

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-766

TITLE JULIA H. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT,  
Appellant V. REPUBLICAN PARTY OF CONNECTICUT, ET AL.

PLACE Washington, D. C.

DATE October 8, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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JULIA H. TASHJIAN, SECRETARY OF :

STATE OF CONNECTICUT, :

Appellant, :

v. : No. 85-766

REPUBLICAN PARTY OF CONNECTICUT, :

ET AL. :

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Washington, D.C.

Wednesday, October 8, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:52 o'clock a.m.

APPEARANCES:

ELLIOT F. GERSON, ESQ., Special Assistant Attorney

General of Connecticut, Hartford, Connecticut; on  
behalf of the Appellant.

DAVID S. GOLUB, ESQ., Stamford, Connecticut; on behalf  
of the Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in No. 85-766, Julia H. Tashjian, Secretary of State of Connecticut, versus Republican Party of Connecticut, et al.

MR. Gerson, you may proceed when you are ready.

ORAL ARGUMENT OF ELLIOT F. GERSON, ESQ.,  
ON BEHALF OF THE APPELLANT

MR. GERSON: Mr. Chief Justice, and may it please the Court, this case involves a conflict between Section 9-431 of the Connecticut General Statutes which requires that persons be enrolled members of a political party when they vote in that party's primary election, and a rule adopted by the Republican Party of the State of Connecticut that would, contrary to that state law, allow unaffiliated voters to vote in Republican primaries for United States Senate, United States House of Representatives, Governor, and certain other state executive offices. The rule would not, however, apply to other elective offices in the state, including state house and state senate.

The issues in this appeal are whether this law, which sets voter qualifications in a major party state primary is unconstitutional simply because a state



1 party adopts a conflicting rule, and whether the  
2 particular rule adopted by the appellee party in this  
3 case is itself violative of Article 1, Section 2, and  
4 the Seventeenth Amendment to the Constitution.

5 When Connecticut enacted its primary electoral  
6 scheme, which has now been in effect for greater than 30  
7 years, the legislature thoroughly debated the  
8 implications of the various electoral codes that had  
9 already been adopted in the various states.  
10 Connecticut, in fact, was one of the last states to  
11 adopt a primary.

12 The legislature selected a system that  
13 recognized the important role played by major political  
14 parties in the electoral and governmental process. The  
15 legislature sought, while opening up the process to the  
16 party rank and file, to at the same time maintain party  
17 responsibility and accountability by limiting  
18 participation in primary voting to party members.

19 The legislature thus struck a balance between  
20 a convention system and a wide open direct primary.  
21 Simply stated, the law in this case allows a candidate  
22 of a major party in Connecticut who obtains 20 percent  
23 of a roll call vote at a party convention to wage a  
24 primary in which all party members may participate.

25 Connecticut law further provides for automatic

1 and preferential ballot access for major parties. The  
2 primaries in Connecticut are financed by the state and  
3 its towns and administered by the state and its towns,  
4 and enrollment is a very simple process involving  
5 completion of a short form up to noon the last business  
6 day before the primary.

7 The basic point --

8 QUESTION: When you say enrollment, is that  
9 synonymous with registration?

10 MR. GERSON: It is synonymous with  
11 participation in a party primary.

12 QUESTION: It is enrollment for the  
13 convention, not for primary voting?

14 MR. GERSON: It is enrollment for purposes of  
15 the primary.

16 QUESTION: Does it differ in some way from  
17 what in other states would be called registration to  
18 vote in the primary?

19 MR. GERSON: No, it does not. There is  
20 registration to vote as an elector in the general  
21 elections, but enrollment refers to enrollment in a  
22 party which allows one to participate in the party  
23 primary.

24 QUESTION: Oh, I see --

25 QUESTION: You mean the person has to elect a

1 party affiliation at that time in order to vote in the  
2 primary of that party.

3 MR. GERSON: That's correct.

4 QUESTION: You have to say, I am a Republican  
5 and I want to vote in the Republican primary, for  
6 example.

7 MR. GERSON: Justice O'Connor, a simple form  
8 simply requires statement of name and address and a  
9 desire to enroll in that party for purposes of that  
10 primary.

11 QUESTION: So under Connecticut terminology  
12 you register to vote in a general election but you  
13 enroll to vote in the primary?

14 MR. GERSON: Yes, Mr. Chief Justice.  
15 Enrollment is enrollment in a party list which allows  
16 one to vote in a party primary.

17 QUESTION: Do you have to be already  
18 registered to vote in the general election to enroll and  
19 successfully vote in the primary?

20 MR. GERSON: You have to be a registered voter  
21 to enroll in a party primary, Your Honor.

22 QUESTION: If you have -- to register to vote  
23 in the general election, may you say you are a  
24 Republican or a Democrat?

25 MR. GERSON: You may be a Republican or a

1 Democrat or unaffiliated voter.

2 QUESTION: Or an Independent. But your  
3 enrollment for the primary purposes does not change your  
4 designation in your registration.

5 MR. GERSON: When you enroll in a primary you  
6 are then listed as a Republican or as a Democrat or as  
7 an unaffiliated voter for purposes of any other election  
8 unless one elects to disaffiliate from that party, which  
9 is also a very simple process.

10 QUESTION: But if you have registered as a  
11 Republican for the general election, in the last  
12 election, then your registration is still good?

13 MR. GERSON: That is correct, Your Honor.

14 QUESTION: If you choose to vote in the  
15 Democratic primary it doesn't change that registration.

16 MR. GERSON: That is correct, Justice White.

17 The basic points I wish to discuss today may  
18 be simply stated. First, that this case does not  
19 involve the merely internal affairs of a private  
20 association, but rather the public electoral functions  
21 of a major political party, that the state has a real  
22 and substantial interest in assuring the accountability  
23 and responsibility of the major political parties in  
24 view of the party's major governmental and electoral  
25 roles, that the decision of the Court of Appeals and



1 particularly the analysis and the test that it employs  
2 have profound implications for the electoral codes of  
3 Connecticut and all the other states, and we also wish  
4 to demonstrate in the particular context of the rule  
5 adopted in this state the significant administrative  
6 burdens that would be imposed on Connecticut's electoral  
7 officials if this rule were in fact implemented.

8 Fourth, that there is no real showing of any  
9 injury to the constitutional right of appellees that  
10 this statute has caused. The state is merely regulating  
11 appellees' interaction with people who do not want to  
12 join them in membership. And finally, we will argue  
13 that the rule itself in this case is unconstitutional as  
14 violative of Article 1, Section 2 and the Seventeenth  
15 Amendment of the Constitution.

16 First, we wish to stress that this case does  
17 ~~not involve the merely~~ internal affairs of a private  
18 association or a private debating society, but rather  
19 the public electoral function of a major political  
20 party. Major political parties dominate the electoral  
21 process, dominate the government. As a practical  
22 matter, the choices that voters will have as to who will  
23 govern them are made when the major parties nominate  
24 their candidates.

25 Accordingly, people have a right to say

1 through their elected representatives how those people  
2 are selected and what electoral system best promotes  
3 governmental goals.

4 QUESTION: What if this weren't a major  
5 party. Are you arguing that we should regard this  
6 provision as different in its application to major and  
7 minor parties?

8 MR. GERSON: Yes, Justice Scalia, this case  
9 would be a different case were a minor party or  
10 petitioning party involved.

11 QUESTION: Now, does the law apply  
12 equivalently to minor parties?

13 MR. GERSON: No, Your Honor, different laws  
14 apply to minor parties and petitioning parties.

15 QUESTION: What is the test of minor?

16 MR. GERSON: The test of a minor party is  
17 whether or not the candidate in a previous election has  
18 received 1 percent of the vote for that office. A minor  
19 party --

20 QUESTION: That is not very major.

21 MR. GERSON: That's correct.

22 CHIEF JUSTICE REHNQUIST: We will resume there  
23 at 1:00 o'clock, Mr. Gerson.

24 MR. GERSON: Thank you.

25 (Whereupon, at 12:00 o'clock p.m., the Court

1 was recessed, to reconvene at 1:00 o'clock p.m. of the  
2 same day.)  
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1 AFTERNOON SESSION

2 (12:59 P.M.)

3 CHIEF JUSTICE REHNQUIST: You may resume, Mr.  
4 Gerson. -

5 ORAL ARGUMENT OF ELLIOT F. GERSON, ESQ.,  
6 ON BEHALF OF THE APPELLANT - RESUMED

7 MR. GERSON: Mr. Chief Justice, just to  
8 further elaborate on Justice Scalia's point about minor  
9 parties, as I stated, a party qualifies as a minor party  
10 by receiving 1 percent of the vote for an office, but  
11 remains a minor party generally until that party  
12 receives 20 percent of the vote in a gubernatorial  
13 election. The state in no way regulates the nominating  
14 process of those minor parties.

15 As I was indicating before the recess, this  
16 case does not involve the merely internal affairs of a  
17 private association but the public electoral functions  
18 of major political parties. When a major party is  
19 participating in a state primary election it is  
20 performing a function that the state has delegated to  
21 it, and the state then adopts that party's choice by  
22 automatically and preferentially placing the nominee of  
23 that party on the general election ballot.

24 The duties assigned to major parties do not  
25 become matters of private law simply because they are



1 performed by a political party. In addition to the —

2 QUESTION: Mr. Gerson, do you concede that a  
3 political party does have a protected First Amendment  
4 right to define its own membership?

5 MR. GERSON: Justice O'Connor, it does have  
6 such a right to define its own membership, but  
7 membership in a political party is not equivalent to  
8 qualification for voting in a party primary. What is  
9 involved in this case is the state determination about  
10 who may participate in a state election. Membership  
11 relates to the internal affairs of a political party.

12 QUESTION: So you reject the concept that  
13 there is any First Amendment right at stake here at all?

14 MR. GERSON: Your Honor, a party certainly has  
15 First Amendment associational rights with respect to its  
16 internal affairs. The party is free to determine  
17 whatever ideology it chooses, whatever platform it  
18 desires, but in this particular case the associational  
19 rights of the party are not implemented. The burden on  
20 the party here is at most an incidental one. They are  
21 desiring to affiliate with people who by their own  
22 voluntary choice are indicating they do not want to be  
23 members of that party, so the membership question in  
24 this case is not one that directly implicates those  
25 rights.

1 QUESTION: Well, but I guess the party is  
2 taking the position that they want to have the votes  
3 counted of people who are interested enough to at least  
4 cast their vote with the party in the selection of  
5 candidates. Is that a right protected by the First  
6 Amendment, do you suppose?

7 MR. GERSON: No, Justice O'Connor, I don't  
8 think it is. To the degree it is, it certainly cannot  
9 supplant the state's major interests in regulating the  
10 electoral process. The state, aside from its electoral  
11 responsibilities, has a substantial interest in ensuring  
12 the accountability and responsibility of major political  
13 parties in light of their elective role. The state --

14 QUESTION: Well, if the Court were to  
15 determine there is some First Amendment right to be  
16 protected here, what standard or test do you think we  
17 would have to employ?

18 MR. GERSON: Justice O'Connor, in the context  
19 of a challenge to an election statute, a state statute  
20 such as this, the appropriate test would be that the  
21 state may adopt a neutral, nondiscriminatory  
22 restriction, and such a restriction is constitutional as  
23 long as the state has a reasonable regulatory interest  
24 with the burden being on the challenger.

25 The test adopted by the Court of Appeals in

1 the context of associational interests of private  
2 associations with their own membership really has no  
3 applicability to the public electoral function in this  
4 case. If it did, it would invalidate many election  
5 codes across the country.

6 The test is implicit in cases of this Court  
7 such as Anderson against Celebreeze where this Court  
8 recognized that election codes inevitably affect the  
9 associational rights of political parties or candidates  
10 or voters to some degree, but nonetheless subjected the  
11 state statute to a much lower level of scrutiny,  
12 indicating that the state's regulatory interests are  
13 generally sufficient to override such associational  
14 claims.

15 The issue in this case, unlike the way in  
16 which the Court of Appeals framed it, which was  
17 asserting that the state was arguing that closed  
18 primaries are to be preferred to open primaries, is not  
19 that at all, but it is rather who makes the choice as to  
20 whether a state's primary electoral system will be an  
21 open system or a closed system or a blanket system or  
22 any other kind of system.

23 That decision has implications for the public  
24 and for the polity at large. It is a decision that does  
25 not go only to the internal affairs of a political

1 party. Indeed, the appellees concede, and in the Court  
2 of Appeals the Democratic Party of Connecticut stated in  
3 its brief that if the Republican Party in this case  
4 adopted this rule, that the Democratic Party would  
5 necessarily follow suit.

6 The reasons that date back to Charles Evans  
7 Hughes' original recommendation that states adopt closed  
8 primaries, reflected also in the American Political  
9 Science Association Committee on Political Parties in  
10 1950 advocated closed primaries, was not because  
11 those -- that -- Charles Evans Hughes or the APSA  
12 believed that closed primaries improved the internal  
13 operations of a political party, but rather that the  
14 implications of a closed system affect the state at  
15 large, and the state has a legitimate if not compelling  
16 interest in determining what kind of election scheme  
17 there is going to be.

18 QUESTION: What benefits, Mr. Gerson, did  
19 Charles Evans Hughes and the American Political Science  
20 Association think flowed from the closed primary?

21 MR. GERSON: A number of them, Chief Justice  
22 Rehnquist. They believed that a closed primary is more  
23 compatible with a responsible party system, that a  
24 closed primary retains membership, the incentive for  
25 membership, and therefore is very important in leading



1 to responsible and accountable elected officials.

2 Without party membership, there is a much  
3 looser link between elected officials and voters.  
4 Again, though, it is important to state, and the  
5 legislative history in 1955 as well as in 1985 reflect  
6 the judgments of Connecticut legislators that the basic  
7 decision as to how the candidates of major parties are  
8 to be selected have implications far beyond that narrow  
9 party.

10 QUESTION: But in your general election you  
11 certainly want the votes of the people not unless they  
12 registered in the primary, so anyone who becomes an  
13 elected official is almost surely going to become the  
14 elected official by virtue of votes other than from  
15 members of the party.

16 MR. GERSON: Absolutely, Justice Rehnquist,  
17 but then again, given the role of major parties in our  
18 states, there is an important interest in the state  
19 ensuring that a candidate of a political party is the  
20 representative of that party for a citizen or for a  
21 voter to be able to go to that party about the  
22 accountability of that particular elected official. The  
23 state has a legitimate interest in making these kinds of  
24 determinations.

25 We are not in any way indicating that this is

1 a decision that is appropriate for all states. Other  
2 states in light of their own interests may determine for  
3 different reasons that an open primary is preferable or  
4 a blanket primary is preferable, but the decisions have  
5 implications well beyond a party, and accordingly that  
6 decision should be made by a body that is accountable to  
7 all the people in a state and not a decision that is  
8 just made by a political party.

9 QUESTION: When you -- how do Independents get  
10 on the ballot in Connecticut, or do they?

11 MR. GERSON: An Independent candidate can get  
12 on the ballot by --

13 QUESTION: Petitioning?

14 MR. GERSON: -- petitioning.

15 QUESTION: And he doesn't need to belong to a  
16 political party?

17 MR. GERSON: That is correct, Your Honor.

18 QUESTION: He can get on the ballot and be  
19 voted for or against without ever being -- belonging to  
20 a party?

21 MR. GERSON: That is correct, Justice White.  
22 Again, the state is not attempting in any way to  
23 regulate the nominating process of Independent  
24 candidates, petitioning candidates, or minor parties.  
25 It is because of the fundamental public electoral role

1 and the important governmental role played by the major  
2 parties that the state has a legitimate interest if not  
3 a compelling interest in determining how that system  
4 shall operate, beyond the very decision as to what kind  
5 of system should be in place. If the decision as to  
6 what kind of elective system there is going to be is  
7 left to the political parties, the implications for the  
8 electoral administration in all the states are profound,  
9 which is undoubtedly one reason --

10 QUESTION: Mr. Gerson, I am still concerned  
11 about the extent to which there may be a First Amendment  
12 interest. In the Democratic Party case I guess the  
13 Court held that the inclusion of people unaffiliated  
14 with a political party may seriously distort its  
15 collective decisions and therefore it has a First  
16 Amendment associational right at stake.

17 Now, isn't the converse true as well?

18 MR. GERSON: No, Justice O'Connor, I don't  
19 believe it is. The Democratic Party case involved the  
20 extraterritorial application of a state law on a  
21 national party. There was never any question in that  
22 case whether the State of Wisconsin could regulate its  
23 own state parties and its own state elective system, and  
24 similarly, that case relied on the Cousins case, where  
25 again this Court applied strict scrutiny in the context

1 of an intrusion into the internal affairs of a political  
2 party. That is not what is involved in this case.

3 QUESTION: Well, certainly there is language  
4 in the opinion to the effect that Democratic Party  
5 implicitly assumes that freedom of association creates a  
6 presumption that it may participate in deciding who  
7 votes in a primary.

8 MR. GERSON: Justice O'Connor, that is  
9 correct, and I think it is also one reason why this  
10 Court has repeatedly recognized in election cases that  
11 any election code is going to inevitably affect the  
12 associational interests or at least the asserted  
13 associational interests of a political party, and if the  
14 opinion of the Court of Appeals were adopted by this  
15 Court, political parties would essentially have a veto  
16 over matters that are now the sovereign responsibility  
17 of the state with respect to election regulation.

18 The State of New York in its amicus brief on  
19 support of 16 states with radically differing kinds of  
20 primary election systems, closed primary and blanket,  
21 indicated that the Court of Appeals decision had the  
22 prospect of undoing 100 years of election law reform.  
23 Under the logic of that opinion the political primary,  
24 just as in this case, it is arguing that it is somehow  
25 opening the process, could just as easily close that



1 process down.

2 There would be nothing to stop the Republican  
3 Party or the Democratic Party or any other major party  
4 from saying to the State of Connecticut, we do not want  
5 a primary at all, we want simply a convention. Or we do  
6 not want a 20 percent rule in the challenge primary, we  
7 want --

8 QUESTION: Well, Mr. Gerson, I think perhaps  
9 your opponents might argue that if the parties were to  
10 take that drastic a position there might be much more  
11 serious administrative or regulatory consequences to the  
12 state. Here it was either the Second Circuit or the  
13 District Judge found that the administrative burden on  
14 the state from administering the kind of a primary that  
15 the Republican Party -- would not be great.

16 Do you question that finding?

17 MR. GERSON: The only thing in the record that  
18 relates to the administrative burden is the comment  
19 by -- in the legislature by the elections attorney for  
20 the state that this system would be workable. There is  
21 nothing to indicate in any way that the system would not  
22 have enormous problems or be difficult or would be  
23 costly. I mean, counting ballots by hand would be  
24 workable.

25 The point, though, is, regardless of the

1 administrative burdens imposed by this particular rule,  
2 if parties could dictate what the qualifications are for  
3 voting in primaries elections, electoral regulation  
4 would become characterized as a form of regulation that  
5 a state engages in of perennial instability. Every  
6 party, every election could adopt different  
7 determinations as to who may vote in its primaries.

8 It would be one thing, although the  
9 administrative burden would still be enormous, if what  
10 was involved really related only to the internal affairs  
11 of that political party, but when, as here, it goes to  
12 how the basic elective system is going to operate, which  
13 has implications well beyond the political party, it  
14 seems to us that such a burden clearly outweighs any  
15 putative associational interests in this case.

16 And if I may just explore what the  
17 associational interests are in this case, the Court of  
18 Appeals initially indicates that the burden is indirect  
19 and that it affects the rights of the Republican Party  
20 to some limited extent, yet somehow transforms that  
21 indirect limited burden into a massive intrusion into  
22 their rights.

23 Yet we would submit that by any reasonable  
24 standard the burden here is really no more than a  
25 minimal inconvenience to the party that is well within

1 the state's Article 1, Section 4 authority to regulate  
2 the time, place, and manner of elections. The fact that  
3 voters take the very simple step of enrolling a day  
4 before hardly leaves the Republican Party of Connecticut  
5 powerless to attract voters to its cause, and we also  
6 have a difficult time understanding the nature of the  
7 interest.

8 Absent a willingness to profess an interest in  
9 affiliation, where is the right? Without a commonality  
10 of interest, where is the association? This statute  
11 does no more than regulate the parties' interaction with  
12 people who do not want to be members of the party for  
13 purposes of voting. The state is not preventing  
14 unaffiliated voters from voting. There is no  
15 disenfranchisement involved in this --

16 QUESTION: But by hypothesis don't we have to  
17 assume that some people are going to vote in the open  
18 primary that didn't vote in the closed primary?  
19 Otherwise it is just much ado about nothing.

20 MR. GERSON: That's correct, Justice  
21 Rehnquist, but we would have to say it is just by  
22 hypothesis. There is no indication in this record that  
23 there are unaffiliated voters who are clamoring for  
24 participation in the Republican Parties in Connecticut.  
25 Quite the contrary.

1 QUESTION: Well, the Republican Party thinks  
2 it is worth a lawsuit anyway.

3 MR. GERSON: Absolutely, Justice Scalia.

4 QUESTION: I mean, you have to believe that  
5 they think it is important.

6 MR. GERSON: The state in no way is  
7 questioning the sincerity of the Republican Party's  
8 desire to open up its primaries. The state is merely  
9 asserting that the decision as to what kind of primary  
10 elective scheme a state is going to adopt is a decision  
11 that must be left to the elected representatives of all  
12 the people of the state, and not just the members of a  
13 particular political faction in the state.

14 The implications --

15 QUESTION: Well, Mr. Gerson, it seems to me  
16 that you denigrate unnecessarily, perhaps, in your  
17 argument the strong interest that a political party may  
18 have in allowing independents in this case to vote in  
19 the primary because they are sufficiently aligned with  
20 the party to permit them to play a role in the party's  
21 decision-making process, and it would seem to me that  
22 that is an arguable position for the party to take.

23 MR. GERSON: Justice O'Connor --

24 QUESTION: Now, there may be countervailing  
25 state purposes here that can outweigh it, but I just



1 wonder whether you aren't giving too little credence to  
2 the interests at stake.

3 MR. GERSON: Justice O'Connor, again, we agree  
4 that the Republican Party sincerely and conscientiously  
5 is arguing its position that it desires this affiliation  
6 that it is now not allowed by the state party, by the  
7 state law. Nonetheless, we would argue that there is  
8 nothing preventing the Republican Party of Connecticut  
9 from involving unaffiliated voters in many of its  
10 internal affairs, taking their --

11 QUESTION: Well, but they want them to be  
12 involved in the most important function of all, which is  
13 nominating candidates.

14 MR. GERSON: Justice O'Connor, precisely, but  
15 that most important function of all is a state function  
16 performed by a major political party. It is not a  
17 matter that goes just to the internal affairs of that  
18 political party.

19 Mr. Chief Justice, I would like to reserve the  
20 rest of my time.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
22 Gerson.

23 We will hear now from you, Mr. Golub.

24 ORAL ARGUMENT OF DAVID S. GOLUB, ESQ.,

25 ON BEHALF OF THE APPELLEES

1 MR. GOLUB: Mr. Chief Justice, and may it  
2 please the Court, there are two fundamental  
3 disagreements between the parties on the issues in this  
4 lawsuit, and one is involved with the questions that  
5 Justice O'Connor was just asking Mr. Gerson about the  
6 nature of the freedom of association issue in this  
7 case. And the state in its argument today has  
8 characterized it as one based on membership, that it is  
9 an attempt to force people who don't want to become  
10 members to participate without assuming the mantle of  
11 membership.

12 That is not the freedom of association issue  
13 that we rely on solely. It is true we want them to  
14 participate. It is true that the Republican Party has  
15 adopted this rule in the ultimate hope that independent  
16 voters will become members of the party in the future.  
17 But the reason the rule is adopted goes beyond that.  
18 The reason the rule was adopted is because whether or  
19 not independent voters become members of the party,  
20 their numbers are so great in the State of Connecticut  
21 they outnumber the number of Republicans significantly.  
22 The present numbers are 700,000 Democrats, 600,000  
23 Independents, and 475,000 Republicans.

24 Whether or not those independent voters become  
25 members of the party, their participation, whether

1 through a formal affiliation or an informal affiliation  
2 in party affairs, their participation in supporting  
3 party candidates at an early stage, their participation  
4 in helping the party select candidates with enough  
5 popular support to win general elections by getting  
6 other independent support or even support from other  
7 groups, those kinds of feelings were what prompted the  
8 Republican Party to adopt this rule.

9 QUESTION: Mr. Golub, you don't contest the --  
10 indeed, you welcome the action of the State of  
11 Connecticut in giving political parties a prominent role  
12 in their electoral process?

13 MR. GOLUB: That's right.

14 QUESTION: I mean, political parties are  
15 folded into the electoral process. I mean, conceivably  
16 they could run it without political parties.

17 MR. GOLUB: Yes.

18 QUESTION: Now, isn't it reasonable for the  
19 state once it has let political parties in to assure  
20 that they are functioning as political parties?

21 MR. GOLUB: Yes.

22 QUESTION: What if the Republican Party  
23 decided that the way it wanted to have its candidates  
24 nominated to be sure of winning in a state that is  
25 overwhelmingly Democratic or independent is simply to

1 endorse each year whatever candidate the Democratic  
2 Party endorses? All right? And the Republican Party by  
3 convention says we will endorse whatever party --  
4 whatever candidate the Democratic Party endorses. Would  
5 the state have to accept that?

6 MR. GOLUB: Well, I think --

7 QUESTION: Doesn't that make the whole party  
8 system a charade?

9 MR. GOLUB: I think that is the critical  
10 question in this case, because whether you take this  
11 case at the primary level, whether you take it at the  
12 convention level, whether you take it back to the town  
13 caucus level where no convention is necessary, the issue  
14 is what degree of involvement can the state have in the  
15 party's determination of the philosophy of its  
16 candidates.

17 QUESTION: And what I am suggesting is, the  
18 only involvement it is asserting here is, all we want to  
19 be sure of is that this candidate is really the party's  
20 candidate, because we are running a party system, and  
21 what you, Republican Party, are telling us is that you  
22 don't want a party's candidate, you want whatever  
23 candidate the independent voters out there want because  
24 basically you want to win.

25 Now, the state is saying that is not a party



1 candidate. The only thing we are imposing upon you is  
2 that you be a party.

3 MR. GOLUB: Let me respond directly to that,  
4 because I think the state's authority to act is limited  
5 to ensuring a fair nominating system and a  
6 representative nominating system, and I say those two  
7 words because they are a little different. We have to  
8 back in history to how the state first developed the  
9 authority to even insist upon primaries. Before the  
10 1900s it is well established there were no primaries.  
11 But the reason that states were allowed to say you must  
12 have a primary, whether it is a direct primary or a  
13 challenge primary, was because party bosses were  
14 preventing a fair and representative decision by the  
15 party and because corruption and fraud was preventing  
16 it.

17 QUESTION: My first hypothetical, which you  
18 rejected, was fair and representative. All of the  
19 Republican Party unanimously in their convention say, we  
20 will nominate every year whatever candidate the  
21 Democratic Party nominates. You tell me that the State  
22 of Connecticut has to accept that and run its primary  
23 system on that basis?

24 MR. GOLUB: I do, and I say that knowing that  
25 it involves what seems on its face to be an incredible

1 position, and I do that because the party's right to  
2 pick its candidate, pick its candidates, and the method  
3 of picking its candidates has to be paramount to the  
4 state's rights to insist that a candidate reflect a  
5 certain philosophy, and taking that a step further, if  
6 the --

7 QUESTION: It isn't a matter of reflecting a  
8 philosophy. It is just a matter of insisting that the  
9 party not abdicate, that the party function as a party.

10 MR. GOLUB: If the party wants to abdicate, if  
11 the party chooses to put up no nominee, if the party  
12 chooses, as the party does in New York from time to  
13 time --

14 QUESTION: Then it should leave the primary  
15 system.

16 MR. GOLUB: I am sorry?

17 QUESTION: Then it should leave the primary  
18 system. The State of Connecticut is saying our primary  
19 system is for parties and we want candidates who are  
20 nominated by the party. If they don't want to nominate  
21 anyone, if they want to leave it up to another party or  
22 to independents, well, they can still participate in the  
23 election but not as a party.

24 MR. GOLUB: If the party in the State of -- if  
25 any party in -- if a major party in the State of

1 Connecticut said at its convention, we unanimously  
2 endorse the Democratic candidate, the state would have  
3 no requirement of insisting upon a primary.

4 QUESTION: That is not my hypothetical. My  
5 hypothetical is, we don't know who the Democratic  
6 candidate is going to be, but we will beforehand  
7 announce that we will endorse whoever the Democratic  
8 Party endorses.

9 MR. GOLUB: If the party decides that that is  
10 the best way for it to get into power, if the party  
11 decides that that is the best way for it to attain its  
12 goals, the party may be 100 percent wrong, the party may  
13 be adopting a self-destructive course, but it is not for  
14 the state to come and say we won't let you do that.

15 QUESTION: I am not concerned about its being  
16 self-destructive. I am concerned about its being  
17 destructive of the whole purpose of a party primary  
18 system, which is what the state is trying to run.

19 MR. GOLUB: What the party has done in this  
20 case is open up its system to make it more  
21 representative. We recognize that the party is limited  
22 by the state's authority to ensure a representative  
23 nominating process or a fair and orderly representing --  
24 nominating process. And in a sense what your question  
25 really suggests is, supposing the party adopted a rule

1 that eliminated a representative quality to its  
2 candidate selection process.

3 QUESTION: No, this is thoroughly  
4 representative. All of the party members thoroughly  
5 vote that we want to abdicate, basically, we will  
6 endorse whoever the Democrats endorse.

7 MR. GOLUB: Well, our position --

8 QUESTION: All I am saying is that maybe  
9 Connecticut has a right to ensure that it be, Number  
10 One, fair, Number Two, representative, and Number Three,  
11 a genuine party choice and not an abdication by the  
12 party.

13 MR. GOLUB: Well, I certainly agree with  
14 Number One, fair, and Number Two, representative, and I  
15 respectfully have to maintain the position that if the  
16 party wants to abdicate or make a mistake, that is why  
17 we have voluntary private parties, so that other parties  
18 can grow up, so that other parties will develop, so that  
19 a majority of the people in the Republican Party who  
20 agree or don't agree with that particular course have  
21 the option of saying, okay, we will do that --

22 QUESTION: Well, Mr. Gerson, some of your  
23 answers suggest to me that one might fairly say that you  
24 are putting the cart before the horse. To me at any  
25 rate the horse would appear to be the general election



1 where the state provides for the election of people who  
2 are going to hold public office in Connecticut, and the  
3 parties are more or less a means to that end.

4 But some of your answers give me the  
5 impression that you think that these kind of election  
6 functions are kind of subordinate to the functioning of  
7 the party.

8 MR. GOLUB: Well, I think that that is the  
9 second disagreement between the parties in this case,  
10 parties with a small "p." And I think that what the  
11 state has asserted within the rubric of "public  
12 electoral function" is a right to impact not only on the  
13 fairness, the orderliness of the primary procedure, but  
14 on the decisions as to who can participate in the  
15 primary procedure.

16 We agree that Article 1, Section 4 confers  
17 upon the state a right to regulate elections, and I  
18 think we also agree -- this has not been articulated  
19 exactly this way, but that the granting of ballot access  
20 to the Republican Party gives the state a right to go  
21 beyond that back a step to before the general ballot is  
22 implemented to the nominating system.

23 We don't agree that the state can do more than  
24 ensure a fair and representative party decision, and to  
25 that extent I am putting the cart before the horse. I

1 wouldn't put it that way, of course.

2 QUESTION: You wouldn't agree that you were,  
3 but --

4 MR. GOLUB: Yes.

5 QUESTION: Do you agree --

6 MR. GOLUB: I put the state's cart before my  
7 horse, or whatever it is.

8 (General laughter.)

9 QUESTION: Mr. Gerson, do you agree that the  
10 primary is an integral part of the election?

11 MR. GOLUB: I agree that it is, and I agree  
12 that --

13 QUESTION: Well, then, the state has the same  
14 right over that that it has over the general election.

15 MR. GOLUB: I don't agree with that.

16 QUESTION: Why not?

17 MR. GOLUB: I think we agree that for the  
18 purposes of state action determinations the primary is  
19 such an important -- can be such an important part of a  
20 general election that the protections of the Fourteenth  
21 or Fifteenth Amendments apply, but we don't think that  
22 the state can bootstrap its way into saying, we have the  
23 right to regulate you, we force you or we require you to  
24 participate in a primary, and now that we require you to  
25 participate in a primary, since that is a "public

1 electoral function," we can now insist upon your  
2 participating substantively in the primary with the  
3 members or the voters that we think are appropriate.

4 I don't think anybody would say that the state  
5 could regulate the people who attend the convention or  
6 the people who attend the town committee caucuses.

7 QUESTION: Because the convention is not a  
8 primary.

9 MR. GOLUB: That's right, and we don't contend  
10 it is, but it is part of the same nominating system  
11 that --

12 QUESTION: What is there in a state primary  
13 that the state cannot regulate?

14 MR. GOLUB: The state cannot regulate who may  
15 participate in the primary as the party wishes.

16 QUESTION: May I ask if under your view the  
17 Republicans could invite 17-year-olds to vote?

18 MR. GOLUB: No.

19 QUESTION: Why not?

20 MR. GOLUB: I think that the state has a right  
21 to establish minimum voter qualifications, which have  
22 traditionally included age and residency and other  
23 similar kinds of things.

24 QUESTION: But if the theory, as Judge Kaufman  
25 explained it, part of it was to get the ideology of the

1 party reaching out and getting other views that's  
2 necessary to vote to get, I don't know why that theory  
3 wouldn't apply to aliens and other unregistered voters.

4 MR. GOLUB: Well, I don't go as far as the  
5 Second Circuit opinion went in that regard.

6 QUESTION: You don't go -- anyway, you don't  
7 go that far.

8 MR. GOLUB: The rationale that I would use,  
9 and I think it is an important rationale for the  
10 argument I am advancing, is, going back to the  
11 representativeness of the decision, what the state has  
12 the right to insist upon is that whatever decision the  
13 party ultimately makes through its primary is a  
14 representative decision of the wishes of its members.  
15 If the members say, only members can participate, at  
16 that point the vote in the primary will be  
17 representative based upon the votes of the members in  
18 the primary.

19 QUESTION: Well, Mr. Golub, then you would say  
20 in a state like Wisconsin where the state mandates an  
21 open primary the Republican Party could come up and say,  
22 no, we want a closed primary, and the state could not  
23 impose an open primary on that party.

24 MR. GOLUB: I think that is a difficult  
25 question.



1 QUESTION: I do, too.

2 MR. GOLUB: Fortunately, it is not posed in  
3 this case. But I have an answer to it.

4 QUESTION: How does it differ from the  
5 question that is posed in this case?

6 MR. GOLUB: It differs in a fundamental  
7 respect. Our rule is supportive of opening up the  
8 system of participatory democracy. If the state --

9 QUESTION: What is so good about that, other  
10 than its appeal?

11 (General laughter.)

12 MR. GOLUB: I have a flag in my pocket to  
13 wave.

14 We think the state can make determinations  
15 about what is necessary to ensure the representative  
16 nature of its parties' decisions, and if a state such as  
17 Wisconsin said, in order to ensure a representative  
18 decision we have to have open primaries, we think that  
19 could be upheld as expanding rather than restricting the  
20 party functions.

21 There is no case in this Court that has ever  
22 held that a state has the authority to restrict a  
23 party's attempt to expand associations, memberships, or  
24 participation in its processes. That includes the white  
25 primary cases, which of course dealt with the parties'

1 attempts to exclude voters, in violation of the  
2 Fourteenth or Fifteenth Amendment. That includes the  
3 disaffiliation cases, Rosario and Cusper, which dealt  
4 with an individual's attempt outside the party to force  
5 his way into the party.

6 QUESTION: Mr. Golub, if the state law said to  
7 each party, well, you may have an open primary for your  
8 party, or you may invite independents to vote and they  
9 may vote in your primary, but provided they do their  
10 enrolling the day before?

11 MR. GOLUB: Well, that is, to an extent, part  
12 of what is involved in this case.

13 QUESTION: I know.

14 MR. GOLUB: I want to clarify one answer that  
15 was given --

16 QUESTION: What's wrong with that?

17 MR. GOLUB: What we think is wrong with it is,  
18 it requires independent voters to make a public  
19 affiliation. In the context --

20 QUESTION: Not any more. They don't have  
21 to -- they don't have to do anything more than what they  
22 do on a -- what the party wants them to do on Election  
23 Day.

24 MR. GOLUB: No --

25 QUESTION: I guess they enroll.

1           MR. GOLUB: The answer that was given to you  
2 earlier on in this argument I don't think went far  
3 enough. Let me explain to you my understanding of the  
4 relevant statute. Statute 956 of the Connecticut  
5 General Statute says a person may enroll in a party, an  
6 unaffiliated voter may enroll in a party at any time.  
7 If he enrolls in a primary up until the day before --  
8 noon before the day of the -- the day of a primary --  
9 I'm sorry, if he enrolls in a party up until noon before  
10 the day of a primary he may in addition to all of the  
11 other accoutrements of party membership vote in the  
12 primary.

13           QUESTION: Yes.

14           MR. GOLUB: But he is a full member of the  
15 party.

16           QUESTION: That isn't my hypothetical. I say  
17 he doesn't -- they say independents may stay  
18 independents and vote in the Republican primary if they  
19 just enroll, just sign up the day before and say, I am  
20 going to vote in the primary.

21           MR. GOLUB: Well, we think that would be a  
22 least restrictive alternative that might be applicable  
23 if the Court finds that the state has other compelling  
24 interests. We say that --

25           QUESTION: Well, I didn't ask -- do you have a

1 solid answer for that or not?

2 MR. GOLUB: Yes. I am sorry. I didn't mean  
3 to avoid the question. Let me try --

4 QUESTION: Well, would it be all right? Would  
5 it be all right for the state to say, go ahead and vote  
6 in the Republican primary as long as you just enroll the  
7 day before? You stay independent but you just let the  
8 party know or let us know also that you are going to  
9 vote.

10 MR. GOLUB: Well, I have trouble with the word  
11 "enrolling" in that context. If it is only  
12 announcing --

13 QUESTION: Use any other word you want, then.

14 MR. GOLUB: Okay. If it is only announcing an  
15 intention to vote --

16 QUESTION: Yes.

17 MR. GOLUB: -- which could be for  
18 administrative reasons, to know how many machines to  
19 have --

20 QUESTION: Yes.

21 MR. GOLUB: -- I have no problem with that.

22 QUESTION: You have no problems with that  
23 then?

24 MR. GOLUB: The problem in Connecticut is that  
25 there is a traditionally historical --



1 QUESTION: So the real -- the real problem  
2 then is what?

3 MR. GOLUB: The problem is that the state is  
4 insisting on a public act of affiliation, leaving the  
5 independent status, joining the Republican Party as a  
6 condition of this association.

7 QUESTION: Yes, but he isn't -- in my example  
8 they are not insisting on that.

9 MR. GOLUB: Yes, I am sorry, but in the  
10 example --

11 QUESTION: Yes, all right.

12 MR. GOLUB: I mean, I think your example, if  
13 it was necessary to administer the open primary --

14 QUESTION: Well, there's a law that says, go  
15 ahead and vote, but you have to sign up to do it.

16 MR. GOLUB: Yes, as long as the state showed  
17 it was necessary for the administration of the primary I  
18 think that could be acceptable. What is not acceptable  
19 is forcing voters to give up their independent status,  
20 because they won't do it, because they haven't done it,  
21 whether it is because they are afraid of --

22 QUESTION: Mr. Golub, all they have to do is  
23 publicly enroll. But even under your system wouldn't  
24 they have to publicly ask for a Republican ballot? And  
25 there are watchers at the polls. They have to identify

1 themselves as participating in the primary even under  
2 what you want.

3 MR. GOLUB: That's correct.

4 QUESTION: It's the difference between  
5 publicly doing it that way and publicly signing an  
6 enrollment form the day before.

7 MR. GOLUB: I think that there is a major  
8 difference philosophically between affiliating with a  
9 party formally and going into a polling booth and  
10 saying, I need a Republican ballot, and I think that  
11 that is a difference not only -- I mean, it is -- I  
12 mean, there are --

13 QUESTION: (Inaudible.)

14 (General laughter.)

15 MR. GOLUB: I, of course, am a registered  
16 Democrat, so --

17 (General laughter.)

18 QUESTION: The more you describe the  
19 difference, the less I like it, because you are saying  
20 that is it, people who really have no affiliation with  
21 the Republican Party at all, in fact, they are deep in  
22 their hearts Democrats, they can come in and they will  
23 cheerfully select the Republican candidate. Right?

24 MR. GOLUB: Well --

25 QUESTION: My problem is that your notion of

1 what it means for the state to assure that the selection  
2 by the party is a representative selection is a strange  
3 description of what is representative. For example,  
4 under the Federal doctrine that Congress has to make  
5 legislative judgments, we don't say that Congress is  
6 making the legislative judgment it has to. If it passes  
7 a law saying we have decided that the executive can do  
8 whatever it wants in this field, that would be invalid  
9 as a delegation of legislative authority.

10 But you are telling me that this is not a  
11 delegation of the parties' responsibility to select its  
12 own candidate. If the party says, we have decided not  
13 who our candidate is, but we have decided that  
14 independents are going to select our candidate, that is  
15 not a representative selection by a party. It is an  
16 abdication of selection by the party.

17 Or at least the state can reasonably view it  
18 that way.

19 MR. GOLUB: I think the state -- the state  
20 could view it that way if it wanted to, but I think it  
21 has no right, and this is where I fundamentally part  
22 with the state's analysis of the case. The state sees  
23 it as an interference with states' rights. We see it as  
24 the state attempting to assert authority in an area that  
25 it is not given authority by the Constitution.

1           Article 1, Section 4 does permit the state --  
2           does authorize the state --

3           QUESTION: You acknowledge that the state has  
4           the right to assure that the party selection be a  
5           representative selection, so all we are quibbling about  
6           is whether it constitutes a representative selection to  
7           say, I am not going to select, I am going to let  
8           somebody else select. You say that that constitutes a  
9           representative selection.

10          MR. GOLUB: It may be that my definition of --  
11          I need to define my definition of representative, and  
12          let me define that so that my quibble can take on a more  
13          substantial status.

14          QUESTION: All right.

15          MR. GOLUB: I think that representative in the  
16          context of the private rights of the association means  
17          that whatever decision is voted upon is voted upon with  
18          the -- as a result of the approval of the majority of  
19          the party members, and if a majority of the party  
20          members say we are going to allow this kind of input,  
21          that is still a representative decision, and I do take  
22          it a step farther, going back to where I got --

23          QUESTION: If you applied that to the doctrine  
24          of unconstitutional delegation, we would have a quite  
25          different system that we would be living under now. You



1 wouldn't think that the Congress was exercising its  
2 responsibility to represent the people if it did  
3 something like that.

4 MR. GOLUB: Well, that is the difference  
5 between a legislature and a political party. A  
6 political party could say, we are not going to nominate  
7 anybody this time. A political party could say, we are  
8 going to nominate somebody this time who we know is  
9 going to lose because in the future that race will help  
10 us. A political party could say, we want to build  
11 something now so that in the future we will be a  
12 different -- a different number, or a different  
13 philosophy. The party has the right to do all that.

14 QUESTION: Well, what if we affirm this  
15 judgment, and the Republican Party plan is therefore put  
16 into effect in Connecticut, but the Republicans still  
17 don't elect any candidates to statewide office, so the  
18 party at its next convention says, instead of having  
19 just our primary open to independents we want only  
20 independents in it, because we think Republican voters  
21 are skewing us away from where the electors are.

22 (General laughter.)

23 QUESTION: Would that be all right?

24 MR. GOLUB: Well, at that point, going back to  
25 the issue of representativeness, the party votes are

1 not -- I mean, the party members have no longer a voice  
2 in the party primary system.

3 QUESTION: We don't know that they have a  
4 majority vote under the present system. We don't know  
5 how many independents are going to come crowding in.  
6 The way you describe it there are a lot more  
7 independents out there than there are Republicans.

8 MR. GOLUB: Yes, but the party has determined  
9 that it wants the input from independents.

10 QUESTION: They have determined under the  
11 Chief Justice's hypothetical, too. They have determined  
12 that they want the independents, just to be sure they  
13 are going to win, they want the independents to make the  
14 pick.

15 MR. GOLUB: The Chief Justice's hypothetical,  
16 though, eliminates any party participation at all in the  
17 primary, and I concede that the state has the right to  
18 require a primary.

19 QUESTION: There has to be at least a minority  
20 participation of the political party --

21 MR. GOLUB: No.

22 QUESTION: -- in the selection of its nominee.

23 MR. GOLUB: I go farther than that, and I  
24 think that there is -- there can be discrimination  
25 through dilution, and I think that the state has the

1 right to make sure that there is no -- that the party  
2 members have an equal right to participate in the  
3 primary. That is what -- there is no claim here that  
4 the party is not allowing its members to participate in  
5 the primary, is not allowing its members a full vote in  
6 all of the party processes. The claim by the state is  
7 that the party can't elicit additional support from  
8 groups outside the party.

9 And the reason we think that that is so  
10 fundamental is, if you have a minority party, and not  
11 just in Connecticut but in a democracy, the way a  
12 minority party displaces the ruling majority is by  
13 forming coalitions with other groups, whether it is  
14 formal coalition so that the party grows, whether it is  
15 an informal coalition of two groups that maintain their  
16 identity.

17 Unless you allow the party to make its own  
18 decision about who it can associate with you can't  
19 displace the ruling majority.

20 QUESTION: I suppose you would sustain a state  
21 law that said you can't cross over or that Republicans  
22 can't vote in a Democratic primary?

23 MR. GOLUB: I would sustain a state law that  
24 intruded upon the party's decision as to who can vote in  
25 its process. If the party said we don't want Democrats

1 to vote here, only independents can vote --

2 QUESTION: What if the party said, we don't  
3 care. Can the state still say Democrats can't vote in  
4 the Republican primary?

5 MR. GOLUB: Well, I take the position that the  
6 state can't say that. I take the position that the --  
7 and I have to do that --

8 QUESTION: I guess you have to. I guess you  
9 have to to in terms of your position.

10 MR. GOLUB: -- to be consistent. That is not  
11 the issue before this Court right now, and I should say  
12 before I run out of my argument that whether or not this  
13 absolute position I am advocating here, and it is an  
14 absolute rule that I am advocating in a sense, the rule  
15 that in the absence of invidious discrimination a  
16 party's decisions about who it will participate with is  
17 absolute.

18 Whether or not that rule is adopted by the  
19 Court there still was the inquiry performed by the two  
20 lower courts where there was an inquiry into the  
21 sufficiency of the reasons the state adopted under the  
22 familiar compelling state interest test that had been  
23 set forth by this Court. And I rely on that as an  
24 alternative basis wholly for the decisions below.

25 But answering Justice White's question, my



1 answer is, the party has the right to associate with  
2 independents. The party has the right to associate with  
3 Democrats. The party has the right to associate with  
4 any qualified voter, so long as it is not done to  
5 discriminate in violation of the Fourteenth or Fifteenth  
6 Amendments.

7 QUESTION: Mr. Golub, I would like to ask you  
8 another, more basic question that we haven't touched on  
9 yet.

10 You said earlier, but I know it was in a  
11 different context, that the primary is part of the  
12 general election process, and if you make that  
13 assumption for purposes of reading Article 1, Section 2  
14 of the Constitution, which I know you might not accept,  
15 but just make it for a moment, is it not correct that  
16 the qualifications requisite for electors of the most  
17 numerous branch of the Connecticut legislature in the  
18 primary include party membership?

19 MR. GOLUB: All right.

20 QUESTION: So if that is true, and if the  
21 primary is a part of the process, why doesn't the plain  
22 language of Article 1, Section 2 answer this case?

23 MR. GOLUB: All right. First of all, I don't  
24 agree that the word "electors" in the second clause of  
25 Article 1, Section 2 applies to primary elections.

1 QUESTION: I understand that, yes.

2 MR. GOLUB: Okay. And that is set forth. And  
3 I think that this Court has held that that is the law  
4 also, because otherwise Oregon versus Mitchell was  
5 wrongly decided. In Oregon versus Mitchell the Court  
6 approved 18-year-old voting for Federal elections,  
7 Federal Senate and House elections, and 21-year-old  
8 voting in state representative elections.

9 And if that language in Article 1, Section 2  
10 means as you have just hypothesized to me, that decision  
11 couldn't stand, because that would be a different  
12 qualifications requisite for the electors. Our position  
13 is that if you are right -- if the state is right that  
14 electors means primary elections as well, that the  
15 purposes of that were to ensure that there was no  
16 restriction of the right to vote in Federal elections,  
17 not just to require straight symmetry of the  
18 qualifications, and that is satisfied by a rule that  
19 expands the right to vote in Federal primary elections  
20 beyond that --

21 QUESTION: What about United States against  
22 Classic?

23 MR. GOLUB: United States versus Classic said,  
24 as I read that decision, primaries are an integral part  
25 of the election system. Therefore, in order to protect

1 the right to vote established in Article 1, Section 2,  
2 we must reach out and allow Federal control over primary  
3 elections. Classic did not say that Article 1, Section  
4 2's reference to electors includes primary elections.  
5 What it said was, if we don't protect primaries from  
6 fraud and corruption, then the right to vote in that  
7 first phrase of Article 1, Section 2 has no -- can be  
8 diluted.

9 And that's what -- if you compare Classic with  
10 Ray versus Blair, in Ray versus Blair a state -- the  
11 Republican Party had --

12 QUESTION: I think Classic stands on its own.  
13 You don't have to compare it with anybody.

14 MR. GOLUB: I am not asking the Court to  
15 impair the holding of Classic at all, but --

16 QUESTION: It said that the primary is an  
17 integral part of the election machinery, period.

18 MR. GOLUB: And I agree with that, but I --

19 QUESTION: No qualifications at all.

20 MR. GOLUB: I agree with that and I think it  
21 goes beyond that to say that because the right to vote  
22 is guaranteed by Article 1, Section 2, Federal control  
23 of the primaries is sanctioned under the aegis of  
24 Article 1, Section 2, but no one has ever said that all  
25 of the election provisions in the Constitution apply to

1 primary elections.

2 And if Article 1, Section 2 through Classic  
3 meant that there would have been -- I mean, then Classic  
4 would have -- then Ray versus Blair, which said that the  
5 loyalty pledge that violated the Twelfth Amendment of  
6 electors to the Electoral College, that Ray versus Blair  
7 would also have to be decided, and Ray versus Blair  
8 specifically addressed this issue about how far does  
9 Classic go and how far does Smith versus Allwright go,  
10 and what it said was, those cases indicate that if there  
11 is a secured right being violated, as there was in Smith  
12 versus Allwright, the secured right under the Fourteenth  
13 or Fifteenth Amendments --

14 QUESTION: Smith and Allwright and Classic  
15 were two different cases.

16 MR. GOLUB: Yes. I agree to that also.

17 QUESTION: One was racial and the other was  
18 not.

19 MR. GOLUB: We are not asking this Court to  
20 adopt any rule that in any way impinges the law of  
21 Classic or Smith versus Allwright.

22 QUESTION: Please don't ask me to do it.

23 (General laughter.)

24 MR. GOLUB: I am not asking you to. I say  
25 that in all seriousness, because the position we have



1 taken in our brief is that, first of all that they were  
2 properly and rightly decided, and second of all, they  
3 are the limits on what the party can do. Just as Smith  
4 versus Allwright said that a party cannot exclude on the  
5 basis of impermissible discrimination voters from a  
6 primary system, we say that's the limit. We can't  
7 exclude. What the state here is doing, and I say this  
8 respectfully, is using the white primary cases for the  
9 flip side, which they don't stand for. The white  
10 primary cases have never been held to say that the state  
11 has the right to prevent a party from expanding.

12 QUESTION: But there again you call Classic a  
13 white primary.

14 MR. GOLUB: No, I am saying Smith versus  
15 Allwright and Terry versus Adams --

16 QUESTION: Okay.

17 MR. GOLUB: -- on this point. The state is  
18 saying those cases allowed the Court to restrict a  
19 party's attempts to expand, and those cases said just  
20 the opposite. They said a party may not -- it said the  
21 state may restrict a party's attempts to exclude. That  
22 goes back to, in a sense, where we started with the  
23 argument, that what the party is trying to do here is  
24 expand, and it is trying to do that in a manner which it  
25 believes is representative and which the state has not

1 shown to be unrepresentative.

2 I recognize that the state has discretion in  
3 making judgments, but in terms of deciding where it can  
4 interfere with a party's private affairs of candidate  
5 selection, I don't think that there is deference to the  
6 state's judgments when they interfere with what are  
7 fundamental associations of who and how people may  
8 participate in the candidate selection.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
10 Golub.

11 Do you have anything further, Mr. Gerson? You  
12 have four minutes.

13 ORAL ARGUMENT OF ELLIOT F. GERSON, ESQ.,  
14 ON BEHALF OF THE APPELLANT - REBUTTAL

15 MR. GERSON: Thank you, Mr. Chief Justice. I  
16 will be brief.

17 I would first like to comment on Justice  
18 Stevens' question about Article 1, Section 2, which we  
19 believe does clearly invalidate the rule that the  
20 Republican Party would supplant the state statute with.  
21 Appellee referred to Oregon against Mitchell as somehow  
22 inconsistent with our position. The holding in Oregon  
23 against Mitchell relied on Congress's power under  
24 Article 1 to override a determination by the state.

25 The pertinent opinion in Oregon against

1 Mitchell that relates to the state's position here is  
2 Justice Stewart's opinion that was joined by Justice  
3 Blackmun and Chief Justice Burger which stated very  
4 clearly that the states are not free to prescribe  
5 qualifications for voters in Federal elections which  
6 differ from those prescribed for the more numerous  
7 branch.

8 In this case the qualifications differ.  
9 Article 1, Section 2, and the Seventeenth Amendment  
10 invalidate it. If there is any point.

11 QUESTION: How does it invalidate it?

12 MR. GERSON: It invalidates it very simply  
13 because many voters in Republican primaries in  
14 Connecticut for Senate and House of Representatives  
15 would lack the qualifications for voting in Republican  
16 primaries for the Connecticut State House of  
17 Representatives. Electors without qualifications to  
18 vote in state primaries would have qualifications to  
19 vote in Federal primaries. The constitutional language  
20 of Article 1, Section 2 forbids just such a  
21 discrimination.

22 QUESTION: So there would be a different  
23 problem if the Connecticut law applied to all offices?

24 MR. GERSON: If the rule adopted by the  
25 Republican Party in this case applied to all --

1 QUESTION: Yes.

2 MR. GERSON: -- Republican offices, then  
3 Article 1, Section 2 would not be invalidated. The  
4 reason it is invalidated is because it discriminates  
5 among offices, and that is a very good illustration of  
6 how constitutional protections begin to unravel when the  
7 sovereign authority of the state over primary elections  
8 is granted to political parties.

9 QUESTION: Well, Mr. Gerson, if we were to  
10 agree with that submission I take it we wouldn't have to  
11 address the other questions.

12 MR. GERSON: That is correct, Your Honor. The  
13 Republican Party rule itself would be unconstitutional  
14 and there would not be a dispute before you.

15 QUESTION: How can a Republican Party rule be  
16 unconstitutional?

17 MR. GERSON: Because the rule itself would  
18 apply in a state election. The Republican Party --

19 QUESTION: What you are saying is, the state  
20 has the authority to foreclose the application of any  
21 rule?

22 MR. GERSON: Of an unconstitutional rule, if  
23 in fact that rule dictates --

24 QUESTION: You are just insisting -- you would  
25 just be insisting that there be -- that people



1 shouldn't -- can't vote who are ineligible.

2 MR. GERSON: Yes, Justice White. The  
3 Republican Party rule --

4 QUESTION: The Constitution, you think,  
5 requires that certain people be allowed to vote and  
6 certain people not be allowed to vote, and you are  
7 enforcing that rule?

8 MR. GERSON: Article 1, Section 2 says the  
9 qualifications shall be the same, and under the  
10 Republican Party rule if it could supplant the state  
11 statute they would not.

12 QUESTION: Well, if the Republican Party just  
13 invited to their state convention independents and put  
14 in the primary anyone who got 20 percent, and decided  
15 only to -- we are going to -- we are not going to  
16 have -- we won't need a primary, we are only going to --  
17 we are just going to put in the general election the  
18 person who gets the most votes at the state convention,  
19 may it do that?

20 MR. GERSON: No, Justice White. If the state  
21 decides there is going to be a primary election, that is  
22 a --

23 QUESTION: All right, they are just going to  
24 put up one candidate then, and we have a primary  
25 election. Everybody votes for one candidate.

1           MR. GERSON: I am not sure I understand the  
2 question, Justice White.

3           QUESTION: Well, how do the Republicans choose  
4 the people who stand for election at the primary?

5           MR. GERSON: By their party convention.

6           QUESTION: Well, suppose they by their own  
7 rule just nominate one candidate.

8           MR. GERSON: And if they did?

9           QUESTION: And they also had Independents  
10 sitting in their state convention.

11          MR. GERSON: Under current Connecticut law  
12 they would not be able to have unaffiliated voters in  
13 their state convention, but that is not the issue before  
14 the Court.

15          QUESTION: Okay.

16          CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Gerson. The case is submitted.

18          (Whereupon, at 1:52 p.m., the case in the  
19 above-entitled matter was submitted.)  
20  
21  
22  
23  
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25

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85-766 - JULIA H. TASHJIAN, SECRETARY OF STATE OF CONNECTICUT, Appellant

REPUBLIC PARTY OF CONNECTICUT, ET AL.

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ript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)