RECENT DEVELOPMENTS

IMPOSING NECESSARY BOUNDARIES ON JUDICIAL DISCRETION IN BALLOT ACCESS CASES:
Clingman v. Beaver, 125 S. Ct. 2029 (2005)

In recent years, when the Supreme Court has reviewed a state’s regulation of political parties’ ability to define their membership, it has done so under the framework of the First Amendment right to freedom of association.1 Although the Constitution grants state legislatures broad power to regulate the manner in which elections are conducted,2 the Court has held that regulations imposing severe burdens on associational rights are subject to strict judicial scrutiny.3 Lesser burdens, however, are upheld as long as they advance important state interests in a reasonable, nondiscriminatory manner.4 Some academics have criticized this approach, arguing that when the Court analyzes the validity of electoral regulations through the lens of associational rights, it will grapple inadequately with underlying issues of democratic openness and competition.5

Last Term, in Clingman v. Beaver,6 the Supreme Court, again gazing through the lens of associational freedom, upheld an Oklahoma statute that prevented a political party from allowing voters registered with other parties to vote in its primary, dismissing arguments that the statute burdened the associational freedoms of both the party and the voters.7 In upholding the statute, the Court rightly declined to use the First Amend-

---

3. See Timmons, 520 U.S. at 358.
4. See id.
7. Id. at 2034.
ment to impose upon Oklahoma its own ideas of democracy, and thus avoided the precarious conclusion that voters may be constitutionally entitled to simultaneously associate with multiple political parties. *Clingman* therefore supports the notion of a limited role for the First Amendment in judicial enforcement of political competition.

Under section 1-104 of Oklahoma’s election laws, a political party can open its primary only to its registered members$^8$ and, if it chooses, registered independents.$^9$ In May 2000, the Libertarian Party of Oklahoma (LPO) made public its intent to open its primary to all registered voters in Oklahoma, including registered members of other parties.$^{10}$ Oklahoma’s secretary of state denied the LPO’s request for members of other parties,$^{11}$ and the LPO, along with several Republican and Democratic voters, filed suit in the United States District Court for the Western District of Oklahoma.$^{12}$ The plaintiffs sought declaratory and injunctive relief, alleging that section 1-104 unconstitutionally burdened their First Amendment freedoms of political association and speech.$^{13}$ They argued that Oklahoma’s “semi-closed” primary system should be replaced by a “party-option open primary” system in which each political party could elect to open its primary to voters registered with other parties.$^{14}$

The district court declined to offer relief, finding that section 1-104 did not severely burden the plaintiffs’ associational rights, and that any burden it did impose was justified by Oklahoma’s important regulatory interest in “matters of structure, stability and party integrity.”$^{15}$ The court noted that a party-option open primary system would directly impose on the state’s other parties by placing them “in the position of con-

---

8. OKLA. STAT. ANN., tit. 26, § 1-104(A) (West 1997) (“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 member, except as otherwise provided by this section.”).

9. Id. § 1-104(B)(1) (“A recognized political party may permit registered voters designated as Independents . . . . to vote in a Primary Election or Runoff Primary Election of the party.”).


11. See id.

12. Id. at *1–2.

13. Id. at *2.

14. Id.

tributing voters to the [LPO] while maintaining a home for them on their registration rolls;16 such “poaching” by the LPO would diminish the meaning of all political party designations within the state17 and likely would affect the results of a number of primary elections.18 The court notably rejected as paternalistic and unfounded justifications based on preventing harms such as “electoral raiding,”19 “swamping,”20 voter confusion, administrative convenience, and poor electoral strategies by the parties.21

A unanimous panel of the Court of Appeals for the Tenth Circuit reversed.22 The court advanced the principle that “a state generally may not restrict the ability of a political party to define the group of citizens that will choose its standard-bearer”23 accordingly, it found that section 1-104 imposed a severe burden on the plaintiffs’ associational rights and demanded strict scrutiny.24 Employing that standard, the court rejected the state interests that the district court had found determinative. It was unconvinced by the argument that section 1-104 was necessary to promote stability in the political process, noting that both Utah and Alaska use party-option open primaries without suffering political instability.25 Neither was the court persuaded that Oklahoma had a compelling interest

---

16. Id. at *17.
17. Id.
18. Id. at *12. The court found that because many recent Oklahoma primary elections were decided by narrow margins (twenty-four percent of the primary elections in 2000 were decided by margins of five percent or less), the crossing over of voters from one party to another would probably affect the outcomes of some close races. Id.
19. “Electoral raiding” occurs when voters associated with one party temporarily align themselves with another party to influence the results of the other party’s primary, possibly to nominate the candidate that the voters believe will be less likely to triumph in the general election. See id. at *18; Clingman, 125 S. Ct. at 2034.
20. “Swamping” is the process by which a party’s philosophical or political identity (or perhaps both) is diminished or lost as a result of primary election participation by non-party members in numbers high enough to drown out the voices of voting party members. See Clingman, 2005 WL 745562, at *18.
21. Id. at *18–19.
22. Beaver v. Clingman, 363 F.3d 1048, 1051 (10th Cir. 2004).
23. Id. at 1057.
24. Id. at 1057–58.
25. Id. at 1060. The court did not explain what might constitute political instability. See id.
in preventing electoral “poaching.”\textsuperscript{26} Indeed, the court argued that by finding that a party had a right to not have its members poached, the district court had invented a new right: “the ability of a group to harness and control the associational opportunities of its members.”\textsuperscript{27}

The Supreme Court reversed.\textsuperscript{28} Writing for the Court, Justice Thomas\textsuperscript{29} concluded that any burden imposed by section 1-104 was minor and justified by legitimate state interests.\textsuperscript{30} First, in a section joined only by a plurality, Justice Thomas expressed a skepticism regarding the existence of a right to associate with one party by voting in its primary, while associating with another party as a registered member.\textsuperscript{31} Moreover, he maintained that even if section 1-104 did burden an associational right, the burden imposed was less severe than the burden imposed by the law upheld in \textit{Timmons v. Twin Cities Area New Party}.\textsuperscript{32} Next, writing for the Court, Justice Thomas distinguished the case at hand from \textit{Tashjian v. Republican Party of Connecticut},\textsuperscript{33} where the Court held that a law requiring voters to register with a party before voting in the party’s primary imposed a severe burden on the rights of both the Republican Party and the Independent voters who wished to associate with it.\textsuperscript{34}

\begin{itemize}
  \item \textsuperscript{26} Id. at 1061.
  \item \textsuperscript{27} Clingman, 363 F.3d at 1061.
  \item \textsuperscript{28} Clingman, 125 S. Ct. at 2034.
  \item \textsuperscript{29} Chief Justice Rehnquist and Justices Scalia and Kennedy joined the opinion in full. Justices O’Connor and Breyer joined except as to the characterization of the burden imposed by section 1-104. See infra text accompanying notes 30–31.
  \item \textsuperscript{30} Clingman, 125 S. Ct. at 2035.
  \item \textsuperscript{31} Id. at 2036 (“[A] voter who is unwilling to disaffiliate from another party to vote in the LPO’s primary forms little ‘association’ with the LPO—nor the LPO with him. That same voter might wish to participate in numerous party primaries, or cast ballots for several candidates, in any given race. The issue is not ‘dual associations,’ but seemingly boundless ones.” (citations omitted)).
  \item \textsuperscript{32} 520 U.S. 351, 359 (1997). In \textit{Timmons}, the Court held that a party’s associational rights are not violated when it is prohibited from selecting as a candidate an individual who is also the candidate of another party. Id. at 353–54. Justice Thomas reasoned that if Minnesota could constitutionally prevent a party from associating with the candidate of its choice because that candidate refused to disaffiliate from another political party, then a party could also be prevented from associating with a voter who refused to do the same. Clingman, 125 S. Ct. at 2036–37.
  \item \textsuperscript{33} 479 U.S. 208 (1986).
  \item \textsuperscript{34} Id. at 216–17. The \textit{Tashjian} Court went on to determine that the interests advanced by the state—administrative convenience, prevention of raiding, avoidance of voter confusion, and protecting the integrity and stability of the two-party system—were not compelling, and, in the case of raiding, inapplicable to the independent voters at issue. Id. at 217–25.
\end{itemize}
Justice Thomas argued that the Oklahoma statute imposed a less severe burden than the Connecticut statute, noting that, whereas the law in *Tashjian* burdened Independent voters by requiring them to affiliate publicly with a party to vote in any primary election, section 1-104 allowed parties to open their primaries to Independent voters. Thus, the voters at issue did not face the burden of having to affiliate publicly with a party, since they had already done so. Justice Thomas therefore concluded that strict scrutiny did not apply.

Justice Thomas next determined that section 1-104 advanced three important state interests. First, it “preserv[ed] [political] parties as viable and identifiable interest groups.” Second, it aided parties in their electioneering and party-building efforts by preserving the integrity of party membership lists as indicators of who will vote in their primaries. Third, it helped prevent parties from raiding voters of other parties. As a final matter, Justice Thomas declined to respond to the argument that section 1-104, when taken together with several other of the state’s election laws, severely burdened the respondents’ associational rights by effectively preventing voters from changing their party affiliations before a primary election.

36. Id.
37. Id. at 2039. Justice Thomas argued that “[t]o 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.” Id.
38. Id.
39. Id. at 2039 (citing Nader v. Shaffer, 417 F. Supp. 837, 845 (D. Conn. 1976)). Justice Thomas argued that this interest was important partly because it helped prevent primary election outcomes that would confuse voters about the ideology of the candidate nominated, and partly because it would make every registered party affiliation in the state significantly less meaningful as an actual index of the registered voter’s ideology. See id. at 2039–40.
40. *Clingman*, 125 S. Ct. at 2040.
41. Id. at 2040–41.
42. See id. at 2042. If a party’s candidate does not receive at least ten percent of the votes cast for President or governor in the general election, it loses recognized party status. *See Okla. Stat. Ann.* tit. 26, § 1-109(A) (West 1997). When a party loses recognized status, those individuals registered with that party become listed as Independents. *See id.* § 110. Because no third party in recent history has been able to meet the ten percent threshold, voters who sympathize with third parties but do not wish to be hassled by repeatedly having to switch their affiliations back from Independent status may simply affiliate with one of the two major parties out of convenience, despite their third-party sympathies. *See Clingman*, 125
spondents raised the argument for the first time before the Supreme Court, and Justice Thomas found no reason to depart from the Court’s ordinary practice of not considering arguments so raised.\(^{43}\)

Justice O’Connor issued a concurring opinion.\(^{44}\) She argued that although the burden imposed by section 1-104 was not sufficiently severe to trigger strict scrutiny,\(^{45}\) it was not as trivial as Justice Thomas suggested.\(^{46}\) She argued that a voter may form a cognizable association with a political party merely by voting in its primary\(^{47}\) and that a voter may form “dual associations” with two different political parties.\(^{48}\) A voter may wish to associate with one party by voting in its primary, yet retain his or her affiliation with another party, because of an abiding partisan commitment or the objective costs of switching parties.\(^{49}\) Justice O’Connor would therefore have set forth a rule 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.”\(^{50}\) Finally, writing only for herself, Justice O’Connor noted that although the Court was correct not to consider whether section 1-104 imposed a severe burden when taken together with Oklahoma’s other election laws, she was seriously troubled by the entirety of Oklahoma’s primary system and might have ruled otherwise had the argument been properly raised.\(^{51}\)

---

S. Ct. at 2046 (O’Connor, J., concurring). Respondents also argued that Oklahoma’s registration deadlines leave an extremely narrow window between the time that a party regains recognized status and the time that voters must affiliate with a party, thus making affiliation with a third party particularly difficult. See id.

43. See Clingman, 125 S. Ct. at 2041–42.

44. Id. at 2044 (O’Connor, J., concurring). Justice Breyer joined the opinion except as to the discussion of the interaction of section 1-104 with Oklahoma’s other election laws. See infra text accompanying note 51.

45. Id. at 2044–45.

46. Id. at 2042.

47. Id. at 2043.

48. Id. at 2043–44. Justice O’Connor further explained that

The validity of voters’ and parties’ interests in dual associations seems particularly clear where minor parties are concerned. For example, a voter may have a longstanding affiliation with a major party that she wishes to maintain, but she may nevertheless have a substantial interest in associating with a minor party during particular election cycles or in elections for particular offices.

Id. at 2043.

49. Clingman, 125 S. Ct. at 2043–44.

50. Id. at 2044.

51. Id. at 2046–47. Justice Breyer did not join this portion of the opinion.
Justice Stevens dissented.\textsuperscript{52} He argued that section 1-104 severely burdened the voters’ First Amendment right to vote for the candidate of their choice.\textsuperscript{53} Indeed, he argued that the burden was so great that, in effect, it amounted to a prohibition, because, for many voters, changing parties can be a “significant decision”\textsuperscript{54} and “the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election.”\textsuperscript{55} Additionally, he asserted that section 1-104 placed a severe burden on the LPO’s ability to select its standard-bearer and shape its message to the public.\textsuperscript{56}

Justice Stevens went on to dismiss each of the asserted state interests as “either irrelevant or insignificant.”\textsuperscript{57} First, he argued that the preservation of the parties as identifiable interest groups was an illegitimate interest because it is improper for the state to tell a political party what its message should be.\textsuperscript{58} Second, he found the asserted interest in avoiding voter confusion to be both paternalistic and contrary to the district court’s findings.\textsuperscript{59} Third, he argued that the state had no valid interest in ensuring that party labels remain rigid identifiers of voter preferences because a state has no valid interest in defining what it means to be a member of a particular party.\textsuperscript{60} Fourth, he maintained that the state’s asserted interest in avoiding the “administrative inconvenience” of inaccurate voter roles was outweighed by the associational interests burdened by the statute.\textsuperscript{61} Last, he argued that any interest in avoiding electoral

\textsuperscript{52} Id. at 2048 (Stevens, J., concurring). Justice Ginsburg joined the dissent in full. Justice Souter joined except as to the discussion of the effect that the Court’s opinion would have on the two-party system. See infra text accompanying notes 63–65.

\textsuperscript{53} See Clingman, 125 S. Ct. at 2048 (Stevens, J., dissenting).

\textsuperscript{54} Id. at 2049 n.1.

\textsuperscript{55} Id.

\textsuperscript{56} Id. at 2049–50.

\textsuperscript{57} Id. at 2051. Justice Stevens determined that “[n]o matter what the standard, [the asserted interests] simply do not outweigh the interests of the LPO and its voters,” id. at 2054, thus suggesting that he did not believe that Oklahoma’s law was supported by even a rational basis. In effect, Justice Stevens may have been arguing that the State’s asserted interests do not “bear some plausible relationship to the burdens [which they] place[] on political parties.” See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 375 (1997) (Stevens, J., dissenting).

\textsuperscript{58} Clingman, 125 S. Ct. at 2051.

\textsuperscript{59} Id. at 2052.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 2052–53.
raiding was based on speculation and, in the case of harms that a party might inflict on itself, outside of the state’s power to regulate. Justice Stevens concluded that the Court had given undue deference to the state’s supposed interest in preserving the two-party system. Noting the recent proliferation of “safe” congressional districts, he argued that primaries are replacing general elections as the most common method of determining the composition of legislatures, and that because the Court upheld a statute that limited political competition at the primary stage, all participants in the political market were harmed.

Clingman’s addition to the caselaw of ballot access lays bare two fundamental points. First, the inherent subjectivity of the First Amendment “severity of the burden” test allows for the Justices’ competing views about the role of the courts in promoting an open and competitive democracy to drive what is purportedly an analysis of associational freedoms. Second, whereas individual voters may develop complex associational preferences within the political marketplace, those preferences simply are not mirrored by the current judicial understanding of First Amendment protections.

Employing a “severity” test is an inherently subjective enterprise: Different members of the Court described the same burden on associational rights as either a “minor barrier[,]” a “modest and politically neutral burden [that was] not altogether trivial,” or a “heavy burden” that might be best classified as a “prohibition” on protected activity. Adding to the confusion, the position taken by each Justice appears inconsistent with the position each took five years ago in California Democratic Party v. Jones. In Jones, the Court, in an opinion authored by Justice Scalia and joined by every member of the Clingman majority (plus Justice Souter), struck down California’s blanket primary law, which had allowed a voter to participate in the primary of whatever party she chose, regardless

62. Clingman, 125 S. Ct. at 2053.
63. Id. at 2054. Justice Souter did not join this portion of the opinion.
64. Id.
65. See id.
66. Id. at 2039 (majority opinion).
67. Clingman, 125 S. Ct. at 2045 (O’Connor, J., concurring).
68. Id. at 2049 (Stevens, J., dissenting).
69. See id.
70. 530 U.S. 567 (2000).
of whether the party wanted to open its primary to nonmembers.\textsuperscript{71} The Court found that the law placed a severe burden on a party’s right not to associate with the members of other parties in its primary,\textsuperscript{72} and that the law was not narrowly tailored to advance a compelling state interest.\textsuperscript{73} In dissent, Justice Stevens\textsuperscript{74} argued that a political party has no First Amendment right to exclude nonmembers from its primary, particularly given the strong public function that the primary serves.\textsuperscript{75} Why then, in \textit{Clingman}, did all the Justices save Souter take stances on the associational autonomy of parties that seem to counter those they took in \textit{Jones}?

Justices Stevens and Ginsburg seem to maintain that, all else equal, the Court should favor results that expand opportunities for voters to participate in the selection of candidates and elected officials.\textsuperscript{76} In \textit{Jones}, Justice Stevens wrote, “States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials.”\textsuperscript{77} In contrast, Justice Stevens read the statute in \textit{Clingman} as effectively prohibiting voters from casting ballots for the candidates of their choice in the primary,\textsuperscript{78} thereby curtailing their ability to participate in the selection process. Under this view, the associational rights that matter most are those that promote inclusion, opportunity, and choice;\textsuperscript{79} the right to

\begin{itemize}
  \item \textsuperscript{71} \textit{Id.} at 569.
  \item \textsuperscript{72} \textit{Id.} at 581–82.
  \item \textsuperscript{73} \textit{Id.} at 585.
  \item \textsuperscript{74} \textit{Jones}, 530 U.S. at 590 (Stevens, J., dissenting). Justice Ginsburg joined the portion of the opinion discussing the First Amendment.
  \item \textsuperscript{75} \textit{Id.} at 594–95 (“[P]rimary elections, unlike most ‘party affairs,’ are state action. The protections that the First Amendment affords to the ‘internal processes’ of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.”).
  \item \textsuperscript{76} \textit{See}, \textit{e.g.}, \textit{id.} at 595–96 (“When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.”).
  \item \textsuperscript{77} \textit{Id.} at 601.
  \item \textsuperscript{78} \textit{Clingman}, 125 S. Ct. at 2049.
  \item \textsuperscript{79} \textit{See} \textit{Jones}, 530 U.S. at 601 (Stevens, J., dissenting) (“I would also give some weight to the First Amendment associational interests of nonmembers of a party seeking to participate in the primary process, to the fundamental right of such nonmembers to cast a meaningful vote for the candidate of their choice, and to the preference of almost 60% of California voters—including a majority of registered
exclude, although part of the freedom of association that most expressive organizations enjoy,\textsuperscript{80} limits the ability of voters to select their candidates and officials.\textsuperscript{81} As Justices Stevens and Ginsburg made clear in Clingman, they believe that the associational interests in any given case are of secondary concern relative to the Court’s main function in expanding the franchise and increasing electoral competition.\textsuperscript{82}

One therefore might be tempted to infer that for the Justices composing the Thomas plurality in Clingman, the consistent theme in their rulings is a raw antipathy toward minor parties. In Jones, they rejected the notion that party affairs are wholly public affairs, free of First Amendment protections,\textsuperscript{83} and they championed the freedom of the parties to select their standard-bearers without being forced to associate with particular individuals.\textsuperscript{84} Then, in Clingman, when robust associational freedom would have benefited a minor party, the Justices found the burden on association to be less than severe.\textsuperscript{85} Indeed, when


\textsuperscript{81} See Jones, 530 U.S. at 595 (Stevens, J., dissenting) (“The so-called ‘right not to associate’ that the Court relies upon, then, is simply inapplicable to participation in a state election. A political party, like any other association, may refuse to allow nonmembers to participate in the party’s decisions when it is conducting its own affairs . . . . But an election, unlike a convention or caucus, is a public affair.” (footnote and citation omitted)).

\textsuperscript{82} See Clingman, 125 S. Ct. at 2048 (Stevens, J., dissenting) (“While the voters in this case certainly have an interest in associating with the LPO, they are primarily interested in voting for a particular candidate, who happens to be in the LPO. Indeed, I think we have lost sight of the principal purpose of a primary: to nominate a candidate for office.” (citation omitted)); see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 381–82 (1997) (Stevens, J., dissenting) (“Indeed, it is a central theme of our jurisprudence that the entire electorate . . . will benefit from robust competition in ideas and governmental policies . . . .”); Pildes, supra note 5, at 123–24.

\textsuperscript{83} Jones, 530 U.S. at 573.

\textsuperscript{84} That freedom would still be cabined by other provisions of the Constitution, such as the Equal Protection Clause. See id. at 573 n.5.

\textsuperscript{85} See Clingman, 125 S. Ct. at 2053 n.11 (Stevens, J., dissenting) (“In Jones, the Court concluded that the associational interests of the parties trumped state interests that were much more compelling than those asserted in this case. Here, by contrast, where the associational interests are being asserted by a minor party rather than by one of the dominant parties, the Court has reversed course and
one considers that the Justices in the Thomas plurality also voted in *Timmons* to uphold a statute that impinged on parties’ associational interests and potentially reduced the ability of minor parties to thrive, the thesis of raw antipathy appears sound. Along this line of thought, Professor Richard Pildes has posited that the majority opinions in *Timmons* and *Jones* reflect a strong preference for electoral stability, which is threatened by the ascendance of third parties.

Although the Justices in the Thomas plurality certainly feared the creation of ripples in the electoral system, 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. A deep sense of balancing is conveyed where, in both *Clingman* and *Timmons*, the Court went out of its way to note the various activities that each state law did not prohibit. In both cases, the Court seems to have said that whatever burdens were imposed, those burdens were not severe because voters remained free to choose the party with which they would affiliate, and each party retained the same legal right to attempt to win over voters (in the traditional, exclusive sense).

---

86. See *Timmons*, 520 U.S. at 363.
87. See id. at 361–62.
88. See Pildes, supra note 5, at 126–30.
89. For instance, the *Clingman* Court argued that Oklahoma had a valid interest in protecting the parties’ electioneering and party-building efforts. See 125 S. Ct. at 2040.
90. See id. at 2035–36 (“Oklahoma has not sought through its electoral system to discover the names of the LPO’s members; to interfere with the LPO by restricting activities central to its purpose; to disqualify the LPO from public benefits or privileges; or to compel the LPO’s association with unwanted members or voters. The LPO is free to canvass the electorate, enroll or exclude potential members, nominate the candidate of its choice, and engage in the same electoral activities as every other political party in Oklahoma. . . . Nothing in § 1-104 prevents members of other parties from switching their registration to the LPO or to Independent status.” (footnote and citations omitted)); *Timmons*, 520 U.S. at 363 (“Minnesota’s laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party’s access to the ballot. They are silent on parties’ internal structure, governance, and policymaking.”).
91. Under such a reading, the Court’s holding in *Tashjian* may be reconciled as a necessary step to expand the franchise: If parties had not been required to associate with Independents, then voters who chose not to affiliate with a party
Further, the plurality’s decision to limit associational freedom need not be seen as inconsistent with Jones, as it reflects the discrepancy between the associational preferences that voters may form and the associational protections that are feasible. In her concurrence, Justice O’Connor emphasized the concept of “dual associations,”92 whereby a voter might have a recognized associational interest with more than one political party. That voters might desire to associate with multiple parties is hardly disputed; in American congressional elections, significant numbers of voters choose to associate with one party by voting for its candidate while formally affiliating with a different party.93 In declining to grant First Amendment protections to dual associations as described by Justice O’Connor, the Thomas plurality did not reject the idea that complex attachments may develop within a voter’s mind or that an individual American might have the capacity to “contain multitudes”,94 rather, the plurality understood that, although parties certainly have associational rights as recognized in Jones, a jurisprudence that recognizes a right to dual associations will invite challenges to a wide swath of election laws.95 The plurality’s concern is hardly alarmist, given that Justice Stevens embraced this expanded role for the Court, arguing in his Clingman dissent that voters’ associational interests should overcome a party’s interest in defining its membership whenever the electoral district is “safe” enough for one party that the primary becomes

---

92. Clingman, 125 S. Ct. at 2043–44 (O’Connor, J., concurring).
94. Walt Whitman, Song of Myself, in Leaves of Grass 22, 72 (Bantam Books 1983) (1892) (“Do I contradict myself? / Very well then I contradict myself, / (I am large, I contain multitudes.)”)
95. The plurality feared that, rather than simply recognizing voters’ interest in associating with two parties, it would be opening the door to “seemingly boundless” associations. See Clingman, 125 S. Ct. at 2035. That the LPO wanted to be a party of second association for those voters is beside the point. Because a regulation that imposes a severe burden on a voter’s associational freedom compels strict scrutiny, see id. at 2035, an expansion of recognized associational interests would mean that strict scrutiny would be employed in more cases.
the only true contest. In rejecting the concept of protected dual associations, the plurality limited the possibility of the Court taking a more proactive stance in rewriting primary laws across the nation.

Ultimately, a wide variety of electoral regulations, down to single member districts and first-past-the-post voting, work to limit competition and voter choice. If courts are to respect legislatures’ constitutional role in determining the manner in which elections will be conducted, then the Court must be able to limit the path to strict scrutiny of such regulations. If the extent to which a statute restricts competition and choice is to be the test for whether the legislature has overreached, what is to separate permissible from impermissible restrictions? Alternatively, if the Court seeks to strike down statutes on the basis of an impermissible intent to entrench incumbents, it will find the analysis to be extraordinarily messy. Given that

---

96. See id. at 2049 n.2 (Stevens, J., dissenting). In effect, Justice Stevens has argued for taking the competition that gerrymandering has sapped from the general election and transplanting it into the primary of whichever party is dominant in a particular district.

97. As further evidence that the plurality sought to limit any associational right that might be used in a later case to expand the role of the Court, the plurality did not reach the issue of whether political parties have an associational right to not have their members poached. Compare Beaver v. Clingman, No. CIV-00-1071-F, 2003 WL 745562, at *17 (W.D. Okla. Jan. 24, 2003) with Beaver v. Clingman, 363 F.3d 1048, 1061 (10th Cir. 2004).


100. Justice Stevens has suggested that regulations might be differentiated based on the extent to which they burden associational rights and the extent to which overturning the statute would affect political stability. Timmons, 520 U.S. at 379–80. In form, this test may not be terribly different from the balancing done by the Justices composing the Thomas plurality; after all, these same Justices struck down a statute that burdened association in Jones and championed stability in Timmons. See supra note 87 and accompanying text. In substance, however, the test advanced by Justice Stevens appears to have few teeth, given his implicit willingness to accept dual associations in Clingman. Moreover, on what basis should a judge decide that certain electoral structures tend too much toward political instability?


102. Professor Klarman suggests that a legislature’s illicit intent to stifle competition through a self-entrenching ballot access restriction might be determined by examining the timing of the legislative enactment and the relative stringency of the restriction. See Klarman, supra note 101, at 535–36. The ability of courts to
the regulation of elections inherently involves the balancing of competing democratic values, the danger of judicial overreaching by an overly zealous court is particularly acute. If the preexisting and highly subjective severity test had been combined with constitutional protection for multiple associations, courts would have found themselves in the possession of great freedom to second-guess legislatures but with little to no guidance for how to do it. Such an untenable result suggests that when a jurisprudence of democracy masquerades under the trappings of the First Amendment, appropriate concerns over judicial manageability will rightly cabin the result.

Lowell J. Schiller

objectively analyze the relative “stringency” or “severity” of a restriction should be questioned in light of the Court’s widely divergent assessments of severity in Clingman. See supra text accompanying notes 66–69. Additionally, when, as in Clingman, a regulation has been in place for over thirty years and has previously been amended to expand opportunities for voters to participate, see S.B. 149, 41st Leg., 1st Reg. Sess. (Okla. 1987), it becomes nearly impossible to determine whether the regulation’s continued existence is the product of illicit motives of legislative self-entrenchment.


104. Cf. Vieth v. Jubelirer, 541 U.S. 267, 278 (“One of the most obvious limitations imposed by [Article III, § 1 of the U.S. Constitution] is that judicial action must be governed by standard, by rule . . . . [L]aw pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”).