

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MICHELE L. TIMMONS, ACTING DIRECTOR,
RAMSEY COUNTY DEPARTMENT OF PROPERTY
RECORDS AND REVENUE, ET AL., Petitioners
v. TWIN CITIES AREA NEW PARTY

CASE NO: No. 95-1608

PLACE: Washington, D.C.

DATE: Wednesday, December 4, 1996

PAGES: 1-55

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MICHELE L. TIMMONS, ACTING :
4 DIRECTOR, RAMSEY COUNTY :
5 DEPARTMENT OF PROPERTY :
6 RECORDS AND REVENUE, ET AL., :
7 Petitioners :

8 v. : No. 95-1608

9 TWIN CITIES AREA NEW PARTY :
10 - - - - -X

11 Washington, D.C.

12 Wednesday, December 4, 1996

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 11:04 a.m.

16 APPEARANCES:

17 RICHARD S. SLOWES, ESQ., Assistant Solicitor General of
18 Minnesota, St. Paul, Minnesota; on behalf of the
19 Petitioners.

20 LAURENCE H. TRIBE, ESQ., Cambridge, Massachusetts; on
21 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 95-1608, Michele Timmons v. The Twin Cities
5 Area New Party.

6 Mr. Slowes, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF RICHARD S. SLOWES

9 ON BEHALF OF THE PETITIONERS

10 MR. SLOWES: Mr. Chief Justice, and may it
11 please the Court:

12 This case is here on a writ of certiorari from
13 the Eighth Circuit Court of Appeals. The issue is whether
14 the laws of Minnesota and those of some 40 other States
15 that limit each candidate to one party designation on the
16 election ballot should be overridden by the desire of a
17 party to place on that ballot as its candidate someone who
18 is already on the ballot as a candidate of another party.

19 In this case, Minnesota's law preventing
20 multiple party nominations prevented the respondent New
21 Party from placing on the Minnesota election ballot as its
22 candidate Representative Andy Dawkins, a Democratic-
23 Farmer-Labor legislator who was already on the ballot as
24 the DFL candidate.

25 The case involves a narrow aspect of political

1 party activity. It is not about the ability of a party to
2 generally select its candidates. It is not about the
3 ability of a party to generally get its candidates on the
4 ballot. It is about the narrower issue of a political
5 party that wishes to put on the ballot somebody else's
6 candidate who is already there.

7 Minnesota's law that precludes that activity
8 does not freeze the status quo. In fact, in Minnesota in
9 the 1994 election a third party qualified as a major
10 party.

11 QUESTION: Somebody else's candidate that is
12 already there. Who gets the first peck? I mean --

13 MR. SLOWES: In this instance what happens is,
14 and what really controls here, Justice Scalia, is that the
15 candidate must file an affidavit of candidacy, and on the
16 affidavit of candidacy he must indicate his political
17 party.

18 QUESTION: Yes.

19 MR. SLOWES: In this instance, Representative
20 Dawkins had filed an affidavit of candidacy for the
21 Democratic-Farmer-Labor primary. That affidavit of
22 candidacy was already on file when the New Party attempted
23 to file another affidavit.

24 QUESTION: What if the New Party had filed --
25 well, the same thing would happen if the New Party had --

1 what if the New Party had put up Dawkins first? Does that
2 mean the Democratic-Farmer-Labor Party wouldn't have been
3 able to run Dawkins?

4 MR. SLOWES: If Representative Dawkins had said
5 yes --

6 QUESTION: To the New Party?

7 MR. SLOWES: -- I'll file this affidavit of
8 candidacy listing the New Party as my party, filed it with
9 the county officials --

10 QUESTION: I presume he would not have done that
11 if he wanted to be elected.

12 (Laughter.)

13 QUESTION: I mean that if he was going to get
14 the DFL nomination, he would -- he could only get one. He
15 would have settled for the DFL.

16 MR. SLOWES: I would presume that's so, Mr.
17 Chief Justice. In fact, in his affidavit which he
18 submitted in this case he indicated he is a lifelong DFL
19 member, that he believes in the DFL party, and if elected
20 to the legis --

21 QUESTION: What if he sent both in at the same
22 time? What would you do?

23 MR. SLOWES: Your Honor, that would not be
24 permitted by the law. First of all, the law --

25 QUESTION: What is the State interest in

1 preventing that from happening?

2 MR. SLOWES: The State interests are multiple,
3 Justice Stevens, and what they have to do with, a number
4 of issues that this Court has recognized as compelling
5 State interests, although we don't believe that the Court
6 has to conclude that they're compelling in this instance.
7 One of them is the concern that multiple party candidacies
8 can lead to voter confusion about how to effectively cast
9 your ballot.

10 When the name appears on the ballot numerous
11 times -- in fact, this recently happened in Connecticut in
12 one of their elections where fusion was used. Some of the
13 voters thought that they had to fill in every line where
14 the name appeared for the vote to count.

15 QUESTION: I guess you could have instructions
16 on the ballot telling people what to do in that event.

17 MR. SLOWES: Justice O'Connor, in fact that's
18 kind of the narrow tailoring that the Eighth Circuit
19 suggested for that. We think --

20 QUESTION: But that would be possible, I guess,
21 to have instructions along with a ballot that did permit
22 parties to name the same person as their candidate.

23 MR. SLOWES: Yes, Your Honor, it would be
24 possible.

25 QUESTION: Or, indeed, I suppose you could count

1 the vote whether you voted on one line, two lines, or
2 either, or both.

3 MR. SLOWES: Your Honor, that would --

4 QUESTION: I -- it seems to me you have to be
5 pretty dense to be confused on this one.

6 (Laughter.)

7 MR. SLOWES: Well, apparently some voters in
8 Connecticut were, Your Honor, and one of the issues in the
9 recount was how do you deal with the ballots where there
10 are multiple markings.

11 QUESTION: Yes, but are we supposed to erase
12 from our mind that there is at least one State that has
13 had a lot of experience with fusion candidates, and
14 there's no large confusion. It's not a major problem. So
15 whatever one might speculate about the lack of
16 intelligence of the voters, we do have the State of New
17 York, where this has gone on without huge confusion.

18 MR. SLOWES: That's indeed the case, Your Honor.

19 QUESTION: New Yorkers are smarter, I think.
20 That's probably the answer.

21 (Laughter.)

22 MR. SLOWES: I think that I have to be careful,
23 if I'm going back to Minnesota, about making that
24 argument, Your Honor.

25 (Laughter.)

1 MR. SLOWES: But I think a State can make a
2 judgment. Indeed, there is that record in New York. But
3 it's a singular record. There is no indication from other
4 States on what will happen. There's not a broad range of
5 empirical experience with this.

6 QUESTION: How many States have these antifusion
7 laws like your State?

8 MR. SLOWES: There are approximately 40, Your
9 Honor. It's difficult to get a precise count, because
10 some of the statutes are ambiguous, and there aren't
11 rulings about them.

12 QUESTION: And most of them have been in effect
13 how many years?

14 MR. SLOWES: Roughly since the turn of the
15 century, Your Honor, so there's not a broad range of
16 empirical evidence, but there's also --

17 QUESTION: What's your answer to the suggestion
18 that someone made here that, assuming somebody gets
19 confused and votes twice, all the State has to do is count
20 it once? Why isn't that the answer, the simple answer to
21 the voter confusion point?

22 MR. SLOWES: Because we can't be certain that
23 the ballot is going to be easily understandable in terms
24 of what they really intended to do.

25 QUESTION: Well, if they marked -- if Joe Doaks

1 is running on two lines and they mark Joe Doaks on each
2 line, isn't it a fair inference that they want Doaks?

3 (Laughter.)

4 QUESTION: Don't you have to know what party
5 they voted for Doaks on in order to determine who gets on
6 the ballot without having to go through a petition process
7 the next time around, or not?

8 MR. SLOWES: Justice Scalia --

9 QUESTION: Is there any minimum party size?

10 MR. SLOWES: In the circumstances of this case,
11 which was a legislative election for a legislative seat --

12 QUESTION: Right.

13 MR. SLOWES: -- the vote count has no effect on
14 the future party status.

15 QUESTION: Okay.

16 MR. SLOWES: Those -- only Statewide elections
17 count in Minnesota for major party status, so that's
18 really not an issue here.

19 QUESTION: Well, but I take it the argument --

20 QUESTION: But that argument would be a valid
21 argument in other elections, although not in this one?

22 MR. SLOWES: If it were a Statewide election
23 there would be that issue, and then the State would have
24 the question of how are we going to appropriately deal
25 with this issue.

1 QUESTION: But I take it the respondent's
2 argument would address a Statewide election if the
3 respondent prevails, would it not?

4 MR. SLOWES: It -- they claim that it does not,
5 Your Honor, because there are three statutes that are --
6 affect fusion in Minnesota. One of them specifically
7 addresses that issue, but in terms of a Statewide
8 election, the statutes that are at issue here would apply
9 to Statewide elections as well, so if they are struck down
10 then it would strike down fusion for Statewide elections
11 and you --

12 QUESTION: And then there would be a problem
13 with determining the amount of votes garnered for each
14 party, or a potential problem.

15 MR. SLOWES: The State would have to retune its
16 system, figure out how it is going to deal with the issue
17 of how you count the votes for a major party, along with
18 the issues such as are we going to have an aggregated or a
19 disaggregated ballot. That is, does the candidate get a
20 separate line for each party that nominates him.

21 QUESTION: But why are these such difficult
22 issues for the State to deal with?

23 Why, for example, can't the State simply decide
24 that in the case in which there is a question of party
25 qualification based on the vote, that one -- that the

1 major party will be deemed to have preeminence, and the
2 vote will count for that purpose, that a minor party will
3 not be allowed in an ambiguous case to count the vote.

4 Why can't the State come up with some kind of a
5 tie-breaker rule which would be easier or less restrictive
6 on voter choice than the antifusion rule?

7 MR. SLOWES: Your Honor, I'm not suggesting that
8 the State's ability or inability to figure out how it
9 wants to count these votes toward major party status is
10 the preeminent interest that justifies the fusion ban, but
11 I think it illustrates a slightly different point, and
12 that is, what goes into creating a fair and orderly and
13 efficient electoral process involves a lot of judgments,
14 essentially a lot of political engineering about how the
15 pieces of the system will work together.

16 This is just one of those pieces, and what we
17 are suggesting is that where the States --

18 QUESTION: If that's not the preeminent
19 interest, what is the preeminent interest? If voter
20 confusion isn't your justification, what are your stronger
21 justifications?

22 MR. SLOWES: The justifications -- I think voter
23 confusion is an interest, Your Honor, and that's a side
24 point of it.

25 QUESTION: May I ask with respect to voter

1 confusion if that is not offset by voter information?
2 That is, it's one thing to have a candidate only on the
3 line of major party. It's quite another thing to have
4 that same candidate on the line of minor party that has
5 certain goals and objectives.

6 So when the public sees someone not only in the
7 line of major party but also of minor party, whether it's
8 to the left or right of the political spectrum, that is
9 telling the voters more about that candidate, so isn't --
10 is that irrelevant, that informing function of being, say,
11 on the liberal party line or on the conservative party
12 line in the State of New York, to take that as an example?

13 MR. SLOWES: Justice Ginsburg, our position is
14 not that it's irrelevant. Our position is that that kind
15 of communicative use of the ballot is not constitutionally
16 compelled.

17 In fact, we don't elect parties at the
18 elections, we elect candidates. We use the ballot to
19 decide which of these candidates is going to hold the
20 official office that the election is for. In fact, if
21 Mr. Dawkins were elected on the DFL ballot, or as a DFLer,
22 there's nothing that prevents him from the next day
23 turning around and becoming a Republican.

24 QUESTION: I'm interested in Justice Stevens'
25 question. Where we are so far is, it was suggested first

1 by Justice Scalia that it might be important for the State
2 to determine which party garners the most votes, and then
3 you were asked a question, well, couldn't we presume that
4 the preeminent party gets the votes. I very much doubt
5 that minor parties would agree with such a presumption.

6 And then you said, well, that's not really our
7 interest. That's a side thing. We're talking about,
8 really, the whole election dynamic. And then Justice
9 Stevens said, well, what is your particular interest, and
10 I never did get the answer to that.

11 MR. SLOWES: I'm sorry, Justice Kennedy, I --

12 QUESTION: Well, you've had a number of
13 questions, but --

14 MR. SLOWES: And I -- let me try to address
15 that. Other interests that are involved: one of the
16 concerns, and this relates to the confusion as well, is
17 that confusion sets up a situation that is ripe for ballot
18 manipulation.

19 It creates a situation where candidates can, in
20 a sense, create bogus minor parties so that they can get
21 their name on the ballot more than one time to give them
22 an advantage, or perhaps taking it even a step further --

23 QUESTION: But that bogus minor party would have
24 to meet all the State statutory requirements for becoming
25 a party eligible to get on the ballot.

1 MR. SLOWES: That's correct, Justice Stevens,
2 and --

3 QUESTION: And so they would be splintering
4 their own strength by going out of the way to create
5 another party, wouldn't they, and has this ever happened?

6 MR. SLOWES: Let me go back to the first
7 question, Your Honor. In Minnesota we make it very easy
8 for minor parties --

9 QUESTION: Right.

10 MR. SLOWES: -- to get on the ballot. In this
11 district it would take 500 signatures on a nominating
12 petition --

13 QUESTION: Right.

14 MR. SLOWES: -- to get someone on the ballot.
15 That's all there is to it. It doesn't require party
16 organization. It doesn't require a lot of things that
17 other States require, so --

18 QUESTION: And you're saying a major party would
19 do that why?

20 MR. SLOWES: Because major party candidates
21 might very well, if they're, for example -- this wasn't
22 the case with Mr. Dawkins, but if they're in a case, an
23 election where they do have a tough contest with an
24 opposing major party, they might decide that it's to their
25 advantage either to have their name on the ballot more

1 than one time, or they might even prefer to have their
2 name on the ballot not only as a Democratic candidate, but
3 also as the no-new-taxes candidate, and the tough-on-
4 crime candidate, and the fusion system, especially in a
5 State like Minnesota that is friendly to minor parties
6 getting on the ballot and makes it easy to do it, opens
7 the door for that kind of ballot manipulation.

8 QUESTION: Would you explain how the Minnesota
9 system works? When you say get on the ballot, are you
10 referring to get on the ballot for the primary election?

11 MR. SLOWES: There are --

12 QUESTION: Or getting on the general election
13 ballot? I thought there was some special provision in
14 your State for minor parties to put a candidate on the
15 general election ballot.

16 MR. SLOWES: Justice O'Connor, there are two
17 ways to get on the ballot in Minnesota. For major
18 parties, which we now have three of, those candidates have
19 to go through a primary election, and --

20 QUESTION: But this -- this party, the Twin
21 Cities Area New Party, did not have to go on the primary
22 election ballot, is that right?

23 MR. SLOWES: That's correct, Your Honor.
24 They're in the second category. We only have two
25 categories. Either you are a major party, or you're just

1 everything else --

2 QUESTION: And if you're everything else, how do
3 you get past the primary and on the general election
4 ballot?

5 MR. SLOWES: To get on the ballot you're
6 required to file a nominating petition.

7 QUESTION: You mean on the general election
8 ballot?

9 MR. SLOWES: On the general election ballot.
10 All you have to do is file a nominating petition that has
11 the requisite number of signatures.

12 QUESTION: But the major parties can't do that.

13 MR. SLOWES: Major --

14 QUESTION: They go through a primary.

15 MR. SLOWES: Yes, Your Honor. Major party
16 candidates have to go through a primary. Everybody else
17 can get on by filing a nominating petition with -- the
18 number of signatures differs per -- for office, but for
19 this office it was --

20 QUESTION: So all we're talking about here is
21 access to the general election ballot, in effect.

22 MR. SLOWES: That's correct, Your Honor.

23 QUESTION: And whether the minor party can
24 nominate the same candidate as some other party --

25 MR. SLOWES: That's --

1 QUESTION: -- who's gotten there by primary
2 election.

3 MR. SLOWES: That's all we're talking about,
4 Your Honor, that's correct.

5 And as I was saying, because it is so easy to
6 get on that general election ballot for nonmajor party
7 candidates, it opens the door for this kind of ballot
8 manipulation.

9 The Eighth Circuit and the respondent suggest
10 that we can take care of that by simply raising our
11 signature threshold, make it tougher to get on the ballot.

12 QUESTION: May I put another question to you
13 that -- what concerns me in the background?

14 I remember when General Eisenhower ran for
15 President there was a real possibility both major parties
16 might have nominated him, and it would seem to me that
17 each of those parties would have had a strong
18 associational interest in picking the nominee of its
19 choice.

20 Now, why is it that they shouldn't be allowed to
21 both nominate General Eisenhower if they wanted to? What
22 is the powerful interest that would prevent each party
23 from picking its own nominee?

24 MR. SLOWES: Your Honor, their interests again
25 are as I've started -- tried to be telling you.

1 QUESTION: Excuse me. I thought they could pick
2 their own nominee.

3 MR. SLOWES: They --

4 QUESTION: Not in Minnesota --

5 QUESTION: No, they can. They just can't have
6 it shown on the ballot as a nominee of that party. Isn't
7 that the case?

8 MR. SLOWES: It all depends on the nomenclature
9 you're using. If you're talking about nominating a
10 candidate as meaning, we're going to name this candidate
11 and he will be on the ballot as our candidate, then that's
12 what's prevented by fusion. What is not prevented is
13 endorsement of a candidate.

14 QUESTION: Right.

15 MR. SLOWES: Supporting the candidate --

16 QUESTION: California for many years had cross-
17 filing. That was how Earl Warren got elected in the
18 primaries without ever even going through a general
19 election. Could a State ban that?

20 MR. SLOWES: Yes. In fact, California has.
21 California was unhappy with that.

22 QUESTION: Yes. They didn't like it.

23 MR. SLOWES: There was a criticism about --

24 QUESTION: And changed it.

25 MR. SLOWES: -- what happened. It reduced party

1 responsibility, or reduced responsibility for governing,
2 and there's -- actually there's criticism of the New York
3 system, that it does the same thing by allowing major
4 parties to cross-nominate, it can prevent problems.
5 Everybody doesn't see this as a universal panacea.

6 And Justice Stevens, the answer to your question
7 is, again, what this Court has looked at in the past in
8 evaluating election statutes is, is the State setting up
9 formidable barriers to participation, and when it's looked
10 at the rights of parties to nominate the candidates, it
11 really hasn't gone so far as to say that a party has a
12 right to select a particular candidate. It has to have
13 the door open to --

14 QUESTION: It just can't select the one it wants
15 and also get it on the ballot. I understand. Of course,
16 you can say you can nominate anybody but you can't have
17 your nominee's name appear on the ballot. That's all. I
18 understand that.

19 MR. SLOWES: Well, that's correct, Your Honor,
20 and the members of the -- and the members of that party
21 have the kinds of associational rights that this Court has
22 found are most important. That is, they retain the right
23 to work collectively to advance a candidate that they
24 support, and they can vote for that candidate.

25 The Minnesota -- the law of Minnesota keeps

1 nobody off the ballot. It's unlike all of the statutes
2 that this Court has struck down in this area. It doesn't
3 keep anybody --

4 QUESTION: What case of ours is closest to
5 supporting your view, do you think?

6 MR. SLOWES: Your Honor, we think that --

7 QUESTION: Is it Storer, or what?

8 MR. SLOWES: Yes, Your Honor. We think that
9 Storer is -- supports us. In Storer, the Court upheld
10 California disaffiliation statutes that prevented two
11 independent -- two former Democratic Party members from
12 running for Congress as independent candidates.

13 The suit was brought not just by those potential
14 candidates, but by some of their supporters. The
15 disaffiliation statute upheld in Storer was far more
16 restrictive of supporters' rights, of parties' rights,
17 because it eliminated a much huger pool of candidates than
18 does a fusion ban, and yet the Court upheld it.

19 And in fact, Your Honor, in Anderson --

20 QUESTION: But for a limited amount of time. I
21 remember you had to -- when you change, disaffiliate from
22 one, it's a waiting period. It's a time period, the
23 disqualification. You can become qualified again. This
24 is a rule that operates forever, no more than one party
25 per candidate.

1 MR. SLOWES: The disaffiliation requirement in
2 California was 12 months before the primary, so somebody
3 had to disaffiliate, I believe it was, something like 17
4 months before the general election. It was quite a long
5 time.

6 But there's another difference that makes the
7 Storer case even more of a restriction than this, in that
8 it not only had a much broader range of candidates who
9 were excluded, but they were totally excluded from the
10 ballot.

11 QUESTION: But it had a quite different
12 justification, too.

13 MR. SLOWES: It had a justification of
14 preserving the stability of the party system and the
15 electoral system, and that's some of the justification for
16 this statute.

17 I kind of haven't been able to get through them,
18 but that's certainly one of the interests that Minnesota
19 is interested in, and that is avoiding the excessive
20 factionalism that the Court found was problematic in a
21 case like Storer.

22 QUESTION: Why isn't the answer to that, or at
23 least part of the way to an answer, that the major party
24 consents to this, so you don't have the factionalism that
25 you have when -- in the -- what has been called the sore

1 loser statute that was involved in Storer.

2 Here, if the major party says no go, then
3 there's nothing -- nothing the minor party can do.

4 MR. SLOWES: Justice Ginsburg, in Storer, where
5 the same answer could have been that if we just do a
6 consent requirement then that will avoid splintering, the
7 Court, facing a statute that was much more restrictive
8 than Minnesota's, didn't require narrow tailoring. The
9 dissent by Justice Brennan suggested that there were
10 things that could have been done to the California statute
11 to tailor it more narrowly. Shorten the disaffiliation
12 period. Apply it only to sore losers.

13 QUESTION: The Minnesota statute doesn't
14 presently require the consent of the DFL party for this.
15 It just requires the consent of the candidate?

16 MR. SLOWES: Well, the Minnesota statute doesn't
17 permit it, Your Honor, even with the --

18 QUESTION: That's right, yes. Yes, okay.

19 MR. SLOWES: While the disaffiliation statute in
20 Storer also didn't permit a candidate to run, there was
21 obviously candidate consent because the candidate --

22 QUESTION: Did the respondent in this case
23 obtain the permission of the DFL party?

24 MR. SLOWES: No, Your Honor, and there's nothing
25 in the record to suggest that they attempted to obtain

1 that permission. They did obtain the permission --

2 QUESTION: Of the candidate.

3 MR. SLOWES: -- of Candidate Dawkins, and that
4 is in the record.

5 There's nothing in the record about any attempts
6 to get DFL permission, or whether the DFL gave permission
7 and, indeed, there has been much made about the fact that
8 the DFL did not object, but, of course, the law prohibited
9 this, so there was no reason for the DFL to object.

10 Again, getting back to the interests of the
11 State, what we have here is we have issues of confusion,
12 and while the Eighth Circuit -- and Justice O'Connor, you
13 suggest that they can use instructions, but we think that
14 part of the reality of voting is that first of all not all
15 voters are as comfortable as everybody might be with a
16 lengthy written ballot with detailed instructions. That's
17 just the reality of it.

18 I don't want to get into Justice Scalia's debate
19 about whether New Yorkers are smarter than Minnesotans --

20 QUESTION: For the record, I was being
21 facetious.

22 (Laughter.)

23 QUESTION: -- running for election anywhere,
24 but even so --

25 MR. SLOWES: But that is the reality. The other

1 thing about it is that voters, a lot of voters don't have
2 a lot of time to spend in the voting booth. They may be
3 voting on their way to work, trying to get to work on
4 time. They may be voting on the way home, trying to pick
5 up the kids at day care, and they can't be standing there
6 with a long ballot reading the instructions.

7 QUESTION: Mr. Slowes, may I ask you a general
8 question, I think that goes to the weight that we should
9 give, or at least the weight that I should give to all of
10 the justifications that the State is raising here?

11 If we were deciding this case, I guess without
12 the benefit of history, I could listen to your arguments
13 and I would say, there's something plausible about them,
14 and the people who write election laws probably know a lot
15 more about voter behavior than I do, and I may not think
16 these are overwhelming justifications, perhaps. I mean,
17 they don't just hit me that hard, but I probably ought to
18 defer to people who know more about this subject than I
19 do.

20 The trouble that I have in giving any kind of
21 deference that way, however, is the history, and if I
22 understand the history correctly, the reason we've got
23 these antifusion laws in so many States was basically a
24 very widespread effort sometime ago simply to maintain the
25 relative hegemony of the two parties, the Republicans and

1 the Democrats.

2 They weren't worried about voter confusion.
3 They didn't want other parties, and is it unfair -- do you
4 think it's wrong for me in assessing the weight that I
5 should give to your justifications to bear that history in
6 mind, and perhaps to be skeptical that the reasons that
7 you very ably give are really the reasons that the
8 legislatures in these many States either gave in the first
9 place or maintain to this day for keeping their laws on
10 the books?

11 MR. SLOWES: Justice Souter, there are a number
12 of responses to that question. First of all, with
13 respect, yes, I think it is unfair for you to look back
14 that many years, particularly because this Court has said
15 in United States v. O'Brien and other cases that a
16 legitimate constitutional State statute will not be struck
17 down merely because there's some allegation of improper
18 motive.

19 And here, to compound that, the allegation of
20 improper motive is a) indirect -- there's nothing in the
21 record to suggest what the Minnesota legislature was
22 thinking or said about this statute. There's nothing in
23 the record that reflects what the Minnesota legislature --

24 QUESTION: Well, you wouldn't concede the major
25 point, would you, that there is something wrong about the

1 State establishing its electoral machinery in such fashion
2 as to facilitate and encourage a two-party system as
3 opposed to the kind of systems -- proportional voting, for
4 example. That alone favors a two-party system. Is there
5 anything wrong with that, so long as you don't ban third
6 parties?

7 MR. SLOWES: There is a balancing that has to be
8 done, Justice Scalia. We believe, and this Court has
9 recognized in some cases that, indeed, and that's part of
10 what was animating Storer in some sense, that the State
11 does have an interest, a generalized interest in
12 preserving, in a sense, political stability, and that --

13 QUESTION: Well, are you -- maybe I
14 misunderstood your argument. I didn't understand you to
15 be putting any weight on the, in effect the preservation
16 of a major two-party system as such, so I just didn't
17 think -- I mean, Justice Scalia has raised a good point,
18 but I didn't think it was the point that you were making.

19 MR. SLOWES: Your Honor, I didn't make that
20 point, and in honesty I don't make that point strongly. I
21 think that is -- I think that is --

22 QUESTION: I was just saying if that were the
23 value, it would not necessarily be unconstitutional, as I
24 thought you were conceding.

25 MR. SLOWES: Well, I'm sorry, Your Honor, I

1 would agree. I think that --

2 QUESTION: What am I supposed to do legally if I
3 think that's the whole point? That is, if I think, which
4 I'll -- if I think that the whole point to justify these
5 things is a two-party system and the democratic advantages
6 that that entails, weighed against a multiparty system and
7 the democratic advantages and disadvantages that that
8 entails, all right. Suppose I think that this represents
9 a judgment of the legislature to go in the two-party
10 direction as opposed to proportional representation.

11 But as you say, you're not putting any weight on
12 that, so should I simply say forget it and move on to the
13 arguments -- what am I supposed to do?

14 MR. SLOWES: I would say, Your Honor, that
15 States do have a permissible choice to be made there, as
16 long as they don't go so far as to close the door to minor
17 party --

18 QUESTION: How do I measure so far? I take it
19 the single member district is constitutional. I take it.
20 Maybe. I don't know. Is -- what about the first past the
21 post? What about the reforms Italy wants to make in order
22 to move in the two-party direction?

23 QUESTION: Or just winner take all.

24 QUESTION: What is the test?

25 QUESTION: I mean, winner take all.

1 MR. SLOWES: Our position is that the
2 disproportionate burden argument that the respondents are
3 making would really take you into all of those areas,
4 because they suggest that if there is an aspect of the
5 system that would be more beneficial to minor parties --
6 they say fusion is more beneficial to minor parties.
7 Therefore, by not permitting it you are impermissibly
8 burdening minor parties, and the same could certainly be
9 said for an absence of multimember districts or
10 proportional representation --

11 QUESTION: Of course.

12 MR. SLOWES: -- which would certainly help minor
13 parties. The same might be said about nonpartisan
14 ballots, which are had in many States. Minor parties --

15 QUESTION: So why don't you just say, so what?

16 MR. SLOWES: What it comes down to, Your Honors,
17 is that these are issues of political engineering. The
18 Court has not established a bright line test, Justice
19 Breyer, to say that we can tell where is so far. What it
20 has is the balancing test from Anderson. But if you look
21 at the landscape of the cases, where it has found that
22 States have gone too far, they have gone far beyond
23 anything that the Minnesota statute does.

24 QUESTION: But then why isn't the argument,
25 well, New York is not Italy, nor is it Fourth Republic

1 France, and this goes -- is not really a problem, and
2 therefore there really isn't a justification. Here it
3 goes too far.

4 MR. SLOWES: Because, Your Honor, it gets back
5 to the argument you just made a few minutes ago. New York
6 can make that judgment, that we think in our State this
7 kind of system can work, and we can have a workable,
8 stable political system. That should not dictate to the
9 other States that they adopt that same system as long as
10 the systems that they adopt do not establish formidable
11 barriers to minor party --

12 QUESTION: Yes, but if the justification's
13 strong enough, I don't know why they couldn't exclude
14 third parties altogether. It seems to me that's the
15 logical position to take, but the Court has said you
16 can't.

17 MR. SLOWES: The Court has said you can't, and
18 there may be --

19 QUESTION: Yes. Maybe that line of cases is
20 just wrong.

21 MR. SLOWES: There is a line that this Court --
22 again, it's not a bright line, but there is a line beyond
23 which the States cannot go in terms of preserving the
24 stability of the system. Williams v. Rhodes, and Anderson
25 v. Celebrezze. When -- thank you.

1 QUESTION: Thank you, Mr. Slowes.
2 Mr. Tribe, we'll hear from you.

3 ORAL ARGUMENT OF LAURENCE H. TRIBE
4 ON BEHALF OF THE RESPONDENT

5 MR. TRIBE: Thank you, Mr. Chief Justice, and
6 may it please the Court:

7 I don't think this case is about political
8 engineering. I suppose if we really had a case in which
9 it was demonstrated that we would become Italy or Fourth
10 Republic France unless we compromise the First Amendment
11 we would have a very much more apocalyptic picture, but I
12 think what's interesting is that in the argument that you
13 heard this morning you didn't hear very much about what
14 the State's brief says are the real reasons.

15 I think in answer to Justice Stevens'
16 question, if confusion isn't that big a problem -- and it
17 doesn't seem New Yorkers are all that confused and, with
18 respect, I guess they're not that much smarter than
19 Minnesotans -- if confusion isn't the problem --

20 QUESTION: Maybe New Yorkers like confusion.

21 (Laughter.)

22 MR. TRIBE: Well, that may be. That may be.
23 Either --

24 QUESTION: Just because --

25 MR. TRIBE: Just because --

1 QUESTION: -- New Yorkers like it, it doesn't
2 mean Minnesotans have to like it.

3 MR. TRIBE: That's right. Minnesotans might
4 like things to be more orderly.

5 What their brief does is talk about all kinds of
6 somewhat fuzzier values, values, they say, that are really
7 more important than the literal rights of association and
8 speech in the First Amendment.

9 They're basically saying -- and they say it in
10 their brief at pages 9, 12, 14, 16 to 18, 24, 44. The
11 repeated theme is that even if the ban on consensual
12 fusion literally abridges the right of people to get
13 together in a party and pick their standard bearer and get
14 him on the ballot even if he's already on the ballot, and
15 even if that's one of the rights that you would normally
16 have under the First Amendment, we have to ask whether
17 protecting those rights here would, in their language,
18 serve First Amendment values, and they say it wouldn't,
19 because -- here again I quote from their brief -- it
20 really wouldn't enrich political discussion with different
21 ideas unless new parties, and I quote, presented
22 candidates overlooked by the major parties.

23 In other words, new faces. That's what third
24 parties are good for, the subtext being that the major
25 parties really have covered the ideological waterfront

1 between them, and unless you're ready to come up with a
2 new face -- if it's just Dwight Eisenhower, or Earl
3 Warren, or here -- not to put him in the same company --
4 Andy Dawkins all over again, then what else is new?

5 We really think that we should orchestrate the
6 consensual alliances of citizens in political association
7 in such a way as to move things away from -- and again,
8 their brief complains about single issue campaigns. They
9 say there would be a tendency, and again I guess I heard
10 this again in the argument this morning, a tendency to end
11 up with various groups that would, heaven forbid, say they
12 were in favor of lower taxes, or some other single issue.

13 Well, you can have a view one way or the other
14 on whether that's --

15 QUESTION: There's some sense to that, isn't
16 there, Mr. Tribe? If a candidate is both DFL and then
17 gets behind small, third party, lower taxes party, tough
18 on crime, it makes the ballot into a form of really
19 communication, which in Burdick we said the State didn't
20 have to do.

21 MR. TRIBE: Well, Mr. Chief Justice, I think
22 that as a theoretical proposition, if there were a
23 demonstrable danger that the ballot would become a laundry
24 list of slogans, and if you could prove that that was at
25 all likely to happen, that it was more than some kind of

1 theoretical possibility, that that would be different.

2 But in Williams v. Rhodes the Court said that
3 theoretically imaginable dangers of multitudinous
4 fragmentary groups getting on the ballot aren't enough,
5 and that you can deal with that by making it less easy to
6 get on the ballot.

7 To deal with it in a slanted way, not by
8 neutrally raising the requirement but by saying you can
9 get on the ballot, it doesn't matter whether you do or do
10 not pass the threshold numerical limit, but what we don't
11 want you to do is be on the ballot if the person you favor
12 is the same one someone else has --

13 QUESTION: We've always --

14 QUESTION: How about California's prohibition
15 against cross-filing? If we rule for you here, does that
16 strike that down, too?

17 MR. TRIBE: Cross-filing by major parties?

18 QUESTION: Well, cross-filing by candidates. A
19 candidate filing in both the Republican, or seeking the
20 nomination of both the Republican and the Democratic
21 Parties.

22 MR. TRIBE: Well, it would depend, Mr. Chief
23 Justice, on whether you had a sore loser situation. That
24 is, I do think that the Court's decisions make it quite
25 clear that a State has the power, as in Storer, to protect

1 the integrity of both political parties and of various
2 routes to the ballot, and to do that --

3 QUESTION: But there's no sore loser at the
4 beginning of the primary.

5 QUESTION: Yes. There's no sore loser -- the
6 primary begins, he's on both ballots, and he wins both
7 ballots.

8 MR. TRIBE: Well, I think it would be a
9 different case, certainly, because the Court has said
10 among other things that you can limit individuals to a
11 single nominating act. It's a little like an
12 extrapolation from the one-person-one-vote rule. It's not
13 clear that people should be able to get lots of bites at
14 the same sort of preliminary apple.

15 That is, it may well be that as one of the rules
16 of the road a State could say that at the primary stage if
17 you're running for office through that particular avenue
18 you have to pick one primary or the other.

19 QUESTION: Why would that be justified and
20 Minnesota's rule here not be justified?

21 MR. TRIBE: Well, to be honest, Mr. Chief
22 Justice, I'm not sure that even that would be justified,
23 but if that would be, it would not be justified unless you
24 gave a veto power. That is, if you said that when both
25 parties are perfectly happy to have this happen, when

1 neither of them vetoes the simultaneous entry of a
2 candidate into both primaries, then the idea that the
3 State would simply be protecting parties from
4 fragmentation wouldn't justify it.

5 QUESTION: In an open primary system a party
6 can't veto a candidate. I mean, in most States if I want
7 to run for the nomination of the Socialist Party and they
8 have an open primary ballot the Socialist Party can't get
9 together and say, well, we don't want him. I have a right
10 to run, and if a majority favor me, I get nominated.

11 MR. TRIBE: Well, I think, Mr. Chief Justice,
12 that the State does not have an interest that would
13 suffice to prevent that. Where it's possible -- I mean,
14 if one said that what this does is pose the problem that
15 Storer involved, that is, a problem in which a political
16 party with its primary loses integrity and finality
17 because those who don't win can pick up their marbles and
18 go elsewhere, that problem can be solved.

19 But unless there's a general system whereby the
20 State can say only certain people are eligible to run in
21 our primary, and it might well be permissible for the
22 State to allow a party to have those rules, to have a rule
23 of this kind is not at all a neutral, politically neutral
24 regulation.

25 That is, it's one thing to have --

1 QUESTION: It's not possible to draw a
2 politically neutral electoral system, it seems to me.
3 You're always making judgments that are either going to
4 favor larger parties, are going to disfavor larger
5 parties, favor smaller, disfavor smaller -- I mean, the
6 mere decision whether to have party affiliation shown on
7 the ballot, for example, that's going to make a big
8 difference.

9 How can you -- why is it necessary for the State
10 to draw up a balloting system that does not disfavor small
11 parties? I think they can do it.

12 MR. TRIBE: Well, they certainly don't have --
13 Justice Scalia, I think they certainly don't have to go
14 out of their way affirmatively to handicap things to
15 benefit small parties, but what Minnesota has done is to
16 say that on the ballot not only may you but you must put
17 your party affiliation.

18 QUESTION: Well, Minnesota and probably 39 other
19 States.

20 MR. TRIBE: A great many say that.

21 QUESTION: Yes, so we're talking about a major
22 effect here.

23 MR. TRIBE: Well, there's no --

24 QUESTION: A ruling in your favor.

25 MR. TRIBE: That's right. There's no question,

1 Justice O'Connor, that there are a great many States that,
2 at the turn of the century, made this move, the political
3 historians seem to agree, in order to marginalize the
4 growing power of the minor parties, and in order to do
5 that --

6 QUESTION: Well, or some say to keep the
7 Republicans in office historically.

8 MR. TRIBE: Well, that would hardly be a better
9 justification constitutionally --

10 QUESTION: But that's --

11 MR. TRIBE: -- whatever one's politics. But the
12 main point is, no one has said, studying the situation,
13 that the reason was one of these plain vanilla reasons
14 like, some people like confusion and others don't, and
15 they should have a right not to be confused, or they can't
16 figure out how to use these ballots.

17 QUESTION: I think it's pretty plain vanilla to
18 say, I like a two-party system, and this fosters the two-
19 party system.

20 MR. TRIBE: Well, I think the Court has said
21 that you can't deliberately disadvantage some minor
22 parties.

23 QUESTION: That's exactly the point that's
24 bothering me, and I'm putting this a little more strongly
25 than I think, but I want to get your response to this.

1 There are a lot of rules deliberately
2 disadvantaging third and fourth and fifth parties -- first
3 past the post, single member districts. There are good
4 arguments for and against such things.

5 Proportional representation in many parties
6 allows parties to grow more quickly and is a better
7 representation of people's views.

8 On the other hand, two parties, which is a much
9 worse representation, and interferes with people's ability
10 to choose what they want, has the advantage that we know
11 whom to hold responsible for good or bad government.

12 Now, you, like I, have read both those positions
13 argued at depth, so where the Constitution is at stake,
14 how can we say that a State doesn't have the right to
15 choose between those two different views of democratic
16 representation?

17 And I know it's a matter of degree, but what I
18 keep coming back to is thinking this was a fairly marginal
19 method of giving the Republicans, if you like, or
20 Republicans and Democrats, an advantage as to the swing
21 voters who were somewhat indifferent, who would go and
22 look at the columns on the ballot and they'd see DFL here,
23 or they'd see New Party here, and if they saw New Party
24 with a popular candidate, they'd vote New Party all the
25 way down the line.

1 You see, that would help that party, and it
2 might better reflect views, but it would undermine the
3 kind of responsibility that the classic argument for a
4 two-party system democratically holds is important, so how
5 am I to judge that?

6 How can I say that the State has no right in
7 these kinds of things to decide either of those two models
8 that it believes is the more -- better democracy?

9 MR. TRIBE: Well, Justice Breyer, I think that I
10 would urge a distinction between the basic architecture of
11 the system, that is, the decision to have single member
12 rather than multimember districts, and having decided
13 that, therefore ruling out proportional representation
14 within the single member districts.

15 The decision of the basic design, when you said
16 that that was intended to have an effect on minor parties,
17 I think the evidence is that it was, as with most of these
18 things, multifarious in its intentions.

19 There are some people who think that the choice
20 of a single rather than multimember districts has a number
21 of positive effects on avoiding the submergence of certain
22 minority groups.

23 When all of those incommensurables are balanced
24 at the threshold designing the system in general,
25 deciding, for example, whether primaries or petitions are

1 to be used as a way of getting on the ballot, deciding
2 where to draw district lines, at that point, as I think
3 Justice O'Connor said in Vandemer, it would be very hard
4 to have justiciable standards for assessing what the State
5 is doing.

6 Once the building has been designed, once the
7 basic architecture is set, once you have the time, place,
8 and manner regulations, the fundamental architecture,
9 then, if you take aim at the content of political
10 alliances, when you tell two parties within this system
11 you can get together about other things, you can have a
12 mutual nonaggression pact, neither of you will run against
13 the other, you could pool your resources -- in 1944 --

14 QUESTION: Why does that make any difference?
15 It's sort of like saying you can paint the whole building
16 green but you can't paint the window frets green.

17 It's okay in the most fundamental design of the
18 system, in those aspects that have the most impact, to act
19 out of two-party system motivation, but it's -- in the
20 details of it, oh, no, you cannot act out of a two-party
21 system moti -- that makes no sense at all.

22 MR. TRIBE: I think, Justice Scalia, with all
23 respect it's less a matter of, you could paint the big
24 picture, we won't touch you, but you can't paint the
25 little dots. It's more a matter of, you can design the

1 overall framework, and we're not going to second-guess the
2 kind of republican form of government you create.

3 But then, when you have essentially content-
4 based rules, when you tell people you can nominate anybody
5 unless the person is popular enough that he might appeal
6 to another party, when you do that --

7 QUESTION: They haven't said that. They have
8 not said that. They can nominate whomever they want.
9 They have just said, look, if we are running the electoral
10 system, we decide whether parties will be shown or not.
11 You're using our advertising in the system.

12 You may nominate anybody you like and you may
13 advertise it in the paper. The New Party backs so-and-
14 so.

15 MR. TRIBE: In --

16 QUESTION: But on the ballot, he will not be
17 shown under your party. You can still support --

18 MR. TRIBE: But look, Justice --

19 QUESTION: -- whoever you want.

20 MR. TRIBE: Justice Scalia, look what that does.
21 It tells the voters, the members of the New Party, that
22 when they go into the voting booth -- let's suppose the
23 New Party decides Mr. Dawkins is the one they want to
24 endorse. They spend money on him, and under the laws of
25 the State they can -- within 100 feet of the polls they

1 can put up signs saying, we believe in Andy Dawkins.

2 But they don't want to give up the right to have
3 someone on the ballot, so they nominate John Smith, and
4 John Smith is on the ballot, and the voters of the New
5 Party have essentially the choice that members of minor
6 parties have been relegated to in 40 States since the
7 19 -- the early 1900's.

8 They go into the ballot box, and they can either
9 waive their right to vote altogether and give it up, or
10 they can vote for John Smith, whom they and their party
11 doesn't really believe in, or they can vote for Dawkins,
12 and they're told that that would be a good thing to do,
13 but then -- then the other party gets credit.

14 QUESTION: And it has very successfully
15 preserved the two-party system in those States that have
16 it, whereas in States like New York it has become a three-
17 party system. Now, must a State decide that it wants the
18 one rather than the other?

19 MR. TRIBE: Well, I think that it's clear a
20 State cannot simply forced herd everybody onto the left or
21 right side of the road in terms of political association,
22 and Minnesota doesn't. It says, you can join together in
23 this party, but at the price of either wasting your vote,
24 waiving --

25 QUESTION: Well, at bottom the key First

1 Amendment interest is being able to vote for who you want
2 to on a general election ballot. There is a right in
3 Minnesota very easily to get someone on the general ballot
4 if you're a minor party. That's not difficult, and at the
5 general election ballot at least all the members of this
6 party can vote for the candidate they truly support.

7 MR. TRIBE: Only at this price, Justice
8 O'Connor. If they vote for Dawkins, and assume for the
9 moment as in many of the cases it's a Statewide candidacy,
10 when they vote for Dawkins they strengthen a party they
11 strongly, or perhaps somewhat disagree with. They also
12 entitle it to public funds because those votes are counted
13 on the DFL line.

14 QUESTION: That's right.

15 MR. TRIBE: And it seems to me that given what
16 this Court said in Burdick, precisely that voting is not
17 simply an exercise in blowing off steam, to be told that
18 the power --

19 QUESTION: Well, but we've also said there is no
20 right to express something --

21 MR. TRIBE: That's --

22 QUESTION: -- in the ballot.

23 MR. TRIBE: And I'm not urging that right.

24 QUESTION: And there's no right of expression
25 there, and this verges closely on that. We want to show

1 we have nominated this same person.

2 MR. TRIBE: Look, Justice O'Connor, first

3 QUESTION: Yes.

4 QUESTION: -- it is only -- it would only be a
5 holding as broad as that of the Eighth Circuit, which we
6 do urge but which we would not require for an affirmance
7 of the judgment, that would lead to that conclusion,
8 because that would be a holding that says, not only do you
9 have a right to consensual fusion, but a right to a
10 separate ballot line or column for the party --

11 QUESTION: Well, but unless you have that, a
12 large part of your argument vanishes.

13 MR. TRIBE: Well, part. I don't think --

14 QUESTION: Because that's the whole point of
15 allowing each party to have a specific issue. That's
16 completely lost if you aggregate.

17 MR. TRIBE: Well, no. Justice Kennedy, what
18 isn't lost is the point you made in dissent in Burdick, I
19 think, but it is really a point that the whole Court, I
20 suspect, agreed with in that context, and that is, you're
21 not at least required -- even if you don't have
22 disaggregation you're not required in casting a vote to
23 help exercise power, not just expression, in a direction
24 that's opposed to your views.

25 That is, the votes that members of the New Party

1 are permitted to cast for someone on the DFL party line
2 are votes that increase the money, the public money that
3 goes to the DFL later and that helps earn and retain major
4 party status for it.

5 There's a write-in provision, and this is quite
6 intriguing, I think. There is a write-in provision in
7 the --

8 QUESTION: Doesn't that just boil down -- what
9 you just said, does that not merely boil down to the fact
10 that the New Party can -- is entitled to have a candidate
11 but is not entitled to have any particular candidate?

12 MR. TRIBE: Well, if the candidate were somehow
13 unqualified, which is not argued here, were it not
14 objectively eligible --

15 QUESTION: This is one of the qualifications,
16 that you not be the candidate of another party.

17 MR. TRIBE: But that --

18 QUESTION: Pick a party. You can be a candidate
19 of any party. If you're a candidate of some other party,
20 the New Party can pick all the rest of the candidates in
21 the world, but not you.

22 MR. TRIBE: Well, I suppose when you're dealing
23 with someone who from this Court's perspective might be
24 rather anonymous, Dawkins, it might not seem like such a
25 terrible thing. I don't know Mr. Dawkins.

1 But if it were Earl Warren, or Dwight
2 Eisenhower, or Colin Powell, to tell someone, oh, you can
3 pick anyone, just not that one, why, because the other
4 party --

5 QUESTION: They can vote for him. But they all
6 can vote for him. We know why they want Mr. Dawkins. I
7 suppose the reason the smaller party wants him is he'll
8 attract support. He'll attract money. He'll attract a
9 lot of things that help the party.

10 MR. TRIBE: And he shares many of their values.

11 QUESTION: Of course. Oh, yes -- oh, that's
12 certainly true. So of course to stop that is to interfere
13 with the ability of these people to build their party.

14 And then what bothers me is the other side
15 saying, of course. You're right. That's the reason we
16 want this law.

17 MR. TRIBE: Of course, they haven't --

18 QUESTION: And now, of course, they can't go --

19 MR. TRIBE: They haven't said that.

20 QUESTION: Well, all right. That's a
21 separate --

22 MR. TRIBE: Well, it does matter, doesn't it --

23 QUESTION: That's what I imagine that -- and of
24 course this isn't going so far, anywhere near as far as to
25 ban a third party. It doesn't go nearly as far as the

1 single member district. It doesn't go nearly as far as
2 first past the post. There are many greater inhibitions
3 than this one.

4 So what I'm looking for is, what's the
5 touchstone to decide here whether this interference goes
6 too far in light of the objective?

7 MR. TRIBE: I think the touchstone, Justice
8 Breyer, is that this tells people what the substance of
9 their consensual political alliance may be. The
10 substance.

11 It may be that it doesn't matter a great deal
12 that somebody that the substance focuses on one person,
13 but it says, you can't organize your associational
14 interests across party lines around an individual. It
15 would be very much like saying you can't have -- you can
16 have a party --

17 QUESTION: You can do that. You just can't get
18 on a separate ballot line. You can organize your
19 interests all you want to until you get to the voting
20 booth.

21 MR. TRIBE: Well, just -- Mr. Chief Justice, I
22 think your question and Justice Scalia's suggest to me a
23 considerable difference between a State that says, all we
24 care about is who gets elected. We're not going to have a
25 party identification. In that case, the difference

1 between the ability to endorse and the ability to nominate
2 vanishes. You're all on the same playing field arguing
3 about who you want.

4 But that is not this case, and it's very
5 important to draw a distinction. In this case, the State
6 says in its ballot laws that next to each candidate's name
7 must be either the word independent, or a party name or
8 principle of three words or less, and that people can
9 write in for someone but they cannot write in the name of
10 someone who's already there.

11 So that there is a specific rule that says even
12 though we've designed our ballot in such a way that you
13 can indicate who you want even if that person hasn't been
14 nominated, you can't indicate who you want if it happens
15 to be the nominee of another party.

16 It is a targeted way, not of saying the purpose
17 of our ballots is not to serve as billboards. It's to
18 exercise power. That the Court said in Burdick is fine.
19 It's a way of saying, we are designing the system, we're
20 engineering it in such a way as to preclude agreement
21 among people of a certain kind expressed not through some
22 use of the ballot that the State hasn't already
23 legitimated, but through the standard use of the ballot,
24 so that it in effect is a targeted way of shaping the
25 kinds of consensual alliances people can have.

1 If someone said --

2 QUESTION: I presume that your argument would
3 also extend to the write-in prohibition, that if we found
4 for you in this case we would also say that the State
5 could not prevent you from writing in the Democratic
6 candidate.

7 MR. TRIBE: Well, I --

8 QUESTION: You want this guy to win, but you
9 don't want anybody to think that you're voting
10 Democratic --

11 MR. TRIBE: I think --

12 QUESTION: -- and so you write in his name
13 separately.

14 MR. TRIBE: Justice Scalia, I think that after
15 Burdick I would certainly argue that you could eliminate
16 all write-ins, but if you allow write-ins, you can't tell
17 people that the name you write must be a name not
18 otherwise on the ballot.

19 QUESTION: So -- but that isn't involved here,
20 is it?

21 MR. TRIBE: No, it -- it is the Minnesota law,
22 but that's not --

23 QUESTION: We --

24 MR. TRIBE: That just shows how the law
25 operates, I think.

1 QUESTION: But your principle would involve
2 that.

3 QUESTION: If we were to rule for you, it would
4 result in quite sweeping changes, and in a lot of States.

5 MR. TRIBE: Well, most people actually suggest
6 that it would be far more marginal than the plaintiffs in
7 this case anticipated, mostly because the benefits of a
8 third party nomination are often going to be somewhat
9 dubious, and so --

10 QUESTION: Mr. Tribe --

11 QUESTION: But this goes to write-ins, too,
12 which isn't a third party.

13 In other words, if you have to allow people to
14 write in someone who's already on the ballot, you're
15 creating a great deal of additional problems in counting
16 the ballot.

17 MR. TRIBE: Mr. Chief Justice, I don't think
18 someone -- if Mr. Dawkins, after a favorable decision, if
19 there were one in a case like this, if he were on the
20 ballot already in a way that would allow a voter to
21 indicate upon choosing him whether the voter is voting for
22 him as a member of the DFL or as a member of the New
23 Party, that there would also be an additional right to
24 say, oh, I don't want to vote for him as a member of the
25 New Party. Up top, I want to write that in.

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1 QUESTION: But if we're breaking down all these
2 nuances, certainly that would be absolutely permissible.
3 Maybe there wouldn't be many of them, but you couldn't say
4 no, I don't think.

5 MR. TRIBE: No, I don't think, Mr. Chief
6 Justice, that it would follow from the right we're talking
7 about that you would have a right --

8 QUESTION: Why isn't the right not to be counted
9 for a party just as important as the right to be counted
10 for a party, which is what you're arguing for here? I
11 think the right not to be counted --

12 MR. TRIBE: Well, I --

13 QUESTION: -- as a member of that party is just
14 as important.

15 MR. TRIBE: You know, I think -- I don't want to
16 just do a 90-degree turn, but I think you're right,
17 Justice Scalia. I think the fact is that if -- if there
18 is a write-in mechanism the State has -- they don't have
19 to have one, but if they have one, I don't think they can
20 tell you that you better write a name that isn't already
21 there, and I don't think that would go away even if we
22 prevail.

23 QUESTION: Mr. Tribe, in California, some
24 ballots have over 200 items to mark. If you had a State
25 like Minnesota, or a system like Minnesota where only 500

1 people are required to petition for a party, I think there
2 is a very, very real danger of confusion which just could
3 bog the process down completely.

4 MR. TRIBE: Well, in California, Justice
5 Kennedy, they disallow fusion and they still have these
6 terribly long ballots. I don't know that there's any
7 reason at all, given the history, to believe that
8 confusion would be enhanced by fusion.

9 And in particular, when Justice Souter asked
10 about the history, I think that should tell us a good bit.
11 Not just why were these things enacted, but where is the
12 evidence that in all the years prior to about 1905, that
13 hundreds of fusion candidacies existed, and the evidence
14 in New York up to the present that either the stability of
15 the political system has been seriously injured, or that
16 people have been obvious -- you know, utterly confused
17 about what to do --

18 QUESTION: Mr. Tribe, what about judges --

19 QUESTION: I'll check the history, but it does
20 seem to me that in those times they did not have
21 initiative, they did not have referendum, they did not
22 have the ability of many citizens to make arguments
23 directly to the public via television and radio.

24 MR. TRIBE: Well, I think, Justice Kennedy, that
25 dealing with a problem of unduly long ballots by

1 techniques that are not at least facially neutral, that
2 don't say, well, let's up it from 500 to 1,500, dealing
3 with it by saying we will allow some kinds of political
4 coalitions and not others, we will allow people to have
5 planks in common in their party platforms, words in common
6 in their party names, but we won't allow them to coalesce
7 around a mutually acceptable candidate, it seems to me not
8 a constitutional --

9 QUESTION: Is it done -- with respect to judges,
10 is the States that generally have no fusion, it's not
11 uncommon to have the same good judge the choice of two,
12 maybe three parties. Do you know how that works in States
13 that have general no fusion laws?

14 MR. TRIBE: With non -- in the election for
15 nonpartisan offices it is often the case that several
16 parties nominate or endorse, but it's often, and typically
17 the case with judges, that no party label is attached to
18 the judge's name in those States, and that is a possible
19 solution.

20 That is, if one agreed with the position that I
21 think Justice Scalia was in part suggesting, that the
22 point of the ballot isn't necessarily to get information
23 about which party, then there is a solution that's
24 neutral. It perhaps isn't the less restrictive
25 alternative, but it's certainly less targeted against

1 minor parties, and that's to say, no party label on the
2 ballot. Anybody can endorse anyone they want.

3 In Tashjian, both the majority and the dissent
4 assumed that that was a paradigmatic exercise of First
5 Amendment rights.

6 Here, we move from endorsement to nomination,
7 but the only difference is that nomination in a State that
8 does put the party name on the ballot counts for a great
9 many things, and to insist that it not count in precisely
10 those cases when otherwise disparate groups that are not
11 so far from the main stream that they are satisfied to
12 nominate protest candidates coalesce around a nominee, to
13 suggest that that's the one case where it's not
14 permissible --

15 QUESTION: Well, that's a real problem in cases
16 where two candidates have virtually the same name. Talk
17 about voter confusion --

18 MR. TRIBE: I suppose that --

19 QUESTION: -- and we've seen that recently in
20 Northern Virginia. It would be pretty disastrous to have
21 two people with the same name and no party designation.

22 MR. TRIBE: I suppose you might have to solve it
23 in some other way. In Texas there were two Morales
24 running recently.

25 I think it is -- it suggests that the problem of

1 confusion, if it is one, is a problem that is not
2 plausibly correlated to the idea of fusion candidacies.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Tribe.

4 MR. TRIBE: Thank you.

5 CHIEF JUSTICE REHNQUIST: The case is submitted.

6 (Whereupon, at 12:04 p.m., the case in the
7 above-entitled matter was submitted.)

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Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

MICHELE L. TIMMONS, ACTING DIRECTOR, RAMSEY COUNTY DEPARTMENT OF PROPERTY RECORDS AND REVENUE, ET AL., Petitioners v. TWIN CITIES AREA NEW PARTY

CASE NO. 95-1608

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)