

BRENNAN  

---

CENTER  

---

FOR JUSTICE

PARTY AFFILIATION  
IN A SYSTEM OF  
AUTOMATIC VOTER  
REGISTRATION

Renée Paradis

## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

## ABOUT THE BRENNAN CENTER'S VOTING RIGHTS AND ELECTIONS PROJECT

The Voting Rights and Elections Project works to expand the franchise, to ensure that every eligible American can vote, and that every vote cast is accurately recorded and counted. The Center's staff provides top-flight legal and policy assistance on a broad range of election administration issues including voter registration systems, voting technology, voter identification, statewide voter registration list maintenance, and provisional ballots.

This is one in a series of papers on Voter Registration Modernization. More information on this policy proposal is available at [www.brennancenter.org/VRM](http://www.brennancenter.org/VRM).

© 2009. This paper is covered by the Creative Commons "Attribution-No Derivs-NonCommercial" license (see <http://creativecommons.org>). It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law is credited, a link to the Center's webpage is provided, and no charge is imposed. The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center's permission. Please let the Center know if you reprint.

## ABOUT THE AUTHOR

**Renée Paradis** is Counsel in the Brennan Center's Democracy Program, working primarily on the Center's efforts to reform the process of voter registration, including fighting restrictions on voter registration drives and advocating for student voting rights. A native of California, she joined the Brennan Center in 2005 following her fellowship at the Drug Law Reform Project of the American Civil Liberties Union, in Santa Cruz, California, and her clerkship with the Honorable Karen Nelson Moore of the U.S. Court of Appeals for the Sixth Circuit, in Cleveland, Ohio. She received her J.D. in 2003 from Columbia Law School, where she was a James Kent scholar, was awarded the Wilfred Feinberg Prize for excellence in Federal Courts, and served as a Notes Editor of the Columbia Law Review. She received her B.A. from Columbia College in 1998.

# TABLE OF CONTENTS

Introduction	1
Party Affiliation in the States	1
Purposes of Tracking Party Affiliation	3
Policy Proposal	4
Conclusion	4
Endnotes	5
Appendix A. Constitutionality of Open Primaries and Same-Day Affiliation Rules	6
Appendix B. State Party Affiliation and Primary Rules Chart	13

# INTRODUCTION

Currently, thirty states and the District of Columbia actively track a voter's affiliation with a political party. Voters have the option to declare an affiliation when they register to vote, by checking a box or writing in a party name on their voter registration form. In a system where, instead of filling out a form on their own, voters are automatically registered to vote, what should states do about party affiliation?

This short paper sets out the different ways states currently track party affiliation, and then discusses the different ways states could adapt their party affiliation systems to function in an automatic system. Two appendices discuss the constitutional constraints on states' choices about party affiliation and political primaries and detail how the states track party affiliation and what primary systems they use.

## PARTY AFFILIATION IN THE STATES

The rules surrounding party affiliation and primary voting are different in each state.

Primary elections generally fall into five categories:

- “Open primaries,” where all voters, regardless of party affiliation, are entitled to vote in a party primary;
- “Closed primaries,” where voters must be formally affiliated with a particular party in order to vote in that party's primary;
- “Semi-closed primaries,” where unaffiliated voters may vote in a party primary without affiliating with a party, but affiliated voters can only vote in their party's primary;
- “Facially closed primaries,” where voters are required by law to be affiliated in some way with a party in order to vote in its primary but their affiliation is not tracked by the state; and
- “Blanket primaries,” where each voter can choose among *all* candidates for a particular office, regardless of the voter's affiliation or the candidate's designation.<sup>1</sup>

Closed and semi-closed primaries are the only primaries that require a state to track party affiliation.

There are four relevant categories of combinations of party affiliation rules and primary participation rules.

## 1. States That Do Not Track Party Affiliation

In the first category are the twenty states that do not currently track party affiliation. Fourteen of these states hold open primaries.<sup>2</sup> Five of the twenty instead hold facially closed primaries, but the rules “closing” the primaries are difficult to enforce and voters are rarely, if ever, prevented from voting in the primary of their choice.<sup>3</sup> And one state, Washington, holds a nonpartisan blanket primary.

## 2. States That Track Party Affiliation But Allow Unaffiliated Voters to Participate in Primary Elections on Election Day

In the second category are fourteen states that track party affiliation, but nonetheless allow unaffiliated voters to opt to vote in a partisan primary on the day of the election, at the polls. There are three kinds of states in this category: those with open primaries;<sup>4</sup> those with “semi-closed” primaries, where unaffiliated voters can choose to vote in a particular party’s primary without affiliating with that party;<sup>5</sup> and states with closed primaries that allow unaffiliated voters to affiliate with a party on the day of the primary.<sup>6</sup>

## 3. States That Require Advance Affiliation as a Condition of Participating in Primary Elections

In the third category are thirteen states (and the District of Columbia) that have closed primaries with an advance affiliation or enrollment deadline that applies to all voters.<sup>7</sup> Seven of these states and the District of Columbia have a party affiliation deadline identical to the voter registration deadline;<sup>8</sup> one state has an affiliation deadline in advance of the registration deadline for affiliated voters only;<sup>9</sup> and five states have affiliation deadlines in advance of the registration deadline for all voters, ranging from eight weeks before a primary election to a full eleven months.<sup>10</sup>

In the second and third categories, many states offer the political parties a choice to open or close their primaries, or to open their primaries to unaffiliated voters only. Indeed, as discussed below, political parties have a right under the Constitution to open their primaries to unaffiliated voters. At least ten states in these categories offer political parties an explicit, statutorily mandated choice in opening or closing their primaries to at least unaffiliated voters.<sup>11</sup> States are classified in this memo as closed or semi-closed unless all parties that hold a primary have opened that primary. The numbers of states in category 2 and category 3 could thus fluctuate from election to election based on the choices made by political parties in each state.

#### 4. States With Mixed Primary Rules

Finally, there are three states with mixed primary rules. In Arizona, presidential primaries are closed, but other primaries are semi-closed. In Nebraska, party affiliation is tracked; Congressional primaries are open; the state legislature is elected on a nonpartisan basis; and all other primaries are closed. In Louisiana, party affiliation is tracked; all federal office primaries are closed, but can be opened to independent voters at the discretion of the parties; for state offices, the state uses the “top two” nonpartisan blanket primary.

All of these rules are laid out in detail in chart format in Appendix B.

## PURPOSES OF TRACKING PARTY AFFILIATION

Broadly speaking, tracking voters’ party affiliation serves two purposes: (1) determining whether voters may participate in party nominee selection processes, most importantly by voting in a particular party’s primary election, and (2) providing an easy means for political parties and other groups to interact with voters who are registered with a particular party.<sup>12</sup> In a system of automatic voter registration, the challenge is to gather party affiliations in a way that serves both purposes well enough to satisfy all stakeholders in the current system.

With respect to the first purpose, determining participation in primary elections, the twenty states that do not track party affiliation, and the fourteen states that allow unaffiliated voters the opportunity to choose to participate in a partisan primary on the day of the election, automatic voter registration presents little to no additional difficulty. For the twenty states without party affiliation, there is no additional difficulty. For the fourteen states that allow voting by unaffiliated voters, while those voters will be registered without a party affiliation in significantly greater numbers than under the present system, unaffiliated voters can choose to affiliate with a party or vote in a primary on the day of the election, and will not be shut out of the primary process.

However, for the thirteen states that have closed primaries with advance affiliation deadlines and for selected primaries in the three states with mixed systems, voters who are registered automatically without a chance to affiliate with a party will be unable to participate in partisan primaries. A system of automatic registration would therefore have to include some mechanism by which voters in these states could affiliate with political parties in order to participate in primary elections. There are two basic mechanisms that would make this possible: allowing unaffiliated voters to participate in primary elections on Election Day, or putting in place some system to ask new registrants for their party affiliations. However, some state parties (or, often, particular factions in state parties) prefer longer affiliation deadlines and closed primaries as a

way to limit participation by voters who may not be committed to the party. It may not be politically feasible in some states to shorten the affiliation deadline.

The second purpose, gathering information on the party affiliation of new voters, is equally relevant for all of the thirty states (and the District of Columbia) that track party affiliation information. Parties, candidates, and other entities that work to educate, engage, or mobilize voters use this information to identify voters by party affiliation. While parties and candidates in particular may have access to more sophisticated information on voters' partisan leanings than their party affiliation, there may very well be states in which this purpose is considered particularly important. An automatic registration system should be able to make some provision to gather affiliation information in advance of an election.

## POLICY PROPOSAL

Ideally, a state that implements automatic registration could allow unaffiliated voters to participate in a primary election on Election Day, whether by affiliating with a party that day or by allowing unaffiliated voters to vote in primary elections, and also provide voters who are automatically registered without party affiliation notice and opportunity to affiliate with a party, by postage paid return postcard, which could be combined with other mailings. These two methods in conjunction provide the most assurance that voters will be able to participate in party primaries and that voters will be identified as party members as early as possible. In most states, both of these methods should be easy to implement. However, method (a) requires eliminating affiliation deadlines for unaffiliated voters, which may present difficulty as discussed above; method (b) may impose small additional administrative costs on states. A state may therefore choose to use only one of these methods in particular circumstances.

## CONCLUSION

Ultimately, party affiliation or enrollment presents a much less significant difficulty for an automatic registration system than may seem on first glance. Thirty-four states currently have affiliation systems that would require no change in a system of automatic registration. And the sixteen states (and the District of Columbia) that would require some change can choose one or both of two simple solutions to ensure voters are able to effectively affiliate with political parties. The current system of party affiliation in the states presents no bar to a system of automatic voter registration.



## ENDNOTES

<sup>1</sup> Blanket primaries can be partisan (where the top vote-getter from each party advances to the general election) or nonpartisan (where the top two vote-getters in the race, regardless of party, advance to the general election). A state cannot impose a blanket partisan primary on a party under *California Democratic Party v. Jones*, but can offer political parties the option.

<sup>2</sup> Georgia, Hawaii, Idaho, Michigan, Minnesota, Missouri, Montana, North Dakota, South Carolina, Texas, Vermont, Virginia, and Wisconsin.

<sup>3</sup> Tennessee, Mississippi, Illinois, Indiana, and Ohio. Additionally, South Carolina and Alabama offer parties the choice to close their primaries, but it is likely that “closed” primaries in these states would be similarly difficult to ensure.

<sup>4</sup> Currently only one state, Arkansas, both tracks party affiliation and has a completely open primary.

<sup>5</sup> Alaska, West Virginia, North Carolina, and Massachusetts all have semi-closed primaries.

<sup>6</sup> Iowa, Colorado, Kansas, Maine, Rhode Island, Utah, Wyoming, New Hampshire, and New Jersey.

<sup>7</sup> California, Delaware, Florida, Kentucky, Maryland, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, and Connecticut.

<sup>8</sup> California, Nevada, New Mexico, Oregon, Pennsylvania, South Dakota, and Florida.

<sup>9</sup> Connecticut.

<sup>10</sup> Delaware, Kentucky, Maryland, New York, and Oklahoma.

<sup>11</sup> Arkansas, Oregon, South Dakota, Maryland, California, Connecticut, Maine, West Virginia, and North Carolina.

<sup>12</sup> Voters may also need to be formally registered with a political party to be that party’s nominee for a particular office, or to participate in that party’s organization or activities.

## APPENDIX A. CONSTITUTIONALITY OF OPEN PRIMARIES AND SAME-DAY AFFILIATION RULES

In assessing what policy solutions will allow states to move to automatic voter registration, it is important to consider the constitutional limits on state candidate selection processes. States have some leeway to decide how primaries and party affiliation systems operate, under their plenary power to regulate elections, but recently the Supreme Court has given increasing weight to party preferences and associational rights in cutting back on state discretion. The Court has given parties fairly broad rights to exclude voters who are not formally, publicly affiliated with the party from a process that chooses a party's formal nominee (who will bear the party's imprimatur). While this line of cases may endanger open primaries, it is quite likely that closed primaries, even with a same-day affiliation rule for unaffiliated voters, would pass constitutional muster.

Four recent Supreme Court cases have suggested that mandatory open primaries may present a constitutional problem. Two subsequent lower-court litigations have tested the constitutionality of open primaries, without a conclusive answer.

In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the Court took up a challenge to California's blanket primary system, where every voter got a ballot which included all candidates for each office, who were listed with their official party designations. Voters could then pick and choose for each office, voting for candidates from different parties for each race, regardless of the voter's stated party affiliation. Then the top vote-getter in each race for each party would advance to the general election as the nominee for their party.

The Court found this system unconstitutional, in that voters who were wholly unaffiliated with the party could assist in choosing the formal party nominee. (Compare *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184 (2008), discussed below, where the Court rejected a similar challenge because the winning nominees were not designated as party nominees.)

Of course, in traditional open primary states, voters who are not affiliated with a party assist in choosing a party's nominee. And there are nine "closed" primary states where voters can affiliate with a party on the day of the election, creating little practical difference between the two kinds of primaries. The Court in *Jones* discussed what it considered the important distinctions between the blanket primary and open and closed primaries:

[The blanket primary] is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party

affiliation the day of the primary, and thus, in some sense, to “cross over,” at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party.<sup>8</sup>

---

<sup>8</sup>In this sense, the blanket primary also may be constitutionally distinct from the open primary, in which the voter is limited to one party’s ballot. See [*Democratic Party of U.S. v. Wisc. ex rel. La Follette*, 450 U.S. 107,] 130, n.2 (Powell, J., dissenting) (“The act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party . . .”). This case does not require us to determine the constitutionality of open primaries.

530 U.S. at 577 & n.8 (emphasis in original). By drawing the law at formal party membership, the Court distinguished closed primaries fairly strongly, suggesting that a closed primary system with day-of affiliation changes would pass constitutional muster. The Court’s distinction for open primaries is weaker, and suggests that the *Jones* Court considered the constitutionality of mandatory open primaries to be less clear.

The question of whether open primaries are constitutional under the rationale of *Jones* turns on whether the act of choosing a particular party’s primary ballot — even when that choice is not recorded or done in private — is itself an act of affiliation substantial enough to tip the scales in favor of constitutionality.

It is worth considering on this issue the opinions in *Clingman v. Beaver*, 544 U.S. 581 (2005). *Clingman* followed the Court’s earlier decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), where the Court held that a state could not require a party to hold a closed primary instead of opening its primary to unaffiliated voters. In *Clingman*, the Court considered whether a state could prevent a party from holding an open primary — one where voters registered with other parties could choose instead to vote in a different party’s primary. A majority of the Court found that Oklahoma’s law preventing voters registered in other parties from voting in the Libertarian Party primary, where the Libertarian Party wanted to open its primary in this way, did not violate the right to associate of either the party or the voters.

Justice Thomas, writing for himself, Chief Justice Rehnquist, and Justices Scalia and Kennedy, argued that voting in a party’s primary was not

associat[ing] with the [Libertarian Party], at least not in any formal sense. They wish to remain registered with the Republican, Democratic, or Reform parties, and yet to assist in selecting the Libertarian Party’s candidates for the general election. Their interest is in casting a vote for a Libertarian candidate in a particular primary election, rather than in banding together with fellow citizens committed to the LPO’s political goals and ideals.

...

However, a voter who is unwilling to disaffiliate from another party to vote in the LPO's primary forms little "association" with the LPO—nor the LPO with him.

544 U.S. at 588-89 (Thomas, J.). Justice O'Connor, writing for herself and Justice Breyer, took issue with this part of Thomas's opinion.

The plurality questions whether the LPO and voters registered with another party have any constitutionally cognizable interest in associating with one another through the LPO's primary. Its doubts on this point appear from two implicit premises: first, that a voter forms a cognizable association with a political party only by registering with that party; and second, that a voter can only form a cognizable association with one party at a time. Neither of these premises is sound, in my view. As to the first, registration with a political party surely may signify an important personal commitment, which may be accompanied by faithful voting and even activism beyond the polls. But for many voters, registration serves principally as a mandatory (and perhaps even ministerial) prerequisite to participation in the party's primaries. The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering. . . . The fact that voting is episodic does not, in my judgment, undermine its associational significance; it simply reflects the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials.

544 U.S. at 600-01 (O'Connor, J.). These two opinions suggest a split between finding party enrollment the *sine qua non* of association between parties and voters, and a more functional view that considers voting with a party to be of the same associational valence regardless of a voter's formal affiliation.

A final Supreme Court case deals with the limits the Constitution places on states in designing partisan primaries. In *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008), the Court considered whether Washington's non-partisan top-two blanket primary violated political parties' associational rights. The Court had made clear in *Jones* that a nonpartisan top-two primary was constitutional; the wrinkle in the Washington case was that the law, while calling for a "nonpartisan" primary nonetheless provided for candidates' own stated "party preferences" to be included on the ballot.

The Court's conservative justices split. Justice Thomas, writing the majority opinion, described the plaintiffs' complaint as the voter confusion threatened by the party preference label. That is, in the general election, voters would mistakenly conclude that candidates with particular party preferences were the candidates of those parties, and that this mistake would seriously impinge on parties' rights to choose their imprimaturs under *Jones*. The majority found that the record

presented by the parties’ pre-enforcement challenge did not provide sufficient proof of this kind of voter confusion to justify an injunction.

Chief Justice Roberts, joined by Justice Alito, wrote separately to emphasize that if voters perceived association between the candidate and the party they stated a preference for, it would amount to forced association, but that the law could be enforced in a way to avoid voter confusion.

Justice Scalia, joined by Justice Kennedy, wrote in dissent, emphasizing the centrality of the ballot as a means of party communication, and suggesting that including the indication of a candidate’s party preference on the ballot — regardless of whether voters were confused as to the meaning of the party preference statement — represented a kind of forced association. Scalia’s opinion describes at length what he perceives as the illegitimate motives for the law — a “dislike for bright-colors partisanship.”

It seems likely, then, that a “closed” primary — even where same-day affiliation is forced on the parties—would be considered constitutional by the Court. Even the Justices who are most concerned with defending parties against perceived encroachment on their rights consider formal party affiliation an important distinction. It is less clear the fate of open primaries or semi-closed, which may be functionally indistinct from closed primaries, but do not require formal enrollment or affiliation with a party, under these cases.

There have been two fully litigated lower court cases after *Jones* that take up the question of a forced open primary.<sup>1</sup> In *Miller v. Brown*, the Eastern District of Virginia and then the Fourth Circuit considered a challenge by the Virginia Republican Party to Virginia’s open primary.

In Virginia, party affiliation is not tracked. Parties are allowed by law to choose their nominees through meetings, canvasses, conventions, or primaries. However, if a party chooses to select a nominee for a particular race through a primary, that primary must be open to all voters. Voters must publicly select a particular party’s ballot, but there is no separate affiliation requirement or any other way to test party loyalty. While ordinarily a party can choose any method to select the nominee for any particular office, if the current officeholder is an incumbent of that party, the incumbent has the right to choose the nominating method for that office.

In *Miller*, the incumbent officeholder, a Republican state senator, had opted for a primary election. The party committee for that senate district had adopted a rule that called for only party members to participate in nomination processes. The district party committee filed suit, claiming Virginia’s general requirement that primaries be open severely burdened the party’s freedom of association, and that this burden was particularly severe where the party was required by its incumbent’s choice to hold a primary.

Somewhat oddly, the state in the *Miller* case conceded in the district court and the appeals court that an open primary that was forced on a party would be a severe burden under *Jones*, and that an open primary in a state which tracked party registration would be unconstitutional.<sup>2</sup> The case thus focused on (1) whether, where a party can avoid a primary altogether and opt instead for a nominating procedure in which non-party members are excluded, it is unconstitutional of the state not to offer the option of a closed primary; and (2) whether, if Virginia's scheme was otherwise constitutional, an incumbent's choice of the open primary over his party's wishes was nonetheless an unconstitutional burden on the party's rights.

The district court answered the first the question in negative, finding that while a mandatory open primary would very likely be unconstitutional, the choice parties had under Virginia law to opt out of a primary altogether and instead use a different nominating process saved the system. Under *Jones*, the possible constitutional problem presented by open primaries is forced association, but under Virginia's law, parties could avoid forced association with non-party members by using different nominating processes. Parties have no intrinsic right to closed primaries in particular—only to a nominating process that allows for exclusion of non-party members.

The court then turned to the party's as-applied challenge to the imposition of an open primary on the party as a result of the incumbent's choice of a primary. Once again, the state defendants had conceded the point that a forced open primary was a severe burden. The court found that none of the state's proffered interests — protection of voters' rights to vote in the primary of their choice and to change their affiliation without state interference; protection of voters' right to hold political beliefs anonymous; and promotion of the integrity of the voting process and encouragement of voter participation — were sufficient to justify the law. The court relied almost exclusively on *Jones* in making its findings, overlooking or ignoring the distinction *Jones* drew between a blanket and an open primary.

On appeal, the Fourth Circuit issued a more limited opinion affirming the district court in both its denial of the facial constitutional challenge and its finding in favor of the as-applied challenge. They noted the *Jones* Court's careful reservation of the question of the constitutionality of open primaries, and specifically reserved the question

whether the act of voting in one party's primary affiliates a voter with the party sufficiently to protect the party's right to associate with those who share its political beliefs. . . . [W]e do not decide whether the open primary statute, viewed in isolation, impermissibly burdens a political party's associational rights, because it clearly does not do so in light of the other methods of nomination permitted by Virginia law, under which a party is free to exclude voters with whom it does not wish to associate. . . . [W]e need not decide this question in reviewing the as-applied ruling because the [state] does not

challenge the holding of the district court that forcing the [party] to conduct an open primary severely burdens its right of free association.

*Miller v. Brown*, 503 F.3d 360, 366 n.6 (4th Cir. 2007). While the district court had affirmatively held the forced open primary unconstitutional, the Fourth Circuit relied exclusively on the state’s concession that it was a severe burden, without deciding the issue as a matter of law.

The state petitioned the full Fourth Circuit to hear the case en banc, a petition which was denied. Judge Wilkinson dissented from the denial of the petition, taking the panel to task for, *inter alia*, leaving open the question of whether open primaries are constitutional after *Jones*. Wilkinson strongly argued that open primaries are a constitutional and legitimate choice for states to make, emphasizing the affiliation created between a voter and the party on the day of the election. Wilkinson suggested there was no difference between an open primary and a closed primary with same-day registration. Wilkinson concluded by emphasizing that closing off open primaries as a constitutionally permissible choice would constitutionally enshrine hyper-partisanship and throw into doubt the primary systems of many states. *See Miller v. Cunningham*, 512 F.3d 98 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of reh’g en banc).

The second case assessing the constitutionality of an open primary in light of *Jones* was *Mississippi State Democratic Party v. Barbour*, in the Northern District of Mississippi and the Fifth Circuit. Mississippi has a requirement that voters are not eligible to participate in primary elections unless they intend to support the party’s nominee in the general election. State law provides no way to enforce this provision, however, and the state does not track party registration. The Democratic Party claimed that the lack of an enforcement mechanism for that provision of law was unconstitutional under *Jones* as a burden on their right to associate only with Democrats.<sup>3</sup>

The district court, without much analysis, concluded that Mississippi’s primary system was an unconstitutional infringement on the party’s right to not associate with non-party members, and dismissed the state’s asserted interests as ones that were rejected in *Jones*. The court also concluded — somewhat out of the blue — that mandatory photo voter identification was also necessary to guarantee that no non-party-members would vote in the party primary, and ordered the implementation of both a closed party primary and a voter identification rule. *Miss. State Democratic Party v. Barbour*, 491 F. Supp. 2d 641 (N.D. Miss. 2007).

As the Fifth Circuit put it, the district court’s ruling “spawned a free-for-all on appeal.” The state attorney general, a Democrat, argued in his appeal that the plaintiffs’ claims were not justiciable; the governor and the secretary of state, both Republicans, filed a separate brief supporting the photo ID ruling; the Democratic party leadership cross-appealed opposing the

photo ID requirement; the NAACP intervened to also challenge the photo ID requirement; and the Mississippi Republican Executive Committee intervened to insure that they would not be forced to close their party primaries.

The Fifth Circuit “put the parties out of their litigation misery,” finding that the party’s claims were not justiciable for lack of standing and ripeness. Basically, the court found that the party had not moved far enough along in its plans to hold a closed primary; while the party plaintiff in the Virginia litigation had adopted a rule stating its intention to hold a closed primary, the party in Mississippi had “taken no steps to authorize the party to conduct closed primaries.” The Mississippi Democrats had applied for preclearance of a closed primary from the Justice Department and had internally authorized the lawsuit, but the circuit court was unimpressed. It seems likely the Fifth Circuit was happy to be able to dispose of the mess on jurisdictional grounds.

While these cases suggest that states should be cautious before moving to forced open primaries, they likewise suggest that closed primaries with formal affiliation rules — even where same-day affiliation is possible — are likely to pass constitutional muster. It is therefore almost certainly no constitutional bar to shifting party affiliation rules to accommodate a system of automatic voter registration.

## NOTES

<sup>1</sup> As of April 2009, a third lawsuit has been filed challenging South Carolina’s open primary, *Harms v Hudgens*, No. 6:09-1022-HFF (D.S.C. April 16, 2009).

<sup>2</sup> The Virginia Attorney General is Bob McDonnell, an announced candidate for Governor this year and generally considered a conservative Republican. Disputes over open and closed primaries can often pit the moderate wing of the party against the more extreme wing, with the former in favor of opening up processes to crossover voters who will support them, while the latter often prefer closed processes to guarantee perceived ideological purity.

<sup>3</sup> In Mississippi, the Democratic Party structure is controlled by African-American party leadership; moderate white Democrats are generally thought to prefer to keep the primaries open so white voters who may be reluctant to self-identify as Democrats, and who regularly vote for Republicans for statewide or national office, will vote in large enough numbers in Democratic primaries to allow moderate white Democrats to win.



## APPENDIX B. STATE PARTY AFFILIATION AND PRIMARY RULES CHART

State	Primary Type	State tracks party affiliation?	Affiliation Deadline	Unaffiliated can vote on day of primary?	Other Comments	Statutory Cite
Alabama	Open	N	n/a	n/a	Parties have the option under state law to require primary voters to sign a statement that they will support the party's nominees in the general election. Parties also have an option generally to impose other qualifications. No party currently uses either	Ala. Code § 17-13-7
Alaska	Semi-closed	Y	Ordinary registration deadline	N	Parties have the option of holding open, semi-closed, or closed primaries under state law. Currently, the Republicans hold a semi-closed primary, while the Democrats, Libertarians, and Independence Party all hold open primaries. The state is classified	Alaska Stat. §§ 15.25.014, .060
Arizona	Mixed	Y	Ordinary registration deadline	N	Presidential primaries in Arizona are closed. Other primaries are closed or semi-closed at the choice of parties. Currently, all parties opt for semi-closed primaries.	Ariz. Rev. Stat. Ann. § 16-467; Ariz. Att'y Gen. Op. No. I99-025 (R99-049)
Arkansas	Open	Y	n/a	n/a	State law provides that parties have the discretion to impose additional qualifications for primary participation, but no party currently does so.	Ark. Code Ann. § 7-7-307
California	Closed	Y	Ordinary registration deadline	N	Parties have the option of holding closed or semi-closed primaries. For most recent primary, both the Republicans and the Democrats held semi-closed primaries but not all ballot-qualified minor parties did so.	Cal. Elec. Code §§ 2151, 2152
Colorado	Closed	Y	Ordinary registration deadline for affiliated voters; Election Day for unaffiliated voters	Y		Colo. Rev. Stat. § 1-7-201
Connecticut	Closed	Y	Three-month waiting period for affiliated voters; day before election for unaffiliated voters	N	State law provides that parties can choose to hold semi-closed primaries, but no party currently does so.	Conn. Gen. Stat. §§ 9-23a; 9-431; 9-59
Delaware	Closed	Y	Nov. 1 for February presidential primary; March 31 for Sept. 9 regular primary	N		Del. Code Ann. tit.15, §§ 2049, 3110, 3189

State	Primary Type	State tracks party affiliation?	Affiliation Deadline	Unaffiliated can vote on day of primary?	Other Comments	Statutory Cite
District of Columbia	Closed	Y	Ordinary registration deadline	N		D.C. Code §§ 1-1001.07; -1001.09
Florida	Closed	Y	Ordinary registration deadline	N		Fla. Stat. §§ 97.055; 101.021
Georgia	Open	N	n/a	n/a		Ga. Code Ann. § 21-2-224
Hawaii	Open	N	n/a	n/a		Haw. Rev. Stat. § 12-31
Idaho	Open	N	n/a	n/a		Idaho Code Ann. §§ 34-904, -1107
Illinois	Facially closed	N	n/a	n/a	Voters must formally affiliate with parties on the day of a primary election. Voters can be challenged as not being genuine members of a party. Statutory law still provides that the voter can only overcome that challenge by making a sworn statement that t	10 Ill. Comp. Stat. 5/7-43, -45
Indiana	Facially closed	N	n/a	n/a	Indiana law provides that only voters who voted for a majority of a party's nominees at the last general election and will vote for a majority at the upcoming election (or, if a voter did not vote in the last general election, only the latter condition) m	Ind. Code §§ 3-10-1-6, -9
Iowa	Closed	Y	Election Day	Y		Iowa Code §§ 43.38, .32
Kansas	Closed	Y	Ordinary registration deadline for affiliated voters; Election Day for unaffiliated voters	Y		Kan. Stat. Ann. §§ 25-3301, -3304, -4502
Kentucky	Closed	Y	December 31 of previous year for May primary	N		Ky. Rev. Stat. Ann. § 116.055
Louisiana	Mixed	Y	Ordinary registration deadline	N	Primaries for federal offices are closed, but could be opened to unaffiliated voters at discretion of parties. State uses "top two" nonpartisan blanket primary for state and local offices.	La. Rev. Stat. Ann. §§ 18:511, :1275.1

State	Primary Type	State tracks party affiliation?	Affiliation Deadline	Unaffiliated can vote on day of primary?	Other Comments	Statutory Cite
Maine	Closed	Y	Fifteen-day waiting period before change of affiliation is effective for affiliated voters; Election Day for unaffiliated voters	Y	Parties have statutory option of opening primaries to all voters. In addition to fifteen-day waiting period for change of affiliation for affiliated voters, voters can't change party affiliation again in the three months after a first change of affiliation	Me. Rev. Stat. Ann. tit. 21, §§ 143, 144, 340
Maryland	Closed	Y	Twelve weeks before a primary election	N	While parties have option to open their primaries under state law, currently no party does so.	Md. Code Ann., Elec. Law §§ 3-303, 8-202
Massachusetts	Semi-closed	Y	Ordinary registration deadline	Y		Mass. Gen. Laws ch. 53, § 37
Michigan	Open	N	n/a	n/a		Mich. Comp. Laws § 168.575
Minnesota	Open	N	n/a	n/a		Minn. Stat. § 204D.08
Mississippi	Facially closed	N		n/a	Mississippi law provides that voters must intend to support a party's nominees in the general election in order to participate in the primary election, but there is no way to enforce this rule.	Miss. Code Ann. § 23-15-575
Missouri	Open	N	n/a	n/a		Mo. Rev. Stat. § 115.397
Montana	Open	N	n/a	n/a		Mont. Code Ann., § 13-10-301
Nebraska	Mixed	Y	Ordinary registration deadline	N	Partisan primaries are generally closed, except that Congressional primaries are open. The state legislature, however, is elected on a nonpartisan basis	Neb. Rev. Stat. § 32-312
Nevada	Closed	Y	Ordinary registration deadline	N		Nev. Rev. Stat. §§ 293.287, 293.518, 293.560
New Hampshire	Closed	Y	For affiliated voters, first Wednesday in June for September primary election; Friday before the October filing period for January presidential preference primary; for unaffiliated voters, Election Day	Y	Parties have the option of closed or semi-closed primaries, and all parties currently close their primaries. However, New Hampshire has a separate same-day affiliation rule for unaffiliated voters.	N.H. Rev. Stat. Ann §§ 654:32, 34; 659:14

State	Primary Type	State tracks party affiliation?	Affiliation Deadline	Unaffiliated can vote on day of primary?	Other Comments	Statutory Cite
New Jersey	Closed	Y	For affiliated voters, 50 days before the primary election; for unaffiliated voters, Election Day	Y		N.J. Stat. Ann. §§ 19:23-45; 19:31-13.2
New Mexico	Closed	Y	Ordinary registration deadline	N		N.M. Stat. §§ 1-4-16, 1-12-7
New York	Closed	Y	Voter registration deadline for previous general election (October of prior year for both February presidential preference primary and September primary)	N		N.Y. Elec. Law § 5-304
North Carolina	Semi-closed	Y	Ordinary registration deadline, except during one-stop voting period, voters who have been registered for at least four years may change party affiliation.	Y	Parties have the option of holding open or semi-closed primaries under state law. Currently, all parties that hold primary elections open their primaries to unaffiliated voters.	N.C. Gen. Stat. §§ 163-59, -82.6A
North Dakota	Open	N	n/a	n/a	North Dakota has no voter registration.	N.D. Cent. Code, § 16.1-11-01 <i>et seq.</i>
Ohio	Facially closed	N	n/a	n/a	While there is no restriction on choosing a particular party's ballot in the first instance,, voters can be challenged on the basis of their lack of affiliation with a party if they voted in a different party primary in the previous two years. Voters can	Ohio Rev. Code Ann. § 3513.19
Oklahoma	Closed	Y	June 1st for end-of-July primary	N		Okla. Stat. tit 26, § 4-119
Oregon	Closed	Y	Ordinary registration deadline	N	Parties have the choice of holding closed or semi-closed primaries. Currently all parties close their primaries.	Or. Rev. Stat. §§ 247.203, 254.365
Pennsylvania	Closed	Y	Ordinary registration deadline	N		25 Pa. Stat. Ann. §§ 1503, 2812, 3050
Rhode Island	Closed	Y	Ninety-day waiting period before change of affiliation is effective for affiliated voters; Election Day for unaffiliated voters	Y		R.I. Gen. Laws §§ 17-9.1-23, -24

State	Primary Type	State tracks party affiliation?	Affiliation Deadline	Unaffiliated can vote on day of primary?	Other Comments	Statutory Cite
South Carolina	Open	N	n/a	n/a	While parties have the right to require additional qualifications for primary voters, no party currently does so.	S.C. Code Ann. § 7-9-20
South Dakota	Closed	Y	Ordinary registration deadline	N	Parties have the choice under state law to hold closed or semi-closed primaries, but currently all parties close their primaries.	S.D. Codified Laws §§ 12-4-15, -6-26.
Tennessee	Facially closed	N	n/a	n/a	Tennessee law technically requires affiliation of a voter with a party before they vote in a primary, but also has a same-day affiliation rule.	Tenn. Code Ann. §§ 2-7-115, -126
Texas	Open	N	n/a	n/a	The act of voting in a party primary is itself an act of affiliation that bars the voter from participating in other party selection mechanisms, but that affiliation expires at the end of the year.	Tex Elec. Code Ann. § 172.086
Utah	Closed	Y	Ordinary registration deadline for affiliated voters; Election Day for unaffiliated voters	Y		Utah Code Ann. §§ 20A-2-107, 20A-2-107.5;
Vermont	Open	N	n/a	n/a		Vt. Stat. Ann. tit. 17, § 2363
Virginia	Open	N	n/a	n/a		Va. Code Ann. § 24.2-530
Washington	Blanket	N	n/a	n/a	Washington holds both a partisan presidential preference primary, which is open to voters who have not participated in another party's caucus, and a blanket nonpartisan primary for all other offices.	Wash. Rev. Code § 29A.52.112
West Virginia	Semi-closed	Y	21 days before a primary	Y	Parties can choose to hold closed or semi-closed primaries under state law. Currently all parties hold semi-closed primaries.	W. Va. Code § 3-5-4
Wisconsin	Open	N	n/a	n/a		Wis. Stat. § 6.80
Wyoming	Closed	Y	Election Day	Y		Wyo. Stat. Ann. § 22-5-214