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PROTECTING OUR NATION'S POLITICAL DUOPOLY: THE SUPREMES SPOIL THE LIBERTARIANS' PARTY

Gary D. Allison*

The necessity for [strict scrutiny] becomes evident when we consider that major parties, which by definition are ordinarily in control of legislative institutions, may seek to perpetuate themselves at the expense of developing minor parties.

Justice Thurgood Marshall¹

I. INTRODUCTION

Have pity on third-party candidates, members, and advocates. It has been 149 years since a third party—the Republican Party—ascended into major-party status.² No independent or third-party candidate has ever won the presidency.³ In fact, no independent or third-party presidential candidate has earned a single electoral vote since

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1. *Munro v. Socialist Workers Party*, 479 U.S. 189, 201 (1986) (Marshall, J., dissenting).

2. The Republican Party was founded in 1854 on the planks of opposition to slavery and endorsement of an economic policy featuring federal investment in internal infrastructure, and a high tariff protecting the industrial sectors. A. James Reichley, *The Life of the Parties: A History of American Political Parties* 96, 100 (Rowman & Littlefield Publishers 2000). At that time, the United States had only one major party, the Democratic Party; the other major party, the Whigs, was badly splintered by the slavery question, *id.* at 87, and stopped fielding candidates for President after 1852, *see id.* *See also* John F. Bibby & L. Sandy Maisel, *Two Parties—Or More? The American Party System* 24–27 (Westview Press 1998). In the presidential election of 1856, James Buchanan, the Democratic candidate, won, but the Republican candidate, John C. Frémont, finished second. Reichley, *supra*, at 101. Abraham Lincoln became the first Republican to be elected President in 1860. *Id.* at 93. Lincoln's election not only ushered in the American Civil War, *id.* at 93, 104–05, it also inaugurated an era of Republican dominance in which its candidates won eleven out of thirteen presidential elections from 1860 through 1908: Abraham Lincoln (1860, 1864), Ulysses Grant (1868, 1872), Rutherford Hayes (1876), James Garfield (1880), Benjamin Harrison (1888), William McKinley (1896, 1900), Theodore Roosevelt (1904), and William Taft (1908). Joseph Nathan Kane, *Facts About the Presidents: A Compilation of Biographical and Historical Data* 608 (Ace Bks. 1976).

3. Our nation's forty-three Presidents have belonged to only five political parties: Federalist (2), Democratic-Republican (4), Democratic (14), Whig (4), and Republican (19). Dave Leip, *Dave Leip's Atlas of U.S. Presidential Elections: The Presidents*, <http://uselectionatlas.org/INFORMATION/INFORMATION/presidents.php> (accessed Sept. 11, 2005). Each of these parties was a major party during the years its candidates were elected President. Reichley, *supra* n. 2, at chs. 3–4 (describing the formation and decline of the Federalist Party; formation and evolution of the Democratic-Republican Party); *id.* at ch. 5 (describing the evolution of the Democratic-Republican Party into the Democratic Party; formation and decline of the Whig Party); *id.* at chs. 6–17 (describing the continuing competition between the Democratic and Republican Parties).

George Wallace won forty-six electoral votes in 1968,⁴ and only four candidates earned electoral votes from 1892 through 1964.⁵ Independent and third-party candidates rarely become governors⁶ or win seats in the United States Senate or the United States House of Representatives.⁷ So, public life in the United States has been dominated by a political duopoly comprised of its two major political parties.

Nevertheless, since the mid-1960s and early-1970s, the United States' electorate has exhibited less major-party loyalty and political participation. The percent of voters identifying themselves as "Strong Partisan" has declined,⁸ while the percent of voters

4. Four persons have received one electoral vote each since 1968, but only because electors pledged to other candidates violated their pledge. These include: John Hospers (Libertarian, 1972), Ronald Reagan (a non-candidate, 1976), Lloyd Bentsen (the Democratic vice-presidential candidate, 1988), John Edwards (the Democratic vice-presidential candidate, 2004). Dave Leip, *Dave Leip's Atlas of U.S. Presidential Elections: United States Presidential Election Results*, <http://www.uselectionatlas.org/USPRESIDENT/> (accessed Sept. 13, 2005). In addition, since 1968, five candidates have received over a million popular votes but failed to earn an electoral vote: John Schmitz (1.1 million, American Party, 1972), John Anderson (5.7 million, Independent, 1980), H. Ross Perot (19.7 million, Independent, 1992), H. Ross Perot (8.1 million, Reform Party, 1996), and Ralph Nader (2.9 million, Green Party, 2000). *Id.*

5. These candidates include: James B. Weaver (twenty-two electoral votes, Populist Party, 1892), Theodore Roosevelt (eighty-eight electoral votes, Progressive Party, 1912), Robert M. La Follette (thirteen electoral votes, fusion candidate of the Progressive and Socialist Parties, 1924), and Strom Thurmond (thirty-nine electoral votes, States' Rights Democratic Party, 1948). J. David Gillespie, *Politics at the Periphery: Third Parties in Two-Party America* app. 3 (USC Press 1993).

6. From 1892 through 1990, only nine persons running as independent or third-party candidates were elected governor. These persons include: Davis H. Waite (Colorado, fusion candidate of the Populist and Silver Democratic Parties, 1892), L. D. Lewelling (Kansas, fusion candidate of the Populist & Democratic Parties who received most of his votes on the Populist Party line, 1892), Murphy J. Foster (Louisiana, fusion candidate of the Anti-Lottery Democrats and the Farm Alliance, 1892), John H. Leedy (Kansas, fusion candidate of the Populist & Democratic Parties who received most of his votes on the Populist Party line, 1896), Hiram Johnson (California, Progressive, 1914), Sidney J. Catts (Florida, fusion candidate of the Prohibition Party and Independent Democrats, 1916), James B. Longley (Maine, Independent, 1974), Walter J. Hickel (Alaska, Alaska Independence Party, 1990), and Lowell P. Weicker (Connecticut, A Connecticut Party, 1990). *Id.* at app. 5. In 1994, Angus King was elected as an independent candidate in Maine, Bibby & Maisel, *supra* n. 2, at 72–73, and in 1998, a former professional wrestler, Jesse Ventura, was elected as a Reform Party candidate in Minnesota, Reichley, *supra* n. 2, at 335. Currently, there are no governors who were elected as independent or third-party candidates. Wikipedia, *List of United States Governors*, http://en.wikipedia.org/wiki/List_of_United_States_Governors (last updated Sept. 12, 2005).

7. There were forty-four congressional sessions from 1901 through 1989. During that time, the number of U.S. Senators from third parties were zero during twenty-seven sessions (1903–1913, 1915–1923, 1947–1971, 1977–1989), only one during thirteen sessions (1913–1915, 1923–1935, 1941–1947, 1971–1977), only two during two sessions (1901–1903, 1935–1937), and only three during two sessions (1937–1941). Gillespie, *supra* n. 5, at app. 4. During this same time period, the number of U.S. House members from third parties were none during twenty-three sessions (1903–1911, 1951–1989), one during five sessions (1911–1913, 1921–1923, 1929–1933, 1949–1951), two during three sessions (1919–1921, 1945–1949), three during two sessions (1923–1925, 1927–1929), four during two sessions (1939–1941, 1943–1945), five during five sessions (1901–1903, 1917–1919, 1925–1927, 1933–1935, 1941–1943), eight during one session (1915–1917), nine during one session (1913–1915), ten during one session (1935–1937), and thirteen during one session (1937–1939). *Id.* Commencing with the 1923–1925 congressional session, every third-party Senator or House member came from Minnesota, Wisconsin, or New York. *Id.* Currently, there is only one Senator and one House member who is neither a Democrat nor Republican—Senator Jim Jeffords, an Independent from Vermont, United States Senate, *Senators of the 109th Congress*, http://www.senate.gov/general/contact_information/senators_cfm.cfm (accessed Sept. 13, 2005), and Congressman Bernard Sanders, also an Independent from Vermont, U.S. House of Representatives, *Official Alphabetical List of the House of Representatives of the United States One Hundred Ninth Congress*, <http://clerk.house.gov/members/olmbr.html> (last updated Aug. 10, 2005).

8. From 1952–1964, the percent of voters identifying themselves as "Strong Partisan" was within a 35–38% range. National Election Studies, *The NES Guide to Public Opinion and Electoral Behavior: Strength of Partisanship 1952–2002*, http://www.umich.edu/~nes/nesguide/topable/tab2a_3.htm (last updated Sept. 13, 2003). In contrast, from 1966–2002, the percent of voters identifying themselves as Strong Partisan was within a 23–31% range. *Id.*

saying they are leaning toward being Independent has increased.⁹ Voter turnout has also declined,¹⁰ and voters have increasingly engaged in ticket splitting.¹¹ In recent years, these trends have given rise to greater interest in alternatives to major-party candidates within the U.S. electorate,¹² and to much scholarly speculation on whether perceived flaws in our politics can be remedied by revitalizing our traditional two-party system or by facilitating the emergence of a multiparty system.¹³

9. Although the percent of voters saying they are independent or apolitical has remained stable within a range of 9–13%, except for the turbulent 1970s when the range was 14–18%, the percent of the voters saying that they are leaning independent has increased significantly from a range of 12–17% in the period 1952–1966, to a range of 18–28% in the period 1968–2002. *Id.*

10. The percent of the electorate that claimed to have voted in polling conducted immediately after national elections was within a range of 58–79% during the period of 1948–1972, and within a range of 47–75% during the period of 1974–2002. National Election Studies, *The NES Guide to Public Opinion and Electoral Behavior: Voter Turnout 1948–2002*, http://www.umich.edu/~nes/nescguide/toptable/tab6a_2.htm (last updated Sept. 13, 2003).

11. The behavior of ticket splitting, where the voter votes for a presidential candidate of one party and a Congressional candidate of another party, can be an indicator of partisanship if the party of the presidential candidate for whom they voted offers attractive Congressional candidates. From 1952–1968, the percent of voters who engaged in ticket splitting was within a range of 12–18%, while the percent was within a range of 22–30% during the period 1972–1992. National Election Studies, *The NES Guide to Public Opinion and Electoral Behavior: Split Ticket Voting Presidential/Congressional 1952–2000*, http://www.umich.edu/~nes/nescguide/toptable/tab9b_2.htm (last updated Sept. 13, 2003). Perhaps reflecting the polarizing effects of the Clinton impeachment, ticket splitting declined to 17% in the 1996 election and 19% in the 2000 election. *Id.*

12. The electorate's increased interest in independent and third-party candidates is reflected by four such candidates winning gubernatorial elections in four different states during the 1990s, *see supra* n. 6, the return of independents to the U.S. Senate and U.S. House after an absence of over forty years, *see supra* n. 7, and the relative strong showings of the H. Ross Perot (1992, 1996) and Ralph Nader (2000) presidential campaigns, *see supra* n. 4. During this same time period, an increasing number of third parties have fielded many candidates for public office. For example, in 1994

the Libertarian party ran fifteen candidates for governor, another fifteen for the U.S. Senate, and eighty-one for the U.S. House of Representatives. Thirteen of these candidates polled more than 5 percent of the vote; nine of them polled enough votes to hold the balance of power between the two major party candidates. In that same election year, the emerging Green party ran six candidates for these offices, one of whom held the balance of power in his state. In 1996, the Libertarians ran 126 candidates for the House or Senate . . . and the Greens ran seven.

Bibby & Maisel, *supra* n. 2, at 73–74.

Additional evidence that the third-party impulse has been more vibrant in recent years than it has in preceding decades comes from the Green Party's 1992 successes in electing thirty-seven persons to local public offices across ten different states, including the Mayor of Cordova, Arkansas, and in qualifying "as a statutory party entitled to ballot access," Gillespie, *supra* n. 5, at 286 (footnote omitted), in Alaska, Hawaii, Arizona, New Mexico, and California. *Id.* A variety of other third parties have been busy fielding candidates and organizing nationally, including the Peace and Freedom Party, the Conservative Party (New York), the Liberal Party (New York), the New Alliance Party, the Natural Law Party, the Populist Party, and the Tax Payers Party. *Id.* at 286–87. Indeed, the United States Federal Election Commission identified seventy-five party labels under which candidates for President, the U.S. Senate, and the U.S. House of Representatives appeared on state ballots during the 2004 election. United States Federal Election Commission, *A Guide to Party Labels*, <http://www.fec.gov/pubrec/fe2004/partylabels.pdf> (accessed Sept. 15, 2005).

13. Examples of this scholarship include:

1. A. James Reichley's *The Life of the Parties: A History of American Political Parties*. Reichley, *supra* n. 2. Arguing that the two-party system has well-served democracy in the United States through most of its history but "that parties are now endangered by a number of cultural, technological, social, political, and legal changes in American life; and that concerned supporters of a free society should therefore seek means for renewing the vitality of parties and the dynamism of the party system." *Id.* at 13. To support this argument, Reichley describes the current weakness of the major parties from the national to the local level, *id.* at chs. 18–20, and then provides an analysis of what can be done to revitalize them, *id.* at ch. 21. Reichley explicitly rejects the multiparty solution, *id.* at 342–43, and concludes that it would "cause far more social damage than political good," Reichley, *supra* n. 2, at 343 (footnote omitted).

Against this background of third-party electoral futility and growing dissatisfaction with our traditional two-party system, the Libertarian Party of Oklahoma (“LPO”) made a modest attempt to improve its fortunes by inviting all registered voters to participate in its 2000 primary elections.¹⁴ It was rebuffed in this endeavor by the Oklahoma Election Board, which ruled that only registered Libertarians and independents could vote in the Libertarian Party’s primaries.¹⁵

The Election Board’s ruling was consistent with Oklahoma’s semi-closed primary law, which states:

No registered voter shall be permitted to vote in any Primary Election or Runoff Primary Election of any political party except the political party of which his registration form shows him to be a member¹⁶

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2. John Bibby and L. Sandy Maisel’s *Two Parties—Or More?* Bibby & Maisel, *supra* n. 2. Documents recent electoral activities of third parties, *id.* at 3–16; presents a history of third parties in the United States, *id.* at ch. 2; documents the unique barriers imposed on third parties by the United States’ form of government, cultural norms, and laws institutionalizing the two major parties, *id.* at ch. 3; documents the general public’s recent flirtation with third-party and independent candidates, *id.* at ch. 4; and hypothesizes about the future strength and vitality of our two-party system. Based on their assessment of the performances of three recently elected third-party/independent governors, Bibby and Maisel conclude that “the citizenry is legitimately just as disappointed with third-party governors as they have been with Democrats or Republicans. Moreover, we believe that effective choice and the ability to express views on the issues of the day have been obscured by the presence of these most successful third-party politicians.” Bibby and Maisel, *supra* n. 2, at 90–91.
 3. Theodore J. Lowi & Joseph Romance, *A Republic of Parties? Debating the Two-Party System* (Rowman & Littlefield Publishers 1998). The two authors, writing in separate essays, offer advocacy for a multiparty system, Theodore J. Lowi, *Toward a Responsible Three-Party System: Prospects and Obstacles*, in Theodore J. Lowi & Joseph Romance, *A Republic of Parties? Debating the Two-Party System* 3–30 (Rowman & Littlefield Publishers 1998) [hereinafter Lowi, *Prospects & Obstacles*], and advocacy for maintaining, but reforming, our traditional two-party system, Joseph Romance, *Gridlock and Reform at the Close of the Twentieth Century*, in Theodore J. Lowi & Joseph Romance, *A Republic of Parties? Debating the Two-Party System* 31–74 (Rowman & Littlefield Publishers 1998).
 4. David K. Ryden, *The United States Supreme Court as an Obstacle to Political Reform*, in *Superintending Democracy: The Courts and the Political Process* ch. 8 (Christopher P. Banks & John C. Green eds., U. Akron Press 2001). Ryden contends that the United States Supreme Court, in its decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), subordinated “[t]he basic goal of ‘fair and effective representation’ . . . to legitimate, but lower rank, values of political stability and ballot control.” Ryden, *supra*, at 164. Ryden also contends that the U.S. Supreme Court’s approach in *Timmons* is an obstacle to our nation undertaking a badly needed re-examination of the “assumptions underlying the two-party system.” *Id.* Although he is “not ready to wholeheartedly embrace a multiparty system,” Ryden urges the Court to develop “an analysis of party systems from a functional perspective within the context of representation objectives” so that it “might . . . better locate minor and new parties on the constitutional/legal spectrum.” *Id.* at 186.
 5. Douglas J. Amy, *Entrenching the Two-Party System: The Supreme Court’s Fusion Decision*, in *The U.S. Supreme Court and the Electoral Process* ch. 8 (David K. Ryder ed., 2d. ed., Geo. U. Press 2002). Contending that the U.S. Supreme Court’s defense of our traditional two-party system in *Timmons*, was based on the Justices’ uncritical acceptance of the benefits of the two-party system and the alleged dangers of a multiparty system. *Id.* at 156–60. To support his thesis, Amy offers a critical analysis of the performance of multiparty systems in other countries to demonstrate that a multiparty system may work as well as, or better than, our traditional two-party system. *Id.* at 160–70.
14. Randy Ellis, *Suit Seeks to End Closed Primary*, Daily Oklahoman (Oklahoma City, OK) 4A (June 20, 2000).
 15. *Id.*
 16. Okla. Stat. tit. 26, § 1-104(A) (Supp. 2004).

A recognized political party may permit registered voters designated as Independents . . . to vote in a Primary Election or Runoff Primary Election of the party.¹⁷

In response, the LPO, some registered Democrats, and some registered Republicans filed suit in federal district court, contending their First Amendment rights of political association were violated by Oklahoma's semi-closed primary law.¹⁸

The district court ruled against the LPO.¹⁹ It found that Oklahoma's semi-closed primary law did not impose severe burdens on the LPO, and furthered the important state interest in "preserving the political parties as viable and identifiable interest groups, insuring that the results of a primary election . . . accurately reflect the voting of the party members."²⁰

On appeal, the United States Court of Appeals for the Tenth Circuit reversed.²¹ First, it found that Oklahoma's semi-closed primary law severely burdened the LPO's freedom of political association because it restricted the LPO's choice as to which voters would choose its standard-bearers in general elections.²² Then, it found that Oklahoma's semi-closed primary law was not narrowly tailored to serve a compelling state interest because Oklahoma did not demonstrate how allowing one party to invite all registered voters to participate in its primaries would destabilize state politics or seriously burden the associational rights of other parties.²³

On May 23, 2005, by a six-to-three decision, the United States Supreme Court reversed the Court of Appeals in the case of *Clingman v. Beaver*.²⁴ In its opinion, the Court held that *Tashjian v. Republican Party of Connecticut*²⁵ was distinguishable from *Clingman* and therefore did not mandate that strict scrutiny be used to judge the constitutionality of Oklahoma's semi-closed primary law.²⁶ The Court also held that

Oklahoma's semiclosed primary advances a number of regulatory interests that this Court recognizes as important: It "'preserv[es] [political] parties as viable and identifiable interest

17. *Id.* at § 1-104(B)(1).

18. Br. of Petr., 2004 WL 2681536 at *6, *Clingman v. Beaver*, 125 S. Ct. 2029 (2005).

19. *Clingman v. Beaver*, 2003 WL 745562 (W.D. Okla. Jan. 24, 2003).

20. *Beaver v. Clingman*, 363 F.3d 1048, 1052-53 (10th Cir. 2004) (internal quotation marks omitted, ellipses in original).

21. *Id.* at 1061.

22. *Id.* at 1055-58. The Court felt this conclusion was compelled by earlier U.S. Supreme Court opinions in which strict scrutiny was applied to a closed primary system that prevented parties from inviting registered independents to vote in their primaries, and to a blanket primary system that permitted each voter to decide office-by-office which party's primary to vote in, regardless of her own party affiliation or lack thereof. *Id.* at 1056-58 (citing, respectively, *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)).

23. *Id.* at 1058-61.

24. 125 S. Ct. 2029 (2005). The main opinion was written by Justice Thomas, which was joined in its entirety by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy. *See id.* at 2042 (O'Connor & Breyer, JJ., concurring by joining Justice Thomas's opinion except for Part II-A); *id.* at 2047 (Stevens, J., dissenting, joined entirely by Justice Ginsburg, and substantially by Justice Souter). Justices O'Connor and Breyer joined Justice Thomas's opinion except for a section in which Justice Thomas contended that the LPO, and voters who were registered in other parties, do not have their rights of association severely burdened by a state law requiring registered members of a particular party to change their registration if they wish to participate in another party's primaries. *Id.* at 2035-37, 2042.

25. 479 U.S. 208 (1986).

26. *Clingman*, 125 S. Ct. at 2037-39.

groups,' enhances parties' electioneering and party-building efforts, and guards against party raiding and 'sore loser' candidacies by spurned primary contenders."²⁷

Thus, the Court thwarted the LPO's modest attempts to advance its cause against the overwhelming odds that confront all minor political parties in the United States.

In succeeding parts of this article, the author evaluates *Clingman* from the perspective of a long-time Constitutional Law professor who is a hyper-political activist.²⁸ In Part II of this analysis, the author details the Court's opinion. Part III contains the author's argument that, as measured against the realities of primary politics and the law governing the regulation of party activities and primary elections, the Court used questionable logic in distinguishing *Clingman* from *Tashjian* and concluding that Oklahoma's semi-closed primary actually advances the regulatory interests asserted by the State. Finally, in Part IV, the author asserts that *Clingman* is the product of a prior precedent that extended undeserved protection to the two-party system and an unfortunate example of how the Court's desire to protect a mythical two-party system may stifle political innovations that could make our political system work better for more people.

II. THE COURT'S OPINION

A. Constitutionally Cognizable Associations

At the outset, the Court dealt with the issue of whether the LPO's desire to have persons who are registered in other parties vote in its primaries created any constitutionally cognizable political associations. A narrow five-to-four majority, comprised of two concurring and three dissenting Justices, found that the associational interests of the LPO and voters from other parties were constitutionally cognizable.

There was common agreement among the Justices and the parties to *Clingman* that two possible political associational interests were at issue: (1) the right of political parties to determine who shall participate in their processes for selecting nominees for public office, and (2) the rights of voters who are registered members of one party to accept the invitation of another party to participate in its primary elections.²⁹ The issue of whether these associational interests were constitutionally cognizable divided the six Justices constituting the decisional majority.

Writing for a plurality of four Justices, Justice Thomas asserted that "a voter who is unwilling to disaffiliate from another party to vote in the LPO's primary forms little

27. *Id.* at 2039 (quoting, respectively, *Nader v. Schaffer*, 417 F. Supp. 837, 845, 848 (D. Conn. 1976), and *Storer v. Brown*, 415 U.S. 724, 735 (1974)) (brackets in original, citations omitted).

28. The author has worked in campaigns for Democratic candidates at all levels for thirty-nine years. In addition, the author has been a Democratic Party nominee for the United States House of Representatives (1986), Chair of the Democratic Party of Oklahoma's First Congressional District (1989-1991), Oklahoma First District Campaign manager for two Democratic candidates for President (Gary Hart-1984, Howard Dean-2004), and a co-founder and chair of a political action committee dedicated to reviving progressive politics in Oklahoma (Just Progress PAC-2004 to present).

29. *Clingman*, 125 S. Ct. at 2035-36; *id.* at 2044 (O'Connor, J., concurring); *id.* at 2047-48 (Stevens, J., dissenting); Br. of Petr. at **14-15, *supra* n. 18; Br. of Respts., 2004 WL 3017301 at **6-7, *Clingman v. Beaver*, 125 S. Ct. 2029 (2005).

'association' with the LPO—nor the LPO with him.”³⁰ To Justice Thomas, it was obvious that such voters do not want to form an association with the LPO “in any formal sense.”³¹ They wish only to “[cast] a vote for a Libertarian candidate in a particular primary election, rather than . . . banding together with fellow citizens committed to the LPO’s political goals and ideas.”³² After noting that voters may desire to vote for numerous candidates across many party lines during primary elections, Justice Thomas concluded that “‘the concept of freedom of association’ . . . ‘ceases to be of any analytic use’” if it “‘is extended’ to a voter’s every desire at the ballot box.”³³ In other words, the plurality Justices would have decided *Clingman* in favor of Oklahoma on the basis that the LPO and voters registered as members of other parties do not have any constitutionally cognizable associational interests with respect to the LPO’s primary elections.

Clingman had to be decided on other grounds because Justice O’Connor, writing a concurring opinion for herself and Justice Breyer, contended that “where a party invites a voter to participate in its primary and the voter seeks to do so, we should begin with the premise that there are significant associational interests at stake.”³⁴ For her, these interests arise from the critically important function of primary elections; determining the “range of choices available at—and often the presumptive winner of—the general election.”³⁵ With respect to primary elections, the voter’s associational interest is to have “a meaningful voice [by joining] together with likeminded others at the polls,” and the party’s associational interest is choosing “who will participate in selecting [its] candidate” since this choice “plays a critical role in determining both [its] message and its prospects of success in the electoral contest.”³⁶ Unlike the plurality Justices, Justice O’Connor refused to elevate the act of registration over the act of voting as a key indicator of a constitutionally cognizable association between a voter and a political party.³⁷

Moreover, Justice O’Connor had little difficulty in accepting the idea that a voter could have constitutionally cognizable associational interests in two different parties, especially when one of them is a minor party, “during particular election cycles or in elections for particular offices.”³⁸ To her, this dual association during primary elections

30. *Clingman*, 125 S. Ct. at 2036.

31. *Id.*

32. *Id.* (footnote omitted).

33. *Id.* (quoting *Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting)).

34. *Id.* at 2044. The dissenting Justices also came to this conclusion. Writing for himself, Justice Ginsburg, and Justice Souter, Justice Stevens asserted that “[i]f a third party invites her to participate in its primary election, her right to support the candidate of her choice merits constitutional protection, whether she elects to make a speech, to donate funds, or to cast a ballot.” *Clingman*, 125 S. Ct. at 2047. He found that such a right assumes even greater importance when it “is reinforced by the right of the [third party] to associate with willing voters.” *Id.* at 2048.

35. *Id.* at 2042.

36. *Id.* at 2043.

37. *Id.* In this regard, Justice O’Connor observed that “[t]he fact that voting is episodic does not . . . undermine its associational significance; it simply reflects the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials.” *Clingman*, 125 S. Ct. at 2043.

38. *Id.* at 2043, 2043–44.

was a logical extension of a person's protected rights to attend the meetings of, and give money to, a particular party and its candidates even though he/she is registered as a member of another party.³⁹

B. Relaxed Scrutiny

The Court's most critical holding was that Oklahoma's semi-closed primary law need not be subjected to strict scrutiny because it does not severely burden the associational rights of political parties or registered voters.⁴⁰ As a consequence, the Court permitted Oklahoma to justify its semi-closed primary by showing that it advances important state interests instead of demonstrating that it was narrowly tailored to serve a compelling state interest.⁴¹

According to the majority, Oklahoma's semi-closed primary law imposes two associational burdens: (1) it requires voters who are registered as a member of a particular party, and who want to vote in the primaries of another party, to reregister either as a member of the other party or as an independent;⁴² (2) it prohibits a party from being able to take action unilaterally to broaden its base simply by inviting all registered voters to participate in its primaries since some voters must take the intermediate step of reregistering to accept the invitation.⁴³ The Court's analysis of whether these burdens were severe enough to justify subjecting Oklahoma's semi-closed primary law to strict scrutiny focused almost entirely on distinguishing *Clingman* from *Tashjian*. This focus was the product of the majority's assertions that strict scrutiny was applied in *Tashjian*, and the LPO's argument that strict scrutiny must be applied in *Clingman* because "the burden imposed by Oklahoma's semi-closed primary system is no less severe than the burden at issue in *Tashjian*."⁴⁴

In *Tashjian*, the Republican Party of Connecticut wanted to invite registered independents to vote in its primaries.⁴⁵ At that time, Connecticut had a closed primary law mandating that only those voters registered as members of a particular party could vote in that party's primaries.⁴⁶ The *Clingman* Court said that the burdens on the right of political association at issue in *Tashjian* were the requirement that independent voters "affiliate publicly with a party to vote in its primary"⁴⁷ and the inability of political parties to "broaden opportunities for joining . . . by their own act, without any intervening action by potential voters."⁴⁸

39. *Id.*

40. *See id.* at 2037–39; *supra* n. 26 and accompanying text.

41. *Clingman*, 125 S. Ct. at 2037–39.

42. *Id.* at 2038. Although she joined this portion of the majority opinion, in her concurring opinion Justice O'Connor framed the burden differently. Her emphasis was not on the act of registering, but rather expressed empathy for "voter[s] with . . . significant commitment to a major party [who] must forfeit registration with that party in order to participate in the LPO primary." *Id.* at 2045.

43. *Id.* at 2038.

44. *Id.* at 2037–38.

45. *Tashjian*, 479 U.S. at 210.

46. *Id.* at 210–11.

47. *Clingman*, 125 S. Ct. at 2038.

48. *Id.* (quoting to *Tashjian*, 479 U.S. at 216 n. 7) (ellipses in original).

To the *Clingman* Court, there were significant differences between *Clingman* and *Tashjian* as to associational burdens placed on voters. In *Tashjian*, independent voters wishing to accept the Republican Party's invitation to vote in its primaries were required to affiliate publicly with the Republican Party, whereas in *Clingman* voters wishing to accept the LPO's invitation to vote in its primaries could reregister either as an LPO member or as an independent.⁴⁹ Thus, in *Clingman* the affected voters did not have to affiliate publicly with any party to vote in the LPO primary, but they did have to disaffiliate publicly with a political party.⁵⁰ As partial justification of its holding that *Tashjian* did not mandate that strict scrutiny be applied to Oklahoma's semi-closed primary law, the Court basically ruled that it is more burdensome for a voter publicly to affiliate with than to disaffiliate from a political party.⁵¹

The Court did find that the associational burdens placed on political parties in *Tashjian* were indistinguishable from those involved in *Clingman*.⁵² However, the Court found that even the *Tashjian* Court did not find these burdens to be severe.⁵³ This finding cemented the Court's holding that *Tashjian* did not mandate that Oklahoma's semi-closed primary law be justified by strict scrutiny.

As a part of its analysis of *Tashjian*, the Court opined that the *Tashjian* Court had "applied strict scrutiny with little discussion of the magnitude of the [associational] burdens."⁵⁴ It also noted that the independent voters involved in *Tashjian* could have voted in any partisan primary simply by reregistering as a member of a political party "as late as the day before the primary."⁵⁵ Then, the Court starkly proclaimed that "requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights."⁵⁶ By doing so, the Court not only held that such a burden on associational rights is too minimal to invoke strict scrutiny, it also cast doubt on the continuing viability of *Tashjian*'s holding that states may not prevent parties from allowing independents to participate in their primaries without first formally affiliating as a party member.

The Court's registration proclamation made reference to the plurality portion of Justice Thomas's opinion wherein he explained why he believed that the disaffiliation burden imposed on voters by Oklahoma's semi-closed primary was slight.⁵⁷ As a part of his explanation, he noted that in the case of *Timmons v. Twin Cities Area New Party*,⁵⁸ the Court had ruled that a law forbidding a candidate to appear on the general election ballot as the nominee of more than one party did not severely burden the associational rights of the candidate or the party whose nomination he or she declined to accept.⁵⁹

49. *Id.*

50. *Id.*

51. *See id.*

52. *Clingman*, 125 S. Ct. at 2038.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Clingman*, 125 S. Ct. at 2038.

58. 520 U.S. 351 (1997).

59. *Clingman*, 125 S. Ct. at 2036-37.

Justice Thomas asserted that the burden involved in *Timmons* was not severe because it “neither regulated the New Party’s internal decision-making process, nor compelled it to associate with voters of any political persuasion.”⁶⁰ By this standard, he found that the burdens imposed by Oklahoma’s semi-closed primary law were minimal because it “does not regulate the LPO’s internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public.”⁶¹ This led Justice Thomas to conclude that “[i]f a party may be prevented from associating with the candidate of its choice . . . because that candidate refuses to disaffiliate from another political party, a party may also be prevented from associating with a voter who refuses to do the same.”⁶² Not satisfied to stop with this conclusion, he went on to assert that it is not difficult for a voter to disaffiliate from a political party because all he or she must do is comply with state registration requirements.⁶³

As its final word on its refusal to apply strict scrutiny to Oklahoma’s semi-closed primary law, the Court articulated a “slippery slope” type of argument. “To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite State electoral codes.”⁶⁴ Having rejected strict scrutiny as the analytical standard, the Court proceeded to judge Oklahoma’s semi-closed primary law under a standard premised on the principle that “[w]hen a state electoral provision places no heavy burden on associational rights, ‘a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.’”⁶⁵

C. Important Justifying State Interests

The Court cited *Nader v. Schaffer*,⁶⁶ a case that it had summarily affirmed without opinion, as authority for its assertion that it had recognized that “preserve[ing] [political] parties as viable and identifiable interest groups,”⁶⁷ and “enhanc[ing] parties’ electioneering and party-building efforts,”⁶⁸ are important state interests.⁶⁹ In addition,

60. *Id.* at 2037.

61. *Id.*

62. *Id.* (citations omitted).

63. *See id.* Curiously, after refusing to join the plurality Justices’ view that in the context of who can vote in primary elections, there are no constitutionally cognizable associational interests between a party and a prospective voter who refuses to register as a member of that party, *see Clingman*, 125 S. Ct. at 2042–44, Justice O’Connor joined the majority for the proposition that the re-registration burden in *Clingman* was not severe, *id.* at 2044–45. With respect to this issue, she proclaimed that “a party’s inability to persuade a voter to disaffiliate from a rival party would suggest not the presence of anticompetitive regulatory restrictions, but rather the party’s failure to win the voter’s allegiance.” *Id.* at 2045. Accordingly, she concluded that “[t]he semiclosed primary law, standing alone, does not impose a significant obstacle to participation in the LPO’s primary.” *Id.*

64. *Id.* at 2039.

65. *Clingman*, 125 S. Ct. at 2039 (quoting *Timmons*, 520 U.S. 358).

66. 417 F. Supp. 837 (D. Conn. 1976), *aff’d*, 429 U.S. 989 (1976).

67. *Clingman*, 125 S. Ct. at 2032 (quoting *Nader*, 417 F. Supp. at 845) (internal quotation marks omitted, second bracket in original).

68. *Id.* (citing *Nader*, 417 F. Supp. at 848).

69. *Id.* at 2039.

the Court cited *Storer v. Brown*⁷⁰ as authority for its assertion that it had recognized that “[guarding] against party raiding and ‘sore loser’ candidacies by spurning primary contenders”⁷¹ are important state interests as well.⁷² Thereafter, the Court found that Oklahoma’s semi-closed primary advanced each of these interests by hypothesizing harms that would befall the LPO, other political parties, and Oklahoma’s political system if great numbers of voters registered as members of other parties voted in LPO primaries without first reregistering as an LPO member or as an independent.⁷³

Thus the Court hypothesized that, in absence of Oklahoma’s semi-closed primary law, the LPO’s primaries could be swamped by voters registered as members of other parties in a manner that could produce nominees indifferent or hostile to traditional LPO principles.⁷⁴ If this happened, the LPO’s true members would be harmed and persons who vote on the basis of candidates’ parties could no longer rely on party labels to signify candidates’ ideologies.⁷⁵ Moreover, the Court held that it would defeat the purpose of party registration—providing “a minimal demonstration by the voter that he has some ‘commitment’ to the party in whose primary he wishes to participate”⁷⁶—because party “commitment is lessened if party members may retain their registration in one party while voting in another party’s primary.”⁷⁷ Accordingly, the Court held that the possibility that these harms will occur is reduced, and therefore political parties are preserved as viable and identifiable interest groups, by Oklahoma’s semi-closed primary preventing persons from voting in LPO primaries while still registered as members of other parties.⁷⁸

After stating its belief that “parties’ voter turnout efforts depend in large part on accurate voter registration rolls,”⁷⁹ the Court simply asserted without further analysis that “[w]hen voters are no longer required to disaffiliate before participating in other parties’ primaries, voter registration rolls cease to be an accurate reflection of voters’ political preferences.”⁸⁰ This is harmful to the important interest of enhancing parties’ electioneering and party-building efforts, said the Court, because parties may “[expend] precious resources to turn out party members who *may have decided* to cast their votes elsewhere.”⁸¹ The inference to be drawn from this finding is that Oklahoma’s semi-closed primary law makes voter registration rolls significantly more accurate in terms of reflecting the likelihood that voters registered as a member of a particular party will actually turn out to vote in that party’s primaries if they are encouraged to do so.⁸²

70. 415 U.S. 724 (1974).

71. *Clingman*, 125 S. Ct. at 2039 (citing *Storer*, 415 U.S. at 735).

72. *Id.*

73. *Id.* at 2039–41.

74. *Id.* at 2039.

75. *Id.*

76. *Clingman*, 125 S. Ct. at 2040 (quoting *Nader*, 417 F. Supp. at 847).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Clingman*, 125 S. Ct. at 2040 (emphasis added).

82. Or, in the Court’s words, “[i]f encouraging citizens to vote is an important state interest, then Oklahoma is entitled to protect parties’ ability to plan their primaries for a stable group of voters.” *Id.* (citation omitted).

Finally, the Court held that Oklahoma's semi-closed primary helps prevent party-raiding and sore loser candidacies by "discouraging voters from temporarily defecting from another party to vote in the LPO primary."⁸³ For purposes of this discussion, the Court defined party raiding as "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election."⁸⁴ The Court then hypothesized that party raiding could be used by one major party whose primary results were not in doubt to get loyal party members to vote in the LPO primary for the LPO candidate most likely to siphon off votes from the candidate of the other major party during the general election.⁸⁵ The Court defined sore loser candidacies by hypothesizing that a prospective major-party primary candidate who determines that he is unlikely to win his party's primary might file instead as an LPO primary candidate in hopes that his supporters from the major party will vote for him in the LPO primary.⁸⁶ If successful, the sore loser could spoil the general election prospects of the major party from whom he or she defected.⁸⁷ The Court deemed these potential harms to be incidents of "party-splintering and excessive factualism" that Oklahoma's semi-closed primary could discourage.⁸⁸

III. THE COURT'S QUESTIONABLE LOGIC

A. *Political Realities*

The authority of states to regulate elections is well established, "for the Constitution grants to the States a broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices."⁸⁹ In exercise of this power, toward the end of the nineteenth century and the beginning of the twentieth century, states enacted mandatory primary election laws as a reform instigated to take the power of nominating party candidates away from small factions of allegedly corrupt party bosses and give it to rank-and-file registered party members.⁹⁰

Nominating general election candidates by primary elections, rather than by party conventions, creates conflicts over the principles and messages of political parties. Political parties have internal procedures for selecting party officers at all levels, local, state, and federal.⁹¹ Only the party elites and activists participate in the party officer

83. *Id.* at 2040–41.

84. *Id.* at 2040 (internal quotation marks omitted).

85. *Id.*

86. *Clingman*, 125 S. Ct. at 2040.

87. *Id.* at 2040–41.

88. *Id.* at 2041 (internal quotation marks omitted).

89. *Tashjian*, 479 U.S. at 217 (quoting U.S. Const. art. I, § 4, cl. 1) (citation omitted).

90. 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*, 36 *Tulsa L.J.* 59, pt. II(A) (2000).

91. See Democratic National Committee, *The Charter and The Bylaws of the Democratic Party of the United States*, http://a9.g.akamai.net/7/9/8082/v001/democratic1.download.akamai.com/8082/pdfs/20060119_charter.pdf (December 3, 2005); Oklahoma Democratic Party, *Constitution and Bylaws*, <http://www.okdemocrats.org/images/ODP%202003%20Constitution%20and%20By-Laws.pdf> (2004); Republican

selection process.⁹² In turn, the decisions of party officers determine each party's organizational structure and official policy principles and priorities.⁹³ In the days when parties nominated their candidates through nominating conventions, candidates were more tightly connected to party principles and priorities since they were developed by the few activists and party bosses who controlled the nomination process.⁹⁴

The dynamics of primary elections have spawned self-anointed candidates, many of whom portray themselves as independent of their political parties.⁹⁵ These candidates have incentives to give only lip service to party principles and priorities, and the party activists who developed them. They can, and increasingly must, acquire a significant portion of the resources they need for expensive primary campaigns from political action committees, wealthy power brokers, and interest groups.⁹⁶ Ultimately, they must acquire primary votes from many nominal party members who are not party elites or

National Committee, *The Rules of the Republican Party as Adopted by the 2004 Republican National Convention August 30, 2004*, <http://www.gop.com/about/aboutread.aspx?abouttype=4> (2004).

92. For example, Tulsa County has about 139,000 registered Democrats. Oklahoma State Election Board, *Registration by Party as of January 15, 2005*, http://www.state.ok.us/~elections/reg_0105.pdf (Jan. 15, 2005). There are 262 precincts in Tulsa County. *Id.* Within the Tulsa County Democratic Party, each precinct is entitled to elect three officers who, along with a few public and state party officers, are entitled to vote for county officers. Oklahoma Democratic Party, *Constitution and Bylaws*, art. II, § 3(B), art. IV, §§ 1–2 (2004). Assuming every precinct sent a full compliment of officers to the county convention, at most about 786 Tulsa County Democrats would vote for county officers and delegates to the district and state conventions. From its Convention, Tulsa County Democrats send about 78 delegates to the district and state conventions. *Id.* at art. II, §§ 4–5, art. IV, § 2(B)(2) (setting forth a formula for calculating each county's share of 528 district and state delegates based on a county's vote for Democratic presidential, U.S. Senate, and gubernatorial candidates). At the state convention, 528 Democrats out of the state's approximately 1.1 million registered Democrats vote to elect state party officers. *Id.* art. IV, § 2(B)(2); Oklahoma State Election Board, *supra*, at http://www.state.ok.us/~elections/reg_0105.pdf.

93. The Constitution of Oklahoma's Democratic Party confers authority to propose, enact, and implement policy resolutions and changes in Democratic Party governance on various levels of party organization from the precincts to the State Central Committee. Oklahoma Democratic Party, *Constitution and Bylaws*, art. VII, § 1(E), § 2(E), (H), (I), § 3(D)–(E), § 4(D)–(E), § 5(C), (E), § 6(B)–(E), § 7(B).

94. See Allison, *supra* n. 90, at 61–62, 61 n. 21; John C. Green, *The Right to Party: The United States Supreme Court and Contemporary Political Parties*, in *Superintending Democracy: The Courts and the Political Process* 149, 152 (Christopher P. Banks & John C. Green eds., U. Akron Press 2001); see also Reichley, *supra* n. 2, at 174–76 (describing city political machines in their heyday, and the great influence party bosses had over public officials from their parties).

95. See Green, *supra* n. 94, at 153–55. The phenomenon of the self-anointed candidate has been described as the product of economic market forces having an increased impact on politics. Peter Kobrak, *Cozy Politics: Political Parties, Campaign Finance, and Compromised Governance* 64–65 (Lynne Rienner Publishers 2002). According to Kobrak, there has been an “historical shift from party-based organizations tied to partisan newspapers to candidate-based membership enterprises heavily dependent on purchasing TV and radio time.” *Id.* at 64. Under these conditions, “candidates’ fortunes no longer rest on the approval of party leaders.” *Id.* Instead, candidates have become “self-recruited entrepreneurs [who win] “through a combination of ambition, talent, and the willingness to devote whatever time [is] necessary to seek and hold office.” *Id.* (footnote omitted). As a consequence, “these entrepreneurs . . . build their own enterprises and become beholden to their own donors.” *Id.* This means “[p]residential and congressional candidates . . . must each strike their own political bargains de novo on each issue, and are less likely to represent a broad party position.” Kobrak, *supra*, at 65.

96. For a particularly good description of the roles interest groups, wealthy donors, and political action committees play in determining the outcome of elections, see Kobrak, *supra* n. 95, at 65–69 (describing the role of interest groups dedicated to narrow issues and priorities in turning out voters who share their goals); *id.* at 109–25 (describing the significance of money from interest groups, wealthy donors, and political action committees in political campaigns). These important sources of money have been labeled the “second constituency,” *id.* at 125, by political scientists and journalists. *Id.* Kobrak contends that “[t]he second constituency really delivers. While elections are often closer now, in 1996 House races, the candidate who raised the most money won 92 percent of the time; in the Senate races, they won 88 percent of the time.” *Id.*

party activists.⁹⁷ Major contributors and party activists tend to have positions on issues that are significantly different than those of nominal party members.⁹⁸ Party activists and major contributors tend to be closer on major issues than they are to nominal party members,⁹⁹ but the major contributors seem to have greater capacity than party activists to assert effective pressure on officeholders to support their interests, and their interests are likely to be narrower and more venal than those of party activists.¹⁰⁰

Voter turnout is significantly lower in primary elections than general elections.¹⁰¹ This fact somewhat mitigates the problem of free-range candidates, since

97. Primary elections at minimum permit every registered voter within a particular district, city, county, or state to vote in the primary elections of the parties of which they are members. This is the so-called closed primary system. Allison, *supra* n. 90, at 59–60. The total number of voters who vote in a party's primary vastly exceeds the number of activists and campaign contributors who also participate. For example, only 528 party officers comprise the Oklahoma Democratic Convention, which is the body that makes decisions about the policies and principles of the Oklahoma Democratic Party. See *supra* n. 92. Financial contributors comprise only about "4 percent of the people." Kobrak, *supra* n. 95, at 120 (footnote omitted). These are very small numbers compared to the approximately 350,000 Democrats who participated in the 2002 U.S. Senate and Gubernatorial Democratic Party Primaries in Oklahoma. Oklahoma State Election Board, *Governor: Democratic Primary Election—August 27, 2002*, at 21, <http://www.state.ok.us/~elections/02dempri.pdf> (2002).

98. "[P]arty elites have more intense and consistent opinions than partisans in the mass public." John C. Green, John S. Jackson & Nancy L. Clayton, *Issues Networks and Party Elites in 1996*, in *The State of the Parties: The Changing Role of Contemporary American Parties* 105, 106 (John C. Green & Daniel M. Shea eds., 3d ed., Rowman & Littlefield Publishers 1999). This distinction was well illustrated by surveys conducted for the 1996 National Election Study to determine within the Democratic and Republican Parties the views of national convention delegates, campaign contributors, voters, and non-voters on four key issues: (1) the level of government services, (2) health insurance, (3) abortion, and (4) aid to minorities. *Id.* at 109–12, 111 tbl. 7.3, 112 tbl. 7.4.

Among Democrats, support for continuing government services was significantly higher for convention delegates (79%) and donors (68%), than among voters (37%) and non-voters (40%). *Id.* at 111 tbl. 7.3. Similarly, support for government provided health care insurance was significantly higher among Democratic convention delegates (71%) and donors (70%), than among Democratic voters (49%) and non-voters (45%). *Id.* With respect to abortion, support for the pro-choice position was dramatically higher among Democratic convention delegates (82%) and donors (90%), than among Democratic voters (52%) and non-voters (43%). *Id.* at 112 tbl. 7.4. Finally, support for aid to minorities was much higher among Democratic convention delegates (68%) and donors (54%), than among Democratic voters (25%) and non-voters (25%). Green, Jackson & Clayton, *supra*, at 112 tbl. 7.4.

Among Republicans, support for reducing government services was significantly higher for convention delegates (88%) and donors (82%), than among voters (60%) and non-voters (40%). *Id.* at 111 tbl. 7.3. Similarly, support for private sector health care insurance was significantly higher among Republican convention delegates (90%) and donors (77%), than among Republican voters (62%) and non-voters (36%). *Id.* With respect to abortion, support for the pro-choice position was dramatically lower among Republican convention delegates (19%), than among Republican donors (35%), voters (32%), and non-voters (41%). *Id.* at 112 tbl. 7.4. There was more agreement, however, on the issue of support for aid to minorities—the percentages favoring such aid were Republican convention delegates (11%), donors (11%), voters (5%) and non-voters (11%), while the percentages opposing such aid were Republican convention delegates (76%), donors (40%), voters (73%), and non-voters (60%). *Id.*

99. See *supra* n. 98 and accompanying text.

100. Kobrak, *supra* n. 95, at 65–69 (describing the interests and tactics of interest groups); *id.* at 125–33 (describing the access and policy rewards expected by major contributors, and the pressures they can bring to bear on officeholders to get them).

101. For example, during the 2002 election cycle in Oklahoma, there were about 1.090 million registered Democrats and 0.743 million registered Republicans on primary day, which was August 27, 2002. Oklahoma State Election Board, *Voter Registration as of January 15, 2002*, http://www.state.ok.us/~elections/vr_0102.pdf (2002); Oklahoma State Election Board, *Voter Registration as of November 1, 2002*, http://www.state.ok.us/~elections/vr_1102.pdf (2002) (the registration figures were estimated by adding the registration totals on these two reports and dividing them by two). In the Democratic primaries, about 0.35 million Democrats voted in the gubernatorial and U.S. Senate primaries, for a turnout rate of 32.1%. Oklahoma State Election Board, *Governor: Democratic Primary Election—August 27, 2002*, *supra* n. 97; Oklahoma State Election Board, *United States Senator: Democratic Primary Election—August 27, 2002*, <http://www.state.ok.us/~elections/>

primary voters tend to be more ideological than general election voters.¹⁰² Faced with the imperatives of first getting their party's nomination, and then attracting a winning majority or plurality vote in the general election, candidates must tread a fine line in offering the primary electorate enough partisan rhetoric to get nominated without adopting issues positions that could turnoff the less partisan general election electorate.¹⁰³ This issues dilemma gives candidates an incentive to make elections about personal issues such as competency and character so that they can win their primaries without addressing controversial issues.¹⁰⁴ More often than not, the conflicts created by

02dempri.pdf (2002). In the Republican gubernatorial primary, about 0.206 million Republicans voted for a turnout rate of 27.7%. Oklahoma State Election Board, *Governor: Republican Primary Election—August 27, 2002*, <http://www.state.ok.us/~elections/02reppri.pdf> (2002). By contrast, on election day, November 5, 2002, there were about 2.068 million registered voters, Oklahoma State Election Board, *Voter Registration as of November 1, 2002, supra*, and about 1.036 million votes were cast in the governor's race for a turnout rate of 50.1%, Oklahoma State Election Board, *Governor: General Election—November 5, 2002*, <http://www.state.ok.us/~elections/02gov.pdf> (2002), while 1.018 million votes were cast in the U.S. Senate race for a turnout of 49.2%, Oklahoma State Election Board, *United States Senator: General Election—November 5, 2002*, <http://www.state.ok.us/~elections/02ussen.pdf> (2002). In between the primary election and the general election, the Democrats had run-off elections on September 17, 2002, to select their nominees for governor and senator. About 0.258 million Democrats voted in both the Gubernatorial and U.S. Senate run-offs for a turnout rate of 23.7%. Oklahoma State Election Board, *Governor: Democratic Runoff Primary Election—September 17, 2002*, <http://www.state.ok.us/~elections/02demrun.pdf> (2002); Oklahoma State Election Board, *United States Senator: Democratic Runoff Primary Election—September 17, 2002*, <http://www.state.ok.us/~elections/02demrun.pdf> (2002).

102. In *Jones*, 530 U.S. 567, the U.S. Supreme Court struck down a California Blanket Primary law, in part, because it was designed to produce party nominees who were more moderate than nominees that had been selected through closed primaries. *Id.* at 580–81. To support this outcome, the Court cited expert testimony that party nominees in states that used blanket primaries, in which every voter can choose to vote in a party's primaries irrespective of their party membership, were more moderate in their views than party nominees selected in primaries in which only party members can vote. *Id.* at 580. Some political science research has determined that “[t]hose legislators whose states hold closed primaries . . . have more ideologically extreme voting records than legislators whose states have semiclosed or open primaries because candidates in semiclosed or open primaries are trying to garner votes from independent voters or voters from the other parties.” Kristin Kanthak & Jeffrey Williams, *Parties and Primaries: The First Electoral Round*, in *Law and Election Politics: The Rules of the Game* 7, 11 (Matthew J. Streb ed., Lynne Rienner Publishers 2005). However, there is also some evidence that purely open primaries produce the more ideologically extreme candidates, possibly because cross-over voters from another party vote for the most extreme candidate so as to saddle the party with a nominee who is less likely to win the general election. *Id.*

103. See *Jones*, 530 U.S. at 579–81, where the Court describes the likelihood that in closed primaries, candidates will have to offer more ideologically extreme positions to win the primary, positions that a more moderate general electorate may not favor. See also Stuart Elaine Macdonald, George Rabinowitz & Holly Brasher, *Policy Issues and Electoral Democracy*, in *Electoral Democracy* 172, 179–96 (Michael B. MacKuen & George Rabinowitz eds., U. Mich. Press 2003), in which two candidate strategies for selecting issues positions are contrasted: The proximity strategy, in which the candidate tries to adopt positions that most closely conform to the median position around which most voters are clustered, and the directional strategy, in which the candidate tries to define him— or herself clearly as being on a particular side by adopting a position that is the strongest he or she can adopt without being labeled an extremist. With respect to which strategy seems to work the best, the authors state that “[v]oters at distal positions on the scale react more strongly to candidates than do voters at more central positions,” *id.* at 177, so that on any particular issue candidates who fail to adopt positions strong enough to attract the distal voters make that issue irrelevant. *Id.* As to which strategy is the most effective, the authors simply note that “it is striking that Republican candidates at least since Reagan have been fairly determinedly directional, while only Clinton of recent Democrats has followed a similar directional strategy.” *Id.* at 196. Given that primary voters are more ideological than general election voters, it follows that the key to winning is for the candidate to adopt positions that are extreme enough to win the primary but are not so extreme as to get him or her labeled as an extremist.

104. Kobrak notes that in order to maximize their potential for winning during the 1990s, parties “sought to avoid discussing several potentially divisive issues that cut across their group coalitions.” Kobrak, *supra* n. 95, at 61. Further, in describing the role of the media in recent campaigns, Kobrak cites a study in which it was asserted that “a major consequence of the ‘media politics’ era [is that] ‘the candidate as a personality has

the issues dilemma produce candidates whose issues positions or personalities are not well-liked by the party elites, the primary electorate, or the general election electorate.¹⁰⁵

The ability of, and the perceived need for, candidates to campaign in ways that contradict or obscure party principles and policies negate the ability of political parties to be ideal organizers of elections. Party principles and priorities optimally reflect the visions of their elite activists for how government can best meet the needs of the people, visions that are moderated only to the extent necessary to attract a winning coalition of contributors, volunteers, and voters.¹⁰⁶ Ideally, elections should be about presenting these moderated optimal visions clearly to the voters so their votes communicate their policy wishes to those who hold public office.¹⁰⁷ For reasons stated above, elections in the United States often are driven by the personal issues of competency and character, or involve candidates who feel free to espouse positions at variance with their parties' visions of governing. So, political reality simply does not match the political ideal, and voters may not be able to rely on party labels as indicators of the clear policy choices at stake in each election.

become the primary consideration at the presidential level.” *Id.* at 63. Professor Theodore Lowi has contended that the two major parties have become so immobilized by wedge issues which divide their constituencies no matter what position is taken that they have sought to focus campaigns on assertions of scandal rather than on real issues. Lowi, *Prospects and Obstacles*, *supra* n. 13, at 8.

105. Professors Bibby and Maisel have documented that the public rates officeholders and politicians well below persons engaged in other professions. Bibby & Maisel, *supra* n. 2, at 85, 85 tbl. 4.1. They offer several reasons for the public's great dissatisfaction with our political system. First, the parties have nominated persons whose personalities were not well-liked by the public. *Id.* at 84–85. Second, candidates have increasingly run on the simple issue that government is bad, thereby magnifying voters' dissatisfaction with government, officeholders, and politicians. *Id.* at 85–86. Third, voters complain of excessive partisan bickering. *Id.* at 86–87. Finally, politicians have created disappointment even when they have addressed real issues because these issues are so complex that meaningful solutions to them have eluded the political system. *Id.* at 87–88.

Kobrak offers a slightly different analysis of why there has been so much dissatisfaction with general election candidates. Specifically, he asserts that the public has been distanced from candidates by the candidates seeking to satisfy the demands of ideological wealthy donors, assertive grass-roots organizations, and special interests in order to accumulate campaign resources and to avoid the opposition of politically effective organizations. Kobrak, *supra* n. 95, at 91–95. The demands candidates must satisfy include taking ideological positions that may be at variance with those of the general public and party activists and promising to provide economic benefits, tax exemptions, and regulatory exemptions to special interests. *Id.*

106. As Kobrak stated:

When functioning ideally, a party . . . constitutes the only voluntary organization in the United States that aspires to accept everyone in its membership, attempts to make decisions designed to withstand the test of time, and plays the critical governance role of sustaining the election period, the transfer of power, and the making of public policy.

Kobrak, *supra* n. 95, at 57. By seeking to be viable politically over the long-term, parties “must be answerable for the quality of their decisions” so as to “[increase] the likelihood that they will seek solutions closer to the public interest.” *Id.* at 56. “By remaining inclusive, parties also serve as an obstacle to factional domination of government.” *Id.* at 56–57. By representing the view of their members, parties form critical links between citizens and the government. *Id.* at 58. These links “[provide] an opportunity for voters to express their preferences through their party intermediaries, and it allows the elites to explain and—particularly where they find it necessary to depart from majority views—justify their policy stands to the citizens.” *Id.* at 58–59. Parties must take care, however, that in the zeal of representing their members, especially their activist members, they do not alienate themselves from the general election electorate. Kobrak, *supra* n. 95, at 90–91. Evidence from real life politics demonstrates that parties and their leaders have often taken pragmatic steps to moderate their views in the interest of winning elections. *Id.*

107. *Id.* at 95, at 59. This ideal is difficult to attain, for the “very process of dichotomizing and simplifying issues will necessarily encourage a politics in which symbolism often dominates substance.” Macdonald, Rabinowitz & Brasher, *supra* n. 103, at 197.

Moreover, the potential for voters to be misled by party labels is magnified by the United States' federalist form of government, which has caused party organizations to evolve at three different levels: national, state, and local.¹⁰⁸ A party's national platform and candidate for President may be unpopular in many states.¹⁰⁹ As a consequence, in such states the party's candidates and officeholders may not support its national platform and/or its presidential nominee.¹¹⁰ To the extent that voters in such states label a party by its national platform and presidential nominee, and then vote on the basis of party labels, a party's state and local candidates are likely to be rejected even though they offer policy choices that are quite different from those offered by the party's presidential nominee.¹¹¹ On the other hand, voters who are aware of these policy differences may

108. Green, *supra* n. 94, at 151–52.

109. Indeed, in 2004, Democratic candidates and officeholders faced potentially hostile political environments in the reddest pro-Bush states as did Republican candidates and officeholders in the bluest pro-Kerry states. President Bush's reddest states include one in which he received over 70% of the vote—Utah—three in which he received 66–69% of the vote—Idaho, Oklahoma, and Wyoming—and six in which he received 61–66% of the vote—Alabama, Alaska, Kansas, Nebraska, North Dakota, and Texas. USA Today, *Election 2004: Results by State*, <http://www.usatoday.com/news/politicselections/front.htm> (accessed Sept. 25, 2005). John Kerry's bluest states include two in which he received 60–62% of the vote—Massachusetts and Rhode Island. *Id.*

110. For example, in 2004, Lincoln Chafee, a moderate Republican U.S. senator from Rhode Island stated that he might leave the Republican Party if President Bush were re-elected. USA Today, *Election 2004: Sen. Chafee Considers Leaving the GOP*, http://www.usatoday.com/news/politicselections/nation/usenate/2004-11-03-ri-chafee_x.htm (Nov. 3, 2004).

The Republican senator said it would have been impossible to vote for President Bush given their opposite views on issues such as abortion, gay marriage, the deficit, tax cuts, the environment and the war in Iraq.

Chafee has opposed the administration's push to drill in the Arctic National Wildlife Refuge and has criticized Bush's handling of the postwar reconstruction of Iraq. He was the only Republican senator to vote against the October 2002 resolution that gave Bush the authority to invade Iraq.

Id.

At the 2004 Republican National Convention, Zell Miller, a conservative Democrat U.S. senator from Georgia (which gave President Bush 58% of its vote), gave the keynote address. In his speech, Senator Miller said: "There is but one man to whom I am willing to entrust their future and that man's name is George Bush." CBS News, *Text of Zell Miller's RNC Speech*, <http://www.cbsnews.com/stories/2004/09/01/politics/main640299.shtml> (Sept. 1, 2004). In explaining his opposition to his party and its presidential candidate, Senator John Kerry, Miller complained: "Now, while young Americans are dying in the sands of Iraq and the mountains of Afghanistan, our nation is being torn apart and made weaker because of the Democrat's manic obsession to bring down our Commander in Chief." *Id.* He went on to assert: "Motivated more by partisan politics than by national security, today's Democratic leaders see America as an occupier, not a liberator." *Id.* Turning his criticism to John Kerry, he assailed Senator Kerry's voting record on national defense:

And, no pair has been more wrong, more loudly, more often than the two Senators from Massachusetts, Ted Kennedy and John Kerry.

Together, Kennedy/Kerry have opposed the very weapons system that won the Cold War and that is now winning the War on Terror.

Listing all the weapon systems that Senator Kerry tried his best to shut down sounds like an auctioneer selling off our national security but Americans need to know the facts.

Id.

111. In the 2004 Oklahoma U.S. Senate race, the Democratic nominee, Congressman Brad Carson, ran a decidedly conservative campaign that was very supportive of President Bush. As an example of Congressman Carson's conservative campaign, when he and Dr. Coburn appeared on *Meet the Press* it was reported:

At times it was hard to tell who was the Democrat and who was the Republican in what has shaped up as one of the most important Senate races in the country.

consciously vote to elect public officials who are members of the President's party and opposed to the policy preferences of the President.¹¹² If this occurs in enough states, the President's party may have great difficulty governing in a coherent manner even if it has achieved a majority within the U.S. Senate and the U.S. House of Representatives.¹¹³

During the post-World War II era, the party who has won the presidency has often failed to win a majority in both houses of Congress.¹¹⁴ Critics have charged that

Oklahoma's Senate candidates faced off on NBC's 'Meet the Press' on Sunday, with Rep. Brad Carson (D) repeatedly embracing GOP policies and President Bush.

Lois Romano, *Turnabout in Okla. Senate Race: Democrat Carson backs Iraq War; Deficit Worries GOP's Coburn*, <http://www.washingtonpost.com/wp-dyn/articles/A4518-2004Oct3.html> (Oct. 4, 2004). On the key issue of the Iraq war, Congressman Carson proclaimed that "I supported the president and the resolution when it came through Congress," Carson said. "I believe that our success in Iraq is critical to our future. And I believe that, if anything, we should be more vigorous in destroying the sanctuaries that terrorists have carved out for themselves." *Id.* He also noted that he disagreed with Senator Kerry's statement that Iraq was "a 'wrong' war." *Id.* During the campaign, Congressman Carson ran a campaign advertisement that was highly offensive to Oklahoma liberals. In it, Congressman Carson's wife, Julie, complains that "During this race, Tom Coburn called my husband evil, then dangerous, now a liberal' . . . 'I don't know what's worse.'" Commercial Closet Association, *Evil, Then Dangerous, Now a Liberal*, <http://www.commercialcloset.org/cgi-bin/iowa/portrayals.html?record=2050> (accessed Sept. 25, 2005). Despite the conservatism of his campaign, Congressman Carson lost decisively to Dr. Coburn, 52.77% to 41.24%, with an unknown Independent candidate getting 5.99%. Oklahoma State Election Board, *General Election November 2, 2004: Summary Results*, <http://www.state.ok.us/~elections/04ussen.pdf> (2004).

112. In the 2000 U.S. Senate elections, Lincoln Chafee won re-election in predominantly Democratic Rhode Island and James Jeffords won re-election in predominantly liberal Vermont as George W. Bush was "winning" the presidency. Both men are moderate to progressive Republicans, and they won as a decidedly conservative Republican won the presidency. See John DeVries, *A Smudged Crystal Ball, 1 USA Political Research* 54 (Nov. 14, 2000) (available at <http://balderdashe.com/usapol/archives/vol11/V1-54.html>). President Bush had been in office only about four months when differences between him and Senator Jeffords became so heated that Senator Jeffords left the Republican Party to become an Independent, thereby giving control of the U.S. Senate to the Democrats. CNN, *Jeffords leaves GOP, throwing Senate control to Democrats*, <http://archives.cnn.com/2001/ALLPOLITICS/05/24/jeffords.senate/> (May 24, 2001).

113. Indeed, under certain circumstances, just one defector can throttle a major presidential initiative. Even before he left the Republican Party, Senator Jeffords had already damaged President Bush's domestic agenda: "Many Republicans believe Jeffords single-handedly sank Bush's proposed tax cut, forcing the White House to negotiate with moderate Democrats on a smaller cut." CNN, *supra* n. 112. As noted above, Senator Jeffords leaving the Republican Party greatly harmed the Republican agenda because it gave control of the U.S. Senate to the Democratic Party. *Id.* With respect to this change, one White House official said that "It just shows how we have much less influence in controlling the agenda than many people think." *Id.* (internal quotation marks omitted).

114. There have been fifteen completed presidential terms since the end of World War II in 1945. In only four of these presidential terms—Truman (1949–1953), Kennedy/Johnson (1961–1965), Johnson (1965–1969), and Carter (1977–1981)—has the President enjoyed having both Houses of Congress controlled by his party throughout the four year term. In contrast, there were five presidential terms where the President endured a Congress completely controlled by the opposition party through out the term—Eisenhower II (1957–1961), Nixon (1969–1973), Nixon/Ford (1973–1977), G.H.W. Bush (1989–1993), and Clinton II (1997–2001). In three presidential terms, the President's party controlled both Houses for two years, and the opposition party controlled both Houses for two years—Roosevelt/Truman (1945–1949), Eisenhower I (1953–1957), and Clinton I (1993–1997). In one presidential term the President's party controlled the Senate for two years and the House throughout, and the opposition party controlled the Senate for two years—G.W. Bush I (2001–2005). In one presidential term the President's party controlled the Senate, and the opposition party controlled the House—Reagan I (1981–1985). Finally, in one presidential term the President's party controlled the Senate for two years and the opposition party controlled the House throughout, and the Senate for two years—Reagan II (1985–1989). Office of the Clerk, U.S. House of Representatives, *Party Divisions*, http://clerk.house.gov/histHigh/Congressional_History/partyDiv.html (accessed Sept. 27, 2005); U.S. Senate, *Party Division in the Senate, 1789-Present*, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (accessed Sept. 27, 2005); see also Bibby & Maisel, *supra* n. 2, at 39 tbl. 2.2.

“divided government [caused] stagnation and the inability to get things done.”¹¹⁵ Not only has our government been afflicted with division, it has also endured more instability than would have been expected from a government dominated by two stable parties.¹¹⁶

B. Legal Background

Clingman was not decided in a legal vacuum. Rather, it was the latest law-making event to add to the body of law, both statutory and judicial, that has greatly influenced the electoral prospects of third parties and the relative rights of voters, candidates, and parties to shape primary elections and determine their outcomes.

1. Third-Party Obstacles

Perhaps the most significant legal obstacle to third-party electoral success is the U.S. preference for electing legislators, state and federal, from single-member plurality winner take-all districts.¹¹⁷ In such districts, there can be only one winner.¹¹⁸ As a consequence, this electoral pressure virtually dictates that two broad-based parties will form, since only large broad-based parties are likely to muster the plurality vote needed to win a significant number of legislative seats.¹¹⁹ Third parties often are created to promote a specific ideology,¹²⁰ or to launch a protest movement concerning specific

115. Bibby & Maisel, *supra* n. 2, at 86. In the worst case scenario, a divided government can lead to budgetary impasses that shutdown the government, as it did in late 1995 when President Clinton and Congress deadlocked over budget policy and the Republicans' use of budget bills to force through regulatory legislation it could not get past a Clinton veto outside of the budgetary process. *Mr. Clinton Wields the Veto*, 145 N.Y. Times A24 (Nov. 14, 1995); Todd S. Purdum, *President and G.O.P. Agree to End Federal Shutdown and to Negotiate a Budget*, 145 N.Y. Times A1 (Nov. 20, 1995); Don Van Natta, Jr., *Bracing for Furloughs and Locked Offices*, 145 N.Y. Times B10 (Nov. 14, 1995).

116. Commencing with the Kennedy administration, the nation endured five straight presidencies that were either interrupted prematurely by tragedy or scandal, or were deemed by voters to be failures for their inability to solve pressing national problems. These presidencies included the Kennedy administration, which ended due to President Kennedy's assassination; the Johnson administration, which was brought down by its inability to deal with the Vietnam War and increasing domestic disorder; the Nixon administration, which was brought down by the Watergate scandal; the Ford Interregnum, which was rejected by voters because of its inability to deal well with economic problems and resentment over President Ford's pardon of President Nixon; and the Carter administration, which voters rejected over its difficulty in handling a major energy crisis, economic problems, and the Iranian Hostage Crisis. For an illuminating and quite readable history of these flawed administrations, read Michael Barone, *Our Country: The Shaping of America from Roosevelt to Reagan* (Free Press 1990).

In addition, the Reagan administration was marred by the Iran-Contra scandal, *id.* at 658–60, and the Clinton administration was marred by a sex scandal that led to President Clinton's impeachment, but not a conviction, William Jefferson Clinton, *Bill Clinton: My Life*, at passim (Alfred A Knopf 2004). Although the Reagan and Clinton scandals did not result in interrupted presidencies, in each case they weakened the administration's ability to pursue its agenda. See Barone, *supra*, at 660 (describing the Iran-Contra Scandal's effects on the Reagan administration); Clinton, *supra*, at passim.

117. Bibby & Maisel, *supra* n. 2, at 56–57.

118. *Id.* at 56.

119. *Id.*

120. Examples of such doctrinaire or ideological parties include: The Prohibition Party, the Socialist Party, the Socialist Labor Party, the Socialist Workers Party, the Communist Party, the American Nazi Party, and the Libertarian Party. Gillespie, *supra* n. 5, at 10. Bibby and Maisel include the Conservative Party and the Peace & Freedom Party in the doctrinaire category. Bibby & Maisel, *supra* n. 2, at 13–14. Closely related to the doctrinaire parties are what Bibby and Maisel have labeled as “new parties,” which “appeal to voters around . . . issues that reflect differences in cultural more than economic ideologies.” *Id.* at 14. These “new parties” include the Libertarian Party, the Green Party, the Natural Law Party, and the Right-to-Life Party. *Id.*

grievances with the two major parties.¹²¹ Such parties have simply been too narrow in their orientation to achieve a winning plurality.¹²² This is especially true in a nation such as the United States where the electorate is remarkably non-ideological,¹²³ and the modest ideological differences that exist are accommodated by the dominant parties.¹²⁴ Moreover, the repeated inability of third parties to win significant numbers of legislative seats may cause potential adherents to feel their votes for third-party candidates are wasted and could facilitate the victory of the major-party candidate they least prefer.¹²⁵

121. Gillespie adopts V.O. Key's notion of "recurring, shortlived . . . party eruptions" to describe these parties. Gillespie, *supra* n. 5, at 11 (internal quotation marks omitted, ellipses in original). He includes in this category the Antimasons, Free Soilers, Populists, Progressives, Dixiecrats, Know Nothings, and American Independents. *Id.* Theodore Roosevelt's Bull Moose Progressives, La Follette Progressives, George Wallace's American Independents, and Strom Thurmond's Dixiecrats were launched to give voice to the intense policy differences of a major political figure with his former party. Bibby & Maisel, *supra* n. 2, at 13; Gillespie, *supra* n. 5, at 11.

122. Bibby & Maisel, *supra* n. 2, at 54–55.

123. Bibby and Maisel comment that:

American society is not characterized by blocs of people irreconcilably attracted to a particular ideology or creed. Racial, religious, and ethnic minorities . . . have not tended toward separatism or extremism. Religious tensions have existed, but open conflict has never been commonplace Nor has America developed the degree of class consciousness that can be found in Europe. . . . There is virtually universal acceptance and support for the existing constitutional order and a capitalist economic system.

Id. at 55.

There is also the very real question as to whether U.S. voters have the capacity or inclination to think in ideological terms. Philip Converse "concluded that most Americans are innocent of ideology, ill prepared, and perhaps even incapable of following . . . discussions about the direction government should take." Donald R. Kinder, *Belief Systems after Converse*, in *Electoral Democracy* 13, 13 (Michael B. MacKuen & George Rabinowitz eds., U. Mich. Press 2003). In a remarkable essay that takes up where Converse left off, Kinder explores orientations voters could use to organize their thinking about politics so as to enable them to cast votes that register their policy preferences to officeholders. *Id.* at ch. 1. Kinder concludes that groupcentrism and ethnocentrism are two orientations that voters seem to use, rather than ideological principles, to form and signal their political beliefs. *Id.* at 16–37. At the end of this exploration, Kinder comes to a somewhat pessimistic conclusion:

Like the ideological principles that Converse looked for but could not find, groupcentrism and ethnocentrism hold out the promise of a general solution to the puzzle of public opinion, but not necessarily an inspiring one. That public opinion is real and that it is organized in systematic and knowable ways does not necessarily make it, or the policies that it influences, enlightened.

Id. at 40.

124. Bibby & Maisel, *supra* n. 2, at 55–56. There have been several periods where third parties achieved significant support. Marjorie Randon Hershey, *Third Parties: The Power of Electoral Laws and Institutions*, in *Law and Election Politics: The Rules of the Game* 23, 25–26, 25 fig. 3.1, 26 fig. 3.2 (Matthew J. Streb ed., Lynne Rienner Publishers 2005). During one heyday, most third-party "votes were cast for Populist and Progressive candidates. But the Democratic Party soon absorbed the main ideas of the 1890s Populists and therefore undermined their appeal to voters." *Id.* at 25. Similarly, in the 1990s, the Republican Party reached out to supporters of H. Ross Perot, and his Reform Party soon faded. *Id.* at 25–26.

It has been suggested that the continuing dominance of U.S. politics by two parties reflects an essential duality of ideology within the American electorate. Reichley, *supra* n. 2, at 3–4. This duality is comprised to two traditions, the liberal tradition and the republican tradition. *Id.* at 3. "Both traditions cherish individual freedom as a fundamental human value." *Id.* They diverge in the emphasis they give to particular types of freedoms. "[T]he republican tradition has particularly advocated freedoms that are least likely to conflict with public order, specifically economic freedoms; and the liberal tradition has specifically championed freedoms that are most likely to be compatible with equality, notably freedoms of personal behavior and expression." *Id.* at 4. Given this ideological duality, Reichley suggests that "a two-party system representing these two traditions is in this sense natural to our politics." *Id.*

125. Theodore J. Lowi, *Toward a Responsible Three-Party System: Plan or Obituary?* in *The State of the Parties: The Changing Role of Contemporary American Parties* 171, 172 (John C. Green & Daniel M. Shea eds., 3d ed., Rowman & Littlefield Publishers 1999).

In contrast, third parties tend to emerge and have staying power in jurisdictions that establish multimember, proportionate-representation districts.¹²⁶ Under such an arrangement, a party can finish third or fourth and still pick up a fair share of legislative seats.¹²⁷ The ability to win consistently a fair share of legislative seats not only enables third parties to attract and maintain an ideologically driven membership,¹²⁸ it also provides third parties with leverage to shape policy and bargain for executive offices for their members whenever their legislative strength constitutes the balance of power on important policy matters.¹²⁹

Our dominant parties have reinforced their duopoly by engaging in increasingly sophisticated political gerrymandering during the process of reapportioning voters.¹³⁰ As a result, a huge portion of legislative districts, federal and state, have become single party districts because gerrymandering has provided one party with an overwhelming percentage of the registered voters.¹³¹

Political gerrymanders have been challenged by members of parties whose ability to elect nominees for public office have been severely disadvantaged by a reapportionment plan.¹³² In these challenges, the plaintiffs contend that the architects of the political gerrymander intentionally discriminated against them by reducing their ability to elect a fair share of their party's nominees to public office.¹³³

Plaintiffs have yet to win the reapportionment remedy they sought in these cases.¹³⁴ There has been significant support among the Justices for the proposition that political gerrymanders present non-justiciable political questions¹³⁵ even though the Court has held that they do not.¹³⁶ Moreover, the Justices who have believed that claims

126. Bibby & Maisel, *supra* n. 2, at 56.

127. Hershey, *supra* n. 124, at 28. Multimember districts and proportionate representation systems are primarily a European phenomenon. *Id.* However, prior to the mid-1950s, multimember districts were common in the United States. *Id.*

128. *Id.*

129. See Amy, *supra* n. 13, at 163; Ryden, *supra* n. 13, at 177.

130. In 2004, none of the 153 contested state legislative seats in California changed hands or parties thanks to sophisticated reapportionment methods agreed to by the Democratic and Republican incumbents. Jeffrey M. Barker, *Sacramento News & Review: Gerrymander Jigsaw: The Politicians Have Created Safe Districts for Their Re-election. Now it's Time to Redistrict in a Fair Way*, <http://www.newsreview.com/issues/sacto/2005-05-12/cover.asp> (accessed Sept. 29, 2005). Gerrymandering has led to a significant decline in competitive seats in the U.S. House of Representatives. Fair Vote: The Center for Voting and Democracy, *Overview: Dubious Democracy 2003-2004 (June 2003)*, <http://www.fairvote.org/dubdem/overview.htm> (accessed Sept. 29, 2005). "In 2002, over 80% of US House races were won by landslide margins of at least 20%. Fewer than one in ten races were by less than a 10% margin. This year's elections were the least competitive races since 1988." *Id.* Worse yet,

[o]ver 90% of Americans live in congressional districts that are essentially one-party monopolies. This means that most voters are faced with unappealing choices: ratify the incumbent party, waste their vote on a candidate who is sure to lose, or sit out the race. Not surprisingly, increasing numbers of American are opting for the latter option.

Id.

131. Barker, *supra* n. 130.

132. See *Vieth v. Jubelirer*, 541 U.S. 267, 272-73 (2004); *Davis v. Bandemer*, 478 U.S. 109, 114-15 (1986).

133. See *Vieth*, 541 U.S. at 272-73; *Davis*, 478 U.S. at 114-14.

134. See *Vieth*, 541 U.S. at 279-81, 279 n. 5, 280 n. 6, 287 n. 8.

135. *Id.* at 277-306 (plurality); *Davis*, 478 U.S. at 144-61 (O'Connor, J., concurring, joined by Burger, C.J. & Rehnquist, J.).

136. *Davis*, 478 U.S. at 118-27.

against political gerrymanders are justiciable have also tended to rule on the merits against the gerrymander challengers. In doing so, they have established plurality support for the proposition that the Equal Protection Clause does not command that reapportionment plans be drawn so that each party may elect a number of officeholders proportionate to its voting strength in a state.¹³⁷ Plurality support has also been established for the proposition that the results of one election are insufficient to establish a discriminatory effect.¹³⁸ Most importantly, a plurality has stated that a gerrymandered electoral system does not violate the Equal Protection Clause unless it “is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”¹³⁹ In that regard, this plurality opined that it is to be presumed that individuals who voted for a losing candidate will be adequately represented by, and “have as much opportunity to influence [the winner,] as other voters in the district.”¹⁴⁰

Our federal government is headed by a single executive, the President.¹⁴¹ This means that in the United States the presidency is the most important political prize.¹⁴² As is the case with single-member legislative districts, the singularity of the presidency means that realistically only very broad based parties have any chance of electing a President.¹⁴³ The advantage of major parties in presidential politics is reinforced by an Electoral College comprised of members elected state-by-state on the basis that the presidential candidate winning a plurality of a state’s vote gets all of the state’s electors.¹⁴⁴ If electors were awarded on a proportionate vote basis in more than just a handful of states, third-party candidates could receive enough electoral votes to insure that no one would achieve the majority of electoral vote needed to avoid having the President elected by the U.S. House of Representatives.¹⁴⁵ Such elections could give third-party candidates leverage to bargain with the major-party candidates by offering to have her electors vote as she directs, in return for policy concessions and executive branch positions.¹⁴⁶

Third parties have also been hindered greatly by restrictive state ballot access requirements. In many states, third parties must file ballot access petitions containing valid signatures of a large number of registered voters in order to be able to nominate their candidates through primary elections and have their nominees placed on the ballot

137. *Id.* at 129–37 (plurality).

138. *Id.* at 135.

139. *Id.* at 132.

140. *Id.*

141. U.S. Const., art. II, § 1.

142. Bibby & Maisel, *supra* n. 2, at 57.

143. *Id.*

144. *Id.* at 57–58.

145. Amendment XII of the United States Constitution provides that the United States House of Representatives shall choose the President “from persons having the highest numbers [of electoral votes] not exceeding three on the list of those voted for as President.” See Reichley, *supra* n. 2, at 4 (indicating that third parties are unlikely to get enough electoral votes to through the presidential election into the House of Representatives as long as states require electors to be elected at large), see also Lowi, *supra* n. 125, at 179 (suggesting that “the existence of a genuine third party would parliamentarize the presidency [by increasing] the probability of presidential elections being settled in the House of Representatives”).

146. Gillespie, *supra* n. 5, at 30.

with their party labels.¹⁴⁷ Assuming a party meets this requirement, it may have to do it all over again for the next election cycle if its candidate for a specified high office fails to achieve a certain percentage of the vote.¹⁴⁸ In addition, the failure of a third party to maintain its officially recognized status may result in its registered members having their registrations changed to independent.¹⁴⁹ This membership cancellation feature discourages voters from registering as members of third parties because it forces them to reregister as a party member during the election cycle if their party once again completes a successful ballot access petition drive.¹⁵⁰ To add insult to injury, candidates who choose to run as independents usually face much lower ballot access hurdles than candidates wanting to run as nominees of third parties.¹⁵¹ The U.S. Supreme Court has upheld such restrictions as reasonable means of advancing the “important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization’s candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.”¹⁵²

States have also imposed restrictions on who can be the preferred nominees of third parties that have been upheld by the U.S. Supreme Court. The fusion candidate, a person who becomes the nominee of two parties—a major party and a third party—is a

147. See Hershey, *supra* n. 124, at 31–32. For example, Oklahoma requires new parties seeking official recognition to file valid petitions containing the signatures of at least 5% of the total vote cast in the last general election for either the governor or the presidential electors. Okla. Stat. tit. 26, § 1-108(2) (Supp. 2004). In 2004, 1,463,758 Oklahomans voted in the presidential general election. Oklahoma State Election Board, *General Election: November 2, 2004*, <http://www.state.ok.us/~elections/04gen.html> (2004). This means a new party seeking recognition in 2005 would have to file valid petitions containing the signatures of 73,188 registered voters. There is some confusion as to whether a person may appear on the general election ballot as the nominee of an unrecognized party. Oklahoma law states that candidates may not file to seek the nomination of party unless they seek to be nominated by a party Oklahoma officially recognizes. Okla. Stat. tit. 26, § 5-104 (2001). Nevertheless, Oklahoma purports to permit candidates of unrecognized parties to be listed on general election ballots along with their parties’ labels beneath the names of candidates nominated by the recognized parties and above the names of candidates running as independents. Okla. Stat. tit. 26, § 6-106 (2001). Only recognized parties may nominate their candidates through primary elections. Okla. Stat. tit. 26, § 1-102 (Supp. 2004).

148. For example, Oklahoma withdraws its recognition of “[a]ny recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election” Okla. Stat. tit. 26, § 1-109(A) (2001). Obviously, Oklahoma will not provide long-term recognition of political parties that only operate on a state or regional basis, since they would lose their recognition after every presidential election for failure to have a presidential candidate on the Oklahoma general election ballot. Assuming that a party had a candidate for President on the Oklahoma general election ballot last year, he or she would have had to garner 146,376 votes to enable his party to retain its status as an officially recognized party.

149. In Oklahoma, the State Election Board is required to “change to Independent the party affiliation . . . of each registered voter of a political party which ceases to be a recognized political party.” Okla. Stat. tit. 26, § 1-110 (2001).

150. See *Clingman*, 125 S. Ct. at 2046 (O’Connor, J., concurring).

151. In Oklahoma, candidates running as Independents will be listed on the general election ballot if they just file for the office they seek and either pay the required fee or submit a petition with the qualifying number of signatures. Okla. Stat. tit. 26, §§ 1-102, 5-105(B) (Supp. 2004). To be a general election candidate as the nominee of a third party, a candidate must belong to a party that is officially recognized by Oklahoma and then win her party’s primary election. See *supra* nn. 147–148 and accompanying text.

152. *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Such restrictions could have avoided the circus-type circumstances of California’s 2003 special election to recall its governor. With very little restrictions in place, 135 candidates managed to get on the ballot, “including a melon-smashing comedian, a twenty-three-year-old porn star, a sumo wrestler, and the publisher of *Hustler* magazine.” Hershey, *supra* n. 124, at 34.

means by which third parties can gain leverage to affect policy and provide their members with meaningful voting opportunities.¹⁵³ A major party lets its willing nominee accept a dual nomination because it gives the nominee two lines on the ballot and the support of another political organization.¹⁵⁴ In return, the nominee articulates some of the third party's major issues positions and perhaps helps some members of the third party acquire government positions.¹⁵⁵ Given the United States' virtual rejection of electing legislators through proportionate representation in multimember districts, "[i]t is no exaggeration to state that fusion voting is the key to a durable multiparty system."¹⁵⁶ Ironically, a movement to outlaw fusion candidacies arose at the beginning of the twentieth century from concern about the advantages it gave a major party.¹⁵⁷ Now, over forty states ban the practice.¹⁵⁸

In the late 1990s, there was briefly some hope that bans on fusion candidacies would be declared unconstitutional violations of parties' and candidates' freedom of association rights as a result of an Eighth Circuit case striking down Minnesota's fusion ban.¹⁵⁹ This hope was dashed in 1997 by the U.S. Supreme Court's reversal of the Eighth Circuit's decision in *Timmons v. Twin Cities Area New Party*.¹⁶⁰

First, the Court held that Minnesota's fusion ban does not severely burden a party's associational rights.¹⁶¹ Parties may nominate anyone they want who will accept their nominations other than persons who accept the nominations of another party.¹⁶² A party is free to endorse a candidate who has accepted the nomination of another party as long

153. Amy, *supra* n. 13, at 152–53; Hershey, *supra* n. 124, at 34–35.

154. See Bibby & Maisel, *supra* n. 2, at 57–58.

155. See *id.*

156. Amy, *supra* n. 13, at 153 (quoting Dan Cantor, executive director of the New Party) (internal quotation marks omitted). Indeed, in New York, where fusion has long been permitted, the Liberal and Conservative Parties have used it to sustain themselves by forging alliances with the Democrats and the Republicans respectively. Hershey, *supra* n. 124, at 35.

157. The Democrats used fusion to good advantage from 1897 through 1907, thereby prompting the Republican Party to lead a movement to ban it. Amy, *supra* n. 13, at 153.

158. *Id.*

159. *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 198–200 (8th Cir. 1996). The Eighth Circuit found that the fusion ban severely obstructed the New Party's associational rights to determine its own nominees, form political alliances, and broaden its base of support. *Id.* at 198–99. It further found that the ban was broader than necessary to protect the Minnesota's interest in preventing destabilizing splintering of major parties since that interest could be met by simply allowing fusion only when the major party assented to it. *Id.* at 199. To that end, the Court expressly held that "Minnesota has no authority to protect a major party from internal discord and splintering resulting from its own decision to allow a minor party to nominate the major party's candidate." *Id.* Moreover, the Court extolled the potential advantages of fusion candidacies by opining that "rather than jeopardizing the integrity of the election system, consensual multiple party nomination may invigorate it by fostering more competition, participation, and representation in American politics." *Id.* Similarly, the Court held that the State's interest in avoiding voter confusion could be met by providing voters with simple instructions, *McKenna*, 73 F.3d at 199, that voter reliance on party labels to determine their votes would not be harmed because fusion would give voters more accurate information about the views of the fusion candidates, *id.* at 199–200, that ballot overcrowding was already dealt with by state laws requiring candidates and parties to demonstrate some "minimum level of support before being placed on the ballot," *id.* at 200, and that there would be no confusion about who wins elections because the votes of fusion candidates would simply be totaled and compared to the votes other candidates receive. *Id.*

160. 520 U.S. 351 (1997).

161. *Id.* at 359–63.

162. *Id.* at 360–61, 363.

as it is willing to support a person who cannot be listed on the ballot as its candidate.¹⁶³ The ban does not forbid a party from endorsing a candidate, seeking political alliances, or “nominat[ing] candidates for office, [or] spread[ing] its message”¹⁶⁴ Nor, said the Court, is a state required to remove reasonable election regulations that as a practical matter severely disadvantage minor parties.¹⁶⁵ Although the Court acknowledged that Minnesota’s fusion ban prevented the New Party from using the ballot as a means of communicating to the public support for a particular candidate and accumulating a message-sending vote for preferred candidates,¹⁶⁶ it nevertheless held that a ban on the use of the ballot for such purposes was neither an infringement of a protected right nor a significant burden on a party’s ability to function.¹⁶⁷

Next, having found that Minnesota’s fusion ban did not severely burden a party’s associational rights, the Court went on to hold that the ban was justified by sufficiently weighty regulatory interests.¹⁶⁸ In doing so, it noted that it was not necessary for the State to offer “elaborate, empirical verification of the weightiness of [its] asserted justifications.”¹⁶⁹ Thus, it accepted at face value Minnesota’s contention that fusion voting could cause voter confusion and ballot overcrowding because the major parties might create sham new parties with campaign-slogan-like names such as “No New Taxes” or “Conserve Our Environment” as a way of converting the ballot into “a billboard for political advertising.”¹⁷⁰ Similarly, the Court accepted the State’s assertion that fusion candidacies could permit third parties to achieve unmerited major-party status by feeding off of “the popularity of another party’s candidate.”¹⁷¹

Finally, and most significantly, the Court held that a state’s interest in preserving the stability of its political system entitles it “to enact reasonable election regulations that may, *in practice, favor the traditional two-party system.*”¹⁷² In this regard, the Court indicated that provisions shoring up the two-party system will be deemed reasonable as long as they do not “completely insulate the two-party system from minor parties’ or independent candidates’ competition and influence”¹⁷³ or constitute a paternalistic mechanism for “protect[ing] political parties from the consequences of their own internal disagreements.”¹⁷⁴ The Court found that the fusion ban was a reasonable regulation related to the legitimate goal of shoring up Minnesota’s two-party system. It did so by noting that the fusion ban is less burdensome on a party’s choices of candidates than a

163. *Id.* at 360.

164. *Id.* at 360–61.

165. *Timmons*, 520 U.S. at 361–62.

166. *Id.* at 362.

167. *Id.* at 362–63. In this regard, the Court proclaimed that “Ballots serve primarily to elect candidates, not as forums for political expression.” *Id.* at 363. Moreover, said the Court, parties are free “to use the ballot to communicate information about itself and its candidate . . . , so long as that candidate is not already someone else’s candidate.” *Id.*

168. *Timmons*, 520 U.S. at 363–70.

169. *Id.* at 364.

170. *Id.* at 365.

171. *Id.* at 366.

172. *Id.* at 367 (emphasis added).

173. *Timmons*, 520 U.S. at 367.

174. *Id.*

regulation it had upheld previously that prohibits candidates from running as independents or the nominees of a party if they had been affiliated with another party within year of the current election cycle's primary elections.¹⁷⁵

The party disaffiliation provision discussed in *Timmons* was upheld by the Court in *Storer v. Brown*.¹⁷⁶ This restriction was justified, said the Court, because it advanced the State of California's compelling interest in guarding against the instability that splintered parties and unrestrained factionalism may impose on its political system.¹⁷⁷ The Court also said that the restriction was a reasonable means for the State to protect the integrity of its direct primary process.¹⁷⁸ Not only does it prevent a person disgruntled with his party to bypass the party's primary, thereby using the general election to continue intraparty feuds,¹⁷⁹ it also prevents another party from recruiting such a person to run as a spoiler Independent candidate.¹⁸⁰

Although the disaffiliation provision upheld in *Storer* was not structured to hinder the ability of third parties to nominate candidates capable of attracting significant election day support, it nevertheless has great potential for shutting down a source of candidates that historically has been quite important to the success of third-party efforts. The last four third-party presidential candidates to capture electoral votes—Theodore Roosevelt, Robert M. La Follette, Strom Thurmond, and George C. Wallace—were each well-known politicians seeking to press their grievances with their "home" parties by running third-party campaigns.¹⁸¹ As such, they seem to have launched precisely the type of campaigns the disaffiliation provision at issue in *Storer* is designed to prevent.

As noted previously, the advent of the mandatory primary election has reduced the ability of party elites to control the candidate nomination process and given rise to the entrepreneurial candidate seeking the nomination with the help of political action committees and interest groups.¹⁸² This development has made it possible for party dissidents to have realistic opportunities to win their parties' nominations as a means of vindicating their political views.¹⁸³ As a consequence, major-party primaries siphon off

175. *Id.* at 367–69. In this regard, the Court observed that the party-disaffiliation requirement "limited the field of candidates by thousands[, while] Minnesota's [fusion ban] precludes only a handful who freely choose to be so limited." *Id.* at 369.

176. 415 U.S. 724, 726–38 (1974).

177. *Id.* at 736.

178. *Id.* at 735.

179. *Id.*

180. *Id.*

181. Roosevelt bolted the Republican Party to run as the nominee of the Bull-Moose Progressive Party in 1912 in part because he felt that he was cheated out of becoming the Republican nominee and in part because he had become ideologically estranged from his successor, William Howard Taft. Gillespie, *supra* n. 5, at 85–87. La Follette also left the Republican Party to run as a Progressive Party presidential candidate in 1924, in part because he had been rejected as the Party's nominee on three other occasions and in part because he had become much more radical than the increasingly conservative Republican Party. *Id.* at 87–89. Thurmond ran as the States' Rights Democratic (Dixiecrat) candidate to protest the Democratic Party's 1948 Civil Rights initiatives. *Id.* at 98–102. Similarly, in 1968 George C. Wallace ran as the nominee of the newly formed American Independent Party in order to air his grievances against the Democratic Party's Civil Rights program, express his view that the United States should fight the Vietnam War as if it wanted win, and call for a law and order crackdown to bring order out of the riotous chaos of the 1960s. *Id.* at 107–21.

182. See *supra* nn. 90–105 and accompanying text.

183. See Bibby & Maisel, *supra* n. 2, at 58 (discussing the primaries nominating congressional and state officials); *id.* at 59 (discussing the presidential primary system).

potential leaders of third-party movements and enable the major parties "to absorb protest movements."¹⁸⁴

Many states have laws requiring voters who want an assured right to vote in primary elections to register as a member of a recognized party.¹⁸⁵ Registering as a member of a party and then voting regularly in that party's primary election tends to form a stable allegiance between the voter and her party.¹⁸⁶ Given that third parties have great difficulty in achieving recognized party status,¹⁸⁷ the allegiances formed by primary voters are inevitably with either the Republican or the Democratic Party.¹⁸⁸ Moreover, Democratic and Republican primaries are given much more publicity than any primaries held by third parties, so primaries give major-party candidates great general election advantages in terms of generating public awareness and political support.¹⁸⁹

2. Primary Participation Rules

The power of primary elections to define issues and select the nominees who will have the best opportunities of winning public office has given rise to important legal controversies as to who can participate in the primary process. These controversies involve determining the relative balance of power among states, party elites, and voters. At minimum, the mandatory primary expanded the universe of who can directly affect the selection of a party's nominees from party elites to persons registered to vote as a member of that party.¹⁹⁰

But, what about voters who want to be able to help determine the general election ballot without formally joining a political party? What about a party that feels the need to use its primary elections as a means of reaching out to Independents or members of other parties? What about voters who want to be able to vote in primaries office-by-office for their preferred candidate irrespective of their party registration? What about party critics who want to force parties to allow more than just their members to participate in their primaries as a means of producing less partisan general election candidates? Prior to *Clingman*, the Court answered all of these questions except the question of whether a party should be able to invite members of other parties to participate in its primaries. In doing so, the Court provided the precedents most relevant to evaluating its *Clingman* decision. As will be demonstrated below, voters have been the big losers in these cases.

In many respects, the tone was set in *Nader v. Schaffer*,¹⁹¹ a federal district court case that was summarily affirmed by the United States Supreme Court without

184. *Id.* at 58. "[T]he Democrats absorbed the Populists in 1896; the Democrats took back the 1948 Dixiecrats; the Republicans and Democrats sought the followers of George Wallace after 1968; and both parties openly courted Perot voters in 1996." *Id.*

185. *See id.*

186. Bibby & Maisel, *supra* n. 2, at 58.

187. *See supra* nn. 147–152 and accompanying text.

188. Bibby & Maisel, *supra* n. 2, at 58.

189. Hershey, *supra* n. 124, at 30.

190. *See supra* nn. 90–105 and accompanying text.

191. 417 F. Supp. 837 (D. Conn. 1976).

opinion.¹⁹² In *Nader*, independent voters sought to strike down Connecticut's closed primary laws, which prohibited them from voting in primary elections.¹⁹³ The independent voters asserted that Connecticut's closed primary election laws (1) deprive them of their "right to vote . . . in an 'integral part'—the primary elections—'of the process by which their United States Senators and Representatives are chosen,'" (2) deprive them of equal protection of the law "by denying them the right to vote in primary elections while extending this right to enrolled party members," and (3) compel them "to choose between a right to vote . . . and the right freely to associate for the advancement of political ideas . . . with a particular candidate regardless of the candidate's party affiliation."¹⁹⁴ The district court rejected these assertions through an analytical framework that has provided a template for assessing political associational rights in the context of primary elections.

First, the district court assessed the burdens Connecticut's closed primary imposed on the associational rights asserted by the independent voters to determine what level of scrutiny should be applied to Connecticut's closed primary laws.¹⁹⁵ Next, it identified any countervailing associational rights possessed by the political parties that might be transgressed by the remedy asked for by the independent voters.¹⁹⁶ Then, the district court assessed Connecticut's asserted interests in its closed primary laws by applying the level of scrutiny dictated by its determination of whether the closed primary severely burdens the independent voters' voting and associational rights.¹⁹⁷ Finally, the district court resolved the independent voters' equal protection claims in light of the relative interests they and the parties have in the parties' primary elections.¹⁹⁸

From its analysis of the independent voters' claims, the district court concluded that any burdens Connecticut's closed primary laws places on the independent voters' voting rights and rights of association are minimal.¹⁹⁹ To that end, it held persons do not have a right to vote in primary elections unless they comply with legitimate state rules regulating the operation of primary elections, which include party membership requirements.²⁰⁰ It also found that apart from voting in partisan primaries the independent voters have significant opportunities to associate with candidates of their choice to promote political ideas without joining a political party, including working in support of or contributing money to these candidates.²⁰¹ Most importantly, the district court held that the party membership condition for voting in partisan primaries only

192. *Nader v. Shaffer*, 429 U.S. 989 (1976).

193. *Nader*, 417 F. Supp. at 840–42.

194. *Id.* at 840; *see also id.* at 842 (discussing the plaintiffs' assertions); *id.* at 842–44 (rejecting plaintiffs' assertions); *id.* at 848 (rejecting plaintiffs' equal protection argument).

195. *Nader*, 417 F. Supp. at 842–44, 848–49.

196. *Id.* at 844–45.

197. *Id.* at 845–49.

198. *Id.* at 848.

199. *Id.* at 848–49.

200. *Nader*, 417 F. Supp. at 842 n. 4 (inferring that party membership is a legitimate primary election restriction from a case involving impermissible racial discrimination—*Smith v. Allwright*, 321 U.S. 649, 661 (1944)—in which the challenger had not questioned the party membership requirement and was therefore presumably willing and able to become a party member in order to satisfy standing requirements).

201. *Id.* at 842.

slightly burdens a person's right to vote since it "imposes . . . no affirmative party obligations . . . , in terms of time or money, [or] even [the] obliga[ti]on to vote for the party's positions or candidates . . ."202 Thus, the district court assessed the validity of Connecticut's primary laws on the basis of whether they are "reasonably related to the accomplishment of legitimate state goals."203

In determining whether Connecticut's closed primary was reasonably related to achieving legitimate state goals, the district court took note of the fact that political parties and their loyal adherents have constitutionally protected rights of association stemming from their "ultimate goal . . . of obtain[ing] control of the levers of government by winning elections" so their "policies and philosophies" "may [be] put into operation."204 Therefore, said the court, "the state has a legitimate interest in protecting party members' associational rights, by legislating to protect the party 'from intrusion by those with adverse political principles.'"205

The district court held that Connecticut's closed primary laws reasonably serve several interests related to the State's "general . . . interest in protecting the overall integrity of the historic electoral process."206 These interests include "preserving parties as viable and identifiable interest groups; insuring that the results of primary elections . . . accurately reflect the voting of party members[; and] preventing fraudulent and deceptive conduct which mars the nominating process."207

In determining whether Connecticut's closed primary reasonably serves the State's asserted interests, the district court focused on the need to provide "assurance that primary election results reflect the will of party members, undistorted by the votes of those unconcerned with, if not actually hostile to, the principles, philosophies, and goals of the party."208 This focus led the district court to proclaim that "a candidacy determined by the votes of non-party members is arguably a fraudulent candidacy."209 It also led the district court to conclude that the closed primary reasonably promotes primary elections that reflect the will of party members and do not produce fraudulent candidacies by "condition[ing] one's participation in a party's nominating process on some showing of loyalty to that party."210 Given the inability of parties to test voters' "political ideas before allowing [them] to vote in a primary election,"211 the court found that the partisan registration requirement "is a constitutionally acceptable surrogate."212 Somewhat offhandedly, the district court also found that the closed primary laws create a

202. *Id.* at 843, 843–44.

203. *Id.* at 849, 848–49.

204. *Id.* at 844, 844–45.

205. *Nader*, 417 F. Supp. at 845.

206. *Id.*

207. *Id.*

208. *Id.* at 846.

209. *Id.* at 847, 846–47.

210. *Nader*, 417 F. Supp. at 847 (emphasis omitted).

211. *Id.*

212. *Id.*

public list of party members that facilitates the "direct solicitation of party members" during the primary campaign.²¹³

With respect to the independent voters' equal protection claim, the district court admitted that they are interested in and affected by partisan primaries.²¹⁴ Nevertheless, it found that the independent voters "are not 'interested' in primary elections in the crucial, distinguishing aspect that party members are interested."²¹⁵ Party members want to nominate "the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies."²¹⁶ Thus, the district court concluded that a state does not engage in impermissible discrimination by excluding independent voters from partisan primary elections because persons who refuse to join a party "are [not] as 'interested' as party members in the outcome of the party nominating process."²¹⁷

Nader involved a conflict between a state and voters over a state law designed in part to vindicate the associational rights of parties to define who can participate in their primaries. In contrast, the 1981 case of *Democratic Party of the United States v. Wisconsin ex rel. La Follette*²¹⁸ involved the attempts of a state, its voters, and state party leaders to mandate broader participation in the process of selecting national convention delegates than a party's national leaders desired.

Wisconsin statutorily mandated open presidential primaries in which any voter is entitled to participate in a specific party's presidential primary regardless whether he or she is publicly registered as a member of that party.²¹⁹ The purpose of Wisconsin's primary is to demonstrate the preferences of Wisconsin voters for particular presidential candidates.²²⁰ Delegates to national party conventions are selected by other processes operated by the political parties.²²¹ However, Wisconsin's open primary law required that any delegation selected to attend a party's national convention must vote for presidential candidates in accordance with the results of Wisconsin's open presidential primary.²²² This requirement conflicted with the national Democratic Party rules that: (1) only persons publicly affiliated with the Democratic Party can participate in the Party's processes for selecting delegates to the Democratic Party's National Convention;²²³ and (2) at every stage delegates be apportioned among the various candidates in accordance to the support they received from binding primaries or alternative caucuses and conventions.²²⁴ These rules were implemented in part to insure that the support presidential candidates received at the Democratic National Convention

213. *Id.* at 848.

214. *Id.*

215. *Nader*, 417 F. Supp. at 848 (emphasis omitted).

216. *Id.*

217. *Id.*

218. 450 U.S. 107 (1981).

219. *Id.* at 109-12.

220. *Id.* at 111-12.

221. *Id.* at 112.

222. *Id.* at 112, 112 n. 6.

223. *La Follette*, 450 U.S. at 109, 109 n. 1.

224. *Id.* at 109-10, 110 n. 2.

reflected only the preferences of persons formally affiliated with the Democratic Party.²²⁵

In resolving this conflict in favor of the national Democratic Party, the Court felt bound by the precedent of its earlier decision in *Cousins v. Wigoda*,²²⁶ which dealt with whether a state could enjoin a national party from seating a delegation that was not selected in accordance with a state's delegate selection primary laws.²²⁷ Without saying so directly, the *Cousins* Court adopted the assertions of the enjoined delegates that the injunction significantly interfered with constitutional rights of political association enjoyed by them and the Democratic Party.²²⁸ Accordingly, it applied strict scrutiny to Illinois' asserted interest in protecting the integrity of its electoral process to determine if it were compelling.²²⁹ After speculating that permitting states to assert electoral rights that affect the processes by which parties select presidential nominees would be disruptive of those processes,²³⁰ the *Cousins* Court held that a state's "interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of selecting delegates to the National Party Convention."²³¹

Proceeding from the *Cousins* pronouncement that "the National Democratic Party and its adherents enjoy a constitutionally protected right of political association,"²³² the *La Follette* Court proclaimed that this right "presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only."²³³ It then rejected Wisconsin's attempt to argue that its open primary laws imposed only minor burdens on this right by holding that, with respect to membership requirements, neither the State nor a court may "constitutionally substitute its own judgment for that of the Party."²³⁴ By doing so, the Court essentially held that any interference, no matter how minor, with a party's interest in defining its membership constitutes a severe infringement on the political association rights of a party and its

225. *Id.* at 115–20. Democratic Party leaders were concerned that various state laws permitting persons who were not registered Democrats to play a role in selecting delegates to the Democratic National Convention could result in the Convention selecting a presidential nominee who would not have been selected had only registered Democrats been involved in the selection process. *Id.* A study of the Wisconsin primaries from 1964–1972 revealed that this was no idle concern. In 1964, 26% of the persons voting in the Democratic primary were not registered Democrats. *Id.* at 118 n. 19. Governor George Wallace received 62% of the non-adherent vote, but only 7% of the registered Democrat vote. *La Follette*, 450 U.S. at 118 n. 19. In 1968, 28% of the persons participating in the Democratic primary were non-adherents, 70% of which voted for Senator Eugene McCarthy and 14% of which voted for President Lyndon B. Johnson, while among registered Democrats 48% voted for Senator McCarthy and 39% voted for President Johnson. *Id.* Finally, in 1972, 34% of the persons participating in the presidential primary were non-adherents, 33% of which voted for Senator George McGovern and 29% of which voted for Governor Wallace, while among registered Democrats 51% voted for Senator McGovern and 7% voted for Governor Wallace. *Id.*

226. *Id.* at 121–22 (citing *Cousins v. Wigoda*, 419 U.S. 477 (1975)).

227. *Cousins*, 419 U.S. at 478–83.

228. *Id.* at 487–88.

229. *Id.* at 489–91.

230. *Id.* at 489–90.

231. *Id.* at 491.

232. *La Follette*, 450 U.S. at 121 (internal quotation marks and bracket omitted).

233. *Id.* at 122 (footnote omitted).

234. *Id.* at 123–24, 124 n. 25.

members. Accordingly, it proceeded to determine whether Wisconsin's interests in its open primary were compelling.²³⁵

Wisconsin argued that its open primary laws served the compelling interest of "preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters."²³⁶ Rather than determine whether these interests were compelling, the Court found that they "all . . . go to the conduct of the Presidential preference primary—not to the imposition of voting requirements upon those who, in a separate process, are eventually selected as delegates."²³⁷ As a consequence, the Court held that "the interests advanced by [Wisconsin] do not justify its substantial intrusion into the associational freedom of members of the National Party."²³⁸

Justice Powell filed a notable dissent in *La Follette*.²³⁹ Of importance to this article is his charge that the majority failed to analyze critically the magnitude of the burden imposed by Wisconsin's open primary laws on the national Democratic Party's presidential nominating processes.²⁴⁰ From his analysis, he found that Wisconsin's open primary laws do not impose significant burdens on the national Democratic Party's associational rights.²⁴¹

First, he noted that these laws do not directly affect delegate selection as did the Illinois laws at issue in *Cousins*.²⁴² "Wisconsin merely requires that the delegates vote in accordance with the results of the Wisconsin open primary."²⁴³ Thus, a party must respect the results of a primary in which some voters affiliated with it "*secretly*, in the privacy of the voting booth[, but it] remain[ed] free to require public affiliation from anyone wishing any greater degree of participation in party affairs."²⁴⁴

Second, Justice Powell contended that the national Democratic Party's associational interests were insignificantly burdened by a requirement that it respect the results of a primary in which persons who were not *publicly* affiliated with the Democratic Party voted.²⁴⁵ In support of this contention, he argued that the results of such primaries should be regarded as reflecting the legitimate preferences of persons who have significant affiliations with the Democratic Party because a person's choice to vote in the Democratic primary is itself a significant act of affiliation.²⁴⁶ He also noted

235. *Id.* at 124–26.

236. *Id.* at 124–25 (footnote omitted).

237. *La Follette*, 450 U.S. at 125 (footnote omitted).

238. *Id.* at 125–26 (footnotes omitted).

239. *Id.* at 127–37 (Powell, Blackmun & Rehnquist, JJ., dissenting).

240. *Id.* at 127–34.

241. *Id.* at 127, 134.

242. *La Follette*, 450 U.S. at 128–30.

243. *Id.* at 129 (internal quotation marks omitted).

244. *Id.* at 129–30 (emphasis in original, footnote omitted).

245. *Id.* at 130–34.

246. Thus, he cited the following quote from a law review comment that in turn had cited to one of his dissenting opinions:

"Independents and members of other parties who seek to participate in a party primary will do so precisely because they identify with the community of interest Their very motive for participating in the primary would be to associate with a party presenting 'candidates and issues more responsive to their immediate concerns.'"

that the ways some states conduct closed primaries—“[v]oters do not register as members of a party; at the polling place they simply state their party preference and are given the ballot of that party, no questions asked”²⁴⁷—diminish any practical differences between open and closed primaries.²⁴⁸ Moreover, perhaps reflecting his views as to who truly speaks for the Party, Justice Powell asserted that the outcomes of open primaries were at least as representative of the views of rank-and-file Democrats as those produced by delegate selection caucuses attended by a few party elites.²⁴⁹ Most intriguingly, he suggested that the Democratic Party’s historical lack of ideological zeal, as demonstrated by its openness to “various elements reflecting most of the American political spectrum,” makes it hard to argue that Wisconsin’s open primary facilitates the ability of persons with incompatible beliefs to damage the Party’s ideological identity.²⁵⁰

Eight years after *Nader*, the U.S. Supreme Court resolved a case, *Tashjian v. Republican Party of Connecticut*,²⁵¹ that was *Nader*’s mirror image. *Tashjian* pitted the Republican Party and independent voters against Connecticut and the Democratic Party over whether closed primary laws are constitutional as applied to a party that wants to allow independent voters to participate in its primaries.²⁵² At the time, there were many more registered Democrats and Independent voters than there were registered Republicans.²⁵³ Accordingly, Republican Party leaders decided it would be smart politics to reach out to Connecticut’s independent voters.²⁵⁴

Nader, *Cousins*, and *La Follette* were concerned with protecting parties from the possible negative effects on their core identities and missions of being forced to associate with persons they regard as non-members. *Tashjian* presented the Court with the ticklish issue of whether states can prevent parties from taking the risks associated with inviting outsiders into their nominating processes in order to pursue the potential advantages of broadening their political associations. Relying heavily on the logic and holding of *La Follette*, the Court held five-to-four that Connecticut’s closed primary laws impermissibly burdened the political association rights of the Republican Party and independent voters who might want to accept the invitation to vote in Republican primaries without first registering as a member of the Republican Party.²⁵⁵

The Court characterized the political association right at stake in *Tashjian* in the same terms used to describe the association right at stake in *La Follette*—“the freedom to

Id. at 132 n. 5 (quoting Arnie R. Braafladt, Student Author, *The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 Willamette L.J. 259, 290 (1978)).

247. *La Follette*, 450 U.S. at 133 n. 8.

248. *Id.* at 133.

249. *Id.* at 133, 134 n. 11.

250. *Id.* at 131, 131–32 (footnote omitted).

251. 479 U.S. 208 (1986).

252. The Republican Party of Connecticut changed its party rules so that independent voters could vote in its primary elections. *Id.* at 212. However, Republican attempts to amend Connecticut’s closed primary laws so that independents could vote in Republican primaries were thwarted first by the Democratically controlled legislature and then by a vetoing Democratic governor after the Republican Party won control of both houses of the legislature. *Id.* at 212–13.

253. As of October 1983, Connecticut had “659,268 registered Democrats, 425,695 registered Republicans, and 532,723 registered and unaffiliated voters . . .” *Id.* at 212 n. 3.

254. *Id.* at 212–13.

255. *Tashjian*, 479 U.S. at 213–25 (Marshall, J. & Brennan, White, Blackmun & Powell, JJ., joining).

join together in furtherance of common political beliefs [which] ‘necessarily presupposes the freedom to identify the people who constitute the association.’”²⁵⁶ Further, the Court found that the Republican Party was exercising this right of association when it reached out to permit independent voters to participate in its primaries without publicly affiliating with it.²⁵⁷

After noting that there is a broad continuum of participation in the affairs of a major party—organizing, fundraising, or simply voting for some of its candidates²⁵⁸—the Court hypothesized that it would be an unconstitutional infringement on a party’s right of association if the State were to prohibit non-members to participate as financial contributors or nominees of a party.²⁵⁹ Expanding beyond these hypothetical examples, the Court then held that the “State limit[ed] the Party’s associational opportunities at the crucial juncture”²⁶⁰ by “plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the ‘basic function’ of selecting the Party’s candidates.”²⁶¹

Much as it did in *La Follette*, the Court assessed the interests asserted by the State in a manner that suggested it believed that any restriction on a party’s efforts to define an association between itself and some defined group constitutes a severe burden on a party’s right of association.²⁶² Thus, it proceeded as if a fundamental right had been transgressed by carefully, if not strictly, scrutinizing each of the State’s asserted interests in its closed primary laws.²⁶³

The Court rejected the State’s plea that it would be too costly to provide the election machinery required to enable independents to participate in the Republican Party’s primaries.²⁶⁴ It did so by simply holding that potential cost increases cannot justify infringements on the Republican Party’s association rights.²⁶⁵

Prevention of party raiding was rejected as a justification because the Court found that party raiding was not implicated in this case.²⁶⁶ Not only did the Court express great skepticism that hordes of independent voters could be enlisted in the task of

256. *Id.* at 214, 214–15 (quoting *La Follette*, 450 U.S. at 122).

257. The *Tashjian* Court commented that “[t]he Party’s attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association.” *Id.* at 214.

258. *Id.* at 215.

259. *Id.*

260. *Tashjian*, 479 U.S. at 216.

261. *Id.* at 215–16.

262. *Id.* at 217–25.

263. *Id.* However, before proceeding to analyze the States’ interests, the Court used a footnote to dismiss the assertions that Connecticut’s closed primary laws imposed only a *de minimis* infringement on the Party’s associational rights. *Id.* at 216 n. 7. Connecticut permitted previously unaffiliated voters to register as a member of a Party “as late as noon on the last business day preceding the primary.” *Tashjian*, 479 U.S. at 216 n. 7. (citing Conn. Gen. Stat. § 9-56 (1985)). Thus, the State argued that any independent voter who wanted to participate in the Republican Party’s primaries could easily meet the Party membership requirement. *Id.* at 215–16. The Court rejected this argument by noting that the formal affiliation process does not provide the Party with the unilateral means of broadening the opportunities of registered voters to join the association and it “conditions the exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter.” *Id.* at 216 n. 7.

264. *Id.* at 217–18.

265. *Id.* at 218.

266. *Tashjian*, 479 U.S. at 219.

nominating the worst possible Republican candidates, it also noted that if this were possible the independent hordes could carry out the raid by simply registering as Republicans at the eleventh hour—the last business day before the primary.²⁶⁷

Although the Court found that the issue of party raiding was not applicable to this case, it took note of a study introduced by the Democratic Party in *La Follette*, which found that “the existence of “raiding” has never been conclusively proven by survey research.”²⁶⁸ It then suggested that in a case where party raiding could be relevant, the Court possibly should consider “whether the continuing difficulty of proving that raiding is possible attenuates the asserted state interest in preventing the practice.”²⁶⁹

Connecticut argued that its closed primary laws prevent voter confusion inherent in the difficulty of determining the views of candidates who are “nominated . . . by an unknown amorphous body outside the party.”²⁷⁰ The Court rejected this argument after acknowledging that party labels may be used by voters as “a shorthand designation of the views of party candidates” in part because it had confidence that voters were capable of “inform[ing] themselves about campaign issues” so they will not be “misled’ by party labels.”²⁷¹ More importantly, the Court found that an amorphous group would be incapable of nominating the Party’s candidates because under Connecticut’s primary laws no one can be a candidate in a party primary without first receiving the support of at least 20% of the delegates attending a nominating convention in which non-members cannot participate.²⁷² It also observed that Republican candidates must attract a significant number of independent voters to win the general election, and that Connecticut’s closed primary laws would prohibit the Republican Party from using the best way of determining which candidate could best appeal to independents; allowing independents to vote in Republican primaries.²⁷³

Finally, the Court rejected Connecticut’s contention that its closed primary laws further its “compelling interest in protecting the integrity of the two-party system and the responsibility of party government.”²⁷⁴ After noting that debates over the relative merits of closed and open primaries had yet to produce a consensus as to which was better,²⁷⁵ and that the political systems of the twenty-nine states which do not have closed primaries have not gone to rack and ruin,²⁷⁶ the Court proclaimed that it was not its role to determine whether Connecticut’s or the Republican Party’s choice of primaries was the best.²⁷⁷ The Court also declined the State’s offer to help save the Republican Party from “undertaking a course of conduct destructive of its own interests”²⁷⁸ by citing *La*

267. *Id.*

268. *Id.* at 219 n. 9 (quoting *La Follette*, 450 U.S. at 123 n. 23) (internal quotation marks omitted).

269. *Id.*

270. *Id.* at 220.

271. *Tashjian*, 479 U.S. at 220.

272. *Id.* at 220–21.

273. *Id.* at 221.

274. *Id.* at 222, 222–24.

275. *Id.* at 222–23.

276. *Tashjian*, 479 U.S. at 222 n. 11, 223 n. 12.

277. *Id.* at 223.

278. *Id.* at 224.

Follette for the proposition that neither a state nor a court “may . . . constitutionally substitute its own judgment for that of the Party.”²⁷⁹ Presaging *Clingman*, the Court followed this conclusion with a warning that the outcome of *Tashjian* does not automatically resolve the issue of whether a state can prohibit one party from inviting members of other parties to participate in its primaries since such an invitation “would threaten other parties with . . . disorganization effects”²⁸⁰

Also presaging *Clingman* was Justice Scalia’s scathing dissent.²⁸¹ He first questioned whether there was a cognizable associational interest at stake, for to him “[i]t seems . . . fanciful to refer to [the desire of the Republican Party to let non-members vote in its primaries] as an interest in freedom of association between . . . the Republican Party and the putative independent voters.”²⁸² Next, he found that the Republican Party’s desire to select nominees who could attract the largest combined Republican and independent vote could be satisfied by the Party paying for polls of independent voters rather than requiring the State to let its primary be used for this task.²⁸³

Finally, Justice Scalia rejected the Court’s characterization of the State’s goal as an attempt to save the Party from itself.²⁸⁴ Reflecting a belief that the Party’s rank-and-file have the best right to speak for the Party, he noted that the decision to invite independents to vote in Republican primaries was made at a Republican Convention rather than by a vote in which all party members could participate.²⁸⁵ Thus, he questioned whether this decision truly reflected the majority will of the Party’s members.²⁸⁶ More significantly, Justice Scalia contended that the parties are not now free to resume nominating their candidates by convention rather than through primary elections because the mandatory primary was a reform intended to save parties from themselves by making them more democratic.²⁸⁷ So, he expressed exasperation that “the Republican Party’s delegation of its democratic choice to a Republican Convention can be proscribed, but its delegation of that choice to nonmembers of the Party cannot.”²⁸⁸

In *Eu v. San Francisco County Democratic Central Committee*,²⁸⁹ the U.S. Supreme Court unanimously struck down California laws prohibiting “the official governing bodies of political parties from endorsing candidates in party primaries.”²⁹⁰ The Court found that the endorsements constituted core political speech that could not be

279. *Id.* (quoting *La Follette*, 450 U.S. at 123–24).

280. *Id.* at 224 n. 13.

281. *Tashjian*, 479 U.S. at 234–37 (Scalia & O’Connor, JJ. & Rehnquist, C.J., dissenting).

282. *Id.* at 235. “The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an ‘association’ with the Party than does the independent or registered Democrat who responds to questions by a Republican Party pollster.” *Id.*

283. *Id.* at 236.

284. *Id.*

285. *Tashjian*, 479 U.S. at 236.

286. *Id.*

287. *Id.* at 237.

288. *Id.*

289. 489 U.S. 214 (1989).

290. *Id.* at 216. The Court also struck down California laws that dictated virtually all aspects of party governing structures, but this portion of *Eu* is not relevant to the topic of this article.

restricted absent a showing that it served compelling state interests.²⁹¹ Party endorsements constitute core political speech, said the Court, because they provide voters with information about “whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought.”²⁹² It also proclaimed that state limits on speech are “particularly egregious where the State censors the political speech a political party shares with its members.”²⁹³ Moreover, the Court found that the endorsement ban “suffocates” the parties’ rights of political association by preventing them “from promoting candidates ‘at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.’”²⁹⁴

California justified the endorsement ban as necessary to promote its compelling interests in having a “stable government and protecting voters from confusion and undue influence.”²⁹⁵ However, the Court found that California failed to provide evidence that the endorsement ban in any way promoted government stability.²⁹⁶ In response to California’s assertion that the ban promoted government stability by keeping parties from splintering into factionalism through self-defeating intraparty strife, the Court held that it had never authorized state regulation “to mitigate intraparty factionalism during a primary campaign,”²⁹⁷ especially since primaries provide “an ideal forum in which to resolve [intraparty feuds].”²⁹⁸ Citing *La Follette*, the Court held that states may not substitute their judgments for that of political parties “even if a ban on endorsements saves a political party from pursuing self-destructive acts.”²⁹⁹

In 1996, the California electorate overwhelmingly approved an initiative petition proposing to replace California’s closed primary system with a blanket primary system.³⁰⁰ Blanket primary elections feature ballots on which office-by-office every candidate is listed regardless of party affiliation and permit every voter, regardless of party affiliation, to vote office-by-office for the candidate of his preference.³⁰¹ For each office, the blanket primary determines a party’s nominee on the basis of which person received the highest vote among all candidates from that party who sought that office.³⁰²

291. *Id.* at 222–24.

292. *Id.* at 223. The Court noted that the silencing of official party organizations had enabled “candidate[s] with views antithetical to those of [their] part[ies] nevertheless to win . . . primary [elections].” *Id.* at 217 (footnote omitted). In fact, a former Grand Dragon of the Ku Klux Klan had managed to win a Democratic Congressional primary even though his political views were “antithetical to those of the Democratic Party.” *Eu*, 489 U.S. at 217 n. 4.

293. *Id.* at 224.

294. *Id.* (quoting *Tashjian*, 489 U.S. at 216).

295. *Id.* at 226 (footnote omitted).

296. *Id.*

297. *Eu*, 489 U.S. at 227.

298. *Id.*

299. *Id.* at 227–28.

300. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1291 (E.D. Cal. 1997), *aff’d*, 169 F.3d 646 (9th Cir. 1999), *rev’d*, 530 U.S. 567 (2000).

301. *Id.* at 1291–92.

302. *Id.* at 1290.

Blanket primaries obviously allow persons unaffiliated with a party to help determine that party's nominees.³⁰³ To prevent this from happening, the governing bodies of four parties—Democrat, Republican, Libertarian, and Peace & Freedom—went to court seeking to have the blanket primary declared unconstitutional.³⁰⁴ They did so even though it appeared that the majority of their rank-and-file members who voted in the initiative election supported the blanket primary.³⁰⁵ After losing in federal district court,³⁰⁶ and in the federal appeals court,³⁰⁷ the protesting political parties prevailed at the U.S. Supreme Court in *California Democratic Party v. Jones*.³⁰⁸

At the outset, the U.S. Supreme Court rejected the blanket primary proponents' argument, accepted by the dissenting Justices, that the right of political association is inapplicable to primary elections because they are purely public affairs that play an integral role in citizens selecting their public officials.³⁰⁹ Writing for the Court, Justice Scalia acknowledged that states have broad regulatory powers with respect to "structuring and monitoring the election process."³¹⁰ He further noted that this power can be used by the states to require parties to select nominees through primary elections, "require parties to demonstrate 'a significant modicum of support' before allowing their candidates a place on th[e] ballot," and "require party registration a reasonable period of time before a primary election" "to prevent 'party raiding.'"³¹¹ Nevertheless, he proclaimed that although primary elections are public affairs subject to certain state regulations,³¹² they are also party affairs because they determine each party's nominees for public office.³¹³ As such, primary elections may not be regulated in a manner that violates a party's First Amendment right of political association.³¹⁴

303. *Id.*

304. *Id.* at 1292.

305. Reliable exit polls revealed that the blanket primary

was supported by 61 percent of Democrats, 57 percent of Republicans, and 69 percent of Independents. . . . Although the turnout by California's six minor parties was too small to sample, given the broad public support for [the blanket primary] among all groups of every sort, it is likely that a majority of the members of these parties also favored the initiative.

Jones, 984 F. Supp. at 1291. Based on these data, proponents of the blanket primary argued that the rank-and-file members of each challenging party approved the initiative and therefore the parties consented to it. *Id.* at 1294 n. 16. The court rejected this argument on three grounds: (1) The polls do not definitively show that a majority of minor parties' rank-and-file members supported the blanket primary, (2) polls should not be accepted for voting when trying to determine the wishes of an electoral subset, and (3) accepting the results of a voters' poll as a party's decision transgresses the procedural rules each party has established to specify who makes decisions for the party and how those decisions are to be made. *Id.*

306. *Id.* at 1289.

307. *Cal. Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000).

308. 530 U.S. 567 (2000).

309. *Id.* at 572–73, 573 n. 4. In his dissent, joined by Justice Ginsburg, Justice Stevens insisted that "[t]he so-called 'right not to associate' . . . is simply inapplicable to participation in a state election." *Id.* at 595. He supported this assertion by opining that "an election . . . is a public affair[, and therefore] while state rules abridging participation in its elections should be closely scrutinized, the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections." *Id.* (footnote omitted).

310. *Id.* at 572.

311. *Jones*, 530 U.S. at 572.

312. *Id.* at 572–73.

313. *Id.* at 573 n. 4.

314. *Id.* at 573.

Contrary to the views of the dissent, the Court held that the right of association applicable to primary elections includes the right of parties to insist that non-members not be allowed to participate.³¹⁵ Justice Stevens contended that states should be allowed to broaden voters' access to primary elections even if political parties object, but that "state rules abridging participation in its elections should be closely scrutinized . . ."³¹⁶ In response, Justice Scalia noted the Court's long traditions in honoring the right of political organizations to "limit control over their decisions to those who share the interests and persuasions that underlie the association's being."³¹⁷ More importantly, he reaffirmed the Court's previous recognition that the right of a political party to exclude persons who do not share its policies and principles is most important when a process for selecting the party's nominees for public office is involved.³¹⁸ Finally, Justice Scalia dismissed the dissents' no exclusion theory as nonsensical because it stands for the proposition that the "First Amendment guarantee[s] a party's right to lose its identity, but not to preserve it."³¹⁹

Having held that parties have a freedom of association right to exclude persons who do not share their policies and principles from their candidate nominating processes, the Court had little trouble finding that the blanket primary imposes a severe burden on parties' political association rights. It noted that the blanket primary permits persons affiliated with rival parties to vote in a party's primaries.³²⁰ Moreover, the Court observed that blanket primaries do not, as do closed and open primaries, confine voters to participating in just one party's primary.³²¹ Therefore, said the Court, the blanket primary does not require voters to engage in some arguably significant act of affiliation with or commitment to a party before voting in that party's primary.³²² Finally, the Court proclaimed its belief that the evidence demonstrated that under California's blanket primary system there is a clear and present danger that a party will have a nominee determined by adherents of an opposing party.³²³ This danger was magnified for minor parties because in the first blanket primary "the total votes cast [in the Libertarian and Peace & Freedom primaries] for party candidates in some races was more than *double* the total number of *registered party members*."³²⁴

315. Compare *Jones*, 530 U.S. at 574–76, 576 n. 7 with *id.* at 593–96 (Stevens & Ginsburg, JJ., dissenting).

316. *Id.* at 595, 595–96 (footnote omitted).

317. *Id.* at 574 (quoting *La Follette*, 450 U.S. at 122 n. 22).

318. *Id.* at 574–76 (citing *Timmons*, 520 U.S. 351; *Eu*, 489 U.S. 214; *Tashjian*, 479 U.S. 208; *La Follette*, 450 U.S. 107).

319. *Id.* at 576 n. 7.

320. *Jones*, 530 U.S. at 577–79.

321. *Id.* at 577, 577 n. 8.

322. *Id.* at 577. With respect to the affiliation required by an open primary, the Court cited to Justice Powell's dissent in *La Follette* in which he theorized that in open primaries the "act of voting in [a party's] primary fairly can be described as an act of affiliation with [that party]." *Id.* at 577 n. 8.

323. The Court stated: "[O]ne 1997 survey of California voters [showed that] 37 percent of Republicans said that they planned to vote in the [next] Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the [next] Republican United States Senate primary." *Id.* at 578. Studies from other states produced similar data. *Jones*, 530 U.S. at 578. There was also credible evidence demonstrating that cross-over voters have policy views that are distinctly different from those of voting party members. *Id.* at 578–79.

324. *Id.* at 578 (emphasis in original).

Proponents of the blanket primary asserted that it will not impose severe burdens on parties' associational rights because it will rarely, if ever, produce nominees different from those favored by a majority of the party faithful, and it still permits parties and their members to engage in many other political activities that support their favored candidates and policies.³²⁵ In response, the Court observed that a party could be significantly damaged if even one of its nominees were determined by the votes of persons who do not support the party's policies and principles.³²⁶ It also expressed concern that "[e]ven when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions"³²⁷

"[T]he whole purpose of [the blanket primary] was to favor nominees with 'moderate' positions."³²⁸ This caused the Court to conclude that, by forcing political parties to associate during their primaries with non-members, the blanket primary "has the likely outcome—indeed . . . the *intended* outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom."³²⁹ As a consequence, the Court subjected the State's alleged interests in the blanket primary to strict scrutiny.³³⁰

Three of the State's proffered interests—"producing elected officials who better represent the electorate[,]. . . expanding candidate debate beyond the scope of partisan concerns,"³³¹ and ensuring that all voters in a district dominated by a single party get to participate in the election that effectively selects the officeholder—were declared by the Court to be illegitimate.³³² The first two proffered interests are illegitimate, said the Court, because they "reduce to nothing more than a stark repudiation of freedom of political association"³³³ The Court found the third proffered interest to be illegitimate because it requires the State to violate a party's associational rights simply because a non-member desires to participate in that party's nominating processes.³³⁴ As to voters stuck in districts dominated by a party to which they do not belong, the Court advised them that they could end their plight by simply joining the dominant party.³³⁵

The Court found that the State's four remaining interests—"promoting fairness [to voters in safe districts], affording voters greater choice, increasing voter participation, and protecting privacy—are not . . . compelling."³³⁶ It may be unfair to exclude non-members of a dominant party in a safe district from the dominant party's primaries, said the Court, but it is "less unfair than permitting nonparty members to hijack the party."³³⁷ The Court held that the interests of affording voters more choice and

325. *Id.* at 579–81.

326. *Id.* at 579.

327. *Jones*, 530 U.S. at 579–80.

328. *Id.* at 580 (emphasis omitted).

329. *Id.* at 581–82 (emphasis in original).

330. *Id.* at 582–86.

331. *Id.* at 582.

332. *Jones*, 530 U.S. at 582–83.

333. *Id.* at 582.

334. *Id.* at 583–84.

335. *Id.* at 584.

336. *Id.* at 584, 584–85.

337. *Jones*, 530 U.S. at 584.

increasing voter participation are not compelling because they effectively “reduce . . . choice, by assuring a range of candidates who are all more ‘centrist,’”³³⁸ and require parties to provide more “choices *avored by the majority.*”³³⁹ Finally, the Court held that keeping voters’ political affiliations secret is not compelling since this information is not as deeply personal as medical or financial records and under federal law must be disclosed “as a condition of appointment to certain offices.”³⁴⁰

C. *Flawed Logic*

As demonstrated above, *Clingman* arrived at the U.S. Supreme Court against a background of important political realities and significant legal precedents. One would have expected this background to have greatly informed the *Clingman* decision. But, as will be shown below, the *Clingman* majority opinion either ignored or contradicted elements of this background in ways that make *Clingman* an aberration to the Court’s political association jurisprudence.

The key political reality is that third parties have experienced almost total electoral futility.³⁴¹ This futility is in part caused by the singularity of the executive branch and the election of the President through the Electoral College, two constitutional institutions that are not likely to be changed.³⁴² In no small measure, the electoral futility of United States third parties also has been caused by legislation, often approved by the judiciary, that is uniquely harmful to third-party prospects—the creation of single-member legislative districts,³⁴³ political gerrymandering,³⁴⁴ burdensome ballot access laws coupled with voter registration cancellation provisions,³⁴⁵ bans on fusion candidacies,³⁴⁶ candidate disaffiliation requirements,³⁴⁷ and the advent of primary elections.³⁴⁸

In its prior political association cases, the Court established a number of important principles. The most important of these is the Court’s insistence that the political association rights of political parties include an almost unfettered right to define the scope of their political associations with voters when candidate nomination processes are involved.³⁴⁹ To drive home the importance of this right, prior to *Clingman* the Court refused to give credence to any arguments that the State has the right to substitute its judgment for that of the parties with respect to defining the scope of their associations

338. *Id.* (emphasis omitted).

339. *Id.* at 584, 584–85 (emphasis in original).

340. *Id.* at 585.

341. *See supra* nn. 2–7 and accompanying text.

342. *See supra* nn. 141–146 and accompanying text.

343. *See supra* nn. 117–129 and accompanying text.

344. *See supra* nn. 130–140 and accompanying text.

345. *See supra* nn. 147–152 and accompanying text.

346. *See supra* nn. 153–175 and accompanying text.

347. *See supra* nn. 176–181 and accompanying text.

348. *See supra* nn. 182–189 and accompanying text.

349. In this regard, the Court has recognized the rights of political parties to associate only with persons who have formally affiliated with them for purposes of nominating candidates, *Jones*, 530 U.S. at 573–80, 576 n. 7; *La Follette*, 450 U.S. at 121–26; *Cousins*, 419 U.S. at 487–91, and the right of parties to expand their associations to include unaffiliated voters during the candidate nomination process, *Tashjian*, 479 U.S. at 214–16, 216 n. 7.

even when the State is trying to keep parties from making choices harmful to their electoral prospects.³⁵⁰ With respect to cases involving candidate nominating processes, the Court expressed skepticism about whether party raiding is something that can ever be done successfully,³⁵¹ and intimated that a voter's choice to participate in a single party's primary election is an act of significant affiliation even if she declines to register as a member of that party.³⁵² In combination, these principles operated so that prior to *Clingman* political parties were victorious in every previous case involving the issue of which classes of voters could participate in candidate nominating processes.³⁵³

Perhaps the most grievous flaw of logic in the *Clingman* Court's opinion is its holding that a political association between the LPO and members of other parties who might participate in LPO primaries without dropping their current partisan affiliations would be so weak that the constitutionality of state inference with it need not be judged by strict scrutiny.³⁵⁴ This holding treats the most important act of association an individual can have with a party and its candidates—voting—as the least important of all the individual/party relationships in the political association continuum. It also greatly deviates from the Court's prior holdings about how the ability of parties to control who participates in their candidate nominating processes is essential to their electoral prospects and the shaping of their messages to the electorate.

The *Clingman* Court's obsession with a person's registration status as an indicator of the strength of her association with a particular party fails to accord proper respect and dignity to the act of choosing to vote in a particular party's primary elections. Every type of primary, except non-partisan and blanket primaries, requires voters to choose to participate in the primary elections of only one party.³⁵⁵ By making this choice, a voter is precluded from participating in any aspect of another party's primary elections no matter how interested he may be in a particular candidate from that party. Picking one party's primary is an act of significant affiliation by the voter. Justice Powell recognized the significance of this affiliation in his *La Follette* dissent,³⁵⁶ and the *Jones* Court

350. *Eu*, 489 U.S. at 227–28; *Tashjian*, 479 U.S. at 224; *La Follette*, 450 U.S. at 123–24, 123 n. 25. *Contra Tashjian*, 479 U.S. at 236–37 (Scalia & O'Connor, JJ. & Rehnquist, C.J., dissenting).

351. *Tashjian*, 479 U.S. at 219, 219 n. 9.

352. *Jones*, 530 U.S. at 577, 577 n. 8; *La Follette*, 450 U.S. at 132, 132 n. 5 (Powell, Blackmun & Rehnquist, JJ., dissenting).

353. In *Jones*, the Court upheld the assertion of four political parties—the California Democratic, Republican, Libertarian, and Peace & Freedom Parties—that California's blanket primary unconstitutionally infringed their rights of political association. *Tashjian*, held that Connecticut's closed primary violated the Connecticut Republican Party's political association right to have independent voters participate in its primary elections. In *La Follette*, the Court held that Wisconsin delegates to the Democratic National Convention did not have to vote in accordance with the results of Wisconsin's open presidential primary because it would violate the associational rights of the national Democratic Party to have its presidential nomination process affected by the votes of persons not formally affiliated with the Democratic Party. *Cousins*, held that it would violate the associational rights of the national Democratic Party if it were forced to refrain from seating a delegation from Illinois that was selected under Democratic Party delegate selection rules that violated Illinois' election laws. In *Nader*, the U.S. Supreme Court summarily upheld a federal district court decision that vindicated Connecticut's closed primary laws as applied to unaffiliated voters who wanted to participate in partisan primaries over the objections of the State, the Connecticut Democratic Party, and the Connecticut Republican Party.

354. *Clingman*, 125 S. Ct. at 2037–38.

355. Kanthak & Williams, *supra* n. 102, at 8–10.

356. *La Follette*, 450 U.S. at 132, 132 n. 5.

insinuated that the significance of this affiliation could insulate open primaries from constitutional attack by a party unhappy about members of other parties voting in its primaries.³⁵⁷

Moreover, of all the ways a voter may associate with a party—donate money, participate in party organization, volunteer to work for a party's candidates, register as a member of the party, vote in the party's primaries, and vote for the party's general election candidates—the act of voting is the most important because it combines with the votes of others to determine party nominees and the winners of public office.³⁵⁸ In an age where the turnout of registered voters for primary elections is often well below 50%,³⁵⁹ it is difficult to understand why the Court privileges registration over the willingness to vote, especially when a party does not object to members of other parties voting in its primaries.³⁶⁰

Given that the act of choosing to participate in the primary of only one party is an act of significant affiliation, it should not matter how hard or easy it might be for a member of one party to reregister as a member of another party or as an independent in order to be eligible to vote in another party's primary. Nevertheless, as noted previously, the *Clingman* Court directly held that it is less burdensome for a person to disaffiliate publicly from his current party of choice by reregistering as an independent than it is for a previously independent voter to publicly affiliate with a party.³⁶¹ The *Clingman* Court offered no justification for this holding other than to cite a footnote in *Tashjian*,³⁶² wherein the *Tashjian* Court asserted that it would severely burden an independent voter to condition her “exercise of the associational right upon the making of a public statement of adherence to the Party which the State requires regardless of the actual beliefs of the individual voter.”³⁶³ Thus, the *Tashjian* principle behind the *Clingman* holding seems to be that a person should not have to take public action that appears to signify his agreement with political views with which he really does not agree as the price of exercising his political association rights.

Logically, the *Tashjian* principle enunciated above applies well to a person who genuinely identifies with the traditional policies and principles of the party to which she belongs but who also wants to vote for a candidate in another party's primary. A person who must disaffiliate from her current party to vote in another party's primary is forced to take public action that falsely signals her repudiation of her current party's policies and principles. Conceptually, this person's intellectual burden is equal to that of the independent voter who must affiliate publicly with a party to vote in a primary election.

All this begs the question of why a person registered as a member of one party would not want to change her registration but still wants to vote in another party's

357. See *Jones*, 530 U.S. at 577, 577 n. 8.

358. For example, money is very important to the outcome of elections, but votes count more; this fact is well illustrated by seven of the top fifteen money raisers losing in the 1996 U.S. Senate elections. Kobrak, *supra* n. 95, at 125.

359. See *supra* n. 101 and accompanying text.

360. See *Clingman*, 125 S. Ct. at 2048–49 (Stevens, Ginsburg & Souter, JJ., dissenting).

361. *Id.* at 2038 (majority).

362. *Id.* (citing *Tashjian*, 479 U.S. at 216 n. 7).

363. *Tashjian*, 479 U.S. at 216 n. 7.

primary. Justice Powell's dissent in *La Follette* supplies the answer. There, he quoted a law review article for the proposition that:

"[M]embers of other parties who seek to participate in a party primary will do so precisely because they identify with the community of interest, if indeed one exists. Their very motive for participating in the primary would be to associate with a party presenting 'candidates and issues more responsive to their immediate concerns.'"³⁶⁴

If left free to cast a vote in another party's primary without having to reregister, such voters send signals to their parties as to what issues positions and types of candidates they wish their parties would provide. This phenomenon perhaps explains why non-party members voted in higher percentages than party members for George Wallace in the 1964 Wisconsin open Democratic presidential primary election.³⁶⁵ Undoubtedly, within this group of voters were Republicans producing a vote that sent a signal to the Republican Party that a sizable number of Republicans perhaps wanted less vigorous enforcement of civil rights laws. So, members of a party have sound reasons why they might want to accept the invitation of another party to vote in its primaries without first disaffiliating from their current party of choice.

The *Jones* Court found that blanket primaries impose severe burdens on the associational rights of a political party by mandating that independent voters and persons affiliated with other parties participate in its primary elections.³⁶⁶ These severe burdens include a heightened risk that a party will be saddled with both nominees who are not favored by its voting members and altered campaign messages.³⁶⁷ For example, in *Jones* the parties were concerned that blanket primaries would produce moderate nominees who would be less inclined to advocate vigorously for the parties' principles and policies.³⁶⁸ So, the *Jones* Court used strict scrutiny to determine the constitutionality of California's blanket primary.³⁶⁹

But, what if a party desires to nominate less ideological candidates in order to send more moderate messages to the electorate? It probably will be unable to accomplish these goals unless it is allowed to expand its primary election associations.³⁷⁰ Therefore, a law that would prevent such a party from including members of other parties and independent voters in its primary election is no less burdensome on associational rights than a law that prevents a party which desires to be more ideologically pure from confining its primary election associations to its own registered members. Essentially, that is what the *Tashjian* Court held and why it used strict scrutiny to judge the constitutionality of Connecticut's closed primary laws.³⁷¹ That is also why strict scrutiny should have been used in *Clingman*.

364. *La Follette*, 450 U.S. at 132 n. 5 (quoting Brafladt, *supra* n. 246, at 290).

365. *Id.* at 118-19 n. 19.

366. *Jones*, 530 U.S. at 574-82.

367. *Id.* at 579-82.

368. *Id.* at 580.

369. *Id.* at 581-82.

370. This is because a party's primary electorate tends to be more ideologically pure than the general election electorate. See *supra* n. 102 and accompanying text.

371. *Tashjian*, 479 U.S. at 217-25.

Even in the absence of applying strict scrutiny, none of the interests advanced by Oklahoma should have been accepted as legitimate reasons for preventing the LPO from inviting voters from other parties to participate in its primary elections and for requiring voters from other parties to disaffiliate from their current party of choice before accepting the LPO's invitation. Previous cases established that a state has no authority to protect a party from its own folly, especially with respect to decisions and actions affecting their selection of nominees.³⁷² So preventing non-party members, hostile to LPO policies and principles, from swamping LPO primaries in ways that produce nominees who are not supported by true LPO members, and who will campaign on themes antithetical to LPO ideology, is not a legitimate state interest.

Nor is it legitimate for a state to have any concern that an open LPO primary could confuse voters, who rely on party labels as a guide to a candidate's ideology, by causing the selection of LPO nominees whose issues positions contradict traditional LPO ideology. As previously noted, the LPO may have wanted to have open primaries as a means of widening its support through the selection of less ideological candidates. Denying the LPO this opportunity on the basis that general election voters may be misled by a change in the ideology of LPO candidates would effectively impose a permanent message and ideology on the LPO in violation of its First Amendment rights.³⁷³

It is specious for Oklahoma to express concern that open LPO primaries could reduce the commitments of registered partisan voters to their parties of current choice and thereby undermine state voter registration lists as reliable databases of voters who will help parties and candidates during elections. In an era where the turnout of registered voters in primary elections is quite low,³⁷⁴ and strength of party commitments is declining precipitously, as reflected in the strength of party identification surveys and increased ticket splitting,³⁷⁵ voter registration lists are already notoriously inaccurate guides as to who are loyal party members.

Moreover, in September 2005, a report of the Commission on Federal Election Reform revealed that voter registration lists are of very low quality in many states because they contain a large percentage of inactive voters as well as the names of persons who have died or moved away.³⁷⁶ Therefore, state voter registration lists are of dubious value for purposes of enhancing electioneering and party-building efforts, which is why the two major parties have developed their own databases for these purposes.³⁷⁷ As a consequence, the effects of an open LPO primary on the usefulness of voter registration lists in identifying loyal party members are unlikely to be significant as

372. *Eu*, 489 U.S. at 227–28; *Tashjian*, 479 U.S. at 224; *La Follette*, 450 U.S. at 123–24, 123 n. 25. *Contra Tashjian*, 479 U.S. at 236–37 (Scalia, J., dissenting).

373. *See Jones*, 530 U.S. at 579–82.

374. *See supra* nn. 10, 101 and accompanying text.

375. *See supra* nn. 8–11 and accompanying text.

376. Center for Democracy and Election Management, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* pts. 2–6, http://www.american.edu/ia/cfer/report/full_report.pdf (Sept. 2005).

377. *See* Noah J. Goodhart, *The New Party Machine: Information Technology in State Political Parties*, in *The State of the Parties: The Changing Role of Contemporary American Parties* 120 (John C. Green & Daniel M. Shea eds., 3d ed., Rowman & Littlefield Publishers 1999).

compared to the effects of other factors that have greatly undermined the usefulness of state voter registration lists for electoral purposes.

Finally, Oklahoma's concern that open LPO primaries would lead to party raiding and "sore-loser" candidacies simply is not valid. In this regard, it is important to note that there have been grave doubts among political scientists as to whether party raiding has ever occurred or indeed is even possible.³⁷⁸

If a major-party renegade and his supporters want to mount an insurgency campaign against their party that extends into the general election, it is quite unlikely that they will go to the trouble of trying to win an LPO nomination. The LPO has had great difficulty remaining eligible to have its supporters designated as party members on the state's voter registration lists and to hold primary elections.³⁷⁹ The LPO nomination would also bring with it ideological baggage,³⁸⁰ and the expectation that LPO candidates are sure losers.³⁸¹ All of this can be avoided under Oklahoma election law by merely filing as an independent candidate, because in Oklahoma independent candidates go straight to the general election upon filing the appropriate papers and fees.³⁸² In fact, some political observers believe that the Republican candidate lost Oklahoma's 2002 gubernatorial race largely because a spirited independent campaign of a well-known Republican maverick negatively focused on him.³⁸³

378. In *Tashjian*, the Court noted that a study sponsored by "the national Democratic Party concluded that 'the existence of "raiding" has never been conclusively proven by survey research.'" 479 U.S. at 219 n. 9 (internal quotation marks omitted, emphasis in original). Given how the Court resolved the raiding issue, it expressed "no opinion as to whether the continuing difficulty of proving that raiding is possible *attenuates* the asserted state interest in preventing the practice." *Id.* (emphasis added). In *Jones*, the federal district court found that even in the context of blanket primaries, which possibly could stimulate much more cross-over voting than open primaries, there was little evidence that party raiding actually occurred. *Jones*, 984 F. Supp. at 1297-98, 1298 n. 23.

379. See *Clingman*, 125 S. Ct. at 2046 (O'Connor, J., concurring).

380. For example, the Oklahoma Libertarian Party currently lists on its webpage the following legislative priorities:

Privatize Marriage: Government licensing of marriage has caused increasing interference with the institution by politicians and bureaucrats. By use of inducements and penalties in the tax code, regulations of employment benefits, and other means, the relationships and decisions of individuals are micromanaged by elected officials. The Oklahoma Libertarian Party opposes such social planning, including additional regulation or definition of marriage, and calls for complete removal of government from the marriage business.

. . .

Educational Tax Credit: Libertarians would enact a dollar-for-dollar tax credit for any individual (or company) who pays for a child's education.

. . .

Second Amendment: Recognizing the second amendment of the Constitution as not merely a firearms law, but in fact an expression of the basic human right to self-defense, we oppose all laws that infringe upon this right and support a *Vermont style concealed carry law*.

Oklahoma Libertarian Party, *OKLP Legislative Agenda*, <http://www.oklp.org/issues.html> (accessed Oct. 7, 2005) (emphasis in original).

381. No minor-party's candidate for governor or President has achieved at least 10% of the vote necessary in Oklahoma to enable it to retain recognized party status. See *Clingman*, 125 S. Ct. at 2046 (O'Connor, J., concurring).

382. Okla. Stat. tit. 26, §§ 1-102, 5-105(B).

383. John Greiner, *Independent Candidate Affected Vote, Observers Say Cockfighting Proposal Also Linked To Outcome*, Daily Oklahoman (Nov. 7, 2002).

In summation, the Court's decision in *Clingman* is an aberration that fails to honor the logic of key political association precedents and reflects indifference to many current political realities. It uses weak or imagined state interests as justifications for denying the LPO the right to conduct open primaries that would have provided expanded electoral options to every Oklahoma voter. As a consequence, the Court's decision in *Clingman* turned a win-win opportunity into a lose-lose situation where neither the LPO nor the voters gained a thing. Worse yet, the Court rendered this decision on the pretext that it was necessary to save the LPO from itself, keep lazy voters from being misled by an evolving LPO ideology, and insulating the entrenched major parties from the slightest competitive threat.

IV. THE COURT'S THIRD-PARTY MUGGING

The Court's zeal in *Clingman* to insulate the major parties from competition appears to reflect the antipathy toward third-party competition it openly displayed in *Timmons*. There, the Court virtually declared an open season on third parties and appeared to authorize the State to use any weapon short of outright banning.³⁸⁴ It also deployed a potent weapon on its own, the willingness to accept with little or no scrutiny fantastical state interests.³⁸⁵ It seems obvious that this weapon was deployed in *Clingman*, for as documented above the *Clingman* Court accepted Oklahoma's justifications for prohibiting an LPO open primary without any critical analysis of their merits.

Most ominously for the future of third parties in the United States, the *Timmons* Court used this "soft scrutiny" weapon to support a state interest it interjected into the case on its own accord³⁸⁶—that the states have an interest in maintaining healthy two-party systems, because two-party systems are needed to provide political stability and to prevent party splintering and factionalism.³⁸⁷ The Court explicitly asserted—as if it were true beyond questioning—that the two-party system is perhaps the most effective means of promoting political stability and preventing party splintering and factionalism.³⁸⁸ Implicit in this assertion is an underlying belief that the emergence of a viable multiparty system would undermine these interests.³⁸⁹ The *Clingman* Court's

384. *Timmons*, 520 U.S. at 367.

385. Thus in *Timmons*, the Court accepted at face value Minnesota's fantasy hypothetical that if fusion were allowed major parties would create sham minor parties with campaign-slogan-like names and thereby turn the ballot into an advertising billboard. *Id.* at 365. It did so after holding that "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation' imposed on the Party's rights. Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Id.* at 364 (citations omitted).

386. See *id.* at 377–78 (Stevens & Ginsburg, JJ., dissenting); Amy, *supra* n. 13, at 157. For the Court's refutation of this assertion, see *Timmons*, 520 U.S. at 366 n. 10.

387. *Timmons*, 520 U.S. at 366–67.

388. *Id.* at 368.

389. Although the *Timmons* majority did not directly imply that multiparty systems are destabilizing, its unquestioning acceptance of the two-party system's merits demonstrates a belief that the two-party system is superior to a multiparty system in promoting stability. Ironically, in his dissenting opinion, in which he strongly defends the right of third parties to use fusion candidacies, Justice Stevens explicitly denigrates the multiparty system. *Id.* at 370–84. For example, he observes that "Systems of proportional representation . . . may tend toward factionalism and fragile coalitions that diminish legislative effectiveness."

uncritical acceptance of Oklahoma's assertion that an LPO open primary could cause political instability, party splintering and excessive factualism,³⁹⁰ and its efforts to undermine *Tashjian*,³⁹¹ provide evidence that the *Timmons* Court's two-party mystique, with its underlying fear of multiparty systems, was the 900 pound gorilla in the *Clingman* Court's chambers.

If real world politics had demonstrated conclusively that two-party political systems were inherently more stabilizing than multiparty systems, the Court's use of a two-party mystique in analyzing the political association rights of third parties might be defensible. However, "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence."³⁹² Professor Douglas J. Amy has documented the many salient facts that demonstrate the falsity of the two-party mystique in his essay *Entrenching the Two-Party System: The Supreme Court's Fusion Decision*.³⁹³ Given the potential for the Court to uphold state laws that unreasonably stifle political competition, it is important to examine these facts.

Professor Amy acknowledges that in a multiparty system, the Republican and Democratic Parties could experience parts of their broad political coalitions splitting off to form their own parties.³⁹⁴ But, he demonstrates that this party splintering need not result in there being so many parties represented in our legislature that stable governing coalitions cannot be formed.³⁹⁵ Many countries have successfully prevented the coalition building problem by imposing electoral thresholds that must be met for a party to win a legislative seat.³⁹⁶ Moreover, in most multiparty system countries the coalitions created by the legislative parties have not been too fragile to provide stable governing.³⁹⁷ In this regard, the tendency of our two-party system to produce weak governing coalitions has been documented elsewhere in this article.³⁹⁸

Professor Amy characterizes factionalism as a tendency to exacerbate group conflict within a society.³⁹⁹ Admirers of the two-party system contend that it defuses group conflict because "[t]he two major parties . . . 'serve as vital, umbrella-like, consensus-forming institutions that help counteract the powerful centrifugal forces in a country teeming with hundreds of racial, economic, social, religious, and political

Id. at 380. He also suggests that if a third party successfully elects a fair number of state legislators, "legislative coalition building will be made more difficult . . ." *Id.*

390. *Clingman*, 125 S. Ct. at 2039-41; *see supra* pages 335-338.

391. *Clingman*, 125 S. Ct. at 2038; *see supra* pages 299-300.

392. John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, 'December 1770, in Michael Moncur, *The Quotations Page: Quotations by Author—John Adams*, http://www.quotationspage.com/quotes/John_Adams/ (accessed October 8, 2005).

393. Amy, *supra* n. 13.

394. *Id.* at 160.

395. *Id.* at 160-61.

396. *Id.* at 161.

397. Professor Amy cites Norway, Germany, Austria, Iceland, Ireland, Luxembourg, the Netherlands, Belgium, Denmark, and Finland as countries with multiparty systems which have enjoyed long-running stable governments. *Id.* at 162. He also cites a study of governmental stability from 1945-1992 that revealed the top five countries in governmental stability over that period of time have multiparty systems. Amy, *supra* n. 13, at 162.

398. *See supra* nn. 112-116 and accompanying text.

399. Amy, *supra* n. 13, at 163.

groups.”⁴⁰⁰ Critics of multiparty systems fear that under a multiparty system the powerful centrifugal forces will form “their own political parties . . . , intensifying rather than moderating the conflicts between them.”⁴⁰¹

In fact, Professor Amy documents that in the real world multiparty systems operate very effectively to diffuse group conflict. They do so because in multiparty systems negotiations among the diverse groups take place after elections during the organization of the legislative bodies.⁴⁰² Given that elections in multiparty systems produce more diverse legislatures, negotiations are conducted among representatives of most elements of society so that the compromises achieved are more likely to be accepted by the electorate than the solutions to major problems produced by the legislatures in two-party systems.⁴⁰³

This great potential for multiparty systems to produce legislative solutions to pressing problems that will be widely accepted by the electorate in great measure is a function of such systems producing legislative majorities that truly represent the majority will of the people.⁴⁰⁴ Voter turnout tends to be greater in multiparty systems than in two-party systems, since voters have a much better chance of finding candidates who best represent their views and also have a realistic chance of electing some of these candidates.⁴⁰⁵ As a consequence, in their totality, the views of the representatives elected to legislative bodies in multiparty systems are more likely to reflect accurately the range and strength of opinion within the electorate.⁴⁰⁶

Finally, Professor Amy convincingly demonstrates that multiparty systems may be superior in producing governing stability. To this end, he characterizes governing stability as the avoidance of wild shifts in governing philosophies in the wake of modest electoral margins for election winners. Professor Amy notes that multiparty systems provide stability because elections usually produce only incremental changes in legislative governing coalitions.⁴⁰⁷ Therefore, legislation produced by succeeding legislative bodies in multiparty systems tends to reflect only incremental policy and practice changes.⁴⁰⁸ In contrast, Professor Amy cites the 1994 U.S. Congressional elections as an example where slight electoral margins produced a wild shift in

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.*

404. Amy, *supra* n. 13, at 166.

405. *Id.* at 164–65. Turnout in multiparty systems approach 80–90%, whereas turnout in two-party systems is often 50% or less. *Id.* at 164.

406. *Id.* at 165. In part this is due to the fact that minorities have realistic opportunities to elect persons who are truly representative of their concerns. *Id.* It is also function of the multidistrict/proportionate representation feature that does not allow the party who wins the most votes to receive all of the representatives from a given geographic area. Amy, *supra* n. 13, at 165. For example, under the two-party/single member district system, in a state with seven congressional districts, a political party will elect all seven congressmen if its nominees win the plurality in every district. *See id.* at 166. If that same state elected congressmen at large under a proportionate representation system, even if the nominees of a single party won an average of 60% of the vote, at least two if not three congressmen would come from parties other than the winning party. *Id.*

407. *Id.* at 165.

408. *Id.*

governing philosophy, for with 51.3% of the vote the Republican Party took over Congress and began pushing to enact its Contract with America.⁴⁰⁹

This demythologizing of the two-party mystique is not offered to convince anyone that the United States, or any state therein, should anytime soon take action to bring about a viable multiparty system. Rather, it is offered to demonstrate that the U.S. Supreme Court has used a false premise as justification for imposing severe and unnecessary restraints on the political association rights of parties and voters under the pretext of promoting political stability, preventing party splintering, and preventing excessive factualism.

Perhaps the *Jones* Court would have struck down blanket primaries even if the two-party mystique had not been developed in *Timmons*, for blanket primaries force unwilling political parties to accept large risks that primaries will produce nominees and messages that reject their traditional principles. Such risks are absent when a party voluntarily agrees to let persons other than its registered members participate in its primary elections. The party voluntarily chooses a path that may alter its ideology and the character of its nominees. Its choice gives primary election voters more opportunities to determine who ultimately will represent them. If the experiment is successful, the party will win more elections, thereby forcing its competitors to consider changing their ideologies and the scope of their political associations. Unfortunately, *Clingman* stands as a perhaps insurmountable obstacle to experiments in broadening primary election associations. Any stability it produces will likely be a paralyzing stasis arising from a policy that equates vigorous political competition with political destabilization.

409. Amy, *supra* n. 13, at 165.