Tom Delay, Robert Torricelli, and Political Party Maneuvering: Why the First Amendment Associational Rights of Political Parties Should Be Extended to Include Candidate Replacement

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Abstract
This Comment analyzes whether the First Amendment associational rights of the major political parties should include candidate replacement and argues that the rights of parties to define who votes in the primary logically should be extended to include a right to replace candidates on the ballot after a withdrawal. Based on the more recent Supreme Court cases finding greater freedom of association for political parties, this Comment will focus on the 2002 replacement of Robert Torricelli in the New Jersey U.S. Senate election and the 2006 failure to replace Tom DeLay in the Texas 22nd Congressional District U.S. House of Representatives election. Although Torricelli and DeLay withdrew under similar circumstances, the courts came to markedly different results, showing the unequal impact of the different candidate replacement laws and their effect on elections for federal office. This Comment recommends a federal standard that will ensure political parties retain their First Amendment associational rights, while still allowing the states to efficiently manage the election process.

Part I.A of this Comment traces the Supreme Court’s jurisprudence on the associational rights of political parties from the restrictive White Primary Cases to the more recent trend of greater associational freedoms. Part I.B discusses the different state candidate replacement laws and illustrates their disparate effect on the ability of political parties to replace withdrawn candidates through discussion of the Torricelli and DeLay withdrawals. Part II.A

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the candidate replacement process, and argues that political parties
should have broad powers to replace withdrawn candidates. Finally,
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and preserves the associational freedoms of the political parties.

Keywords
First Amendment associational rights, Political parties, Political candidate replacement laws, Tom DeLay,
Robert Torricelli
COMMENTS

TOM DELAY, ROBERT TORRICELLI, AND POLITICAL PARTY MANEUVERING: WHY THE FIRST AMENDMENT ASSOCIATIONAL RIGHTS OF POLITICAL PARTIES SHOULD BE EXTENDED TO INCLUDE CANDIDATE REPLACEMENT

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∗ Articles Editor, American University Law Review, Volume 57; J.D. Candidate, May 2008, American University Washington College of Law; B.A. in Computer Science and Government, 2004, Wesleyan University. I would like to dedicate this Comment to my uncle John P. (Jay) Baker, a WCL alumnus and former member of the American University Law Review, who passed away this year on his 49th birthday. Thank you to the Volume 56 and 57 staff of the American University Law Review, especially my editor, Stephanie A. Casey, for all your hard work. Thanks also to my faculty advisor, Professor Stephen J. Wermiel. A very special thank you to my dad, Robert S. Baker, for his assistance with topic selection and throughout the entire process, my mom, Ruth Baker, for inspiring me to work hard enough to join her in the ranks of family members published in a Law Review, and my partner, Sarah K. Brown, for her unyielding encouragement and assistance in editing earlier drafts. Finally, a big thank you to all my family and friends for their unconditional love and support.

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INTRODUCTION

In every election year, there seems to be at least one candidate for federal office who wins his or her party’s primary election and then withdraws before the general election.\(^1\) Candidates withdraw for many reasons including death,\(^2\) family or personal reasons,\(^3\) political pressure,\(^4\) and political scandal.\(^5\) After a candidate withdraws, the

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3. See, e.g., Ford & Bush, supra note 1 (outlining the marital problems and messy divorce that led to the withdrawal of Senate candidate Jack Ryan before the 2004 election).

4. See, e.g., id. (detailing the pressure asserted by Ryan’s Republican party, including calls made to the chairman of the National Republican Senatorial Committee for Ryan’s withdrawal, after the disclosure of details of Ryan’s divorce); Sean Loughlin, Torricelli Drops Out of N.J. Race, CNN.com, Oct. 1, 2002, http://archives.cnn.com/2002/ALLPOLITICS/09/30/elec02.nj.s.torricelli.race/index.html (quoting Senator Robert Torricelli, who trailed in the polls leading up to his
logical question is, “What happens to his or her place on the ballot?” Rather than one national standard, as is the case with federal campaign finance laws regulating campaign contributions, each state has its own laws governing replacement of withdrawn primary winners.

In recent election cycles, many primary winners withdrew from the general election, leading to disparate results. When a candidate dies, there is a clear need to replace him or her on the ballot. When death is not the reason for withdrawal, the strict necessity for replacement is absent. Nevertheless, parties often urgently attempt to replace a withdrawn candidate. The attempted replacements of former U.S. Representative Tom DeLay and former U.S. Senator Robert Torricelli provide interesting examples due to the factual similarities of the two situations and opposite ultimate outcomes. In 2002, Torricelli faced low poll numbers and accusations of accepting bribes when he decided to withdraw only thirty-six days before the general senatorial election. Although replacement seemed outside re-election and was under heavy scrutiny for an ethics scandal, as declaring “I will not be responsible for the loss of the Democratic majority in the United States Senate”).

5. See, e.g., Babington & Weisman, supra note 1 (placing Congressman Mark Foley’s alleged improper conduct toward minors in the context of Foley’s political activities, by noting that “Foley chaired the House caucus on missing and exploited children and was credited with writing the sexual-predator provisions of the Adam Walsh Child Protection and Safety Act of 2006”).

6. See Federal Election Campaign Act, 2 U.S.C. §§ 431-442 (2000) (restricting the amount of money all candidates for federal office, regardless of geographical location, can accept from different types of donors when campaigning).

7. See Benjamin Handler, Note, Abandoning the Cause: An Interstate Comparison of Candidate Withdrawal and Replacement Laws, 37 COLUM. J.L. & SOC. PROBS. 413, 414-15 (2004) (examining strategic withdrawals by candidates and how the different election laws of the states are “woefully inadequate” to handle such situations).

8. Compare Coleman Wins Minnesota Senate Race, CNN.COM, Nov. 6, 2002, http://archives.cnn.com/2002/ALLPOLITICS/11/06/elec02.min.s.hotrace/ (reporting Norm Coleman’s victory over former Vice President Walter Mondale, who replaced U.S. Senator Paul Wellstone after Wellstone’s death in a plane crash only eleven days before the general election in 2002), with Republican Senator Loses to Dead Rival in Missouri, CNN.COM, Nov. 8, 2000, http://archives.cnn.com/2000/ALLPOLITICS/stories/11/07/senate.missouri/ (discussing that even though Missouri Governor Mel Carnahan died in a plane crash about three weeks before the 2000 general election for the U.S. Senate, Carnahan won the election posthumously after the Missouri law would not allow Carnahan’s name to be replaced on the ballot). As these examples show, it may be easier for a deceased candidate to win an election than a replacement who was not involved in the election prior to the death of the initial candidate.

9. See, e.g., Loughlin, supra note 4 (discussing the aftermath of Senator Torricelli’s late withdrawal and noting that “[e]ven before Torricelli’s announcement, party officials were looking at possible alternative candidates”).

10. See id. (noting that “Torricelli’s campaign has been hurt by an ethics controversy” and that recent polls “showed him trailing Forrester by double digits”).
the timeframe permitted on the face of the New Jersey law, the New Jersey Supreme Court allowed the New Jersey Democratic Party to replace Torricelli’s name on the ballot. The comparably embattled DeLay decided to withdraw from his re-election bid months before the general election in 2006, but the federal courts declared the Texas statute unconstitutional and did not allow the Republican Party of Texas to replace DeLay on the ballot.

While the courts in the Torricelli and DeLay cases came to markedly different decisions on candidate replacement, the Supreme Court has recently moved toward finding that the two major political parties—Republican and Democratic—have a definitive freedom of expressive association guaranteed by the First and Fourteenth Amendments of the Constitution. In these recent cases, in contrast

11. See N.J. Stat. Ann. § 19:13-20 (West 1999) (setting out procedure for “the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election” while remaining silent in regards to vacancies occurring the last fifty days before the election).

12. See N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1037-39 (N.J. 2002) (noting that the statute is silent on vacancies occurring in the last fifty days before the general election and arguing that where there is sufficient time to make a replacement during these last fifty days, as there was here, the replacement should occur).

13. See Tex. Democratic Party v. Benkiser, No. A-06-CA-459-SS, 2006 WL 1851295, at *2 (W.D. Tex. July 6, 2006), aff’d, 459 F.3d 582 (5th Cir. 2006) (outlining the Republican Party of Texas’s attempted replacement of DeLay on the ballot after DeLay, rather than actually withdrawing from the election, attempted to declare himself ineligible based upon his residency in Virginia). Delay likely attempted this maneuver because the Texas withdrawal statute requires proof of a “catastrophic illness” or death for withdrawal and replacement. Tex. Elec. Code Ann. § 145.036(b) (Vernon 2006). Although DeLay’s attempt was not a withdrawal as defined by the Texas statutes, the analysis remains the same because DeLay would have withdrawn if the Texas statutes were not written in a way to limit his options. Due to the statutory language, however, DeLay needed to be declared ineligible in order for the Republican Party to be able to replace his name on the ballot. See Tex. Elec. Code Ann. § 145.003 (Vernon 2006) (setting forth the limited grounds on which a candidate may be declared ineligible).

14. See Tex. Democratic Party, 459 F.3d at 588-89 (declaring that DeLay was not ineligible because Texas cannot apply the ineligibility statute in order to change the eligibility requirements in the U.S. Constitution for Congressional candidates by creating a pre-election inhabitancy requirement).

15. See Nathaniel Persily, Toward a Functional Defense of Political Party Autonomy, 76 N.Y.U. L. Rev. 750, 767 (2001) (highlighting the “robust protection” the Court has given to the major party expressive association claims, while noting that “the Supreme Court has accorded minor parties fewer associational rights than major parties”); see, e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369-70 (1997) (holding that Minnesota’s law against “fusion” candidates, prohibiting candidates from appearing on the ballot for more than one party, does not violate the First Amendment associational rights of the New Party, and effectively endorsing the two party system). For a discussion of cases that defined the associational rights of the major political parties, while not specifically addressing and treating somewhat differently the rights of smaller political parties, see Cal. Democratic Party v. Jones, 530 U.S. 567 (2000), Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214
to the old White Primary Cases, the Supreme Court struck down laws that prohibit parties from allowing non-party members to vote in the party primary and laws that prohibit parties from limiting primary voters to include only party members.

This Comment analyzes whether the First Amendment associational rights of the major political parties should include candidate replacement and argues that the rights of parties to define who votes in the primary logically should be extended to include a right to replace candidates on the ballot after a withdrawal. Based on the more recent Supreme Court cases finding greater freedom of association for political parties, this Comment will focus on the 2002 replacement of Robert Torricelli in the New Jersey U.S. Senate election and the 2006 failure to replace Tom DeLay in the Texas 22nd Congressional District U.S. House of Representatives election. Although Torricelli and DeLay withdrew under similar circumstances, the courts came to markedly different results, showing the unequal impact of the different candidate replacement laws and their effect on elections for federal office. This Comment recommends a federal standard that will ensure political parties retain their First Amendment associational rights, while still allowing the states to efficiently manage the election process.

Part I.A of this Comment traces the Supreme Court’s jurisprudence on the associational rights of political parties from the restrictive White Primary Cases to the more recent trend of greater associational freedoms. Part I.B discusses the different state candidate replacement laws and illustrates their disparate effect on


16. See discussion infra Part I.A.1 (providing background information on some of the many cases surrounding the Texas Democratic Party’s continual attempts to conduct white only primary elections in the early to mid twentieth century).

17. See Tashjian, 479 U.S. at 225 (concluding that the State could not require the Republican Party to hold a primary closed to unaffiliated independent voters when the Republican Party wanted to have those independent voters in their primary election).

18. See Cal. Democratic Party, 530 U.S. at 574, 589 (arguing that “a corollary of the right to associate is the right not to associate” and therefore the State cannot “forc[e] political parties to associate with those who do not share their beliefs”).

19. See discussion infra Part I.B (discussing the laws and inconsistent results that allowed Torricelli to be replaced on the ballot when he withdrew only a few weeks before the election, while DeLay was not replaced even though he withdrew many months before the election for remarkably similar reasons).
the ability of political parties to replace withdrawn candidates through discussion of the Torricelli and DeLay withdrawals. Part II.A analyzes the associational rights of political parties in the context of the candidate replacement process, and argues that political parties should have broad powers to replace withdrawn candidates. Finally, Part II.B of this Comment recommends a national standard for candidate replacement in federal elections that is narrowly tailored and preserves the associational freedoms of the political parties.

I. BACKGROUND

A. History of Political Parties’ Associational Rights

Political parties in the United States have evolved over time and adjusted to the changing political world. The U.S. Constitution did not contain any mention of political parties, but as soon as elections were held, people began identifying with political parties and working within a party system to elect public officials. Political parties play such a large role in U.S. elections today that some commentators argue the electoral system would collapse without the two major political parties. Despite the significance of political parties today, they did not obtain any significant legal recognition until 1842, and an influx of laws addressing political parties followed almost immediately.

20. See generally JOHN W. EPPERSON, THE CHANGING LEGAL STATUS OF POLITICAL PARTIES IN THE UNITED STATES (Harold Hyman & Stuart Bruchey eds., 1986) (presenting a thorough discussion of political party history and arguing that political parties were converted from private to public between 1787 and 1985).

21. See, e.g., Ray v. Blair, 343 U.S. 214, 220-21 (1952) (“[P]olitical parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable.”); see also Ronald L. Nelson, The U.S. Supreme Court and the Institutional Role of Political Parties in the Political Process: What Tradition?, 15 WIDENER L.J. 85, 88-92 (2005) (detailing the history of political parties from their omission from the Constitution to their formation “based on political necessity rather than constitutional imperative”).

22. See, e.g., JOHN H. ALDRICH, WHY PARTIES? 277-96 (Benjamin I. Page ed., 1995) (analyzing why political parties were established in the United States and how they have changed over time to become an essential part of the American political system). But see MARTIN P. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES 1952-1994 168-98 (1996) (arguing that political parties are losing significance and that the 1992 presidential campaign of Independent Ross Perot illustrates how people have become interested in independent candidates).

23. See EPPERSON, supra note 20, at 49 (explaining that even after the first legal recognition of political parties in 1842, there was virtually no legal recognition of political parties by the end of the Civil War). Epperson discusses the many laws that followed the initial recognition of political parties, starting with California’s passage of the first law in the United States that intended to regulate the nomination process.
These laws affecting political parties led to Supreme Court intervention in 1921 in *Newberry v. United States.* In *Newberry,* the Court examined a federal law regulating the amount of money that a candidate could spend in order to gain the nomination of a political party. A divided Supreme Court concluded that primaries “are in no sense elections for an office, but merely methods by which party adherents agree upon candidates.” Effectively, the Court read the word “election” out of the phrase “primary election” and determined that legislatures only had the power to regulate general elections. The rationale in *Newberry* came under scrutiny in the *White Primary Cases,* when the Court addressed the efforts of southern political parties to exclude African-Americans from participating in primary elections.

1. Political parties and the *White Primary Cases:* excluding voters based on race

The philosophy expounded in *Newberry* did not stand for long, as the Court subsequently adjusted its decision to allow regulation of primary elections in order to address racial discrimination by political parties in the South. Six years after *Newberry,* the Court declared in...
Nixon v. Herndon that a Texas state law prohibiting African-Americans from voting in the Democratic Primary denied those voters equal protection under the Fourteenth Amendment. After Herndon, the Texas Legislature enacted a law giving political parties the power to decide who could vote in their primaries. The Texas Democratic Party took that power and created a rule that African-Americans could not participate in the primary. The Supreme Court held that this rule also violated the Fourteenth Amendment, thus indicating that political parties must follow the Constitution as though the parties were public actors.

Although the Supreme Court went back and forth on this point in subsequent cases, the Court eventually settled on the conclusions that Congress had the power to regulate primary elections and that the Fifteenth Amendment protected voters against racial discrimination by political parties in primary elections. The Court continued to recognize this protection of African-American voting rights in Terry v.

(outlining the early White Primary Cases and citing the Supreme Court’s holdings that primary elections could be regulated when there was discriminatory state action). But see id. at 60 (noting that the cases actually “had little, if any, direct impact on black voting in the South” until the Court decided Smith v. Allwright, 321 U.S. 649 (1944)).

31. See id. at 541 (declaring that the Texas statute discriminated against voters by the sole distinction of color and that “color cannot be made the basis of a statutory classification affecting the right set up in this case”).
32. Nixon v. Condon, 286 U.S. 73, 81-82 (1932); see Klarman, supra note 29, at 58 (noting that the new law attempted to remove the party discrimination from state action by giving the parties the power to decide who could vote in the primary, rather than barring by state statute the ability of blacks to vote in the primary, as in Herndon).
33. See Condon, 286 U.S. at 82 (discussing the Texas Democratic Party’s new resolution “that all white democrats who are qualified under the constitution and laws of Texas . . . and none other, be allowed to participate in the primary elections”).
34. See id. at 88-89 (holding that leaders of the political parties who excluded African-Americans from voting in the primary election were delegates of the State’s power and therefore could not discriminate against African-Americans, as the leaders were constrained by the Fourteenth Amendment).
35. See United States v. Classic, 313 U.S. 299, 320 (1941) (“[A] primary election which involves a necessary step in the choice of candidates for election as representatives in Congress, and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.”).
36. See Smith v. Allwright, 321 U.S. 649, 666 (1944) (“Here we are applying, contrary to the recent decision in Grovey v. Townsend, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen’s right to vote.”). The Grovey Court classified the party definition of who may vote in a primary election as non-state action and therefore concluded that there were no convincing grounds for declaring a constitutional infraction. Grovey v. Townsend, 295 U.S. 45, 55 (1935). The Smith Court overruled the Grovey holding that the Texas Democratic Party was a private and voluntary association, not a delegate of state power. Smith, 321 U.S. at 664-66.
Adams, when it condemned discrimination that was seemingly far removed from state action. The events in question were not discrimination by a political party, but rather discrimination by a group composed of members of the Texas Democratic Party called the Jaybird Association. Thus the Court had to decide whether this group must follow the Fourteenth and Fifteenth Amendments. The Jaybird Association held significant power in Texas by conducting a straw poll before the primary election that essentially decided the primary winner and eventual general election winner. The Court held that the Jaybird Association’s exclusion of blacks from their straw poll violated the Fifteenth Amendment. This decision helped put an end to the white primary, and in doing so minimized the apparent freedom of association claims of political parties and their closely affiliated groups by seemingly classifying political parties as public actors and not private associations.

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37. 345 U.S. 461 (1953).
38. See id. at 462-64 (defining the question to be decided as whether the Fifteenth Amendment protections of the Constitution extend to impact the actions of an organization that is not a state actor or a political party, but still acts in a way to deliberately exclude African-Americans from voting).
39. See id. at 463 (explaining that the Jaybird Association was “run like other political parties” and noting that white people “are automatically members if their names appear on the official list of county voters” and “that Jaybird activities follow[ed] a plan purposefully designed to exclude Negroes from voting”).
40. Id. at 472-73 (Frankfurter, J., concurring).
41. See id. at 482-83 (Clark, J., concurring) (arguing that the Jaybird straw poll and the Democratic primary are linked together by the regularity of the Jaybird vote and its consistency in picking the ultimate winner); see also id. at 483 (describing the power of the Jaybird Association, noting that “[a]fter gaining the Jaybird Democratic Association’s endorsement, the announced winners after full publicity then file in the July Democratic primary” and that “[t]he record reveals that 3,910 eligible voters were listed in Fort Bend County in the presidential year 1944; though only 2,092 participated in the July primary under the Democratic banner, 3,790 members voted in the July primary under the Democratic Association”); id. at 472 (Frankfurter, J., concurring) (noting that candidates not endorsed by the Jaybird Association “almost never file in the Democratic primary”).
42. See id. at 476-77 (Frankfurter, J., concurring) (clarifying that the Jaybird Association’s role in the scheme to undermine the operation and regulation of the official primary brings it within reach of the Fifteenth Amendment); see also id. at 483-84 (Clark, J., concurring) (noting that “the Jaybird Democratic Association operates as an auxiliary of the local Democratic party” and since the winner of the straw poll has little or no opposition afterwards “the Negro minority’s vote is nullified”).
43. See HINE, supra note 28, at 248 (recognizing the decision in Terry as “represent[ing] the last gasp of the Democratic white primary”).
44. See Terry, 345 U.S. at 484 (Clark, J., concurring) (concluding that “the Jaybird Democratic Association fall[s] within the broad principle laid down in Smith v. Allwright and therefore defines state action broadly to include political parties and other organizations that have influence in elections).}
2. Political parties’ right to exclude and include voters based on party registration

Many years after the White Primary Cases, Supreme Court opinions discussing the status of political parties’ associational rights moved away from issues of race to the more general issue of party control over the primary process. In these cases, the Supreme Court shifted its characterization of political parties back toward private associations with greater freedom to make internal decisions.

In one of the first cases finding greater associational rights for political parties, the Court declared in 1981 that parties have the constitutional right to make rules determining how convention voters are chosen, and who can vote at a party convention. After holding that political parties have an associational right to make purely internal decisions regarding conventions, the Court addressed party control over who may vote in primary elections. The Supreme Court, in Tashjian v. Republican Party of Connecticut, definitively held that political parties have constitutionally protected freedom of association under the First and Fourteenth Amendments. Tashjian involved a challenge by the Republican Party of Connecticut to a Connecticut law that prohibited non-members

45. See generally Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 COLUM. L. REV. 274, 278-80 (2001) (arguing that the more recent cases regarding political party associational rights have incorrectly attempted to give political parties a right of expressive association that trumps demands by voters for an unrestrained right to participate).

46. Cf. Persily, supra note 15, at 754-63 (detailing two ways to view the White Primary Cases in light of the question of political parties’ associational rights, namely to dismiss them as unique or consider them definitive).

47. See Democratic Party of the U.S. v. Wis. ex rel. La Follette, 450 U.S. 107, 126 (1981) (holding that the associational right of the National Democratic Party could be balanced with the substantial interest of the State of Wisconsin in regulating its elections by allowing Wisconsin to hold an open primary, but not requiring the Wisconsin delegates to the National Party to vote at the National Convention in accordance with the Wisconsin primary results, if to do so would violate the National Party rules). This was a dispute about the Wisconsin primary process, where the Wisconsin Democrats held an open primary in which every registered voter could vote, and the delegate from Wisconsin was required, under Wisconsin law, to vote at the National Convention in accordance with the results of the Wisconsin primary. However, the State’s mandate that the Wisconsin delegates be required to allocate their votes according to the results of the primary violated National Party rules. Id. at 109-12. The Court held that the associational rights of both the State party to be free to choose how their primary elections are conducted and the national party to control the process by which delegates are selected to its National Convention could survive. Id. at 126.


49. Id. at 214 (citing Elrod v. Burns, 427 U.S. 347, 357 (1976) (plurality opinion); see also id. at 214 (citing Kusper v. Pontikes, 414 U.S. 51, 57 (1973)) (noting that “[t]he right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom”).
to vote in their primary. The Court held that the Connecticut law limited the Republican Party’s freedom of association by prohibiting the Party from allowing independent voters to partake in the Republican Party primary. The Court then rejected Connecticut’s claimed interests and held that a statute requiring a closed primary is unconstitutional when it stops a political party from opening their candidate selection process to independent voters.

In addition to having the right to allow independent voters to vote in a party primary, the Court held in California Democratic Party v. Jones that political parties’ associational rights include the right to exclude non-members from voting in the primary. The case addressed a California law passed by ballot initiative that required a blanket primary to determine party nominations. A blanket primary allows primary voters to vote in any political party primary for each political office. For example, a registered Republican may vote in the Republican primary for governor, the Democratic primary for Senator, and the Libertarian primary for House of Representatives.

After the ballot initiative passed, the Democratic, Republican, Libertarian, and Peace and Freedom Parties joined together in challenging the California law.

50. See Tashjian, 479 U.S. at 210-12 (explaining that the Connecticut statute requires voters to be members of the party in order to vote in that party’s primary, while the Republican Party of Connecticut’s rule allowed both registered Republicans and voters not enrolled in any party to vote in the Republican Party primary).
51. See id. at 215-16 (arguing that by limiting the people who the party may invite, “[t]he State thus limits the Party’s associational opportunities at the crucial juncture” of candidate selection).
52. See id. at 217-25 (rejecting Connecticut’s claims that the statute served the compelling interests of “ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government”).
53. See id. at 225 (concluding that the statute is a burden on the First Amendment rights of the Republican Party, that the state interests presented are insubstantial, and therefore that the statute is unconstitutional as applied).
55. See id. at 575 (declaring that a political association’s “right to exclude” is most important during a primary election or other means of selecting the party nominee).
56. See id. at 570-71 (noting that the law came into effect from the passage of Proposition 198, which passed by a statewide vote of the members of all parties).
57. See id. at 570 (explaining California’s blanket primary in comparison to an open or closed primary). There is no set primary that a voter is required to vote in when nominating any candidate for any office under California’s blanket primary system. Id. The voter essentially may choose his or her favorite candidate from all the candidates in every party for each individual office. See id. (“Under the new system, ‘all persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate’s political affiliation.’” (quoting CAL. ELEC. CODE ANN. § 2001 (West Supp. 2000))).
58. See id. at 571 (noting that each party involved has a party rule prohibiting non-members from voting in the party primary). The challenge is also interesting
In his majority opinion, Justice Scalia addressed whether political parties are public or private by noting, “we [the Court] have not held . . . that the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely.”

Justice Scalia took the opportunity to clarify the rulings in the *White Primary Cases*, explicitly stating that “[t]hey do not stand for the proposition that party affairs are public affairs, free of First Amendment protections . . . .” The Court went on to state emphatically that “[t]here is simply no substitute for a party’s selecting its own candidates.”

Since the Court found that the California law placed a severe burden on the associational rights of the political parties, the State needed to show that the law was narrowly tailored to achieve a compelling state interest in order for the blanket primary law to stand. The Court, however, rejected as uncompelling all seven state interests offered by California. Moreover, the Court concluded that the blanket primary law was not narrowly tailored to serve any of the interests presented, even if those interests were compelling. Thus, the Court held the California blanket primary requirement unconstitutional and gave political parties the right to choose to exclude non-members from the candidate selection process.

because Proposition 198 passed by a majority vote in California, yet all the recognized political parties in the state challenged the law and thus the desires of their members. *Id.* at 570-71.

59. *Id.* at 572-73.

60. *Id.* at 573 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986)).

61. *Id.* at 581.

62. *Id.* at 582.

63. *Id.* at 582-86. The seven interests offered by California were (1) “producing elected officials who better represent the electorate,” (2) “expanding candidate debate beyond the scope of partisan concerns,” (3) “ensur[ing] that disenfranchised persons enjoy the right to an effective vote,” (4) “promoting fairness,” (5) “afford[ing] voters greater choice,” (6) “increasing voter participation,” and (7) “protecting privacy.” *Id.* at 582-84.

64. *See id.* at 582-86 (eliminating the State’s third compelling interest and then stating that “[r]espondents’ remaining four asserted state interests—promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy—are not, like the others, automatically out of the running; but neither are they, in the circumstances of this case, compelling”).

65. *See id.* at 585-86 (holding that political parties’ First Amendment freedom of association to exclude non-members from their primary election is severely and unnecessarily burdened by Proposition 198 and declaring that a non-partisan blanket primary that did not include any party affiliations on the ballot would protect all the state interests that California put forth in defense of Proposition 198); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 104 (2004) (arguing that the Court’s decision was “potentially as sweeping as many landmark Warren Court decisions” because it “might mean that parties are entitled to opt for whatever primary-election structure they prefer”); John R. Labbe, Comment, *Louisiana’s Blanket Primary After California Democratic Party v. Jones*, 96 Nw. U. L.
Subsequently, the Court allowed Oklahoma to set a boundary on political parties’ right to declare who can vote in their primaries in *Clingman v. Beaver*. In *Clingman*, the Court upheld an Oklahoma law that prohibited parties from allowing members of other parties to vote in their primary. The Court decided that refusing to allow registered members of one party to vote in a primary of another party was not a large infringement on the party’s freedom of association. The Court noted that Oklahoma allowed independent voters to vote in any primary they wanted but required affiliated voters to vote in their party’s primary. The Court rested its decision on the fact that a voter could change his or her registration or simply become unaffiliated with all political parties and choose any primary to vote in. According to the Court, “a voter who is unwilling to disaffiliate from [one] party to vote in [another party’s] primary forms little ‘association’ with the [second party and vice versa].”

In *Eu v. San Francisco County Democratic Central Committee*, the Supreme Court looked at political parties’ associational rights outside the context of defining the eligible primary voters. The Court examined whether a California law banning primary endorsements

REV. 721, 742-53 (2002) (concluding that the only options remaining for each state are either to require a closed primary or to allow the primary to shift back to party control completely, possibly ending direct primaries altogether).

67. See id. at 598 (concluding that whether members of one political party should be allowed to vote in another party’s primary election is a decision for each individual state and not within the U.S. Constitution’s control).
68. See id. at 587 (“We are persuaded that any burden Oklahoma’s semiclosed primary imposes is minor and justified by legitimate state interests.”).
69. See id. at 584-85 (noting that the Oklahoma laws in question allow the party itself to decide whether or not to allow independent voters to vote in the primary).
70. See id. at 587-88 (citing Tashjian v. Republican Party of Conn., 479 U.S. 208, 235 (1986) (Scalia, J., dissenting)) (concluding therein that a party has the freedom to associate with whomever they choose to select as their nominees as long as the individual is not already formally associated with another party and refuses to change that association); Lowell J. Schiller, Recent Development, *Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases*, 29 HARV. J. L. & PUB. POL’Y 331, 343 (2005) (arguing that the Court’s rejection of “dual associations” was not inconsistent with *California Democratic Party v. Jones*, even though *Clingman* “limited the possibility of the Court taking a more proactive stance in rewriting primary laws across the nation”), *But see* M. Jason Scoggins, Recent Development, *Placing Unnecessary Limits on Voting and Associational Freedoms*, 29 HARV. J. L. & PUB. POL’Y 343, 356 (2005) (concluding that the Court should re-examine the semi-closed primaries similar to Oklahoma’s and that parties should have the associational right to “police member loyalty” in order to increase “transparen[cy] and improve accountability”).
73. See id. at 225 (reading precedent broadly in noting that the statute prohibiting parties from making primary endorsements “directly hampers the ability of a party to spread its message and hamstrings voters seeking to inform themselves about the candidates and the campaign issues”).
by political parties was unconstitutional.\footnote{As in \textit{Clingman}, the Court found the state’s suggested interests uncompelling. Further, the Court held that even if the interests had been compelling, the state had not narrowly tailored the law to serve any of the suggested interests.} In striking down the California law, the Court emphasized that a political party’s freedom of association, among other things, includes the freedom “to select a ‘standard bearer who best represents the party’s ideologies and preferences.’”\footnote{Id. at 224 (quoting Ripon Soc’y, Inc. v. Nat’l Republican Party, 525 F.2d 567, 601 (D.C. Cir. 1975) (Tamm, J., concurring in result)).}

Together, these cases support the idea that political parties have limited associational rights under the First and Fourteenth Amendments to define the group of people who vote to choose the parties’ general election candidates. However, because the Supreme Court never overruled the \textit{White Primary Cases}, some limits on the associational rights of political parties remain.\footnote{See Persily, supra note 15, at 758-59 (stating that the \textit{White Primary Cases} are viewed in different ways and that the recent cases involving primary elections and political parties fail to set forth an “honest appraisal that incorporates [the \textit{White Primary Cases}] into the larger doctrine of case law on state action”).} Unquestionably, political parties cannot discriminate on the basis of race in deciding who can participate in the selection of general election candidates.\footnote{See discussion supra Part I.A.1 (providing background information on the \textit{White Primary Cases} and detailing the end result which prohibited political parties from excluding people from the party primary based on their race).} Furthermore, political parties do not have the right to allow voters affiliated with other parties to vote in their primary when state laws say otherwise.\footnote{See Clingman v. Beaver, 544 U.S. 581, 589 (2005) (noting that little association exists between a voter and a party when the voter is registered to a different party and thus upholding a state law that required a voter to vote in the primary for the party to which the voter is registered).}

Outside of these limitations, political parties appear to have the right to decide who chooses their general election candidates.

B. \textit{Political Parties’ Efforts to Replace a Withdrawn Primary Winner}

This Comment addresses a political party’s rights when political candidates in a federal election win their party’s primary election but, for one reason or another, decide to withdraw before the general election. The law of each state regulates how to proceed in this
situation. These laws may lead to markedly different results under very similar circumstances. Some state laws allow for withdrawal under any circumstance, while others only allow withdrawal in particular situations. Many states have candidate replacement laws that set a timeline for when a replacement is acceptable and when it is not. However, while most states with such timelines require withdrawals and replacements to occur by a set number of days before the general election, no standard number of days exists among the states.

Compounding the problem of having many different candidate replacement laws is the differing interpretations of these laws by the courts. Whether courts read candidate replacement laws strictly or liberally largely determines whether or not a candidate may be replaced. Strict interpretation often leads to a party’s inability to replace a withdrawn candidate, as the judge refuses to allow candidate replacement unless the situation at hand fits the statute perfectly. On the other hand, a liberal reading of the statute will likely lead to the replacement of a withdrawn candidate because a

80. Handler, supra note 7, at 414-15.
81. See discussion infra Part I.B (discussing the remarkably similar political situations and reasons for withdrawal between Tom DeLay and Robert Torricelli and focusing on the fact that Torricelli was replaced and DeLay was not, even though DeLay withdrew from the election much earlier than Torricelli).
82. See, e.g., Ala. Code § 17-13-23 (2007) (allowing replacement of a candidate without restrictions as to the reason for, or timing of, the withdrawal).
83. See, e.g., Calif. Elec. Code § 8803 (West 2006) (allowing replacement of a candidate only if the original candidate dies and the proper election officials are notified “at least 68 days before the date of the next ensuing general election”).
84. See generally Handler, supra note 7, at 419 (noting that Minnesota allows candidate replacement to occur if withdrawal is made more than fourteen days before an election, while Colorado allows a candidate substitution if the original candidate withdraws at least eighteen days before the general election).
85. Compare W. Va. Code § 3-5-19 (2007) (allowing replacement of candidates who die “no later than twenty-five days before the general election,” replacement of candidates with “extenuating personal circumstances” ninety-eight days prior to general election, and replacement of incapacitated candidates “if the vacancy occurs not later than eighty-four days before the general election”), with Alaska Stat. § 15.25.110 (2006) (“If a candidate of a political party nominated at the primary election dies, withdraws, resigns, becomes disqualified from holding the office for which the candidate is nominated, or is certified as being incapacitated in the manner prescribed by this section after the primary election and 48 days or more before the general election, the vacancy may be filled by party petition.”).
86. Cf. Morell E. Mullins, Sr., Coming to Terms with Strict and Liberal Construction, 64 Ala. L. Rev. 9, 87 (2000) (analyzing methods courts use for statutory construction and concluding that “courts persist in ruling that . . . they will strictly or liberally construe statutes in a way that favors certain purposes, results or parties”).
judge is more likely to find that the statute covers a given situation in an effort to ensure greater voter choice. 88

The Tom DeLay and Robert Torricelli cases demonstrate the absurdity of the inconsistent interpretation of candidate replacement laws for federal office. 89 Both DeLay and Torricelli withdrew for largely political reasons. DeLay, however, was not replaced on the ballot despite withdrawing many months prior to the election, while Torricelli was replaced when he withdrew only a few weeks before the election. As detailed below, the federal district and circuit courts read the Texas statute strictly in deciding not to allow a replacement on the ballot for Tom DeLay. On the other hand, the New Jersey Supreme Court read the New Jersey statute liberally in finding that the Democratic Party could replace Robert Torricelli on the ballot.

1. Attempted replacement of Tom DeLay in Texas

In September 2005, U.S. House of Representatives Republican Majority Leader Tom DeLay stepped down from his leadership position following an indictment on a criminal conspiracy charge. 90 The embattled DeLay vehemently denied the charges as baseless, remained a Member of Congress, and vowed to run for re-election. 92

88. See, e.g., N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1033 (N.J. 2002) (“Election laws are to be liberally construed so as to effectuate their purpose. They should not be construed so as to deprive voters of their franchise or so as to render an election void for technical reasons.” (quoting Kilmurray v. Gilfert, 91 A.2d 865, 865 (1952))).

89. See discussion infra Parts I.B.1 and I.B.2 (representing the uncertain affect of withdrawal and replacement).

90. See R. Jeffrey Smith, DeLay Indicted in Texas Finance Probe, WASH. POST, Sept. 29, 2005, at A01 (reporting the indictment of DeLay “on a charge of criminally conspiring with two political associates to inject illegal corporate contributions into 2002 state elections that helped the Republican Party reorder the congressional map in Texas and cement its control of the House in Washington”).

91. See Nicholas Thompson, The Tom DeLay Scandals: A Scorecard, SLATE, Apr. 7, 2005, http://www.slate.com/id/2116392/ (detailing five Tom DeLay “scandals” well before his indictment). DeLay had a reputation for getting what he wanted in Congress and he was a master at maneuvering, which made him a highly watched figure and a very polarizing person. See Peter Perl, ‘Absolute Truth ’, WASH. POST, May 13, 2001 (Magazine), at W12 (stating that DeLay is known in Washington by such nicknames as “the Hammer,” “the Exterminator” and “the Meanest Man in Congress”). One of the most ironic aspects of DeLay’s rise to power was that he was elected on the backs of the conservative religious community who care deeply about morals. DeLay’s alleged illegal actions, however, appear to show him as an immoral man. Cf. John W. Dean, David Kuo’s Book “Tempting Faith”: The Author’s Agenda, the Authoritarian Behavior He Reports, And the White House’s Response, FINDLAW’S WRIT, Oct. 29, 2006, http://writ.news.findlaw.com/dean/20061029.html (detailing the “remarkable, actually weird but understandable, connection between being corrupt and being elected by the Religious Right”).

92. See, e.g., Ralph Blumenthal, Primary for DeLay’s Seat is Shaping Up as Referendum on the Incumbent, N.Y. TIMES, Mar. 6, 2006, at A14 (discussing DeLay’s primary
In March 2006, Tom DeLay faced a Republican Party primary against three challengers and collected sixty-two percent of the vote despite his indictment.\(^{93}\)

DeLay’s election victory quickly turned sour when polls showed him trailing his Democratic opponent, former U.S. Representative Nick Lampson.\(^{94}\) Lampson gained momentum throughout the race as the “anti-corruption candidate” by focusing almost exclusively on DeLay’s alleged criminal problems and ethics violations.\(^{95}\) Meanwhile, DeLay faced further ethical questions after his former chief of staff pled guilty to conspiracy and corruption charges.\(^{96}\) As DeLay’s poll numbers continued to suffer and his criminal investigation was constantly in the news, DeLay decided to resign from the House of Representatives and quit campaigning for re-election.\(^{97}\)

DeLay stopped his bid for re-election seven months before the general election but after his victory in the Republican primary election.\(^{98}\) The relevant Texas statute stated that a candidate could be declared ineligible as long as the declaration occurred thirty days before the election and “the information on the candidate’s application for a place on the ballot indicates that the candidate is...
ineligible for the office." The Republican Party of Texas argued that DeLay was ineligible to run for Congress in Texas because he was a resident of Virginia and registered to vote in Virginia. The United States District Court for the Western District of Texas, however, emphasized that the Constitution required a candidate to be an “inhabitant” of the state in which he is running for Congress only “when elected.” Since this statute addressed eligibility of candidates, the district court declared that Texas could not change the constitutional eligibility requirements for federal candidates.

By strictly construing the statute in relation to the Constitution, the district court held that DeLay’s residency before the election was irrelevant, as long as he could be an inhabitant of Texas “when elected.” The court further stated that it would not speculate as to DeLay’s inhabitance on Election Day. The United States Court of Appeals for the Fifth Circuit agreed with the district court, recognizing that DeLay would only have to move back to Texas on the day of the election in order to meet the Constitution’s eligibility requirements. In making their decisions, the district and circuit courts likely took note of reports that DeLay won the primary with the full intention of dropping out before the general election, as well as arguments that a new candidate could unfairly affect the Democratic challenger. The district and circuit courts did not

99. Tex. Elec. Code Ann. § 145.003 (Vernon 2006); see also discussion supra note 13 (explaining why the Republican Party of Texas attempted to declare DeLay ineligible rather than simply having DeLay withdraw from the election altogether and then attempt to replace him).


101. See U.S. Const. art. I, § 2 (“No person shall be a Representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.”); Tex. Democratic Party, 2006 WL 1851295, at *7 (stating that “historical materials also support a literal reading of ‘when elected’ to mean on election day itself” and not at any point prior to the election).


103. Id. at *5.

104. See id. at *6 (“The Court finds that the Constitution does not permit such speculative determinations where the election of a United States Representatives is at issue, specifically because Benkiser’s prediction of future eligibility based on current inhabitancy would amount to an imposition of an unconstitutional pre-election residency requirement.”).

105. See Tex. Democratic Party, 459 F.3d at 589-90 (declaring that Benkiser could not know whether DeLay would be ineligible from his inhabitancy on June 7, 2006 when the election wasn’t until November 2006).

106. See Tex. Democratic Party, 2006 WL 1851295, at *2 (explaining that the Texas Democratic Party and its candidate Nick Lampson claimed standing in part because they will be injured by an “unfair advantage” gained by the Republican Party of Texas
allow DeLay’s name to be replaced on the ballot. As a result, the Republican Party of Texas later dropped Delay from the ballot without a replacement, instead putting the Republican Party’s weight behind a write-in candidate in hopes of defeating Lampson.  

2. Attempted replacement of Robert Torricelli in New Jersey

In 2002, Democratic Senator Robert Torricelli was seemingly on his way to re-election. The former counsel to Vice President Walter Mondale, six-term Member of the U.S. House of Representatives, and sitting Senator won the Democratic primary with 100% of the vote in an unopposed race. Meanwhile, Torricelli’s Republican opponent, Doug Forrester, was generally unknown, had very little political experience, and was trailing in the polls. However, the Senate
Ethics Committee’s summer investigation led to the news that Torricelli improperly accepted gifts from a campaign contributor. The polls quickly reversed, and Forrester soon had a four percentage point lead over Torricelli. As re-election looked doubtful, and likely amidst pressure from his party, Torricelli withdrew from the general election on September 30, 2002.

Torricelli’s withdrawal came thirty-six days before the general election. New Jersey’s statutory language indicated that a withdrawal must be made at least fifty-one days before the general election. The statute stated that there need not be a specific reason for a withdrawal, and it allowed replacement of the candidate “not later than the 48th day preceding the date of the general election.” The statute, however, did not mention what procedure should apply when a vacancy occurred within the last fifty days before the general election.

available at http://www.quinnipiac.edu/x1299.xml?ReleaseID=425 (discussing a poll that showed Torricelli ahead 44% to 36%, but noting that Torricelli was vulnerable particularly because many voters held an unfavorable view of him); see also Ansolabehere & Snyder, supra note 108, at 316 (“Challenger political experience is an important predictor of the vote in House and Senate elections.”).


112. PUB. MIND POLL, FARLEIGH DICKINSON UNIV., SEPT. 25, 2002 SURVEY (2002), http://publicmind.fdu.edu/torch/tab.html (showing 47% of voters would vote or were leaning towards voting for Forrester as compared to 43% for Torricelli when asked “If the election for New Jersey’s U.S. Senator were held right now, and you had to make a choice, which of the following two candidates would you vote for?”).

113. See Loughlin, supra note 4 (stating that Torricelli’s campaign “called reports of his possible withdrawal ‘misleading rumors’ early in the day, but that after Torricelli met with party leaders, he decided to withdraw from his race for re-election).  


115. See N.J. STAT. ANN. § 19:13-20 (West 1999) (establishing only the procedure for withdrawals that occur on or before the 51st day prior to the general election).

116. Id. § 19:13-20(d).

117. See id. § 19:13-20 (omitting any discussion of what should occur outside of the time frame discussed in the statute); N.J. Democratic Party, Inc., 814 A.2d at 1057 (“By its terms, [the statute] establishes an absolute right in a State committee to replace a candidate up to and including the forty-eighth day before the general election. Here, we confront a vacancy created outside of the statutory window. Nothing in [the statute] addresses the precise question whether a vacancy that occurs between the forty-eighth day and the general election can, in that circumstance, be filled.”).
While a strict reading of the statute could have kept Torricelli’s name on the ballot, the New Jersey Supreme Court interpreted the statute liberally. The court declared that the statute’s silence regarding replacement during the last forty-seven days before the general election did not forbid withdrawals or replacements. Moreover, the court stated that the legislature did not intend “to limit voters’ choice in a case where there is sufficient time to place a new candidate on the ballot and conduct the election in an orderly manner.” The court reasoned that even if a withdrawal took place in the last fifty days before the general election, the candidate could be replaced during the final forty-seven days before election day if it was administratively feasible because the voters of New Jersey benefit by having a candidate on the ballot from both of the major political parties. This decision paved the way for the New Jersey Democratic Party to replace Torricelli with former U.S. Senator Frank Lautenberg.

118. If the statute meant to allow replacement during the last forty-seven days before the general election then there is a strong argument that the legislature would have included this information, but since the legislature is silent on this time period, it is reasonable to conclude that the legislature did not intend for any replacements to occur during the last forty-seven days before the general election. See Colby W. Smith, Note, Election Law—Analysis and Implications of Judicial Interpretation of Ballot Access Statutes Pertaining to Candidate Substitution in the Era of Modern Political Campaigning, 35 RUTGERS L.J. 825, 825 (2004) (declaring outright and abruptly that the state statute at issue in the Torricelli case forbade candidate withdrawal “within fifty-one days of the election” and thus forbade the withdrawal and replacement of Torricelli). But see Angelo J. Genova & Jennifer Mazawey, In the Election of 2002, the Voters of New Jersey Were the Winners, 27 SETON HALL LEGIS. J. 77, 85 (2002) (agreeing with the court’s decision that the statute does not include language prohibiting a party from filling a vacancy within forty-eight days of the election).

119. See N.J. Democratic Party, Inc., 814 A.2d at 1036 (noting the Court’s traditionally liberal interpretation of the candidate replacement law “in the sense of construing it to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day”).

120. See id. at 1038 (reasoning that, unlike other states’ statutes, which provide for the consequences of a vacancy outside of the statutory window, the New Jersey statute’s complete silence cannot be considered the legislature’s intention to prohibit filling the vacancy). But see William E. Baroni, Jr., Administrative Unfeasibility: The Torricelli Replacement Case and the Creation of a New Election Law Standard, 27 SETON HALL LEGIS. J. 53, 74-75 (2002) (criticizing the New Jersey Supreme Court by calling the judges “election monitors” who are ignorant of election deadlines and concluding that the decision will have a “long-term effect on the practice of election law” by creating unclear election deadlines).

121. N.J. Democratic Party, Inc., 814 A.2d at 1039 (emphasis in original) (demonstrating the New Jersey Supreme Court’s liberal statute interpretation providing emphasis on voter choice and supporting the two-party system).

122. See id. at 1039, 1041 (finding that “there is sufficient time before the general election to place a new candidate’s name on the ballot” and that the modern electoral process requires the participation of the two major parties).

II. DISCUSSION

A. Political Parties’ Associational Right to Choose a Standard Bearer Should Extend to Allow Candidate Replacement

A discussion about the associational rights of political parties should begin with the distinction between public and private associations. As noted above, the *White Primary Cases* show that the Court did not see political parties as purely private associations. However, the string of cases from *Tashjian* to *California Democratic Party* demonstrates that political parties are not completely public either. The Constitution gives states control of the “times, places and manner of holding elections for Senators and Representatives.” But, Justice Marshall wrote in *Tashjian* that “this authority does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of the State’s citizens.” In regulating how political parties can replace withdrawn candidates, the states must be cognizant of the freedom of association. The political party seems to be a hybrid public and private association that has both associational rights and limits on the extent of those rights to ensure voters are able to participate in the process.

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es.cnn.com/2002/ALLPOLITICS/10/01/elec02.nj.s.torricelli.race/index.html. The article notes, interestingly, that Lautenberg and Torricelli were longtime rivals within the New Jersey Democratic Party. *Id.* The seventy-eight year-old Lautenberg used his name recognition and popularity in New Jersey to defeat Forrester by over 200,000 votes even though he only campaigned for the last month before the election. Div. Of Elections, N.J. Dep’t of Law & Pub. Safety, 2002 General Election Results 1-2 (2002), http://www.state.nj.us/lps/elections/2002results/02generalelection/2002g_us_state_sum_candidate_tally.pdf.

124. See discussion *supra* Part I.A.1 (outlining the Supreme Court decisions that led to the eventual end of the white primaries in the south by stopping political parties from excluding people from voting in the primary election based solely on race and guaranteeing the rights of the black voters under the Fourteenth and Fifteenth Amendments to the Constitution).

125. See discussion *supra* Part I.A.2 (chronicling the Supreme Court cases from 1986 to the present that expanded associational rights of political parties to ensure that they had both the power to include independent voters or exclude independent voters from the party’s primary election).


128. See *id.* (“The power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of political association.”).

129. See, e.g., Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 Tex. L. Rev. 1741, 1752 (1993) (discussing an interpretation that “most of us want,” namely “that parties bear constitutional rights and that they act unconstitutionally when they deprive any group of citizens of the opportunity for political participation” (original emphasis)). The Supreme Court decisions during the *White Primary Cases* and the more recent cases regarding party affiliation of primary voters show that the Court agrees with this view of political parties having a
a severe burden on these hybrid associational rights of the political party, then the law is unconstitutional unless it is narrowly tailored to serve a compelling state interest.130

1. A political party’s associational rights are severely burdened when the party cannot name a standard bearer

The first step in analyzing whether political parties’ First Amendment freedom of association extends to candidate replacement is to examine whether candidate replacement laws severely burden the hybrid associational rights of political parties.131 In general, the situation in question arises when “candidate X” wins the primary election but subsequently attempts to withdraw his or her candidacy before the general election takes place. After this withdrawal, the result is essentially the same as the situation before the primary election; the party has no general election candidate and there are many people who want to run for the office by replacing “candidate X” on the ballot. The major difference is that the primary voters already picked “candidate X” to represent them and now “candidate X” is no longer available.

In California Democratic Party, Justice Scalia began his analysis by clarifying “that a State may require parties to use the primary format for selecting their nominees.”132 The high cost associated with holding an election often makes the option of an additional primary election impractical after the original nominee withdraws.133 Most state laws, therefore, allow party leaders to select a replacement for “candidate X” in specific circumstances and within certain time constraints.134 These limitations have led to situations where there

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130. See, e.g., Cal. Democratic Party, 530 U.S. at 586 (striking down a state proposition under strict scrutiny for burdening a political party’s associational freedom).
131. See Tashjian, 479 U.S. at 214 (articulating that a court must inquire first into the character and magnitude of the statute’s imposition on the party’s rights).
134. See, e.g., Fla. Stat § 100.111(4)(a) (2005)

In the event that death, resignation, withdrawal, removal, or any other cause or event should cause a party to have a vacancy in nomination which leaves no candidate for an office from such party, the Department of State shall
may be sufficient time to replace “candidate X” on the ballot, but a
restrictive state law does not allow the political party to do so, such as
with Tom DeLay’s withdrawal in 2006.\textsuperscript{135}

The Supreme Court has indicated that a state law that effectively
does not allow a political party to replace a withdrawn candidate may
be a large burden on the party’s associational freedom.\textsuperscript{136} In \textit{Eu},
Justice Marshall noted that “\textit{[t]he freedom of association means . . . that
a political party has a right to . . . select a standard bearer who best
represents the party’s ideologies and preferences.\textsuperscript{137}}” Similarly,
Justice Scalia wrote in \textit{California Democratic Party} that “[t]here is simply
no substitute for a party’s selecting its own candidates.”\textsuperscript{138} If a
candidate withdraws after winning the primary and the political party
is unable to name a replacement for the general election, then the
law effectively eliminates the party’s constitutional right to select a
standard bearer as guaranteed by the Supreme Court.\textsuperscript{139}

The Texas ineligible candidate statute is a good example of a
statute that puts extreme restrictions on the rights of a party to

\begin{quote}
notify the chair of the appropriate state, district, or county political party
executive committee of such party; and, within 5 days, the chair shall call a
meeting of his or her executive committee to consider designation of a
nominee to fill the vacancy. The name of any person so designated shall be
submitted to the Department of State within 7 days after notice to the chair
in order that the person designated may have his or her name on the ballot
of the ensuing general election. If the name of the new nominee is
submitted after the certification of results of the preceding primary election,
however, the ballots shall not be changed and the former party nominee’s
name will appear on the ballot. Any ballots cast for the former party
nominee will be counted for the person designated by the political party to
replace the former party nominee. If there is no opposition to the party
nominee, the person designated by the political party to replace the former
party nominee will be elected to office at the general election. For purposes
of this paragraph, the term ‘district political party executive committee’
means the members of the state executive committee of a political party
from those counties comprising the area involving a district office.
\textsuperscript{135} See discussion \textit{supra} note 13 (detailing the strict requirements of the Texas
statute for candidate replacement even when DeLay withdrew many months before
the general election).
\textsuperscript{136} See \textit{Cal. Democratic Party}, 530 U.S. at 574 (noting the importance of the
political party’s right to exclude people from the association during the nominee
selection process).
(citations and internal quotations omitted).
\textsuperscript{138} \textit{Cal. Democratic Party}, 530 U.S. at 581.
\textsuperscript{139} See id. at 581 (emphasizing that the most important aspect of a political party
is being able to choose its own candidates); \textit{Eu}, 489 U.S. at 224 (reinforcing that
selecting a “standard bearer” for the party is at the heart of political association
because while voters have the right to identify with a party, the party also has a right
to “identify the people who constitute the association”).
\end{quote}
choose its candidate.\footnote{See discussion supra Part I.B.1 (noting the relevant statute regarding Tom DeLay’s withdrawal and showing that the Fifth Circuit’s reading of the statute leaves political parties with little leeway to replace a candidate who moves out of state).} Under the Texas statute, if “candidate X” dies then the party may replace “candidate X” on the ballot.\footnote{See \textsc{Tex. Elec. Code Ann.} \textsection 145.003 (Vernon 2006) (stating that candidates can only be declared ineligible if their applications for place on the ballot or other public record conclusively establish ineligibility). Certainly a death certificate is a public record that conclusively establishes ineligibility, but the other eligibility standards are governed by the U.S. Constitution, according to the federal court. See \textsc{Tex. Democratic Party v. Benkiser, No. A-06-CA-459-SS, 2006 WL 1851295, at *4 (W.D. Tex. July 6, 2006), aff’d, 459 F.3d 582 (5th Cir. 2006) (quoting the Constitution as listing three requirements that “are exclusive and may not be changed or expanded in any way” for eligibility to be elected to the House of Representatives: first, the candidates must be twenty-five years old; second, they must have been a U.S. citizen for at least seven years; and third, “when elected” they must be an inhabitant of the state for which they are elected to represent); see also U.S. \textsc{Const.} art. I, \textsection 2, cl. 2.} However, if “candidate X” decides to move out of the country or state and does not wish to seek election any longer, the federal courts interpreted the statute as not allowing a replacement of “candidate X” since there is a chance “candidate X” will return to the state before the election.\footnote{See \textsc{id.} (concluding that even though DeLay was living in Virginia, registered to vote in Virginia, and had no intention whatsoever of continuing his bid for re-election, the U.S. Constitution would not allow a replacement because there was a possibility that DeLay could move back to Texas on election day and therefore fulfill all the constitutional requirements).}

The Texas statute, as interpreted by the federal courts, leads to the result of forbidding political parties in Texas to replace candidates who abandon the state and their election race.\footnote{\textsc{Eu}, 489 U.S. at 224 (quoting \textsc{Ripon Soc’y, Inc. v. Nat’l Republican Party}, 525 F.2d 567, 601 (D.C. Cir. 1975)). The need for a party to select its standard bearer after a candidate abandons interest in the election is similar to the need for a party to endorse its preferred candidate before the primary election, which the Court guaranteed in \textsc{Eu}. \textit{Id.}} This indefensible result occurred in spite of the Supreme Court holding that selecting a “standard bearer who best represents the party’s ideologies and preferences” is within the political party’s First Amendment freedom of association.\footnote{\textsc{Eu}, 489 U.S. at 224 (quoting \textsc{Ripon Soc’y, Inc. v. Nat’l Republican Party}, 525 F.2d 567, 601 (D.C. Cir. 1975)). The need for a party to select its standard bearer after a candidate abandons interest in the election is similar to the need for a party to endorse its preferred candidate before the primary election, which the Court guaranteed in \textsc{Eu}. \textit{Id.}} When the Texas law prohibits a replacement, the political race that follows does not have a candidate from each of the major political parties and therefore limits the choices of voters as well as the desire of the party to have a candidate in the race.\footnote{See, e.g., \textsc{Tex. Democratic Party v. Benkiser, 459 F.3d 582, 595 (5th Cir. 2006) (leading to the situation where the Republican Party of Texas cannot replace their nominee who has quit the race in a congressional district that generally votes}}
as in Tashjian, state laws that do not allow a political party to replace its candidates limit “the [p]arty’s associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.”\textsuperscript{146} If a political party may not replace its withdrawn candidate, it is effectively disallowed from naming a standard bearer for the party contrary to rights seemingly protected by the Supreme Court.\textsuperscript{147}

The Supreme Court’s recent line of cases establishing greater First Amendment associational freedoms for political parties should extend to include the right of a party to replace a candidate who withdraws from a race.\textsuperscript{148} Even if the candidate dies or quits the race the day before the election, the political party and all members of the party have a burden on their associational rights if the party is not permitted to replace the withdrawn candidate.\textsuperscript{149} Without a new candidate being selected, voters would lack meaningful choice between the two major political parties. A political party and its members should not lose the right to select a standard bearer whenever a candidate withdraws from the election after winning the primary. As long as a replacement is logistically possible before the election, the political party should be able to select its standard bearer when the original primary winner is no longer running for office.

State laws that do not allow political parties to replace a withdrawn general election candidate place a severe burden on the associational rights of the political parties because the party is denied the opportunity to choose a standard bearer. After considering the nature of the right, an examination of a state law that severely burdens a party’s associational rights then shifts to address whether the law “is narrowly tailored to serve a compelling state interest.”\textsuperscript{150}

\begin{footnotesize}
\begin{enumerate}
\item Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986).
\item Cf. Eu, 489 U.S. at 224 (securing a political party’s right to select a standard bearer by ensuring parties are allowed to grant endorsements during the primary election).
\item Cf. Pildes, supra note 65, at 106 (citing Antonin Scalia, The Legal Framework for Reform, COMMONSENSE, vol. 4, no. 2, at 40, 49 (1981)) (quoting Supreme Court Justice Antonin Scalia on regulating primary elections of political parties: “As an original matter, I happen to think [any such legislation] should be [invalidated]. I see no reason why the government should be any more able to tell the Republican Party how to choose its leaders than to tell the Mormon Church how to select its elders.”).
\item Cf. Eu, 489 U.S. at 224 (noting that the selection of a standard bearer in the general election race is one of the most important functions of a political party).
\end{enumerate}
\end{footnotesize}
This Comment will examine the Texas and New Jersey statutes, as they are illustrative of the various candidate replacement laws in the country.

2. The Texas candidate replacement law does not serve a compelling state interest

The Texas candidate replacement statute can pass constitutional muster if it is narrowly tailored to serve a compelling state interest. The Texas statute allows for replacement of an ineligible candidate, but the federal courts held that candidates may be declared ineligible only if they do not satisfy the constitutional requirements of age, citizenship, and inhabitance on Election Day. Since the argument to replace DeLay was not made on freedom of association grounds, what Texas would claim as a compelling state interest is unknown. However, the most likely state interest for Texas to argue is that the law promotes fairness in elections. In fact, the Texas Democratic Party argued that allowing the Republican Party of Texas to replace Tom DeLay on the ballot would be unfair because it would require a change of strategy and a need to raise more money and resources for "an entirely different campaign."

Fairness is certainly a concern in all elections, but there is no evidence that changing candidates actually makes elections unfair.

151. See id. (requiring courts to strictly scrutinize the heavy burdens a statute imposes on a party's associational freedom).
155. Cf. Marc Caputo, Signs for Foley Replacement Can't Be Posted Near Polls, MIAMI HERALD, Oct. 19, 2006, at B6, available at http://www.miami.com/mla/miamiherald/news/15793109.htm (discussing fairness in replacement candidates and quoting a Republican lawyer as arguing that Democrats think supplying notices of a candidate replacement are fair when the candidate is a Democrat, but unfair when the candidate is a Republican). The statement sets forth the foundation of a strong argument that candidate replacement is neither fair nor unfair in an election, but rather that the party who needs to replace at that particular time thinks it is fair and the other party argues that the process is unfair. Cjf. id. ("The case drips with irony: Democrats, accustomed to arguing for full and open elections, want to limit election information that even the judge said sounded fair. Republicans, who say voters are smart enough to figure out elections and need to take 'personal responsibility' to stay informed, now want the government to step in."). When commentators discuss what is necessary to ensure fair elections, the topic of candidate replacement is rarely, if ever, discussed. For example, a search on Google.com on Jan. 17, 2007 for the
Although former Senator Lautenberg was able to win in New Jersey after replacing the embattled Torricelli, former Vice President Walter Mondale, for example, was unable to win in Minnesota after replacing the deceased Senator Paul Wellstone. Both opponent candidates had to shift their political strategy and adjust to the new opponent, but political campaigns are constantly adjusting to new revelations and news stories in a similar fashion, making a change in strategy unlikely to be a major burden on candidates.

The state would likely claim additional compelling interests for the candidate replacement law, such as avoiding voter confusion or limiting additional cost of elections. For example, the state may argue that voter confusion would arise if the political parties were allowed to pick a new candidate in the election whenever it pleased. It is rare, however, that a situation arises where a party would like to replace its candidate, because the original candidate already has the support of most of the party voters, and therefore a change will often hurt the party’s chance of victory.

phrase “fair elections” returned about 1,070,000 results, and a search for the phrase “candidate replacement” returned about 13,900 results. However, a search for pages that include both the phrases “fair elections” and “candidate replacement” found only two websites. Furthermore, each of these websites was a weblog (“blog”) and neither site actually discussed fair elections and candidate replacement together. ELECTIONLAWBLOG.COM, ELECTION LAW ARCHIVES, http://electionlawblog.org/archives.html (last visited May 31, 2007); DEMOCRATICUNDERGROUND.COM, ELECTION REFORM, FRAUD, & RELATED NEWS, http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=203x451786 (last visited May 31, 2007).

156. Compare Div. of Elections, supra note 109, with MINN. OFFICE OF THE SEC’Y OF STATE, 2002 MINNESOTA GENERAL ELECTION RESULTS (2003), http://electionresults.sos.state.mn.us/20021105/ElecRslts.asp?M=S&Races=0103 (showing former Vice President Mondale received 47.34% of the vote, while Norm Coleman garnered 49.53% for the victory and 0.5% of voters still voted for the deceased Paul Wellstone).

157. See generally John Theilmann & Allen Wilhite, Campaign Tactics and the Decision to Attack, 60 J. Pol. 1050 (1998), available at http://www.jstor.org/view/00223816/di014746/01p0130f/0 (discussing the decisions and adjustments that must be made in political campaigns around the use of negative advertisements).


159. Cf. Timmons, 520 U.S. at 364 (noting that Minnesota claimed that allowing a candidate to serve as the nominee for more than one party could confuse voters).

will likely only happen when it is absolutely necessary, as with the
depth of a candidate, or when a candidate faces corruption and ethics
charges like Torricelli and DeLay.\footnote{161} Furthermore, any voter
confusion that arises will likely be to the detriment of the party who
chooses to replace its candidate and the party will have the burden of
informing the public of the change.\footnote{162}

As for limiting the cost of elections and administering elections
effectively, the cost of replacing a candidate will be miniscule to the
state, unless the ballots have already been printed.\footnote{163} If the state must
re-print ballots then the state would likely argue that limiting this
additional cost would further a compelling interest.\footnote{164} However,
Justice Marshall wrote in \textit{Tashjian} that "the possibility of future
increases in the cost of administering the election system is not a
sufficient basis here for infringing [the party's] First Amendment

\footnote{161} See, e.g., Loughlin, \textit{supra} note 4 (detailing Torricelli's reasons for withdrawal).

\footnote{162} Cf. Susan Roesgen, \textit{GOP Slogan: 'Punch Foley for Negron'}, CNN.com, Nov. 7, 2006, http://www.cnn.com/\POLITICS/blogs/politicalticker/2006/11/gop-sloganpunch-foley-for-negron.html (showing some of the difficult hurdles that replacement candidates must face by reporting a slogan used by replacement candidate Joe Negron in an effort to inform voters that a vote for the disgraced and withdrawn Mark Foley would actually be a vote for Negron). A party that must withdraw its initial candidate and place a new person on the ballot risks confusing voters while those who stick with the same candidate do not. See \textit{Sonneman}, 969 P.2d at 639-40 (finding that voter confusion is a legitimate state interest and therefore important to avoid). This is the chance that a party must take and attempt to overcome if they decide to replace a candidate, which is another reason why such replacements rarely occur.

\footnote{163} If the ballots have not been printed, then the only cost associated with changing a name is the time it takes to re-organize the ballot in the actual electronic document used to set up the printing. If, however, ballots must be reprinted then the cost can be very high, but that additional cost could be passed along to the party making the replacement. See, e.g., N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1053 (N.J. 2002) (noting that the Democratic Party would have to pay $800,000 for reprinting of the absentee ballots).

\footnote{164} Cf. Bullock v. Carter, 405 U.S. 134, 147 (1972) (noting the "legitimate state objective" of lowering the cost to the State of holding primary elections). But cf. N.J. Democratic Party, Inc., 814 A.2d at 1039-42 (concluding that the cost and feasibility of reprinting ballots with thirty-four days before the general election is not enough of a reason to stop the replacement from occurring).
Thus, arguing that the statute serves the compelling state interest of limiting additional costs may be difficult and, even if successful, there is a strong argument that the statute is not narrowly tailored to serve that interest.166

Remarkably, some state interests argued in prior litigation would be furthered by the parties’ ability to replace withdrawn candidates and not by a state law restricting replacement. For example, in California Democratic Party, the state argued that its primary law would give voters greater choice and increase voter participation.167 When a candidate withdraws, however, voter choice is decreased and the replacement of a withdrawn candidate who is no longer campaigning gives voters an additional choice and may even get more voters to the polls on election day168. Furthermore, in Tashjian, the state claimed that they had a “compelling interest in protecting the integrity of the two-party system.”169 If candidate replacement is not allowed, then only one of the major parties will have a candidate who wants to be on the general election ballot. However, if the replacement is allowed then the two-party system is furthered by giving all voters two viable options from which to choose.170 Since there would likely not be a compelling state interest found and some compelling state interests are furthered by allowing replacement, the statute would not be “narrowly tailored” to serve any compelling state interests.

166. Cf. id. (rejecting the claimed state interest of cost reduction). For a statute to be narrowly tailored to reduce cost, it may need to have language regarding the date on which the ballots are printed in order to help lower the cost rather than broad language that does not allow for the replacement of candidates. Cf. ARIZ. REV. STAT. ANN. § 16-343 (2006) (allowing replacement of candidates when they withdraw as long as the required paperwork is filed before the official ballots are printed). The Texas statute does not have this language narrowing the date when the statute is effective. See TEX. ELEC. CODE ANN. § 145.003 (Vernon 2006).
168. See N.J. Democratic Party, Inc., 814 A.2d at 1034-35 (N.J. 2002) (“It is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups.” (quoting Kilmurray v. Gilfert, 91 A.2d 865 (N.J. 1952))) (emphasis omitted).
169. Tashjian, 479 U.S. at 222; see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364-67 (naming possible state interests for not allowing candidates to become the party nominee for more than one party and including one state interest as “favor[ing] the traditional two party system”).
170. See N.J. Democratic Party, Inc., 814 A.2d at 1036 (stating that the law exists to allow every party representation on a ballot).
171. See, e.g., id. at 1034-35 (supporting the two-party system and the general idea that the voters are the winners when both the Republican and Democratic Parties have a serious and competitive nominee on the general election ballot).
3. The New Jersey candidate replacement law is narrower but still lacks a compelling state interest

Although there are likely no additional state interests that New Jersey, or any other state, could argue to support a law that does not allow candidate replacement, it is worth looking briefly at how narrowly tailored the New Jersey statute is to serving any conceivable state interest. A statute that allows for candidate replacement up until a certain amount of days before the election is unmistakably more narrowly tailored than a statute that does not allow replacement at all. The New Jersey statute allows replacement for any reason as long as it is sufficiently before the election to allow the state to hold fair and competent elections. By setting a time where replacements can occur, the state is arguably narrowly tailoring the statute to allow replacements unless doing so would become too costly or administratively infeasible. This type of law, therefore, may pass constitutional scrutiny if the state can successfully argue that the statute serves a compelling state interest. Interestingly, the New Jersey Supreme Court did not find the additional cost of replacing a candidate after the statute’s deadline to be a good enough reason to disallow the replacement.

Regardless of the additional cost analysis, the expenses associated with changing a candidate in an election are dwindling as touch screen voting technology limits the need for printing ballots altogether. If voting is all electronic then, just like updating a

172. See N.J. STAT. ANN. § 19:13-20 (West 1999) (setting out procedure for replacing candidates when withdrawal occurs anytime on or before the fifty-first day before the general election).
173. Id.; see N.J. Democratic Party, Inc., 814 A.2d at 1042 (concluding that the candidate replacement was legal because it “will not affect adversely the right of any qualified voter to participate in the election” and the replacement should go forward because it is administratively feasible).
174. Where the state’s argued interest is administering fair elections, a statute that allows candidate replacement up until it is administratively infeasible is much more narrow than a statute that does not allow replacement at all. This type of reliance on promoting fairness in elections seems to be New Jersey’s best defense of its candidate replacement law. Cf. Curry v. Baker, 802 F.2d 1302, 1317-18 (11th Cir. 1986) (emphasizing in dicta the importance of the “state’s interest in insuring honest and fair elections” and that this interest would allow for the conduct at issue even if due process and equal protection rights were infringed).
175. Cf. id. at 1318 (showing that the state interest in ensuring fair elections is adequate justification for some constitutional infringement).
176. Cf. N.J. Democratic Party, Inc., 814 A.2d at 1039-41 (allowing the replacement of Torricelli even though some absentee ballots had already been mailed and although re-printing and re-mailing new ballots would cost additional funds).
177. Many states now have some electronic voting and statutes that govern electronic voting. See, e.g., ALA. CODE § 17-7-20 (2007) (setting out definitions for the “Electronic Vote Counting Systems” article of the “Electronic Voting Machines” chapter of the Code of Alabama); Tom Zeller Jr., Ready or Not (and Maybe Not),
computer document or web page, it will be very easy to change a candidate if a party must make a replacement.\footnote{178} Therefore, replacements may occur nearer to Election Day if they are necessary and the administrative costs associated with such replacements will continue to decrease as technology advances.\footnote{179} Reevaluation of the laws surrounding candidate replacement is needed to devise a new standard that preserves associational rights of political parties while allowing the state to retain a system that is easy to administer, and promotes voter choice and fair elections.

\section*{B. Recommendation of a National Legislative Standard for Candidate Replacement in Races for Federal Office}

Political parties should have the same constitutional right to associate in every state, but candidate replacement laws of the various states infringe on party associational rights differently.\footnote{180} A national law that establishes a clear standard for candidate replacement would provide stability to political parties and resolve candidate replacement issues outside the court system. Although the Elections Clause in Article I of the U.S. Constitution gives states the power to regulate the time, place, and manner of holding elections, it goes on to note that “the Congress may at any time by [l]aw make or alter...
such [r]egulations.\textsuperscript{181} Furthermore, the Supreme Court noted “it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the [s]tates.”\textsuperscript{182} The statute proposed in this Comment would “make or alter”\textsuperscript{183} the current state laws on candidate replacement as they apply to federal office, much like the congressionally established campaign finance legislation that regulates contributions to federal political candidates equally in every state.\textsuperscript{184}

This Comment proposes the following federal statute:\textsuperscript{185}

(a) If a party nominee selected through a party primary election or other selection process dies, becomes disqualified, or withdraws his/her candidacy for any reason, then the vacancy shall be filled in a special primary election to be conducted as provided in this statute. All special primary expenses shall be paid by the political party whose nominee must be replaced, except in the case of death of a nominee or disqualification by law, where the state shall pay. If more than one party requires a special primary, then the expenses shall be paid by the parties proportionately to the number of respective vacancies to be filled. The state shall pay for the special primary if it falls on the day of the general election and the parties shall pay for the special general election that follows. For a death, disqualification, or withdrawal within the last four weeks before the general election, the parties shall pay for the special primary election and the state shall fund the special general election.

(b) The filing period for a special primary election to fill a vacancy shall open the second Tuesday after the nominee’s death, disqualification, or withdrawal, and shall remain open through the following Tuesday. The special primary election shall be conducted on the second Tuesday immediately following the close of the filing period, unless such special primary election would fall within the four weeks preceding the general election date. If the special primary is held four weeks or more before the date of the general election, that office is to be filled at the general election. If the special primary election schedule described would place the
special primary within the four weeks preceding the general election date, then the special primary election shall take place on the day of the general election and the office shall be filled in a special general election to be held on the second Tuesday in the month following the special primary election.

(c) Where the party nominee whose position becomes vacant was unopposed, each political party registered with the State Election Commission may nominate a candidate for the office at issue through a special primary election in the same manner and under the same procedures provided by this statute.

(d) If no deaths, disqualifications, or withdrawals have occurred, or if all parties have elected replacements by the Tuesday four weeks preceding the general election, then all necessary ballots, including absentee ballots, shall be printed. If a vacancy for a particular office exists for which a replacement has not been made by the Tuesday four weeks preceding the general election, then all necessary ballots, including absentee ballots, shall be printed once all special election filing deadlines pass. If death, disqualification, or withdrawal occurs within the last four weeks preceding the general election then a notification shall be placed on the ballot stating the date in which the special election will be held for the office(s) with a candidate vacancy and the process provided in this statute shall be followed.

Section (a) of the proposed statute addresses under what circumstances a primary winner may withdraw from the general election. Some state laws require the candidate to be extremely ill, which raises subjective questions that are often difficult to answer about the severity of the illness. Other state laws have a list of reasons detailing when withdrawal is allowed, many of which include personal or family reasons. Such broad statutes effectively allow withdrawal for any reason and risk raising subjective questions about the sufficiency of a reason to withdraw, which are difficult to decide consistently. The proposed statute would eliminate the need to fit

186. Cf. id. (defining several examples of when a candidate may withdraw from an election including limits to non-political reasons).
187. See, e.g., Miss. Code Ann. § 25-15-317 (2006) (setting “[r]easons of health, which shall include any health condition which, in the written opinion of a medical doctor, would be harmful to the health of the candidate if he continued” as a “legitimate nonpolitical reason” for withdrawal from an election).
188. See, e.g., S.C. Code Ann. § 7-11-50 (2006) (listing “family crises” as a reason that a candidate may withdraw and be replaced after gaining the party nomination); W. Va. Code § 3-5-19 (2007) (setting a window allowing replacement between the primary and ninety-eight days before the general election for candidates with “extenuating personal circumstances”).
the reason for withdrawal into a particular category by allowing a political candidate to withdraw from the election for any reason. This standard would reduce the amount of rule-bending necessary to withdraw, and remove the subjective questioning that currently arises.

To deter political maneuvering, section (a) of the statute would require the party to pay for and hold a new primary to select the replacement when a candidate withdraws. This procedure should assure trustworthiness in the system and encourage the parties to rarely use the statute. Furthermore, desire to win the election will provide additional independent encouragement for political parties to sparingly replace candidates because changing candidates during a political campaign may not necessarily be a successful maneuver.

Under this proposed statute, withdrawals may take place at any time, and the special primary must conclude before the fourth Tuesday (or twenty-eight days) prior to the general election for the race to be decided on the day of the general election. Each state,
further, may not mail out absentee ballots until twenty-eight days before the election assuring that the absentee ballots are final. If a candidate withdraws between one and twenty-eight days before the general election, this proposed statute draws a bright line and the candidate will not be replaced on the ballot. Instead, the special election process would continue as described in the proposed statute and a special general election to fill the office would occur on the second Tuesday of the month following the original general election. The statute also defines specific timelines for the special election process, including section (c), which allows other political parties to nominate candidates after a withdrawal in order to stop unopposed candidates from ensuring their political party holds the seat.

This statutory scheme strikes a balance between political parties' First Amendment freedom of association rights, voters’ rights to electoral choice, and the state’s interest in conducting a fair election.
with viable candidates. The state will avoid exorbitant costs since the party will pay for special elections when candidates choose to withdraw and there will be no need to reprint ballots for the initial general election. Additionally, candidates and parties will know the exact rules of the game and these rules will be the same across every state with respect to federal races. Ultimately, this federal statute would ensure that disparate results, such as those exemplified by the Tom DeLay and Robert Torricelli cases, would no longer occur.

**CONCLUSION**

It is clear from the *White Primary Cases* that political parties do not have absolute First Amendment freedom of association privileges. However, the more recent Supreme Court decisions show that one area where political parties do have strong associational rights is in deciding who may vote in their primary election based on non-discriminatory standards like party registration. This right of association is, broadly stated, a guarantee that the political party can choose its candidate in the best way it sees fit, as long as the party does not discriminate against any racial group or other suspect class. In the event that a party’s primary winner dies, becomes disqualified, or withdraws before the general election, the party is left in the same situation as before the primary and their right to choose a new candidate should not be lesser than their initial right to choose the original candidate. Currently, each state defines when parties are allowed to replace withdrawn candidates, and many state laws place severe burdens on the party’s right to choose a replacement.

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198. *See discussion supra* Part I.A (detailing the First Amendment freedom of association protections for political parties and how state laws should be narrowly tailored to serve a compelling state interest such as conducting fair elections and creating a real choice for voters between the two major parties).

199. *Cf. Bullock v. Carter*, 405 U.S. 134, 147 (1972) (noting the “legitimate state objective” of lowering the cost to the state of holding primary elections); *Election Cost—$4 Billion and Climbing, supra* note 133 (discussing the enormous costs of elections).


201. *See discussion supra* Part I.B (analyzing and discussing the attempted replacements of Tom DeLay and Robert Torricelli in their respective states).

202. *See discussion supra* Part I.A.1 (concluding that exclusion of blacks in primaries was illegal and violated the Fifteenth Amendment).

203. *See discussion supra* Part I.A.2 (finding that political parties have some associational rights based on the First and Fourteenth Amendments).

204. *See discussion supra* Part I.A.1 (discussing the notion that discrimination based on race will always be illegal in political party decision-making).

205. *See discussion supra* Part II (detailing the problems a party faces when a candidate withdraws before an election).
standard bearer in federal elections. Selecting a candidate to appear on the general election ballot is one of the most critical activities of a political party, and state laws should not be able to infringe upon that process without being narrowly tailored to serve a compelling state interest. The national standard proposed in this Comment would preserve the associational rights of the political parties consistently throughout the country, while still allowing the states to hold successful and efficient elections.

206. See discussion supra Part II (showing through several examples how state codes place heavy burdens upon parties that must replace a candidate and offering analysis as to why these burdens should be lightened).