

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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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

1. See, e.g., Charles Babington & Jonathan Weisman, *Rep. Foley Quits in Page Scandal*, WASH. POST, Sept. 30, 2006, at A01 (discussing Congressman Mark Foley's decision to withdraw from his re-election bid weeks before the 2006 election amidst evidence of online sexual advances toward minors); Liam Ford & Rudolph Bush, *Ryan Quits Race*, CHI. TRIB., June 26, 2004, at 1 (detailing the decision by Republican candidate for Senate, Jack Ryan, to withdraw a few months prior to the 2004 election after reports of an ongoing messy divorce surfaced); *Sen. Wellstone, Seven Others Die in Plane Crash*, FOXNEWS.COM, Oct. 25, 2002, <http://www.foxnews.com/story/0,2933,66707,00.html> (reporting the crash of a small plane carrying Senator Paul Wellstone and members of his family and staff just two weeks before the 2002 election).

2. See, e.g., *Missouri Has New Governor After Crash Kills Carnahan*, CNN.COM, Oct. 18, 2000, <http://archives.cnn.com/2000/US/10/18/carnahan.plane.01/index.html> (noting that Senate candidate and Governor Mel Carnahan died three weeks before the 2000 election in a plane crash).

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,⁶ each state has its own laws governing replacement of withdrawn primary winners.⁷

In recent election cycles, many primary winners withdrew from the general election, leading to disparate results.⁸ 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.⁹ 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.¹⁰ 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.mn.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,¹¹ the New Jersey Supreme Court allowed the New Jersey Democratic Party to replace Torricelli's name on the ballot.¹² The comparably embattled DeLay decided to withdraw from his re-election bid months before the general election in 2006,¹³ but the federal courts declared the Texas statute unconstitutional and did not allow the Republican Party of Texas to replace DeLay on the ballot.¹⁴

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.¹⁵ 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 ineligibility 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*,¹⁶ the Supreme Court struck down laws that prohibit parties from allowing non-party members to vote in the party primary¹⁷ and laws that prohibit parties from limiting primary voters to include only party members.¹⁸

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.¹⁹ 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

(1989), and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). See generally FREEDOM OF ASSOCIATION (Amy Gurmann ed. 1998) (compiling essays on the freedom of association as an individual and civic value); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 767 (2002) (arguing for a "new approach to freedom of association under the Constitution" and concluding that "the significance of associations . . . lies in their contributions to popular sovereignty, rather than to free speech").

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.²⁰ 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.²¹ 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.²² 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.²³

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*.²⁴ 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.²⁵ 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.”²⁶ 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.²⁷ 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.²⁸

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.²⁹ Six years after *Newberry*, the Court declared in

of political parties. *Id.* at 50. This law was in response to the widespread corruption within political parties at the time and paved the way for states to pass similar laws. *Id.* at 50-52. By 1900, at least thirty-five states had passed legislation regulating political party primaries and conventions, all of which had the general goal of removing candidate nominations from the hands of party bosses. *Id.* at 51-53. By passing laws to regulate political primaries, the state legislatures attempted to label the political parties as public entities, and Epperson breaks these initial laws down into four categories that spanned the gamut from laws addressing general anti-corruption goals to statutes establishing direct primaries. *Id.* at 52-61. The courts generally upheld these laws, but they were largely ineffective at changing the political party structure, as the parties were able to adapt and continue to control their organization until the Supreme Court intervened in the *White Primary Cases*. *Id.* at 61, 131-51.

24. 256 U.S. 232 (1921).

25. *See id.* at 244-45 (explaining that the statute “in effect declares a candidate for the United States Senate punishable by fine and imprisonment, if (except for certain specified purposes) [the candidate were to] give, contribute, expend, use, promise or cause to be given, contributed, expended, used or promised in procuring his nomination and election more than \$ 3,750”).

26. *Id.* at 250.

27. *See id.* (declaring that primary elections and general elections are “radically different” and therefore the term “elections” in the Constitution does not include primary elections).

28. *See generally* DARLENE CLARK HINE, BLACK VICTORY: THE RISE AND FALL OF THE WHITE PRIMARY IN TEXAS (2003) (analyzing and discussing the history of the *White Primary Cases* from their beginning with the Texas Democratic primary, through similar instances of segregated primary elections in other southern states, to the fall of the white primary).

29. *See, e.g.*, Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 57-60 (2001)

*Nixon v. Herndon*³⁰ that a Texas state law prohibiting African-Americans from voting in the Democratic Primary denied those voters equal protection under the Fourteenth Amendment.³¹ After *Herndon*, the Texas Legislature enacted a law giving political parties the power to decide who could vote in their primaries.³² The Texas Democratic Party took that power and created a rule that African-Americans could not participate in the primary.³³ 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.³⁴

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 elections³⁵ and that the Fifteenth Amendment protected voters against racial discrimination by political parties in primary elections.³⁶ 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)).

30. 273 U.S. 536 (1927).

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,³⁷ when it condemned discrimination that was seemingly far removed from state action.³⁸ 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.³⁹ Thus the Court had to decide whether this group must follow the Fourteenth and Fifteenth Amendments.⁴⁰ 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.⁴¹ The Court held that the Jaybird Association's exclusion of blacks from their straw poll violated the Fifteenth Amendment.⁴² This decision helped put an end to the white primary,⁴³ 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.⁴⁴

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 2,032 participated in the July primary under the Democratic banner, 3,790 members voted in the May balloting of the Jaybird 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.⁴⁵ In these cases, the Supreme Court shifted its characterization of political parties back toward private associations with greater freedom to make internal decisions.⁴⁶

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.⁴⁷ 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*,⁴⁸ definitively held that political parties have constitutionally protected freedom of association under the First and Fourteenth Amendments.⁴⁹ *Tashjian* involved a challenge by the Republican Party of Connecticut to a Connecticut law that prohibited parties from allowing 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.

48. 479 U.S. 208 (1986).

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.⁵⁰ 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.⁵¹ The Court then rejected Connecticut's claimed interests⁵² 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.⁵³

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*⁵⁴ that political parties' associational rights include the right to exclude non-members from voting in the primary.⁵⁵ The case addressed a California law passed by ballot initiative that required a blanket primary to determine party nominations.⁵⁶ 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.⁵⁷ After the ballot initiative passed, the Democratic, Republican, Libertarian, and Peace and Freedom Parties joined together in challenging the California law.⁵⁸

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).

54. 530 U.S. 567 (2000).

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.”⁵⁹ 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”⁶⁰ The Court went on to state emphatically that “[t]here is simply no substitute for a party’s selecting its own candidates.”⁶¹

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.⁶² The Court, however, rejected as un compelling all seven state interests offered by California.⁶³ 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.⁶⁴ 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.⁶⁵

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) “affording 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*.⁶⁶ In *Clingman*, the Court upheld an Oklahoma law that prohibited parties from allowing members of other parties to vote in their primary.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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]."⁷¹

In *Eu v. San Francisco County Democratic Central Committee*,⁷² the Supreme Court looked at political parties' associational rights outside the context of defining the eligible primary voters.⁷³ 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).

66. 544 U.S. 581 (2005).

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 345, 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").

71. *Clingman*, 544 U.S. at 589 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 235 (1986) (Scalia, J., dissenting)).

72. 489 U.S. 214 (1989).

73. *See id.* at 223 (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 hamstring voters seeking to inform themselves about the candidates and the campaign issues").

by political parties was unconstitutional.⁷⁴ As in *Clingman*, the Court found the state's suggested interests un compelling. 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.⁷⁵ 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.'"⁷⁶

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 *White Primary Cases*, some limits on the associational rights of political parties remain.⁷⁷ Unquestionably, political parties cannot discriminate on the basis of race in deciding who can participate in the selection of general election candidates.⁷⁸ 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.⁷⁹ Outside of these limitations, political parties appear to have the right to decide who chooses their general election candidates.

B. *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

74. See *id.* at 216-17 (explaining that the law makes it a misdemeanor for a primary candidate to claim to be the party's "officially endorsed candidate," and that this has made it "possible for a candidate with views antithetical to those of her party nevertheless to win its primary").

75. See *id.* at 232-33 (rejecting the claim of a compelling interest to manage the internal affairs of political parties democratically because the State did not show that the regulation was necessary to ensure fair and orderly elections).

76. *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)).

77. See Persily, *supra* note 15, at 758-59 (stating that the *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 *White Primary Cases*] into the larger doctrine of case law on state action").

78. See discussion *supra* Part I.A.1 (providing background information on the *White Primary Cases* and detailing the end result which prohibited political parties from excluding people from the party primary based on their race).

79. 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).

situation.⁸⁰ These laws may lead to markedly different results under very similar circumstances.⁸¹ Some state laws allow for withdrawal under any circumstance,⁸² while others only allow withdrawal in particular situations.⁸³ Many states have candidate replacement laws that set a timeline for when a replacement is acceptable and when it is not.⁸⁴ 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.⁸⁵

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.⁸⁶ 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.⁸⁷ 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., CAL. 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 ALB. 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").

87. See, e.g., *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 WL 1851295, at *6 (W.D. Tex. July 6, 2006), *aff'd*, 459 F.3d 582 (5th Cir. 2006) ("In deciding election disputes, '[a]ny constitutional or statutory provision which restricts the right to hold office must be strictly construed against ineligibility.'" (quoting *Wentworth v. Meyer*, 839 S.W.2d 766, 767 (Tex. 1992))).

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 embattled⁹¹ 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. 20, 2006, <http://writ.news.findlaw.com/dean/20061020.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

election race against little-known challengers and his optimism about victory in the general election).

93. Sylvia Moreno, *DeLay Wins Tex. GOP Primary*, WASH. POST, Mar. 8, 2006, at A04.

94. *Id.*

95. A search on Google.com on Jan. 10, 2007 restricted to the Nick Lampson campaign website (<http://www.lampson.com/>) for "Nick Lampson DeLay corruption" (quotations omitted) returned 30 hits. The pages found included language such as "Our campaign to bring an end to Tom DeLay's era of corruption and cronyism had our best fundraising quarter yet. . .," <http://www.lampson.com/messages?id=0009>, and "Tom DeLay is the poster boy for corruption in Washington," <http://www.lampson.com/news?id=0048>, among others. See also Josephine Hearn, *Dems Decry 'Culture of Corruption'*, THE HILL, Sept. 29, 2005, at 1 (discussing Lampson and other Democrats' strategy to portray the Republican Party as corrupt in order to win elections in November 2006).

96. See Juliet Eilperin & Jeffrey H. Bimbaum, *A Force Behind the Power*, WASH. POST, Apr. 1, 2006, at A09 (discussing former DeLay aide Tony C. Rudy's guilty plea to charges of conspiracy to corrupt public officials with lobbyist Jack Abramoff, who was already in prison after pleading guilty to multiple charges).

97. See Jonathan Weisman & Chris Cillizzi, *DeLay to Resign from Congress*, WASH. POST, Apr. 4, 2006, at A01 ("Former aides and sources close to DeLay said his decision was motivated not by [former aide] Rudy's guilty plea but by DeLay's concerns that he might lose his suburban Houston seat to his Democratic opponent, former representative Nick Lampson, and his belief that another Republican could win instead.").

98. See R. Jeffrey Smith & Jonathan Weisman, *DeLay Departing on Own Terms*, WASH. POST, Apr. 5, 2006, at A01 ("DeLay was determined to hang on to his seat at least through the primary . . . because he considered his three Republican challengers gadflies and traitors and he was determined to try to block them from succeeding him.").

ineligible for the office.”⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹ Since this statute addressed eligibility of candidates, the district court declared that Texas could not change the constitutional eligibility requirements for federal candidates.¹⁰²

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.”¹⁰³ The court further stated that it would not speculate as to DeLay’s inhabitation on Election Day.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ The district and circuit courts would 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).

100. *See* *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 WL 1851295, at *5-*7 (W.D. Tex. July 6, 2006), *aff’d*, (noting that Benkiser submitted documentation of DeLay’s voter registration and drivers license in Virginia to the court).

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).

102. *Tex. Democratic Party*, 2006 WL 1851295, at *6.

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 Representative is at issue, specifically because Benkiser’s prediction of future eligibility based on current inhabitation 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 inhabitation 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.¹⁰⁷

2. *Attempted replacement of Robert Torricelli in New Jersey*

In 2002, Democratic Senator Robert Torricelli was seemingly on his way to re-election.¹⁰⁸ 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.¹⁰⁹ Meanwhile, Torricelli's Republican opponent, Doug Forrester, was generally unknown, had very little political experience, and was trailing in the polls.¹¹⁰ However, the Senate

if DeLay was replaced on the ballot); Smith & Weisman, *supra* note 98 (detailing DeLay's desire to win the primary before withdrawing from the election); Handler, *supra* note 7, at 413 (suggesting that two goals of candidate replacement laws should be "to distinguish legitimate political decisions from corrupt practices" and "reduce the influence of political bosses," thus statutes and the courts interpreting them should try to ensure the primary voters choose political candidates as often as possible, rather than allowing committees to hand-pick candidates on a regular basis after the primary).

107. See, e.g., Hilary Hylton, *Campaign '06: Tom DeLay's Gift to the Democrats*, TIME.COM, Oct. 23, 2006, <http://www.time.com/time/nation/article/0,8599,154973,9,00.html> (citing experts who say that DeLay's district, which President Bush won in 2004 carrying 64% of the vote, would likely go to the Democrats since the court decisions and DeLay's actions left the race without a Republican candidate). Remarkably, the write-in candidate, Shelley Sekula-Gibbs, received roughly 42% of the total votes and nearly held DeLay's seat for the Republican Party. TEXAS SEC'Y OF STATE, 2006 GENERAL ELECTION RESULTS, STATEWIDE RACE SUMMARY, <http://elections.sos.state.tx.us/elchist.exe> (select "2006 General Election" in drop-down menu, select "Statewide Race Summary," and click submit) (showing further that the Democrat Nick Lampson won by under 15,000 votes in the strongly Republican 22nd Congressional District).

108. Cf. *New Jersey Senate Election Results*, CNN.COM, Nov. 6, 1996, <http://www.cnn.com/ELECTION/NJ00senate.html> (showing Torricelli winning his last campaign with a 53% to 43% margin). Although incumbents are not guaranteed to win, they have a distinct advantage in our system and Torricelli only became vulnerable when ethics violations arose. See generally Stephen Ansolabehere & James M. Snyder, Jr., *The Incumbency Advantage in U.S. Elections: An Analysis of State and Federal Offices, 1942-2000*, 1 ELECTION L.J. 315 (2002) (surveying the elections from 1942 to 2000 and analyzing the continually increasing advantage that incumbents enjoy when running for re-election).

109. DIV. OF ELECTIONS, N.J. DEP'T OF LAW & PUB. SAFETY, 2002 PRIMARY ELECTION RESULTS 1, 5 (2002), http://www.state.nj.us/lps/elections/2002results/02primaryelection/2002p_us_state_sum_candidate_tally.pdf. Official results also show that the Republican primary was a three person competitive race that Douglas Forrester won by just under 17,000 votes. *Id.* at 2-5.

110. See Samara Aberman, *Doug Forrester Biography*, ONLINE NEWSHOUR, http://www.pbs.org/newshour/vote2002/races/nj_forrester.html (last visited May 31, 2007) (noting that Forrester's only experience in an elected office was a "two-year stint as mayor of West Windsor, New Jersey"); Press Release, Quinnipiac University Polling Institute, GOP Challenger in Striking Distance of Torricelli, Quinnipiac University Poll Finds; Senate Race Pits Unknown Vs. Unliked (June 19, 2002),

Ethics Committee's summer investigation led to the news that Torricelli improperly accepted gifts from a campaign contributor.¹¹¹ The polls quickly reversed, and Forrester soon had a four percentage point lead over Torricelli.¹¹² As re-election looked doubtful, and likely amidst pressure from his party, Torricelli withdrew from the general election on September 30, 2002.¹¹³

Torricelli's withdrawal came thirty-six days before the general election.¹¹⁴ New Jersey's statutory language indicated that a withdrawal must be made at least fifty-one days before the general election.¹¹⁵ 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."¹¹⁶ The statute, however, did not mention what procedure should apply when a vacancy occurred within the last fifty days before the general election.¹¹⁷

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.").

111. See *Torricelli Apologizes for Ethics Lapses*, CNN.COM, July 31, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/07/30/torricelli.ethics/index.html> (noting that Torricelli bought a CD player and television at below market-value prices and borrowed bronze statues to display in his office from a supporter, thereby violating Senate rules).

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).

114. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1032 (N.J. 2002) ("On September 30, 2002, Senator Robert G. Torricelli announced his withdrawal as the New Jersey Democratic Party's candidate for the United States Senate in the Nov. 5, 2002 general 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 1037 ("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,¹¹⁸ the New Jersey Supreme Court interpreted the statute liberally.¹¹⁹ 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.¹²⁰ 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."¹²¹ 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.¹²² This decision paved the way for the New Jersey Democratic Party to replace Torricelli with former U.S. Senator Frank Lautenberg.¹²³

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).

123. *Dems Pick Lautenberg to Replace Torricelli*, CNN.COM, Oct. 2, 2002, <http://archiv>

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.¹²⁴ However, the string of cases from *Tashjian* to *California Democratic Party* demonstrates that political parties are not completely public either.¹²⁵ The Constitution gives states control of the “times, places and manner of holding elections for Senators and Representatives.”¹²⁶ 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.”¹²⁷ In regulating how political parties can replace withdrawn candidates, the states must be cognizant of the freedom of association.¹²⁸ 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.¹²⁹ If a law imposes

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).

126. U.S. CONST. art. I, § 4, cl. 1.

127. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

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

mix of constitutional rights and constitutional requirements. Compare *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (concluding that parties can exclude voters not registered in their party from the primary election), with *Terry v. Adams*, 345 U.S. 461, 477 (1953) (concluding that groups of party members could not hold straw polls that exclude voters based on the race of the voter, when the straw poll led to an inevitable primary election and general election victory for the winner).

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).

132. *Cal. Democratic Party*, 530 U.S. at 572.

133. Cf. *Election Cost—\$4 Billion and Climbing*, MSNBC.COM, Nov. 2, 2004, <http://www.msnbc.msn.com/id/6388580> ("The National Association of Secretaries of State estimates the elections will cost an average of \$33 million per state.").

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 2006.¹³⁵

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.¹³⁶ In *Eu*, Justice Marshall noted that “[f]reedom of association means . . . that a political party has a right to . . . select a standard bearer who best represents the party’s ideologies and preferences.”¹³⁷ Similarly, Justice Scalia wrote in *California Democratic Party* that “[t]here is simply no substitute for a party’s selecting its own candidates.”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.¹³⁹

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

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.

135. See discussion *supra* note 13 (detailing the strict requirements of the Texas statute for candidate replacement even when DeLay withdrew many months before the general election).

136. See *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).

137. *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (citations and internal quotations omitted).

138. *Cal. Democratic Party*, 530 U.S. at 581.

139. See *id.* at 581 (emphasizing that the most important aspect of a political party is being able to choose its own candidates); *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”).

choose its candidate.¹⁴⁰ Under the Texas statute, if “candidate X” dies then the party may replace “candidate X” on the ballot.¹⁴¹ 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.¹⁴²

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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ Just

140. 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).

141. See TEX. ELEC. CODE ANN. § 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 *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. CONST. art. I, § 2, cl. 2.

142. See *Tex. Democratic Party*, 2006 WL 1851295, at *8 (“[N]o determination as to DeLay’s eligibility due to present inhabitancy in Virginia can be made at this time or at any time prior to election day because construing the Texas Election Code to permit such a declaration of ineligibility based on inhabitancy at this time would be an unconstitutional application of state law.”).

143. See *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).

144. *Eu*, 489 U.S. at 224 (quoting *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 *Eu. Id.*

145. See, e.g., *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.”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.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.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.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.”¹⁵⁰

strongly Republican, thus giving the Democratic Party a much stronger chance of winning).

146. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986).

147. *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).

148. *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.”).

149. *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).

150. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000).

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.¹⁵¹ 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 inhabitation on Election Day.¹⁵² 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.¹⁵³ 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.”¹⁵⁴

Fairness is certainly a concern in all elections, but there is no evidence that changing candidates actually makes elections unfair.¹⁵⁵

151. *See id.* (requiring courts to strictly scrutinize the heavy burdens a statute imposes on a party's associational freedom).

152. *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 589-90 (5th Cir. 2006); *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 WL 1851295, at *5-*6 (W.D. Tex. July 6, 2006), *aff'd*, 459 F.3d 582 (5th Cir. 2006) (citing U.S. CONST. art. I, § 2).

153. *Cf. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 260 (1974) (White, J., concurring) (noting that Florida advanced the “concededly important interest of ensuring free and fair elections” as a reason for its law that the Court deemed to infringe on the First Amendment freedom of the press rights of the petitioners).

154. Plaintiffs' Second Amended Original Complaint at 5, *Tex. Democratic Party v. Benkiser*, No. A-06-CA-459-SS, 2006 WL 1851295 (W.D. Tex. July 6, 2006), *aff'd*, 459 F.3d 582 (5th Cir. 2006).

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/mld/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. *Cf. 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.¹⁵⁶ 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.¹⁵⁷

The state would likely claim additional compelling interests for the candidate replacement law, such as avoiding voter confusion or limiting additional cost of elections.¹⁵⁸ 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.¹⁵⁹ 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.¹⁶⁰ Rather, candidate replacement

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 web log ("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/di/014746/01p0130f/0> (discussing the decisions and adjustments that must be made in political campaigns around the use of negative advertisements).

158. Cf. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (mentioning Minnesota's argument that it has an interest in avoiding voter confusion to support its reasoning for banning fusion candidates across multiple parties); *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); *Sonneman v. State*, 969 P.2d 632, 639-40 (Alaska 1998) (examining the State's claimed interests in "reducing costs in printing the ballots" and "preventing voter confusion").

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).

160. Cf. *Illinois GOP Offers Senate Nod to Alan Keyes*, CNN.COM, Aug. 6, 2004, <http://www.cnn.com/2004/ALLPOLITICS/08/04/illinois.senate/> (discussing the Illinois GOP's six-week search for a candidate to replace primary winner Jack Ryan in the 2004 Senate election and showing the difficulty of finding someone who wants to replace a candidate without having a solid political base from a primary victory). The Illinois Republican Party eventually settled on Alan Keyes as the replacement, a

will likely only happen when it is absolutely necessary, as with the death of a candidate, or when a candidate faces corruption and ethics charges like Torricelli and DeLay.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.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.¹⁶³ If the state must re-print ballots then the state would likely argue that limiting this additional cost would further a compelling interest.¹⁶⁴ However, Justice Marshall wrote in *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

conservative TV talk show host who was not a resident of Illinois. *Id.* Although there is no telling how Jack Ryan would have performed as the Republican nominee, it would have been difficult for him to do much worse than Alan Keyes. *Cf. Illinois Election Results 2004*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/elections/2004/il/> (listing U.S. Senate election results that show Democrat Barack Obama defeated Republican replacement Alan Keyes with 70% of the vote to Keyes’ 27%). *But see* Rick Hampson, *Torricelli Fill-in Out of Retirement*, USA TODAY, Nov. 7, 2002, at 5A, *available at* http://www.usatoday.com/news/politicselections/2002-11-06-lautenberg_x.htm (reporting Democrat replacement Frank Lautenberg’s victory over Republican Doug Forrester and thus showing that some replacement candidates can overcome the difficulty of joining a campaign late).

161. *See, e.g.*, Loughlin, *supra* note 4 (detailing Torricelli’s reasons for withdrawal). Candidates all work hard to get their nomination and few, if any, want to withdraw even in the face of serious allegations. *Id.* (noting that dropping out of the New Jersey senatorial race was the most painful thing Torricelli has ever done).

162. *Cf.* Susan Roesgen, *GOP Slogan: ‘Punch Foley for Negron’*, CNN.COM, Nov. 7, 2006, <http://www.cnn.com/POLITICS/blogs/politicalticker/2006/11/gop-sloganp-unch-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 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.

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, 1033 (N.J. 2002) (noting that the Democratic Party would have to pay \$800,000 for reprinting of the absentee ballots).

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).

rights.”¹⁶⁵ 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 day.¹⁶⁸ 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.¹⁷⁰ However, if the replacement is allowed then the two-party system is furthered by giving all voters two viable options from which to choose.¹⁷¹ 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.

165. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986).

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).

167. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000).

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.¹⁷² 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.¹⁷³ 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.¹⁷⁴ This type of law, therefore, may pass constitutional scrutiny if the state can successfully argue that the statute serves a compelling state interest.¹⁷⁵ 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.¹⁷⁶

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.¹⁷⁷ 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.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.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.

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.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

Electronic Voting Goes National, N.Y. TIMES, Sept. 19, 2004, at 1, (discussing expansion of electronic voting machines across the country). This expansion of electronic voting is likely to continue, but there are many citizen groups and individual politicians that are fighting to bring back paper ballots, due in part to a fear of election fraud with the use of electronic ballots. See, e.g., Christian Davenport & Ann E. Marimow, *Ehrlich Wants Paper Ballots for Nov. Vote*, WASH. POST, Sept. 21, 2006, at A01 (explaining Maryland Governor Robert Ehrlich’s desire to use paper ballots after the electronic voting in the “primary election was plagued by human error and technical glitches”).

178. But see David Cho & Lisa Rein, *Fairfax to Probe Voting Machines; Election Board Report Minimized Flaws, Supervisors Say*, WASH. POST, Nov. 18, 2003, at B08 (describing criticism from both Democrats and Republicans about the performance of the county’s new \$3.5 million electronic touch-screen voting machines). See generally R. MICHAEL ALVAREZ & THAD E. HALL, *POINT, CLICK, & VOTE: THE FUTURE OF INTERNET VOTING* (2004) (outlining the history of voting on the internet and the future possibilities of internet voting in America).

179. But cf. Zeller, *supra* note 177 (stating that there are still many glitches in electronic voting that need to be fixed before the general public will trust the system).

180. Compare NEV. REV. STAT. § 293.165 (2006) (declaring that there are no changes to be made to the general election ballot after one week past the primary election, even in the case of the death of a candidate), and NEV. REV. STAT. § 293.175 (2006) (setting the twelfth Tuesday before the general election as the date of the primary, and thus not allowing any candidate replacements during the last eleven weeks (or seventy-seven days) before the general election), with ALA. CODE § 17-13-23 (2007) (allowing replacement of candidates for “death, resignation, revocation, or otherwise” without setting a deadline for such replacement, thus permitting withdrawal and replacement at any time and for nearly any reason).

such [r]egulations.”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.”¹⁸² The statute proposed in this Comment would “make or alter”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.¹⁸⁴

This Comment proposes the following federal statute: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

181. U.S. CONST. art. I, § 4, cl. 1.

182. *Foster v. Love*, 522 U.S. 67, 69 (1997) (internal quotations and citations omitted).

183. U.S. CONST. art. I, § 4, cl. 1.

184. See, e.g., *Senate Approves Campaign Finance Bill*, CNN.COM, Mar. 21, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/03/20/campaign.finance/index.html> (discussing the passage of a campaign finance bill that will regulate campaign contributions by individuals and organizations across the country when donating to candidates running for federal office).

185. This proposed statute is modeled after a South Carolina statute. See S.C. CODE ANN. § 7-11-50 (2006).

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.¹⁸⁶ 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.¹⁸⁷ Other state laws have a list of reasons detailing when withdrawal is allowed, many of which include personal or family reasons.¹⁸⁸ 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.¹⁸⁹ 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. § 23-15-317 (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”).

189. *Cf. HAW. REV. STAT. ANN. § 11-117* (LexisNexis 2007) (requiring a “statement from a licensed physician indicating that such ill health may endanger the

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.¹⁹⁰ This procedure should assure trustworthiness in the system and encourage the parties to rarely use the statute.¹⁹¹ 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.¹⁹²

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.¹⁹³ Each state,

candidate's life" and thus indicating that the legislature worried candidates would falsely claim they had a severe illness in order to withdraw from the election); S.C. CODE ANN. § 7-11-50 (2006) (allowing withdrawal for "family crises" that can include any "circumstances which would substantially alter the duties and responsibilities of the candidate to the family or to a family business" and therefore essentially allows the candidate to determine when to withdraw and let the party pick a replacement).

190. Cf. ARK. CODE ANN. § 7-7-104 (2007) (setting forth a process to follow after a candidate withdraws that will set up a special primary in order to select a new nominee from the party); S.C. CODE ANN. § 7-11-55 (2006) (declaring that a vacancy after the original candidate was chosen through a primary election "must be filled in a special primary election to be conducted as provided in this section").

191. See *supra* notes 161-162 and accompanying text (arguing that withdrawals will occur in rare instances because candidates all work hard to get nominations and have little desire to withdraw).

192. Cf. *Coleman Wins Minnesota Senate Race*, *supra* note 8 (noting that the Democrats chose former Vice President Walter Mondale to replace the deceased Paul Wellstone on the ballot for U.S. Senate). But see *Dems Pick Lautenberg to Replace Torricelli*, *supra* note 123 (detailing the Democrats' pick of former Senator Frank Lautenberg to replace Torricelli in 2002 after Lautenberg retired from the Senate in 2000).

193. Cf. VA. CODE ANN. § 24.2-539 (2007) (allowing for replacement of withdrawn candidate as long as such replacement is administratively feasible). The goal of the proposed statute in this Comment is to set a firm line across states that both allows the state to administer a fair election and protects the parties' First Amendment associational rights. See *supra* note 185 and accompanying text (setting out the proposed statute). The state statutes vary as to when they allow a replacement, from around 130 days before the election through Election Day itself. See, e.g., IND. CODE ANN. § 3-13-1-7 (LexisNexis 2007) (requiring that withdrawals and replacements occur before June 30th, which is between 125 and 131 days before the general election on the first Tuesday after the first Monday of Nov.); WIS. STAT. § 7.38 (2006) (allowing replacement of the name of the deceased candidates to occur up until the day of the election and providing statutory language to permit stickers with the new candidate's name to be placed over the deceased candidate on the ballot). The average number of days before Election Day that the statutes allowed candidate replacement to occur was roughly thirty-six days prior to the general election. The proposed statute is modeled after Section 7-11-50 of the Code of Laws of South

further, may not mail out absentee ballots until twenty-eight days before the election assuring that the absentee ballots are final.¹⁹⁴ 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.¹⁹⁵ 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.¹⁹⁶ 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.¹⁹⁷

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

Carolina Annotated, which allows the general election ballot to be set up until fourteen days before Election Day. See S.C. CODE ANN. § 7-11-55 (2006). The proposed statute in this Comment uses twenty-eight days to provide the state the final ballot in enough time before the election to administer the election. The state can print ballots a full four weeks before the general election, thus providing a reasonable amount of time to fulfill administrative responsibilities. Furthermore, the political party is protected fully because replacements are still allowed and a special election is held for withdrawals that occur within the last four weeks before Election Day.

194. This would ensure that the state does not lose money from the cost of reprinting ballots. Another potential way to limit the state's losses is to make the political party pay for any reprinting costs. See *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1033 (N.J. 2002) (requiring the New Jersey Democratic Party to pay \$800,000 to cover the cost of reprinting the ballots after the court ordered the replacement of the candidate).

195. Cf. UTAH CODE ANN. § 20A-1-501 (2007) (allowing replacement of candidates who die, resign as a result of disability certified by a physician, or are disqualified after the primary election and up until the deadline for voters to register to vote, while disallowing any replacements after the deadline for voters to register for the election); UTAH CODE ANN. § 20A-2-102.5 (2007) (setting the voter registration deadline at "30 calendar days before the date of the election" and if that day is a weekend or holiday then extending the deadline "to the next regular business day").

196. Cf. S.C. CODE ANN. § 7-11-50 (2006) ("If the nomination is certified less than two weeks before the date of the general election, that office must not be filled at the general election but must be filled in a special election to be held on the second Tuesday in the month following the election . . ."); IOWA CODE § 49.58 (2006) (proscribing a special election "on the first Tuesday after the second Monday in December" rather than attempting to make a change to the ballot after the death of a candidate and instead of counting any votes on the original election day).

197. Cf. Margaret R. Kugel, Note, *Political Pinch-Hitting: Fair or Foul Play in the 2002 New Jersey Senate Election?*, 40 HOUS. L. REV. 1147, 1178 n. 194 (2003) (noting that "[u]nopposed candidates are not a rarity in United States elections" in support of the argument that candidate replacement should not occur as it did for Robert Torricelli's candidacy in 2002).

with viable candidates.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹

CONCLUSION

It is clear from the *White Primary Cases* that political parties do not have absolute First Amendment freedom of association privileges.²⁰² 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.²⁰³ 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.²⁰⁴ 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.²⁰⁵ 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

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).

200. Cf. Federal Election Campaign Act, 2 U.S.C. §§ 431-442 (2000) (establishing campaign finance laws for "general, special, primary, or runoff election[s]" to federal office regardless of the state in which the election is held).

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.²⁰⁶ 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).