SUPREME COURT OF THE UNITED STATES

No. 99–401

CALIFORNIA DEMOCRATIC PARTY, ET AL., PETITIONERS *v.* BILL JONES, SECRETARY OF STATE OF CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 26, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to Part I, dissenting.

Today the Court construes the First Amendment as a limitation on a State's power to broaden voter participation in elections conducted by the State. The Court's holding is novel and, in my judgment, plainly wrong. I am convinced that California's adoption of a blanket primary pursuant to Proposition 198 does not violate the First Amendment, and that its use in primary elections for state offices is therefore valid. The application of Proposition 198 to elections for United States Senators and Representatives, however, raises a more difficult question under the Elections Clause of the United States Constitution, Art. I, §4, cl. 1. I shall first explain my disagreement with the Court's resolution of the First Amendment issue and then comment on the Elections Clause issue.

I

A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the

State.[1] The United States Constitution imposes constraints on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

The blanket primary system instituted by Proposition 198 does not abridge "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Ante*, at 6.[2] The Court's contrary conclusion rests on the premise that a political

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[1] See *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986) (observing that the United States Constitution grants States a broad power to prescribe the manner of elections for certain federal offices, which power is matched by state control over the election process for state offices). In California, the Secretary of State administers the provisions of the State Elections Code and has some supervisory authority over county election officers. Cal. Govt. Code Ann. §12172.5 (West 1992 and Supp. 2000). Primary and other elections are administered and paid for primarily by county governments. Cal. Elec. Code Ann. §§13000–13001 (West 1996 and Supp. 2000). Anecdotal evidence suggests that each statewide election in California (whether primary or general) costs governmental units between $45 million and $50 million.

[2] Prominent members of the founding generation would have disagreed with the Court's suggestion that representative democracy is "unimaginable" without political parties, *ante*, at 6, though their anti-party thought ultimately proved to be inconsistent with their partisan actions. See, *e.g.*, R. Hofstadter, The Idea of a Party System 2–3 (1969) (noting that "the creators of the first American party system on both sides, Federalists and Republicans, were men who looked upon parties as sores on the body politic"). At best, some members of that generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed. *Id.*, at 16–17, 24. Indeed, parties ranked high on the list of evils that the Constitution was designed to check. *Id.*, at 53; see The Federalist No. 10 (J. Madison).

party's freedom of expressive association includes a "right not to associate," which in turn includes a right to exclude voters unaffiliated with the party from participating in the selection of that party's nominee in a primary election. *Ante*, at 6–7. In drawing this conclusion, however, the Court blurs two distinctions that are critical: (1) the distinction between a private organization's right to define itself and its messages, on the one hand, and the State's right to define the obligations of citizens and organizations performing public functions, on the other; and (2) the distinction between laws that abridge participation in the political process and those that encourage such participation.

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects. *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 354–355, n. 4, 359 (1997) (recognizing party's right to select its own standard-bearer in context of minor party that selected its candidate through means other than a primary); *id.*, at 371 (STEVENS, J., dissenting); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214 (1989); *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 124 (1981) ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"); *Cousins* v. *Wigoda*, 419 U. S. 477, 491 (1975) ("*Illinois'* interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the *National* Party Con-

vention" (emphasis added)).[3] A political party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted

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[3]The Court's disagreement with this interpretation of *La Follette* is specious. *Ante*, at 8–9, n. 7 (claiming that state-imposed burden actually at issue in *La Follette* was intrusion of those with adverse political principles into party's primary). A more accurate characterization of the nature of *La Follette*'s reasoning is provided by Justice Powell: "In analyzing the burden imposed on associational freedoms in this case, the Court treats the Wisconsin law as the equivalent of one regulating delegate selection, and, relying on *Cousins* v. *Wigoda*, 419 U. S. 477 (1975), concludes that any interference with the National Party's accepted delegate-selection procedures impinges on constitutionally protected rights." *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 128 (1981) (dissenting opinion). Indeed, the *La Follette* Court went out of its way to characterize the Wisconsin law in this manner in order to avoid casting doubt on the constitutionality of open primaries. *Id.*, at 121 (majority opinion) (noting that the issue was not whether an open primary was constitutional but "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party"). The fact that the *La Follette* Court also characterizes the Wisconsin law at one point as a law "impos[ing] . . . voting requirements" on delegates, *id.*, at 125, does not alter the conclusion that *La Follette* is a case about state regulation of internal party processes, not about regulation of primary elections. State-mandated intrusion upon either delegate selection or delegate voting would surely implicate the affected party's First Amendment right to define the organization and composition of its governing units, but it is clear that California intrudes upon neither in this case. *Ante*, at 2–3, n. 2.

La Follette and *Cousins* also stand for the proposition that a State's interest in regulating at the *national* level the types of party activities mentioned in the text is outweighed by the burden that state regulation would impose on the parties' associational rights. See *Bellotti* v. *Connolly*, 460 U. S. 1057, 1062–1063, and n. 3 (1983) (STEVENS, J., dissenting) (quoted in part *ante*, at 9, n. 7). In this case, however, California does not seek to regulate such activities at all, much less to do so at the national level.

its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line.

As District Judge Levi correctly observed in an opinion adopted by the Ninth Circuit, however, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. 169 F. 3d 646, 654–655 (1999); cf. *Timmons*, 520 U. S., at 360 (concluding that while regulation of endorsements implicates political parties' internal affairs and core associational activities, regulation of access to election ballot does not); *La Follette*, 450 U. S., at 120–121 (noting that it "may well be correct" to conclude that party associational rights are not unconstitutionally infringed by state open primary); *id.*, at 131–132 (Powell, J., dissenting) (concluding that associational rights of major political parties are limited by parties' lack of defined ideological orientation and political mission). I think it clear– though the point has never been decided by this Court– "that a State may require parties to use the primary format for selecting their nominees." *Ante*, at 4. The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action.[4] It is because the primary is state action that an organization– whether it calls itself a political party or just a "Jaybird" association– may not deny non-Caucasians the right to participate in the selection of its nominees. *Terry* v. *Adams*, 345 U. S. 461 (1953); *Smith* v. *Allwright*, 321 U. S.

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[4] Indeed, the primary serves an essential public function given that, "[a]s a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made." *Morse* v. *Republican Party of Va.*, 517 U. S. 186, 205–206 (1996) (opinion of STEVENS, J.); see also *United States* v. *Classic*, 313 U. S. 299, 319 (1941).

649, 663–664 (1944). The Court is quite right in stating that those cases "do not stand for the proposition that party affairs are [*wholly*] public affairs, free of First Amendment protections." *Ante*, at 6. They do, however, stand for the proposition that primary elections, unlike most "party affairs," are state action.[5] The protections that the First Amendment affords to the "internal processes" of a political party, *ibid.*, do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

The so-called "right not to associate" that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow non-members to participate in the party's decisions when it is conducting its own affairs;[6] California's blanket primary system does not infringe this principle. *Ante*, at 2–3, n. 2. But an election, unlike a convention or caucus, is a public affair. Although it is true that we have extended First Amendment protection to a party's right to invite independents to participate in its primaries, *Tashjian* v. *Republican Party of Conn.*, 479

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[5] Contrary to what the Court seems to think, I do not rely on *Terry* and *Allwright* as the basis for an argument that state accommodation of the parties' desire to exclude nonmembers from primaries would necessarily violate an independent constitutional proscription such as the Equal Protection Clause (though I do not rule that out). Cf. *ante*, at 6, n. 5. Rather, I cite them because our recognition that constitutional proscriptions apply to primaries illustrates that primaries– as integral parts of the election process by which the people select their government– are state affairs, not internal party affairs.

[6] "The State asserts a compelling interest in preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters. But all of those interests go to the conduct of the Presidential preference primary– not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates." *La Follette*, 450 U. S., at 124–125.

U. S. 208 (1986), neither that case nor any other has held or suggested that the "right not to associate" imposes a limit on the State's power to open up its primary elections to all voters eligible to vote in a general election. In my view, while state rules abridging participation in its elections should be closely scrutinized,[7] the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.

Although I would not endorse it, I could at least understand a constitutional rule that protected a party's associational rights by allowing it to refuse to select its candidates through state-regulated primary elections. See *Marchioro* v. *Chaney*, 442 U. S. 191, 199 (1979) ("There can be no complaint that [a] party's [First Amendment] right to govern itself has been substantially burdened by [state regulation] when the source of the complaint is the party's own decision to confer critical authority on the [party governing unit being regulated]"); cf. *Tashjian*, 479 U. S., at 237 (SCALIA, J., dissenting) ("It is beyond my understanding why the Republican Party's delegation of its democratic choice [of candidates] to a Republican Convention [rather than a primary] can be proscribed [by the State], but its delegation of that choice to nonmembers of the Party cannot"). A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where non-members could be excluded. In

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[7] See *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 370 (1997) (STEVENS, J., dissenting) (general election ballot access restriction); *Bullock* v. *Carter*, 405 U. S. 134 (1972) (primary election ballot access restriction).

the real world, however, anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member. See 169 F. 3d, at 655, and n. 20. There is an obvious mismatch between a supposed constitutional right "not to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. See *La Follette*, 450 U. S., at 133 (Powell, J., dissenting) ("As Party affiliation becomes . . . easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance").

The Court's reliance on a political party's "right not to associate" as a basis for limiting a State's power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways. Assuming that a registered Democrat or independent who wants to vote in the Republican gubernatorial primary can do so merely by asking for a Republican ballot, the Republican Party's constitutional right "not to associate" is pretty feeble if the only cost it imposes on that Democrat or independent is a loss of his right to vote for non-Republican candidates for other offices. Cf. *ante*, at 10, n. 8. Subtle distinctions of this minor import are grist for state legislatures, but they demean the process of constitutional adjudication. Or, as JUSTICE SCALIA put the matter in his dissenting opinion in *Tashjian:*

> "The . . . voter who, while steadfastly refusing to register as a Republican, casts a vote in [a non-closed] Republican primary, forms no more meaningful an

> 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use." 479 U. S., at 235.

It is noteworthy that the bylaws of each of the political parties that are petitioners in this case unequivocally state that participation in partisan primary elections is to be limited to registered members of the party only. App. 7, 15, 16, 18. Under the Court's reasoning, it would seem to follow that conducting anything but a closed partisan primary in the face of such bylaws would necessarily burden the parties' "freedom to identify the people who constitute the association.'" *Ante*, at 6–7. Given that open primaries are supported by essentially the same state interests that the Court disparages today and are not as "narrow" as nonpartisan primaries, *ante*, at 14–18, there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have.

By the District Court's count, 3 States presently have blanket primaries, while an additional 21 States have open primaries and 8 States have semi-closed primaries in which independents may participate. 169 F. 3d, at 650. This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others at the parties' behest is, as the District Court rightly observed, "an extraordinary intrusion into the complex and changing election laws of the States [that] . . . remove[s] from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance." *Id.*, at 654.[8]

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[8]When coupled with our decision in *Tashjian* that a party may re-

In my view, the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work– party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials– that are held by the litigants in this case. *O'Callaghan* v. *State*, 914 P. 2d 1250, 1263 (Alaska 1996); see also *Tashjian*, 479 U. S., at 222–223; *Luther* v. *Borden*, 7 How. 1, 40–42 (1849). That choice belongs to the people. *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 795 (1995).

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. See, *e.g.*, 169 F. 3d, at 656–659, and n. 23. Moreover, that conclusion rests substantially upon the

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quire a State to open up a closed primary, this intrusion has even broader implications. It is arguable that, under the Court's reasoning combined with *Tashjian*, the only nominating options open for the States to choose without party consent are: (1) not to have primary elections, or (2) to have what the Court calls a "nonpartisan primary"– a system presently used in Louisiana– in which candidates previously nominated by the various political parties and independent candidates compete. *Ante*, at 18. These two options are the same in practice because the latter is not actually a "primary" in the common, partisan sense of that term at all. Rather, it is a general election with a runoff that has few of the benefits of democratizing the party nominating process that led the Court to declare the State's ability to require nomination by primary "'too plain for argument.'" *Ante*, at 4; see *Lightfoot* v. *Eu*, 964 F. 2d 865, 872–873 (CA9 1992) (explaining state interest in requiring direct partisan primary).

Court's claim that "[t]he evidence before the District Court" disclosed a "clear and present danger" that a party's nominee may be determined by adherents of an opposing party. *Ante*, at 10. This hyperbole is based upon the Court's liberal view of its appellate role, not upon the record and the District Court's factual findings. Following a bench trial and the receipt of expert witness reports, the District Court found that "there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants." 169 F. 3d, at 656. While the Court is entitled to test this finding by making an independent examination of the record, the evidence it cites– including the results of the June 1998 primaries, *ante*, at 10–11, which should not be considered because they are not in the record– does not come close to demonstrating that the District Court's factual finding is clearly erroneous. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 498–501 (1984).

As to the Court's concern that benevolent crossover voting impinges on party associational interests, *ante*, at 11, the District Court found that experience with a blanket primary in Washington and other evidence "suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting . . . although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states." 169 F. 3d, at 657. In my view, an empirically debatable assumption about the relative number and effect of likely crossover voters in a blanket primary, as opposed to an open primary or a nominally closed primary with only a brief pre-registration requirement, is too thin a reed to support a credible First Amendment distinction. See *Tashjian*, 479 U. S., at 219 (rejecting State's interest in

keeping primary closed to curtail benevolent crossover voting by independents given that independents could easily cross over even under closed primary by simply registering as party members).

On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." 169 F. 3d, at 662;[9] cf. *Timmons*, 520 U. S., at 364 ("[W]e [do not] require elaborate, empirical verification of the weightiness of the State's asserted justifications"). The Court's glib rejection of the State's interest in increasing voter participation, *ante*, at 17, is particularly regrettable. In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. See Brief for Respondents 46 (noting that study presented to District Court showed higher voter turnout levels in blanket primary states than in open or closed primary states); *ante*, at 1 (KENNEDY, J., concur-

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[9] In his concurrence, JUSTICE KENNEDY argues that the State has no valid interest in changing party doctrine through an open primary, and suggests that the State's assertion of this interest somehow irrevocably taints its blanket primary system. *Ante*, at 2. The *Timmons* balancing test relied upon by the Court, *ante*, at 14, however, does not support that analysis. *Timmons* and our myriad other constitutional cases that weigh burdens against state interests merely ask whether *a* state interest justifies the burden that the State is imposing on a constitutional right; the fact that one of the asserted state interests may not be valid or compelling under the circumstances does not end the analysis.

ring). I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process,[10] to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, *Burdick* v. *Takushi*, 504 U. S. 428, 445 (1992) (KENNEDY, J., dissenting), and to the preference of almost 60% of California voters— including a majority of registered Democrats and Republicans— for a blanket primary. 169 F. 3d, at 649; see *Tashjian*, 479 U. S., at 236 (SCALIA, J., dissenting) (preferring information on whether majority of rank-and-file party members support a particular proposition than whether state party convention does so). In my view, a State is unquestionably entitled to rely on this combination of interests in deciding who may vote in a primary election conducted by the State. It is indeed strange to find that the First Amendment forecloses this decision.

II

The Elections Clause of the United States Constitution, Art. I, §4, cl. 1, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof" (emphasis added). This broad constitutional grant of power to state legislatures is "matched by state control over the election process for state offices." *Tashjian*, 479 U. S., at 217. For the reasons given in Part I, *supra*, I believe it would be a proper exercise of these powers and would not violate the First Amendment for the

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[10] See *La Follette*, 450 U. S., at 135–136 (Powell, J., dissenting); cf. *Tashjian*, 479 U. S., at 215–216, n. 6 (discussing cases such as *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), in which nonmembers' associational interests were overborne by state interests that coincided with party interests); *Bellotti* v. *Connolly*, 460 U. S., at 1062 (STEVENS, J., dissenting) (discussing associational rights of voters).

California Legislature to adopt a blanket primary system. This particular blanket primary system, however, was adopted by popular initiative. Although this distinction is not relevant with respect to elections for state offices, it is unclear whether a state election system not adopted by the legislature is constitutional insofar as it applies to the manner of electing United States Senators and Representatives.

The California Constitution empowers the voters of the State to propose statutes and to adopt or reject them. Art. 2, §8. If approved by a majority vote, such "initiative statutes" generally take effect immediately and may not be amended or repealed by the California Legislature unless the voters consent. Art. 2, §10. The amendments to the California Election Code that changed the state primary from a closed system to the blanket system presently at issue were the result of the voters' March 1996 adoption of Proposition 198, an initiative statute.

The text of the Elections Clause suggests that such an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state "Legislature[s]." It could be argued that this reasoning does not apply in California, as the California Constitution further provides that "[t]he legislative power of this State is vested in the California Legislature . . ., but the people reserve to themselves the powers of initiative and referendum." Art. 4, §1. The vicissitudes of state nomenclature, however, do not necessarily control the meaning of the Federal Constitution. Moreover, the United States House of Representatives has determined in an analogous context that the Elections Clause's specific reference to "the Legislature" is not so broad as to encompass the general

"legislative power of the State."[11] Under that view, California's classification of voter-approved initiatives as an exercise of legislative power would not render such initiatives the act of the California Legislature within the meaning of the Elections Clause. Arguably, therefore, California's blanket primary system for electing United States Senators and Representatives is invalid. Because the point was neither raised by the parties nor discussed by the courts below, I reserve judgment on it. I believe, however, that the importance of the point merits further attention.

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For the reasons stated in Part I of this opinion, as well as those stated more fully in the District Court's excellent opinion, I respectfully dissent.

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[11] *Baldwin* v. *Trowbridge*, 2 Bartlett Contested Election Cases, H. R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 47 (1866) ("[Under the Elections Clause,] power is conferred upon the *legislature*. But what is meant by 'the legislature?' Does it mean the legislative power of the State, which would include a convention authorized to prescribe fundamental law; or does it mean the legislature *eo nomine*, as known in the political history of the country? The [C]ommittee [of Elections for the U. S. House of Representatives] have adopted the latter construction").