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Party On: The Right to Voluntary Blanket Primaries

Margaret P. Aisenbrey

University of Michigan Law School

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NOTE

PARTY ON: THE RIGHT TO VOLUNTARY BLANKET PRIMARIES

Margaret P. Aisenbrey*

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Political parties have unique associational rights. In party primaries, party members associate to further their common political beliefs, and more importantly, to nominate candidates. These candidates are the "standard bearer[s]" for the political party—the people who "best represent[] the party's ideologies and preferences." The primary represents a "crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." Because the primary is such a critical moment for the political party, the party's associational rights are most important at this time.

In 2004, the Green Party of Alaska and the Republican Moderate Party of Alaska filed suit in Alaska state court, arguing that a primary statute that banned parties from joining together to voluntarily issue a single blanket primary ballot violated their associational rights. In State v. Green Party of Alaska, the Alaska Supreme Court agreed, holding that the Alaska Constitution protected the right of political parties to participate in voluntary blanket primaries and that the statute impermissibly burdened the parties' associational rights. The court's analysis drew substantially from federal constitutional precedent, and in particular, the Supreme Court's decision in California Democratic Party v. Jones, which recognized broad associational rights for political parties. Only a few months prior to the Alaska court's decision, however, the U.S. Supreme Court had decided Clingman v. Beaver, which had interpreted political parties' associational rights more narrowly than had California Democratic Party. Because Clingman stood in tension with California Democratic Party, the Alaska court chose to leave open the issue of whether a prohibition on a voluntary blanket primary ballot would violate the federal constitution. This Note addresses that question.

3. Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986); see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997) ("[T]he New Party, and not someone else, has the right to select the New Party's 'standard bearer.'"); Cousins v. Wigoda, 419 U.S. 477 (1975) (holding that the party, not the state, has the right to decide who will be state's delegates at the party convention).
4. See Cal. Democratic Party, 530 U.S. at 575 ("In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."). These protections, however, only extend to classes of voters, and the political party may not choose to exclude voters registered to the party. See infra note 20 and accompanying text.
In a blanket primary, the voter receives only one ballot, listing all of the candidates from all of the parties. The voter can vote for one candidate for each position, regardless of the candidate’s or the voter’s party affiliation. For instance, a voter can nominate a Republican for state legislature, a Democrat for governor, and a Libertarian for the United States House of Representatives.

There are three types of blanket primaries: 1) partisan, which are unconstitutional; 2) non-partisan; and 3) voluntary. In a partisan blanket primary, the state requires the parties to participate, and the top vote-getters from each party win that party’s nomination. In 2000, the Supreme Court held this type of primary unconstitutional in *California Democratic Party*, invalidating primary schemes in California, Alaska, and Washington. In a non-partisan blanket primary, the top two vote-getters, regardless of party affiliation, move on to the general election. These candidates are not technically any party’s nominees, since both candidates can be from the same party. Louisiana currently has a non-partisan blanket primary, which remains unchallenged in that state. Finally, a voluntary blanket primary, by definition, is instituted by the parties rather than the state. In a voluntary blanket primary, the parties jointly agree to issue a blanket primary ballot and consent to the top vote-getter winning their individual nominations.

*Clingman* and *California Democratic Party* are reconcilable in a way that favors voluntary blanket primaries. When one reads *Clingman* and *California Democratic Party* in the way this Note suggests, the First and Fourteenth Amendments compel the state to allow parties to issue voluntary blanket primary ballots. This Note argues that, essentially, a voluntary blanket primary is the unconstitutional partisan blanket primary without the unconstitutional element—state-mandated party participation. Part I considers the manner in which a state may compel association between a political party and a voter. Part II argues that while the state has broad regulatory power in the primary context, it may not prevent a political party from choosing to associate with voters who wish to associate with it unless doing so protects some other associational right, such as that of a second political party. Finally, Part III argues that if two parties support a voluntary blanket primary for their registered voters, then the state has no compelling interest in protecting these parties from themselves. State interference in this context

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would severely burden a core associational right of voters and political parties and would not satisfy strict scrutiny. Therefore, when parties wish to issue a voluntary blanket primary ballot, the federal constitution compels states to allow them to do so.

I. STATE COMPELLED ASSOCIATIONS: BURDENS ON POLITICAL PARTIES IN PRIMARIES

State regulation of elections often implicates the rights guaranteed by the First and Fourteenth Amendments, but in ways that rarely cause a court to hold a regulation unconstitutional. "Election laws will invariably impose some burden upon individual voters," and a burden on the associational rights of parties or voters does not necessarily compel strict scrutiny. Instead, "a more flexible standard applies":

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

For instance, a state may force certain associations upon a political party by imposing a primary, even though mandating these associations burdens the party's associational rights.

This Part considers the various types of primaries that states have historically imposed, and how these primaries implicate the associational interests of political parties. Section I.A discusses states' imposition of primaries on political parties, despite the resulting interference with those parties' associational rights. Section I.B considers the party's core associational right to identify and associate only with the class of voters of its choosing in the selection of its candidates. Certain state-mandated primaries, such as the partisan blanket primary, impose too great a burden on this right.

A. Forced Associations: Imposing a Primary

A primary is an association between the political party and the voter. Most primaries are mandated by the state, and such a mandated association

14. Id. at 434; see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" (quoting Burdick, 504 U.S. at 434)).
15. Burdick, 504 U.S. at 434 (citations and internal quotation marks omitted).
Voluntary Blanket Primaries burdens the party’s associational rights. These primary systems strip party activists of their power to define the party’s candidates. These activists may favor a system that allows them either to choose who will be the party’s nominees or to decide what is necessary for someone to qualify as a member of their party. Instead, voters, who may not have invested time and energy in the party, choose the candidates, and the state decides what qualifies a voter to become a member of the party. At the turn of the nineteenth century, when states began adopting primaries and other political procedures for parties to nominate candidates, parties challenged the regulations as infringing on their associational rights. State courts repeatedly upheld laws that regulated political parties, often refusing to consider parties as voluntary associations. Today, it remains “too plain for argument” that states may require political parties to participate in primaries.

A state has great flexibility in mandating associations between the party and the voters—even in defining the association’s limits. Although political parties have the right to choose their own candidates, states control a party’s ability to exclude or include voters during the party’s exercise of that right. States currently mandate a variety of primaries: closed, open

16. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, freedom of association plainly presupposes a freedom not to associate. The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.” (citations and internal quotation marks omitted; alterations removed)).


19. Id. at 878–80.

20. Lightfoot v. Eu, 964 F.2d 865, 872 (9th Cir. 1992) (quoting Am. Party of Tex. v. White, 415 U.S. 767, 781 (1974)). While the Supreme Court has never squarely addressed the issue, the Ninth Circuit has upheld the constitutionality of mandated primary elections, and the First Circuit has strongly suggested it would agree. See id. at 872–73; Cool Moose Party v. Rhode Island, 183 F.3d 80, 83 n.4 (1st Cir. 1999); see also Cal. Democratic Party v. Jones, 530 U.S. 567, 572 (2000); Am. Party of Tex., 415 U.S. at 781; Issacharoff, supra note 17, at 286.

21. See supra note 3.

22. See Winkler, supra note 18, at 888–89 (“The regulation of the membership of the party and of the right to participate in the nomination of its candidates, in this respect, is taken from the party and placed in the control of the Legislature.” (quoting State ex rel. Adair v. Drexel, 105 N.W. 174, 179 (Neb. 1905)) (alteration removed)); see also SAMUEL ISSACHAROFF; PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 377 (2d ed. 2001).

23. In a closed primary, only voters registered with the political party may participate in its primary. The state determines whether there will be a “waiting period” before a voter newly registered with a political primary may vote in its primary. See, e.g., KAN. STAT. ANN. §§ 25-3301, 25-3304 (2005) (imposing fourteen day “waiting period” before a voter registered to a new party may vote in the primary); 10 ILL. COMP. STAT. 5/7-43 (2005). The Court has never ruled on these primaries directly, but lower courts have found them constitutional. See, e.g., Van Allen v. Berman, No. 98-9337, 1999 U.S. App. LEXIS 15071 (2d Cir. July 2, 1999); Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), aff’d, 429 U.S. 989 (1976); Smith v. Penta 405 A.2d 350, 357 (N.J. 1979) (upholding the constitutionality of the closed primary system); In re Barkman, 726 A.2d 440 (Pa. Commw.
semi-closed, open, and nonpartisan blanket. In these ways, the state can compel the party to affiliate with all voters registered with the party in a closed primary, with registered voters and independents in a semi-closed primary, with all voters who select the party's ballot on the day of the primary in an open primary, or with all voters in a non-partisan blanket primary. All of these primary schemes burden the associational rights of the party faithful to some extent because, at the very least, the party may not exclude voters registered with it even though such voters may not be loyal to the party. Moreover, state legislatures, not parties, govern party membership through registration laws. Even the waiting period—the amount of time a voter must wait after registering with a party before he or she is eligible to vote in its primary—is within the province of the legislature. Some states use a closed primary with a same-day waiting period, where the voter may register with a party and vote in its primary on the day of the primary.


25. In an open primary, the voter is given every party's ballot and selects one in the voting booth. See, e.g., Wis. STAT. § 5.62 (2003–2004). In a semi-open primary, any voter can vote in any party's primary but is restricted to that single party's ballot before he or she goes to the voting booth. See, e.g., Mo. REV. STAT. § 115.397 (2004). For the purposes of this Note, I have not differentiated and will refer to both generally as "open primaries." Whether open primaries are constitutional is an unsettled question. See, e.g., Cal. Democratic Party, 530 U.S. at 577 n.8 (declining to reach the question of whether an open primary is constitutional); Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 120–21 (1981) (same); see also Miller v. Brown, No. 05-2254, 2006 U.S. App. LEXIS 22234 (4th Cir. Aug. 30, 2006) (reversing the district court's decision that Virginia's Eleventh Senatorial District Republican Committee lacked standing to challenge the open primary and was not ripe for review, and remanding to the district court for a decision on the merits).

26. This type of primary was distinguished from a partisan blanket primary in California Democratic Party, 530 U.S. at 598 n.8 (Stevens, J., dissenting). In a non-partisan blanket primary, the voter receives one ballot with all candidates from each political party and can only vote for one candidate per office, but may select a candidate from one political party for Governor and another for State Senator, for example. The top two vote-getters move on to the general election. See LA. REV. STAT. ANN. §§ 18:401, 18:481 (2005). In Louisiana's system, if one candidate receives an outright majority, that candidate is declared the winner and does not run in the general election. Id. § 18:511. That difference may prevent the primary scheme from being invalidated because the Ninth Circuit has recently held that the top two vote-getters may be considered the party's nominee where the candidate can self-identify as running for a particular party's nomination regardless of the party's willingness to be associated with that particular candidate. See Wash. State Republican Party v. Washington, No. 05-35774, 2006 U.S. App. LEXIS 21421 (9th Cir. Aug. 22, 2006) (holding a top-two scheme adopted by the Washington voters in a referendum unconstitutional).

27. See, e.g., NEB. REV. STAT. § 32-312 (2005).

28. See, e.g., Nader, 417 F. Supp. 837 (D. Conn. 1976) (upholding a closed primary from a challenge by independent voters and noting that those voters could simply register with the party on the day of the primary and unregister the following day).
the opposite extreme, states can impose an eleven-month waiting period. The party has no say in the waiting period’s length. A party must associate with, at the very least, its registered voters, and the party has no say in who its registered voters are. The act of registration rests entirely with the individual voter and is part of the voter’s basic freedom to associate. Even a voter with adverse principles may register with a party. As the Court articulated in California Democratic Party, a voter should “simply join the party” if she feels disenfranchised because one party’s primary is essentially the only competitive election in her district. Such an act would not meaningfully reflect the voter’s political preferences, since the voter may not truly believe in that party’s values, but the Court still considered it the appropriate action for such a voter to take.

B. When Forced Associations Over-Burden the Party: Party Raiding

Parties have an interest in limiting the amount of raiding that occurs in their primary, and no state can impose a primary that exposes the party to too much raiding without that party’s agreement. Party raiding is “a process in which dedicated members of one party formally switch to another party to alter the outcome of that [second] party’s primary.” Parties have the right

30. See Issacharoff, supra note 17, at 284 (noting the mismatch between a supposed constitutional right “not to associate” and a rule that allows the state to determine the timing for membership).
31. See Clingman v. Beaver, 544 U.S. 581, 601 (2005) (O’Connor, J., concurring) (“The act of casting a ballot in a given primary may ... constitute a form of association that is at least as important as the act of registering.”); Cal. Democratic Party, 530 U.S. at 577 n.8 (“[T]he act of voting in [a] primary fairly can be described as an act of affiliation with the [party].”) (quoting Democratic Party of U.S. v. Wisconsin ex. rel. La Follette, 450 U.S. 107, 130 n.2 (1981) (Powell, J., dissenting)); id. at 596 (Stevens, J., dissenting) (“In the real world, however, anyone can ‘join’ a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election ...”); State ex rel. La Follette v. Democratic Party of U.S., 287 N.W.2d 519, 535 (Wis. 1980) (“[T]he essence of the legal definitions of party membership in the United States will surely continue to be self-designation. The fact remains that today even in ... [a] closed-primary state you are a Democrat if you say you are; no one can effectively say you are not; and you can become a Republican any time the spirit moves you simply by saying that you have become one. You accept no obligations by such a declaration; you receive only a privilege—the privilege of taking an equal part in the making of the party’s most important decision, the nomination of its candidates for public office.” (quoting Austin Ranney, Curing the Mischiefs of Faction 166 (1975))).
32. See Kusper v. Pontikes, 414 U.S. 51, 57–58 (1973) (“The right to associate with the political party of one’s choice is an integral part of the basic constitutional freedom [to associate].”).
34. Id. at 572. Voters may “raid” a primary in two different ways. First, voters may vote for a weaker candidate so that the candidate from their party has a greater chance of success. For an example of this type of raiding see infra notes 41–43 and accompanying text. Second, voters may vote for a candidate who is perceived as more mainstream—even when another candidate who adheres closer to the party’s core ideology may be just as electable. For an example of this type of raiding, consider when Democrats crossed over to nominate John McCain in the 2000 Michigan presidential preference primary. See Editorial, Mr. McCain’s Michigan Surprise, N.Y. Times, Feb. 23, 2000, at A20
to "limit control over their decisions to those who share the interests and persuasions that underlie the association's being," and therefore can successfully challenge primary schemes that over-expose them to party raiding.

When parties oppose a partisan blanket primary, it is unconstitutional for the state to impose it because it allows for significant party raiding. In California Democratic Party, the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party sued California, arguing that the statute imposing a partisan blanket primary unconstitutionally burdened their associational rights. The Supreme Court agreed, holding that any primary system must allow the party to select a standard bearer to represent their party. The Court held the primary system severely burdened the political parties' associational rights because it "force[d] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." This severe burden triggered strict scrutiny, and the Court found no compelling interest to justify the primary regime.

Many parties oppose partisan blanket primaries because they fear party raiding. For instance, Alaska had a partisan blanket primary for much of the twentieth century. In 1974, during debates to re-institute the blanket primary, many Alaskan Democrats feared that Republicans would "use[] it to their advantage by crossing party lines in the primary to elect the weakest Democratic candidate." This apprehension of party raiding was realized in 1980, when Democratic challenger Clark Gruening defeated two-term Democratic Senator Mike Gravel in the primary. Republican voters at least partially contributed to this defeat, since they wished to see a Republican take the seat but considered Gravel a difficult candidate to beat. Gruening lost to Republican Frank Murkowski in the general election, and Murkowski served in the Senate until 2002. Ten years later, because of concerns about
party raiding and a potential decline in party discipline, the Alaska Republican Party amended its internal rules to prohibit voters registered with other political parties from voting in its primary.\textsuperscript{44}

II. COMPELLED ASSOCIATIONS OF VOTERS AND POLITICAL PARTIES: BROADENING THE PRIMARY

Although the state cannot force the party to associate with voters who do not affiliate with the party, the party can choose to broaden its associations to include voters who are not formally associated with the party. This Part examines the rights and interests of voters and political parties to broaden their associations. Section II.A argues that when voters challenge a regulation, a state can defend its regulation as protecting political parties only when the political party agrees with the regulation. Section II.B discusses the state interest in protecting political parties.\textsuperscript{45} It contends that when other political parties' associational rights are also implicated by the regulation, the state can choose to implement a primary to protect either political party. On the other hand, the state cannot assert a state interest in protecting the political party from itself because that would unconstitutionally substitute the state's judgment for that of the party. Finally, Section II.C explores the rights of voters to associate with more than one political party at once, forming dual associations.

A. The State Interest in Protecting Political Parties' Associational Rights from Voters

When a voter refuses to register with a political party and the party does not want that voter to participate in its primary, the state has an interest in protecting the associational rights of political parties and the electoral process to

\textsuperscript{44} At least, that is what the party argued when it challenged the blanket primary as unconstitutionally burdening its associational rights. See Brief in Opposition to Petition for Writ of Certiorari at 7–9, Republican Party of Alaska v. O'Callaghan, 520 U.S. 1209 (1997) (No. 95-1962), 1996 WL 33438499. The Alaska Supreme Court held the blanket primary constitutional in 1995. See O'Callaghan, 914 P.2d at 1263. Originally, a U.S. District Court Judge had found the practice unconstitutional, as a preliminary ruling, and following this preliminary decision the parties had stipulated that the lieutenant governor would adopt new rules allowing for separate primary ballots. Id. at 1252–53. The 1992 and 1994 Republican primaries were semi-closed, with only registered Republicans and unaffiliated voters allowed to vote in the primary. Id. at 1253. After a voter challenged this closed Republican primary, the Alaska Supreme Court eventually found the partisan blanket primary constitutional in 1996, and ordered the Republican Party to join the blanket ballot. Id. at 1264. Five years later, the Alaska Republicans' argument won a majority of the Supreme Court in another case challenging a partisan blanket primary, and the Court invalidated partisan blanket primaries. See Cal. Democratic Party, 530 U.S. 567 (2000).

\textsuperscript{45} In the interest of brevity, this Note will discuss when a state can or cannot assert an interest in protecting political parties occasionally without qualifying that a voter or a party must have challenged the state regulation for the state to assert such interests.
defend a closed primary regime. In *Nader v. Schaffer*, independent voters in Connecticut who wished to vote in the Republican Party’s primary sued the state to open the primary. The party opposed allowing nonmembers to vote in its primary. While the statute burdened voters’ rights by conditioning the right to vote in a primary on the act of publicly affiliating with the party, the court reasoned that voters who refused to affiliate with the party “are not ‘interested’ in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies.” This language suggests that the court was concerned with the potential for the independent voters to raid the primary—either by voting for candidates who were not true to the party’s ideals or by voting for a candidate who did not have the best chance of winning. The court went on to argue that requiring voters to register with a party served important “housekeeping function[s],” suggesting that both party leadership and candidates benefited from knowing who the members of the party were. Because the voters were not willing to join the party, their interest was “fundamentally inconsistent” with the party’s interest, and the statute was nothing more than a “minimal infringement” on the associative interests of the voters, prompting the court to apply rational basis. The court noted that the Connecticut legislature had broad authority to adopt whatever type of primary it considered “best meet[s] the needs of the state” and that the state had legitimate interests in preserving the parties as viable interest groups and in protecting the integrity of the electoral process. These state interests justified the closed primary under the lower standard of review.

Had the Republican Party of Connecticut wanted to include independent voters, however, the result would have been different, and in *Tashjian v. Republican Party of Connecticut* that very situation arose. The Republican Party of Connecticut decided it wanted to allow independent voters to vote in its primary, and it sued the state, arguing that the regulation preventing this association unconstitutionally burdened its associational rights. The U.S. Supreme Court characterized “[t]he Party’s attempt to broaden the base of public participation in and support for its activities [as] conduct undenia-

47. *Id. at 840.*
48. See *id.; see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 212 (1986) (“In [Nader], the Party opposed the plaintiff’s efforts to participate in the Party primary.”).
50. *Id.*
51. *Id.*
52. *Id. at 845.* (“[T]he 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.’” (quoting *Ray v. Blair*, 343 U.S. 214, 221–22 (1952))).
53. *Id. at 850.*
54. *See id. at 845.*
bly central to the exercise of the right of association." The Court held the state regulation placed the same burden on the voters that the Nader court had found minimal, but that the situation here presented another burden, one on the political party's associational rights. Together, these two burdens compelled strict scrutiny. In Tashjian, the state's regulation impermissibly burdened the independent voters and the party because no conflict existed between the associational rights of the voters and the party; the burden was imposed upon both groups and in protection of no one. The Court noted the interests of the independent voter were no longer "fundamentally inconsistent" with those of the party members because the party members had made an internal decision to allow those voters into the primary. The state had no interest in protecting the associational rights of other political parties because the voters were independent and therefore the regulation implicated no other political party's associational rights. Many courts have since characterized the "associational right[s] of a political party [as including the right] to decide whether it wants to include nonmembers in its own primaries; this is a decision that the state generally must respect in its regulation of primaries."

To allow the state to assert an interest in protecting a political party from itself would strip the party of its autonomy and associational rights. Because the party willingly associated with the independent voters in Tashjian, the state's interest in preventing raiding was "not implicated." Instead, "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, [was] protected by the Constitution." Internal party decisions, such as the Republican Party of Connecticut's decision to permit independents to vote in the Republican primary, are fundamental to a party's right to associate. The state has no

56. Id. at 214. The regulation prevented the political party's members from choosing "to broaden opportunities for joining the association by their own act, without any intervening action by potential voters." Id. at 216 n.7. The Court described the second interest in broadening public participation as less important. See id. at 215.

57. Id. at 216. The Court characterized the other burden in requiring voters to publicly affiliate with the party as more important. Id. at 216 n.7.

58. See id. at 217.

59. Id. at 216 n.6.


62. Tashjian, 479 U.S. at 219. The Court rejected the state interest and distinguished it from other, seemingly similar state interests accepted in Nader and like cases because "[i]n the present case, the state statute is defended on the ground that it protects the integrity of the Party against the Party itself." Id. at 224; see also Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 124 (1981) ("It is for the National Party—and not the Wisconsin Legislature or any court—to determine the appropriate standards for participation in the Party's candidate selection process.").

63. Tashjian, 479 U.S. at 224.

64. See supra text accompanying note 16; see also Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000). Similarly, neither a state nor a court could decide that the Boy Scouts' exclusion of a homosexual scout leader was irrational or antithetical to the Boy Scouts as an organization—this
compelling interest in protecting the political party from itself, even if the state wants to prevent the party from acting in an unwise or irrational manner. A political party's associational rights ensure that the party, not the state, decides how the party's associational goals are best achieved. The party's internal decisions affecting the associational rights of another party, however, present a different situation.

B. The State Interest of Protecting Parties: Saving the Party from Other Political Parties

This Section argues that the state has an interest in protecting political parties when at least one political party whose interests are affected agrees to the state's protection. Section II.B.1 considers the case of Clingman v. Beaver. In Clingman, the state could protect the associational rights of other political parties, such as the Republican Party, and this explains why the Libertarian Party could not open its primary to Republican voters. Section II.B.2 argues that when a state regulation protects at least one political party that seeks such protection, courts should defer to the state legislature. Nevertheless, the state has no interest, as Section II.B.3 argues, in only protecting a political party from itself, for that would unconstitutionally substitute the state's judgment for that of the party.

1. Clingman v. Beaver and Reverse Party Raiding

In Clingman v. Beaver, the Libertarian Party of Oklahoma (LPO) sued Oklahoma to allow it to have an open primary, one in which every voter—not just Libertarians and independent voters—could vote. The Court had considered this scenario as a hypothetical in Tashjian, noting that it would raise different considerations than in Tashjian itself and that these considerations would implicate other parties' associational rights by threatening those

65. Tashjian, 479 U.S. at 224 ("The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point 'even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party.' The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. 'And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.'" (quoting La Follette, 450 U.S. at 123-24)); see also Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 227-28 (1989) ("[E]ven if [a state regulation] saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party."); La Follette, 450 U.S. at 123-24 ("[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party. . . [A]s is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.").

parties with "disorganization effects." In Clingman, the burden on the associational rights of the LPO paralleled the burden on the Republican Party of Connecticut in Tashjian, but LPO's proposed open primary had the potential to allow reverse primary raiding in the other political parties' primaries. The voters who wished to vote in the LPO's primary were already registered with another party. These other parties had an interest in ensuring their registered voters were committed to associating with them so they would not be threatened by the "disorganization effects" that the Tashjian Court had considered a potential problem.

The Clingman Court fractured on the issue of how significantly the statute had burdened the voters and the LPO. The burden on the party—that it may not "broaden [its] opportunities for joining . . . by [its] own act, without any intervening action by potential voters"—was the same burden the Court had assigned lesser importance to in Tashjian. Six Justices in Clingman agreed that, standing alone, this burden was not severe enough to trigger strict scrutiny, and the Court applied a lower standard of review. The Court stated it used rational basis, but it classified the state interests as "important" and the concurrence argued that the review should have been more exacting.

A lower standard of review was appropriate because in Clingman the state acted to protect the associational rights of the other political parties. The burden on the other political parties would have been great if the state had not prevented the LPO from opening its primary to Democratic and Republican voters, while the burden on the LPO was great because the state had. The LPO's right to associate with registered Republicans and Democrats was incompatible with the Republican and Democratic parties' right to preserve the loyalty of their own registered voters. Had registered Republicans or Democrats been allowed to vote in another party's primary, those

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67. Tashjian, 479 U.S. at 225 n.13 ("Under such circumstances, the effect of one party's broadening of participation would threaten other parties with the disorganization effects . . . .").

68. Clingman explained the distinction that the voters were forced to affiliate publicly in Tashjian whereas in Clingman the voters challenging the primary had already publicly affiliated with another party. Clingman, 544 U.S. at 592. This Note argues the distinction had more to do with the parties with which the voters had registered, not the public affiliation requirement.

69. Tashjian, 479 U.S. at 225 n.13.

70. Clingman, 544 U.S. at 592 (quoting Tashjian, 479 U.S. at 216 n.7) (ellipses in original).

71. Id. The justices also agreed that the burdens in Clingman were not as severe as in Timmons v. Twin Cities Area New Party, 520 U.S. 351, 369 (1997). Clingman, 544 U.S. at 592. The Court in Timmons, 520 U.S. at 369, had held that a ban on allowing candidates to be more than one party's nominee was "justified by 'correspondingly weighty' valid state interests."

72. See Clingman, 544 U.S. at 587 ("We are persuaded that any burden Oklahoma's semi-closed primary imposes is minor and justified by legitimate state interests.").

73. Id. at 593.

74. Id. at 598 (O'Connor, J., concurring) ("I think respondents' claim implicates important associational interests, and I see no reason to minimize those interests to dispose of this case."); see also M. Jason Scoggins, Recent Development, Placing Unnecessary Limits on Voting Associational Freedoms: Clingman v. Beaver, 125 S. Ct. 2029 (2005), 29 HARV. J.L. & PUB. POL'Y 343, 351 (2005) (arguing the scrutiny was not adequately searching).
voters might have become more loyal to that other party. Without a mandate to un-register with the Republican or Democratic Party, however, such voters might have remained registered Democrats or Republicans. These voters would then have been well-positioned to raid the Democratic or Republican primaries if they saw a chance to nominate either a more Libertarian-leaning candidate or a candidate less likely to siphon-off support for the LPO. This potential for reverse party raiding and the burden it would cause on the associational rights of the other political parties—the Democratic and Republican parties in this case—caused the Court ultimately to uphold Oklahoma’s statute.

The concern about election and campaign-related disorder that motivated the Court in Clingman was the same concern that had led Justice Marshall to hold out the Clingman scenario as raising different considerations—including threatening other parties with “disorganization effects” when he authored Tashjian. Both concerns correspond with a fear of reverse primary raiding. The Clingman plurality’s view that voters would be willing to vote in many primaries illustrates that it was concerned that these voters had no real connection to the LPO, and that a voter’s interest in associating with other political parties would “cease[] to be of analytic use.” If these voters could assert rights to vote in the primary of any political party, their registration with a particular party would become less meaningful. If registration were so trivial, forcing political parties to select their candidates via primaries would become a much greater burden.

The state can readily assert an interest in protecting parties when there is a lower standard of review and when the state is protecting other political parties. Clingman identified three important state interests: (1) “preserv[ing] [political] parties as viable and identifiable interest groups”; (2) aiding in “parties’ electioneering and party-building efforts”; and (3) “guard[ing] against party raiding and ‘sore loser’ candidacies.” The Court’s discussion of these state interests, as Justice Stevens noted in his dissent, demonstrates that the Court was concerned with the fate of the Democrats and Republicans if the LPO was able to open its primary. In its discussion of the first state interest, the Court reasoned that, without a scheme that required a voter to disaffiliate, the parties could suffer from their voters having a less mean-

75. Tashjian, 479 U.S. at 225 n.13.
76. Clingman, 544 U.S. at 591 (quoting Tashjian, 479 U.S. at 235 (Scalia, J., dissenting)).
77. Id. at 594 (quoting Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn. 1976)) (alteration “[political]” in original).
78. Id. (citing Nader, 417 F. Supp. at 848).
79. Id. (citing Storer v. Brown, 415 U.S. 724, 735 (1974)); see also id. at 595 (“[The] commitment [to the party] is lessened if party members may retain their registration in one party while voting in another party’s primary.”).
80. Id. at 617 (Stevens, J., dissenting) (“It is clear, of course, that the majority here is concerned only with the Democratic and Republican Parties, since party building is precisely what the LPO is attempting to accomplish.”).
Voluntary Blanket Primaries

In its treatment of the second interest, the Court noted that under the proposed scheme, "parties risk expending precious resources to turn out party members who may have decided to cast their votes elsewhere." The court was worried the party would waste its resources on voters who were essentially only affiliated with the party to engage in reverse raiding.

Although the Court did not explicitly identify a potential for reverse party raiding, the Court’s treatment of the state interests and the analysis of how those interests affected other political parties suggest that the issue of reverse party raiding motivated the Court. Because the LPO invited the voters registered to other parties to vote in its primary, the primary implicated no concern about raiding the LPO’s primary similar to in Tashjian. Reverse party raiding might occur, however, if, as the Court explained, Democrats raided the Libertarian primary by voting for the “candidate most likely to siphon off votes from the Republican candidate in the general election.” In other words, voters might vote in the Libertarian primary precisely as the Libertarian Party hoped—in a way that would improve the viability of its candidates. Because this might hurt a second political party, Republicans, Oklahoma was permitted to prevent it. On the other hand, had the Republicans and Democrats agreed to the LPO proposed rule, Clingman should have come out differently.

2. Deference to Legislatures Where There Is Danger of Reverse Party Raiding

It is appropriate for the legislature to decide what is best for the state in situations where a regulation could burden different voters in different ways. The regulation of elections always imposes some burden on voters, and legislatures have some discretion in how to implement election laws. Thus, the Clingman majority concluded that “[s]tates may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.”

81. Id. at 595 (majority opinion); see also Dmitri Evseev, A Second Look at Third Parties: Correcting the Supreme Court’s Understanding of Elections, 85 B.U. L. REV. 1277, 1302 (2005).
82. Clingman, 544 U.S. at 596.
84. Clingman, 544 U.S. at 596.
85. For a further discussion of Clingman’s deference to legislatures, see Lowell J. Schiller, Recent Development, Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases: Clingman v. Beaver, 125 S. Ct. 2029 (2005), 29 HARV. J.L. & PUB. POL’Y 331, 341 (2005) (“[A] fair reading of Clingman reveals a careful attempt to advance not only stability, but also the competing values of free association, a robust franchise, and deference to legislatures.”).
In *Clingman* and other cases that presented a potential for reverse party raiding, the Court used language that suggests the state may limit the voter to one party's primary, regardless of whether the party assents to a voter's affiliation with multiple parties. For instance, in *American Party of Texas*, the plaintiffs, all minor political parties, sued the state arguing that their associational rights were burdened by a statute banning a voter who voted in a major party's primary from signing a nominating petition for a minor party's candidate. If the minor parties were successful, a voter could freely vote in a major party's primary and nominate candidates from another, minor party. Without agreement from the major parties, permitting a voter to associate with both a major and minor party in the same nomination process threatened the associational rights of the major parties. Perhaps because the major parties did not intervene and indicate their assent to their voters' affiliating with other parties, the Court upheld the statute in *American Party of Texas*, stating it was "nothing more than a prohibition against any elector's casting more than one vote in the process of nominating candidates for a particular office." The state legislature may choose between allowing a voter to both vote in the primary and sign a nominating petition, or alternatively either to vote in the primary or to sign a nominating petition. In an earlier case, *Jenness v. Fortson*, the Court upheld a Georgia statute that allowed voters to do both. The state legislature clearly can choose to limit its voters to a single nominating act, but this nominating act has been read traditionally to allow states to limit it to one act for an individual office. States do not have a "duty to allow voters to move freely from one to the other method of nomi-

88. *See, e.g.*, Am. Party of Tex. v. White, 415 U.S. 767, 786 (1974) ("[T]he State may determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process.").

89. *Id.* at 767–68.

90. *Id.* at 785. The Court went on to note that it was for the state to "determine that it is essential to the integrity of the nominating process to confine voters to supporting one party and its candidates in the course of the same nominating process." *Id.* at 786. This Note has argued this language is appropriate only where there are conflicting associational rights of different parties. Had the parties' interests all aligned, the state could not substitute its judgment for the parties. *See infra* Section II.B.3.

91. *Am. Party of Tex.*, 415 U.S. at 785 n.17 ("It is true that under the Georgia system in *Jenness v. Fortson*, the State had apparently decided that its legitimate goals would not be compromised by allowing voters to sign a petition even though they have signed others and participated in a party primary. Nothing in that decision, however, can be read to impose upon the States the affirmative duty to allow voters to move freely from one to the other method of nominating candidates for the same public office." (citation omitted)).


nating candidates for the same public office.”95 Like in Clingman, the regulations at issue in Jenness v. Fortson and American Party of Texas burdened associational rights regardless of the way the regulations were implemented—i.e., regardless of whether the regulations allowed or prohibited a voter to sign a nominating petition and vote in a primary. Thus, the legislature could choose which regulation to implement.96 For these reasons, the Clingman Court appropriately deferred to the legislature. If the Republicans and Democrats had agreed to allow their voters to vote in the LPO’s primary, however, the regulation only would have protected the parties from themselves, and the Court should have applied a higher standard of review.

3. No State Interest in Protecting the Party from Itself

This Note argues that some of Clingman’s language erroneously suggests that Oklahoma could protect the Libertarian Party from itself.97 According to the Court, Oklahoma had a state interest in maintaining existing party ideologies.98 If carried through to its logical conclusion, the Court’s reasoning would effectively allow the state to prevent a party from evolving. This flawed reasoning suggests that a party could not find new ways to promote the candidates who would attract cross-over voters, as the Republican Party of Connecticut did. This would impermissibly substitute the state’s judgment for that of the party. The language, however, was not central to the holding, and this Note argues that it should be read narrowly. As discussed in Section II.B.1, Clingman may have been about protecting other political parties from the disorganization effects and election-related disorder that could occur if the LPO were allowed to implement its rule. Therefore, the Court did not need to find Oklahoma had an independent interest in protecting the LPO from its own rule in Clingman. Instead, as Tashjian made clear, states must permit parties to find common ground with voters by giving those voters a voice in their primaries and allow the party to attract a broader class of people. Clingman only added a small caveat: states may prevent parties from doing so in a way that threatens other political parties.

If courts were to follow Clingman’s dicta regarding preserving party labels, it would signal a significant break from precedent. The Court in Tashjian refused to recognize that preserving party labels could be a compelling state

96. As Part III will argue, however, where a regulation would burden the associational rights of parties and voters if it is implemented in only one way, the Constitution compels the state not to apply the regulation in the way that would burden the associational rights of both the political parties and the voters.
97. See Clingman v. Beaver, 544 U.S. 581, 594 (2005) (“It does not matter that the LPO is willing to risk the surrender of its identity in exchange for electoral success.”).
98. Id. (suggesting that there was a state interest in preserving the “integrity of its primary system” and in “avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population to the extent [it] relies on party labels as representative of certain ideologies” (quoting Nader v. Schaffer, 417 F. Supp. 837, 845 (D. Conn. 1976)) (second alteration in original)).
interest because the Court professed "a great[] faith in the ability of individual voters to inform themselves about campaign issues." The Tashjian Court argued that "[a] State's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism."  

The Court has not found an important or compelling state interest in a state's desire to "avoid primary election outcomes which would tend to confuse or mislead the general voting population to the extent [the voters] rely on party labels as representative of certain ideologies" in other cases regulating primaries unless either: (1) a potential for raiding existed, or (2) the party acquiesced to the regulation. As support for the existence of this interest Clingman cites two cases, Nader v. Schaffer and Eu v. San Francisco County Democratic Central Committee, but neither case supports the proposition that preserving party labels is a compelling or even an important state interest when the party does not agree to the regulation. In Nader, the court applied rational basis and accepted weaker state interests, and the Republican Party, the party endangered by raiding, supported the challenged statute. Furthermore, Nader also found that political parties (rather than states) have an interest in avoiding confusing outcomes in their primaries. Nader, therefore, suggests that while states have a legitimate interest in preserving party labels, it is the party that should decide whether the state can assert this interest in the first place. Eu recognized the state has a legitimate interest in "fostering an informed electorate," but found that a regulation that banned a political party's endorsement of a particular primary candidate did not serve that purpose. In generally discussing the interest, Eu cited a series of cases that accepted a state interest in preserving party labels where the regulation at issue prevented party raiding, limited each voter to a sin-


100. Tashjian, 479 U.S. at 221 (quoting Celebrezze, 460 U.S. at 798).


102. Id. (quoting Nader, 417 F. Supp. at 845, and citing Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 228 (1989)).


104. Id. at 845. Nader cites Ray v. Blair, 343 U.S. 214, 226 n.14 (1952), which found in applying rational basis that a state can reasonably classify voters or candidates according to party affiliation. But Clingman suggests this rational interest would survive either a stronger rational basis or intermediate scrutiny because otherwise the classification based on party would not mean anything, and the Court tied that meaning into the associational rights of the other political parties, noting this could "undermine the crucial role of political parties in the primary process." Clingman, 544 U.S. at 595. This Note argues this language indicates the Court's concern for reverse party raiding.


106. Rosario v. Rockefeller, 410 U.S. 752, 761 (1973) (explaining that waiting periods before voters may change party registration prevented party raiding).
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All of these cases either implicated voter confusion at the general election stage—when the associational rights of political parties are much less important—or prevented party raiding. This state interest would not be appropriate if used to defend a regulation that a state imposed against a political party’s wishes, unless the regulation protected another political party from party raiding. If the state could burden the party’s associational rights to preserve traditional party ideologies, except if it was protecting another party’s associational rights, it would amount to the state unconstitutionally substituting its judgment for that of the party.

C. Voters’ Right to Form Dual Associations

Voters have associational rights to form dual associations, and at the very least a dual association raises “significant associational interests.” Both the dissent and the concurrence in Clingman suggested that voters had an interest in associating with more than one party at a time, and the association between an already affiliated voter and the LPO could be meaningful. The dissenting and concurring opinions, representing the views of five Justices, noted that Oklahoma could not prohibit other ways that the Libertarian Party could form associations with these voters. For instance, Oklahoma could neither bar donations to more than one party nor prevent a voter registered with another party from attending a Libertarian...
meeting, as those kinds of regulations would clearly violate the First Amendment.113

Despite the Clingman plurality’s language that a voter who forms a dual association forms a minimal association, it is inappropriate for a court to decide which associations are meaningful. How much or how little association a party wishes to form with a voter is a decision for the party, not a court.114

While voters have an interest in forming associations with more than one political party, a law that burdens this interest—without more—will rarely be unconstitutional. Justice O’Connor’s concurrence in Clingman suggested that while the voters’ interest in forming dual associations was significant, there may be few instances where a statute preventing dual associations in a primary election would be unconstitutional.115 Furthermore, where the political party opposed such an association, a regulation that burdened the voters’ interest in forming a dual association would probably never alone trigger heightened review.116 For example, when a voter sued to compel a blanket primary in Green v. Texas, the district court held that the statute mandating a closed primary did not severely burden the voter by preventing him from associating with more than one party in a blanket party, and that there was an overriding state interest in protecting the political process and preventing party raiding.117 Therefore, Texas’s lack of a blanket

113. See id. at 608 (Stevens, J., dissenting) (“No one would contend that a citizen’s membership in either the Republican or the Democratic Party could disqualify her from attending political functions sponsored by another party, or from voting for a third party’s candidate in a general election. If 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.”); see also Tashjian, 479 U.S. at 215 (“Were the State to restrict by statute financial support of the Party’s candidates to Party members, or to provide that only Party members might be selected as the Party’s chosen nominees for public office, such a prohibition of potential association with nonmembers would clearly infringe upon the rights of the Party’s members under the First Amendment to organize with like-minded citizens in support of common political goals.”).

114. See supra notes 64–65, 109 and accompanying text; see also Clingman, 544 U.S. at 602 (O’Connor, J., concurring) (“I question whether judicial inquiry into the genuineness, intensity, or duration of a given voter’s association with a given party is a fruitful way to approach constitutional challenges to regulations like the one at issue here. Primary voting is an episodic and sometimes isolated act of association, but it is a vitally important one and should be entitled to some level of constitutional protection. Accordingly, 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. From this starting point, we can then ask to what extent and in what manner the State may justifiably restrict those interests.”).

115. Clingman, 544 U.S. at 602 (O’Connor, J., concurring) (“But the fact that a State’s regulatory authority may ultimately trump voters’ or parties’ associational interests in a particular context is no reason to dismiss the validity of those interests.”).

116. In essence, voters arguing they had an interest in forming a dual association in a primary would face a burden on their associational interests even more minor than in Nader, where the burden voters faced was they did not wish to form an association at all. See Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), aff’d, 429 U.S. 989 (1976).

117. Green v. Texas, 351 F. Supp. 143, 145 (N.D. Tex. 1972) (“[T]he Texas statutes here under review serve to protect the political rights of Texans to join political parties and to enjoy the free right of association appurtenant thereto with some protection against raids and interference from independents or members of other political parties.”).
The political parties in *Green v. Texas* were not on record as agreeing to a blanket ballot. Because the voters stood alone, they could not compel a blanket primary.

For a burden on the voters' interest in forming dual associations to trigger heightened review, the political party's associational rights must align with those of the voters. Because the burden identified by the court in *Green* was solely on the voters and not on the associational interests of the parties, the state could assert an interest in the protection of the parties' self-identified interests. *Green* was essentially like *Nader* in that the voters had an associational interest that, alone, was insufficient to trigger strict scrutiny. Conversely, when two or more political parties willingly enter associations with voters who willingly associate with these parties, the state cannot interfere unless these associations would affect the rights of other political parties, such as by raising a potential for reverse raiding.

### III. Party and Voter Associational Interests in a Blanket Ballot: Voluntary Blanket Primaries

This Part argues that associational interests of political parties and voters align when two parties volunteer to issue a blanket primary ballot. So long as the ballot is only issued to independents and voters registered to the volunteering parties, the constitution compels the state to allow the voluntary blanket primary. The Alaska Supreme Court in *State v. Green Party of Alaska* relied heavily on *Tashjian* and *California Democratic Party*. The opinion only mentioned *Clingman* once, to note that *Clingman*'s holding shed some doubt on the earlier jurisprudence and that *Clingman* was not controlling because the court found the primary compelled by the Alaska Constitution. This Part argues that this Note's proposed reading of *Clingman* relieves the tension between *Clingman* and *California Democratic Party* that caused the Alaska court to leave unanswered the question of whether voluntary blanket primaries would be compelled by the U.S. Constitution. If *Clingman* is read for the proposition that the state can protect other political parties, the U.S. Constitution compels states to allow political parties to opt-in to participate in a voluntary blanket primary. Yet, states can

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118. *Id.*

119. *See id.* (not mentioning a position taken by the political parties).

120. *Id.* at 146 ("The State of Texas has an overriding interest, on behalf of its citizenry, in protecting the integrity of the political process, and such protection certainly includes the prevention of 'raiding' from one political party to another.").

121. *Compare id.* at 145 ("Even if constitutional violations were present, however, we hold as a matter of law that there exists a compelling state interest for the limitations in question and that such compelling interest overrides these constitutional considerations.") with *Nader*, 417 F. Supp. at 845 (not characterizing the magnitude of the burden of the voters associational rights but stating that "[i]n addition to protecting the associational rights of party members, a state has a more general, but equally legitimate, interest in protecting the overall integrity of the historic electoral process").


123. *Id.* at 1064 n.72.
limit the primary to the voters registered with the participating parties and independents.

Section III.A contends that because the associational interests of voters and political parties align in this regime—in a way that affects no other political party—strict scrutiny applies to a ban on a voluntary blanket primary. A ban on voluntary blanket primary ballots would at least significantly, and possibly severely, burden both the right of voters to associate with more than one political party and the right of political parties to broaden their voter base. Section III.B discusses the possible interests that a state could assert to prevent two parties from issuing a voluntary blanket primary. No state interest emerges that is sufficient to outweigh the associational rights involved, either because the interests are not important or compelling, or because the state can tailor the primary regime in another way that does not burden the associational rights of voters or parties.

A. Preventing Voluntary Blanket Primaries Significantly Burdens the Rights of Parties and Voters

A court must apply a heightened review, if not strict scrutiny, to a law preventing a voluntary blanket primary because such a law would significantly or severely burden political parties' and voters' associational rights. While it is difficult to quantify exactly how much of a burden would compel strict scrutiny, the burdens in this case are quite similar to those at issue in California Democratic Party. California Democratic Party held that compelling political parties to issue a blanket primary against their preferences severely burdens those parties' associational rights.\textsuperscript{124} The reverse, forbidding parties to issue a blanket primary against their preferences, is equally true.\textsuperscript{125} For a state to prevent such an association when the parties opt-in to a voluntary blanket primary is just as burdensome on the parties' associational rights. Just as the state cannot force parties to associate in this way, the state cannot prevent parties from associating in this way when they choose to do so.

There are many reasons a party may want to hold a blanket primary with other parties. Where a party wishes to attract centrist voters who might vote for its candidates even if they are registered with another party, that party may favor a blanket primary. For example, Alaska instituted a blanket ballot in 1947. At that time, Alaska Republicans "supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and non-aligned voters."\textsuperscript{126} Some Democrats also supported the blanket primary and argued in favor of blanket primaries because "[i]n [a


\textsuperscript{125} California Democratic Party relied on the idea that the "corollary of the right to associate is the right not to associate." Id. at 574.

\textsuperscript{126} O'Callaghan v. State, 914 P.2d 1250, 1255 (Alaska 1996) (quoting Memorandum from Gordon S. Harrison, Director, Legislative Research Agency, Research Request 90.294 (May 23, 1990)).
particular district in Alaska, probably nine of every ten voters want to vote for the man, not the party.\textsuperscript{127}

Any regime that denies the ability of voters to affiliate with parties in a voluntary blanket primary burdens their associational interests. When parties attempt to issue a voluntary blanket primary ballot, the associational interests of the voters and the political parties align as they did in \textit{Tashjian}.\textsuperscript{128} A burden on these aligned associational interests should trigger at least intermediate scrutiny if not strict scrutiny. Because the political party has the discretion to opt-in to the blanket primary, no other party is adversely affected by the association.\textsuperscript{129} As Justice Marshall argued in \textit{Tashjian}, nonmembers have a right to associate with a political party.\textsuperscript{130} If a state prevented nonmembers from contributing to or becoming candidates for a political party, it "would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals."\textsuperscript{131}

At the very least, a prohibition on a voluntary blanket primary should trigger intermediate scrutiny, if not strict scrutiny, because it burdens the political parties' right to broaden their associations and the voters' right to associate with more than one party. While the Court has never explicitly accepted the right to associate simultaneously with multiple political parties, five Justices in \textit{Clingman} acknowledged that such a right must exist. As these Justices argued in the concurrence and dissent in \textit{Clingman}, prohibiting a voter from donating to more than one political party at one time would clearly violate the voter's associational rights.\textsuperscript{132} Preventing a voluntary blanket primary, similarly, would burden this interest. Justice O'Connor doubted a burden on this right by itself would ever cause a court to nullify a law. Nevertheless, where both the political party and the voters wish to affiliate with each other, any reviewing court should start from Justice O'Connor's presumption that "there are significant associational interests at stake."\textsuperscript{133} As the next Section argues, whether the heightened level of review is intermediate scrutiny or strict scrutiny, the state does not have important or compelling interests to justify a ban on a voluntary blanket primary.

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 1256. Similarly, when voters in California imposed a partisan blanket primary through Proposition 198 in 1996, the statement of support on the ballot pamphlet contend it would allow voters to vote "for the best candidate for each office, regardless of party affiliation." Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1290 (E.D. Cal. 1997).
\item \textsuperscript{128} \textit{See supra} Section II.A.
\item \textsuperscript{129} Of course, the voluntary blanket primary could only be issued to independent voters and voters registered with opting-in parties to avoid the problem in \textit{Clingman}. If the ballots were issued to voters who were registered to a party that did \textit{not} opt-in, that party would be threatened by the same disorganizing effects or election disorder. \textit{See} Clingman v. Beaver, 544 U.S. 581, 593 (2005); \textit{see also} \textit{Tashjian} v. Republican Party of Conn., 479 U.S. 208, 224 n.13 (1986).
\item \textsuperscript{130} \textit{Tashjian}, 479 U.S. at 215.
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{See supra} notes 112–113 and accompanying text.
\item \textsuperscript{133} \textit{Clingman}, 544 U.S. at 602 (O'Connor, J., concurring); \textit{see Tashjian}, 479 U.S. 208 (1986); Democratic Party of U.S. v. Wisconsin \textit{ex rel.} La Follette, 450 U.S. 107 (1981).
\end{itemize}
B. No Important or Compelling State Interest Prevents a Voluntary Blanket Primary

No state interest is capable of overriding the associational rights implicated when parties wish to issue a voluntary blanket primary. In defending a ban on blanket primaries, the state might assert a generalized interest in (1) preventing party raiding;\(^ \text{134} \) (2) protecting the integrity of elections, which could translate more generally to protecting the political parties;\(^ \text{135} \) or (3) "avoid[ing] primary election outcomes which would tend to confuse or mislead the general voting population."\(^ \text{136} \) None of these potential interests is sufficiently important or compelling when the political parties do not assent to the regulation.

A shared primary ballot does not implicate the state's interest in preventing party raiding or reverse primary raiding. Presumably, none of the parties on the ballot is concerned by raiding, since they all chose to be on the ballot.\(^ \text{137} \) The voluntary blanket primary also does not allow reverse party raiding as long as only the voters registered to the volunteering parties and independents can choose the blanket ballot. Even if the dicta in Clingman allows the state to assert an interest in preventing confusion among the voting population by maintaining party ideologies,\(^ \text{138} \) the interest is not compelling.\(^ \text{139} \)

The state cannot constitutionally prevent a voluntary blanket primary by asserting an interest in protecting the associational rights of the parties because that would amount to substituting the state's judgment for that of the parties.\(^ \text{140} \) The state interest in protecting the integrity of the election often justifies limiting the voter to a single nominating act,\(^ \text{141} \) or preventing a voter from opening a primary without the affected political party's acquiescence.\(^ \text{142} \) While both Clingman and American Party of Texas suggest that the state may choose to limit the voter to one party's primary, neither case involved a situation in which both parties agreed to permit the voters to form

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134. E.g., Clingman, 544 U.S. at 596.

135. See, e.g., id.; see also Issacharoff, supra note 17, at 286 (noting there is a diffuse state interest in protecting the integrity of elections); supra Section II.B (discussing instances where the state has asserted an interest in protecting the associational rights of political parties).


137. See Tashjian, 479 U.S. at 219 & n.9 (finding the interest is not implicated when the political party chooses to allow those voters into its primary).

138. See supra notes 102–103 and accompanying text.

139. Compare Clingman, 544 U.S. at 593–94, with Tashjian, 479 U.S. at 220.

140. See Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981); see also Ripon Soc'y, Inc. v. Nat'l Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution . . . ").


Voluntary Blanket Primaries

dual associations with the other political parties. If the state were to impose this limitation on voters and parties who wanted to participate in a voluntary blanket primary, however, it could only defend its regulation by asserting interests in protecting the parties from themselves or substituting the state's judgment for the judgment of the parties, and neither interest would pass muster.

The Alaskan Democratic Party's choice to join or partially join the blanket ballot amounts to an internal party decision, and neither a state nor a court may prevent the party from making its own decision. In 2004, the Green and Republican Moderate Parties in Alaska won a preliminary injunction, which allowed any political party to choose to join the blanket primary for the 2004 election. Each of the four recognized minor parties in Alaska joined the blanket ballot. The Democratic Party, however, balked. Possibly because of its fears of party raiding, the Democratic Party refused to participate in a primary in which registered Republicans could vote. As a result, Alaska issued three ballots: (1) the Republican ballot, which only registered Republicans and unaffiliated voters could choose; (2) the "Democratic plus" ballot, that any voter who was not a registered Republican could choose and which listed all candidates except the Republican slate; and (3) the blanket ballot, which any voter, including a registered Republican, could choose, and which listed candidates of all the minor political parties. After the final decision in Green Party of Alaska, holding voluntary blanket primaries compelled by the Alaska Constitution, the Democratic Party decided to allow Republicans to vote in its primary. Therefore, in the 2006 August primary, there were two ballots on which a voter could nominate candidates: (1) a Republican ballot that a registered Republican or an unaffiliated voter could choose; and (2) a blanket ballot which anyone could choose, listing each party's slate except for the Republican one.

143. See supra notes 88, 90 and accompanying text.
144. See supra Section II.B; see also supra notes 64–65, 109 and accompanying text.
145. See supra notes 64–65, 109 and accompanying text.
147. Id. These four parties were the Green Party, the Republican Moderate Party, the Libertarian Party, and the Alaska Independent Party. Id.
148. Id.
149. Id.
150. Shortly after the final decision in Green Party of Alaska, the Democratic Party announced that it would place its candidates on the 2006 blanket primary ballot, and also allow registered Republicans to vote in its primary. Therefore, there was no 2006 "Democratic plus" ballot; the democratic ticket will go on the blanket primary ballot which any registered voter may choose. Petty, supra note 146.
blanket primary partially in 2004, and fully in 2006, the Democratic Party exercised its judgment. The Democrats knew the primary had a potential for raiding because of what happened in the 1980 senatorial primary, and yet they seem to have decided this risk was outweighed by the primary’s potential for broadening the appeal of Democratic candidates. The state cannot interfere in this type of decision, even if it verges on the Democrats’ self-destruction.

Even if the state has an important or compelling interest in preserving party labels and avoiding outcomes that would tend to confuse voters, regulating who votes in political primaries is not narrowly tailored to serve that interest. Regulating which candidates can stand for election better addresses the preservation of party labels. For instance, states can require candidates to have a lasting affiliation with the party, such as by requiring an oath of loyalty. Alternatively, states can allow parties to restrict the candidates who appear on their primary ballot to those who fit with their ideology. The state can also mandate that the candidate not vote in another party’s primary or run on another party’s ticket for a period of years. A state can choose to use any of these measures to ensure party candidates support the central tenets of the party to avoid confusion. These regulations are more narrowly tailored to the state interest than a prohibition on voluntary blanket primaries. If states regulate the primary in alternative ways that would preserve party labels, both the voters and the parties would still exercise their associational rights via a voluntary blanket primary.

152. See supra notes 41–43 and accompanying text.


156. Duke v. Massey, 87 F.3d 1226 (11th Cir. 1996) (upholding a state law that permitted the Republican Party to exclude plaintiff from its presidential primary ballot); see also Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 122 (1981) (considering whether political parties have the right to define their association and limit it to those people only). Of course, no such scheme could pass muster if it became a de facto appointment process and allowed the political party leadership to circumvent their moment of accountability. See, e.g., Lopez Torres v. N.Y. State Bd. of Elections, No. 06-0635-cv, 2006 U.S. App. LEXIS 22310, at *100 (2d Cir. Aug. 30, 2006).

157. See Lippit v. Cipollone, 337 F. Supp. 1405 (N.D. Ohio 1971), aff’d, 404 U.S. 1032 (1972); see also McClure v. Galvin, 386 F.3d 36 (1st Cir. 2004) (requiring independent candidates not to have registered with a party or voted in a primary for 90 days prior to the filing date was constitutional); cf. Am. Party of Tex. v. White, 415 U.S. 767 (1974) (accepting that states may impose burdens to determine whether a candidate is “serious”).


159. See Duke, 87 F.3d at 1235 (considering the state has a compelling interest in protecting political parties’ right to define their membership and finding Georgia’s statute, which allows three party leaders to decide which candidates in a presidential primary are aligned with the parties views and to exclude others, narrowly tailored to fit that interest).
Moreover, the state can narrow the scope of the voluntary blanket primary to protect the associational interests of the party that chooses not to join the voluntary blanket primary. For example, under this Note’s reading of Clingman, the state could mandate a “semi-closed” voluntary blanket primary in order to prevent reverse party raiding. In such a primary, the blanket ballot would not be available to voters registered to a party that did not join the voluntary blanket primary. In Alaska, for instance, the state could choose to prevent registered Republicans from voting in the blanket primary. By preventing registered Republicans from voting in the voluntary blanket primary, the state would minimize the risk that the registered Republican would remain registered to the Republican Party but have a different party loyalty. The Republican Party did not opt-in to the voluntary blanket primary and it chose only to allow independents, unaffiliated voters, and registered Republicans to vote in its primary. Any state action that would protect the Republican Party of Alaska from voters registered to other parties, therefore, would be permissible because it would protect that party’s internal decision.

CONCLUSION

The holdings in Clingman and California Democratic Party demonstrate the uneasy tension between state regulation of primaries and party associational rights. Any primary system requires a political party to associate with voters who may or may not have the party’s best interests at heart. Thus, in any primary, there will always be a potential for raiding, but that potential is not implicated where the party agrees to allow the voters to vote in its primary. When a party chooses to allow associations with voters who may or may not be hostile to its interests, it is an internal party decision and the state may not prohibit it unless it is protecting the associational rights of another political party. When more than one political party willingly chooses to associate with a voter who in turn chooses to associate with those willing parties, the state has no business limiting the number of parties with which a voter associates. It can only limit the voter to one nomination per office. This Note has argued that if the state prevents a voluntary blanket primary by asserting the interests of the party which chooses to join such a primary, it would be tantamount to regulating a party’s internal processes in breach of the party’s fundamental rights. For that reason, neither a court nor a state may prevent a party from entering into a voluntary blanket primary.

160. Petty, supra note 146; see also State of Alaska, 2006 Primary Election—Ballot Choices, supra note 151.