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Duke v. Cleland: The Eleventh Circuit Neglects the First Amendment Rights of Political Parties and Allows States to Limit Ballot Access of Presidential Primary Candidates

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RECENT DEVELOPMENT

Duke v. Cleland: The Eleventh Circuit Neglects the First Amendment Rights of Political Parties and Allows States to Limit Ballot Access of Presidential Primary Candidates

I. INTRODUCTION

Notwithstanding H. Ross Perot's strong third place finish in the 1992 Presidential election,[1] history suggests a successful presidential candidate must be a member of one of the two major political parties to win.[2] As a result, many candidates compete for each major party's nom-

1. Ross Perot, an independent candidate, drew 19% of the popular vote, the best showing by an independent or third-party candidate since Theodore Roosevelt received 27% while running on the Bull Moose ticket in 1912. R. W. Apple, Jr., *The 1992 Elections: President-Elect—The Overview; Clinton, Savoring Victory, Starts Sizing up Job Ahead*, N. Y. Times A1 (Nov. 5, 1992).

2. The most recent candidate to be elected president who did not run on the Democratic or Republican ticket was Zachary Taylor, a Whig, in 1848. *The World Almanac and Book of Facts 1992* 425 (Pharos, 1991).

ination.[3] Moreover, the leaders of state Democratic and Republican parties that hold presidential primaries often have attempted to remove the lesser-known, and sometimes politically unpopular, candidates from the ballot.[4]

One argument advanced by state party leaders in support of their attempts to prevent some candidates from appearing on the ballot is that the political party has a First Amendment freedom of association that includes the right not to associate with those candidates they deem ideologically outside the party.[5] Aside from having the support of law,[6] theoretical justification for this proposition exists. The purpose of political parties is to advance the shared beliefs of their members and convert often diffuse beliefs into specific, responsive public decisions.[7] One way political parties advance shared beliefs is to select candidates representing those shared beliefs to run in a general election.[8] If those candidates can attract sufficient popular support to be elected, the candidates can effectuate the political parties' interests.[9]

American political parties, however, are not ideologically monolithic. In fact, Justice Powell characterized them as having "a fluidity and overlap of philosophy and membership."[10] Political parties do not win elections by converting voters into adherents of their entire platform, but by forging coalitions with competing interests in the hopes of attracting more voters than the coalition put together by the opposing party.[11] As a result, political parties often develop vague and overlapping programs that do not offer the voter sharply different choices.[12]

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3. In 1992, the well-known candidates for the Democratic nomination were Edmund G. Brown, Bill Clinton, Tom Harkin, Robert Kerry, and Paul Tsongas. The lesser-known Eugene McCarthy, Larry Agran, and Lyndon LaRouche also sought the party's nomination. The well-known Republican candidates were President George Bush and Pat Buchanan. However, the lesser-known Emmanuel Branch, Harold E. Stassen, and the not-as-well-liked David Duke also sought the Republican nomination. See *McCarthy v. Elections Bd.*, 480 N.W.2d 241, 243-44 (Wis. 1992) (discussing the Wisconsin Ballot).

4. See generally *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992); *Duke v. Smith*, 784 F. Supp. 865 (S.D. Fla. 1992); *LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992); *McCarthy*, 480 N.W.2d at 241.

5. See, for example, *Duke*, 954 F.2d at 1530-31.

6. See text accompanying notes 27-30.

7. See generally Everett Carll Ladd, *Where Have All the Voters Gone? The Fracturing of America's Political Parties* xxi (Norton, 2d ed. 1982).

8. Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L. J. 117, 123 (1984) ("*Guttman article*"). See also *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (stating that the basic function of political parties is to select candidates to run in general elections).

9. *Guttman article* at 123.

10. *Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J., dissenting).

11. A. Ranney, *Curing the Mischiefs of Faction: Party Reform in America* 201 (Berkeley, 1975).

12. Id.

Political parties often do not have a single ideology accepted by all members. Therefore, one could argue that the leaders of political parties have no unique insight that would allow them to discern accurately which candidates are ideologically outside the party.

The First Amendment limits the power of government to interfere with political parties' choice to exercise their freedom of association.[13] The Supreme Court has held that states cannot interfere with a party's selection of its candidates during the primary election process absent a compelling interest.[14] Consequently, direct state interference in a party's candidate selection process is unconstitutional.[15]

This Recent Development analyzes *Duke v. Cleland*.[16] In *Duke*, the court addressed an action brought by David Duke, a former member of the Ku Klux Klan, Nazi party, and National Association for the Advancement of White People, against Max Cleland, the Georgia Secretary of State and chair of the Presidential Candidate Selection Committee.[17] Duke brought the suit because his name was removed from the Georgia Presidential Preference Primary Ballot by Republican Party members of the state-created Presidential Candidate Selection Committee.[18]

This Recent Development analyzes the Eleventh Circuit's decision and focuses on the state's involvement in Duke's exclusion from the primary ballot. Part II sets forth the legal background and an appropriate framework of analysis. Part III summarizes the opinions of the majority and dissent. Part IV analyzes the court's decision in light of relevant case law and suggests that the court's analysis was flawed because neither the majority nor the dissent considered the most important issue—whether the state constitutionally can compel the Republican Party to establish an elite Presidential Candidate Selection Committee and confer upon the committee the power to remove otherwise qualified candidates from the primary ballot.

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13. See text accompanying notes 19-26.

14. See *Opinion of the Justices to the Governor*, 385 Mass. 1201, 434 N.E.2d 960, 963 (1982) (advisory opinion) (supporting the protection of a party's control over who its candidate in a general election will be).

15. See text accompanying notes 20-26.

16. 954 F.2d 1526 (11th Cir. 1992).

17. See *Duke v. Cleland*, 783 F. Supp. 600 (N.D. Ga. 1992).

18. Id.

II. LEGAL BACKGROUND

A. *The First Amendment's Protection of the Right of Association*

Although the word "association" is not contained in the text of the First Amendment, the Supreme Court held in *NAACP v. Alabama* that the First Amendment protects a positive right to work collectively with others to pursue goals substantively protected by the First Amendment, including political advocacy.[19] In *Cousins v. Wigoda*, the Court for the first time explicitly held that political parties enjoy this constitutionally protected freedom of association.[20]

In *Cousins*, the Court confronted a situation in which the Democratic National Convention refused to seat a group of delegates elected to represent the city of Chicago in the 1972 Illinois Democratic Primary because the delegates were slated in a manner that violated party guidelines.[21] The Court held that state laws governing the electoral processes do not take precedence over party rules governing the eligibility of delegates selected for the party's presidential nominating convention.[22] After first asserting that political parties and their adherents enjoy the First Amendment freedom of political association and noting that the Fourteenth Amendment protects this right from infringement by the states,[23] the Court applied the compelling interest test to determine if the state's interest in protecting the outcome of the votes cast at the primary outweighed the party's constitutional guarantee of free association.[24]

The Court found that the state's interest failed to meet the compelling interest test because the states have no constitutionally man-

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19. 357 U.S. 449 (1958). In addition, the Court has held that it is unconstitutional for a governmental practice or policy to interfere with or discourage a group's pursuit of ends having special First Amendment significance, such as literary expression or religious worship. See Laurence H. Tribe, *American Constitutional Law* § 12-26 at 1013-14 (Foundation, 2d ed. 1988) ("*Tribe hornbook*").

20. 419 U.S. 477 (1975).

21. Id. at 478-79. A group of challengers contested the elected delegates' right to be seated at the Democratic National Convention because the slate of the elected delegates was assembled in violation of new party guidelines, requiring more open access to meetings and affirmative action in the delegate selection process. Id. at 479. See also Arthur M. Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. Cal. L. Rev. 213, 225 (1984) ("*Weisburd article*").

The National Party Credentials Committee recommended seating the challengers instead of the elected delegates. *Cousins*, 419 U.S. at 480-81. The elected delegates sued in state court and received an injunction prohibiting the challengers from taking on roles as delegates. Despite the injunction, the Democratic National Convention seated the challengers. Id. at 481.

22. Id. at 483.

23. Id. at 487.

24. Id. at 489.

dated role in the selection of candidates for President and Vice President, which is the primary purpose of the nominating convention.[25] Consequently, the party seated the challengers in place of the elected delegates even though they were not elected under the laws of that state.[26]

The Court also has recognized that the First Amendment freedom of association protects the right not to associate with others. The Court recently specified how this "negative" right applies to political parties in *Democratic Party of United States v. Wisconsin*.[27] In *Democratic Party*, the Court held that the National Democratic Party could refuse to seat delegates selected in a Wisconsin open primary. Wisconsin state law required state delegates to vote at the national convention in accordance with the results of the open primary,[28] while the rules of the National Democratic Party state that only registered Democrats may participate in delegate selection procedures, including primaries.[29] By allowing the party to refuse to seat delegates, the Court upheld the party's freedom not to associate. The Court concluded that the party's freedom to associate for the common advancement of political beliefs included the freedom to identify those members who constitute the association and to limit the association to those people only.[30] Therefore, the National Democratic Party constitutionally could refuse to seat delegates selected by non-party members.

Additionally, the Court limited the extent to which the state can interfere with a political party's First Amendment freedom to associate with independent voters. In *Tashjian v. Republican Party of Connecticut*,[31] the Court invalidated a state law requiring voters in a political party's primary to be registered members of that party.[32] The state Republican Party had a contrary rule allowing independent voters to vote in its party primaries.[33] The Court held that the state law was unconstitutional[34] because it denied the party the right to govern the selection of its candidates, despite the state's legitimate interests in ensuring the

25. Id. at 489-90.
26. Id. at 491.
27. 450 U.S. 107 (1981).
28. Id. at 122-24. In an open primary, the state does not require a voter to declare publicly a party preference or to have that preference publicly recorded. Thus, a registered voter in an open primary state may vote in the primary of either party. See id. at 112 n.4.
29. Id. at 109.
30. Id. at 122.
31. 479 U.S. 208 (1986).
32. Id. at 210-11.
33. Id. at 210.
34. Id. at 229.

orderly administration of primaries, preventing voter raiding, avoiding voter confusion, and protecting the integrity of the two-party system.[35]

The Supreme Court also has invalidated state statutes that significantly interfere with a party's freedom to structure itself internally. In *Eu v. San Francisco County Democratic Central Committee*,[36] the Court struck down a California statute that prohibited party leaders from making primary endorsements and restricted the party's latitude to organize itself internally on the grounds that the statute deprived the political parties and their members of the rights of free speech and free association.[37]

In *Eu*, the Court stated that laws burdening the rights of political parties and their members can be upheld only if they advance a compelling state interest and are narrowly tailored to serve that interest, establishing a strict level of scrutiny.[38] The Court then addressed the statute's ban on primary endorsements. After holding that the ban was unconstitutional because it prohibited purely political speech,[39] the Court also found it infringed on the party's constitutional guarantee of free association[40] because it burdened the party's right to identify people who are members of the party and select a standard bearer who best represented the party's ideologies and preferences.[41]

In response, the State argued that the ban was necessary to ensure a stable political system. Although the Court accepted the State's proposition that the maintenance of a stable political system is a compelling state interest,[42] the Court held that the statute was not narrowly tailored to serve this interest because the State could not explain adequately how banning parties from opposing or supporting primary candidates advanced this state interest.[43] The State argued that this statute embraced a similar compelling interest in party stability, but

35. Id. at 217.

36. 489 U.S. 214 (1989).

37. Id. at 224, 233. A provision of the California Election Code forbade the official governing bodies of political parties from endorsing candidates in party primaries, dictated the size and composition of the state central committees, set forth rules governing the selection and removal of committee members, fixed the maximum term of office for the chair of the state central committee, required that the chair rotate between residents of northern and southern California, specified the time and place of committee meetings, and limited the dues parties could impose on their members. Id. at 216-19.

38. Id. at 222.

39. Id. at 222-24.

40. Id. at 224.

41. Id.

42. Id. at 226.

43. Id.

the Court rejected this justification as well, noting that a primary is an ideal place to resolve interparty feuds.[44]

Additionally, the Court held that the organizational restraints imposed by the statutes impermissibly burdened the associational rights of political parties and their members because they limited the parties' discretion in deciding how to organize themselves, conduct their affairs, and select their leaders.[45] The Court then distinguished this interference from laws it previously had upheld, such as statutes requiring primary voters to have residence in the state and be a certain age in order to vote.[46] According to the Court, these statutes burdened the associational rights of parties to garner support and members, yet served a compelling interest in preserving the integrity of the election process because these statutes ensured that elections were fair and honest.[47] The organizational restrictions struck down in *Eu*, however, were unrelated to preservation of the integrity of the election process and directly regulated the composition of the party leadership, unlike the restrictions upheld in prior cases.[48]

The cases discussed above suggest that any time a state substitutes its discretion for that of the political party, it infringes upon that party's associational interests.[49] Thus, when a state substantially erodes party members' freedom of association, the Court will subject these acts to strict scrutiny.[50]

B. The State Action Requirement

The First and Fourteenth Amendments regulate only the behavior of the government, not private conduct.[51] Therefore, voters and candidates who assert that a political party is denying them their freedom to associate with it must establish that the political party is a state actor to mount a meaningful constitutional challenge.[52] Under the older view of state action, in which private entities that performed public functions were deemed to be state actors, the Court found state action to

44. Id. at 227. The State also argued that the endorsement ban was necessary to protect voters from confusion and undue influence. Id. at 228. The Court rejected this argument on the grounds that restricting the flow of information does not help voters make good decisions and because the state presented no evidence that the ban was necessary to prevent fraud and corruption. Id. at 228-29.

45. Id. at 230.

46. Id. at 231 (citing *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972)); *Oregon v. Mitchell*, 400 U.S. 112, 118. (1970).

47. *Eu*, 489 U.S. at 231.

48. Id. at 231-32.

49. See *Tribe hornbook* § 13-22 at 1112-18 (cited in note 19).

50. Id.

51. Civil Rights Cases, 109 U.S. 3 (1883).

52. See *Tribe hornbook* § 13-23 at 1118-21 (cited in note 19).

exist when political parties took on official electoral roles pursuant to state law.[53]

The earliest cases in which the Supreme Court held that political parties' nominating functions constituted state action were the White Primary cases, in which black voters challenged the parties' refusal to allow them to vote.[54] In *Nixon v. Herndon*,[55] the Court struck down a Texas statute that prohibited blacks from voting in party primaries on the grounds that the statute was a direct and obvious infringement of the equal protection guarantee of the Fourteenth Amendment.[56] Although in this case the Court did not address the issue of state action because the state statute mandated the challenged discrimination, the Court has found state action to exist when a political party takes a particular course of action explicitly permitted by a state statute.[57]

For example, in *Nixon v. Condon*,[58] black voters challenged a policy adopted by the Democratic Party of Texas that barred blacks from voting in party primaries.[59] The Court held that the party's rule constituted state action because a state statute gave the committee power to proclaim voter qualifications for the party.[60] The Court then struck down the policy on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[61]

Condon and the other White Primary cases that followed[62] marked the beginning of the public function approach to analyzing state action. In these cases, the Court reasoned that because the entire electoral process is a public function, a political party entrusted by the state to perform electoral duties becomes an agent of the state and its acts constitute state action.[63]

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53. *Weisburd article* at 216 (cited in note 21).

54. See text accompanying notes 55-63.

55. 273 U.S. 536 (1927).

56. Id. at 541.

57. See *Nixon v. Condon*, 286 U.S. 73 (1932).

58. Id.

59. Id. at 82. The Democratic Party disqualified these voters pursuant to a state law enacted after *Herndon*, which allowed the executive committees of political parties to establish voter qualifications. Id.

60. Id. at 88-89.

61. Id. at 89. According to Professor Tribe, the White Primary cases also suggest that political party activities that are part of the candidate selection process are deemed state action because the nominee of that party will receive some preferential state treatment. *Tribe hornbook* § 13-23 at 1119 (cited in note 19).

62. See *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); *Gray v. Sanders*, 372 U.S. 368 (1962).

63. *Smith*, 321 U.S. 649 (holding that a rule adopted by the state convention of the Texas Democratic Party that prohibited non-whites from voting in party primaries violated the Fifteenth Amendment and finding state action in the fact that the running of primaries is a governmental function and an integral part of the election process); *Terry*, 345 U.S. 461 (holding that a racially

Under the Court's current doctrinal approach to state action, the activity must be one that was traditionally under the exclusive domain of the government.[64] Under this approach, nominating procedures of political parties generally are not state action because governmental nomination of political candidates is antithetical to the norms of American democracy.[65] If, however, a particular nominating procedure is required by a statute, state action obviously is present, and no formal inquiry into the matter is required.[66] This was the situation in *Duke* because in Georgia, a detailed statute allowed a state-created committee to remove candidates from the Republican and Democratic presidential primary ballots.[67]

III. Recent Development: *Duke v. Cleland*

A. Facts

On December 4, 1991, David Duke announced his candidacy for the Republican nomination for President of the United States.[68] Georgia law required that the state Democratic and Republican parties hold a presidential preference primary in 1992.[69]

To appear on the Georgia ballot, candidates need not gather signatures of party members, but news media throughout the United States generally must advocate or recognize candidates as both aspirants for that office and members of a political party or body that conducts a presidential preference primary.[70] Georgia law required the Secretary of State to prepare a list of the candidates who met the statutory qualifications and submit the list to the statutorily established Presidential Candidate Selection Committee.[71] In December 1991, Secretary of State

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restrictive election held by the Jaybird Democratic Association was state action because the state had allowed this unofficial pre-primary to usurp the role of the official Democratic primary).

64. In *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974), the Court rejected an argument that the termination of electric service by a privately owned public utility was state action. It held that the act of providing electric power was not a public function. Id. at 352. The Court limited the public function doctrine to situations in which private entities perform functions "traditionally exclusively reserved to the State." Id.

65. See id.

66. See *Tribe hornbook* § 18-1 at 1688 (cited in note 19) (stating that when the validity of a statute is at issue in a particular case, no further inquiry into the existence of state action is required).

67. Ga. Code Ann. § 21-2-193 (Michie, 1987) ("O.C.G.A.").

68. *Duke v. Cleland*, 954 F.2d 1526, 1527 (11th Cir. 1992).

69. O.C.G.A. § 21-2-191 (Michie, 1987 and Supp. 1992).

70. O.C.G.A. § 21-2-193(a) (Michie, 1987).

71. Id.

Max Cleland, conforming to the Georgia statute, submitted a list of aspirants, including David Duke, to the Committee.[72]

Georgia law also allowed the Committee members of a political party to remove a candidate's name from its party's ballot by unanimous agreement.[73] In December 1991, all three Republican Committee members[74] agreed to remove Duke's name from the ballot.[75] Pursuant to Georgia law, Duke then made a written request to the Secretary of State that his name be reinstated on the ballot.[76] If any member of the Committee then had wanted Duke's name to appear on the primary ballot, the statute required the Secretary of State to include it.[77] No Republican member of the Committee, however, requested that the Secretary of State place Duke's name on the ballot.[78]

On January 15, 1992, Duke, along with three persons registered and qualified to vote in Georgia Republican primary elections,[79] brought an action in the United States District Court for the Northern District of Georgia. They sought a temporary restraining order and a preliminary injunction to prevent the Committee from excluding David Duke from the 1992 Georgia Republican presidential preference primary ballot.[80] The district court denied the motions, holding that the plaintiffs did not meet the burden of proof required for granting a preliminary injunction.[81] The United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court and concluded that the plain-

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72. *Duke*, 954 F.2d at 1527.

73. O.C.G.A. § 21-2-193(a) provides in pertinent part: "Each person designated by the Secretary of State as a presidential candidate shall appear upon the ballot of the appropriate political party or body unless all committee members of the same political party or body as the candidate agree to delete such candidate's name from the ballot."

74. The Presidential Candidate Selection Committee is composed of Georgia's Secretary of State, the Speaker of the House of Representatives, the majority leader of the Senate, the minority leaders of both the House and the Senate, and the chairpersons of both the Democratic and Republican parties. The Secretary of State is the Committee's nonvoting chairperson. O.C.G.A. § 21-2-193(a).

75. *Duke*, 954 F.2d at 1527.

76. Id. at 1528. O.C.G.A. § 21-2-193(b) allows the removed candidate to request that his name be reinstated on the ballot.

77. *Duke*, 954 F.2d at 1528.

78. Id.

79. Apparently, these voters were made parties to the suit so that the appellants would have standing to argue that the Committee's action infringed upon their voting rights. Id. at 1531.

80. *Duke v. Cleland*, 783 F. Supp. 600, 601 (N.D. Ga. 1992).

81. Id. Specifically, the court considered whether: (1) a substantial likelihood existed that the plaintiffs ultimately would prevail on the merits; (2) the plaintiffs would suffer irreparable injury unless the injunction issued; (3) the threatened injury to the movants outweighed whatever damage the proposed injunction might have caused the opponent; and (4) the injunction, if issued, would not be adverse to the public interest. Id.

tiffs' claims that the committee's action denied them their freedom of association and right to vote were without merit.[82]

B. *Majority Opinion*

A divided three-judge panel of the Eleventh Circuit affirmed the district court's denial of a preliminary injunction, which would have prevented the Secretary of State from excluding David Duke from the primary ballot.[83] After concluding that the controversy was not moot, even though the ballots already had gone to the printer without Duke's name on them,[84] the majority stated that it was unsure what constitutional standard of scrutiny to apply, but concluded that even under strict scrutiny Duke was unlikely to prevail.[85]

The first substantive issue the court considered was whether the Committee's decision to exclude Duke from the ballot infringed upon his freedom of association.[86] Based on dicta from *Democratic Party*[87] and *Tashjian*,[88] the majority concluded that the Committee's action did not infringe on Duke's freedom of association.[89] The majority first stated that in those two cases the Supreme Court recognized a freedom of association belonging to the party that includes the right to limit its membership to those who the party thinks share its collective beliefs.[90] The court then concluded that Duke had no right to associate with the party because the party has the freedom not to associate with Duke.[91]

The second issue the majority addressed was whether the decision of the Committee burdened the voters' right to vote.[92] Although the majority recognized that the right to vote is fundamental,[93] it found that the specific right to vote was not at issue in this case because the appellants could vote for Duke as an independent or third-party candi-

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82. *Duke*, 954 F.2d at 1533.

83. Id.

84. Id. at 1528-29. The court concluded that the controversy was not moot for two reasons. First, the appellees did not demonstrate to the court's satisfaction that it was too late for Duke's name to appear on the ballot or for other appropriate relief to be granted. Id. at 1529. Second, the court feared that "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if [it] should fail to resolve the constitutional issues that arose in [1992]." Id. (quoting *Norman v. Reed*, 112 S. Ct. 698 (1992)).

85. *Duke*, 954 F.2d at 1530.

86. Id.

87. 450 U.S. 107 (1981). See text accompanying notes 27-30.

88. 479 U.S. 208 (1986). See text accompanying notes 31-35.

89. *Duke*, 954 F.2d at 1531.

90. Id. at 1530.

91. Id. at 1531.

92. Id. Although the case was styled *Duke v. Cleland*, Duke was joined by three persons registered and qualified to vote in the 1992 primary who wished to have the opportunity to vote for Duke. See id. at 1528 n.3.

93. Id. at 1531 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)).

date in the general election.[94] After deciding that the voters' absolute right to vote for Duke for President in the general election was not infringed, the majority proceeded to evaluate the countervailing state interests that may have justified burdening this lesser-protected right to vote specifically for Duke in the primary.[95]

The court again noted that the Supreme Court has long recognized political parties' right to exclude those whose ideologies they deem to be in confiict with those of the party.[96] The court then analogized the burden on the appellants' right to vote to the burden placed on voters by the Supreme Court's holding in *Democratic Party*, which the Eleventh Circuit majority characterized as permitting the party to exclude all voters who were not members of the Democratic Party from the party primary.[97] Without explaining why a party's interest in protecting itself from intrusion by persons with contrary views is a state interest, the majority concluded that such an interest justified burdening the right to vote and excluding Duke from the primary ballot.[98]

C. *The Dissent*

The dissent agreed with the majority that Duke does not have a right to associate with those who do not wish to associate with him.[99] It, however, would have reversed the district court's denial of injunctive relief.

First, the dissent argued that the exclusion of Duke heavily burdened the voters' right to vote.[100] Citing *Lubin v. Panish*,[101] the dissent argued that the right to vote is not limited to considerations of voters' access to the ballot, but also includes their access to alternative viewpoints and positions presented on the ballot.[102] Second, the dissent asserted that the Committee's removal of Duke from the ballot "affected" the right of Duke and his supporters to associate for the advancement of their shared political beliefs.[103] Third, the dissent stressed that although the right to seek party nomination or political office is not a fundamental right, state action affecting candidate ballot access rights

94. *Duke*, 954 F.2d at 1531.
95. Id.
96. Id.
97. Id. at 1532.
98. Id. at 1532-33.
99. Id. at 1535.
100. Id.
101. 415 U.S. 709, 716 (1974). In *Lubin*, the Court beld that the Constitution prohibits a state from requiring an indigent candidate for public office to pay filing fees that he cannot afford to pay without providing alternative means. Id. at 717-18.
102. *Duke*, 954 F.2d at 1535.
103. Id.

should be subject to heightened scrutiny when the restriction unjustifiably burdens the availability of political opportunity.[104]

The dissent then evaluated the extent of the burden placed upon the rights of Duke and his supporters.[105] Based on its views about the realities of the two-party primary system and reliance on the Supreme Court's statement in *Anderson v. Celebreeze*[106] that the opportunity to run as a write-in candidate "is not an adequate substitute for having one's name printed on the ballot,"[107] the dissent found the burden significant notwithstanding the fact that voters could support Duke as a third-party or write-in candidate.[108]

Finally, the dissent applied the compelling interest test and found that the state failed to demonstrate a compelling interest that justified Duke's exclusion.[109] The dissent noted that the majority's analysis begged the question of whether the preservation of the right of the Republican Party not to associate with Duke is a compelling state interest.[110]

According to the dissent, however, even if the state had demonstrated a compelling interest, the state action was not narrowly tailored to serve the alleged compelling governmental interest, and therefore failed the compelling interest test.[111] The state action was not narrowly tailored because including Duke on the ballot would not force any undesired association between Duke and the party because no one is required to vote for him and the party is free to campaign against him, urging voters to defeat him in the polls.[112] The dissent reasoned that because the Supreme Court in *Eu* struck down as unconstitutional a law prohibiting party officials from endorsing or campaigning for particular candidates in the primary, the Court, by implication, recognized that candidates who were disfavored by the party leaders should be permitted to participate, even if unsuccessfully, in the primary process.[113]

IV. ANALYSIS

The Supreme Court cases of *Cousins*, *Democratic Party*, *Eu*, and *Tashjian* held that political parties and their members have a freedom

104. Id. at 1536.
105. Id.
106. *Anderson v. Celebrezze*, 460 U.S. 780 (1983).
107. Id. at 799 n.26.
108. *Duke*, 954 F.2d at 1536-37.
109. Id. at 1537.
110. Id.
111. Id.
112. Id.
113. Id. at 1538.

of association granted by the First Amendment that allows them to determine their organizational structure, endorse candidates, and set requirements for voter participation in their primaries.[114] These cases also held that a state must have a compelling governmental interest to justify any interference with these constitutionally protected activities.[115] In each of these cases, the Supreme Court decided in favor of the parties asserting their First Amendment right to free association without state interference. The Court's consistent emphasis on upholding this right, along with a careful reading of the facts presented in *Duke*, suggests that the most important question presented by this case is whether the state of Georgia constitutionally can compel the Republican Party to establish an elite Presidential Candidate Selection Committee and confer upon the Committee the power to remove otherwise qualified candidates from the primary ballot. The majority and dissent ignored this critical question.

If the Republican Party, through its machinery, created and conferred such authority on the Committee absent a state mandate, then the majority would have been correct in concluding that the associational rights of Duke and his supporters were not violated when the Committee removed Duke's name from the ballot.[116] The Court has found that a political party is permitted to make decisions concerning

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114. See text accompanying notes 20-48.

115. See *Cousins v. Wigoda*, 419 U.S. 479, 489 (1975); *Democratic Party*, 450 U.S. at 124; *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989); *Tashjian*, 479 U.S. at 217.

116. See *Marchioro v. Chaney*, 442 U.S. 191 (1979). In *Marchioro*, the Court held that a Washington statute requiring each major political party to have a state committee consisting of two persons from each county in the state did not violate the party's freedom of association. Id. at 199. The statute conferred upon the committee the power to call conventions, provide for the election of delegates to national conventions, fill vacancies on the ticket, provide for the nomination of presidential electors, and perform all functions inherent in such an organization. Id. at 192 n.1. The charter of the state Democratic Party gave the state committee the authority to organize and administer the party's administrative apparatus, fundraise for candidates, conduct workshops, instruct candidates on effective campaign procedures and organization, and further the party's objectives of influencing policy and electing adherents to office. Id. at 193.

The State Democratic Party argued that the statute was unconstitutional because statutory restrictions on the composition of the committee, which under the party's charter was assigned the functions of a purely internal governing body, violated its freedom of association. Id. at 194, 197. The party members did not argue that the functions statutorily assigned to the committee impermissibly infringed upon the party's freedom of association. Id. at 198-99. Consequently, the Court held that the party could not claim that the statute infringed upon its right to govern itself, an argument derived from its First Amendment freedom of association, because the source of the complaint was the party's own decision to confer the authority to make purely internal decisions on the state committee. Id. at 199.

In *Eu*, the Court distinguished *Marchioro* by noting that unlike the Washington statute, the California Code provision, not the party's charter, assigned the statutorily-mandated committee the internal governance task of conducting the party's campaigns. *Eu*, 489 U.S. at 232 n.22. The Georgia statute at issue in *Duke* is analogous to the California election provision struck down in

its internal governance.[117] Thus, the correct characterization of the facts of this case would have been that the Party, on its own volition, established a Presidential Candidate Selection Committee and bestowed upon it the power to remove candidates from the primary ballot. As a result, the Committee's use of party-bestowed discretion to remove Duke would have constituted the Party's exercise of its own freedom of association in choosing not to associate with Duke, and the Party's internal decisionmaking process would have defeated Duke.

If this characterization of the facts was correct, Georgia, in composing a ballot absent Duke's name, merely would have accepted the result of the Party's own decisionmaking process. Absent a statute compelling the party to create or follow the decisions of the Committee, no state action would have precipitated Duke's removal and Duke would not have had a cause of action because the Constitution limits the actions of governments, not private groups.[118]

The facts of *Duke*, however, are very different from the scenario described above. A state statute created the Committee and mandated that the Republican Party clear its candidates with this Committee.[119] Because a statute requires the Republican Party to create the Committee and accept its decisions, state action clearly exists in the candidate selection process.[120] The removal of Duke by the state-created Committee thus interfered with the ability of party members to support the candidate of their choice.

Eu suggests that this interference in a party's internal structure and decisionmaking process is an unconstitutional infringement of the party's freedom of association. In *Eu*, a unanimous Supreme Court[121] struck down parts of the California Election Code that prohibited party leaders from endorsing primary candidates and required political parties to conform to a specific organizational structure.[122] The Court explained that one of the reasons for striking down the Code provision prohibiting primary endorsements by party leaders was that the ban impermissibly burdened the party's First Amendment freedom to organize itself, identify its members, and select a standard bearer who best represented the party's ideologies and preferences.[123]

Eu because the statute is the sole source of the Presidential Selection Committee's existence and authority to remove candidates from the primary ballot.

117. *Eu*, 489 U.S. at 229-30.

118. See text accompanying notes 51-53.

119. O.C.G.A. § 21-2-193(a) (Michie, 1987).

120. *Tribe hornbook* § 18-1 at 1688 (cited in note 19).

121. The decision was 8-0. Chief Justice Rehnquist took no part in the consideration or decision of this case. *Eu*, 489 U.S. at 214.

122. See text accompanying notes 36-41.

123. *Eu*, 489 U.S. at 224.

This Georgia election statute similarly infringes upon the Republican Party's freedom of association. First, the statute interferes with the Party's ability to devise its own internal structure because it mandates the establishment of the Presidential Candidate Selection Committee and specifies its membership and duties. Second, the statute conveys upon the Committee the sole and final authority to decide which candidates may appear on the ballot. Therefore, the statute burdens the ability of party members to vote for a candidate who most closely represents their ideals and beliefs.

In concluding that the Republican Party's exclusion of Duke was an appropriate exercise of the party's freedom not to associate with persons who do not share the party's political beliefs, the majority relied heavily on *Democratic Party*.[124] The majority based this reliance on its conclusion that the burdens placed on nonmembers' right to vote in *Democratic Party*[125] were analogous to those placed on the appellants' right to vote in *Duke*.[126] This analogy has no foundation.

As a preliminary matter, the majority mischaracterized *Democratic Party* as a case about voting rights. In *Democratic Party*, however, the Supreme Court held that the National Democratic Party's freedom of association required the party's rule[127] to prevail over any state interests in assuring that the delegates elected in the open primary were seated.[128] The right to vote was not an issue addressed by the Court in that case.[129]

Furthermore, *Democratic Party*, standing alone, and viewed in the context of other Supreme Court decisions dealing with the associational rights of political parties, does not support the majority's conclusion that the exclusion of Duke because of his political beliefs was a legitimate exercise of the Party's freedom of association. Although the majority accurately stated that the Court in *Democratic Party* held that political parties have an associational freedom to refuse to seat delegates elected in violation of party rules,[130] the majority failed to recognize the clear distinction between the facts of *Democratic Party* and

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124. *Duke*, 954 F.2d at 1532-33.

125. In *Democratic Party*, the Court held that the National Democratic Party could refuse to seat Wisconsin delegates elected in a primary open to nonmembers. *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 121-22 (1981).

126. *Duke*, 954 F.2d at 1532.

127. *Democratic Party*, 450 U.S. at 124.

128. Id. at 126.

129. In fact, the Court summarily rejected all alleged voting-related compelling interests advanced by the state to justify its insistence that its delegates to the convention be seated. Id. at 124-25. The state asserted "a compelling interest in preserving the overall integrity of the election process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters." Id.

130. *Duke*, 954 F.2d at 1532.

Duke. In *Democratic Party*, the members of the National Democratic Party, speaking through their rules, chose to exercise their associational rights by limiting participation in the delegate selection process to members of the Party.[131] In *Duke*, however, a state statute restricted the ability of the party to exercise its freedom of association by establishing its own candidate selection rules. In addition, the Committee's decision to remove Duke from the ballot interfered with the ability of the party members to associate freely with a particular candidate solely because the state-created Committee, of which two-thirds of the members were state officials, found Duke unacceptable.

In *Democratic Party*, the Court held that the First Amendment prohibits the state from mandating that a national party seat delegates selected in an open primary because such a mandate would amount to forcing an association between members of that party and nonmembers. The decision of the majority in *Duke* contradicts the holding of *Democratic Party* and allows the state to interfere with party members' First Amendment freedom to associate with Duke.

The majority's interpretation of *Democratic Party* is even more suspect when read in light of *Tashjian*. The Supreme Court held in *Tashjian* that a state statute prohibiting political parties from opening their primaries to independent voters impermissibly burdened the party's First Amendment guarantee of free association.[132] When applied to the facts of *Duke*, *Tashjian* suggests that the Georgia statute, which hinders the ability of party members to vote for the candidate of their choice, also impermissibly interferes with the party's First Amendment freedom of association. Read together, *Democratic Party* and *Tashjian* support the proposition that the First Amendment protects political parties' freedom to choose with whom they wish to associate in the primary election process.

The *Duke* majority clearly did not understand the implications of *Eu*, *Democratic Party*, or *Tashjian*, and ignored the statute's interference with the party's freedom of association. Instead, the majority first hesitantly recited Supreme Court holdings in an unsuccessful attempt to determine an appropriate level of scrutiny.[133] Then, the court analyzed the Committee's removal of Duke's name in light of a conspicuously unasserted premise that the state has a compelling interest in protecting the party's freedom to associate with persons of common political beliefs.[134] As noted by the dissent, the majority begged the ques-

131. Id.
132. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 229 (1986).
133. *Duke*, 954 F.2d at 1530-31.
134. Id. at 1529-33.

tion of whether the preservation of the First Amendment right of the Republican Party not to associate with Duke is a compelling state interest.[135] However, the dissent also failed to address the critical issue of whether the state constitutionally can establish a Presidential Candidate Selection Committee and require the party to accept unconditionally the Committee's decision to remove Duke from the ballot.

Perhaps the majority and dissent failed to address this critical issue because the appellants failed to argue that the statute interfered with the party's freedom of association.[136] If Duke lost because his lawyers did not brief the court adequately, his lawyers primarily are to blame. Nonetheless, the court was aware of the possible constitutional challenges that Duke could have brought against the statute, but refused to address them directly. One reason why the court may have avoided the issue of the statute's constitutionality was that Duke may have lacked standing to challenge a statute that interfered with the freedoms of the state Republican Party. Consequently, this case could be read as a standing holding in disguise.

Even if Duke did not have third-party standing to assert the rights of the party, the majority failed to consider the First Amendment rights of the party members who wished to have the opportunity to vote for Duke in the primary and joined Duke in this action. In *Tashjian*, the Supreme Court asserted that a hypothetical state statute that restricted the field of potential party nominees for public offices to party members alone would infringe upon other party members' freedom to associate with those who share their political goals.[137] The Georgia statute ignored by the *Duke* majority similarly infringes on the freedom of party members to associate with their political kin because the statutorily-created Committee has the power to restrict the field of candidates.[138]

Had the majority read *Tashjian* carefully, it would have discovered that the Court distinguished situations in which the state interferes with the ability of a party or its members to associate with nonmembers in its primaries from situations in which a nonmember desires to associate with a party that does not want to associate with him.[139] The *Tash-*

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135. Id. at 1537.

136. The majority noted that the appellants did not challenge the constitutionality of the Georgia statute or assert that the Committee lacked the authority to speak for the Party. Id. at 1530 n.5.

137. *Tashjian*, 479 U.S. at 215. Justice Marshall, writing for the majority, stated: "Were the State to . . . provide that only Party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals." Id.

138. O.C.G.A. § 21-2-193(a).

139. See *Tashjian*, 479 U.S. at 215 n.6.

jian Court recognized that in this latter group, a party's exercise of its freedom of association expressed through its membership qualifications outweighs a nonmember's desire to participate in the party's affairs.[140] The majority in *Duke*, however, mistakenly characterized *Duke* as a case in which an outsider wanted to associate with an unwilling Republican Party.[141] This characterization was erroneous because members of the Republican Party joined with Duke in this cause of action because they wished to support his candidacy for President.[142]

V. CONCLUSION

Rank and file members of any political party that conducts presidential primaries should be concerned with the outcome of *Duke*. The Eleventh Circuit's inattention to the constitutional issue of whether a state can compel a political party to establish an elite committee with the power to screen out possible nominees before party members can do so through the primary process sets bad precedent and renders presidential primaries little more than rubber stamp endorsements of the selections of these elite party committees. Future courts faced with similar cases should recognize that the First Amendment protects the rights of political parties to choose their own method of candidate selection and should strike down statutes mandating elite selection committees as unconstitutional.

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140. Id.

141. *Duke*, 954 F.2d at 1531.

142. Id. at 1528 n.3. Because the Georgia Republican Presidential Primary is closed to nonmembers, appellants Andrews, Gorton, and Manget, who the majority noted are registered and qualified to vote in the primary, are by definition members of the party for the purpose of the primary election.

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