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## The Constitutional Implications of Government Funding for Florida's Primary Voting Process: Is It Constitutionally Permissible to Publicly Fund the Two Major Parties' Primaries to the Exclusion of All Other Political Parties?

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# THE CONSTITUTIONAL IMPLICATIONS OF GOVERNMENT FUNDING FOR FLORIDA'S PRIMARY VOTING PROCESS: IS IT CONSTITUTIONALLY PERMISSIBLE TO PUBLICLY FUND THE TWO MAJOR PARTIES' PRIMARIES TO THE EXCLUSION OF ALL OTHER POLITICAL PARTIES?

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## I. INTRODUCTION

In *Nelson v. Dean*,<sup>1</sup> a recent opinion by the Chief Judge of the Northern District of Florida, Robert L. Hinkle discusses numerous aspects of the con-

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stitutionality of the Florida primary voting process.<sup>2</sup> Among the issues discussed, although not thoroughly explored, is the funding of Florida's primary voting process.<sup>3</sup> Specifically, Chief Judge Hinkle presents this question where he writes at the end of his opinion:

To be sure, plaintiffs hinted at oral argument that if their constitutional and Voting Rights Act challenges to the DNC's exclusion of Florida delegates was rejected—as has now occurred—plaintiffs might assert that the change of the primary date itself was unconstitutional or violated the Voting Rights Act. Plaintiffs carefully did not, however, actually assert that claim. The claim will not be addressed unless and until actually presented. Leave to amend will be granted. The granting of leave ought not, however, be read as a suggestion that claims of this type would, or would not, have merit.<sup>4</sup>

Thus, is it unconstitutional for Florida to fund the primary voting system, yet simultaneously employ a closed primary system that precludes all except registered Democrats from voting in Democratic primaries, and precludes all except registered Republicans from voting in Republican primaries, without implicating the constitutional right to the freedom of association and the competing Equal Protection Clause of the Fourteenth Amendment.<sup>5</sup>

Furthermore, is it unconstitutional for the state to fund the participation of the Democratic and Republican parties in the primary voting system, yet refuse to fund the participation of a minor party in the primary voting system? At the very least, the rights to the freedoms of assembly, association, and equal protection are implicated.<sup>6</sup> Interestingly, Florida appears to have established one of the most exclusive primaries, in that it is a closed primary which specifically precludes minor political parties from participating in the primaries, thereby denying minor political parties funding which is available for the Republican and Democratic state funded primaries.<sup>7</sup> These very relevant and timely issues are explored below.

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of Florida School of Law, Class of 2009 for their invaluable research efforts that greatly contributed to this article.

1. 528 F. Supp. 2d 1271 (N.D. Fla. 2007).
2. See generally *id.*
3. *Id.* at 1274–75.
4. *Id.* at 1283.
5. *Id.* at 1279–80.
6. *Nelson*, 528 F. Supp. 2d at 1279.
7. *Id.* at 1279–80.

## II. BACKGROUND OF PRESIDENTIAL PRIMARIES AND THEIR FUNDING IN THE UNITED STATES

The Democratic and the Republican parties select their presidential nominees at the “national party convention[s] held [in] the summer of each presidential election year.”<sup>8</sup> In each state, presidential nominees receive delegates to the national conventions through caucuses, state conventions, or primary elections.<sup>9</sup> Caucuses and conventions are party funded meetings where attendees choose nominees for the national convention.<sup>10</sup> In a primary, the registered voters choose the nominee by voting through a secret ballot.<sup>11</sup>

States employing the primary election system do so through state statutes providing for one of four different types of primaries: closed, open, blanket, or semi-closed.<sup>12</sup> In a closed primary, which Florida has adopted, “only persons who are members of the political party . . . can vote on its nominee” who must be from their party.<sup>13</sup> Independents or members of another political party cannot vote in the closed primary.<sup>14</sup> Each party sets a specific deadline before the election by which one must register with that party or change their party affiliation in order to vote in the primary.<sup>15</sup> In a semi-closed primary, “a political party may invite only its own registered members and voters registered as Independents to vote in its primary.”<sup>16</sup> In open primaries, anyone, “regardless of party affiliation, may vote for a party’s nominee, . . . limited to that party’s nominees *for all offices* . . . [thus one] may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general.”<sup>17</sup> In a blanket primary, voters are not limited to voting only for candidates of one party, but instead they can vote for any candidate even if that candidate is affiliated with a different party.<sup>18</sup>

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8. Leonard P. Stark, *You Gotta Be on It to Be in It: State Ballot Access Laws and Presidential Primaries*, 5 GEO. MASON L. REV. 137, 138 (1997).

9. *Id.*

10. *See Nelson*, 528 F. Supp. 2d at 1272.

11. *See Wagner v. Gray*, 74 So. 2d 89, 91 (Fla. 1954) (stating that a primary election is a “selective mechanism by which the members of a political party express their preference in . . . selection of . . . party’s candidates for public office . . . [and] are not in reality elections, but are simply nominating devices”).

12. David A. Chase, Note, *Clingman v. Beaver: Shifting Power from the Parties to the States*, 40 U.C. DAVIS L. REV. 1935, 1939–40 (2007).

13. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000) (emphasis in original).

14. *See Clingman v. Beaver*, 544 U.S. 581, 587 (2005).

15. *See id.* at 606.

16. *Id.* at 581.

17. *Jones*, 530 U.S. at 576 n.6.

18. *Id.* at 570.

For decades, the primary system has been the most used delegate selection system in the United States.<sup>19</sup>

The primary election was developed as a way to choose presidential nominees within the context of political parties.<sup>20</sup> Although the United States Constitution does not mention political parties, they emerged due to a clash of notions between Alexander Hamilton's idea of a strong federal government and limited government advocated by Thomas Jefferson.<sup>21</sup> As political debate over the form of government continued, "[b]y the 1796 elections, Federalists and Republicans" began organizing separate campaigns with party leaders having power over the nominations.<sup>22</sup> The Republican Party soon split into two smaller factions, the Democratic-Republican Party and the National-Republican Party.<sup>23</sup> Each party organized caucuses—informal meetings—to choose party candidates for the national convention.<sup>24</sup> Because of the concerns that small caucuses do not represent the will of the population, party members began choosing delegates for the formal nomination meetings in a convention.<sup>25</sup> Conventions, however, were criticized for a lack of transparency, since party leaders influenced the nominations.<sup>26</sup> Therefore, in late nineteenth/early twentieth century, a primary developed as a delegate selection process, which, through secret vote, eliminated the problems raised by the informal selection process of caucuses and conventions.<sup>27</sup> Once the states began conducting primary nomination elections, the states became involved

19. Joanna Klonsky, *The Caucus System in the U.S. Presidential Nominating Process*, COUNCIL ON FOREIGN REL., Mar. 3, 2008, [http://www.cfr.org/publication/15640/caucus\\_system\\_in\\_the\\_us\\_presidential\\_nominating\\_process.html](http://www.cfr.org/publication/15640/caucus_system_in_the_us_presidential_nominating_process.html).

20. Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 629 (2d Cir. 1989).

21. See Geoffrey R. Stone, *Roy R. Ray Lecture: Freedom of the Press in Time of War*, 59 SMU L. REV. 1663, 1663–64 (2006); see also JOSEPH J. ELLIS, *FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION* 140, 198–99 (2000); Thomas B. McAfee, *Natural Substance Above All: The Utopian Vision of Modern Natural Law Constitutionalist*, 4 S. CAL. INTERDISC. L.J. 501, 525 (1995).

22. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320 (2006).

23. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework—A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1050 (2006).

24. John R. Labbé, Comment, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721, 722 (2002).

25. Deidra A. Foster, Comment, *Partisanship Redefined: Why Blanket Primaries Are Constitutional*, 29 SEATTLE U. L. REV. 449, 451 (2006).

26. Leonard P. Stark, Note, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE L. & POL'Y REV. 331, 332–33 (1996) [hereinafter Stark, *The Presidential Primary*].

27. *Id.*

in supervising the conduct of those elections, including the regulation of who could vote in party primaries.<sup>28</sup> However, the original justification for that regulation was to ensure that the nominees of the parties were elected in a fair and impartial manner by the members of the party.<sup>29</sup> The primary soon became not only a delegate selection process of a particular party, but it was enacted as a law in many states.<sup>30</sup> In 1903, Wisconsin was the first state to pass a law requiring the presidential nominees for the national convention to be elected in the primary.<sup>31</sup> Since then, states have passed laws which specify the criteria for state elections.<sup>32</sup>

Although political parties run presidential primaries, states fund and pass various laws regarding the primaries.<sup>33</sup> In the 1970s, campaign reform proposals were elevated by the national attention paid to campaign fundraising abuses brought in light by the Watergate investigations.<sup>34</sup> In 1974, at the height of the Watergate crisis, the federal government instituted a system of matching public funds for presidential primaries and full public financing of presidential general elections by amending the Federal Election Campaign Act.<sup>35</sup> In 1976, public money was used to fund a United States presidential election for the first time.<sup>36</sup>

“[T]he first public financing within the jurisdiction of the United States” took place in Puerto Rico in 1957.<sup>37</sup> Costa Rica and Argentina, in 1954 and 1955, respectively, “were the first modern countries to formally provide public fund[ing] for political parties.”<sup>38</sup> Iowa, Maine, Rhode Island, and Utah became the first states in America to enact public financing.<sup>39</sup> Maryland, Minnesota, and New Jersey followed suit in 1974 with “the first partial public financing systems.”<sup>40</sup> By 2007, there were twenty-seven states that pro-

28. See *id.* at 332.

29. See *id.* at 332–33.

30. See Klonsky, *supra* note 19; Stark, *The Presidential Primary*, *supra* note 26, at 333.

31. Foster, *supra* note 25, at 452.

32. See *id.*

33. See *id.* at 453.

34. See Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 NOTRE DAME J. LEGIS. 167, 167 (1998).

35. Kenneth D. Katkin, *Campaign Finance Reform After Federal Election Commission v. McConnell*, 31 N. KY. L. REV. 235, 239 (2004).

36. See Scott D. Slater, Comment, *Where the Bucks Stop: An Analysis of Presidential Telephone Solicitations Under 18 U.S.C. § 607*, 59 U. PITT. L. REV. 851, 879 n.247 (1998).

37. Benjamin J. Wyatt, *The Origins of State Public Financing of Elections* (Apr. 2002) (unpublished B.A. thesis, Wesleyan University), available at <http://www.wesleyan.edu/wsa/scfr/thesis.htm> (last visited Nov. 9, 2008).

38. *Id.*

39. *Id.*

40. *Id.*

vided some form of public subsidy in state elections.<sup>41</sup> Out of those states, eleven offered public funds to political parties for both general elections and primary campaigns.<sup>42</sup> Maine, Arizona, and Vermont follow the Clean Elections Plan under which the candidates may only receive public funds.<sup>43</sup>

### III. THE FOUNDATION OF THIS REPUBLIC—NO STATE GOVERNMENT SHALL INTERFERE WITH ANY INDIVIDUAL'S FREEDOMS OF ASSOCIATION OR ASSEMBLY

Necessarily, whether a party has a closed, semi-closed, open, or blanket primary, one's First Amendment rights will be implicated; specifically, the First Amendment right of the freedom to associate and the First Amendment right to the freedom to assemble.<sup>44</sup> Most notably, a closed primary system creates a prohibition on who one can vote for.<sup>45</sup> Let's address, in turn, how the freedom of assembly and the freedom of association are implicated, and how some courts have dealt with them.

#### A. *Freedom of Assembly*

The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>46</sup> The right of assembly guaranteed in the Federal Constitution to the people is not restricted to the literal right of meeting together to petition the Government "for a redress of grievances."<sup>47</sup> According to one federal district court, "the First Amendment itself is merely a limitation against federal abridgment of the rights embodied in that amendment."<sup>48</sup> However, "the [F]ramers of the Fourteenth Amendment, [which was] adopted after the Civil War, made clear that no state or local government could censor political ex-

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41. *Id.*

42. Wyatt, *supra* note 37.

43. *Id.*

44. See Chase, *supra* note 12, at 1939, 1941, 1950–52.

45. Cal. Democratic Party v. Jones, 530 U.S. 567, 570 (2000).

46. U.S. CONST. amend. I.

47. See *Thornton*, 514 U.S. at 843 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 513 (1939)).

48. *Thompson v. Bond*, 421 F. Supp. 878, 881 (W.D. Mo. 1976).

pression.”<sup>49</sup> The Due Process Clause of the Fourteenth Amendment “prevents any denial of [this right] by the states.”<sup>50</sup>

When the First Congress was debating the Bill of Rights, it was contended that there was no need to separately assert the right of assembly because it was subsumed in freedom of speech.<sup>51</sup> Mr. Page of Virginia responded, however, that at times “such rights have been opposed, and [that] people have . . . been prevented from assembling together on their lawful occasions. . . . If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.”<sup>52</sup> The motion to strike “assembly” was defeated.<sup>53</sup>

### B. *Freedom of Association*

Although the word “association” does not appear in the First Amendment, the freedom of association is derived from the First Amendment freedoms of speech and assembly.<sup>54</sup> The freedom to associate “necessarily presupposes the freedom to identify the people who constitute the association and to limit the association to those people only.”<sup>55</sup>

A political party’s right to choose its own nominees is a core associational activity.<sup>56</sup> This is because “the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions.”<sup>57</sup> As the United States Supreme Court has repeatedly stated, political parties have associational rights, and one of those rights is the right to choose the “standard bearer who best represents the party’s ideologies.”<sup>58</sup> In *Tashjian v. Republican Party of Connecticut*,<sup>59</sup> the United States Supreme Court held that the Connecticut statute requiring voters of any party primary to be registered

49. Akhil Reed Amar, *The Bill of Rights and Our Posterity*, 42 CLEV. ST. L. REV. 573, 577 (1994).

50. *Thompson*, 421 F. Supp. at 881.

51. 1 ANNALS OF CONG. 731–32 (Joseph Gales ed., 1834).

52. *Id.* at 732.

53. *Id.* at 733.

54. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

55. *Democratic Party of the U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981).

56. See *Timmons*, 520 U.S. at 359–60.

57. *La Follette*, 450 U.S. at 122.

58. See *March Fong Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Soc’y, Inc. v. Nat’l Republican Party*, 525 F.2d 567, 601 (D.C. Cir. 1975)).

59. 479 U.S. 208 (1986).



members of the party, conflicted with the Republican Party's rule permitting "voters not affiliated with any political party—to vote in [the] Republican primaries," and "deprive[d] the Party of its First Amendment right to enter into political association with individuals of its own choosing."<sup>60</sup> The Court observed that "[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, is protected by the Constitution."<sup>61</sup> While "[t]he State has wide latitude to regulate elections to ensure that they are fair and honest . . . the State cannot first require parties to nominate by primary election, and then structure the primary elections to deprive the parties of their First Amendment rights."<sup>62</sup>

#### IV. GOVERNMENTALLY FUNDED CLOSED PRIMARY SYSTEM AND THEIR IMPLICATIONS ON THE FREEDOM TO ASSOCIATE

Florida's statute establishing its closed primary system specifically states:

In a primary election a qualified elector is entitled to vote the official primary election ballot of the political party designated in the elector's registration, and no other. It is unlawful for any elector to vote in a primary for any candidate running for nomination from a party other than that in which such elector is registered.<sup>63</sup>

Also, Florida case law has, for more than seventy years, held that "no one is entitled to vote in a *party* primary absent a declaration of his party affiliation as a member of the particular party whose primary is being held."<sup>64</sup> Although no one appears to have challenged whether the aforementioned law

60. *Id.* at 210–11.

61. *Id.* at 224.

62. Brief for the Petitioners-Appellant at 19, *Cal. Democratic Party v. Jones*, No. 99-401 (9th Cir. Mar. 3, 2000). "California need not have a primary system at all. But if California chooses to conduct primary elections, it must respect the political parties' freedom of association." *Id.* (citing *Tashjian*, 479 U.S. at 218).

63. FLA. STAT. § 101.021 (2008).

64. *State ex rel. Gandy v. Page*, 170 So. 118, 120 (Fla. 1936).

The primary election laws of this state clearly require participants in primary elections, whether as voters or candidates, to specially register for that purpose. . . . For primary elections a declaration of party affiliation on the primary election books is indispensable to qualify one to participate in such primary elections. Absent such declaration of party affiliation, the registrant is not entitled to be considered as a legally registered member of the party whose affairs he seeks to participate in so far as primary elections . . . are concerned.

*State ex rel. Hall v. Hildebrand*, 168 So. 531 (Fla. 1936).

violates a Florida citizen's freedoms to associate and assemble, the United States Supreme Court has addressed this issue on several occasions.<sup>65</sup>

The United States Supreme Court has recognized the government's ability to restrict the rights of individuals to participate in the primary process for numerous reasons. For example, in *Rosario v. Rockefeller (Rosario II)*,<sup>66</sup> the United States Supreme Court rejected the citizens' argument that "their First and Fourteenth Amendment right of free association with the political party of their choice" was violated because of New York's delayed enrollment scheme.<sup>67</sup> An integral part of the scheme was that to participate in a primary election, a person must enroll before the preceding general election.<sup>68</sup> As the Second Circuit Court of Appeals stated: "Allowing enrollment any time after the general election would not have the same deterrent effect on raiding for it would not put the voter in the unseemly position of asking to be enrolled in one party while at the same time intending to vote immediately for another."<sup>69</sup> For this reason, New York's scheme required an insulating general election between enrollment and the next party primary.<sup>70</sup> "The resulting time limitation for enrollment [was] thus tied to a particularized legitimate purpose, and [was] in no sense invidious or arbitrary."<sup>71</sup> Further, "the statute merely imposed a time deadline on their enrollment, which they had to meet in order to participate in the next primary."<sup>72</sup>

The United States Supreme Court again recognized the propriety of restricting participation in the primary process in *Anderson v. Celebrezze*.<sup>73</sup> In fact, the Court specifically recognized that "[a]lthough these rights of voters are fundamental, not all restrictions imposed by the [s]tates on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."<sup>74</sup> The Court recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."<sup>75</sup> The Court concluded:

65. See generally *Rosario v. Rockefeller (Rosario II)*, 410 U.S. 752 (1973).

66. *Id.* at 752.

67. *Id.* at 758.

68. See *id.* at 757.

69. *Rosario v. Rockefeller (Rosario I)*, 458 F.2d 649, 653 (2d Cir. 1972).

70. See *Rosario II*, 410 U.S. at 758.

71. *Id.* at 762.

72. *Id.* at 757.

73. 460 U.S. 780, 788 (1983).

74. *Id.*

75. *Id.* (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.<sup>76</sup>

In *New York State Board of Elections v. López Torres*,<sup>77</sup> regarding a New York State Supreme Court justice election—as opposed to a presidential election—the Court “considered it to be ‘too plain for argument,’ that a State may prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot. . . . That prescriptive power is not without limits.”<sup>78</sup> In *California Democratic Party v. Jones*,<sup>79</sup> for example, the Court invalidated California’s blanket primary on First Amendment grounds, reasoning that it permitted non-party members to determine the candidate bearing the party’s standard in the general election.<sup>80</sup> The Court “acknowledged an individual’s associational right to vote in a party primary without undue state-imposed impediment.”<sup>81</sup>

In *Kusper v. Pontikes*,<sup>82</sup> the Court invalidated an Illinois law that required a voter wishing to change his party registration so as to vote in the primary of a different party to do so almost two full years before the primary date.<sup>83</sup> But *Kusper* does not cast doubt on all state-imposed limitations upon primary voting.<sup>84</sup> In *Rosario II*, the Court upheld a New York State requirement that a voter enroll in the party of his choice at least thirty days before the previous general election in order to vote in the next party primary.<sup>85</sup>

Similar to the facts in *Rosario II*, in Florida, party changes must be made by the end of the twenty-ninth day before the primary election.<sup>86</sup> As such, it would appear that, in and of itself, *Florida Statutes*, section 101.021, making it “unlawful for any elector to vote in a primary for any candidate

76. *Id.*

77. 128 S. Ct. 791 (2008).

78. *Id.* at 798.

79. 530 U.S. 567 (2000).

80. *Id.* at 586.

81. *See López Torres*, 128 S. Ct. at 798.

82. 414 U.S. 51 (1973).

83. *Id.* at 57, 61.

84. *See generally Rosario II*, 410 U.S. 752 (1973).

85. *Id.* at 757, 762.

86. FLA. STAT. § 97.055 (2008).

running for nomination from a party other than that in which such elector is registered” would pass constitutional muster.<sup>87</sup> Furthermore, the twenty-nine day requirement to change party affiliation, based on United States Supreme Court precedent, is not overly burdensome and does not violate one’s freedoms to associate and assemble.<sup>88</sup>

V. IF GOVERNMENTS ARE INVOLVED IN FUNDING PRIMARIES, CAN THEY LIMIT FUNDING TO JUST THE DEMOCRATIC AND REPUBLICAN PARTIES?

A. Framers’ Views on Parties

The Framers abhorred the “idea of political parties, representing institutionalized divisions of interest.”<sup>89</sup> This is the type of divisive political thinking that the Framers attempted to flee.<sup>90</sup> In fact, the Framers “attempted to design a ‘Constitution Against Parties’” and curtail any tide of political competition that might “divide coalitions of officeholders and cut through the constitutional boundaries between . . . branches.”<sup>91</sup> Notwithstanding, in 1790, the Treasury Secretary, Alexander Hamilton, “began to recruit members of Congress” to support “his economic development program.”<sup>92</sup> Thomas Jefferson and James Madison intensely opposed the program, and the two sides began to collect public support for their respective positions.<sup>93</sup>

By 1796, there were two competing parties: the Federalists and the Republicans.<sup>94</sup> By 1797, its members were not only specifically identified as Federalist or Republican, but they regularly and almost strictly voted along party lines.<sup>95</sup> The institutionalized division of interest that the Framers had so desperately tried to steer clear of had been born.<sup>96</sup>

Such partisan politics that propagated divisive interests was harmful to the separation of powers doctrine, and the Framers knew it.<sup>97</sup> Pursuant to the separation of powers doctrine, the executive branch has to be “genuinely

87. FLA. STAT. § 101.021.

88. See FLA. STAT. § 97.055; *Rosario II*, 410 U.S. at 758 (holding that a New York law establishing a thirty day deadline for voter affiliation is valid).

89. Levinson & Pildes, *supra* note 22, at 2320.

90. See *id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Levinson & Pildes, *supra* note 22, at 2320.

95. *Id.*

96. *Id.*

97. *Id.*

independent!”<sup>98</sup> In fact, the Framers initially rejected ideas that the President should obtain appointment by Congress.<sup>99</sup> Any such requirement would be wholly antithetical to executive independence.<sup>100</sup> Notwithstanding, party caucuses in Congress were the primary vehicle for selecting presidential candidates.<sup>101</sup> In fact, the Framers’ vision of numerous candidates, as opposed to the presidential electoral process with just two political parties, was meant to preclude the political and fundraising dominance that the Republicans and Democrats enjoy today.<sup>102</sup> Contrary to the Framers’ intent, members of smaller parties have little to no chance of having a successful presidential campaign.<sup>103</sup>

*B. The State Funding of Democratic and Republican Party Primaries to the Exclusion of All Others Implicates and Perhaps Violates the Equal Protection Clause of the Fourteenth Amendment*

Limiting the state funding of primaries to the Democratic and Republican parties contributes to the political and fundraising dominance discussed above.<sup>104</sup> First Amendment freedoms to assemble and associate necessarily conflict with equal protection concerns, because the support of one or two political organizations with public financing to the exclusion of others implicates the Equal Protection Clause of the Fourteenth Amendment.<sup>105</sup> Of course, these First Amendment freedoms are entitled under the Fourteenth Amendment to protection from infringement by the States.<sup>106</sup> Consequently, limiting the state funding of primaries exclusively to the Democratic and Republican parties is the centerpiece of the constitutional uneasiness because of the potential violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>107</sup> That is, does limiting funding of primaries to just two political parties invidiously discriminate against all other parties in violation of the Equal Protection Clause?

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98. *Id.* at 2321.

99. Levinson & Pildes, *supra* note 22, at 2321.

100. *Id.*

101. *Id.*

102. *See id.*

103. *See* Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 111 (1996).

104. *See id.* at 111–12.

105. *See id.*

106. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276–77 (1964).

107. Black, *supra* note 103, at 135–36.

## 1. United States Supreme Court Decisions

In one of the most cited and well recognized cases regarding the limiting of funding to the Democratic and Republican primaries, *Williams v. Rhodes*,<sup>108</sup> the Court was confronted with a state electoral structure that “favor[ed] two particular parties—the Republicans and the Democrats—and in effect tend[ed] to give them a complete monopoly.”<sup>109</sup> The Court held unconstitutional the election laws of Ohio as they violated the Equal Protection Clause of the Fourteenth Amendment insofar as in combination they “made it virtually impossible for a new political party, even though it [had] hundreds of thousands of members, or an old party, which [had] a very small number of members, to be placed on the state ballot” in the 1968 presidential election.<sup>110</sup> The state laws made “no provision for ballot position for independent candidates as distinguished from political parties,”<sup>111</sup> and a new political party, in order to be placed on the ballot, had “to obtain petitions signed by qualified electors totaling [fifteen percent] of the number of ballots cast in the last preceding gubernatorial election.”<sup>112</sup> But this requirement was only a preliminary hurdle.<sup>113</sup> Although the Ohio American Independent Party in the first six months of 1968 had obtained more than 450,000 signatures—well over the [fifteen percent] requirement<sup>114</sup>—Ohio had nonetheless denied the party a place on the ballot, by reason of other statutory “burdensome procedures, requiring extensive organization and other election activities by a very early date,”<sup>115</sup>—“including the early deadline for filing petitions and the requirement of a primary election conforming to detailed and rigorous standards.”<sup>116</sup> Justice Douglas candidly stated:

Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined “political party”

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108. 393 U.S. 23 (1968).

109. *Id.* at 32.

110. *Id.* at 24.

111. *Id.* at 26.

112. *Id.* at 24–25.

113. *Williams*, 393 U.S. at 25.

114. *Id.* at 26.

115. *Id.* at 33.

116. *Id.* at 27.

in such a way as to exclude virtually all but the two major parties.<sup>117</sup>

While *Williams* seemed adamantly opposed to a state law that appeared to create a duopoly shared by the Democrats and Republicans,<sup>118</sup> in *American Party of Texas v. White*,<sup>119</sup> the Court found other differential treatment towards the minor parties constitutional.<sup>120</sup> The Court was confronted with whether a state law prohibiting a minor party from not having a primary election, but relegating it to a convention, was invidiously discriminatory and in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>121</sup> The Court rejected assertions of invidious discrimination.<sup>122</sup> Specifically, the Court rather conclusorily refused to find that “the convention process [was] invidiously more burdensome than the primary” process.<sup>123</sup> The appellant could not demonstrate discrimination of “some substance” nor could the appellant demonstrate any offense to the Constitution.<sup>124</sup>

The *White* Court, however, did seem to validate a threshold requirement for a government funded primary election for a minor political party when it dealt with whether a Texas provision “provid[ing] for public financing from state revenues for primary elections of only those political parties casting 200,000 or more votes for governor in the [prior] general election” violated the Equal Protection Clause.<sup>125</sup> The Court upheld the validity of the provision, reasoning that a political party should not be made to bear the burden of the additional expense of a state required primary election.<sup>126</sup> Furthermore, the Court also held that the State was justified in not providing funding to political parties which had not previously shown such widespread public support.<sup>127</sup> The Court specifically stated: “[W]e cannot agree that the State, simply because it defrays the expenses of party primary elections, must also finance the efforts of every nascent political group seeking to organize itself.”<sup>128</sup>

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117. *Id.* at 35–36 (Douglas, J., concurring) (footnotes omitted).

118. *See Williams*, 393 U.S. at 32.

119. 415 U.S. 767 (1974).

120. *Id.* at 794–95.

121. *Id.* at 781.

122. *Id.* at 793–94.

123. *Id.* at 781.

124. *White*, 415 U.S. at 781–82.

125. *Id.* at 791–92.

126. *See id.* at 793.

127. *See id.* at 794.

128. *Id.*

## 2. Florida Statutes Outright Deny Primaries—Let Alone Funding for Primaries—to Minor Political Parties

In each year in which a general election is held, a primary election for nomination of candidates of political parties shall be held on the Tuesday 10 weeks prior to the general election. The candidate receiving the highest number of votes cast in each contest in the primary election shall be declared nominated for such office. If two or more candidates receive an equal and highest number of votes for the same office, such candidates shall draw lots to determine which candidate is nominated.<sup>129</sup>

Whenever any special election or special primary election is held as required in s. 100.101, each county incurring expenses resulting from such special election or special primary election shall be reimbursed by the state. Reimbursement shall be based upon actual expenses as filed by the supervisor of elections with the county governing body. The Department of State shall verify the expenses of each special election and each special primary election and authorize payment for reimbursement to each county affected.<sup>130</sup>

So how do these laws apply to minor political parties seeking to conduct a primary election—they do not.<sup>131</sup> The primary election method of nominating candidates is not available to minor political parties.<sup>132</sup> Pursuant to section 97.021(17), *Florida Statutes*, a minor political party is defined as follows: A “[m]inor political party” is any group as defined in this subsection which on January 1 preceding a primary election does not have registered as members [five] percent of the total registered electors of the state.”<sup>133</sup>

129. FLA. STAT. § 100.061 (2008).

130. FLA. STAT. § 100.102 (2008).

131. See *State ex rel. Merrill v. Gerow*, 85 So. 144, 146 (Fla. 1920).

132. See generally *State ex rel. Barnett v. Gray*, 144 So. 349 (Fla. 1932); *Gerow*, 85 So. at 146 (stating that the rights and powers conferred and granted by the primary election laws are limited to those political parties that, at the general election for state or county officers preceding a primary, polled more than five percent of the entire vote cast in the state).

While the Florida Election Code provides that qualified candidates for nomination to an office are entitled to have their names printed on the official primary election ballots, this provision necessarily means the qualified candidates of the so-called major political parties because the primary election laws apparently apply only to such parties.

21 FLA. JUR. 2d *Elections* § 120 (2005).

133. FLA. STAT. § 97.021(17) (2008).



Notably, the aforementioned statutory requirements are similar to the statutory requirements set forth in *White* and *Williams v. Rhodes*. In light of the historically significant failure of laws like this to provide any footing for third parties who seek a primary election, it seems clear that the application of this in Florida raises constitutional concerns and this issue needs to be revisited. In Florida, if a third party wished to conduct a primary election, and on January 1, 2008, decided that it wanted to be placed on the presidential primary ballot for the primary election that took place on January 29, 2008—the date of Florida’s primary—the third party would have to rely on whether it met the five percent threshold during the last race, which was the gubernatorial race which took place in November 2006.<sup>134</sup> This is a deadly blow to any third party, as historically, third parties tend to grow their support and constituents nationally, as exemplified by the significant support garnered by Abraham Lincoln, Theodore Roosevelt, Robert LaFollette, Eugene Debs, Henry Wallace, Strom Thurmond, George Wallace, John Anderson, and H. Ross Perot, each of whom garnered at least seven percent of the votes during the elections.<sup>135</sup> However, the chance of third parties reaching the five percent threshold in Florida at the time of the previous gubernatorial election is practically nonexistent given the nature of our political history and how third parties, or any political party, are formed and emerge to national prominence. Indeed, the first two parties, the Federalists and the Antifederalists, were formed around supporting and opposing national issues and agendas.<sup>136</sup> Of course, during any particular primary, the Democrats and Republicans have their established base, and that established base will likely remain intact from one primary to the next.<sup>137</sup> However, that maintenance of an established base is not necessarily with any of the third parties, which usually flow from national grassroots efforts that are catalyzed by some financial and/or political distress that occurred since the previous primary.<sup>138</sup> It is this national uprising, as opposed to the limited likelihood of a statewide uprising, that gives any third party a chance to succeed. Clearly, the present primary system institutionally supports the maintenance of the Democratic and Republican bases of support.

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134. *See id.*

135. Paula Shaki, *Third Parties Influential in Past, Present Elections*, available at [http://www.collegian.psu.edu/archive/1996\\_jan-dec/1996\\_oct/1996-10-07\\_the\\_daily\\_collegian/1996-10-07d01-004.htm](http://www.collegian.psu.edu/archive/1996_jan-dec/1996_oct/1996-10-07_the_daily_collegian/1996-10-07d01-004.htm) (Oct. 7, 1996); *Results of Presidential Elections*, <http://www.usconstitutional.net/elections.html> (last visited Nov. 8, 2008).

136. *See* Levinson & Pildes, *supra* note 22, at 2319.

137. *See generally* James Bennet & Keith Bradsher, *Republicans Again Courting Democrats and Independents*, N.Y. TIMES, Feb. 21, 2000, at A1.

138. *See generally id.*

Moreover, the present primary system financially supports the maintenance of these respective bases of support. In fact, the state funding for the Democratic and Republican primaries in Florida averaged over \$5 million in 2008.<sup>139</sup> Third parties do not get any support through state funding. Thus, each of the two established major parties has a \$5 million advantage over any third party seeking to have a primary.<sup>140</sup>

Notwithstanding the unlikely occurrence of any minor party achieving the five percent threshold, if the threshold is hurdled,

[a]ny group of citizens organized for the general purposes of electing to office qualified persons and determining public issues under the democratic processes of the United States may become a minor political party of this state by filing with the department a certificate showing the name of the organization, the names of its current officers, including the members of its executive committee, and a copy of its constitution or bylaws. It shall be the duty of the minor political party to notify the department of any changes in the filing certificate within 5 days of such changes.<sup>141</sup>

More importantly, if a Florida citizen has concluded that her political interests are not represented by the major political parties, and she seeks to exercise her rights to political association and assembly via a minor political party, pursuant to section 103.091(4), *Florida Statutes*, she will not be allowed to participate in the primary:

Any political party other than a minor political party may by rule provide for the membership of its state or county executive committee to be elected for 4-year terms at the primary election in each year a presidential election is held. The terms shall commence on the first day of the month following each presidential general election; but the names of candidates for political party offices shall not be placed on the ballot at any other election. The results of such election shall be determined by a plurality of the votes cast. In such event, electors seeking to qualify for such office shall do so with the Department of State or supervisor of elections not earlier than noon of the 71st day, or later than noon of the 67th day, preceding the primary election. The outgoing chair of each county executive committee shall, within 30 days after the committee members take office, hold an organizational meeting of all newly elected members

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139. See generally Beth Reinhard & Rob Barry, *Florida Lucrative for McCain*, MIAMI HERALD, Feb. 22, 2008, at 6B.

140. See generally *id.*

141. FLA. STAT. § 97.021(17) (2008).

for the purpose of electing officers. The chair of each state executive committee shall, within 60 days after the committee members take office, hold an organizational meeting of all newly elected members for the purpose of electing officers.<sup>142</sup>

The burden created by the Florida Legislature appears to have overstepped its constitutional boundaries as delineated by the Equal Protection Clause.<sup>143</sup> As discussed in *Williams v. Rhodes*, the state legislature violates the Equal Protection Clause of the Fourteenth Amendment when it makes it “virtually impossible for a new political party . . . to be placed on the state ballot.”<sup>144</sup> Like the Ohio statute in *Williams*, Florida statutes have placed on minority parties an unconstitutionally high hurdle in front of third party candidates running for president.<sup>145</sup> In light of the clear enhancement that the Florida statutes give to the two major parties by aiding their members ability to engage in the freedoms to associate and assemble by funding their primaries with upwards of \$5 million each, in conjunction with their failure to aid minor parties in the same way, and the considerable tension with the Equal Protection Clause stemming from, the application of the Florida statutes, as well as the United States Supreme Court’s rulings, make it “virtually impossible for a new political party . . . to be placed on the state ballot.”<sup>146</sup> Accordingly, a serious constitutional challenge could be mounted against Florida’s presidential primary as it is presently constituted.<sup>147</sup> As previously stated, historically, third parties only emerge from presidential election cycles, not gubernatorial election cycles. As such, relying on gubernatorial election cycles deliberately inhibits the growth of third parties to the benefit of the two major parties making this state action constitutionally suspect. Florida has debilitated any opportunity for a third party to succeed as a presidential candidate.<sup>148</sup> In effect, Florida has unconstitutionally institutionalized a two party system.<sup>149</sup>

## VI. CONCLUSION

The First Amendment rights to associate and assemble for the purpose of advancing shared beliefs, including political beliefs, are two of the most

142. FLA. STAT. § 103.091(4) (2008).

143. *See id.*

144. *Williams v. Rhodes*, 393 U.S. 23, 24 (1968).

145. FLA. STAT. § 103.091(4); *see generally Williams*, 393 U.S. at 23.

146. *Williams*, 393 U.S. at 24.

147. *See generally id.*

148. *See generally* FLA. STAT. § 103.091(4).

149. *See generally id.*

precious rights provided to each citizen of this nation. The Framers held an unabashed obsession for protecting these rights, and these rights are to be protected by the Equal Protection Clause of the Fourteenth Amendment from infringement by any state.<sup>150</sup> Only time will tell whether the Supreme Court will opine on the constitutionality of Florida's statutes, but application of previous Supreme Court case law, and the facts of how modern third parties emerge in American politics, appear to make the constitutional viability of Florida's statutes increasingly suspect.

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150. See generally *Williams*, 393 U.S. at 23.