the least restrictive manner." Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 283 (2d Cir. 1985), *aff'd*, 107 S. Ct. 544 (1986) (citing Roberts v. United States Jaycees, 104 S. Ct. 3244, 3258 (1984); Democratic Party of United States v. Wisconsin, 450 U.S. 107, 124 (1981); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Williams v. Rhodes, 393 U.S. 23, 31 (1968); Unity Party v. Wallace, 707 F.2d 59, 62 (2d Cir. 1983)); *see* Note, *Freedom of Association—Explanation of the Underlying Concepts*—Republican Party of Connecticut v. Tashjian, 34 U. KAN. L. REV. 841, 848 (1986).

37. *Tashjian*, 107 S. Ct. at 548 (citing Elrod v. Burns, 427 U.S. 347, 357 (1976) (plurality opinion); Buckley v. Valeo, 424 U.S. 1, 15 (1976)).

38. *Tashjian*, 107 S. Ct. at 549.

39. *Id.* at 550.

40. *Id.*

rights of the Party and its members."[41] First, the Court determined that the administrative burden that might result from allowing unaffiliated voters to vote in primaries did not justify Connecticut's strict closed primary system. The Court stated:

> While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.[42]

The Court also rejected the argument that the state's restrictive primary system was warranted in order to prevent raiding, the practice " 'whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary.' "[43] Although conceding that a state might have a legitimate interest in preventing such activity, the Court determined that Connecticut's closed primary statute did not serve to prevent raiding by unaffiliated voters because the statute allowed unaffiliated voters to affilate with a party as late as the day before the primary.[44] Therefore, the Court held that the state had no compelling interest in retaining its current system in order to prevent raiding.[45]

The Court next rejected the state's argument that the state's interest in preventing voter confusion justified its strict closed primary system. The State had alleged that "it would be difficult for the general public to understand what a candidate stood for who was nominated in part by an unknown amorphous body outside the party, while nevertheless using the party name."[46] The Court held, however, that individual voters could be expected to educate themselves

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41. *Id.*

42. *Id.* at 551.

43. *Id.* (quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973)).

44. *Id.* at 551. The Court stated: "Indeed, under [CONN. GEN. STAT. § 9-56 (1985)], which permits an independent to affiliate with the Party as late as noon on the business day preceding the primary, . . . the State's election statutes actually *assist* a 'raid' by independents, which could be organized and implemented at the eleventh hour." *Id.*

In contrast, North Carolina's previous primary system required a voter to affiliate with a party at least 21 business days before a primary election. N.C. GEN. STAT. §§ 163-59, -74(b) (1983) (amended by Act of June 18, 1987, ch. 408, 1987 N.C. Adv. Legis. Serv. 211). Although this requirement would support the argument that North Carolina's closed primary system actually did serve to prevent raiding, the system would probably still be held unconstitutional pursuant to *Tashjian* because of the Supreme Court's somewhat skeptical view of raiding (*see infra* note 45), and because this 21 day time period imposed an even greater restriction on the parties' freedom of association.

45. *Tashjian*, 107 S. Ct. at 551. In addition, the Court expressed some discomfort with the application of the label "raiding" to activities by independent voters, stating that raiding by independents is "a curious concept only distantly related to the type of raiding discussed in [earlier cases]." *Id.* Also, the Court added that research has never proven conclusively that raiding, even in the traditional sense, actually exists. *Id.* at 551 n.9. However, the Court went on to state that because the closed primary statute in question did not prevent raiding by independents "we express no opinion as to whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice." *Id.*

46. *Tashjian*, 107 S. Ct. at 551.

adequately with respect to campaign issues.[47] Also, the Court noted that allowing unaffiliated voters to vote in party primaries would not result in the selection of a party nominee with ideals foreign to those of the party, as a nominee must be approved at a party convention before she could be placed on the primary ballot.[48] Based on these considerations, the Court determined that "[t]he State's legitimate interests in preventing voter confusion and providing for educated and responsible voter decisions" did not justify burdening the party's rights.[49]

Finally, the Court determined that the State's interest in the preservation of the two-party system was not sufficient to outweigh the party's right of association.[50] Although the Court has previously characterized the "preservation of the integrity of the electoral process [as] a legitimate and valid state goal,"[51] the Court held that the State's interest in *Tashjian* was not so compelling as to warrant an intrusion on the party's fundamental right of association. The Court stated that the statute may "save the Republican Party from undertaking a course of conduct destructive of its own interests,"[52] but that " 'as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.' "[53]

After concluding that the State had no compelling interest in retaining its closed primary system, the Court addressed the State's argument that the party's rule violated the qualifications clause and the seventeenth amendment of the United States Constitution.[54] The State alleged that because the party's rule allowed unaffiliated voters to vote in primaries for the United States Congress but not for the state legislature, it violated the constitutional requirement that voters for members of the United States Congress "have the Qualifications requisite for [voters for members of] the most numerous Branch of the State Legislature."[55]

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47. *Id.*

48. *Id.* at 552. Although North Carolina's primary system has no such requirement, it is unlikely that a court would find such a deficiency sufficient to create a compelling state interest in the preservation of a strict closed primary system. This argument is supported by statistical evidence—there are so few unaffiliated voters in North Carolina that as a practical matter it would be virtually impossible for the unaffiliated voters to select a party's candidates contrary to the wishes of the party members. If, however, as a result of the amendments to North Carolina's primary system the number of unaffiliated voters dramatically increases, the absence of some sort of party action to select primary candidates might support an argument by the state in favor of reinstituting a strict closed primary system.

49. *Id.* at 552.

50. *Id.* at 554.

51. Rosario v. Rockefeller, 410 U.S. 752, 761 (1972).

52. *Tashjian*, 107 S. Ct. at 554.

53. *Id.* (quoting Democratic Party of United States v. Wisconsin, 450 U.S. 107, 124 (1981)). The Court also noted that "appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 states which have chosen to permit more substantial openness in their primary systems." *Id.* at 553 n.12.

54. *Id.* at 554. The qualifications clause of article I provides that "Electors in each state [for the United States House of Representatives] shall have the Qualifications requisite for Electors of the most numerous branch of the State Legislature." U.S. CONST. art. I, § 2, cl. 1. The seventeenth amendment provides the same requirements for the electors of the United States Senate. U.S. CONST. amend XVII.

55. *Id.* at 554 n.14 (quoting U.S. CONST. art. I, § 2, cl. 1).

The Court, interpreting these provisions to "require only that 'anyone who is permitted to vote for the most numerous branch of the state legislature has to be permitted to vote' in federal legislative elections," upheld the rule.[56]

Because *Tashjian* prompted the 1987 amendments to North Carolina's election laws, the first and most important question in analyzing these amendments is whether they serve to bring North Carolina's primary system within the constitutional boundaries established by that case. An examination of the amendments reveals that the general assembly "opened" North Carolina's closed primary system the minimum amount clearly dictated by *Tashjian* by allowing parties to open their primaries to unaffiliated voters but not to members of other parties, and by requiring a public declaration of affiliation. However, the general assembly omitted one feature—the ability of parties to choose to open only certain offices, leaving the primary elections for all other offices closed—which may prevent North Carolina's revised primary system from achieving constitutional validity.

The specific issue in *Tashjian* was whether a state could constitutionally prohibit a political party from allowing unaffiliated voters to vote in its primary elections. North Carolina had had such a restriction since 1915.[57] Therefore, when the *Tashjian* Court held this type of system invalid, it was clear that the North Carolina election laws had to be revised. The North Carolina General Assembly had four possible alternatives for a new system—a variation of the closed primary system in which parties could choose to allow only unaffiliated voters to participate in their primaries, a variation of the closed primary system in which parties could choose to allow *all* voters to participate in their primaries, an open primary system, or a blanket primary system.

The general assembly chose the first alternative.[58] This choice may well have been influenced by two factors. First was the presence of dicta in *Tashjian* suggesting that the second alternative might be unconstitutional.[59] This dicta suggests that it would be permissible for a state to prohibit parties from adopting rules opening their primaries to all voters, including members of other parties, due to the disorganizing effect such a rule could have on the other parties.[60] Arguably, this same rationale would prohibit a state from allowing a party to choose such a system.

The second factor that may have influenced the general assembly's choice of an alternative primary system is a corollary to the holding in *Tashjian*: if prohibiting parties from allowing unaffiliated voter participation unconstitutionally infringes the parties' right of association, then forcing parties to allow voters who are not members to vote in their primaries, as in the open or blanket primary systems, must also unconstitutionally infringe the parties' right of associa-

56. *Id.* at 555 (quoting Republican Party of Connecticut v. Tashjian, 770 F.2d 265, 286 (2d Cir. 1985) (Oakes, J., concurring)).

57. Act of Mar. 9, 1915, ch. 101, § 5, 1915 N.C. Public Laws 154, 156.

58. *See supra* text accompanying notes 17-18.

59. *Tashjian*, 107 S. Ct. at 554 n.13.

60. *Id.*

tion. *Tashjian* clearly indicates that great deference should be accorded to a party's determination of its affiliates. The open and blanket primary systems, however, limit the ability of parties to choose their affiliates by preventing parties from restricting their primaries to party members.[61] In addition, the state's interests in protecting the legitimacy of the election process, held in *Tashjian* to be insufficient to warrant a strict closed primary system, are even less protected in an open or blanket primary. Apparently the only interests being protected in these types of primaries are "the rights of the elector to vote and freely associate with the party of his choice."[62] Somewhat ironically, the Connecticut Supreme Court held that these rights were insufficient to require the Connecticut Republican Party to allow unaffiliated voter participation in a case brought by such a voter prior to the party's change of heart and adoption of the rule in question.[63] Thus, there is a strong argument that both the open and blanket primary systems are unconstitutional. Even if such systems are valid, however, the uncertainty surrounding them warrants the North Carolina General Assembly's decision to choose the least possible degree of openness required by *Tashjian*.

Although North Carolina's amended election laws permit a party to allow unaffiliated voter participation in primary elections, the North Carolina amendments do not allow opening some offices while leaving others closed.[64] This limitation raises the question, not addressed by the *Tashjian* Court, of whether a state can restrict the parties' freedom of association by making a party's decision to open its primaries an all or nothing proposition, or whether parties are constitutionally entitled to a greater degree of flexibility. Although the *Tashjian* Court indicated that some administrative considerations would warrant a degree of state control over the primary process even after its decision, prior decisions indicate that if the state's interference is substantial, a strict scrutiny review standard will be applied.[65] If, however, the interference is insubstantial, the restriction will be upheld if the state has merely a legitimate interest.[66] Therefore, it is important to determine whether this limitation would be considered substantial. One situation in which the Supreme Court found a state restriction to be insubstantial was in *Marchioro v. Chaney*,[67] in which the Court held that a state statute requiring each major party to establish a state committee consisting of two

61. *See supra* notes 19-26 and accompanying text.

62. Comment, *Open Versus Closed Primaries: A Dilemma in the Illinois Election Process*, S. ILL. U.L.J. 210, 221 (1977).

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

64. As stated earlier, the Republican Party's rule permitted unaffiliated voters to vote in primaries for the United States Congress, but not for the state legislature. This aspect of the rule gave rise to the State's claim that the rule violated the qualifications clauses of article I and the seventeenth amendment. *See supra* notes 54-56 and accompanying text.

In contrast to the North Carolina amendments, the Connecticut amendments passed in response to *Tashjian* specify that state party rules "may authorize unaffiliated electors to vote for some or all offices to be contested at its primaries." 1987 Conn. Legis. Serv. 251 (codified at CONN. GEN. STAT. § 9-431 (1987)).

65. *Tashjian*, 107 S. Ct. at 554 n.13. *See supra* note 36.

66. *See* Note, *"It's My Party And I'll Cry If I Want To": State Intrusions Upon the Associational Freedoms of Political Parties*—Democratic Party of the United States v. Wisconsin *ex rel.* La Follette, 1983 WIS. L. REV. 211, 239 (1983).

67. 442 U.S. 191 (1979).

members from each county did not substantially burden the parties' freedom of association because the parties had the power to choose what functions, if any, to delegate to the committees.[68] In that case, however, the Court emphasized that the restriction was negligible because the parties could easily circumvent it.[69] Where a restriction such as this directly affects a party's choice of whom to permit to select its candidates, however, it is probable that a court would consider this a substantial interference and would warrant application of the strict scrutiny standard.

In addition to limiting a party's decision to open its primaries to an all or nothing proposition, the amendments impose the further limitation that in order to vote in a primary, an unaffilated voter must publicly specify a party preference.[70] The Court in *Tashjian* indicated that such a requirement is constitutionally permissible, stating that "a requirement that independent voters merely notify state authorities of their intention to vote in the Party primary would be acceptable as an administrative measure."[71]

The amendments' third limitation on the parties' right to allow unaffiliated voter participation requires that the party must follow a specified procedure in selecting this option. The procedure consists of adopting a resolution to this effect and filing a notification with the State Board of Elections by the first day of December preceding the primary.[72] Once a party selects the open option, if it later chooses to re-close its primaries, it must repeat this procedure.[73] This minimal burden is apparently designed to discourage the parties from frequently switching their primaries from one system to another. Without such a limitation, one commentator has noted that "[i]t is possible . . . that [a] party will endlessly manipulate the pool of eligible primary voters, providing an enormous administrative burden on the state in conducting primary elections."[74] According to this commentator, the type of solution implemented in North Carolina's amendments is valid, as the state "has the ability to require reasonable notice of

68. *Id.*

69. *Id.* at 198-99.

70. N.C. GEN. STAT. § 163-150(a) (1987). This requirement, combined with the prohibition that participants in a party's primary may not be members of another party, distinguishes North Carolina's new primary system from open primary systems.

71. *Tashjian*, 107 S. Ct. at 550 n.7.

72. N.C. GEN. STAT. § 163-74(a1) (1987). The North Carolina Republican Party was surprised to learn just the week before the March 8, 1988, primaries of an additional procedural requirement imposed by the Voting Rights Act of 1965. *See* News & Observer (Raleigh, N.C.), Mar. 5, 1988, at 10A, col. 5. The Voting Rights Act requires that any changes in voting qualifications and procedures in political subdivisions in which the Act applies be approved by the United States Department of Justice. 42 U.S.C § 1973c (1982). The Act applies in 40 North Carolina counties. News & Observer (Raleigh, N.C.), Mar. 5, 1988, at 10A, col. 6; *see also* 42 U.S.C. § 1973b(a), (b) (1982) (providing the method for determining what political subdivisions are subject to the Act). The North Carolina Republican Party was able to obtain the needed approval on an expedited basis, however, in time for the March 8 primaries. News & Observer (Raleigh, N.C.), Mar. 8, 1988, at 1C, col. 1.

73. N.C. GEN. STAT. § 163-74(a1) (1987).

74. Peck & Hunter, Tashjian v. Republican Party*: A Conflict Between Party Rules and Election Laws*, 18 URB. LAW. 1005, 1015 (1986).

changes in voter eligibility to assure the integrity of the election process."[75]

An important question raised by the new amendments is whether the decision requiring them is sound. This question is especially pertinent since four Justices who heard *Tashjian* would have reversed the United States Court of Appeals for the Second Circuit's decision favoring the Republican party.[76] The dissenting Justices were split among themselves as to the grounds for reversal, however. Justices Stevens and Scalia would have reversed based on the argument that the party's rule violated the qualifications clause of article I and the seventeenth amendment of the United States Constitution.[77] Justice Scalia also would have reversed based on the argument that the party's freedom of association was not unconstitutionally infringed by the statute.[78] Justice O'Connor and Chief Justice Rehnquist shared this view.[79]

The qualifications clause arguments only arose in *Tashjian* because of the particular provisions of the party rule allowing unaffiliated voter participation in the Republican primaries. Specifically, the rule permitted unaffiliated voters to vote in the Republican primaries for the United States Senate and House of Representatives, and for statewide offices, but not for seats in the state legislature.[80] The qualifications clause of article I provides that "Electors in each state [for the United States House of Representatives] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[81] The seventeenth amendment provides the same requirement for the electors of the United States Senate.[82] The State in *Tashjian* argued that these provisions "require an absolute symmetry of qualifications to vote in elections for Congress and the lower house of the state legislature," and that therefore the party rule was invalid.[83] Although this argument rests on a somewhat technical aspect of the party's rule, it is relevant for an examination of North Carolina's amendments because the omission of this provision from the North Carolina amendments may subject them to constitutional challenge.[84]

Prior to analyzing the specific requirements of the qualification clauses of article I and the seventeenth amendment, the Court addressed the threshold question of whether these clauses apply to primary elections.[85] Reversing the Second Circuit on this issue, the Supreme Court determined that the clauses do apply to primaries, stating that "[i]f primaries were not subject to the requirements of the Qualifications Clauses . . . the fundamental principle of free electo-

75. *Id.* It is not clear how restrictive such a notice provision must be. In this respect, perhaps North Carolina's amendments provide more leeway to the parties than is constitutionally required.

76. *Tashjian*, 107 S. Ct. at 557, 559. The four dissenting Justices were Rehnquist, C.J., O'Connor, Scalia & Stevens, JJ.

77. *Id.* at 557 (Stevens & Scalia, JJ., dissenting).

78. *Id.* at 559 (Scalia & O'Connor, JJ., Rehnquist, C.J., dissenting).

79. *Id.* (Scalia & O'Connor, JJ., Rehnquist, C.J., dissenting).

80. *Id.* at 554.

81. U.S. CONST. art. I, § 2, cl. 1.

82. U.S. CONST. amend. XVII.

83. *Tashjian*, 107 S. Ct. at 555.

84. *See supra* notes 64-69 and accompanying text.

85. *Tashjian*, 107 S. Ct. at 555.

ral choice would be subject to . . . erosion."[86] The Court next addressed the issue of whether the party's rule violated these clauses. As pointed out by the dissent in *Tashjian*, the plain language of the qualifications clause indicates that the electors for the United States Congress in each state *shall have* the same qualifications as the electors for the most numerous branch of the state legislature.[87] The majority in *Tashjian*, however, chose to interpret this language in light of the Framers' purpose in adopting the qualifications clause of article I.[88] Based on its interpretation of records from the Constitutional Convention, the majority determined that the purpose of the qualifications clause was to ensure that voters who were eligible to vote in elections for the state legislature were not disenfranchised from voting in federal elections.[89] Because the Republican Party's rule did not have this effect, the Court upheld the rule.

The dissent argued that because the Constitutional Convention records relied on by the majority dealt with a proposed modification to the qualifications clause which would have disenfranchised a large number of state voters, and not with the adoption of the original language of the clause itself, these records were irrelevant to an analysis of the Framers' purpose in enacting the clause.[90] Neither the majority nor the dissent cited solid precedent supporting its opinion.

Justices Scalia and O'Connor and Chief Justice Rehnquist would have denied the Republican Party's claim on the basis that the party had no associational interest, or at best a minimal associational interest, in allowing unaffiliated voter participation in its primaries.[91] The dissenters emphasized that the Connecticut statute allowed unaffiliated voters to join a party as late as the day before a primary, did not restrict the party's ability to recruit new members, and did not restrict party members' choices of candidates.[92] Specifically, the dissent argued that "[a]ppellees' only complaint is that the Party cannot leave the selection of its candidates to persons who are *not* members of the Party, and are unwilling to become members."[93] Although this argument has some appeal, it assumes that for a voter and a party to have a protectible right of association, the voter must necessarily be a party member. The type of associational interests protected under the Constitution, however, are not so narrowly defined. As previously stated by the Court, the right of association "includes the right to express one's attitudes or philosophies by membership in a group *or by affiliation with it or by other lawful means.*"[94] The majority in *Tashjian* observed that "the act of formal enrollment or public affiliation with the [p]arty is merely one ele-

86. *Id.*

87. *Id.* at 557 (Stevens & Scalia, JJ., dissenting).

88. *Id.* at 555.

89. *Id.* at 556.

90. *Id.* at 558 (Stevens & Scalia, JJ., dissenting).

91. *Id.* at 559 (Scalia & O'Connor, JJ., Rehnquist, C.J., dissenting) ("In my view, the Court's opinion exaggerates the importance of the associational interest at issue, if indeed it does not see one where none exists."). The dissent cautioned that "[i]f the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." *Id.* at 560.

92. *Id.* (Scalia & O'Connor, JJ., Rehnquist, C.J., dissenting).

93. *Id.* (Scalia & O'Connor, JJ., Rehnquist, C.J., dissenting).

94. Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (emphasis added).

ment in the continuum of participation in [p]arty affairs, and need not be in any sense the most important."[95] Once it is accepted that a right of association exists, the state must show a compelling interest in order to interfere substantially with that right.[96] The majority, as discussed above, found that the State had no compelling interest in this case.[97]

Finally, it is important to examine the possible effects that the election law amendments may have on elections and political parties in North Carolina. For the 1988 primaries, only the North Carolina Republican Party has opted to allow unaffiliated voter participation.[98] If this proves to be advantageous to the Republican party, however, the North Carolina Democratic Party could also adopt such a rule. According to one commentator, this would "mak[e] the primaries of both parties open for all intents and purposes and remove the incentive for any voter to declare a party registration."[99] This commentator has also predicted that in that type of situation, "the parties' rules could cause an exodus from both their ranks, thereby destroying the parties."[100] This dire result seems particularly unlikely in North Carolina, however, where there are very few unaffiliated voters. As of April 1984, there were 2,137,005 registered Democrats, 704,301 registered Republicans, and only 119,797 unaffiliated voters.[101] These statistics are quite different from those of Connecticut, where there are more unaffiliated voters than registered Republicans.[102] Because only one North Carolina party has elected to permit unaffiliated voter participation in its primaries, and because the number of unaffiliated voters in North Carolina is so small, the effects of the 1987 election law amendments should be minimal on elections and parties in this state.

In conclusion, the 1987 amendments to North Carolina's election laws were clearly mandated by the United States Supreme Court's decision in *Tashjian*. For the most part, the amendments strictly and narrowly adhere to the holding of that case. The only possible challenge that might be made against the amendments is that they do not allow the parties to selectively open their primaries for individual offices. Because of the small number of unaffiliated voters in North Carolina, it seems unlikely that either major party will find it necessary, or worthwhile, to attempt such a challenge.

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95. *Tashjian*, 107 S. Ct. at 549.

96. *See supra* note 36.

97. *See supra* notes 41-53 and accompanying text.

98. State Board of Elections Memorandum, *Special Order Relating to the 1988 Primary Elections* (Nov. 20, 1987).

99. Peck & Hunter, *supra* note 74, at 1013.

100. Peck & Hunter, *supra* note 74, at 1013-14.

101. Registration Statistics, State Board of Elections, State of North Carolina (April 9, 1984).

102. *See supra* text accompanying note 30.