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THE COUNTY LINE: THE LAW AND POLITICS OF BALLOT POSITIONING IN NEW JERSEY

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INTRODUCTION

Unelected and unaccountable party bosses and political machines have for many years used the associational rights of the First Amendment to maintain complete control over New Jersey's politics. Today, these party bosses exercise unchecked power to endorse candidates up and down the primary ballot in New Jersey. Political candidates who fail to secure the endorsement of these party bosses and political machines have virtually no chance of winning an election. That is because New Jersey law provides advantages to machine-backed candidates that are extremely difficult for any challenger to overcome. In state primaries, party-backed candidates are given the opportunity to bracket with one another, to use the same party slogan, and to appear on

the same line on the ballot. These mechanisms then combine to guarantee that each party-backed candidate always receives a favorable position on the ballot. In New Jersey, this system is often referred to as "the County Line," and it is used by the state's party bosses and county chairs to deprive the state's citizens of their right to exercise a free and fair vote.

New Jersey is a distinct outlier when it comes to democratic practice in the United States. It is the only state in the nation that employs a ballot design in primary elections that is organized by columns or rows of groupings of candidates for different offices, as opposed to organizing the ballot by the office being sought. This unique ballot structure intentionally and effectively deprives the state's voters from being able to replace party-backed insiders with challengers. Party bosses in New Jersey derive their power from their ability to control the ballot and which candidates have access to it. As such, what matters most to political candidates, at least as far as primary elections go, is that they have the support of their county party chair, rather than the support of the state's voters. It is a system that is antithetical to democracy and the ability of citizens to control their government.

Many of the problems surrounding the County Line system in New Jersey stem from a 1989 Supreme Court decision, *Eu v. San Francisco County Democratic Central Committee*.[1] That case considered the constitutionality of a California law that prevented political parties from endorsing candidates in advance of a party primary.[2] After the Supreme Court struck down California's law, New Jersey's Appellate Division invalidated a similar New Jersey statute that had banned political party organizations from endorsing candidates prior to a primary election.[3] Piece by piece, subsequent cases and other laws in New Jersey combined to create a system where unelected and unaccountable party bosses were able to use the First Amendment to gain control over the state's politics. Despite the ubiquitous nature of the County Line in New Jersey politics, scholars have not carefully explored the justifications behind this system or chronicled the effects that it has had on the state's politics. This Article seeks to explore the history of the County Line system of ballot positioning in New Jersey and to explain how and why it poses a threat to the rights of voters and candidates throughout the state.

The Article proceeds as follows. Part I provides a history of how New Jersey's election laws regulate political parties and their ability to

1. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989).
2. *Id.* at 216.
3. *Id.* at 233; Batko v. Sayreville Democratic Org., 860 A.2d 967, 971–72 (N.J. Super. Ct. App. Div. 2004).

participate in primary elections. It summarizes the *Eu* decision and its significance on how political parties are able to govern their internal affairs. Part II discusses the implications of the County Line on primary elections in New Jersey. It uses various examples and anecdotal evidence to demonstrate the impact of the County Line on democratic practice in New Jersey. Part III turns to examining the associational freedoms at issue in perpetuating the County Line and tries to weigh them against other important rights that are at stake in guaranteeing free and fair elections. Part IV proposes various ways that New Jersey's primary election ballots can be changed so that party-backed candidates are not granted state-conferred advantages over other candidates. Finally, Part V concludes by explaining why New Jersey's current County Line system of placing party-backed candidates together in a preferential ballot position in primary elections places an unconstitutional burden on the right to vote.

I. NEW JERSEY'S LAWS ON POLITICAL PARTIES AND PRIMARY ELECTIONS

To understand the current power that party insiders hold in New Jersey, it is first important to understand a bit of history. The reason the state first adopted direct primary elections in the early 1900s was to guard against party bosses and political machines exercising unfettered control over the process by which parties nominated candidates for the general election.[4] New Jersey's legislature in the decades following the institution of the direct primary passed a number of laws that attempted to protect citizens and prevent party insiders from exerting extraordinary influence over the political process.[5] However, over time, those protections began to erode. Moreover, as a result of *Eu*, the legislature's ability to regulate political party organizations became severely limited, and the parties were able to regain control and unprecedented power.

A. The Origin of the Primary System in New Jersey

Before 1789, there were no statewide parties in New Jersey, but rather, more localized groups of individuals who would nominate candidates for office.[6] It was not until after the first congressional elections that statewide political parties began to emerge, and in turn, party conventions were held to select candidates to represent the

4. *See* RALPH SIMPSON BOOTS, THE DIRECT PRIMARY IN NEW JERSEY 31–33 (1917).
5. *See infra* Part I.B.
6. *See* Stevenson v. Gilfert, 100 A.2d 490, 491 (N.J. 1953).

parties.[7] Such party conventions were not subject to state regulation until 1878.[8] While subsequent laws continued to place some minor regulations on primaries and conventions, only in 1903 did the New Jersey legislature pass a law mandating a direct primary.[9] A direct primary means that the members of a political party get to vote for the candidates they want to nominate to represent the party at a general election.[10]

Among other items, the Direct Primary Law of 1903 called for primary elections to be paid by public expense, set the dates on which primary elections would be held, and issued requirements for ballots, voter registration lists, and polling booths.[11] This law also set signature and petition requirements for party endorsements, and created regulations to determine who could vote in the primary.[12] Finally, the new law required a primary election to be held for the direct nomination of ward and township officers by voters for the first time in New Jersey.[13] In 1907, the direct primary was extended to additional offices, including all municipal and county offices, state senator, and assemblyman, with county and city committee members subsequently added in 1909.[14] Speaking of the impact of the 1903 law, the Supreme Court of New Jersey stated "that primary elections were no longer matters of private concern to be dealt with by party managers in any manner they chose but, on the contrary, were of public concern and required regulation in the public interest."[15]

The legislature subsequently passed the Geran Act in 1911 with the approval of then-Governor Woodrow Wilson, who asserted that the law would "break up the private and secret management of party machines."[16] The passage of the Geran Act came amidst frustration with

7. *Id.*

8. *Id.* (citing Act of Mar. 27, 1878, ch. 113, 1878 Acts of the One Hundred and Second Legislature of the State of New Jersey 178).

9. BOOTS, *supra* note 4, at 16–17.

10. *See id.* at 2–3.

11. *See generally* Act of Apr. 14, 1903, ch. 248, 1903 Acts of the Legislature of the State of New Jersey 603–25.

12. *See id.* at 607–08.

13. BOOTS, *supra* note 4, at 17–18.

14. *Id.* at 26–29.

15. Stevenson v. Gilfert, 100 A.2d 490, 492 (N.J. 1953) (citing Wene v. Meyner, 98 A.2d 573, 576 (N.J. 1953)).

16. BOOTS, *supra* note 4, at 30–31 (internal citation and quotation marks omitted); *see also id.* at 66 (Wilson proclaimed that the current election system presents "nothing more than a choice between one set of machine nominees and another," and further remarked that "we did not get representative government at all—at least not government representative of the people, but government representative of political managers who

and distrust of party officials, party bosses, and political machines.[17] Mr. Geran, the legislator after whom the bill was named, explained as follows: "This bill gives the people the control of the election machinery and places in their hands the power to administer government."[18] In addition to other reforms, such as comprehensive regulation of voter registration and the institution of a signature comparison process at the polls, the Geran Act also extended the direct primary to all candidates for governor and congressional representative.[19] The Supreme Court of New Jersey recognized even decades after the Geran Act was passed that "there is little question that the direct primary has at least afforded broad opportunities to party voters to select their own party candidates."[20]

B. The Evolution of New Jersey Law Prior to Eu

Following the institution and regulation of the direct primary, other reforms were enacted that continued to reduce the dominant role of party leadership over primary elections. These other reforms included, among other things, a primary endorsement ban, a law regulating ballot placement and positioning for U.S. Senate candidates and state gubernatorial candidates, and laws concerning redistricting and the public financing of elections.

1. The Primary Endorsement Ban

In 1930, the legislature passed a law to prohibit political parties from endorsing candidates for party nomination or position prior to the primary election.[21] This Primary Endorsement Ban was designed to prevent party organizations from interfering with the right of voters to decide which candidates they wanted to nominate at a primary.[22] The Primary Endorsement Ban's importance was recognized even decades after its passage.

In 1972, the court in *Cavanagh v. Morris County Democratic Committee* considered whether a political party could circumvent the Primary Endorsement Ban by creating under its bylaws a candidate

served their own interest and the interests of those with whom they found it profitable to establish partnership.") (internal quotation marks omitted).

17. *See id.* at 31–33.

18. *Id.* at 32 (internal citation and quotation marks omitted).

19. *Id.* at 32–36.

20. *Stevenson*, 100 A.2d at 494.

21. *See* N.J. STAT. ANN. § 19:34-52 (West 2020), *invalidated by* Batko v. Sayreville Democratic Org., 860 A.2d 967 (N.J. Super. Ct. App. Div. 2004).

22. *See* Cavanagh v. Morris Cty. Democratic Comm., 297 A.2d 594, 597–99 (N.J. Super. Ct. Ch. Div. 1972).

screening committee, which would, in turn, make endorsements for the party.[23] The court rejected this attempted end-run around the statute's prohibitions, holding that a party committee could not create a committee independent of itself to circumvent the statute.[24] In so holding, the court acknowledged that the aim of New Jersey's law was to prevent interference by the county committee in the nomination of candidates, and that the Primary Endorsement Ban was necessitated by the state's past experience with primaries, which were wrought with fraud and wrongdoing.[25] In that regard, the court noted that party conventions were replaced by primaries due to "public dissatisfaction with the political manipulation at conventions."[26] The court also acknowledged that "[t]he major reason for changing to the primary election is to prevent political manipulation by certain select members of the party," and it recognized that the legislature could "safeguard[] the right of individual voter participation in choice of party candidates" by "preventing party committees from exerting their influence on the party membership."[27]

The strength and effect of the law subsequently began to suffer some setbacks, however. From April 10, 1975, until February 1, 1977, the Primary Endorsement Ban was suspended by the legislature.[28] While it was under suspension, both houses of the legislature passed a bill to amend the law; the amendments would have allowed a party committee to endorse candidates in a primary election so long as three requirements were met: (1) adequate notice of a meeting to make endorsements was sent to all members of the committee, (2) a quorum was present as determined by the bylaws of the organization, and (3) a majority of the members who were present to vote endorsed the candidate(s).[29] However, Governor Brendan Byrne filed the bill in the State Library without signing it, thereby preventing the bill from becoming law.[30] These events, along with efforts—such as those struck down in *Cavanagh*—to set up candidate screening committees or other "dummy" committees to circumvent the law, led to a great deal of confusion as to the applicability and effect of the Primary Endorsement Ban.[31]

23. *See generally id.*
24. *See id.* at 597.
25. *See id.* at 597–99.
26. *See id.* (citing Ray v. Blair, 343 U.S. 214, 221–22 (1952)).
27. *Id.* at 598–99.
28. *See* Act of Apr. 10, 1975, ch. 67, 1975 Acts of the Legislature of the State of New Jersey 120.
29. *See* Assembly Bill No. 2435 (Introduced Jan. 11, 1977).
30. *See* Governor's Statement to Assembly Bill No. 2345.
31. *See* Formal Op. N.J. Att'y Gen No. 9, 1–2 (May 5, 1977) ("It should be noted at the outset, that, of late, there has been much confusion surrounding the applicability of the

The Primary Endorsement Ban was weakened further a few years later. In *Gillen v. Sheil*, the court held that the statute's prohibition on party endorsements prior to the primary did not extend to party officers' actions in their individual capacities, as opposed to endorsements made as a party official or on behalf of the party organization.[32] Thus, while official endorsements of the party as an entity were still forbidden, individual party actors could now exert influence over the nomination process.

The court in *Gillen* also confronted a technical issue concerning how candidates could be featured together on the ballot.[33] Under the law as it then stood, candidates could be featured on the same line of the ballot through one of two avenues.[34] First, candidates for compatible offices for the same unit of government could file a "joint petition[]" with the same filing officer.[35] For example, two candidates for county freeholder could submit a joint petition to the county clerk. Second, candidates from different units of government who had to file petitions with a different filing officer than the county clerk (e.g., municipal clerk, Secretary of State) could submit mutual requests to be featured together, or "bracketed" on the same line of the ballot as county candidates who filed a joint petition with the county clerk.[36] For example, if a candidate for town council or for the state senate wanted to bracket with candidates for county freeholder, such candidate would first have to request and receive permission from the freeholder candidates who filed their joint petition with the county clerk.

In light of this background, and specifically the requirement that bracketing requests be made through county candidates who file a joint petition, the court in *Gillen* considered whether or not a candidate would be able to be featured on the same line of the ballot as other candidates, in the event that there was only one county position open on the ballot, thereby precluding the possibility of a "joint petition."[37] The court looked to the legislative intent of the statutes at issue to determine whether the phrase "joint petition" should be read literally to require a petition filed by at least two candidates; it ultimately concluded that such a literal meaning would be an untenable construction under these specific circumstances, as it would prohibit the ability of candidates to appear

aforementioned statute. . . . [But since the Governor refused to sign Assembly Bill No. 2435], at present, N.J.S.A. 19-34-52 is in full force and effect.").

32. Gillen v. Sheil, 416 A.2d 935, 936–38 (N.J. Super. Ct. Law Div. 1980).
33. *Id.* at 937.
34. *Id.*
35. *Id.* at 938.
36. *See* N.J. STAT. ANN. § 19:49-2 (West 2012); *Gillen*, 416 A.2d at 938.
37. *See Gillen*, 416 A.2d at 937–39.

together on the ballot in years when there are not a minimum of two open county-wide offices.[38] In reaching this conclusion, the court acknowledged a "well-established pattern of having candidates for different offices but similar view appear together on the ballot."[39] Regarding the importance of that pattern, the court stated as follows:

> This pattern is not simply one which benefits the candidates, but one which is essential to an intelligible ballot. Voters have an important interest in finding candidates of similar persuasion grouped together rather than being spread upon the ballot in random fashion. Voters are disadvantaged if philosophically affiliated candidates are scattered around the ballot.[40]

What the court may have recognized in *Gillen*, perhaps, is that if party-preferred candidates could not bracket with joint county candidates, such inability would also deprive them of the assurance of gaining favorable ballot position under existing New Jersey case law. Earlier, in *Moskowitz v. Grogan*, the Appellate Division had held that when there are at least two groups of county candidates who file a joint petition, there must be an initial drawing as among such groups, and all candidates who requested and received permission to bracket together with such groups must have their names placed on the same line of the ballot.[41] The court in *Moskowitz* also held that where there were at least two groups of state candidates who did not affiliate with county candidates filing a joint petition, separate drawings must be held for ballot position among these un-bracketed candidates, but not against those candidates who affiliated with joint county candidates.[42]

In essence, what the courts in *Gillen* and *Moskowitz* did was take existing New Jersey laws regarding filing petitions and bracketing requests and, through their interpretations of those laws, invented a new requirement that county clerks must award preferential ballot position to joint county candidates and those bracketing with them.[43] The

38. *See id.* at 938–39.

39. *Id.* at 939; *cf.* Harrison v. Jones, 130 A.2d 887, 890 (N.J. Super. Ct. App. Div. 1957) ("[G]roups of candidates having the same party faction label or designation and desiring to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot should have the right to do so.") (citing Bado v. Gilfert, 80 A.2d 564, 565 (N.J. Super. Ct. App. Div. 1951)).

40. *Gillen*, 416 A.2d at 939 (citing Quaremba v. Allan, 334 A.2d 321, 326–27 (N.J. 1975)).

41. *See* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968) (interpreting bracketing requests under N.J. STAT. ANN. § 19:49-2).

42. *Id.*

43. *See id.*; *see also Gillen*, 416 A.2d at 939.

implications of these court decisions can be better understood when stated in the inverse: candidates not aligned with joint county candidates will suffer a disadvantage on the ballot. Importantly, these legal principles were developed while New Jersey's Primary Endorsement Ban was still in effect. Yet, as explained below, while the Primary Endorsement Ban is no longer the law, the principles in *Gillen* and *Moskowitz* remain in place today, are still good law, and continue to influence New Jersey elections.

2. U.S. Senate and Gubernatorial Ballot Placement

In 1981, the New Jersey legislature passed the Open Primary Law, which set forth special requirements for the ballot placement in a primary election of candidates running for U.S. Senator and Governor.[44] The statute at issue contained three provisions related to candidates in a primary election for these offices: (1) the names of all candidates for U.S. Senator or Governor had to be placed on the first line (column or row depending on how the ballot was designed) of the primary election ballot; (2) if both offices were up for election in the same year, all candidates for U.S. Senator had to be printed on the first line, and all candidates for Governor had to be printed on the second line; and (3) no candidates for any other office could have their name printed on the same line of the primary election ballot as candidates for U.S. Senator or Governor.[45] One purpose of this legislation, as the court noted the legislative history of the statute, was to "simplify the task of any person wishing to vote for a candidate for Governor or Senator, since he would not, as now, have to read all lines of the ballot for the names of the various candidates."[46]

Much of the power wielded by county committees stems from the fact that candidates need to bracket with county candidates in order to receive a more favorable ballot position. However, under the 1981 Open Primary Law, candidates for U.S. Senator and Governor were separated from any other candidates on the ballot; thus, these statewide candidates no longer needed to rely on alliances with groups of county candidates and/or party bosses that controlled them.[47] In this manner, the 1981 Open Primary Law, combined with the Primary Endorsement Ban,

44. N.J. STAT. ANN. § 19:23-26.1 (West 1981).

45. *See id.*

46. *See* Lautenberg v. Kelly, 654 A.2d 510, 513 (N.J. Super. Ct. Law Div. 1994), *overruled in part by* Schundler v. Donovan, 872 A.2d 1092 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005).

47. *See* § 19:23-26.1.

resulted in campaigns that were candidate-based, further weakening county political parties,[48] albeit only for a short period of time.

3. Public Financing, Redistricting Reforms, and Other Factors

Other factors also contributed to a decrease in the power of county political parties prior to the *Eu* decision as well. Around the mid-1960s, suburbanization weakened county political parties on both sides of the aisle, loosening the loyalty previously exhibited by urban Democratic voters moving out of the city, and of rural Republican voters moving to the suburbs.[49] In addition, reapportionment decisions during this time required legislative districts to be drawn based on the principle of one-person, one-vote, rather than based on county line boundaries.[50] In 1977, New Jersey law added provisions for the public financing of gubernatorial campaigns, which, alongside restrictions on the ability of party organizations to endorse and contribute to the primary elections of candidates, resulted in more candidate-centered campaigns, and further deprived party leaders of power and control over the nomination process.[51]

County party organizations were thus reduced to their weakest level of influence by the mid-1980s.[52] However, many of the reforms aimed at reducing the influence of party committees in the primary nominating process would be undone by and in the aftermath of the *Eu* decision.

C. The Eu *Decision*

In *Eu v. San Francisco County Democratic Central Committee*, the Supreme Court examined a California state law that prohibited the governing bodies of the state's political parties from endorsing candidates in advance of a primary election.[53] The Court also reviewed several California laws that it described as "regulat[ing the parties'] internal affairs," including a requirement that the Party Chair of the state central

48. *See* N.J. ELECTION LAW ENF'T COMM'N, WHITE PAPER NO. 16, A RESURGENT PARTY SYSTEM: REPARTYIZATION TAKES HOLD 71 (2003) [hereinafter RESURGENT PARTY SYSTEM].

49. *Id.*

50. *See id.* (citing N.J. ELECTION LAW ENF'T COMM'N, WHITE PAPER NUMBER NO. 12, REPARTYIZATION: THE REBIRTH OF COUNTY ORGANIZATIONS 2 (1997)); Reynolds v. Sims, 377 U.S. 533, 537–40 (1964); Baker v. Carr, 369 U.S. 186, 187–91 (1962).

51. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 71–72. For a more in-depth discussion of factors leading to the weakening of political parties in the 1960s and 1970s, see Maureen W. Moakley, *Political Parties*, *in* THE POLITICAL STATE OF NEW JERSEY 49–52, (Gerald M. Pomper ed., Rutgers Univ. Press, 1986).

52. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 72.

53. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989).

committee rotate between residents of Northern and Southern California and be subject to certain term limits.[54] In addition, the California law included mandates on the size and composition of the state central committees, specific rules for selecting and removing committee members, regulations on the time and place for committee meetings, and limits on dues that parties could impose on members.[55] The plaintiffs challenged all of these provisions of California law, claiming that each infringed on their freedom of speech and freedom of association under the First and Fourteenth Amendments.[56]

1. The Balancing Test

In reviewing the constitutionality of the state laws at issue, the Court resorted to using a balancing test that it had set forth several years earlier in the case of *Anderson v. Celebrezze*.[57] The Court in *Anderson* acknowledged that it was necessary for states to pass laws in order to properly administer elections; although voting was a fundamental right and state election laws would inevitably have some impact on the right to vote, the Court in *Anderson* recognized that "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[58] Therefore, when a state's regulations might curtail a citizen's right to vote, the Supreme Court suggested in *Anderson* that courts had to employ a balancing test that weighed the burden on voting rights against the state's interests in passing the particular law in question.[59] Additionally, courts had to consider the extent to which the state's law made it necessary to burden the plaintiffs' rights.[60] This balancing test became the fundamental standard used by courts any time a state election law was challenged for placing a burden on the right to vote.[61]

In *Eu*, the Court held that, under *Anderson*, it must first determine if the state election law burdens First and Fourteenth Amendment rights; if the law "burdens the rights of political parties and their members," then in order for the law to stand, the State must demonstrate that it serves a compelling state interest, which must also be "narrowly

54. *Id.* at 218.
55. *Id.* at 218–19.
56. *Id.* at 219.
57. *See id.* at 222 (citing Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).
58. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).
59. *Id.* at 789.
60. *Id.*
61. *See* Cody S. Barnett & Joshua A. Douglas, *A Voice in the Wilderness: John Paul Stevens, Election Law, and a Theory of Impartial Governance*, 60 WM. & MARY L. REV. 335, 365–66 (2018).

tailored to serve that interest."[62] The Court proceeded to apply this standard to the various provisions of California law that were challenged in *Eu*.[63] It should be noted that the balancing test in *Anderson* was later clarified and refined in subsequent cases, including *Burdick v. Takushi*[64] and *Crawford v. Marion County Election Board*,[65] which were decided after the Court's decision in *Eu*.

2. Application of the Balancing Test to the Ban on Primary Endorsements

Applying this test to the ban on primary endorsements, the Court found in *Eu* that California's prohibition did in fact burden free speech and associational rights.[66] In its review, the Court found that the ban directly affected core political speech, which was just as critical before a primary as it was before a general election.[67] Because California's primary endorsement ban prevented parties from declaring that certain candidates "adhere[] to the tenets of the party" or are otherwise qualified for a particular office, the ban was found to have directly restricted the parties' ability to spread their message and to have affected the ability of voters to become informed about the candidates and the issues relevant to their campaigns.[68] The Court found the law's restrictions "particularly egregious" in light of the fact that they pertained to the "political speech a political party shares with its members."[69] Furthermore, the Court found that the ban also burdened the freedom of association, which protected not only the right of an individual to associate with the party of his choice, but also the right of the party to "identify the people who constitute the association," and also to select its standard bearer to represent the party's ideology.[70]

Having found a burden on free speech and association, the Court then rejected the government's asserted interests, which included preserving stable governments and avoiding voter confusion.[71] The Court was unable to find a link between the primary endorsement ban and an interest in stable governments; it found that while there may be a

62. *See Eu*, 489 U.S. at 222 (citations omitted).
63. *Id.* at 222–33.
64. Burdick v. Takushi, 504 U.S. 428 (1992).
65. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (lead opinion).
66. *See Eu*, 489 U.S. at 222–26.
67. *Id.* at 222–23.
68. *Id.* at 223.
69. *Id.* at 223–24 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring)).
70. *Id.* at 224 (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986)).
71. *See id.* at 225–29.

compelling interest in preventing party splintering and factionalism with regard to the disruption of parties from those who are not members, there was no compelling interest in party stability.[72] Rather, the Court stated that primaries were ideal forums to address intraparty feuds, and that while "a State may enact laws to 'prevent the disruption of the political parties from without,' [it may not enact] . . . laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'"[73]

The Court also refused to find a compelling interest in protecting voters in a primary from undue influence and confusion.[74] While the Court recognized there could be a legitimate interest in having an informed electorate, and acknowledged that states could "regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption," it found no evidence that "restricting the flow of information" via California's primary endorsement ban served that interest.[75] Having found no compelling interest, the Court held that the primary endorsement ban violated the First and Fourteenth Amendments.[76]

3. Application of the Balancing Test to California's Other Restrictions

The Court then applied its balancing test to the term limit and geographical restrictions on the party chairs, and on the organizational and compositional requirements of the parties' governing bodies, that had been imposed by California law.[77] It found that these laws directly burdened the associational rights of the political parties and their members, holding that freedom of association protects the party's determination as to the structure it wants to use to pursue the goals of the party and decisions concerning the process to be used for electing the party's leaders.[78] The Court stated that California's various requirements further prevented the party from making decisions as to who the members of the parties' governing bodies should be, how long a state central committee chair needs to successfully develop and carry out policy, and whether a resident from one part of the state can effectively

72. *Id.* at 226–28.
73. *Id.* at 227 (quoting *Tashjian*, 479 U.S. at 224).
74. *Id.* at 228–29.
75. *Id.* (citations omitted).
76. *Id.* at 229.
77. *See id.* at 229–33.
78. *Id.* at 230.

unify the party and promote its message.[79] In finding a burden on associational rights, the Court stated that California's restrictions on how a political party is organized, carries out its affairs, and selects its own leaders was stronger than the associational rights in *Tashjian v. Republican Party*, where the party sought to associate with non-party members in the primary, as opposed to associating with its own members in *Eu*.[80]

In assessing the alleged state interests, the Court recognized that there could be a compelling interest in "preserving the integrity of [the] election process," and the "State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest" or "impose restrictions that promote the integrity of primary elections."[81] Thus, a state can require major political parties to nominate candidates in a primary while requiring minor parties to hold conventions, limit voters from participating in more than one primary, institute a durational requirement before voters can change party affiliation to vote in a primary election of another party, and impose a reasonable filing fee for a candidate to be placed on the ballot.[82] The Court distinguished these situations because those restrictions did not involve "direct regulation of a party's leaders," but were rather an "indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections."[83]

By contrast, the Court noted in *Eu* how California did not demonstrate that its laws were necessary to protect the integrity of the electoral process, but rather contended that it served a compelling government interest in the "democratic management of the political party's internal affairs."[84] Thus, the Court distinguished cases in which it was necessary for courts to intervene to prevent the violation of civil rights.[85] Furthermore, the Court stated that "the State has no interest in 'protect[ing] the integrity of the Party against the Party itself.'"[86] As the State could not justify its regulation of internal party affairs by

79. *Id.*

80. *Id.* at 230–31.

81. *Id.* at 231 (citations omitted).

82. *See id.* (citing Am. Party of Tex. v. White, 415 U.S. 767, 779–80, 785–86 (1974); Rosario v. Rockefeller, 410 U.S. 752, 761 (1973); Bullock v. Carter, 405 U.S. 134, 145 (1972)).

83. *Id.* at 231–32.

84. *Id.* at 232 (internal quotation marks and citation omitted).

85. *Id.* (citing Smith v. Allwright, 321 U.S. 649 (1944) (protecting civil rights by judicial intervention)).

86. *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986)) (alteration in original).

demonstrating that such laws were necessary to ensure an orderly and fair election, the Court held that California's elections laws were unconstitutional.[87]

D. The Application of Eu *to New Jersey's Election Practices*

Prior to *Eu*, the importance of safeguarding primaries from party interference and control was widely recognized in New Jersey.[88] While county bosses and political machines did exert control during various periods after the institution of the direct primary in New Jersey, especially prior to the 1960s,[89] there was nevertheless a widespread understanding in the state that reasonable regulation of party primaries by the legislature was "appropriate to secure the integrity of the nominating process."[90] However, the *Eu* decision served to undermine such previously enshrined principles.

1. The Constitutionality of the Primary Endorsement Ban

While New Jersey's Primary Endorsement Ban remained on the books after *Eu*, the statute containing the ban was implicitly and

87. *Id.* at 233.

88. *See* Cavanagh v. Morris Cty. Democratic Comm., 297 A.2d 594, 598 (N.J. Super. Ct. Ch. Div. 1972) ("[T]he aim of the [Primary Endorsement Ban] is to prevent interference by the county committee with the candidacies of persons running for . . . nomination."); Stevenson v. Gilfert, 100 A.2d 490, 492 (N.J. 1953) (The 1903 act extending the direct primary "represented full legislative recognition that primary elections were no longer matters of private concern to be dealt with by party managers in any manner they chose but, on the contrary, were of public concern and required regulation in the public interest.") (citing Wene v. Meyner, 98 A.2d 573, 576 (N.J. 1953)); Fields v. Hoffman, 520 A.2d 751, 758 (N.J. 1986) (Stein, J., dissenting) (discussing New Jersey's strong "public interest in primary elections free from domination by the party hierarchy"), *superseded in part by statute*, 1990 N.J. Laws 56, N.J. STAT. ANN. § 19:27-11.1, as recognized in Catania v. Haberle, 588 A.2d 374, 375 (N.J. 1990).

89. *See* BOOTS, *supra* note 4, at 69–70; RESURGENT PARTY SYSTEM, *supra* note 48, at 70–71 ("In a word, the history of electoral politics in New Jersey prior to the 1960s is one of a county political party system flush with power . . . [i]t was a time of bosses, both famous and infamous, who had a steady hand on the wheel of New Jersey politics and governance."); *Government—Political History*, NEWJERSEYALMANAC.COM, https://www.newjerseyalmanac.com/political-history.html (last visited Apr. 9, 2020) ("Despite the reforms put in place during Wilson's brief time as governor, county bosses continued to be key players in the 1920s and after.").

90. *See Wene*, 98 A.2d at 576; *see also Cavanagh*, 297 A.2d 594 at 599 ("There is no question but that primary elections are so far matters of public concern that they are proper objects of legislative control and that appropriate measures may be enacted.") (citing Nagler v. Stiles, 343 F. Supp. 415, 417 (D.N.J. 1972)); *Stevenson*, 100 A.2d at 492.

explicitly questioned and largely ignored.[91] Then, fifteen years after *Eu*, the Appellate Division in New Jersey officially declared the Primary Endorsement Ban unconstitutional in *Batko v. Sayreville Democratic Organization*,[92] under the same principles set forth by the Supreme Court in *Eu*. In *Batko*, a candidate who switched her party affiliation from Republican to Democrat sought to participate in the screening process of the Sayreville Democratic Party and to receive the party's endorsement to run under the "party line" in a primary election.[93] After being denied the party line, she subsequently ran for office the following election cycle and was again denied the ability to participate because, under a revised provision of the party's bylaws, she had not been a registered Democrat for two years prior to the screening.[94]

In reviewing the plaintiff's claims, the Appellate Division considered the constitutionality of the state's prohibition on party committees endorsing candidates prior to a primary election.[95] Without extended analysis, the Appellate Division noted that the Supreme Court in *Eu* found a similar provision in a California statute to be unconstitutional, and further cited the Supreme Court's acknowledgement that New Jersey had been one of only two additional states (Florida was the other) that had enacted a similar ban.[96] Thus, while the Appellate Division acknowledged that the Primary Endorsement Ban was intended to ensure that "primaries be more than a perfunctory exercise where the voter's role is reduced to rubber stamping the backroom-selection of the party's leadership," and while the Appellate Division referred to that intent as a "laudable goal," it generally held that New Jersey's ban on primary endorsements violated the "free speech principles articulated by the Supreme Court in *Eu*."[97] Noticeably absent from the Appellate Division's determination was any analysis of the balancing test utilized

91. *See, e.g.*, Lautenberg v. Kelly, 654 A.2d 510, 513–14 (N.J. Super. Ct. Law Div. 1994), *overruled in part by* Schundler v. Donovan, 872 A.2d 1092 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005); *see also* Batko v. Sayreville Democratic Org., 860 A.2d 967, 972 (N.J. Super. Ct. App. Div. 2004) (acknowledging "unpublished consent judgment entered by the Mercer County Superior Court in the case of *New Jersey Republican State Comm. v. Robert Del Tufo*, No. L-91-1645 (Law Div. Apr. 12, 1991), in which the Attorney General expressly acknowledged the unconstitutionality of *N.J.S.A.* 19:34-52.").

92. Batko v. Sayreville Democratic Org., 860 A.2d 967, 972 (N.J. Super. Ct. App. Div. 2004).

93. *Id.* at 969.

94. *Id.*

95. *See id.* at 971.

96. *Id.*

97. *Id.* at 972.

in *Eu*, including considerations of the governmental interests at stake.[98] The Appellate Division also failed to delve into any of the particularities of New Jersey's unique election laws and how those laws impact the overall political climate, specifically in the context of the nomination process at primary elections.[99]

While party organizations always maintained a certain degree of power and influence, the Primary Endorsement Ban, at its zenith, prevented party organizations from exercising influence over which primary candidate would ultimately appear on the general election ballot. Even though it was not effective in every respect, the Primary Endorsement Ban by and large made it more difficult for party organizations to influence the primary process. Prior to *Eu*, states like New Jersey had the ability to enact laws to regulate parties' endorsement processes and to prevent parties from having undue influence over their primary elections. The Primary Endorsement Ban, at least in theory, functioned like a dam that held back the county political machines from corrupting a fair process for nominating primary candidates. However, the adoption of *Eu*'s reasoning by New Jersey's courts, and their declaration that the Primary Endorsement Ban was unconstitutional, again opened up the floodgates for New Jersey politics to be dominated by party organizations.[100]

2. The Constitutionality of Senate and Gubernatorial Ballot Placement Laws

The 1981 Open Primary Law regulating ballot placement for U.S. Senate and state Gubernatorial candidates was also challenged following *Eu*. In *Lautenberg v. Kelly*, the court found a constitutional violation of the free speech and associational principles set forth in *Eu*, insofar as the state law prohibited candidates for U.S. Senator or Governor from being featured on the same line of the ballot as other candidates on the "party line" and thus prevented candidates "from associating with and

98. *Compare id.* (finding the statute unconstitutional without analysis of the factors in the balancing test), *with* Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 222–33 (1989) (conducting extended analysis of burdens on free speech and association and review of asserted compelling state interests).

99. *See Batko*, 860 A.2d at 967.

100. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 69 (The *Eu* decision and invalidation of New Jersey's primary endorsement ban "was the catalyst for the rebirth of moribund political parties in New Jersey, not the least of these the county party committees.").

advancing the views of a political party on the ballot."[101] The court in *Lautenberg* invalidated the entire statute containing the Open Primary Law, stating that all of its provisions were "inextricably intertwined."[102] In declaring the entire statute unconstitutional, the court acknowledged that its ruling would disadvantage federal senatorial and state gubernatorial candidates who run alone or who have bracketing requests rejected by local party officials.[103] This would ensure that under New Jersey's laws, candidates who wanted to run for U.S. Senate or for Governor could not realistically win their party's nomination in a primary election without gaining the support of the party machine.

Despite the ruling in *Lautenberg*, the statute containing the Open Primary Law was never repealed by the legislature.[104] Subsequently, in 2005, the Appellate Division overruled the portion of the *Lautenberg* decision that found the first and second paragraphs of the 1981 Open Primary Law unconstitutional under *Eu*, while leaving intact its ruling that the third paragraph, prohibiting senatorial and gubernatorial candidates from being featured on the same line of the ballot as candidates for other offices, was unconstitutional.[105] In *Schundler v. Donovan*, the county clerk faced a situation in which there were seven gubernatorial candidates for the Republican primary election, but only limited space on the ballot.[106] The county clerk, who is vested with certain discretion to design the ballot,[107] held a first drawing for gubernatorial candidates who were "bracketed" with other candidates, then a second drawing for gubernatorial candidates who were not bracketed with a full slate, and eventually placed the names of the fifth, sixth, and seventh candidates whose names were drawn on the fifth and last column on the ballot; thus the fifth column of the ballot was shared by the fifth, sixth, and seventh candidates.[108] This deviated from the requirements of the 1981 Open Primary Law, which mandated that all candidates for governor had to be listed on the first column or row of the ballot.[109] Nevertheless, in light of the unusual circumstances at issue with respect to this particular ballot and election, the court upheld the county clerk's

101. *See* Lautenberg v. Kelly, 654 A.2d 510, 513–14 (N.J. Super. Ct. Law Div. 1994), *overruled in part by* Schundler v. Donovan, 872 A.2d 1092 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005).

102. *Lautenberg*, 654 A.2d at 514.

103. *Id.*

104. *Schundler*, 872 A.2d at 1098.

105. *See id.* at 1098–99.

106. *Id.* at 1096.

107. *See* N.J. STAT. ANN. § 19:49-2 (West 2019) (providing some discretion to county clerks to arrange the ballots).

108. *See Schundler*, 872 A.2d at 1094.

109. *See id.* at 1097.

exercise of discretion, and said it would not interfere so long as it was exercised to achieve fairness and did not constitute a clear statutory violation or was not unreasonable.[110]

The Appellate Division recognized that the legislature's clear purpose in passing the 1981 Open Primary Law was to provide for "ballot placement equality."[111] In analyzing the constitutional concerns regarding ballot placement equality and other associational rights, the court declared that the primary focus must be on the "integrity and fairness of the electoral process," with "equality of treatment among candidates for the same office [being] a linchpin of that idea."[112] Therefore, with respect to the requirement that all senatorial or gubernatorial candidates be featured on the first and same line of the ballot, county clerks must try to carry this requirement out to the greatest possible extent that physical constraints allow, while also making a good faith effort to effectuate the associational rights of candidates.[113]

In explaining its reasoning, the court in *Schundler* presupposed that the principles set forth in *Eu* should be interpreted so as to require bracketing in New Jersey.[114] However, the court did not explain why this was so. Having reached that unsubstantiated premise, the court noted that the bracketing allegedly required by *Eu*, when combined with the physical limitations of the ballot in this case, led to a situation that would offend several principles of even treatment well beyond ballot placement that normally result from luck of the draw; it would lead to a substantial advantage for certain bracketed candidates, while unbracketed candidates would be "shunted off to obscure columns of the ballot."[115] The court contrasted this situation with more typical elections involving fewer candidates where bracketing would not impose an obvious ballot position advantage for any senatorial or gubernatorial candidate, as there would be enough room for each to be featured in their own column.[116] Therefore, the court declared that in ordinary situations all candidates had to be treated similarly, subject only to drawing for ballot position, and without regard to whether a candidate was bracketed or not, "notwithstanding that the right to bracketing is, as a general matter,

110. *See id.* at 1098 (describing the circumstances as "a special situation because of the number of candidates and limitations that may exist by reason of the physical dimensions of the ballot").
111. *Id.*
112. *Id.*
113. *See id.* at 1098–99.
114. *See id.*
115. *Id.*
116. *Id.* at 1099.

fundamental as an expressive exercise."[117] Accordingly, the court held that those provisions of the 1981 Open Primary Law that required senatorial or gubernatorial candidates to be on the same line and first line of the ballot did not necessarily violate the associational rights principles of *Eu*, and left it to the county clerks to give full effect to the equal treatment and expressive rights principles, "with equality of treatment as the starting point."[118]

To the extent that the 1981 Open Primary Law and the Primary Endorsement Ban had fostered candidate-centered campaigns for top-of-the-ticket candidates prior to *Eu*,[119] the result of *Lautenberg* and *Schundler* was to further strengthen the party's influence over the primary nomination process. Candidates for U.S. Senator and Governor would again need to seek the support of county bosses to obtain the party's endorsement for primary elections.[120] Additionally, despite the lofty language regarding equality of placement of candidates on the ballot, the court in *Schundler* empowered county clerks to exercise a great deal of discretion in organizing the ballot in ways that benefit the county party organization.[121] For example, under the guise of exercising discretion, county clerks could try to place unbracketed candidates for the same office far away from one another or underneath one another, especially when it involves county and local candidates not protected by the 1981 Open Primary Law. Even with respect to statewide candidates for U.S. Senator or Governor, county clerks could try to use the physical constraints of the ballot as an excuse to circumvent having to comply with the provisions of the 1981 Open Primary Law. Moreover, the *Schundler* decision essentially wrote the playbook for party insiders to ensure that ballots are overpopulated by candidates who are not even serious about running for office, which would trigger the ability of county clerks to exercise discretion in constructing ballots that disadvantage candidates not favored by the party organization.[122]

An example of how a county clerk, presumably relying on *Schundler*, forced gubernatorial candidates underneath one another, notwithstanding the clear language of the 1981 Open Primary Law, can

117. *Id.*; *see also* Andrews v. Rajoppi, 2008 WL 1869869, at *3 (N.J. Super. Ct. App. Div. Apr. 29, 2008) (holding that where there were only three Senate candidates on the ballot, special circumstances did not exist to warrant unequal treatment of such candidates with respect to the draw for ballot placement).

118. *Schundler*, 872 A.2d at 1099–1100.

119. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 71.

120. *See id.* at 72.

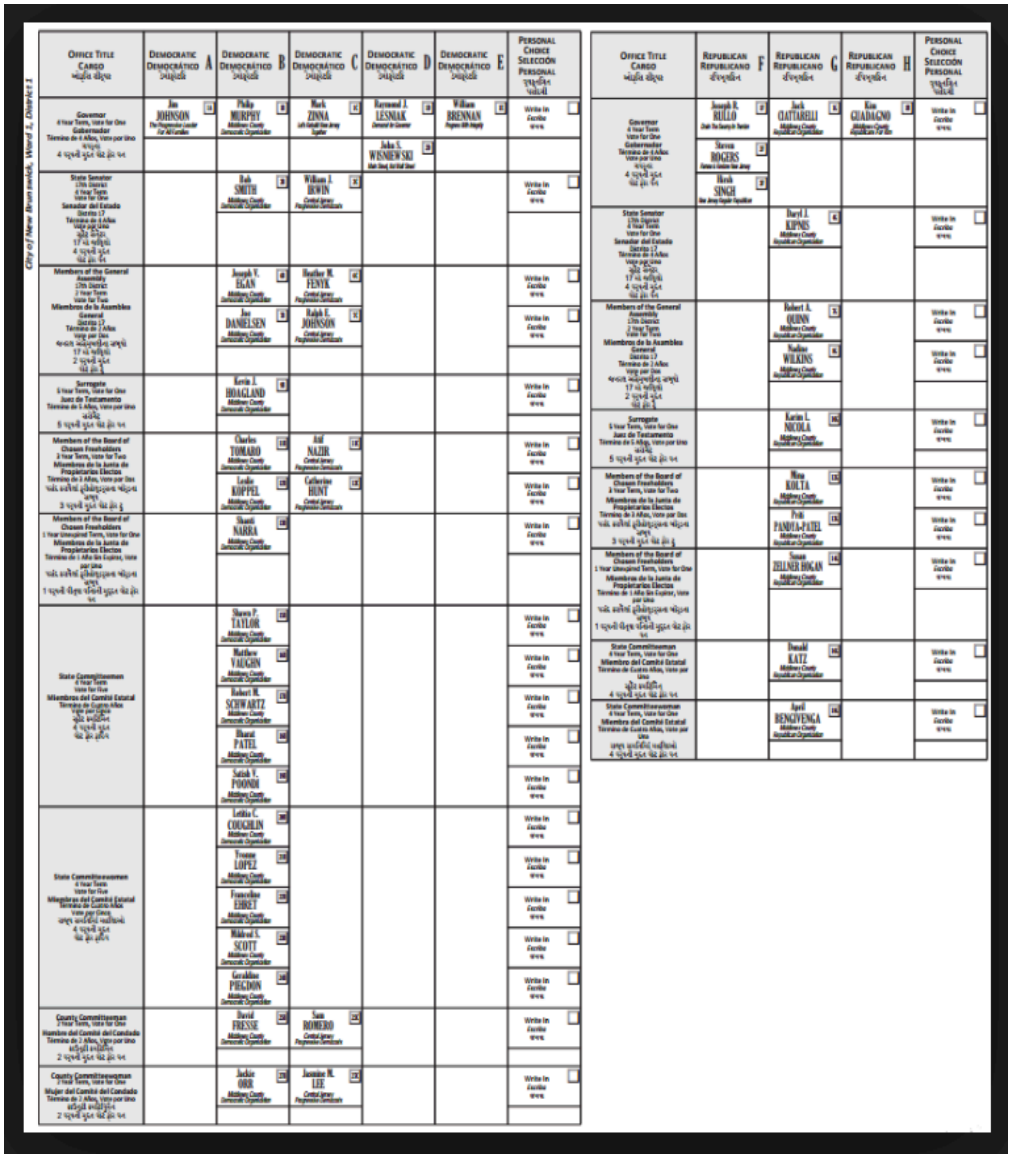
121. *See Schundler*, 872 A.2d at 1095.

122. *See infra* Part II.C (explaining how "phantom candidates" are used to overcrowd the ballot).

be gleaned from the 2017 Democratic Primary Election Ballot in New Brunswick.[123] There, six candidates for governor were on the ballot, but only six columns were available, and one of these columns had to be used for possible write-in votes.[124] Therefore, candidate John Wisniewski was forced onto a second column underneath a candidate for the same office, and thus was the only gubernatorial candidate not afforded his own column on the first line of the ballot.[125] The design of the ballot precluded John Wisniewski from appearing to be a serious candidate and made him harder to find on the ballot.

123. *See infra* Figure 1.
124. *See infra* Figure 1.
125. *See infra* Figure 1.

Figure 1: Democratic Primary Election Ballot—New Brunswick, NJ (2017)[126]



126. *Graphic excerpted from* MIDDLESEX COUNTY CLERK'S OFFICE, SAMPLE VOTING MACHINE BALLOT, OFFICIAL PRIMARY ELECTION, TUESDAY, JUNE 6, 2017. The sample ballot reproduced herein was obtained by the author through an Open Public Records Act request made to the county clerk's office (on file with author).

3. 1993 Campaign Finance Law

In 1993, a few years after the *Eu* decision, the New Jersey legislature passed a significant campaign finance law dealing with restrictions, limits, and other regulations on contributions between various candidates, parties, and other entities.[127] Among other things, the 1993 law granted significant fundraising and spending advantages to county committees, including allowing political parties to receive higher contribution amounts than were set for contributions to candidates, and allowing political parties to contribute an unlimited amount of money to their candidates.[128] This law made it easier for county committees to amass large sums of money from contributors who may have maxed out their donations to individual campaigns. It also transformed the county committees into entities whose financial resources would be highly coveted by candidates whose offices fall within the county—candidates to whom the county committee could contribute large sums of money.[129] These reforms significantly changed the landscape of political power in New Jersey, strengthening party organizations and concentrating power particularly at the county level.[130] As explained by Jeffrey Brindle, then-Deputy Director of the New Jersey Election Law Enforcement Commission,

> Without question the availability of campaign funds is the single most important factor in [the county political party committee's] resurgence. Increasing amounts of contribution activity intensify the magnitude of their clout vis-à-vis the electoral process, contributing to the growing impact of the county party organizations on political life in New Jersey.[131]

County parties could now not only endorse candidates, but also had a significant structural fundraising advantage that would allow them to benefit the candidates they endorsed. In sum, party bosses and political machines at the county level could now dominate the nomination process,

127. *See generally* Elections—Contributions and Expenditures, 1993 N.J. Sess. Law Serv., ch. 65 (West).

128. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 69; *cf.* N.J. ADMIN. CODE § 19:25-11.2 (2020) (current regulations allow individuals to donate only $2,600 to a candidate committee, but they can contribute up to $37,000 to a county party committee); N.J. ADMIN. CODE § 19:25-11.7 (2020) (county political party committees still have no monetary limits on expenditures made to candidates seeking office in that county).

129. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 69; N.J. ADMIN. CODE § 19:25-11.7 (2020)

130. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 69.

131. *Id.* at 75.

would not be hindered by candidate-based campaigns at the statewide level, and controlled a substantial amount of the money in New Jersey politics.[132]

II. HOW THE COUNTY LINE INFLUENCES PRIMARY ELECTIONS

Under New Jersey state law, political parties are given several important powers, including the ability to nominate candidates for primary elections and to elect members to serve for party office at the state, county, and municipal level.[133] State law sets membership and organizational structures and requirements for municipal committees, county committees, and the state and national committees.[134] Of particular importance for nominations, endorsements, and ballot placement are county committees.

The county committee is the statutory body that represents the party at the county level and runs the internal affairs of the party organization.[135] Each county committee is governed by its own bylaws.[136] Members of each party's county committee are elected during primary elections, with two members elected from each election district (which is a subdivision of a municipality) in the county.[137] The members of each county committee must elect a county chair who must be a resident of the county; as there are no other qualifications beyond county residency, this means that a county chair does not necessarily even have to be an elected member of the county committee itself, and therefore may not be directly accountable to the voters in any way.[138]

A. The Advantage of the County Line

There are many reasons the county committees are so important with respect to primary elections. As per their respective bylaws, county committees hold conventions or follow other processes to determine

132. *Cf. id.* at 74 ("During the 1990's [sic], as the result of the heretofore mentioned *Eu* decision and changes to New Jersey's campaign finance laws, county political party committees came about as close to meeting Wilson's definition of a 'powerful party' as any such New Jersey entity in recent memory . . . . Through their involvement in primary elections, and through taking advantage of recent campaign finance reforms, county party organizations can influence the candidate nomination process as well as the governmental appointment process.").

133. *See* N.J. STAT. ANN. § 19:5-1 (West 2019).

134. *See* §§ 19:5-2, 19:5-3, 19:5-4.

135. *See* § 19:5-3.

136. § 19:5-3.2.

137. § 19:5-3.

138. *See id.*

which candidates they will endorse for offices which fall wholly or partially in their county.[139] An endorsement is usually made for every office on the ballot. In addition to good publicity, such endorsements are critical for candidates. The practical effect of receiving the endorsement of the county committee is that it leads to the endorsed candidates having their names listed on the same column or row of the ballot, with the same ballot slogan under each of their names. This slate of endorsed candidates appearing on the same line of the ballot is known as the "County Line." Receiving the endorsement of the county committee and being featured on the County Line is in many instances the most important factor in determining that a candidate wins a primary election.

The slogan used by county committee-endorsed candidates is often owned by a corporation, which grants permission for the slogan's use to the slate of candidates endorsed by the county committee.[140] This is because New Jersey law requires that those who wish to use a ballot slogan containing the name of another person or an incorporated association must receive the written consent of such person or entity.[141] For all practical purposes, the county chair and the county's political machine, or those under their close direction, will control the corporation that owns the slogan.[142] Furthermore, all endorsed candidates will be featured on the same line of the ballot with that same slogan.[143] Technically, the county line itself is controlled by the campaign manager of the candidates (usually two or more freeholder candidates) who file a joint petition with the county clerk, and not by the county chair; however, in practice, the county chair will control who that campaign manager is.[144] Minor technicalities aside, whether officially or unofficially, the county chair and the party bosses get to exercise control over which

139. *See* § 19:5-3.2 (providing for county committees to adopt their own bylaws).

140. Kevin O'Toole, *Courage and Strategy of Getting on the Ballot*, INSIDER NJ (Apr. 6, 2017, 4:23 PM), https://www.insidernj.com/courage-strategy-getting-ballot.

141. N.J. STAT. ANN. § 19:23-17 (West 2019).

142. O'Toole, *supra* note 140.

143. N.J. STAT. ANN. § 19:49-2 (West 2019) (requiring those seeking to be on same ballot line with same slogan to obtain consent of campaign manager of county candidates who filed a joint petition).

144. *See id.*; *see also* Nick Acocella, *How Much Does the Line Matter?*, INSIDER NJ (June 10, 2017, 8:24 AM), https://www.insidernj.com/much-line-matter/ ("[The County Line] belongs to the campaign manager for the party's designated candidates for freeholder. That is, of course, merely a technical problem. It's a basic tenet of County Chairmanship 101 that the Chair picks himself or herself or someone very close to be the campaign manager for the party's freeholder candidates."); O'Toole, *supra* note 140 ("The common misconception during conventions is that the organization awards 'the line,' when in fact they award the slogan (if they actually own it). The campaign manager for the joint candidates for countywide office controls who is on that organization 'line.' So in a nutshell: own the slogan and control the campaign manager and YOU control the process.").

candidates get endorsed and can thus be featured prominently on the ballot with the other endorsed candidates under a unified slogan.

The County Line will often feature high-profile candidates running for the highest offices at the top of the ballot. These high-profile candidates have widespread name recognition and will typically be recognized by voters. Parties know that voters are much more likely to vote down the line for all candidates who are associated with the few recognized names at the top of the ballot than they are to vote for a candidate with a different slogan on a different line of the same ballot.[145] Moreover, because the County Line will consist of a slate of candidates who together request and receive permission to bracket with county candidates who file a joint petition, the county clerks are likely to place this slate of candidates into an initial drawing that guarantees them a preferential ballot position.[146] Those obtaining the endorsement of the party also receive access to money, voter databases, field organizations, and other resources that may not be available to other candidates.[147]

By contrast, candidates who do not receive the party's endorsement and are not on the County Line often appear on the ballot without other high-profile candidates. They typically also lack access to money and the resources that those on the County Line get through the county committee.[148] Such candidates, especially those not placed in the

145. *See* Michelle Caffrey, *Party Lines: Candidate Placement on Ballot a 'Puzzle' for South Jersey County Clerks*, NJ.COM (Jan. 17, 2019), https://www.nj.com/gloucester-county/2014/06/party_lines_ballot_placement_a_puzzle_for_county_clerks_can_have_big_impact_on_primary_elections.html ("'The ballot position does make a difference,' said Bruce Caswell, chair of the political science and economic departments, and associate professor of political science, at Rowan University. Ballot position advantages are especially relevant during primary elections, he said, when voters are choosing candidates within their own party and most candidates don't have a lot of name recognition . . . . Some voters then take cues from candidates' names, perceived ethnic identity or gender, but most often they vote for candidates in the first position or along the endorsed party 'line.'"); Yael Niv, *The Voting Shell Game*, GOOD GOV'T COAL. N.J., https://www.ggcnj.org/lineoped/ (last visited Apr. 9, 2020).

146. *See* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968).

147. *See* Kate King, *In New Jersey, Boss-Run Politics Rule*, WALL ST. J. (Apr. 25, 2017, 9:18 PM), https://www.wsj.com/articles/in-new-jersey-politics-county-party-support-is-essential-1493161171 ("Securing endorsements from county party leaders provides access to vast networks of campaign supporters and fundraisers, as well as prominent ballot placement, which is considered crucial to winning primary elections."); Alex Pareene, *Cory Booker Chooses the Wrong Side in a New Jersey Street Fight*, NEW REPUBLIC (June 26, 2019), https://newrepublic.com/article/154305/booker-wrong-side-new-jersey-fight ("New Jersey's politics are boss-driven. County party committees control ballot placement, along with access to funding, experienced staff, and volunteers.").

148. *See* Bill Orr, *Transforming Your Community: Become a Democratic Committee Member*, BLUE JERSEY (Mar. 21, 2018), http://www.bluejersey.com/2018/03/transforming-your-community-become-a-democratic-committee-member/ ("In NJ just one county party

preferential drawing because they are not bracketed with a different slate of joint county candidates, are often relegated to obscure portions of the ballot, instead of the next available line; this is often referred to as "Ballot Siberia" in New Jersey, as these candidates are harder for voters to find, and they otherwise appear in voters' minds to be less important.[149] For this reason, as a general rule, obtaining the county committee's endorsement leads to being featured on the County Line and becomes synonymous with winning the primary election.[150]

The importance of a county party's endorsement for ballot positioning can be seen in the 2017 Democratic Primary Election for Governor. In 2017, gubernatorial candidate Phil Murphy won the endorsement of all of New Jersey's twenty-one county parties, but he only carried twenty of these counties at the polls.[151] Interestingly, John Wisniewski obtained the most votes in Salem County, one of only two counties in the State that does not feature a County Line bracketing system for its ballots.[152]

A mild example of what it looks like on the ballot when a candidate runs off the County Line can be seen in the 2019 Democratic Primary Election Sample Ballot for the Borough of Tenafly in Bergen County:

boss, or a small group, or a political boss like George Norcross can sometimes determine which candidate gets the primary party line and the lion-share of its support.").

149. For a further discussion of Ballot Siberia, with examples of actual ballots, see *Altman*, YOUTUBE (May 13, 2019) https://www.youtube.com/watch?v=niDwzwVMvio&feature=youtu.be&fbclid=IwAR2eOpeXVe7Z8GORIw3L7I2uhVify8D5_TJXQmPB2JwvQWHeg2gn7A00E2s.

150. *See* RESURGENT PARTY SYSTEM, *supra* note 48, at 72 ("By the new millennium, these [party] organizations became virtually indispensable to any candidate hoping to win his or her party's nomination, and later on, the general election."); *see also* Acocella, *supra* note 144 (concluding that "having the [county] lines . . . *is all that matters*") (emphasis added); King, *supra* note 147 (quoting an interview with New Jersey lobbyist and former Somerset County Republican Chair Dale Florio ("[C]ounty organizations are 'the single most influential political unit of government in New Jersey. . . . They are basically individual fiefdoms, be it Republican or Democrat.'") and quoting Jennifer Duffy, senior editor at the nonpartisan Cook Political Report ("Boss-run politics, that's exactly what it is. . . . Once these organizations have their say, historically, it's kind of [sic] done deal.")).

151. *See* Acocella, *supra* note 144.

152. *See id.* (noting it was the first time a candidate for statewide office carried a county without receiving the county party endorsement since 1997).

Figure 2: Democratic Primary Election Sample Ballot—Tenafly, NJ (2019)[153]

DEMOCRATIC - DEMÓCRATA - 민주당

PERSONAL CHOICE SELECCIÓN PERSONAL 개인선택	PRIMARY ELECTION ELECCIÓN PRIMARIA 예비선거 37th Legislative District 37° Distrito del Legislativo 주상하원 37선거구	Democratic Demócrata / 민주당 COLUMN 1 / COLUMNA 1 칼럼 1	Democratic Demócrata / 민주당 COLUMN 2 / COLUMNA 2 칼럼 2	Democratic Demócrata / 민주당 COLUMN 3 / COLUMNA 3 칼럼 3
1	For Members of the General Assembly Para Miembros de la Asamblea General 주하원의원 (VOTE FOR TWO / VOTE POR DOS / 두 명에게 투표하십시오.)	DEMOCRATIC COMMITTEE OF BERGEN COUNTY GORDON M. JOHNSON		
2		DEMOCRATIC COMMITTEE OF BERGEN COUNTY VALERIE VAINIERI HUTTLE		
3	For Members of the Board of Chosen Freeholders Para Miembros de la Junta De Concejales del Condado 프리홀더 의원 (VOTE FOR THREE / VOTE POR TRES / 세 명에게 투표하십시오.)	DEMOCRATIC COMMITTEE OF BERGEN COUNTY THOMAS J. SULLIVAN		
4		DEMOCRATIC COMMITTEE OF BERGEN COUNTY GERMAINE M. ORTIZ		
5		DEMOCRATIC COMMITTEE OF BERGEN COUNTY MARY AMOROSO		
6	For Mayor Para Alcalde 시장 (VOTE FOR ONE / VOTE POR UNO / 한 명에게 투표하십시오.)	DEMOCRATIC COMMITTEE OF BERGEN COUNTY MARK ZINNA		
7	For Members of the Council Para Miembros del Concejo 의회 의원 (VOTE FOR TWO / VOTE POR DOS / 두 명에게 투표하십시오.)	DEMOCRATIC COMMITTEE OF BERGEN COUNTY ADAM MICHAELS	DANIEL PARK	
8		DEMOCRATIC COMMITTEE OF BERGEN COUNTY MAXIM BASCH		

Form 64 - Tenafly
37th

Candidate Daniel Park, who ran for city council, appears in a separate column all by himself, while all of the candidates endorsed by the county committee are featured in the first column, one right above the other. The county committee's candidates also all share a common slogan, "Democratic Committee of Bergen County." Furthermore, in order to vote for Park, a voter, having likely voted for every candidate on the county line for other offices (as there were no other candidates on the ballot to choose from), would have to vote "off the line" for the one office for which Park was running. In this manner, the county committee-endorsed candidates receive the County Line advantage, while "off the line" candidates remain significantly disadvantaged.

153. *Graphic excerpted from* BERGEN COUNTY CLERK'S OFFICE, SAMPLE VOTING MACHINE BALLOT, OFFICIAL PRIMARY ELECTION, TUESDAY, JUNE 4, 2019. The sample ballot reproduced herein was obtained by the author through an Open Public Records Act request made to the county clerk's office (on file with author).

B. The Power of the County Chair

New Jersey's election laws have transformed counties into the focal point of the state's elections. The power of the county committees and especially of county chairs is fueled by several concerns. The first is the need of high-profile candidates, whose names might appear higher up on the ballot, to receive permission to "bracket" with county candidates filing a "joint petition" at the county level with the county clerk.[154] Such bracketing has to happen for these high-profile candidates to be placed in the preferential drawing for the best position on the ballot. The second concern that candidates have is that ballots are arranged at the county level, with significant discretion afforded to the county clerk.[155] This power is combined with significant fundraising and spending advantages granted to county committees as a result of the 1993 campaign finance reform; these advantages allow county committees to amass large sums of money through increased contributions limits and the removal of spending limits on their preferred candidates.[156] Thus, the county committee takes on enormous importance, and leads to concentration of power in the hands of the county chairs who head the county committees.[157]

Because the endorsement of the county committee can bestow significant, practical ballot and financial advantages on candidates seeking a party's nomination in a primary election, such endorsements are highly coveted by primary candidates throughout the state.[158] The process by which candidates obtain the endorsement of the party are set forth in the various bylaws of the different county committees.[159] In some counties, the bylaws call for a convention to consider the various

154. *See* N.J. STAT. ANN. § 19:49-2 (West 2020).

155. *See id.*; *see also* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968).

156. *See* RESURGENT PARTY SYSTEM*, supra* note 48, at 69.

157. *See generally* Daniel Yadin, *How Democratic is the Democratic Party Primary for Governor?*, NEW BRUNSWICK TODAY (June 5, 2017), https://newbrunswicktoday.com/article/how-democratic-democratic-party-primary-governor (detailing the power of the Middlesex County Chairman in connection with the 2017 Gubernatorial Primary Election in New Jersey).

158. *Cf.* Colleen O'Dea, *Some NJ Congressional Primary Candidates Argue Party-Line Politics Are Unfair*, NJ SPOTLIGHT (May 14, 2018), https://www.njspotlight.com/stories/18/05/13/some-nj-congressional-primary-candidates-argue-party-line-politics-are-unfair/ ("So many candidates drop out of a race after not getting county lines because they are considered crucial to victory.").

159. *See* § 19:5-3.2 (requiring the county committees to "adopt a constitution and bylaws [that ensure] fundamental fairness and the rights of [its] members . . . in the governance of the county party").

candidates seeking the party's endorsement.[160] In other counties, whether through provisions of the bylaws or otherwise, the county chair makes the ultimate decision on which candidates to endorse.[161] In fact, even in certain counties whose bylaws call for a more democratic convention process before an endorsement is offered, the practical reality is that county chairs exert pressure to ensure their handpicked candidates receive the endorsement of the county committee.[162]

These realities ensure that political candidates in New Jersey have all of the incentive in the world to provide unwavering support to their county chairs. The alternative is that they risk not receiving the endorsement of the county committee and the practical, ballot, and financial benefits that will surely accompany it. Anything short of unwavering support could amount to political suicide.[163] Loyalty can be further rewarded when a higher position becomes available, and the party needs to endorse someone for it. For example, if a state senator retires, the county chair may choose to replace that state senator on the County Line with a state assemblyperson who has been loyal to the county chair. This would in turn trigger a chain reaction, whereby the assembly seat may be filled by a loyal county freeholder, whose position may in turn be filled by a mayor or town councilperson, and so forth.

160. *See, e.g.*, BY-LAWS OF THE BERGEN COUNTY DEMOCRATIC COMMITTEE art. VIII, § 1(A), https://d3n8a8pro7vhmx.cloudfront.net/bergendems/pages/26/attachments/original/1481560349/BCDCBYLAWS.pdf?1481560349 (last visited Apr. 10, 2020) ("[T]he County Chairperson shall hold the County and Congressional Convention for the purpose of selecting candidates for county office, state, committee, and Congress.").

161. *See, e.g.*, BY-LAWS OF THE MONMOUTH COUNTY DEMOCRATIC COMMITTEE art. VII, § 1(I), https://co.monmouth.nj.us/documents/112/County%20By-Laws%20(2).pdf (last visited Apr. 10, 2020) ("The Chairperson shall . . . [d]etermine which candidates in any primary election held in Monmouth County shall be authorized to run with the designation of the Monmouth County Democratic Committee on their line."); *see also* Yadin, *supra* note 157 (claiming that during the 2017 gubernatorial primary election, a discretionary voice vote was held to determine which candidate to endorse, "mean[ing] that, if by some miracle, another candidate defeated Murphy, that [Middlesex County Chair, Kevin] McCabe could still give Murphy the party's official endorsement and, therefore, favorable ballot position").

162. *See Bergen County Republican Organization Chairman Stripping County Committee's Right to Endorse their Candidates*, RIDGEWOOD BLOG (Mar. 5, 2018), http://theridgewoodblog.net/bergen-county-republican-organization-chairman-stripping-county-committees-right-to-endorse-their-candidates/ ("The BCRO has suspended their own rules, suspended the process of endorsing a candidate, and instead of a county convention the BCRO chairman will 'give' the endorsement to the 'moderate' of his choice."); O'Dea, *supra* note 158 (stating that in situations where party members vote, they are often "persuaded by their local chairs and co-chairs as to how to decide" and they "don't want to cross their chairs").

163. *See, e.g.*, Bob Dreyfuss & Barbara Dreyfuss, *Can a Sanders Democrat Win the New Jersey Governor's Race?*, NATION (Feb. 22, 2017), https://www.thenation.com/article/can-a-sanders-democrat-win-the-new-jersey-governors-race/ (detailing fallout from New Jersey candidates considering endorsement of Bernie Sanders for President in 2016).

On the other hand, questioning the actions of the county chair, or otherwise voting out of line, could lead to retribution. The way to punish politicians who have failed to show unwavering support and allegiance to the county chair, is to throw them off of the County Line when they run for re-election.[164] Thus, an endless cycle of self-fulfilling prophecies continues in New Jersey: candidates provide support for and never question the chair, and the chair delivers the endorsement for the candidates that allows them to maintain office or move on to higher office.[165] Candidates continue to be re-elected and advance their political careers, and the chair remains in power, thus perpetuating the state's system of party bosses and machine politics.[166]

Despite the unprecedented power wielded by county chairs, the position itself is not elected directly by the voters. Instead, the county chair is accountable only to the county committee members.[167] Making matters even worse, the county committee also makes endorsements of its own members who run for re-election to county committee; therefore, the county committee members who have the ability to elect a new chair are also incentivized to "play ball" with the existing county chair so as to not ruin their chances of re-election if the county chair chooses not to endorse them.[168] The perils of this kind of authoritative control over the

164. *See, e.g.*, *id.* (describing New Jersey Assemblyman John Wisniewski's experience after supporting Bernie Sanders for President, where he stated that another Assemblyman, after initially offering him support, later called him back and said, "I got a call from my county chair, who said that if I support Sanders, I won't get the party line for reelection next time").

165. *Cf.* Jeff Edelstein, *In Soviet Mercer County, Democrats Control the Single Party Machine*, TRENTONIAN (Nov. 27, 2018), https://www.trentonian.com/news/in-soviet-mercer-county-democrats-control-the-single-party-machine/article_612ba9de-f26d-11e8-94e4-8bd3d2eda969.html (discussing power of the county party in Mercer County); Tracy Tully, *Why a Progressive Democrat was Dragged out of an N.J. Senate Hearing*, N.Y. TIMES (Dec. 10, 2019), https://www.nytimes.com/2019/12/10/nyregion/NJ-sue-altman-progressive-democrats.html?smid=nytcore-ios-share (noting that it's "almost impossible for an insurgent to win a primary," because "[t]he well-oiled political organizations in New Jersey's 21 counties are skilled at nurturing obedience, in large part by controlling which candidates share the ballot line with incumbents").

166. *See* Pareene, *supra* note 147 ("The county committees are, a New Jersey lobbyist once told *The Wall Street Journal*, run as 'individual fiefdoms,' with each committee chair a little boss whose favor anyone seeking office needs to win."). For an account of the current state of party machine politics in New Jersey, see generally Julia Sass Rubin, *Can Progressives Change New Jersey? How the Old Democratic Machine Politics Got Reestablished in One State, and How It Can Be Overcome*, AM. PROSPECT (forthcoming 2020).

167. *See* N.J. STAT. ANN. § 19:5-3 (West 2012) (requiring only that the chair be a resident of the county).

168. *See, e.g.*, Jan Heffler, *Camden County Democratic Machine Trounces Progressive Challengers in State and Local Races*, PHILA. INQUIRER (June 4, 2019), https://www.inquir

very members responsible for electing a chair are further magnified by the fact that the bylaws of many county committees require that the vote for chair be done in an open forum, rather than by secret ballot; under an open forum system, the votes of all those who vote against the chair would be tallied and recorded, and county chairs would know exactly who voted against them.[169]

Additionally, the county clerk, who is afforded discretion to design the ballot, also happens to be an elected officeholder. Therefore, county clerks, like other candidates for elected office, can benefit significantly from obtaining the endorsement of the county committee and being featured on the County Line. It is not difficult to recognize the inherent appearance of impropriety that stems from this dynamic, as the county clerk, at least in theory, has the power to design a ballot that benefits candidates endorsed by the county committee and to send all unbracketed candidates off to Ballot Siberia. Indeed, county clerks have been challenged in the past for alleged partisan wrongdoing in connection with drawing for ballot position.[170] In sum, county chairs remain extremely powerful, and can bestow a significant advantage to candidates by facilitating their endorsements.

C. Additional Entrenchment Measures

As is evident, the County Line poses significant institutional advantages for political candidates who are lucky enough to obtain a county committee's endorsement. In addition to this advantage, some county actors have taken even further steps to prop up candidates receiving a party's endorsement, and to debilitate those running off the County Line. Such actions are designed to further entrench the county chair's power and to solidify the nomination of the county party's endorsed candidates.

In Camden County, activists and candidates have complained of "phantom candidates" appearing and running for county freeholder. These phantom candidates allegedly had no interest in serving in office, but were rather placed on the ballot solely by the political machines to

er.com/politics/new-jersey/camden-county-election-results-nj-primary-2019-20190605.html (detailing efforts of Camden political machine to fend off progressive county committee candidates); *see also* David Todd McCarty, *Taking Down the South Jersey Political Mafia*, STANDARD (Nov. 1, 2019), http://www.capemaystandard.com/2019/11/12/taking-down-the-south-jersey-political-mafia/.

169. *See, e.g.*, BY-LAWS OF CAMDEN COUNTY DEMOCRAT COMMITTEE, INC., art. IV, § 4.05(b) (requiring contested elections for county chair be conducted by roll call vote).

170. *Cf.* Mochary v. Caputo, 494 A.2d 1028, 1029 (N.J. 1985) (county clerk's ballot draw resulted in Democrats having been picked first for preferential ballot placement forty out of the previous forty-one times).

push candidates who were not on the party line onto obscure portions of the ballot.[171] This works in counties like Camden because the county clerk will hold an initial drawing for county candidates who file a joint petition, and those who bracket with them; by contrast, those candidates not aligned with county candidates are excluded from the preferential drawing and relegated to Ballot Siberia.[172]

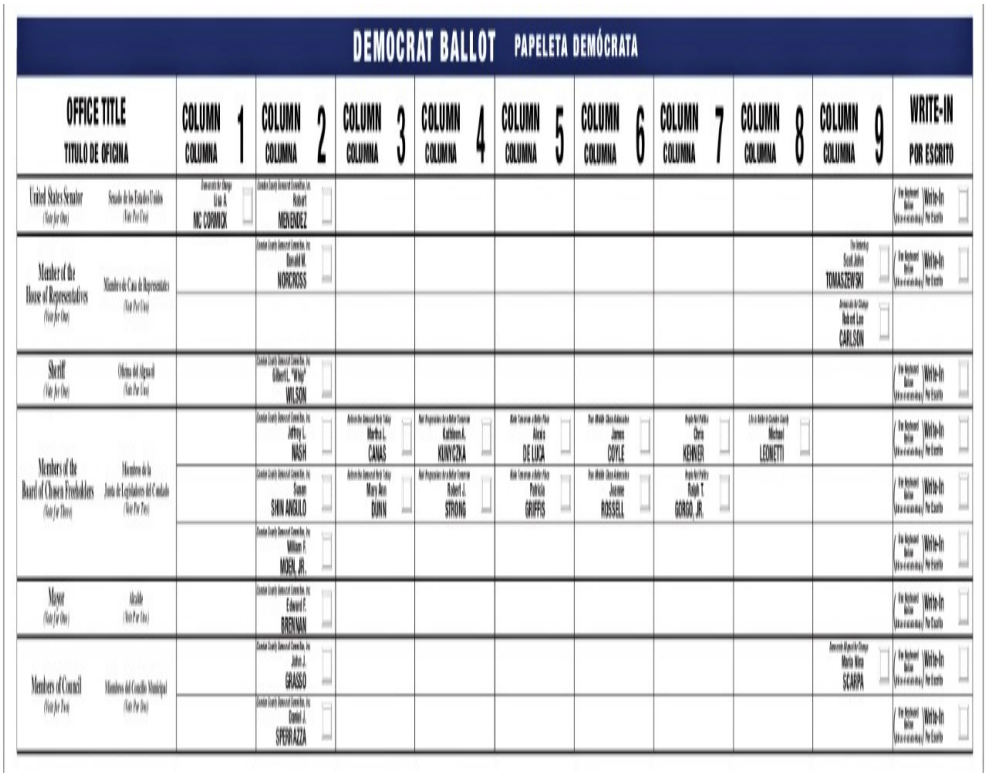
For example, the 2018 Democratic Primary Election Sample Ballot for the Borough of Merchantville in Camden County demonstrates that three candidates ran for U.S. Congress in a congressional district which included, in part, municipalities in Camden County: Donald W. Norcross, the incumbent congressman, who was endorsed by the party (and is the brother of South Jersey political boss George E. Norcross III); and, then, Scot John Tomaszewski and Robert Lee Carlson, two candidates who were not endorsed by the party and not running with a slate of other candidates.[173] However, the existence of six alleged pairs of "phantom candidates" running for county freeholder resulted in a situation where Norcross was featured in Column 2 (with all of the other candidates endorsed by the party, including U.S. Senator Robert Menendez), while Tomaszewski and Carlson's names were both featured in Ballot Siberia—all the way in Column 9 of the ballot, stacked one on top of the other, and far away from other candidates on the ballot, all notwithstanding the fact that they were running for nomination to the exact same office.

171. *See* Matt Friedman, *Anti-machine Democrats in Camden County Complain of 'Phantom Candidates'*, POLITICO (Apr. 10, 2019), https://www.politico.com/states/new-jersey/story/2019/04/09/anti-machine-democrats-in-camden-county-complain-of-phantom-candidates-960442 (candidates allegedly did not know their running mates, had no campaign websites, and had only a vague idea of why they were running).

172. *See id.*; *cf.* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968); N.J. STAT. ANN. § 19:49-2 (West 2020).

173. *Infra* Figure 3.

Figure 3: Democratic Primary Election Sample Ballot—Merchantville, NJ (2018)[174]



DEMOCRAT BALLOT PAPELETA DEMÓCRATA

OFFICE TITLE / TITULO DE OFICINA	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4	COLUMN 5	COLUMN 6	COLUMN 7	COLUMN 8	COLUMN 9	WRITE-IN / POR ESCRITO
United States Senator	Lisa A. MC CORMICK	Robert MENENDEZ								
Member of the House of Representatives		Donald M. NORCROSS							Russell John TOMASZEWSKI	
									Robert Lee CARLSON	
Sheriff		Gilbert L. "Whip" WILSON								
Members of the Board of Chosen Freeholders		Jeffrey L. WASH	Martha L. CANAS	Kathleen A. KUNYCZKA	Alexis DE LUCA	James COYLE	Chris KEHNER	Michael LEONETTI		
		Jason SHIN ANGELO	Mary Ann DUNN	Robert J. STRONG	Patricia GRIFFIS	Jerome ROSSELL	Ralph T. GORGO, JR.			
		William F. MOEN, JR.								
Mayor		Edward F. BRENNAN								
Members of Council		John J. GRASSO							Maria Rosa SCARPA	
		Daniel J. SPERANZA								

Such ballot tricks are obviously designed to make it more difficult for candidates running off the County Line to win a primary election.

Other entrenchment measures include political posturing with respect to use of the slogan. As already mentioned, under New Jersey law, if candidates want to use a slogan in the primary that includes the name of an incorporated entity, they must receive permission from that private entity to use the entity's name.[175] As such, it has become customary for county parties to form an incorporated entity and register

174. *Graphic excerpted from* CAMDEN COUNTY CLERK'S OFFICE, SAMPLE VOTING MACHINE BALLOT, OFFICIAL PRIMARY ELECTION, TUESDAY, JUNE 5, 2018. The sample ballot reproduced herein was obtained by the author through an Open Public Records Act request made to the county clerk's office (on file with author).

175. *See* N.J. STAT. ANN. § 19:23-17 (West 2020).

it with the State in order to protect others from stealing a slogan that they want to use.[176] In practice, the county committee will decide which candidates to endorse, and then the incorporated entity will allow all such candidates to use its name in their slogan.[177]

In Union County, the slogan used by the county committee for the candidates on the County Line is "Regular Democratic Organization" or "RDO."[178] However, instead of endorsing candidates and then seeking a slogan that will enable all of the endorsed candidates to be featured on the County Line, the Union County Democratic Committee ("UCDC") has manipulated its bylaws to allow a private entity, controlled by party bosses, to hold veto power over the candidates endorsed by the county committee.[179] Specifically, the UCDC's bylaws essentially mandate that its endorsed candidates use the slogan, "Regular Democratic Organization," and vest the RDO, a private incorporated entity, with unprecedented power; the RDO can refuse to allow certain candidates to use the slogan and thereby prevent them from appearing on the County Line and even to determine that funds will not be raised for such candidates.[180] What this means is that if the RDO refuses to grant permission to certain candidates to use its slogan, the UCDC will not endorse such candidates.[181] This is quixotic and backwards, as the county committee is the organization that is supposed to endorse candidates.[182] If a slogan is refused by a private entity, a different slogan should be used.

In turn, the RDO has its own set of bylaws and follows a procedure outlined within them to determine when it will withhold an endorsement.[183] The RDO has recently prevented candidates from using its slogan, which has resulted in the UCDC refusing to endorse candidates otherwise entitled to the County Line.[184] In essence, a private

176. *See* O'Toole, *supra* note 140.

177. *See id.*

178. *See* CONSTITUTION AND BY-LAWS GOVERNING THE UNION COUNTY DEMOCRATIC COMMITTEE, UNION COUNTY DEMS art. III, § 3, http://unioncountydems.com/wp-content/uploads/2013/05/img306.pdf (last visited Apr. 10, 2020) [hereinafter UCDC BYLAWS].

179. *See id.*

180. *See id.*

181. *See id.*

182. *See* O'Toole, *supra* note 140.

183. *See* BYLAWS OF REGULAR DEMOCRATIC ORGANIZATION OF UNION COUNTY, INC. (on file with the author).

184. *See* David Wildstein, *Mahr Abandons Union County Democratic Committee*, N.J. GLOBE (Apr. 6, 2019, 2:40 PM), https://newjerseyglobe.com/local/mahr-abandons-union-county-democratic-committee/ (discussing how a private entity RDO submitted a slate of candidates for bracketing without consulting county committee members in Fanwood).

corporation made up of unaccountable trustees holds veto power over the elected county committee members who may wish to endorse a candidate of their choice. This manipulation of the UCDC Bylaws allows the party bosses controlling the RDO to ensure that they maintain final say over the UCDC's endorsements.

The above examples demonstrate some of the ways in which various county actors have taken additional measures to entrench themselves further in power and control the County Line, even beyond the significant institutional advantages that the County Line system itself already bestows on parties.

III. BALANCING ASSOCIATIONAL FREEDOMS AGAINST OTHER RIGHTS

The modern County Line system in New Jersey is rooted in the First Amendment's freedom of association. This freedom has been bestowed on political parties by *Eu* and other Supreme Court cases.[185] In striking down California's primary endorsement ban, as well as other state laws regarding the structure of party organizations, the Court's decision in *Eu* left party managers with enormous control over party decisions and operations.[186] At the same time, it made it harder for states to regulate a party's structure and governance.[187] This emphasis on party manager control stands at odds with the reason behind the direct primary in New Jersey, particularly as it relates to the relative power of party leadership vis-à-vis that of the general party membership.

A. The Expressive Rights of Party Managers

While the Court in *Eu* placed great weight on the ability of party managers to endorse candidates and make decisions regarding the party's internal affairs, its analysis did not adequately consider the fact that combatting party manager control was the driving force behind the transition toward direct primary elections across the country in the early 1900s. Nationally, as Frances Hill explains, "primary elections were intended to dilute, if not break, the control of party bosses over candidate selection."[188] Another scholar explains the origin of primary elections as follows:

185. *See* Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 222, 229 (1989).
186. *See id.* at 233.
187. *See id.*
188. Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 537 (2010).

> At the turn of the century, in response to the so-called Progressive movement, the States adopted the mandatory primary election to democratize the process of selecting the parties' general election nominees. Prior to the advent of primary elections, parties selected their general election nominees at party conventions or caucuses that were allegedly controlled by small numbers of party insiders tied to powerful, well-organized interest groups. Reformers believed that primary elections would reduce the influence of party insiders and powerful interest groups on electoral politics by giving every party member eligible to vote under state law an equal opportunity to help determine his or her party's nominees for elective offices.[189]

Yet, despite this, Hill argues that, in *Eu*, "[t]he Court appears to have forgotten its own history in resolving the tension between voters' rights and party rights with the result that it has now embraced a narrow concept of voters' rights and an expansive and potentially unbounded concept of party managers' rights."[190] Hill explains that in the years leading up to *Eu*, Supreme Court jurisprudence had strongly focused on protecting voters' rights, and it did so for two reasons: (1) the Court viewed voting, including in primaries, "as both an individual right and as the foundation of legitimate government"; and (2) the Court viewed "associational claims by political party managers [as] significant impediment[s] to voting."[191] Central to these themes, according to Hill, was the premise that "[v]oting is not simply a choice among candidates. It is first and foremost the foundational structural element of the Constitution. It is the basis of legitimate government authority."[192]

Hill notes that a shift in the Supreme Court's jurisprudence came with the foundational case of *Cousins v. Wigoda*, in which the Court allowed a party's national committee's rules to trump a state statute regarding the seating of delegates to the party's national convention.[193] This case ushered in an era of political parties advancing First Amendment claims, which "have protected only the unfettered discretion

189. Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, *Symposium: 1999–2000 Supreme Court Review*, 36 TULSA L.J. 59, 61–62 (2000) (footnotes omitted).

190. Hill, *supra* note 188, at 537–38.

191. *Id.* at 542–43.

192. *Id.* at 540; *cf.* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (describing the right to vote as "preservative of all rights").

193. *See* Hill, *supra* note 188, at 597–604 (discussing Cousins v. Wigoda, 419 U.S. 477 (1975)).

of political party managers and, in the process, have repeatedly negated voters rights and the significance of voting."[194] The Supreme Court then decided *Tashjian v. Republican Party of Connecticut*, in which it found that a state statute requiring a closed primary unconstitutionally burdened the party's associational rights to decide if it wanted to hold an open primary.[195] Three years later, the Court decided *Eu*, striking down California's primary endorsement ban, as well as other laws pertaining to governance and organization of the party.[196]

Hill asserts that, as a result of these cases, the Court has in some ways treated primary elections as the private affairs of private entities, which has led to a situation in which the will of party managers has essentially become synonymous with the identity of the party itself.[197] This stripped rights away from voters as members of their parties, depriving them of associational rights in their parties.[198] Instead, the First Amendment right to associate became the right of party managers, who were not directly accountable to voters, to choose, decide, and act however they wanted without interference.[199] These cases made the associational rights of the party "an end in itself," and they solidified party managers' rights at the expense of not only voters' rights, but also at the expense of the important role that voting plays as a foundational element of legitimate government in a democratic society.[200]

This emphasis on First Amendment rights for party managers at the expense of the rights of voters and party members was further exacerbated by subsequent Supreme Court decisions holding that the right of expressive association for the organization was allocated to the party managers.[201] Outside of the specific election law context, in *Boy Scouts of America v. Dale*, the Court held that the Boy Scouts' right of expressive association under the First Amendment protected the organization's ability to select its members, and thus to exclude individuals from membership based on sexual orientation.[202] Two days later, the Court decided *California Democratic Party v. Jones*, and,

194. *Id.* at 597.
195. Tashjian v. Republican Party of Conn., 479 U.S. 208, 224–25 (1986).
196. Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 229, 233 (1989).
197. Hill, *supra* note 188, at 597.
198. *See id.* at 602.
199. *See id.* at 604; *cf.* Neuman v. Ocean Cty. Democratic Cty. Comm., No. 16-2701 (FLW), 2017 U.S. Dist. LEXIS 12254, at *16 (D.N.J. Jan. 30, 2017) (county committee's alleged last-minute manipulation of the process for endorsing candidates constituted "internal party conduct," which "[did] not amount to state action for purpose of attaching § 1983 liability").
200. *See* Hill, *supra* note 188, at 607.
201. *See id.* at 612.
202. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000).

applying similar logic, it invoked the expressive associational rights of political parties under the First Amendment and struck down a state statute that created blanket primaries, in which any voter could vote for any candidate from any party.[203] In this regard, the Court found that "a corollary of the right to associate is the right not to associate," and simultaneously declared that the party's right to exclude members is important when selecting a nominee.[204] Thus, the Court's view of the rights of political parties now included an affirmative expressive associational right, which belonged to party managers and could be used to exclude voters while allowing a party to have no accountability to voters.[205]

This jurisprudence allowed voters—and the important role they play in lending legitimacy to government—to be completely removed from the equation.[206] As Hill explains, "The result is a constitutionalized deference to political-party managers."[207] Indeed, other constitutional scholars have similarly criticized the Supreme Court's First Amendment analysis in *Eu*, based on the court's unbalanced emphasis on the expressive rights of a party being exercised by party managers. For example, Daniel Hays Lowenstein has challenged the notion that the party organization itself is best positioned to speak on behalf of the party, which can be viewed as consisting not just of the party organization, but also of the party electorate and the elected officeholders who were nominated by that party to stand for office.[208]

In essence, the Court's First Amendment jurisprudence gave back to party managers the control, influence, and domination that the direct primary sought to take away from them. The Court's emphasis on the expressive associational rights of party managers, for all practical purposes, removed the substantive role of voters from party decision-making by allowing party managers to control the process for

203. Cal. Democratic Party v. Jones, 530 U.S. 567, 569, 586 (2000).

204. *Id.* at 574.

205. *See* Hill, *supra* note 188, at 618.

206. *See id.* ("Expressive association, linked with claims that political parties are private associations, have eliminated state government, the federal government, party members, and voters from any constitutionally significant role in primary elections."); *id.* at 623 ("[T]he idea of consent as the basis of government has been obscured if not lost.").

207. *Id.* at 623.

208. Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1760, 1777–79 (1993); *see also id.* at 1791–92 (asserting that the Supreme Court departed from its prior restraint in such cases and placed intraparty disputes into the realm of government interfering with a private organization's freedom of association, and in doing so, replacing "sensitive understanding" of important controversies with a "manipulation of constitutional concepts" and reliance on "the formulation of constitutional 'tests'").

endorsements and for making all other decisions affecting the party's internal affairs. In addition, the Court's jurisprudence limited the ability of the states to regulate matters pertaining to party governance, thereby preventing voters from seeking change through election of their legislators. The end result is a system where voters and party members are divorced from unaccountable party managers and left with little recourse to influence a party's decision-making. Under such circumstances, it is fair to say that the party managers are able to act without the consent of their members, which calls into question the very legitimacy of a democratic government that derives its consent from the people.[209]

B. Eu *and the Application of Expressive Rights in New Jersey*

The shortcomings of the Supreme Court's First Amendment jurisprudence, and particularly its analysis in *Eu*, has unfolded into a nightmare in New Jersey. On one hand, *Eu* has been used in New Jersey to invalidate and otherwise undermine important statutes that were designed to curb the corrupting influence of party machines, such as the Primary Endorsement Ban.[210] On the other hand, the decision left party committees tremendous power to operate in ways that benefit the party organization. In New Jersey, party committees have been able to persuade courts to engage in an expansive reading of *Eu*, and they have protected their own unfair and undemocratic practices by labelling them as mere intraparty disputes in which the courts should not intervene.[211] It did not help voters in New Jersey, and elsewhere, when subsequent Supreme Court cases continued to find that expressive associational rights of the party belonged to party managers and not to the voters or members of the party.[212] In New Jersey, the protections designed to curb the power of the party organization were struck down or otherwise eroded in the wake of *Eu*, while other laws that increased the party's power, such as those that concerned bracketing and preferential ballot draws, remained in place.[213]

209. *See* Hill, *supra* note 188, at 539–40.

210. *See, e.g.*, Batko v. Sayreville Democratic Org., 860 A.2d 967, 971–72 (N.J. Super. Ct. App. Div. 2004).

211. *See id.*

212. *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 591–95 (2000); Tashjian v. Republican Party of Conn., 479 U.S. 208, 218 (1986); Cousins v. Wigoda, 419 U.S. 477, 487–89 (1975).

213. *See, e.g.*, N.J. STAT. ANN. § 19:49-2 (West 2020); Gillen v. Sheil, 416 A.2d 935, 938–39 (N.J. Super. Ct. Law Div. 1980); Moskowitz v. Grogan, 243 A.2d 280, 282–83 (N.J. Super. Ct. App. Div. 1968).

The result is a situation where party organizations are incentivized to behave badly and take further measures to obviate their own continued power. The cumulative effect has been embodied in the advantage offered by the County Line and the unchecked power granted to county chairs throughout the state. Today, New Jersey politics is completely and totally dominated by party managers and party insiders. These insiders have combined the expressive associational protections of the First Amendment, the fundraising and organizational advantages granted to their parties by statute, and state-conferred ballot advantages given to them by New Jersey case law, to wipe out any challengers to their rule. Importantly, in addition to the power given to political party managers by the Supreme Court's First Amendment jurisprudence, New Jersey's election laws create a synergistically negative environment for any notion of participatory democracy. While *Eu* gave party managers the power to control the rules that govern a party's affairs, New Jersey law exacerbated such power and control by providing ballot and other advantages to the party organization that are designed to ensure that the party managers and their preferred candidates remain in power.

The significance of *Eu* cannot be understated. The direct primary came to popularity toward the end of the nineteenth century so that people could regain control over their government after party bosses and political machines had failed to adequately represent their constituents in government.[214] In New Jersey, the legislature intended for the direct primary to replace the prior system of political organizing in the delegate and convention system, which allowed party actors to run their affairs and choose their nominees without any significant input from voters or much government regulation.[215] Such unfettered discretion given to the parties under the delegate and convention system, when combined with an absence of state regulation, led to corruption.[216] Political party insiders would take any measures necessary to secure their own nominations, and they would use their nominees to control the government and reap the advantages of power, often for corrupt purposes.[217]

In sum, despite the extraordinary step of instituting the direct primary in New Jersey over one hundred years ago in order to reduce the influence of party insiders, party bosses and political machines once again dominate the political process, now receive ballot and fundraising

214. *See* BOOTS, *supra* note 4, at preface.
215. *Id.* at 9.
216. *See id.*
217. *See id.*

advantages, and continue to engage in entrenchment measures.[218] Furthermore, participation in the primary has decreased dramatically. In the years after the implementation of the direct primary, approximately 60% of those voting in the general election took part in the primary election.[219] By contrast, during the presidential election cycle of 2016, only approximately 35% of those who voted in the general election in New Jersey also voted in the primary election.[220] Today, it can be argued that most voters in New Jersey are generally dissatisfied with their parties. In fact, a plurality of voters in the state choose to remain unaffiliated, rather than declare a party affiliation.[221]

In the vast majority of circumstances, primary elections in New Jersey have devolved into a meaningless selection of candidates by party managers, and not by voters.[222] A government should not automatically be considered democratic simply because voting happens to be involved. The First Amendment analysis in *Eu*, combined with New Jersey's unique election laws and ballot advantages, have resulted in an attack on the entire direct primary system and the reason for its genesis, thereby reducing its importance to a mere hypothetical and theoretical form of participation, without guarding against the corruption and

218. *See supra* Part II.

219. *See* BOOTS, *supra* note 4, at 121.

220. *Compare 2016 Official General Election Results: President*, N.J. DEP'T OF STATE, DIV. OF ELECTIONS (Dec. 6, 2016), https://www.state.nj.us/state/elections/assets/pdf/election-results/2016/2016-official-general-results-president-1206b.pdf (adding total votes cast for each candidate for President reveals that 3,874,046 New Jersey voters participated in the General Election for President), *with 2016 Official Primary Election Results: President*, N.J. DEP'T OF STATE, DIV. OF ELECTIONS (Aug. 8, 2016), https://www.state.nj.us/state/elections/assets/pdf/election-results/2016/2016-official-primary-results-president.pdf (adding total votes cast on behalf of each candidate for the presidential nomination of both the Republican and Democratic parties reveals that a combined 1,342,257 New Jersey voters participated in the Republican and Democratic Party Primary Elections for President).

221. *See* Jeffrey Mongiello, Comment, *Fusion Voting and the New Jersey Constitution: A Reaction to New Jersey's Partisan Political Culture*, 41 SETON HALL L. REV. 1111, 1125 nn. 84–85 (2011) ("New Jersey voters do not hold deep ties to either of the two major parties. At the ballot, voters choose between the two parties because of a lack of real choice, but the registration numbers show that almost half of New Jersey voters prefer to remain unaffiliated rather than declare themselves as an official member of the Democratic or Republican parties."); *cf. Party Images*, GALLUP, https://news.gallup.com/poll/24655/party-images.aspx (last visited Apr. 10, 2020) (A Gallup Poll of national voters between January 21, 2019 and January 27, 2019 shows the Democratic Party had a 45% favorable rating and 51% unfavorable rating, and the Republican Party had a 37% favorable rating and 58% unfavorable rating.).

222. *But cf.* BOOTS, *supra* note 4, at 121 ("All thoughtful people have emphasized the importance of the primary election, pointing out that it is a matter of greater moment even than the general election because if proper candidates are not presented for the latter, satisfactory public officials cannot be secured and the election will simply be a question of avoiding the greater of two evils.").

influence it was designed to protect. Primary elections in New Jersey serve to elevate form over substance and render the direct primary all but useless as far as carrying out its intended purpose.

IV. THE PATH TOWARD PRIMARY BALLOT REFORM

A call for the reversal of the Supreme Court's First Amendment jurisprudence has been explored in further depth by other commentators and is beyond the scope of this article, other than to note this author's agreement with their criticism.[223] Notwithstanding the unbalanced weighing of free speech and associational rights, and disregard for the importance of participatory democratic institutions evidenced in cases like *Eu*, there is something that can be done in New Jersey to mitigate against the perpetuation of party organization control over nominees. A necessary step is primary ballot reform to diminish arbitrary ballot advantages. An earlier attempt at ballot reform is chronicled below, followed by the reforms I propose.

A. A Prior Attempt at Reform

Within several years of the Supreme Court's decision in *Eu*, there was an attempt by the New Jersey legislature at ballot reform, specifically as a result of that decision. The effort was led in the State Senate by Senator William Schluter, who sponsored the Primary Ballot Reform Act, calling for numerous findings and declarations and proposing various reforms to the process for selecting nominees and candidate appearance on the ballot.[224]

The Primary Ballot Reform Act sought to recognize the following regarding the status of New Jersey primary elections in the aftermath of *Eu*: (a) the importance of primaries as "part of the democratic process;" (b) "the importance of primaries in curbing the unbridled power of party bosses;" (c) the reality that one-party dominance means that that party's nominee will likely result in that nominee being elected to office; (d) the extreme concentration of power granted to county chairs; (e) the ability of the party chair to make an endorsement that, due to New Jersey election laws, provides "a virtually unbeatable advantage over opponents;" (f) the resulting unfair and undemocratic process whereby party members are not able to adequately participate; and (g) the fact that this process contravenes the very purpose of a primary election and allows a "small minority within the party . . . to stifle the voice of party

223. *See, e.g.*, Hill, *supra* note 188; Lowenstein, *supra* note 208, at 1777–79.
224. *See* S.B. 1432, 208th Leg. (N.J. 1996).

membership" and thereby "distort[] the primary ballot structure and alignment" in a manner that affects the outcome of elections.[225] Schluter's bill, which specifically referenced *Eu*, recognized that the state had "a compelling interest in ensuring an orderly and fundamentally fair system of structuring primary election ballots"; as such, the state sought to address concerns of equal protection and "openness and accountability in representative government," while "avoid[ing] arbitrary and discriminatory actions by individual party functionaries" and "eliminat[ing] unfair and discriminatory ballot placements."[226]

Among its myriad proposals, Schluter's bill sought to standardize the procedure for the parties' selection of their nominees.[227] It would accomplish this by mandating a random draw of all candidates for the same office to determine ballot position, as well as specific procedures for a ballot slating convention whereby members of the county committee would vote by secret ballot to determine who gets the party endorsement.[228] With these standardized and more democratic procedures in place, the bill would have then repealed the Primary Endorsement Ban, which prevented political parties from endorsing candidates in primary elections.[229] The Statement accompanying the bill acknowledged that it would "affect[] the internal affairs of political parties" and potentially "infringe to some extent upon the associational rights of parties and party members," but nevertheless maintained that this was "necessary to further the State's compelling interest in ensuring that party primary ballot structure is determined in a fair, equitable and democratic manner and in guaranteeing an orderly primary election process."[230]

The bill was referred to committee, but never made it out of committee, and thus did not become law.[231] While the Primary Ballot Reform Act would have fallen short of resolving all of the significant ballot issues in New Jersey, it identified several areas in need of reform, including standardizing the primary nomination procedure, ensuring a fair and a democratic vote of the county committee members, guaranteeing that they vote by secret ballot, and creating a uniform

225. *See id.* § 2.
226. *See id.*
227. *See id.* at § 3.
228. *See id. But see id.* §§ 3–4 (allowing for grouping of candidates and preferential ballot draws so long as specific procedures set forth in the Act and aimed at a more democratic process were followed).
229. *See id.* § 9; *see also id.* at Statement accompanying bill.
230. *See id.* at Statement accompanying bill.
231. *See* S1432, Bills 1996–1997, N.J. Leg., https://www.njleg.state.nj.us/bills/ (last visited Apr. 10, 2020).

method for ballot drawing.[232] Its findings and declarations capture the essence of the unique ballot challenges of primary elections in New Jersey and the unbridled power that county chairs had in the wake of *Eu*.[233] The Primary Ballot Reform Act sheds light on the challenges that needed to be addressed to ensure a better democracy for the state. Primary ballot reform is essential to this goal.

B. Focus on the Ballot

The power of party bosses and political machines in New Jersey ultimately stems from their ability to control access to the primary ballot, and particularly, the County Line. If ballot placement were randomized, primary challengers would not be concerned about the County Line and would be able to take their message directly to voters, who would decide the outcome of primary elections instead of county chairs. Thus, the most important reform that New Jersey could adopt concerns the structure of the state's primary ballots. Below I propose a way to reform the state's primary ballots, and I explain some of the benefits that are likely to result from such reforms. I call for the state to create ballots not organized by columns, but rather by office sought, so as to give each candidate for each office an equal chance of receiving the most favorable ballot position. Most importantly, my proposal dispenses with undemocratic practices such as preferential ballot drawings, Ballot Siberia, bracketing, and the County Line. In doing so, these proposed reforms serve as an important first step in eliminating the corrupting influence that party bosses and political machines exercise over the nomination process through each of these practices.

1. Proposed Primary Ballot Reforms

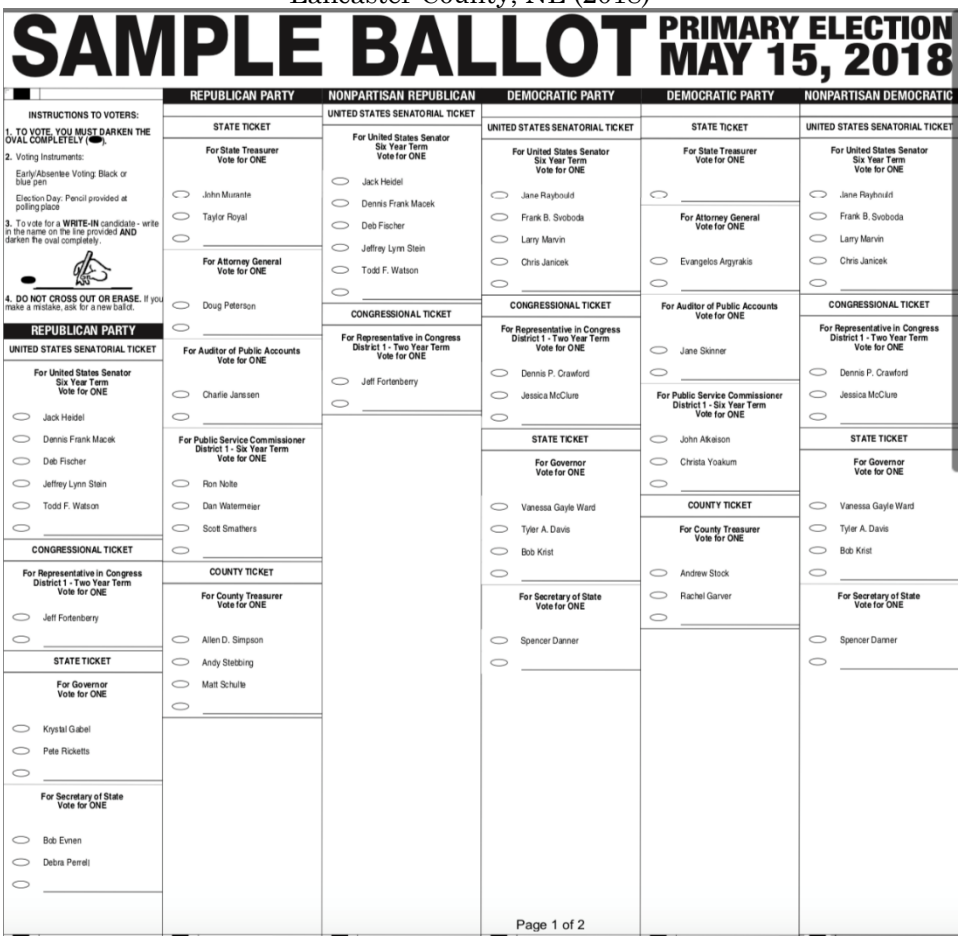
For every office on the ballot, the selection of ballot placement should be determined by the luck of the draw, and not by any other measure. In other words, no candidate should receive preferential treatment because he or she received the county endorsement, is part of a full slate of candidates, is aligned with a candidate for U.S. Senate or Governor, or is aligned with county candidates who filed a joint petition. This proposed reform would dispense with the notion of a "County Line" by eliminating column ballots, bracketing, and multiple rounds of drawings. Instead, for every office on the ballot, the name of the office being sought would be listed, and underneath would appear a "bubble" for the names of each

232. *See* S.B. 1432, at §§ 3–4.
233. *See id.* at § 2.

candidate running for each office, one underneath the other, in the order they were drawn.

An example of how each candidate for a particular office will have his or her name appear on the ballot under the "bubble ballot" structure I propose here, without columns and bracketing, can be seen in the May 15, 2018, Primary Election Sample Ballot for Lancaster County, Nebraska:

Figure 4: Primary Election Sample Ballot—
Lancaster County, NE (2018)[234]



SAMPLE BALLOT PRIMARY ELECTION MAY 15, 2018

INSTRUCTIONS TO VOTERS:
1. TO VOTE, YOU MUST DARKEN THE OVAL COMPLETELY ( ).
2. Voting Instruments:
Early/Absentee Voting: Black or blue pen
Election Day: Pencil provided at polling place
3. To vote for a WRITE-IN candidate - write in the name on the line provided AND darken the oval completely.
4. DO NOT CROSS OUT OR ERASE. If you make a mistake, ask for a new ballot.

REPUBLICAN PARTY
UNITED STATES SENATORIAL TICKET
For United States Senator Six Year Term Vote for ONE
Jack Heidel
Dennis Frank Macek
Deb Fischer
Jeffrey Lynn Stein
Todd F. Watson
CONGRESSIONAL TICKET
For Representative in Congress District 1 - Two Year Term Vote for ONE
Jeff Fortenberry
STATE TICKET
For Governor Vote for ONE
Krystal Gabel
Pete Ricketts
For Secretary of State Vote for ONE
Bob Evnen
Debra Perrell

REPUBLICAN PARTY
STATE TICKET
For State Treasurer Vote for ONE
John Murante
Taylor Royal
For Attorney General Vote for ONE
Doug Peterson
For Auditor of Public Accounts Vote for ONE
Charlie Janssen
For Public Service Commissioner District 1 - Six Year Term Vote for ONE
Ron Nolte
Dan Watermeier
Scott Smathers
COUNTY TICKET
For County Treasurer Vote for ONE
Allen D. Simpson
Andy Stebbing
Matt Schulte

NONPARTISAN REPUBLICAN
UNITED STATES SENATORIAL TICKET
For United States Senator Six Year Term Vote for ONE
Jack Heidel
Dennis Frank Macek
Deb Fischer
Jeffrey Lynn Stein
Todd F. Watson
CONGRESSIONAL TICKET
For Representative in Congress District 1 - Two Year Term Vote for ONE
Jeff Fortenberry

DEMOCRATIC PARTY
UNITED STATES SENATORIAL TICKET
For United States Senator Six Year Term Vote for ONE
Jane Raybould
Frank B. Svoboda
Larry Marvin
Chris Janicek
CONGRESSIONAL TICKET
For Representative in Congress District 1 - Two Year Term Vote for ONE
Dennis P. Crawford
Jessica McClure
STATE TICKET
For Governor Vote for ONE
Vanessa Gayle Ward
Tyler A. Davis
Bob Krist
For Secretary of State Vote for ONE
Spencer Danner

DEMOCRATIC PARTY
STATE TICKET
For State Treasurer Vote for ONE
For Attorney General Vote for ONE
Evangelos Argyrakis
For Auditor of Public Accounts Vote for ONE
Jane Skinner
For Public Service Commissioner District 1 - Six Year Term Vote for ONE
John Alkelson
Christa Yoakum
COUNTY TICKET
For County Treasurer Vote for ONE
Andrew Stock
Rachel Garver

NONPARTISAN DEMOCRATIC
UNITED STATES SENATORIAL TICKET
For United States Senator Six Year Term Vote for ONE
Jane Raybould
Frank B. Svoboda
Larry Marvin
Chris Janicek
CONGRESSIONAL TICKET
For Representative in Congress District 1 - Two Year Term Vote for ONE
Dennis P. Crawford
Jessica McClure
STATE TICKET
For Governor Vote for ONE
Vanessa Gayle Ward
Tyler A. Davis
Bob Krist
For Secretary of State Vote for ONE
Spencer Danner

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234. *Graphic excerpted from* LANCASTER COUNTY CLERK'S OFFICE, SAMPLE BALLOT, PRIMARY ELECTION, MAY 15, 2018. The sample ballot reproduced herein was obtained by

In addition, the slogan for each candidate would appear next to each candidate's name. This would allow candidates to associate with one another using the same slogan, and to receive the endorsement of the party. Such a mechanism would be faithful to *Eu* and recognize that parties have First Amendment rights, but not to the extent that the additional advantages of bracketing and preferential ballot draws and placements should be conferred on the parties by the state.

2. Benefits of Proposed Primary Ballot Reforms

There are a number of reasons that ballot reform would be desirable in New Jersey. These include the following: (1) treating candidates for the same office equally, regardless of their affiliation with candidates for other offices; (2) standardizing the ballot draw and ballot placement process across all twenty-one counties in New Jersey; (3) avoiding the political gamesmanship that characterizes the current practice of party "bracketing," to procure ballot advantages upon certain candidates and to disadvantage others; and (4) reducing the power that county committee chairs currently have over determining the winner of party primaries.

The first benefit of the bubble ballot that I am proposing is that it treats every candidate equally and does not place one candidate in a more favorable position than another for arbitrary reasons. Both the New Jersey legislature and the state's courts have recognized the importance of this principle.[235] For example, the 1981 Open Primary Law calls for all candidates for statewide top-of-the-ticket offices (i.e., U.S. Senate and Governor) to be printed in the first column or row of the ballot.[236] Furthermore, courts interpreting that statute have recognized that treating all candidates for the same office equally should be the most important consideration for ballot placement.[237] Courts have allowed county clerks to disregard this requirement only in extenuating circumstances, such as the physical limitations of the ballot itself.[238] Of course, by eliminating columns and bracketing, no such extenuating circumstances would arise.

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the author through a request made to the county election commissioner's office (on file with author).

235. Schundler v. Donovan, 872 A.2d 1092, 1095, 1098–99 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005); N.J. STAT. ANN. § 19:23-26.1 (West 2019).

236. § 19:23-26.1.

237. *Schundler*, 872 A.2d at 1098–99.

238. Andrews v. Rajoppi, 2008 WL 1869869, at *3–4 (N.J. Super. Ct. App. Div. Apr. 29, 2008); *Schundler*, 872 A.2d at 1099–1100.

Moreover, it is not only candidates for U.S. Senate and Governor who deserve to be treated equally. All candidates who run for any office have the right to be treated equally by the county clerks who draw their names. One way to accomplish this goal is by guaranteeing that a candidate's name is selected to appear on the ballot randomly, irrespective of any other factors.

Second, the bubble ballot that I propose would standardize the ballot drawing process throughout the state. Rather than having twenty-one varying standards in each of New Jersey's twenty-one counties, county clerks would have to follow the same procedure throughout the state. This avoids confusion for candidates, voters, and clerks themselves, as everyone would share an understanding of how the ballot draw is supposed to work and where a candidate's name should appear on the ballot. Additionally, this reform would avoid the appearance of (or actual) impropriety regarding the degree of discretion in designing ballots currently exercised by the county clerks, who are, of course, elected officials who have an interest in providing themselves with ballot advantages.[239]

Third, the proposed reforms would avoid political gamesmanship currently used to procure an advantage or to intentionally or unintentionally disadvantage other candidates. For example, no candidate would be at risk of being relegated to Ballot Siberia. As such, parties would not have the same incentive to solicit others to run as "phantom candidates" in order to crowd the ballot and push challengers further away from the top-most or left-most portion of the ballot. Similarly, candidates would not be forced to align with candidates running for other offices (i.e., U.S. Senate, Governor, or county freeholder), just to avoid being placed in a subsequent, non-preferential ballot draw and to avoid an unfavorable ballot position.[240] This would allow candidates to run for an office without aligning with candidates for other offices, and it would allow candidates to not worry about the additional ballot disadvantages they might be subjected to if they did not bracket.

Finally, the proposed reforms would reduce the power of county committee chairs and their influence over the election process, which

239. *See* N.J. STAT. ANN. § 19:49-2 (West 2019) (granting authority to county clerk to determine ballot arrangement); *Schundler*, 872 A.2d at 1100 (demonstrating that the legislature vested discretion in county clerks who have the "duty to administer the electoral process with fidelity to . . . the public interest").

240. *Cf.* § 19:23-26.1 (regarding ballot placement of U.S. Senate and Governor); § 19:49-2 (regarding bracketing requests with candidates filing a joint petition with the county clerk); Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968) (regarding preferential drawing for bracketed candidates).

currently may be unfairly obtained by ballot advantages stemming from party endorsements. While county chairs would undoubtedly continue to be powerful in a variety of ways, and while county endorsements will continue to be sought by candidates, the proposed reforms would decouple state-conferred ballot advantages from those benefits that naturally flow from receiving the party endorsement. By eliminating these advantages, ballots would be more consistent with the purpose of the direct primary system that was adopted in New Jersey to guard against certain candidates gaining insurmountable advantages based upon decisions made by a small handful of powerful individuals.[241] And for candidates not seeking or receiving a party's endorsement, the proposed reforms would prevent them from being placed at a severe disadvantage. These candidates would have a better chance of continuing to compete for a party's nomination, and thus these candidates generally would have less incentive to compromise their principles out of fear of crossing a county chair and being thrown off the County Line.

V. A CONSTITUTIONAL CHALLENGE TO THE COUNTY LINE

New Jersey's current County Line system—including its preferential ballot draw, its system of bracketing, and the ballot placement laws and practices that give it life—is vulnerable to a constitutional challenge. This section sets forth a blueprint for how that challenge should proceed, including the grounds for it. When a voter brings a challenge under the First or Fourteenth Amendments to a state's electoral practices, the courts employ a balancing test to evaluate the constitutionality of state laws that infringe on a voter's rights. Indeed, the Court in *Eu* engaged in such balancing. However, some authorities in New Jersey have mistakenly relied on *Eu* to conclude that candidates have a constitutional right to bracket with one another on the ballot. To the contrary, if New Jersey were to pass a law that called for a ballot design that did not allow for bracketing, such as the reforms I proposed above, such a law would be deemed constitutional under the balancing test. Moreover, New Jersey's current County Line system is unconstitutional under the same balancing test.

A. The Balancing Test for Laws Affecting Voting Rights

Courts confronted with a constitutional challenge to a state's election law or practice under the First and Fourteenth Amendments must apply a balancing test to determine whether a state's voting practice can stand.

241. *See supra* Part III.

This balancing test is often employed by the courts and was originally set forth in *Anderson v. Celebrezze*,[242] and then later refined and clarified in *Burdick v. Takushi*[243] and *Crawford v. Marion County Election Board*.[244]

Prior to *Anderson*, state election laws negatively impacting the right to vote were often subject to strict scrutiny because they burdened a fundamental right.[245] In such cases, the law would be struck down as unconstitutional unless the state could demonstrate a compelling government interest for its law and show that the law was sufficiently tailored to achieve that compelling state interest.[246] For example, under this stringent standard of review, the Supreme Court struck down Virginia's state law that required voters to pay a poll tax in order to vote.[247]

However, in *Anderson*, the Court recognized that it was necessary for states to pass election laws in order to properly administer elections in an orderly, efficient, and fair manner.[248] Thus, notwithstanding the fact that every election law might impact the right to vote in some fashion, the Court held that "the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[249] Therefore, where a state law burdens the right to vote, the Court in *Anderson* called for a careful analysis of "the character and magnitude of the asserted injury," as well as the "precise interests put forward by the State as justifications for the burden imposed by its rule."[250] Under *Anderson*, courts must then weigh the burdens against the state interests, and also must take into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."[251]

This balancing test was later clarified in *Burdick*, in which the Supreme Court recognized that not every voting regulation should be subject to strict scrutiny.[252] Instead, the Court explained that when voting rights under the First and Fourteenth Amendment are subject to "'severe' restrictions," then the state law has to be narrowly tailored to support a compelling state interest; however, if the state law "imposes

242. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
243. Burdick v. Takushi, 504 U.S. 428, 434 (1992).
244. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 190 (2008) (lead opinion).
245. Barnett & Douglas, *supra* note 61, at 366.
246. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627, 632–33 (1969).
247. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).
248. *See Anderson*, 460 U.S. at 788–89.
249. *Id.* at 788.
250. *Id.* at 789.
251. *Id.*
252. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

only 'reasonable, nondiscriminatory restrictions' . . . [then] 'the State's important regulatory interests are generally sufficient to justify' the restrictions."[253]

In *Crawford*, Justice Stevens' lead opinion reaffirmed the standard set forth in *Anderson* and refined in *Burdick*, clarifying that there is no test for a threshold amount of severity of burden that a law must impose.[254] Rather, the court must weigh the burdens and state interests even for slight burdens, which "must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[255] Under this sliding scale, if the burdens are limited or minimal, the state interest would not have to be compelling, but there must be a legitimate state interest to outweigh such minimal burdens.[256] In essence, the strength of the state's interest is related to the severity of the burden that the law imposes; the greater the burden, the stronger the justification must be for the state's interest in passing the law under the balancing test.[257] These cases together set forth the standard used for determining the constitutionality of state statutes affecting voting rights under the First and Fourteenth Amendments.[258]

B. New Jersey's Muddled Case Law Regarding Bracketing

Before reaching the issue of why New Jersey's current County Line system based on bracketing is unconstitutional, it is first important to address and dispel a principle that has developed out of New Jersey case law that appears to suggest that candidates have a constitutional right to bracket with other candidates. This principle stems from a misplaced reliance on *Eu* and continues to be perpetuated in New Jersey case law and by county clerks when designing the ballot. Determining whether there is a constitutional right for candidates to bracket is important, because, if such a right exists, then the state legislature would be prohibited from passing ballot reform measures that do not allow for bracketing, such as the bubble ballot reforms that I proposed earlier. However, no such constitutional right to bracket exists.

253. *Id.* at 434.
254. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 191 (2008) (lead opinion).
255. *Id.* (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).
256. *See id.* at 202–03 (citing *Burdick*, 504 U.S. at 439).
257. *See id.*; *see also* Joshua A. Douglas, *The History of Voter ID Laws and the Story of* Crawford v. Marion County Election Board, *in* ELECTION LAW STORIES 490 (Joshua A. Douglas & Eugene D. Mazo eds., 2016).
258. *See* Barnett & Douglas, *supra* note 61, at 365–66 (referring to balancing test from the *Anderson*, *Burdick*, and *Crawford* cases as the "ABC" test).

1. New Jersey's Misplaced Authorities on Bracketing

The ability to bracket in New Jersey is statutory, and it stems from a convoluted paragraph that consists of a single, long, run-on sentence that is part of what I will call the state's Bracketing and Ballot Placement Law.[259] Under this law, candidates who file a joint petition with the county clerk and who request to use the same slogan will have their names drawn together at the ballot draw and will be featured on the same column or row of the ballot.[260] Candidates who run at the municipal level, and who thus file their petitions with the municipal clerk, may file a petition using the same slogan as joint county candidates.[261] Such candidates can request that their names be featured on the same line of the ballot as the joint county candidates by notifying the county clerk in writing within two days after the deadline has passed for filing their petitions.[262] The county clerk must then immediately notify the campaign manager of the joint county candidates of any such requests made by any municipal candidates.[263] Upon notification by the county clerk, the campaign manager of the joint county candidates then has two days in which to file a written consent allowing such municipal candidates to be featured on the same line of the ballot as the joint county candidates.[264] If these requirements are met, the county clerk must place such candidates on the same line of the ballot.[265] The same process of requesting and granting permission from the campaign manager of the joint county candidates applies to candidates who file their petitions with the Secretary of State (e.g. all statewide candidates, all federal candidates, and other candidates who may represent voters across more than one county).[266]

How bracketing works was the subject of many early cases in the decades following the institution of the direct primary, and courts generally upheld the validity of primary ballots where affiliated candidates were given ballot placement preference and bracketed

259. N.J. STAT. ANN. § 19:49-2 (West 2020).
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *See id.* While the text of the specific Bracketing and Ballot Placement Law states that such candidates file their petitions with the Attorney General, New Jersey law was subsequently changed to require such candidates to file with the Secretary of State. *See* N.J. STAT. ANN. § 19:23-6 (West 2020).

together in the same column of the ballot.[267] However, such cases were usually decided based on statutory construction, interpretation of state court precedent, and the reasonable exercise of discretion by county clerks; by contrast, they were not based on any federal constitutional imperative.[268] Even in *Quaremba v. Allan*, one case in which the constitutionality of bracketing under the Bracketing and Ballot Placement Law was considered, it was in the context of a challenge to the *permissibility* of bracketing, and that case did not hold that New Jersey was *required* to permit candidates to bracket together on the ballot as a matter of constitutional mandate.[269] In other words, the court only addressed whether New Jersey was allowed to pass a law requiring bracketing, and the court determined that it was. The case did not address whether the Constitution required county clerks to allow candidates to bracket together independent of a state statute requiring same. Moreover, *Quaremba* was decided prior to the development of the balancing test set forth eight years later in *Anderson*.[270]

However, the notion that candidates have a constitutional right to bracket on the ballot with one another stems from a line of cases addressing the 1981 Open Primary Law, which concerned the ballot placement of U.S. Senate and Gubernatorial candidates. In *Schundler v. Donovan*, the Appellate Division struck down the portion of the 1981 law that required the offices of U.S. Senator and Governor to be placed in a column or row separate from candidates seeking nomination for any other office.[271] In holding that portion of the law unconstitutional, the court stated as follows:

> We, of course, recognize the breadth of the constitutionally-based principles articulated and applied in *Eu*. The First Amendment

267. *See* Quaremba v. Allan, 334 A.2d 321, 325 (N.J. 1975) (upholding validity of § 19:49-2 and the positioning of lines on the primary ballot); Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968) (providing for a preferential drawing for groups of candidates bracketed pursuant to § 19:49-2 followed by non-preferential drawings for unbracketed candidates); Harrison v. Jones, 130 A.2d 887, 890 (N.J. Super. Ct. App. Div. 1957) ("[G]roups of candidates having the same party faction label or designation and desiring to have this fact brought to the attention of the voter in a primary election with the additional effectiveness produced by alignment of their names on the machine ballot should have the right to do so . . . .") (citing Bado v. Gilfert, 80 A.2d 564, 565–66 (N.J. Super. Ct. App. Div. 1951)).

268. *See Quaremba*, 334 A.2d at 323–25, 327–30; *Moskowitz*, 243 A.2d at 282–83; *Harrison*, 130 A.2d at 890–91.

269. *See Quaremba*, 334 A.2d at 325–27 (discussing challenge to constitutionality of bracketing under a now-outdated Equal Protection analysis).

270. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

271. *See* Schundler v. Donovan, 872 A.2d 1092, 1099 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005).

> protects the free speech and associational rights of every candidate in a primary election *to declare a ballot affiliation* with any other candidate or cause, or to designate his or her choice not to affiliate. Thus, the absolute prohibition contained in the last sentence of [the 1981 Open Primary Law] must be seen as a violation of the *Eu* standard.[272]

The court in *Schundler* jumped to its conclusion about the breadth of *Eu* without any support, explanation, or analysis; specifically, the court failed to explain how *Eu* holds that primary election candidates have a right "to declare a ballot affiliation."[273] The court did not undergo a careful and comprehensive review of specific burdens, precise state interests, and the extent to which it is necessary for the state to place burdens on the right to vote, as the current balancing test articulated in *Anderson* and *Burdick* called for.[274]

Furthermore, *Eu* spoke to associational rights with respect to endorsements, and did not address ballot affiliations.[275] The only sentence in *Eu* that appears to refer to the word "ballot" in the context of associational rights reads as follows:

> Even though individual members of the state central committees and county central committees are free to issue endorsements, imposing limitations "on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."[276]

This sentence from *Eu* includes a quote from *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, which deals with First Amendment protections in the context of campaign finance.[277] Thus, when the Court in *Eu* quoted this line about "band[ing] together to advance . . . views on a ballot measure,"[278] it was not referring to

272. *Id.* (emphasis added).

273. *Id.*

274. *See id.* (claiming that *Eu* recognizes a First Amendment right to "declare a ballot affiliation" and therefore concluding that the inability of certain candidates to bracket is unconstitutional).

275. *See* Eu v. S.F. Democratic Cent. Comm., 489 U.S. 214, 224–25 (1989).

276. *See id.* (citing Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 296 (1981)).

277. *See id.*; Citizens Against Rent Control/Coal. for Fair Hous. v. Berkeley, 454 U.S. 290, 292–93, 296 (1981).

278. *See Eu*, 489 U.S. at 224–25.

"declar[ing] a ballot affiliation,"[279] but rather to the First Amendment right of individuals to "pool money through contributions."[280] The reference made by the Court in *Eu* was meant to stand for the proposition that a political party should not be deprived of the ability to make endorsements when individual members of the committees were free to do so acting alone.[281] Thus, to the extent that the Appellate Division relied on *Eu* to recognize a First Amendment right to declare a ballot affiliation, and to the extent that subsequent cases blindly rely on *Schundler*'s interpretation of *Eu*,[282] the reliance was misplaced and stands at odds with other cases that have rejected a right to use the ballot for expressive associational purposes.[283]

It should be noted that while the *Schundler* court relied on a faulty premise and on sloppy reasoning to strike down part of the 1981 Open Primary Law, that law was also problematic for another reason: it dealt exclusively with the offices of U.S. Senate and Governor.[284] As such, if the court in *Schundler* had upheld the constitutionality of the third paragraph of the statute, it would have effectively allowed candidates for all other offices to bracket with one another, but not with candidates for U.S. Senate or Governor.[285] The statute, thus, created an inequity with respect to associating on the ballot itself whereby it was permissible to affiliate with candidates for U.S. House of Representatives, state senator, state assemblyman, etc., but not with candidates for U.S. Senate and/or Governor.[286] It also would have prevented candidates for U.S. Senate and Governor from bracketing with anyone, while allowing candidates for all other offices to do so.[287]

Additionally, other laws and practices in New Jersey further undermine the *Schundler* court's notion that candidates have a constitutional right to bracket with one another. Indeed, New Jersey has an entire statutory section devoted to nonpartisan municipal elections that certain municipalities may adopt.[288] Municipal candidates in

279. *Schundler*, 872 A.2d at 1099.

280. *Citizens Against Rent Control*, 454 U.S. at 296.

281. *See Eu*, 489 U.S. at 224–25.

282. *See, e.g.*, Andrews v. Rajoppi, 2008 WL 1869869, at *1–2 (N.J. Super. Ct. App. Div. Apr. 29, 2008) (refusing to enforce the portion of the 1981 Open Primary Law that prohibited U.S. Senate and Gubernatorial candidates from bracketing with candidates for other offices solely because of the *Schundler* decision).

283. *See infra* note 297 and accompanying text.

284. *See* N.J. STAT. ANN. § 19:23-26.1 (West 2020).

285. *See id.*

286. *See id.*

287. *See id.*

288. Uniform Nonpartisan Elections Law, N.J. STAT. ANN. §§ 40:45-5–40:45-21 (West 2020).

jurisdictions that have adopted the Uniform Nonpartisan Elections Law have no ability to bracket with candidates running for non-municipal offices (e.g. county-wide, statewide, etc.), do not have a primary election, and are prohibited from declaring a party affiliation on the general election ballot, when municipal elections are held in November.[289] Similarly, for municipalities that have school board elections in November, candidates are prohibited from appearing on the ballot with a party designation.[290]

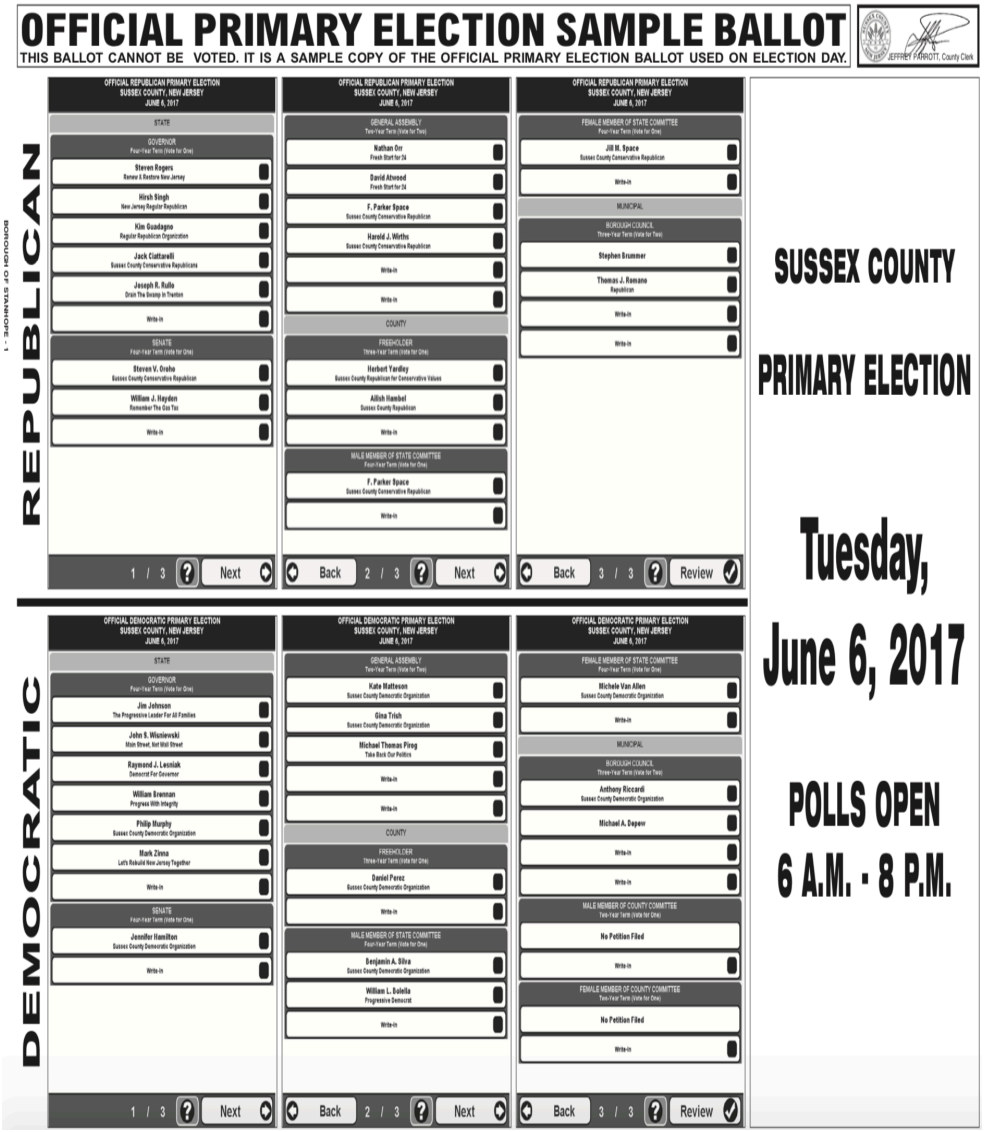
Bracketing has not even been followed by all twenty-one counties in New Jersey.[291] For example, as can be seen in the 2017 Primary Election Sample Ballot for the Borough of Stanhope, the ballot in Sussex County did not include bracketing but did allow candidates to appear on the ballot with the same slogan, and candidates were drawn for ballot position separately for each office, similar to what I called for in my proposed bubble ballot reform:

289. *See id.* § 40:45-7.2 (requiring the county clerk to separate municipal candidates from other candidates for municipalities holding nonpartisan municipal elections in November); *id.* § 40:45-10 (prohibiting reference to party in slogan of municipal non-partisan candidates).

290. *See* N.J. STAT. ANN. § 19:60-1 (West 2020).

291. *See* Caffrey, *supra* note 145 (discussing how two counties do not have a county line, including Salem where candidates are placed in the order they are picked regardless of party endorsements).

Figure 5: Primary Election Sample Ballot—
Stanhope, NJ (2017)[292]



292. *Graphic excerpted from* SUSSEX COUNTY CLERK'S OFFICE, SAMPLE VOTING MACHINE BALLOT, OFFICIAL PRIMARY ELECTION, TUESDAY, JUNE 6, 2017. The sample ballot reproduced herein was obtained by the author through an Open Public Records Act request made to the county clerk's office (on file with author).

Bracketing cannot be a constitutional right. After all, if candidates enjoyed a constitutional right to bracket with one another, which the court in *Schundler* found based on its reading of *Eu*, surely we would expect to find bracketing in every state across the country.[293] Yet, today, New Jersey is the only state in the nation that continues to use a ballot organized by columns or rows of groupings of candidates—rather than by office sought—and that provides for bracketing in primary elections.[294] These considerations further demonstrate that *Schundler*'s reliance on *Eu* is misplaced, and its conclusion that candidates have a constitutional right to bracket with one another lacks an adequate foundation that is rooted in First and Fourteenth Amendment jurisprudence.

2. Eliminating Bracketing Does Not Unconstitutionally Impinge on Associational Rights

Application of the balancing test to this author's proposed reforms eliminating the county line further demonstrates that there is no constitutionally based right for candidates to bracket with one another, independent of state law. My proposed reforms would impose little to no burden on voting rights, and the state's interests in adopting them are more than sufficient to outweigh the minimal burdens, if any, that might be imposed on the associational rights of parties.

The burden on associational rights that result from eliminating the County Line and the state's column-style bracketing system is, at best, no burden at all, and, at worst, only minimal. That is because my idea for using a bubble ballot contains no direct burden on the ability of candidates and/or parties to associate; parties would remain free to endorse candidates and candidates may associate with the party and/or with one another.[295] These parties and candidates can publicly advertise

293. *See* Schundler v. Donovan, 872 A.2d 1092, 1097–1100 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005).

294. *See* Julia Sass Rubin, New Jersey's Primary Ballot Design Enables Party Insiders to Pick Winners (2020), *available at* rucore.libraries.rutgers.edu/rutgers-lib/63623/PDF/1/play/ (discussing and compiling primary election ballots from all fifty states and the District of Columbia, with ballot images made available at https://drive.google.com/drive/folders/1vudVsxEcLvY2nZAfD_k88780nyh5sGCr?usp=sharing); *see also* Yael Niv, *It's the End of the Line and We Know It*, INSIDER NJ (Apr. 22, 2020, 9:42 AM), insidernj.com/its-the-end-of-the-line-and-we-know-it/. *But cf.* CONN. GEN. STAT. § 9-437 (2019) (organizing ballot by office sought but providing for ballot preference for party-backed candidates).

295. *Cf.* Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (holding that blanket primary unconstitutionally infringed upon right not to associate and burdened parties' rights to exclude members when selecting a nominee); Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214 (1989) (holding that ban on primary endorsements unconstitutionally prevented party from endorsing a candidate and required parties to follow certain

their endorsement and support for one another and would be free to educate the public accordingly.[296]

The only anticipated purported limitation on expressive speech and association would be the desire to use the primary ballot itself to convey an additional message about who the county committee supports or which candidates support one another. However, courts have found that there is no First Amendment right to use the ballot for expressive purposes.[297] For example, in the face of arguments about associational and expressive rights, the Supreme Court has upheld state laws that prevent parties from indicating their nominees on the ballot and that prevent minor parties from having their chosen candidates appear on the ballot with the minor party's designation; similarly, the United States Court of Appeals for the Sixth Circuit has upheld a state law that prevented judicial candidates from appearing on the general election ballot with any party designation.[298]

Moreover, while not constitutionally required, my proposed reform would still allow New Jersey candidates who wish to associate with one another to be featured on the ballot with the same party slogan; it would only remove the additional layer of expressive manifestation on the ballot that allows party-backed candidates also to appear on the same line. In

procedures for nominating candidates and selecting internal leadership); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding that closed primary statute was an unconstitutional burden on party's ability to decide if it wanted an open primary).

296. *See* Ohio Council 8 Am. Fed'n of State v. Husted, 814 F.3d 329, 335 (6th Cir. 2016) (rejecting challenge to the law prohibiting party affiliation of judicial candidates from appearing on general election ballot) ("The burden on the plaintiffs' . . . rights is minimal because political parties and judicial candidates remain free to provide, and voters remain free to receive, a plethora of information regarding whether a given candidate affiliates with or is endorsed by a particular political party. . . . [The law] only minimally burdens a political party's rights because a political party has no First Amendment right to designate its nominee on the general-election ballot and because a party has many other opportunities to champion its nominee and educate voters.").

297. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 453 n.7 (2008) ("The First Amendment does not give political parties a right to have their nominees designated as such on the ballot."); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 362–63 (1997) (upholding fusion ban because political parties do not have a right to convey a particularized message through the ballot, and stating that "[b]allots serve primarily to elect candidates, not as forums for political expression"); Burdick v. Takushi, 504 U.S. 428, 438 (1992) (upholding write-in ban as primary election ballot and process was meant to select a candidate, and its constitutional function was not meant to provide "a more generalized expressive function"); *Ohio Council 8*, 814 F.3d at 336 (upholding law preventing judicial candidates from appearing on the ballot with a party designation because "a political party has no First Amendment right to use the general-election ballot for expressive activities" and "has no right to use the ballot itself to educate voters").

298. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 458–59; *Timmons*, 520 U.S. at 369–70; *Ohio Council 8*, 814 F.3d at 338–40.

this sense, my proposed reforms would enable parties to have greater expressive associational displays on the ballot than other states do, and, as mentioned, these prohibitions in other states have uniformly been upheld.[299]

Even if my reform proposal places some burdens on the associational rights of parties and candidates, any such burdens would only be minimal,[300] and the state's interests in passing such reforms would easily outweigh them under the balancing test.[301] Specifically, the state would have a legitimate interest in treating all candidates equally on the ballot, standardizing the ballot draw process and ballot placement across all twenty-one counties, eliminating state-conferred ballot advantages and disadvantages of bracketing, and reducing the influence of county chairs that results directly from their influence over who gets the County Line.[302] These legitimate, non-discriminatory state interests are consistent with infringements on First Amendment rights that have been upheld to protect the integrity of the election process and ensure an orderly and fair election, and to assure that such elections are equitably and efficiently operated.[303] Moreover, by eliminating county clerk discretion, my proposed reforms would address and resolve two issues with which New Jersey courts have struggled: (1) the fact that county clerks have adopted varying bracketing standards for similar situations, and (2) ensuring equal treatment on the ballot for candidates running for the same office.[304]

299. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 458–59 (preventing parties from indicating their nominee on the ballot); *Timmons*, 520 U.S. at 369–70 (preventing minor party from having their chosen candidate appear on the ballot with their designation); *Ohio Council 8*, 814 F.3d at 338–40 (preventing judicial candidates from having any party designation on the general election ballot).

300. *See Ohio Council 8*, 814 F.3d at 336–37 (holding that any burden from preventing party designation on the ballot for judicial candidates would only be minimal as there were many ways a party could convey its message and educate voters as to which candidates they nominated).

301. *See* Crawford v. Marion Cty. Election Bd., 533 U.S. 181, 202–03 (2008) (lead opinion); *Burdick*, 504 U.S. at 434.

302. *See supra* Part IV.B.2.

303. *See, e.g.*, *Burdick*, 504 U.S. at 433 ("[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."); *cf.* Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process. Toward that end, a State may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest.") (internal citations omitted).

304. *See, e.g.*, Andrews v. Rajoppi, 2008 WL 1869869, at *8–14 (N.J. Super. Ct. App. Div. Apr. 29, 2008).

Given the minimal, if any, burden my proposed reforms would place on parties' associational rights, and the host of legitimate state interests sufficient to justify any purported burdens, my proposed reforms would pass constitutional standards. Therefore, application of the balancing test further demonstrates that, contrary to the suggestion of some New Jersey authorities, there is no constitutional right of candidates to bracket with one another on the primary election ballot.

C. Examining the Constitutionality of the County Line

New Jersey's current County Line and bracketing system places a significant burden on voting rights, furthers little to no legitimate government interests, and is unnecessary to achieve such interests. When the state's interests and the burden on the right to vote are properly balanced, it is clear that the current County Line system stands upon infirm constitutional ground.

1. Burden on the Fundamental Right to Vote

In applying the balancing test, it is important to identify how voting rights are being burdened by state election laws, as well as whose voting rights have been burdened.

a. How Voting Rights are Burdened

The burden placed on the right to vote by the current bracketing system is significant. As explained above, New Jersey's election laws have been interpreted to allow for a preferential drawing among candidates who are bracketed with certain other candidates, relegating any other unbracketed candidates to subsequent rounds of non-preferential drawings, as between such unbracketed candidates for each remaining office.[305] Such unbracketed candidates are automatically precluded from obtaining the highly-sought first row or left-most column on the ballot, are pushed further down or farther to the right than the bracketed candidates, and are not even guaranteed the next available column or row on the ballot.[306] Instead, unbracketed candidates can be and often are relegated to obscure portions of the ballot, and sometimes are listed underneath another candidate running for the same office.[307] These measures systemically provide a ballot advantage to bracketed candidates and a ballot disadvantage to unbracketed candidates before

305. *See supra* Part II.A.
306. *See supra* Part II.A.
307. *See supra* Part II.C.

voting even begins. Social science research shows that where a candidate's name appears on the ballot matters; in particular, the ability to be featured on the coveted first line of the ballot bestows significant advantages upon such candidates.[308] While the exact effect of positional bias on ballots has been the subject of much debate, its significance and impact have been highlighted in many publications.[309]

However, New Jersey's current bracketing and ballot placement system treats similarly situated candidates, as well as the voters who support them, differently. The County Line system disadvantages unbracketed candidates and their corresponding voters, and that impacts the fairness and integrity of the state's elections. Ballot ordering laws imposing similar burdens on voting rights have been struck down by courts in the United States. The one time the Supreme Court considered a constitutional challenge to granting preferential ballot position to certain types of candidates—in this case, based on their incumbency or seniority—it summarily affirmed a lower court's preliminary injunction and opinion mandating that all candidates be afforded an equal opportunity to obtain preferential ballot position.[310] The lower court in that case recognized that granting preferential ballot position was "a purposeful and unlawful invasion of plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment."[311] It enjoined election officials from determining such ballot placement issues "by any means other than a drawing of candidates' names by lot or other nondiscriminatory means by which each of such candidates shall have an equal opportunity to be placed first on the ballot."[312]

Other federal courts have similarly rejected attempts to provide certain types of candidates with a ballot position advantage. For example, the United States Court of Appeals for the Eight Circuit affirmed findings of the district court that the first position contained a ballot advantage, and further held that a North Dakota law that awarded first position to the candidates of the party that received the most votes at the last congressional election "burden[ed] the fundamental right to

308. *See infra* note 309 and accompanying text.

309. *See, e.g.*, Eric Chen et al., *The Impact of Candidate Name Order on Election Outcomes in North Dakota*, 35 ELECTORAL STUD. 115, 121 (2014); Nuri Kim et al., *Moderators of Candidate Name-Order Effects in Elections: An Experiment*, 36 POL. PSYCHOL. 525, 526 (2015); Joanne M. Miller & John Krosnick, *The Impact of Candidate Name Order on Election Outcomes*, 62 PUB. OPINION Q. 291, 295 (1998); Josh Pasek et al., *Prevalence and Moderators of the Candidate Name-Order Effect*, 78 PUB. OPINION Q. 416, 436 (2014).

310. *See* Mann v. Powell, 398 U.S. 955, 955 (1970).

311. *See* Mann v. Powell, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970).

312. *Id.*

vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment."[313] The court found that the statute requiring incumbents to be listed first did not even pass a rational basis test, and thereby rejected the asserted state interest of "making the ballot as convenient and intelligible as possible for the great majority of voters."[314] Similar decisions have been reached by a district court in Illinois and by the United States Court of Appeals for the Seventh Circuit.[315] A district court in Oklahoma invalidated a state law that required that candidates representing the Democratic Party receive the top position on all general election ballots.[316] A district court in Florida recently struck down a longstanding state statute that required the first position on the general election ballot be given to candidates associated with the party that obtained the most votes for governor in the previous gubernatorial election, although the United States Court of Appeals for the Eleventh Circuit vacated the decision for lack of standing.[317] The Democratic Party has recently filed additional lawsuits challenging ballot position laws in other states.[318]

State courts have similarly found an advantage conferred by the primacy effect and have struck down laws providing ballot order advantages that prioritized arbitrary candidate characteristics, such as

313. McLain v. Meier, 637 F.2d 1159, 1165–67 (8th Cir. 1980) (noting that other courts have found that the first position bestows a ballot advantage and collecting cases). *But see* New All. Party v. N.Y. Bd. of Elections, 861 F. Supp. 282, 284–85, 300 (S.D.N.Y. 1994) (upholding New York law that reserved first positions on the general election ballot for political parties before independent candidates, and ordered them based on prior electoral success in the gubernatorial election where no evidence was presented by plaintiffs regarding positional bias).

314. *Id.* ("This justification virtually admits that the state has chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters.").

315. *See* Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977) (affirming district court finding of substantial evidence that top ballot placement provides an advantage, rejecting state interests of avoiding confusion and having a consistent practice, and striking down longstanding practice of county clerks to place candidates from their own party first on the ballot); Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972) (statute granting priority in ballot placement for reasons of "incumbency and seniority" denies equal protection to plaintiffs).

316. Graves v. McElderry, 946 F. Supp. 1569, 1581–82 (W.D. Okla. 1996).

317. Jacobson v. Lee, 411 F. Supp. 3d 1249, 1254–55 (N.D. Fla. 2019), *vacated on other grounds*, Jacobson v. Fla. Sec'y, No. 19-14552, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020).

318. *See* Colby Itkowitz, *Democrats Sue Three Battleground States Over Law that GOP Candidates' Names Be Listed First on Ballot*, WASH. POST (Nov. 1, 2019, 2:32 PM), https://www.washingtonpost.com/politics/democrats-sue-three-battleground-states-over-law-that-gop-candidates-names-be-listed-first-on-ballot/2019/11/01/b62c8f44-fcc0-11e9-8906-ab6b60de9124_story.html.

New Hampshire's law that gave preference based on the alphabetical last name of candidates, and California's and New York's laws that gave preference to incumbents.[319]

While most of the above cases dealt with general elections, the principles set forth therein provide ample support for a constitutional claim against New Jersey's County Line and ballot placement system; moreover, the burden placed on voting rights is even greater in New Jersey because it falls upon candidates and corresponding voters in a primary election. Studies have indicated that the positional bias effect on a ballot has an even greater impact in primary elections than it does in general elections, as such races often receive less media coverage and voters generally have less substance and information upon which to base their decisions.[320] In fact, at least one commentator has suggested that unfair ballot ordering should be subject to strict scrutiny when applied to primary elections, given the severe burden imposed on candidates and voters.[321] Additionally, where the practice of the County Line and ballot placement leads to the entrenchment of party bosses and political machines, there is even greater justification for striking it down.[322] That one candidate will get the first position over others is inevitable in any election; however, in New Jersey, it is the arbitrary assignment of preferential ballot position stemming directly from the state's election system which causes the unconstitutional burden.[323]

The discretion afforded to county clerks in determining ballot position, and the varying standards that accompany such discretion,

319. Akins v. Sec'y of State, 904 A.2d 702, 707–08 (N.H. 2006); Gould v. Grubb, 536 P.2d 1337, 1337, 1347–48 (Cal. 1975); Holtzman v. Power, 313 N.Y.S.2d 904, 1024–25 (N.Y. Sup. Ct. 1970).

320. *See, e.g.*, Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 388 (2010) ("In primary and non-partisan elections, the effect [of ballot order] is larger both in magnitude and statistical significance for all types of candidates."); Jonathan GS Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 268 (2004) ("We find that the effect of name order on primary election outcomes is significantly larger than Miller and Krosnick's estimate for general elections. . . . This phenomenon may not adversely affect any particular class of citizens, but it undermines equality among individual candidates. This is no less offensive to the democratic principle of fair play than, say, a state program that would provide a single candidate in each election contest—determined by lottery—with a cash grant."). For a discussion of the impact of positional bias in primary elections as compared to the bulk of authorities dealing with general elections, see DARREN GRANT, THE BALLOT ORDER EFFECT IS HUGE: EVIDENCE FROM TEXAS (2016), https://www.shsu.edu/dpg006/ballot%20order.pdf.

321. *See* Miller, *supra* note 320, at 396.

322. *See id.* at 401 ("When election practices that impact the right to vote also act to entrench incumbents or other political elites, courts should be particularly suspicious.").

323. *See id.*

further serve to make New Jersey's current bracketing and ballot placement system suspect.[324] Such discretion has led to varying standards across counties and from election to election as to with which offices' other candidates need to be bracketed in order to appear in the preferential drawing, how and where to place candidates on the ballot when there are more candidates than columns, how many columns need to be on the ballot, what limitations are placed on the ballot by virtue of the voting machine at issue, whether one candidate can be placed underneath another candidate for the same office, and so forth.[325] The Bracketing and Ballot Placement Law, the 1981 Open Primary Law, and the cases interpreting these statutes do not make clear whether the ballot draw and ballot position and bracketing should run off the candidates for Senator or for county freeholder, and they do not address the added complication of what happens when candidates for President are on the ballot, at the top of the ticket.[326] This leaves candidates guessing as to which candidates for other offices they must bracket with to be included in the preferential drawing to avoid being relegated to Ballot Siberia, where it will be hard for voters to find them.

It should be noted that while state and federal courts in New Jersey have rejected previous challenges to ballot order arrangements in other contexts, such cases only dealt with general elections, not with primary elections.[327] Those cases are also easily distinguished in that they involve rights with respect to ballot position between major party candidates and candidates simply nominated by petition for the general election; those cases implicate different stakes and concerns related to the role of our two-party system, rendering them inapposite for our purposes here.[328] Therefore, those cases should have no bearing on a challenge to the County Line and bracketing system used in primary elections. Moreover,

324. *See id.* at 391 ("The most questionable ballot order methods are those in which a state election official is given discretionary power to determine ballot order.").

325. *See, e.g.*, Andrews v. Rajoppi, 2008 WL 1869869, at *2–3 (N.J. Super. Ct. App. Div. Apr. 29, 2008) (noting that seven county clerks gave preferential ballot position to bracketed candidates, four gave preference to non-bracketed candidates, eight drew ballot position regardless of bracketing, and two did not have any bracketing); *supra* Figure 1 (New Brunswick Ward 1, District 1 2017 Democratic Primary Election Ballot: placing gubernatorial candidate beneath another candidate for same office); *supra* Figure 3 (Merchantville Borough June 5, 2018 Official Democratic Primary Election Sample Ballot: allowing freeholder candidates to bump congressional candidates far away from one another and one underneath another); *supra* Figure 5 (Sussex County, Borough of Stanhope 2017 Primary Election Ballot: not providing for bracketing).

326. *See* N.J. STAT. ANN. §§ 19:49-2, 19:23-26.1 (West 2020).

327. *See, e.g.*, N.J. Conservative Party, Inc. v. Farmer, 753 A.2d 192, 192 (N.J. Super. Ct. Ch. Div. 1999); Democratic-Republican Org. of N.J. v. Guadagno, 900 F. Supp. 2d 447, 450 (D.N.J. 2012), *aff'd*, 700 F.3d 130 (3d Cir. 2012).

328. *See Guadagno*, 900 F. Supp. 2d at 459.

it is worth mentioning that the plaintiffs in those cases failed to submit any evidence whatsoever to show how ballot placement resulted in an advantage for certain candidates over others.[329] Thus, there is room for even further distinction of those cases if any evidence of positional bias is actually presented in a challenge to the County Line.

In addition to implicating issues of positional bias, in New Jersey the current County Line and ballot placement system also implicates the First Amendment right of association. Indeed, it is axiomatic that the right of association includes the corresponding right to not associate.[330] By preventing candidates who choose not to associate with joint county candidates (or with candidates running for U.S. Senator or Governor) from being included in the initial ballot draw, New Jersey essentially punishes such candidates and the voters who support them on the basis of their decision not to associate or bracket with other candidates on the ballot. Stated differently, in order for a candidate to be treated similarly on the ballot to others running for the same office, that candidate is forced to associate with candidates for county freeholder (or U.S. Senator or Governor). Thus, by conferring ballot-positioning advantages on some candidate associations, the law disadvantages candidates who wish to exercise their right not to associate with candidates for county freeholder (or U.S. Senator or Governor), let alone candidates who wish to exercise their right not to associate with anyone. In this way, New Jersey burdens the associational rights of candidates under the First Amendment and the equal protection rights of these candidates and their supporters under the Fourteenth Amendment.[331]

The burden on both the associational and equal protection rights can be better understood by bracketing scenarios that do not guarantee a preferential ballot draw for the first column of the ballot. For example, if candidates for county committee, town council, mayor, assembly, state senate, and U.S. Congress all decided to associate with one another and bracket together on the ballot, they would not be guaranteed a spot in the preferential ballot draw.[332] By contrast, if a single candidate for town council bracketed with two county freeholders, that association would allow such a candidate to be included in the preferential ballot draw.[333]

329. *See Democratic-Republican Org.*, 900 F. Supp. 2d at 457–58; *Farmer*, 753 A.2d at 198–200.

330. *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000).

331. *Cf.* Graves v. McElderry, 946 F. Supp. 1569, 1582 (W.D. Okla. 1996) (striking down law that would have afforded the first ballot position to all Democrats in every general election for every office and thereby essentially punishing candidates who did not associate with the Democratic party).

332. *See* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968).

333. *See id.*

As is evident, New Jersey applies arbitrary criteria to which associations of candidates are granted ballot preferences, and which associations are not.

Additional burdens of the current County Line and bracketing system are also evident from the hoops that municipal candidates have to jump through to be included in the preferential ballot draw. Imagine that, during a presidential election cycle, you decide to run for your town council with the goal of making a difference in your community. To avoid the possibility of being relegated to Ballot Siberia, and to cover your bases in light of varying methods of ballot drawing by different county clerks, you would have to find candidates with whom to bracket who are running for President, U.S. Senate, and two county freeholders.[334] Yet you (and any voters supporting you) may not support any of the existing candidates for such offices and cannot reasonably be tasked with finding other candidates to run for such positions just to ensure a chance at a favorable ballot position. This leaves you with a Hobson's choice: align with candidates you do not wish to associate with or forfeit your place in the preferential ballot draw and be placed on the ballot according to the county clerk's discretion. As these examples demonstrate, New Jersey's current County Line and bracketing system certainly burdens associational and equal protections rights.

While all of the above strongly suggests that New Jersey imposes a significant burden on the fundamental right to vote, litigators challenging the law would be wise to further bolster their claims by gathering evidence of a statistical nature and/or relying on the testimony and reports of expert witnesses.[335]

b. Whose Rights Are Burdened

In considering the burden on the fundamental right to vote, it is worth briefly giving some thought to whose rights are burdened. While standing to bring suit is not a major focus of this article, litigators would

334. *See* N.J. STAT. ANN. §§ 19:49-2, 19:23-26.1; Schundler v. Donovan, 872 A.2d 1092, 1094 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005); *Moskowitz*, 243 A.2d at 283.

335. *See generally* McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) (relying on such evidence to invalidate state law); Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977) (same); *Graves*, 946 F. Supp. at 1580 (same); New Alliance Party v. New York Bd. of Elections, 861 F. Supp. 282, 287 (S.D.N.Y. 1994) (rejecting plaintiff's claim where "plaintiff has tendered no empirical evidence in support of its claims [and] has proffered no statistical studies or expert testimony demonstrating the existence of position bias and its effects . . . ."); *cf.* Niv, *supra* note 294 ("An analysis done by the Communications Workers of America reveals that in the past ten years, not a single [state legislative] (i.e., Assembly or state Senate) primary candidate who ran 'on the line' lost. Not a single one.").

also be wise to identify a variety of different plaintiffs, out of an abundance of caution.

In order to demonstrate standing, plaintiffs must show three things: (1) they suffered an injury in fact; (2) a causal connection such that the injury is "fairly traceable" to the defendants; and (3) the injury will likely be "redressed by a favorable decision."[336] In particular, litigators should be mindful of claims that organizations, candidates, or voters have not suffered an injury in fact. These inquiries are fact-specific, and depend on the law at issue and the parties bringing suit; as such, courts have reached varying conclusions as to whether plaintiffs have demonstrated this element.[337] Litigators should also be mindful of another issue: the possible assertion by a defendant in the context of an election that there is no redressable injury because the election has already taken place, and thus the claim is moot. This mootness argument was rejected by a federal district court in Oklahoma in *Graves v. McElderry*.[338] In *Graves*, the court found that the circumstances of that case, as well as the fact that the majority of plaintiffs filed affidavits indicating their intentions to run for office again in the next general election, placed it into an exception to the mootness doctrine, falling under the category of "capable of repetition,

336. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 41–43 (1976)).

337. *Compare* Green Party of Tenn. v. Hargett, 767 F.3d 533, 544–45 (6th Cir. 2014) (minor party plaintiffs satisfied injury in fact standard even though they did not qualify for ballot access in connection with the upcoming election, because they backed independent candidates who had been affected by the ballot order law and because the plaintiffs had been subject to the ballot order law when they qualified for the ballot in a prior election cycle), Libertarian Party v. Buckley, 8 F. Supp. 2d 1244, 1247–48 (D. Colo. 1998) (injury in fact standard satisfied with respect to candidates who "were excluded [by statute] from being placed in the top tier of the ballot" and with respect to the Libertarian Party on behalf of such candidates and those "who will be excluded in the future"), Nelson v. Warner, Docket No. 3:19-0898, 2020 U.S. Dist. LEXIS 46055, at *4–11 (S.D. W. Va. Mar. 17, 2020) (finding injury in fact and rejecting argument that burden was too speculative because even though the complaint alleged only that the primacy effect *might* occur in the next election rather than alleging that it *will* occur, the complaint nevertheless alleged the universal nature of the primacy effect which occurs on every ballot in the state), *with* Jacobson v. Fla. Sec'y, No. 19-14552, 2020 U.S. App. LEXIS 13714, at *14–23 (11th Cir. Apr. 29, 2020) (voters and political party did not establish an injury in fact because evidence of their vote being diluted was based on an "average measure of the primacy effect" and thus was not tied to a particular election). *But cf.* Gary Fineout, *Trump's Name Can Be First on Florida Ballot, Court Says*, POLITICO (Apr. 29, 2020, 5:41 PM), https://www.politico.com/states/florida/story/2020/04/29/trumps-name-can-be-first-on-florida-ballot-court-says-1281167 (quoting Plaintiff's attorney in *Jacobson*, Marc Elias ("While we disagree strongly with the [*Jacobson*] court's ruling that Democrats don't have standing, it is important to note that the court did not dispute that Republicans are given an unfair advantage due to ballot order.") (internal quotation marks omitted)).

338. Graves v. McElderry, 946 F. Supp. 1569, 1576–77 (W.D. Okla. 1996).

yet evading review."[339] The court was able to invoke this exception because the general election was ongoing for too short of a period of time to fully litigate, and because there was a reasonable probability that the plaintiffs would be subject to the same conduct again.[340]

In light of the above, those looking to challenge the County Line would be wise to include as plaintiffs a combination of (1) organizations that promote democratic reforms and/or that seek to elect and support candidates; (2) candidates for office; and (3) voters supporting such candidates. With respect to each of these categories, litigators might include as plaintiffs those who have previously had their preferred candidates excluded from the preferential ballot draw and preferential ballot position, and/or who are running for office in upcoming primary elections who will likewise inevitably be excluded.

2. The State's Interests

There is good reason to believe that New Jersey's current County Line and ballot placement system significantly burdens candidates' and voters' rights. But even if a court only found a minimal burden, the state would still have to demonstrate a legitimate interest in preserving the County Line that would outweigh the burden.[341] It is anticipated that purported state interests might include issues related to election administration costs, avoiding voter confusion, and the associational effects of bracketing.

Arguments regarding administration costs are often made in the context of switching to a rotation system, and thus would not necessarily be applicable.[342] While there are different varieties, a rotation system generally refers to the practice of featuring candidates in different order in different jurisdictions or locations.[343] In doing so, it prevents the same candidate from being listed first on all ballots.[344] In contrast to having to switch to a rotation system, the costs of switching "to a random order ballot is negligible" as the ballots would be the same and would not be more difficult to count.[345] More importantly, such arguments speak more to the remedy, rather than to any particular state interest, and courts can fashion a remedy that is equitable in light of the circumstances after

339. *Id.* at 1577 (citing Murphy v. Hunt, 455 U.S. 478, 482 (1982)).
340. *Id.*
341. *See* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 202–03 (2008) (lead opinion) (citing *Burdick*, 504 U.S. at 439).
342. *See* Miller, *supra* note 320, at 403.
343. *See id.* at 379–81.
344. *See id.*
345. *Id.* at 403.

finding that the current County Line and bracketing system is unconstitutional.[346] Moreover, discriminatory practices, such as those that provide preferential ballot position based on arbitrary criteria, cannot be justified by arguments of administrative efficiency.[347]

The more common purported state interest is in avoiding confusion among voters.[348] One of the arguments that is made to justify a state interest in avoiding voter confusion is that the law or practice is consistent and thus allows voters to know where to expect to find their candidates.[349] However, in this instance, it is unclear what confusion is being avoided through the current bracketing and ballot placement system, and how. To the contrary, the current system leads to varying inconsistent methods being used both across counties and across election cycles, all of which make it difficult to predict where candidates will be located on the ballot. Candidates running for the same office have been featured underneath one another, as well as multiple columns away from one another, with candidates for other offices located in between.[350] A slate of candidates for all offices, except county freeholder, could get relegated to Ballot Siberia, and, by contrast, a slate of only two candidates, both running for county freeholder, would be included in the drawing for preferential ballot position.[351] One would be hard-pressed to find a more confusing system.

Avoiding voter confusion is somewhat related to another anticipated state interest—respecting the rights of candidates who wish to declare a ballot association. However, even in the context of a general election ballot ordering system, the United States Court of Appeals for the Eight Circuit rejected the state interest of making the ballot "as convenient and intelligible as possible for the great majority of voters."[352] Instead the court found that "the state [had] chosen to serve the convenience of those voters who support incumbent and major party candidates at the expense of other voters[,]" and that "[s]uch favoritism burdens the fundamental

346. *See* Jacobson v. Lee, 411 F. Supp. 3d 1249, 1278–79, 1284 (N.D. Fla. 2019), *vacated on other grounds*, Jacobson v. Fla. Sec'y, No. 19-14552, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020).

347. *See* Gould v. Grubb, 14 Cal. 3d 661, 675 (Cal. 1975). *Cf.* Obama for Am. v. Husted, 697 F.3d 423, 433–34 (6th Cir. 2012) (finding that state interest in "smooth election administration" was not sufficient to outweigh unequal burden on voters).

348. *See* Miller, *supra* note 320, at 403.

349. *See* Sangmeister v. Woodard, 565 F.2d 460, 467 (7th Cir. 1977) (acknowledging but rejecting this justification).

350. *See supra* Part II.

351. *See id.*; *see also* Moskowitz v. Grogan, 243 A.2d 280, 283 (N.J. Super. Ct. App. Div. 1968).

352. McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980).

right to vote possessed by supporters of the last-listed candidates . . . ."[353] Similarly, New Jersey relies on arbitrary criteria to benefit candidates receiving the endorsement of the county committee and perhaps some others who happen to be associated with joint county candidates and/or candidates for U.S. Senate or Governor.[354] Moreover, even under a rational basis standard of review, other courts have rejected the notion of avoiding voter confusion as a legitimate state interest, striking down similar ballot order laws.[355]

Furthermore, any alleged state interest in enabling candidates to declare a ballot affiliation would be disingenuous because it is under-inclusive. This is because it is only designed to protect ballot affiliations of certain candidates, but not of others. The current system does not appear to be concerned with voter confusion and/or associational rights if none of the candidates are candidates who are eligible to file a joint petition with the county clerk.[356] Moreover, to the extent that the County Line systemically benefits party-endorsed candidates, courts have held that "[p]olitical patronage is not a legitimate state interest which may be served by a state's decision to classify or discriminate in the manner in which election ballots are configured as to the position of candidates on the ballot."[357] Providing a ballot advantage to party-backed candidates generally does nothing to further any state interest, which is particularly so in states like New Jersey where it cuts against the very purpose of instituting a direct primary in the first place.[358]

It is worth noting that any purported claim to a legitimate state interest in affording preferential ballot treatment is to some degree

353. *Id.*

354. *See* N.J. STAT. ANN. § 19:23-26.1 (West 2020); *see also Moskowitz*, 243 A.2d at 283 (requiring preferential drawing for those candidates bracketed with candidates who file a joint petition with the county clerk).

355. *See, e.g.*, *McLain*, 637 F.2d at 1167 (rejecting the asserted state interest of "making the ballot as convenient and intelligible as possible for the great majority of voters," and holding that North Dakota's statute requiring the first ballot position to be given to candidates for the party that received the most votes in the last congressional election could not even withstand rational basis review); Jacobson v. Lee, 411 F. Supp. 3d 1249, 1282–83 (N.D. Fla. 2019), *vacated on other grounds*, Jacobson v. Fla. Sec'y, No. 19-14552, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020) (finding state's asserted interests would not justify Florida's ballot order law even under rational basis standard).

356. *See* Schundler v. Donovan, 872 A.2d 1092, 1097 (N.J. Super. Ct. App. Div. 2005), *aff'd*, 874 A.2d 506 (2005) (rejecting bracketing for those not affiliated with candidates who filed a joint petition with the county clerk); *Moskowitz*, 243 A.2d at 283.

357. Graves v. McElderry, 946 F. Supp. 1569, 1581 (W.D. Okla. 1996) (citing Rutan v. Republican Party of Ill., 497 U.S. 62 (1990)).

358. *Cf.* Cavanagh v. Morris Cty. Democratic Comm., 297 A.2d 594, 598 (N.J. Super. Ct. Ch. Div. 1972) ("The major reason for changing to the primary election is to prevent political manipulation by certain select members of the party.").

undermined by the fact that, in New Jersey, such a requirement was never imposed by the legislature itself; rather, it originated from the discretion of county clerks, and it was then institutionalized through judicial intervention.[359] Indeed, the Bracketing and Ballot Placement Law does not, on its face, require bracketed candidates to receive preferential ballot treatment.[360]

The Supreme Court's balancing test calls for courts to consider the extent to which it is necessary to burden voters' rights to achieve the purported state interests.[361] To the extent that the state's interest has to do with respecting associational rights, candidates are already permitted to be featured on the ballot with the same slogan, which serves to identify their association with the county committee.[362] Furthermore, because of principles set forth in the *Eu* case, county committees are already free to endorse candidates,[363] and are free to educate the public as to their endorsements. In light of this critical ability to publicize the county party's affiliation with certain candidates, there is no longer any need to feature all of the candidates on the same column of the ballot, let alone to provide them with a ballot advantage over unbracketed candidates. Certainly, the need to have the additional visual alignment of bracketing, beyond the fact that parties and endorsed candidates can associate in all of the above ways, should not be deemed sufficient to outweigh the burdens on the rights of unbracketed candidates and their voters who will not be eligible for the preferential ballot position and may be placed in obscure portions of the ballot where they are harder to find. That it is not necessary to burden voting rights to achieve such state interests is further apparent from the fact that New Jersey is the only state in the nation left that continues to maintain a ballot organized by columns or rows of groupings of candidates in order to advantage party-favored candidates in primary elections.[364]

359. *See Moskowitz*, 243 A.2d at 283 (requiring preferential draw for bracketed candidates).

360. *See* N.J. STAT. ANN. § 19:49-2 (West 2020).

361. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

362. *See* § 19:49-2.

363. *See* Batko v. Sayreville Democratic Org., 860 A.2d 967, 971 (2004) (acknowledging the effect of the *Eu* decision in rendering N.J. STAT. ANN. § 19:34-52's primary endorsement ban unconstitutional).

364. *See* Rubin, *supra* note 294; Niv, *supra* note 294. Although it organizes its primary election ballots by office sought, there is another state, Connecticut, that does display candidates' names in columns and rows, and does provide preferential ballot position to party-backed candidates. *See* CONN. GEN. STAT. § 9-437 (2019). That another state also utilizes a constitutionally suspect ballot order practice in no way diminishes the strength of the claim with respect to the unconstitutionality of New Jersey's bracketing and ballot order system. *Cf.* Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 226 n.17 (1989)

For the foregoing reasons, no state interests are sufficient to outweigh the burdens that New Jersey's current bracketing and ballot system place on the fundamental right to vote. Moreover, because the state interests lack merit, the County Line cannot even withstand rational basis review.[365] As such, there are good grounds to conclude that such system, in its current form, is ripe for a constitutional challenge under the balancing test.

CONCLUSION

While New Jersey politics has long been dominated by party bosses and political machines, the ability to regulate political parties to reduce their undue influence on the political process was significantly diminished in the wake of the Supreme Court's decision in *Eu*. State election laws and court interpretations of such laws further entrench power in the hands of a small number of party elites by enabling a situation where candidates receiving the party endorsement obtain real and practical advantages. Thus, candidates endorsed by the county committee can bracket together on the ballot under the County Line, and are, in turn, afforded a preferential ballot position through a drawing in which other unbracketed candidates cannot participate.

To promote fairness and protect the fundamental right to vote, primary ballot reform is a necessary first step. New Jersey should join virtually all other states in the nation and do away with bracketing and ballot columns for its primary elections. Instead, it should adopt the bubble ballot, which is organized by office sought, and which lists all candidates for a particular office in the order in which their names are drawn from a single drawing. Short of obtaining the necessary reforms through legislation, there are good grounds for a constitutional challenge to the County Line and ballot placement system in New Jersey, which places a burden on fundamental rights guaranteed by the First and Fourteenth Amendments.

Whether change is brought by legislation or by challenge in a judicial forum, the time is ripe to allow voters some measure of control over which candidates earn their party's nomination, rather than have this decision

(striking down California's primary endorsement ban and noting that only two other states, New Jersey and Florida, banned political parties from endorsing candidates in a primary election).

365. *Cf.* McLain v. Meier, 637 F.2d 1159, 1167 (8th Cir. 1980) (striking down ballot order law under rational basis standard); Jacobson v. Lee, 411 F. Supp. 3d 1249, 1282–83 (N.D. Fla. 2019), *vacated on other grounds*, Jacobson v. Fla. Sec'y, No. 19-14552, 2020 U.S. App. LEXIS 13714 (11th Cir. Apr. 29, 2020) (holding state's asserted interests would not justify Florida's ballot order law even under rational basis standard).

be effectively dictated by party elites under a sham procedure that pretends to be democratic simply because voting and ballots are involved. The failure to do away with this system serves as a grave injustice on the people of New Jersey and would continue to erase the important legacy of the twentieth century progressive reformers who instituted direct primary elections. The fight is long overdue to replace the County Line and restore a democratic system that removes disproportionate and concentrated political power away from a handful of corrupt party bosses, and into the hands of the people.