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## The Oregon Constitution and the Quest for Party Reform

Discontent over the character of elections and what many feel has been unnecessary conflict in the state legislature has led to repeated calls in recent years for political reform in Oregon. To many of those who call for change, the political parties are to blame for much of the state government's woes. The problem, as these reformers see it, is that the rules governing party nominations and general elections limit choice on the ballot, keep voters from participating in elections, produce election outcomes that do not capture public sentiment, and encourage unhealthy partisan conflict in government that has made it difficult for the state to address pressing policy matters. In general, two main types of reforms have been offered to overcome these problems. On the one hand, some reformers in Oregon have called for reducing the involvement of political parties in elections and government by either opening primary elections to nonparty members or by making elections entirely nonpartisan. On the other hand, some reformers advocate for changing the election rules in ways that would help enhance the position of third parties in the state.

The disillusionment that Oregon residents have toward political parties and the desire for reform is not new. During the Progressive Movement in the early 1900s, Oregon often led the nation in championing constitutional and statutory reforms that were designed

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to reign in the power of political parties.<sup>1</sup> These reforms include the direct primary, the initiative process and referenda, and the direct election of U.S. senators.<sup>2</sup> Other reform efforts followed. In 1931, the Legislative Assembly passed legislation making the state judiciary nonpartisan.<sup>3</sup> Eight years later, the legislature made the office of Superintendent of Public Schools nonpartisan as well.<sup>4</sup> In 1994, Oregon enacted a strict campaign finance law, which would have severely limited the role of party money in elections if the law were not overturned by the Oregon Supreme Court in 1997.<sup>5</sup> In 1995, the Commissioner of Labor and Industries also became nonpartisan.<sup>6</sup>

Despite this long history of reform, Oregon residents have not always held such negative views of political parties. When Oregon was still a territory, and in the years following statehood, political parties were routinely considered to be essential elements of democratic government.<sup>7</sup> While there were some voices raised in support of nonpartisan politics, the parties were seen by most as providing an indispensable vehicle for allowing the public to influence the direction of government.<sup>8</sup> Even William U'Ren, the leader of the Progressive Movement in Oregon, did not see parties as inevitably being the cause of corrupt government.<sup>9</sup> Rather, he pushed

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<sup>1</sup> See ROBERT E. BURTON, *DEMOCRATS OF OREGON: THE PATTERN OF MINORITY POLITICS, 1900–1956*, at 21–22 (1970); GORDON B. DODDS, *OREGON: A BICENTENNIAL HISTORY 179–80* (1977).

<sup>2</sup> Warren Marion Blankenship, *Progressives and the Progressive Party in Oregon, 1906–1916*, at 1 (Aug. 1966) (unpublished Ph.D. dissertation, University of Oregon) (on file with Knight Library, University of Oregon); DODDS, *supra* note 1, at 169–70, 179–80.

<sup>3</sup> Am. Judicature Soc’y, *History of Reform Efforts: Oregon*, [http://www.judicialselection.us/judicial\\_selection/reform\\_efforts/formal\\_changes\\_since\\_inception.cfm?state=OR](http://www.judicialselection.us/judicial_selection/reform_efforts/formal_changes_since_inception.cfm?state=OR) (last visited May 9, 2009).

<sup>4</sup> OR. SEC’Y OF STATE, OREGON DEPARTMENT OF EDUCATION: ADMINISTRATIVE OVERVIEW 4 (2007), <http://arcweb.sos.state.or.us/recmgmt/sched/special/state/overview/20060017odeadov.pdf>.

<sup>5</sup> Steve Suo, *Court Tosses Campaign Limits*, OREGONIAN, Feb. 7, 1997, at A1.

<sup>6</sup> SECRETARY OF STATE, OREGON BLUE BOOK, LABOR AND INDUSTRIES COMMISSIONERS OF OREGON, <http://www.sos.state.or.us/bbook/state/elections/elections31.htm> (last visited May 9, 2009).

<sup>7</sup> See discussion *infra* Part I.A.

<sup>8</sup> See discussion *infra* Part I.A.

<sup>9</sup> W.S. U'Ren, *Remarks on Mr. Herbert Croly’s Paper on “State Political Reorganization,”* PROCEEDINGS OF THE AM. POL. SCI. ASS’N 138–39 (1912) (U'Ren championed the use of proportional representation to improve representation of different parties.); see also George H. Haynes, “*People’s Rule*” in Oregon, 1910, 26 POL. SCI. Q. 32, 39–40 (1911).

reforms that he thought would make the parties more representative of the public.<sup>10</sup>

Over time, however, a large share of Oregonians began to distrust political parties and see them as being harmful to the state's political process. Perhaps there is no better measure of how disillusioned many Oregon residents have become with the party system today than in the large number of residents that are registered to vote as "nonaffiliated" or as members of third parties.<sup>11</sup> In 1968, just more than two percent of state voters were not registered as either Republican or Democrat.<sup>12</sup> As of 2008, more than twenty-four percent of voters were registered as nonaffiliated or with a third party.<sup>13</sup>

Given the long concern for party reform in Oregon, the anniversary of the state constitution presents an appropriate time to reflect on the position of political parties in the state's history and the potential impact of these recent reform proposals. The purpose of this Article is to provide that reflection. The primary argument I make is that while the legislature has seen considerable partisan conflict over the past several years, the current reform proposals should be approached with caution. Drawing from past political science research, I explain how each of the current reform proposals will have some undesirable consequences if adopted, and why the costs of these consequences are likely to exceed the benefits that the reform may bring.

This Article is divided into two main sections. In Part I, I provide a history of political parties in Oregon, describing their importance from before statehood to the present. This section explains how the role of political parties has changed over time and why party reform has come to look so appealing. In Part II, I examine three reform proposals that have been discussed in Oregon over the past several years: a nonpartisan legislature, the top-two primary, and fusion voting. I conclude by discussing other factors underlying Oregon's political problems and some alternative solutions.

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<sup>10</sup> U'Ren, *supra* note 9, at 138–39.

<sup>11</sup> OR. SECRETARY OF STATE, STATISTICAL SUMMARY: 2008 GENERAL ELECTION, <http://www.sos.state.or.us/elections/nov42008/g08stats> (last visited May 9, 2009) [hereinafter STATISTICAL SUMMARY].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

## I

## A HISTORY OF POLITICAL PARTIES IN OREGON

When Oregon joined the nation on Valentine's Day in 1859, political parties had already become embedded in Oregon politics.<sup>14</sup> The founding of the state occurred during the heyday of what is called the "Party Period" in American history.<sup>15</sup> It was a time in the nation's history in which parties dominated almost every aspect of American politics. Thus, when Oregon was founded, it is not surprising that the Democratic and Republican Parties had already been established. The parties were so important in Oregon's early history, in fact, that they played a central role both in moving the territory to statehood and in writing the constitution that still governs the state today.<sup>16</sup> In the latter part of the nineteenth century, however, the corruption of the political machines that dominated Oregon politics helped spawn a populist revolt in the state, one that led to major reforms in the role and influence of parties.<sup>17</sup> While there was a long period in the twentieth century in which party reform moved off the political agenda, growing partisan conflict has helped make reform a major issue again today.<sup>18</sup> In many ways, the recent reform effort reflects the state's populist roots, which are distrustful of political parties. The effort is also, however, an outgrowth of the public's unhappiness with the legislature's performance in recent years.<sup>19</sup> To evaluate the current reform proposals, it is helpful to begin by understanding the history of party politics in Oregon and the reasons why many residents see party reform as being necessary today.

*A. The Development of the Party System*

The first party organizations emerged in Oregon in the early 1850s.<sup>20</sup> During the 1851–52 session of the territorial legislature, the

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<sup>14</sup> DODDS, *supra* note 1, at 102.

<sup>15</sup> Ronald P. Formisano, *The "Party Period" Revisited*, 86 J. AM. HIST. 93, 93–120 (1999).

<sup>16</sup> See discussion *infra* Part I.B.

<sup>17</sup> See discussion *infra* Part I.C.

<sup>18</sup> See discussion *infra* Part I.D.

<sup>19</sup> *Id.*

<sup>20</sup> Some historians refer to parties in Oregon in the 1840s, including the Mission, Independent, and American Parties. Walter Woodward writes that there was little organization to these parties. Thus, he identifies parties as emerging in the 1850s. See

Democratic members of the legislature met and passed a resolution calling for the organization of the Democratic Party in the Oregon Territory.<sup>21</sup> The legislators' resolution, and the prodding of the *Oregon Statesman* newspaper, led to a series of Democratic county conventions across the territory.<sup>22</sup> By the end of 1852, the Democratic Party had become Oregon's first organized political party.<sup>23</sup>

The Democratic Party's success in the subsequent territorial election in 1853 helped spur other parties to form as well. Facing no organized opposition, the Democrats easily triumphed in the election, winning all the council races and all but four of the twenty-six lower-house seats.<sup>24</sup> The party's candidate for congressional delegate, General Joseph Lane, was also easily elected.<sup>25</sup> Beaten soundly, the supporters of the Whig Party recognized that they needed to organize in opposition, which they immediately began to do.<sup>26</sup> Thus by 1854, five years before the state was recognized, Oregon had become divided into two competing political parties.<sup>27</sup> Two years later, the Republican Party had its first organizing meeting in Albany and was soon on its way to replacing the Whigs as one of the two major parties in the state.<sup>28</sup>

Several different factors were important to the development of the party system in Oregon. Within the state, the big local issue that helped stimulate the creation of the parties was the debate on where to place the capital, in Salem or Oregon City.<sup>29</sup> According to Woodward, this debate helped establish "[t]he line of cleavage"

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WALTER CARLETON WOODWARD, *THE RISE AND EARLY HISTORY OF POLITICAL PARTIES IN OREGON: 1843–1868*, at 28–31, 38–39 (1913); *see also* DAVID ALAN JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890*, at 52–59 (1992).

<sup>21</sup> WOODWARD, *supra* note 20, at 50.

<sup>22</sup> DODDS, *supra* note 1, at 96; JOHNSON, *supra* note 20, at 53; WOODWARD, *supra* note 20, at 50.

<sup>23</sup> *See* WOODWARD, *supra* note 20, at 50–51.

<sup>24</sup> The territorial legislature consisted of two chambers: the council and a house of representatives. *Id.* at 57; Or. State Archives, Or. Sec'y of State, *Oregon Legislators and Staff Guide*, <http://arcweb.sos.state.or.us/legislative/histleg/territorial/1853reg.htm> (last visited Mar. 16, 2009).

<sup>25</sup> WOODWARD, *supra* note 20, at 57.

<sup>26</sup> *Id.* at 58.

<sup>27</sup> *Id.* at 58–62.

<sup>28</sup> *Id.* at 94; JOHNSON, *supra* note 20, at 58–61.

<sup>29</sup> WOODWARD, *supra* note 20, at 40.

between Whigs and Democrats, with the Whig party supporting Oregon City and the Democrats supporting Salem.<sup>30</sup> A second factor was a desire for increased federal patronage. By creating party organizations, many early territorial leaders recognized that Oregon would be better able to acquire aid from the national government, which was dominated by party politics.<sup>31</sup>

Yet it was more than just the debate over the capital's location and political opportunism that led to the creation of parties. Instead, many Oregon residents were drawn to parties because democracy was seen at the time as being unfathomable without such political organizations.<sup>32</sup> After the founding of the nation, American politics had been dominated by elite factions.<sup>33</sup> In the 1830s, however, the nation witnessed the rise of the first mass-based political parties, which would then dominate American politics for the next fifty-five years.<sup>34</sup> To most Americans, parties were essential to democracy. Silbey writes: "the United States had become a partisan nation organizationally, intellectually, and emotionally. The rituals of politics, its rhetoric, its institutions, and most of all, its commitments, were all partisan. Partisanship was the glue that held the political nation together . . . ."<sup>35</sup>

Oregon was not immune to the nation's strong attraction to party organization. Johnson writes that the early Democratic settlers to Oregon perceived of the party as "a way of life . . . that had its roots in local communities."<sup>36</sup> The importance of the party was so pervasive that membership "involved subsuming oneself into a like-minded political community."<sup>37</sup> Although there were some who called for nonpartisanship, they were a small minority in the state.<sup>38</sup> Moreover, as the Democratic Party grew more powerful, those who

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<sup>30</sup> See *id.*; JOHNSON, *supra* note 20, at 53–54.

<sup>31</sup> Dorothy O. Johansen, *A Tentative Appraisal of Territorial Government in Oregon*, 18 PAC. HIST. REV. 485, 491–92 (1949).

<sup>32</sup> See JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 1 (1991); Formisano, *supra* note 15, at 94.

<sup>33</sup> SILBEY, *supra* note 32, at 1.

<sup>34</sup> *Id.* at 1–2.

<sup>35</sup> *Id.* at 126.

<sup>36</sup> JOHNSON, *supra* note 20, at 57.

<sup>37</sup> *Id.* at 58.

<sup>38</sup> Johnson describes the opponents of Democrats, which included those who opposed parties, as being "isolated in a few locales." *Id.*

had advocated nonpartisanship recognized that they needed their own party organization to compete.<sup>39</sup>

### *B. The Dominance of the Political Party Machines*

The push for party reform today has been motivated in part by a belief that Oregon politics have become too partisan, which has made it difficult for the government to function. While Oregon politics have certainly become more partisan in recent years, the position of political parties in the state is different from how it was when Oregon entered the nation. From before statehood to the late 1800s, party machines ran Oregon politics.<sup>40</sup> What made the party machines different from what we see today is that the party organizations had absolute control over the nomination process, which gave them the ability to control the government.<sup>41</sup> The party organizations then used that control for their own personal gain, distributing the spoils of office among their supporters.<sup>42</sup> The party was hierarchical in structure, with a boss or bosses at the top directing the party's action.<sup>43</sup>

The first party machine to emerge in Oregon was the Salem Clique, a powerful Democratic organization that was led by Asahel Bush, the publisher of the *Oregon Statesman*.<sup>44</sup> The Salem Clique played a dominating role in Oregon politics from the early 1850s through the beginning of statehood.<sup>45</sup> What made Bush and the Clique successful was a network of supporters that was spread throughout the state.<sup>46</sup> This network enabled Bush to dominate the local and territorial conventions in which party nominees were selected.<sup>47</sup> Because state

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<sup>39</sup> See *id.* at 58–59; WOODWARD, *supra* note 20, at 58–60.

<sup>40</sup> Dodds writes that “[t]he most striking feature of state politics until the nineties was the alliance between business, especially the railroads, and government.” See DODDS, *supra* note 1, at 153.

<sup>41</sup> See JOHNSON, *supra* note 20, at 61; Joseph Gaston describes how later Republican machines relied on “packing of primaries, stuffing of ballot boxes, [and] packing of party conventions” to control the party and “monopolize its favors.” JOSEPH GASTON, 1 THE CENTENNIAL HISTORY OF OREGON, 1811–1912, at 654–55 (1912).

<sup>42</sup> See JOHNSON, *supra* note 20, at 61–62, 302.

<sup>43</sup> See DODDS, *supra* note 1, at 153; JOHNSON, *supra* note 20, at 302; WOODWARD, *supra* note 20, at 84.

<sup>44</sup> See JOHNSON, *supra* note 20, at 53–55; WOODWARD, *supra* note 20, at 80–85.

<sup>45</sup> Joe Bowersox, *Place, People, in OREGON POLITICS AND GOVERNMENT* 17, 23–24 (Richard A. Clucas, Mark Henkels & Brent S. Steel eds., 2005).

<sup>46</sup> See JOHNSON, *supra* note 20, at 61.

<sup>47</sup> See *id.*; WOODWARD, *supra* note 20, at 84–85.

voters were overwhelmingly Democrats, the Clique's handpicked candidates were easily elected.<sup>48</sup>

Woodward describes "[t]he rule of Bush and the Clique" as being "absolute and imperious," one in which dissent within the party was not tolerated.<sup>49</sup> Woodward writes that Bush and the Clique:

laid the plans and issued the orders. It was for the rank and file to obey. And obedience must be unquestioning. If a Democrat forgot this, he must be disciplined. If he persisted in his temerity the wrath of the Statesman was turned upon him and he was destroyed politically.<sup>50</sup>

Similarly, Johnson writes that the Clique retained the support of many Democrats because of its control over the spoils of office, including "a federal appointment, personal promotion, or legislative honors."<sup>51</sup>

The Salem Clique not only played a dominant role in Oregon government, but was also influential in pushing the territory toward statehood and in composing the Oregon Constitution. In the early 1850s, the Bush-led Democratic Party was the leading champion for statehood.<sup>52</sup> For three consecutive years in the 1850s, the Democratic Party placed a measure on the ballot for statehood.<sup>53</sup> Opposed by Whigs and the members of other parties, the statehood vote went down in defeat in each election because voters feared that statehood would increase costs.<sup>54</sup> The battle between the parties over statehood ended, however, when Congress passed the Kansas-Nebraska Bill on May 22, 1854.<sup>55</sup> The Act overturned the Northwest Ordinance and the Missouri Compromise and opened up the nation's territories to slavery.<sup>56</sup> Fearful that the Act might bring slavery to Oregon, the Whigs and other parties dropped their opposition.<sup>57</sup> No longer a

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<sup>48</sup> WOODWARD, *supra* note 20, at 86.

<sup>49</sup> *Id.* at 84.

<sup>50</sup> *Id.*

<sup>51</sup> JOHNSON, *supra* note 20, at 61.

<sup>52</sup> WOODWARD, *supra* note 20, at 78–79.

<sup>53</sup> *See id.* at 79; Charles Henry Carey, *Introduction to THE OREGON CONSTITUTION: AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857*, at 21–22 (Charles Henry Carey ed., 1926).

<sup>54</sup> *See* JOHNSON, *supra* note 20, at 65; WOODWARD, *supra* note 20, at 78–79.

<sup>55</sup> *See* Carey, *supra* note 53, at 22; WOODWARD, *supra* note 20, at 89–99.

<sup>56</sup> Carey, *supra* note 53, at 22; JOHNSON, *supra* note 20, at 63; WOODWARD, *supra* note 20, at 89–90.

<sup>57</sup> *See* Carey, *supra* note 53, at 22; *see also* JOHNSON, *supra* note 20, at 65; WOODWARD, *supra* note 20, at 89–100.



partisan issue, Oregon residents voted overwhelmingly to support a state constitutional convention.<sup>58</sup>

Although the Kansas-Nebraska Bill had ended partisan opposition to the constitutional convention, the convention itself was marked by partisan politics, with the forces loyal to Bush and the Clique controlling the process and the outcome. When the convention convened, the party machine made sure that only delegates who were loyal to the Salem Clique would be in positions of power at the convention, including convention president and committee chairs.<sup>59</sup> Although there were a few Democrats at the convention who had previously opposed the machine, most of them had agreed to support the machine's positions once the convention began.<sup>60</sup> As a result, the final vote on the constitution generally followed party lines.<sup>61</sup>

While the Salem Clique played a dominating role in territorial politics and the constitutional convention, its influence began to fade when the party became divided by internal conflict shortly after Oregon entered the nation.<sup>62</sup> In 1859, Democratic opponents to the machine were able to gain control of the party apparatus and removed the Clique from power.<sup>63</sup> But the Salem Clique's loss of power did not spell the end of party-dominated politics in Oregon. As the Democratic machine faded, it was replaced by other machines, the most prominent of which was a Republican Party machine that had close ties to the Portland law firm of John Mitchell and Joseph Dolph.<sup>64</sup> As the nineteenth century came to a close, however, the position of the machine was about to change as the state embarked on an effort to reform party organizations.

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<sup>58</sup> Carey, *supra* note 53, at 21; JOHNSON, *supra* note 20, at 65; WOODWARD, *supra* note 20, at 108.

<sup>59</sup> JOHNSON, *supra* note 20, at 69; WOODWARD, *supra* note 20, at 118–19.

<sup>60</sup> See Carey, *supra* note 53, at 35; WOODWARD, *supra* note 20, at 118–19.

<sup>61</sup> WOODWARD, *supra* note 20, at 118–19.

<sup>62</sup> *Id.* at 150–52; DOUGLAS HEIDER & DAVID DIETZ, LEGISLATIVE PERSPECTIVES: A 150-YEAR HISTORY OF THE OREGON LEGISLATURES FROM 1843 TO 1993, at 26–27 (1995).

<sup>63</sup> See WOODWARD, *supra* note 20, at 150–51.

<sup>64</sup> DODDS, *supra* note 1, at 153. Johnson discusses the machine of the 1870s led by La Fayette Grover, which had rebuilt the Democratic Party. See JOHNSON, *supra* note 20, at 299–302.

*C. The Progressive Movement and the Decline of Partisanship*

The quest for party reform in Oregon in the late 1800s grew out of the public's disillusionment with party machines and corrupt politics. Initially, the push for reform came from many farming communities, which had been facing severe economic problems but found no support from government.<sup>65</sup> In the 1890s, however, other segments of society joined in demanding change in the political system as part of the Progressive Movement, which was sweeping the state and the nation.<sup>66</sup> Beginning with the adoption of the initiative process in 1902, Oregon introduced a number of progressive reforms that severely impacted political parties, decimating the machines and changing the role of party organizations for decades to come.<sup>67</sup>

The central issue for many reformers was the close ties between the Republican Party and the business community, especially the transportation industry. Beginning in the early 1880s, the Republicans emerged as the majority party in the state, gaining control of the legislature and routinely capturing a majority of votes in presidential elections.<sup>68</sup> With the exception of the eight-year tenure of Democratic-Populist Sylvester Pennoyer, the Republicans also controlled the governor's office from 1882 until 1903.<sup>69</sup> The Republican Party machine that ran the state government was closely aligned with several transportation companies, including the Northern Pacific Railroad and the Oregon Railway and Navigation Company.<sup>70</sup> The party machine provided financial and other benefits to the business community, including helping the railroads and other supporters to gain millions of acres in public lands.<sup>71</sup> The businesses,

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<sup>65</sup> See DODDS, *supra* note 1, at 157–58; WILLIAM G. ROBBINS, OREGON: THIS STORIED LAND 76 (2005).

<sup>66</sup> DODDS, *supra* note 1, at 157–58.

<sup>67</sup> E.D. Dover, *Parties and Elections*, in OREGON POLITICS AND GOVERNMENT, *supra* note 45, at 47, 57–58; Lester G. Seligman provides an overview of how the progressive reforms had impacted party organizations by the 1950s. See Lester G. Seligman, *A Prefatory Study of Leadership Selection in Oregon*, 12 WES. POL. Q. 153, 153–56 (1959).

<sup>68</sup> DAVID PETERSON DEL MAR, OREGON'S PROMISE: AN INTERPRETIVE HISTORY 117 (2003).

<sup>69</sup> SECRETARY OF STATE, OREGON BLUE BOOK, GOVERNORS OF OREGON, <http://www.sos.state.or.us/bbook/state/elections/elections24.htm> (last visited May 9, 2009).

<sup>70</sup> DODDS, *supra* note 1, at 153.

<sup>71</sup> PETERSON DEL MAR, *supra* note 68, at 116.

in turn, made certain that the machine remained in power and even relied on voter fraud at times to ensure the machine's victory.<sup>72</sup>

As the farming economy declined in the late 1800s, Oregon farmers appealed to the legislature to regulate the transportation industry, which they felt was charging excessive rates and denying farmers a fair income.<sup>73</sup> The appeals had little effect on lawmakers.<sup>74</sup> Disillusioned with the corruption and lack of government responsiveness, the farmers joined together in a populist revolt against the government, one that sought to break down the power of the governing and business elite.<sup>75</sup> Despite the election of Pennoyer as governor, the farmers were unable to overturn the party machine or to displace the power of the transportation industry.<sup>76</sup>

In the 1890s, however, the desire for change spread to other segments of society, including workers, business owners, prohibitionists, women's rights activists, and many middle-class voters who had grown tired of the corruption.<sup>77</sup> These diverse groups joined together as part of the Progressive Movement in Oregon.<sup>78</sup> The most important Progressive reformer was William Simon U'Ren, a Wisconsin native who arrived in Oregon in 1889 and soon became the leading champion of reform.<sup>79</sup> Elected to the legislature in 1896, U'Ren was able to exploit a split in the machine's leadership to get the legislature to adopt a series of constitutional changes, including the introduction of the initiative and referendum.<sup>80</sup> The benefit of the initiative process was that it allowed the reformers to have an avenue to bring change without working through the machine-controlled legislature.<sup>81</sup> Through a series of statutory and constitutional initiatives, the Progressives enacted major reforms that altered the position of the political parties in Oregon.<sup>82</sup>

The Progressives successfully championed several different reforms that are considered to have reduced the power of political

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<sup>72</sup> DODDS, *supra* note 1, at 157.

<sup>73</sup> *See id.* at 157–58; ROBBINS, *supra* note 65, at 76.

<sup>74</sup> *See* DODDS, *supra* note 1, at 157–58.

<sup>75</sup> *See id.* at 156–61; ROBBINS, *supra* note 65, at 76–78.

<sup>76</sup> DODDS, *supra* note 1, at 157–61; PETERSON DEL MAR, *supra* note 68, at 120–21.

<sup>77</sup> DODDS, *supra* note 1, at 165.

<sup>78</sup> *Id.* at 161–66.

<sup>79</sup> *Id.* at 162.

<sup>80</sup> HEIDER & DIETZ, *supra* note 62, at 81–83.

<sup>81</sup> DODDS, *supra* note 1, at 168–69.

<sup>82</sup> Dover, *supra* note 67, at 60; Seligman, *supra* note 67, at 155–56.

parties. These include the initiative and referenda, the direct election of U.S. senators, and the use of nonpartisan elections for many local and statewide offices.<sup>83</sup> Yet none of these reforms were as important as the introduction of direct primary elections in 1904. Prior to the use of the direct primary, the party organizations selected candidates through local and statewide conventions.<sup>84</sup> Through their network of supporters, the party machines were able to ensure that the conventions placed the machine candidates on the ballot.<sup>85</sup> Because the voters faithfully supported their parties in the general election, the machine candidates were able to easily win office.<sup>86</sup> The machine then used the spoils of office to retain its network of supporters.<sup>87</sup> The introduction of the primary election was important because it removed the power of choosing nominees away from party organizations and gave it to voters. Unable to control the nomination process, machines could no longer control the government or the perquisites that came from elected office.<sup>88</sup> The result was the disappearance of the machines.<sup>89</sup>

The introduction of primary elections actually had a much broader impact than simply ending party machines. With the passage of the direct primary, party organizations became less relevant in state elections because it meant that candidates no longer needed to appeal to party leaders in order to become nominated. Instead, potential candidates could just reach out to voters. The result was the decline of party organizations and the emergence of what are called “candidate-centered campaigns.”<sup>90</sup> Candidate-centered campaigns are ones in which candidates develop their own personal issues, recruit their own advisors and staff, raise most of their own campaign finances, direct their own marketing efforts, and attempt to sell themselves directly to voters in both the primary and general

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<sup>83</sup> See DODDS, *supra* note 1, at 168–73; Seligman, *supra* note 67, at 155–56.

<sup>84</sup> Blankenship, *supra* note 2, at 10.

<sup>85</sup> Dover, *supra* note 67, at 60; Seligman, *supra* note 72, 155–56.

<sup>86</sup> WOODWARD, *supra* note 20, at 86–87.

<sup>87</sup> See JOHNSON, *supra* note 20, at 61–62, 302.

<sup>88</sup> L. SANDY MAISEL, AMERICAN POLITICAL PARTIES AND ELECTIONS: A VERY SHORT INTRODUCTION 43 (2007).

<sup>89</sup> SAMUEL J. ELDERSVELD & HANES WALTON, JR., POLITICAL PARTIES IN AMERICAN SOCIETY 104 (2d ed. 2000).

<sup>90</sup> Dover, *supra* note 67, at 60.

elections.<sup>91</sup> It wasn't until several decades later that the parties would reemerge as leading actors in Oregon politics.

*D. The New Partisan Conflict and Modern Reform Efforts*

The Progressive Movement died out at the start of the First World War, and with it, the clamor for reform became less prominent in Oregon politics. Although there were some important changes in state law over the next few decades that affected political parties, including the introduction of nonpartisan judicial elections in 1931, the role of political parties in the state was no longer a major political issue.<sup>92</sup> In the past few years, however, the demand for party reform has reemerged, leading to several proposals for restructuring the election system. What has triggered this new interest in reform?

There appears to be two main concerns motivating reformers. First, some reformers argue that the current election system is not doing a good job in representing state residents. One concern of these reformers is that the primary system produces legislators whose policy positions are not representative of district residents.<sup>93</sup> The problem with the primaries, reformers argue, is that the voters who participate tend to be more partisan than nonvoters, which produces winners who are more partisan than the general population.<sup>94</sup> Since many legislative districts in the state tend to be dominated by one party, whoever wins the majority party's primary will also win in the general election.<sup>95</sup> As a result, the election process produces victors

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<sup>91</sup> See MALCOLM E. JEWELL & SARAH M. MOREHOUSE, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* 2 (4th ed. 2001).

<sup>92</sup> Am. Judicature Soc'y, *supra* note 3. Most of the major political histories of the state do not talk about party reform efforts after the First World War. Rather, these histories emphasize a range of other issues as dominating Oregon politics over the next few decades, including the rise of the Ku Klux Klan, the debate over Prohibition, and problems created by the Great Depression. Looking at the changes that were transpiring in the state, Dodds writes that "the limits of progressive accomplishment had been reached in the state by 1912." DODDS, *supra* note 1, at 183. Burton also describes many of the political issues confronting the state from the end of the Progressive Movement to the 1950s. BURTON, *supra* note 1.

<sup>93</sup> See, e.g., Editorial, *Open Up Oregon's Elections*, OREGONIAN, Apr. 9, 2007, at B4 [hereinafter *Open Up*].

<sup>94</sup> See *id.*; Britten Chase, *Gronke, Keisling Square Off in Measure 65 Debate*, POLITICKEROR.COM, Oct. 10, 2008, <http://www.politicker.com/Oregon/19306/gronke-keisling-square-measure-65-debate>.

<sup>95</sup> A study by the League of Women Voters found that the final election results for twenty-eight state legislative races in 2008 were decided in the primary election. This figure considers solely those races in which one party did not run a candidate. It did not

who hold policy positions that are more extreme than the voters in their districts, which, in turn, helps create the partisan conflict in the legislature.

Another way in which elections are seen as producing unrepresentative results is that only registered party members are allowed to participate in a party's primary election.<sup>96</sup> Given the growing number of Oregon voters who are registered as nonaffiliated or for a third party, it means that a large number of Oregon voters are excluded from a key part of the election process. If districts are dominated by one party, the primary can determine the election. Thus, independent voters, or even those in a minority party, do not have a meaningful say in who is elected.<sup>97</sup>

Finally, some reformers believe that the current system does a poor job in providing representation because there is not enough choice in elections.<sup>98</sup> With only Democratic and Republican candidates likely to win office, supporters of other parties have no representation.<sup>99</sup>

The second main concern of modern reformers is that the Oregon Legislative Assembly has become so partisan that it is not able to function effectively. Some observers point at the 1993 session as the time in which the legislature became overly partisan.<sup>100</sup> In particular, they attribute the initial rise in partisanship to Larry Campbell's leadership as the Republican House Speaker during the conflict-filled 1993 session;<sup>101</sup> however, others maintain that the partisan divide began in the 1980s when the Democrats controlled the legislature.<sup>102</sup>

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consider those districts in which one party held a substantial advantage in registered voters. LEAGUE OF WOMEN VOTERS OF OR. EDUC. FUND, ELECTION METHODS: REVIEW OF ALTERNATIVES AND OREGON PROPOSALS 9 (2008) [hereinafter LEAGUE OF WOMEN VOTERS].

<sup>96</sup> Phil Keisling & Norma Paulus, *Reviving Oregon Elections: Let's Make Primaries Truly Open, Inclusive and Fair*, OREGONIAN, Apr. 13, 2008, at E1; see also *Open Up*, *supra* note 93.

<sup>97</sup> *Open Up*, *supra* note 93.

<sup>98</sup> Nena Baker, *Small Parties Want a Bigger Voice*, OREGONIAN, Sept. 28, 1997, at B2; see also Don McIntosh, *Party On: The New Working Families Party Promises to Shake Up Oregon Elections*, WILLAMETTE WEEK (Portland, Or.), July 19, 2006.

<sup>99</sup> See Baker, *supra* note 98; McIntosh, *supra* note 98.

<sup>100</sup> *Influential Citizens*, BULLETIN (Bend, Or.), Sept. 28, 2006, <http://www.bendbulletin.com/apps/pbcs.dll/article?AID=/20060928/NEWS0107/609280340>; Russell Sadler, *Our Childish Legislature*, BLUEOREGON.COM, Aug. 7, 2005, [http://www.blueoregon.com/2005/08/our\\_childish\\_le.html](http://www.blueoregon.com/2005/08/our_childish_le.html).

<sup>101</sup> *Influential Citizens*, *supra* note 100; Sadler, *supra* note 100.

<sup>102</sup> *Influential Citizens*, *supra* note 100; *Partisan Politics Commands the Stage*, OREGONIAN, July 25, 1993, at C1.

Another potential cause cited by reformers for the increased partisanship has been the renewed involvement of political parties in legislative-assembly elections. Beginning in the 1980s, the legislative party caucuses began to play a more important role in raising campaign funds and recruiting candidates than they had in years.<sup>103</sup> Since the 1980s, the parties have expanded their fundraising activities and the different types of campaign support they provide candidates.<sup>104</sup> As a result, the legislative parties play a central role in campaign politics today, recruiting and training candidates, raising campaign funds, and providing professional campaign advice.<sup>105</sup> In competitive races, the support of the caucus can be particularly important in helping candidates raise sufficient funds to compete and attain office.<sup>106</sup>

Although the parties clearly play a more active role in campaigns today, their involvement is different from the role of the party machines of the 1800s. Unlike in the 1800s, there is no single party boss who dictates nominations and public policy. While the modern parties play an important role in elections, they do not control the nomination process as did the machines. Even though the parties are involved in recruitment, the candidates still have to gain the support of voters in the primary election to become nominated. The party organizations do not usually formally take sides in primary battles; rather they leave it up to local voters to choose a nominee.<sup>107</sup> Although there are exceptions, the party organizations only begin championing specific candidates after the nomination process is over.<sup>108</sup> As a result, most election campaigns still have a very strong

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<sup>103</sup> See Sarah B. Ames, *Parties Pass Political Action Committees in Spending*, OREGONIAN, Nov. 4, 1988, at E6; Jeff Mapes, *Political Machine Hums Behind Legislative Races*, OREGONIAN, Nov. 1, 1998, at A1 [hereinafter *Political Machine*]; Jeff Mapes, *State Demos Try to Resolve Financing Flap*, OREGONIAN, Jan. 7, 1990, at B7 [hereinafter *State Demos*].

<sup>104</sup> Ames, *supra* note 103; *Political Machine*, *supra* note 103.

<sup>105</sup> See *Political Machine*, *supra* note 103.

<sup>106</sup> See *id.*

<sup>107</sup> See Jeffrey A. Karp & Susan A. Banducci, *Oregon*, in STATE PARTY PROFILES: A 50-STATE GUIDE TO DEVELOPMENT, ORGANIZATION, AND RESOURCES 265, 268–69 (Andrew M. Appleton & Daniel S. Ward eds., 1996); Sarah M. Morehouse & Malcolm E. Jewell, *The Future of Political Parties in the States*, in 37 THE BOOK OF THE STATES 331, 334–36 (2005); Jay Goodliffe & David B. Magleby, *Campaign Spending in Primary Elections in the U.S. House* (2000) (prepared for Midwest Political Science Association Annual Meeting, April 27–30, 2000, Chi., Ill.).

<sup>108</sup> This observation is based on conversations with individuals associated with Oregon political parties. To be more confident of this assessment, I analyzed the 2008

candidate-centered character, with the party organization providing a variety of services to the candidates to help them gain office.

Whatever the underlying cause of the partisan conflict, almost every legislative session since 1993 has received harsh reviews in the press.<sup>109</sup> The 1993 session was described by observers as being “atrocious” and “absolutely awful.”<sup>110</sup> The 1999 legislative session was considered by many to be among the most divisive in the state’s history. The session had been marked by an internal fight within the Republican Party and repeated conflict between the Republican-controlled legislature and the Democratic governor.<sup>111</sup> There was less conflict in the 2001 session, but the legislature was still stymied for a brief period of time when Republican and Democratic legislators squared off over redistricting legislation.<sup>112</sup> The battle over redistricting was so severe that Democratic House members walked out of the session, which in turn led the Republicans to hire process servers to force the Democrats back to work.<sup>113</sup> The 2003 session set a new record for length, as the legislature remained in session until August 27.<sup>114</sup> While there was clearly some partisan conflict during

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expenditures by the House Democratic and Republican caucus campaign committees (Future PAC and Promote Oregon PAC). These are the party committees that contribute to legislative candidates. Nearly ninety-five percent of Future PAC’s expenditures came considerably after the primary election. Similarly, more than eighty percent of Promote Oregon PAC’s expenditures were after the primaries. The expenditure data was accessed using ORESTAR, the state’s electronic campaign database. See Elections Div., Or. Sec’y of State, ORESTAR, <http://www.sos.state.or.us/elections> (last visited May 9, 2009).

<sup>109</sup> See *Lawmakers Buoyed by End to Legislative Gridlock*, OREGONIAN, May 5, 1993, at D1; Jeff Mapes, *Animal House Session Ending in Divisions, Turmoil*, OREGONIAN, June 10, 1995, at D1; Jeff Mapes, *Legislature Conducts Management Session*, OREGONIAN, July 6, 1997, at A1.

<sup>110</sup> *Partisan Politics Commands the Stage*, OREGONIAN, July 25, 1993, at C1.

<sup>111</sup> See Steve Law, *Political Bickering Produced a Messy, Productive Session*, STATESMAN JOURNAL, July 26, 1999, at 1F; James Mayer & Lisa Grace Lednicer, *Budget Cuts, Quiet Work May Define 71st Legislature*, OREGONIAN, Jan. 7, 2001, at A1.

<sup>112</sup> See Lisa Grace Lednicer & Dave Hogan, *After Five-Day Walkout, House Gets Back to Work*, OREGONIAN, July 1, 2001, at A1.

<sup>113</sup> *Id.*

<sup>114</sup> Harry Esteve, *Legislative Loose Ends Could Unravel Lawmakers’ Legacy*, OREGONIAN, Aug. 31, 2003, at A1; Harry Esteve & James Mayer, *Headache, Not Handshake, New Norm in Budget Deals*, OREGONIAN, Aug. 17, 2003, at A1; Editorial, *Moderates Point the Way*, OREGONIAN, Aug. 31, 2003, at F4 [hereinafter *Moderates*]; SECRETARY OF STATE, OREGON BLUE BOOK, CHRONOLOGY OF LEGISLATIVE SESSIONS IN OREGON, <http://www.sos.state.or.us/bbook/state/legis/legis17.htm> (last visited May 9, 2009).



the session,<sup>115</sup> the main causes of the late adjournment were the difficulties confronting the legislature in trying to fill an unexpected budget shortfall (a problem that forced the legislature to meet in five special sessions in 2002).<sup>116</sup> Moreover, many commentators praised the session for the leading role played by moderates.<sup>117</sup>

Despite the more moderate tone of the 2001 and 2003 sessions, many reformers had had enough of the partisan conflict and began to call for party reform.<sup>118</sup> Given the increased partisan rancor since the early 1990s, and the difficulty that the state has had in addressing some of its most pressing public policy concerns, it is understandable that many Oregonians are again looking to reform the party system. Before any reforms are adopted, however, there are two questions that legislators and voters need to consider. First, how likely are these reforms to solve the governing problems confronting the state? And second, what problems might the reforms create? I consider these questions in the following section.

## II

### EVALUATING MODERN PARTY REFORMS

When Oregon voters cast their ballots in the general election on November 4, 2008,<sup>119</sup> they were given the opportunity to restructure the partisan character of state elections. Ballot Measure 65 called for an alternative system of voting in which all the candidates for a given office would run in the same primary election, with the top two candidates going on to compete in the general election.<sup>120</sup> If passed, the measure would not have removed parties entirely from elections, but it promised voters that the top-two primary system would reduce partisanship and produce greater participation in elections.<sup>121</sup> Even though the proposal was defeated in the election,<sup>122</sup> the ballot

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<sup>115</sup> Esteve, *supra* note 114; Esteve & Mayer, *supra* note 114; *Moderates*, *supra* note 114.

<sup>116</sup> Esteve, *supra* note 114; Esteve & Mayer, *supra* note 114; *Moderates*, *supra* note 114.

<sup>117</sup> Esteve, *supra* note 114; Esteve & Mayer, *supra* note 114; *Moderates*, *supra* note 114.

<sup>118</sup> See discussion *infra* Part II.A.

<sup>119</sup> OFFICIAL VOTERS' PAMPHLET, OREGON GENERAL ELECTION, NOVEMBER 4, 2008, 132, available at <http://oregonvotes.org/nov42008/guide/pdf/vol1.pdf>.

<sup>120</sup> *Id.*

<sup>121</sup> See Chase, *supra* note 94; Keisling & Paulus, *supra* note 96.

<sup>122</sup> *How Oregon Voted*, OREGONIAN, Nov. 5, 2008, at A11.

measure represented the most successful attempt in recent years to reform the party system. Yet it is not the only proposal that has received serious attention among Oregonians. Since 2004, two other reforms have developed a base of dedicated supporters and attracted public support. One of the proposals calls for creating a nonpartisan legislature, while the other calls for allowing candidates to be nominated by more than one political party through what is called fusion voting.<sup>123</sup>

Despite the current wave of disillusionment with partisan politics, the state should be wary of these modern proposals to reform the party system. While some of the proposals may reduce partisanship or improve representation, they all are likely to create new problems, without fully solving the problems they are meant to address. In the sections that follow, I describe the different reform proposals, why they are promoted, and how they may impact state politics.

#### A. *Nonpartisan Elections*

The most extreme proposal to reduce the role of parties in Oregon politics is simply to ban parties from playing a formal role at all in elections. Since 2004, there have been several efforts to create a nonpartisan state legislature.<sup>124</sup> In 2004 and 2006, supporters circulated petitions for a statutory initiative to remove party labels from state legislative elections.<sup>125</sup> The proposals failed to make the ballot.<sup>126</sup> In 2005, State Senator Charlie Ringo introduced legislation that would have made the legislature and the four partisan executive offices in the state nonpartisan.<sup>127</sup> In addition, the Public

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<sup>123</sup> See discussion *infra* Parts II.A, II.C.

<sup>124</sup> Initiative Petition 129 (2004), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20040129..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20040129..LSCY..NONPARTISAN); Initiative Petition 4 (2006), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20060004..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20060004..LSCY..NONPARTISAN).

<sup>125</sup> Initiative Petition 129 (2004), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20040129..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20040129..LSCY..NONPARTISAN); Initiative Petition 4 (2006), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20060004..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20060004..LSCY..NONPARTISAN).

<sup>126</sup> Initiative Petition 129 (2004), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20040129..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20040129..LSCY..NONPARTISAN); Initiative Petition 4 (2006), available at [http://egov.sos.state.or.us/elec/web\\_irr\\_search.record\\_detail?p\\_reference=20060004..LSCY..NONPARTISAN](http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20060004..LSCY..NONPARTISAN).

<sup>127</sup> Jeff Mapes, *Oregon Lawmakers Push for Nonpartisan Legislature*, OREGONIAN, Feb 24, 2005, at C1. The four partisan executive positions in Oregon are governor, secretary of state, attorney general, and treasurer. Dover, *supra* note 67, at 57–58.

Commission on the Oregon Legislature recommended a nonpartisan legislature in 2006.<sup>128</sup>

These efforts called for changing the rules for legislative elections so that they correspond with the rules for state Commissioner of Labor and Industries, the Superintendent of Public Instruction, and most local government races.<sup>129</sup> Under these rules, there would still be a primary and general election.<sup>130</sup> However, rather than running in separate partisan races, all candidates would run in one primary campaign, with the top-two vote-getters advancing to the general election.<sup>131</sup> Party labels would not be allowed on the ballot in either election.<sup>132</sup>

The main goal of these proposals was to reduce the partisan conflict in the legislature and make public policy more reflective of the public's policy preferences.<sup>133</sup> But what effect would the introduction of a nonpartisan legislature have on Oregon politics? Would it reduce partisan conflict within the state legislature? Would it improve the quality of democracy? Some answers to these questions may be found by looking at research on electoral and legislative politics in Nebraska, which has the only nonpartisan legislature in the nation today, and Minnesota, which had a nonpartisan legislature from 1913 to 1973.<sup>134</sup> Moreover, the research on the multitude of nonpartisan local governments across the nation and on partisan legislatures provides additional insights into how the introduction of a nonpartisan legislature would affect Oregon

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<sup>128</sup> PUBLIC COMMISSION ON THE OREGON LEGISLATURE, A BLUEPRINT FOR A 21ST CENTURY LEGISLATURE: REPORT OF THE PUBLIC COMMISSION ON THE OREGON LEGISLATURE TO THE SEVENTY-FOURTH LEGISLATIVE ASSEMBLY 15 (2006), available at <http://www.leg.state.or.us/pcol> [hereinafter PUBLIC COMMISSION].

<sup>129</sup> See James Mayer, *Senate OKs Notion of Nonpartisan State Capitol*, OREGONIAN, May 21, 2005, at A1; Dover, *supra* note 67, at 57.

<sup>130</sup> S.B. 602, 73rd Or. Legis. Ass'y, Reg. Sess. (2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb0600.dir/sb0602.intro.pdf>; Mayer, *supra* note 129.

<sup>131</sup> S.B. 602, 73rd Or. Legis. Ass'y, Reg. Sess. (2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb0600.dir/sb0602.intro.pdf>; Mayer, *supra* note 129.

<sup>132</sup> S.B. 602, 73rd Or. Legis. Ass'y, Reg. Sess. (2005), available at <http://www.leg.state.or.us/05reg/measpdf/sb0600.dir/sb0602.intro.pdf>.

<sup>133</sup> PUBLIC COMMISSION, *supra* note 128, at 15; Mayer, *supra* note 129.

<sup>134</sup> Charles R. Adrian, *The Origin of Minnesota's Nonpartisan Legislature*, in THE NORTH STAR STATE: A MINNESOTA HISTORY READER 243, 243 (Anne J. Aby ed., 2003); ALAN ROSENTHAL, HEAVY LIFTING: THE JOB OF THE AMERICAN LEGISLATURE 90 (2004); Minnesota Legislative Reference Library, *Party Control of the Minnesota House of Representatives, 1951-*, <http://www.leg.state.mn.us/lrl/histleg/caucush.asp> (last visited May 9, 2009).

politics.<sup>135</sup> Combined, this large body of political science research provides few reasons to be optimistic about a nonpartisan legislature.

Turning to proponent's desire to reduce conflict, some research has found that nonpartisan primaries do indeed produce more moderate representatives than in closed primaries, which is the type of primary that is currently used in Oregon.<sup>136</sup> For example, in their study of U.S. House members elected under different types of primary systems, Gerber and Morton found that conservative Democrats and liberal Republicans are more likely to be elected from districts with nonpartisan and open primaries.<sup>137</sup> The authors also found, however, that the primary system that produced the most moderates is a semi-closed one.<sup>138</sup> Under the rules for a semi-closed primary, independents and new registrants are allowed to participate, but members of other parties are excluded.<sup>139</sup>

Beyond reducing conflict, would nonpartisan primaries improve the quality of democracy? A large number of studies suggest that a change to a nonpartisan legislature would affect Oregon politics in a number of less-than-desirable ways.

To understand the potential impact of a nonpartisan legislature on the quality of democracy in the state, it is helpful to look at research on voting behavior. One of the things that political scientists have found from years of voting studies is that there are costs to voters in participating in elections.<sup>140</sup> It takes time and effort to determine where candidates stand on issues and how to vote. Thus, one of the things that voters do to reduce voting costs is to look for shortcuts that

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<sup>135</sup> A National League of Cities survey found that seventy-seven percent of cities have nonpartisan elections. JAMES H. SVARA, TWO DECADES OF CONTINUITY AND CHANGE IN AMERICAN CITY COUNCILS 14 (2003), available at <http://www.nlc.org/ASSETS/AED3E653151A49D6BF0B975C581EFD30/rmpcitycouncilrpt.pdf>.

<sup>136</sup> Under a closed primary, only registered members of a party can participate. JEWELL & MOREHOUSE, *supra* note 91, at 103.

<sup>137</sup> See Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY 192, 196 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002); Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 306-07 (1998).

<sup>138</sup> Gerber & Morton, *supra* note 137, at 321-22.

<sup>139</sup> *Id.* at 322.

<sup>140</sup> JOHN H. ALDRICH, WHY PARTIES?: THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 46 (1995); Monika L. McDermott, *Race and Gender Cues in Low-Information Elections*, 51 POL. RES. Q. 895, 897-98 (1998).

give them clues about candidates' policy positions.<sup>141</sup> In other words, they look for what are called voting cues. Voting cues include such things as a candidate's party affiliation, incumbency status, race, and gender.<sup>142</sup> Party labels may not be a perfect indicator of a candidate's policy preferences, but they are considered to provide a fairly accurate picture of where most candidates stand.<sup>143</sup>

Party affiliation thus provides an important voting cue that helps voters save time and effort in identifying candidates who hold policy preferences that are similar to their own preferences.<sup>144</sup> If the partisan label was removed, it would not mean that voters would begin to pay better attention to candidates' policy positions.<sup>145</sup> Rather, it would mean that voters would look for other cues that would reduce the time costs associated with voting.<sup>146</sup> None of the alternative voting shortcuts, however, provide as much information about a candidate's policy preferences as does the party label.<sup>147</sup> As a result, voters are more likely to choose candidates who hold policy preferences that are different from their own preference.<sup>148</sup> Indeed, past studies of nonpartisan elections have found that voters rely on other voting cues when partisan labels are removed.<sup>149</sup> In particular, voters are more likely to support incumbents in a nonpartisan election than they would in partisan elections.<sup>150</sup>

In addition to making it more difficult for voters to choose candidates who represent their views, the introduction of a nonpartisan legislature would likely reduce voter participation. Research has found that the costs associated with casting a ballot affects individuals' decisions on whether to participate in an

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<sup>141</sup> See Stephen Ansolabehere et al., *Party and Incumbency Cues in Voting: Are They Substitutes?*, 1 Q. J. POL. SCI. 119 (2006); McDermott, *supra* note 140, at 897–98.

<sup>142</sup> Ansolabehere et al., *supra* note 141; McDermott, *supra* note 140, at 895–96.

<sup>143</sup> Brian F. Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7, 9 (2001).

<sup>144</sup> *See id.*

<sup>145</sup> *Id.* at 10.

<sup>146</sup> *Id.*

<sup>147</sup> *See id.*

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 11.

<sup>150</sup> *Id.* The bulk of the literature has found that as party cues decline, voters rely more on incumbency and other information shortcuts. However, Ansolabehere, Hirano, Snyder, and Ueda found that when the Minnesota legislature turned from nonpartisan to partisan in 1973, there was a rise in the use of partisan cues but no decline in the use of incumbency. Ansolabehere et al., *supra* note 141.

election.<sup>151</sup> When the cost of participation is too high, it discourages many people from voting. Likewise, when the cost is lower, it encourages greater participation. For example, one of the reasons that the turnout rate is highest among the better educated is that it is easier for those with more education to absorb the information about competing candidates.<sup>152</sup> Party labels and other voting cues are valuable in a democracy because they reduce the costs for participation. If voting cues were limited, it would likely reduce participation rates because the cost of participating would become prohibitive to many voters, especially those with lower levels of education. Thus, the introduction of a nonpartisan legislature would likely keep many Oregon citizens from voting.

A decline in participation is more likely to be seen in the general election rather than the primary, but primary elections could also be affected. Currently, more than twenty-four percent of Oregon voters cannot participate in partisan primaries because they are registered as unaffiliated or with a third party.<sup>153</sup> The introduction of the nonpartisan legislature will make this large group eligible to vote in primaries, which may mitigate the decline in turnout when converting to nonpartisan elections. However, research has found that independents participate at a lower rate than partisans,<sup>154</sup> so if the legislature became nonpartisan, the state could still see a decline in primary participation even though more voters would be eligible to participate. It is also worth remembering that party organizations play an important role in getting citizens to vote. If parties were removed from the process, it would reduce mobilization efforts and worsen turnout. Beyond lowering turnout, the use of a nonpartisan election is likely to further skew participation demographics by lowering turnout among those with less education and from lower socioeconomic levels. Indeed, research has found that turnout tends to be lower in nonpartisan elections, especially among the poor and less educated.<sup>155</sup>

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<sup>151</sup> ALDRICH, *supra* note 140, at 46.

<sup>152</sup> RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 35–36 (1980).

<sup>153</sup> See STATISTICAL SUMMARY, *supra* note 11.

<sup>154</sup> See SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 212 (1987).

<sup>155</sup> See Susan Welch & Timothy Bledsoe, *The Partisan Consequences of Nonpartisan Elections and the Changing Nature of Urban Politics*, 30 AM. J. POL. SCI. 128, 130 (1986).

Additionally, the introduction of a nonpartisan legislature is likely to affect elections by increasing the importance of interest groups and making elections less competitive. If political parties were forced out of elections, candidates would become more dependent on interest groups for campaign funds.<sup>156</sup> If this were to occur, one result would be that the state would see a decline in competitive elections.<sup>157</sup> Political parties channel their resources strategically in a manner that encourages greater competition on the ballot.<sup>158</sup> Parties spend their money on races in which the outcome is uncertain, hoping to maximize the number of seats they hold.<sup>159</sup> As a result, the most expensive races in the state tend to be ones in which legislators have done a poor job in representing their districts or where partisan registration is close.<sup>160</sup> Most interest groups, on the other hand, channel their money to candidates who are likely to win, especially incumbents and those who hold positions of power.<sup>161</sup> Thus interest group giving tends to reinforce the advantages that incumbents and other frontrunners have in running for office. The exception to this pattern is that strong ideological groups may contribute funds to candidates who support their political positions. Without parties involved in elections, elections would become less competitive, though ideological groups would still be involved in pushing their preferred candidates.

It is important not only to consider how the creation of a nonpartisan legislature would affect elections, but how the legislature operates. While nonpartisan elections may bring more moderate representatives, the legislators would not necessarily do a better job in representing their constituents or finding reasoned policy solutions. Legislative scholars have studied roll-call votes to understand what factors influence how legislators decide to cast votes on policy matters. Not surprisingly, they have found that party affiliation plays an important role in structuring how legislators vote in most

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<sup>156</sup> See JEWELL & MOREHOUSE, *supra* note 91, at 214.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 268.

<sup>160</sup> The race to unseat Karen Minnis in 2006 provides an illustrative example: Minnis, a conservative Republican, had to fight to hold her seat in a district with a Democratic advantage. See Janie Har, *Speaker, Foe Spending Big Bucks*, OREGONIAN, Oct. 18, 2006, at B1; Dave Hogan, *A Few Give a Lot in Oregon Races*, OREGONIAN, Oct. 31, 2006, at B1.

<sup>161</sup> JEWELL & MOREHOUSE, *supra* note 91, at 214.

American legislatures.<sup>162</sup> However, when looking at nonpartisan legislatures, the scholars found that there is very little structure whatsoever to how legislators vote.<sup>163</sup> The lack of structure in voting behavior means that the representatives do not consistently follow any type of cue in deciding how to vote; they do not follow party or regional lines, nor do they follow the wishes of their own constituency.<sup>164</sup> In looking at Nebraska's nonpartisan legislature from 1927 to 1969, Welch and Carlson found that there was "relatively little structure in voting in the Nebraska legislature."<sup>165</sup> Thirty years later, Wright and Schaffner found that the urban/rural divide in Nebraska explained some votes, but that there was generally no structure in how members cast votes.<sup>166</sup> In other words, both of these studies found that it is almost as if the legislators cast their votes randomly, looking at each bill separately and voting without regard to their constituency or any other factor that would provide some consistency in their voting patterns.

The last factor that should be considered is the benefit of allowing groups of like-minded individuals to join together in political parties to influence politics. Many political scientists believe, as early Oregon citizens did, that it is essential for the health of democracy to allow people to associate in political parties.<sup>167</sup> Political parties are groups of individuals who share a common set of beliefs and policy preferences and who work together to elect candidates who will promote their beliefs and preferences.<sup>168</sup> In essence, many political scientists see parties as being important because they aggregate the desires of individual citizens so that those citizens can have a meaningful say in government.<sup>169</sup> If parties were removed from

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<sup>162</sup> *Id.* at 243–52.

<sup>163</sup> See Frank Rall, *Nebraska: Sons of the Pioneers*, in STATES IN CRISIS 72, 72–83 (James Reichley ed., 1964); Susan Welch & Eric H. Carlson, *The Impact of Party on Voting Behavior in a Nonpartisan Legislature*, 67 AM. POL. SCI. REV. 854, 865–66 (1973); Gerald C. Wright & Brian F. Schaffner, *The Influence of Party: Evidence from the State Legislatures*, 96 AM. POL. SCI. REV. 367, 377 (2002).

<sup>164</sup> Welch & Carlson, *supra* note 163, at 858–59, 865–66.

<sup>165</sup> *Id.* at 865. The lack of consistency in voting in nonpartisan legislatures was also noted by Frank Rall in the 1960s. Rall, *supra* note 163.

<sup>166</sup> Wright & Schaffner, *supra* note 163, at 374.

<sup>167</sup> For an overview of the support among political scientists for parties, see American Political Science Association Organized Section on Political Organizations and Parties, [http://www.apsanet.org/~pop/APSA\\_Report.htm](http://www.apsanet.org/~pop/APSA_Report.htm) (last visited May 9, 2009).

<sup>168</sup> John Kenneth White, *What is a Political Party?*, in HANDBOOK OF PARTY POLITICS 5, 5–6 (Richard S. Katz & William Crotty eds., 2006).

<sup>169</sup> See *id.* at 7.



politics, the only other avenue for association would be through interest groups. Moreover, allowing parties to control government helps voters know who to credit when things are going well and who to blame when things go poorly. Voters who are dissatisfied with how the government is performing under one party can simply put the other party into power. If there were no party labels, it would be difficult to hold the government collectively responsible for its actions. As one study on the Nebraska legislature wrote, a nonpartisan legislature is like having “teams without uniforms.”<sup>170</sup> Without uniforms, it is hard to keep track of the sides and hold elected officials accountable.

In sum, the introduction of the nonpartisan primary may moderate conflict in the Oregon legislature, but would do so at considerable costs, including lower participation rates, less competitive elections, stronger interest groups, poorer representation, and less accountability.

### *B. Top-Two Primary*

The top-two primary system is designed to improve voter participation and reduce partisan conflict without removing parties entirely from legislative politics. On November 4, 2008, Oregon voters were given the opportunity to vote on a statutory initiative to introduce the top-two primary in the state. Measure 65 called for replacing the current election system with one in which all candidates would run in a primary election.<sup>171</sup> The top two vote-getters would then compete in the general election.<sup>172</sup> The proposal differed from creating a nonpartisan legislature in that it still allowed candidates to identify their party affiliation or preference on the ballot. If Measure 65 had been adopted, it would have required using a top-two primary in all partisan state and local races, as well as for the U.S. House and Senate.<sup>173</sup> The presidential-nomination process would have remained unchanged.<sup>174</sup>

Supporters of the top-two primary sometimes refer to it as the open primary, but the term open primary means something different in

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<sup>170</sup> Schaffner, Streb & Wright, *supra* note 143.

<sup>171</sup> Ballot Measure 65, Official Voters' Pamphlet, Measures, Oregon General Election, Nov. 4, 2008, available at <http://oregonvotes.org/nov42008/guide/pdf/vol1.pdf>.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *See id.*

election studies. An open primary is one in which the voters do not have to register for a party prior to voting.<sup>175</sup> Rather, when the voters arrive at the polls, they ask for the ballot of one of the parties.<sup>176</sup> The voters are thus free to decide on election day if they want to vote in the primary for Republicans, Democrats, or a third party.<sup>177</sup>

The stated goals of the top-two primary supporters are to raise voter participation, increase choice on the ballot, reduce partisan conflict in the state legislature, and produce election winners who have the support of a majority of voters.<sup>178</sup> In a newspaper article published in 2008, Phil Keisling and Norma Paulus wrote that the current political system “encourages—indeed, virtually guarantees—excessive partisanship, abysmal voter turnout and a growing inability to civilly discuss, much less solve, Oregon’s most pressing problems.”<sup>179</sup> Keisling and other supporters argue that the top-two primary would bring about four significant changes. First, it would improve participation by allowing all voters to participate in the primary and have a say in who is the finalist.<sup>180</sup> Second, it would increase choice on the ballot because a greater range of candidates would see the top-two primary as creating greater opportunities for them to succeed than would be possible through partisan primaries.<sup>181</sup> Third, it would bring more moderates into office by forcing candidates to appeal to a broader segment of their district to get nominated, which in turn would reduce partisan conflict in the legislature.<sup>182</sup> Finally, it would require election winners to have the support of a majority of voters by making a majority vote the legal threshold to gain office.<sup>183</sup>

Will a top-two primary system achieve these goals? Are there other ways it will affect Oregon politics? The top-two primary system is not used extensively in the United States, so there has been little research on how it affects elections. Currently, only two states,

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<sup>175</sup> JEWELL & MOREHOUSE, *supra* note 91, at 104.

<sup>176</sup> *See id.*

<sup>177</sup> *See id.*

<sup>178</sup> *See* Chase, *supra* note 94; Keisling & Paulus, *supra* note 96.

<sup>179</sup> Keisling & Paulus, *supra* note 96.

<sup>180</sup> Phil Keisling & Sam Reed, *Taking Back the Vote*, N.Y. TIMES, Oct. 20, 2004, at A27.

<sup>181</sup> Keisling & Paulus, *supra* note 96.

<sup>182</sup> *See* Keisling & Paulus, *supra* note 96; Jeff Mapes, *Inside the Capitol: Cutting the Party from Partisanship*, OREGONIAN, Apr. 8, 2005, at C1 [hereinafter *Inside the Capitol*].

<sup>183</sup> LEAGUE OF WOMEN VOTERS, *supra* note 95, at 21.

Louisiana and Washington, have a top-two primary. Louisiana began to use the top-two primary in 1975 for all state elections, including congressional elections.<sup>184</sup> In 2006, however, the state approved legislation that allowed closed primaries for congressional races.<sup>185</sup> Washington voters adopted the top-two primary through the initiative process in November 2004.<sup>186</sup> The primary was used in Washington for the first time in the 2008 election.<sup>187</sup> These two systems are similar, but not identical, to the primary proposed for Oregon. One different aspect of Oregon's proposal is that it allows party endorsements to appear on the ballot.<sup>188</sup> Despite the limited use of the top-two system, and the unique character of Oregon's proposal, one can draw insights from political science research to help understand the system's potential impact.

Will the top-two system increase voter participation? As I discuss above, more than twenty-four percent of voters cannot participate in partisan primaries because they are registered as unaffiliated or with a third party.<sup>189</sup> Thus, the introduction of the top-two system may increase participation in primary elections simply because it will make more than 400,000 nonaffiliated voters and 70,000 members of third parties eligible to participate.<sup>190</sup> However, the same caveat applies that I mention above—research has found that independents participate at a lower rate than strong partisans.<sup>191</sup> So even though the top-two system appears to open a door to more participants in primaries, many individuals are not likely to walk through the door given this low participation rate of independents.

It is also important to keep in mind that the decision to participate is predicated on a costs analysis. When costs are high, participation declines.<sup>192</sup> The introduction of the top-two system will not bring down the costs associated with voting in the primary election; in fact,

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<sup>184</sup> WAYNE PARENT, *INSIDE THE CARNIVAL: UNMASKING LOUISIANA POLITICS* 36–45 (2004).

<sup>185</sup> See Richard Rainey, *Special Election Will Close La.'s Open Primaries: March 8 Vote to Replace Jindal Could Cause Confusion in State*, NEW ORLEANS TIMES-PICAYUNE, Dec. 30, 2007, at 1.

<sup>186</sup> See David Steves, *Washington Voters Offer Preview to Oregon's Measure 65*, REGISTER-GUARD (Eugene, Or.), Aug. 16, 2008.

<sup>187</sup> See *id.*

<sup>188</sup> LEAGUE OF WOMEN VOTERS, *supra* note 95, at 18.

<sup>189</sup> See STATISTICAL SUMMARY, *supra* note 11.

<sup>190</sup> *Id.*

<sup>191</sup> VERBA & NIE, *supra* note 154, at 212.

<sup>192</sup> WOLFINGER & ROSENSTONE, *supra* note 152, at 8.

it may increase the costs if voters are confronted with more candidate names on the ballot. With a larger field, voters may feel more confused about the choices and decide to not vote. On the other hand, individual voters can become more motivated to participate if they believe their votes have a greater potential to actually influence election results. Research has found that participation increases in more competitive elections.<sup>193</sup> But there is nothing inherently built into the top-two system to ensure more competitive races that would increase the value of voting and participation rates. Thus, there is reason to be skeptical that the top-two system will significantly increase primary participation.

The arguments regarding why the top-two system would not increase turnout in primary elections apply to general elections as well. By this I mean that the top-two system does nothing to reduce the costs associated with voting. As a result, we should not expect it to increase participation in general elections. Moreover, independent voters are already allowed to participate in general elections, thus the introduction of a top-two system will not expand the pool of eligible participants as it does in primary elections.

There has not been a great deal of research on turnout in top-two systems, though Kazee found no change in turnout levels before and after Louisiana introduced the top-two system.<sup>194</sup> In addition, the turnout for the first top-two primary in Washington in August 2008 was considerably lower than in 2004, but comparable to turnout in previous presidential election years.<sup>195</sup> The turnout in 2008 was 42.6%, compared with 45.1% in 2004 and 40.8% in 2000.<sup>196</sup>

Would the top-two primary system provide more choice on the ballot? The answer is mixed. One reason to expect more choice in the primary is simply that all the candidates would be competing together; thus, voters would be able to choose from candidates not just from their party but from other parties as well. However, the

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<sup>193</sup> John F. Bibby & Thomas M. Holbrook, *Parties and Elections*, in *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* 62, 94–95 (Virginia Gray & Russell L. Hanson eds., 8th ed. 2004).

<sup>194</sup> Thomas A. Kazee, *The Impact of Electoral Reform: "Open Elections" and the Louisiana Party System*, 13 *PUBLIUS* 131, 138 (1983).

<sup>195</sup> Wash. Sec'y of State, August 19, 2008 Top 2 Primary, <http://vote.wa.gov/Elections/WEI/VoterTurnout.aspx?ElectionID=25> (last visited May 9, 2009) [hereinafter Top 2]; Press Release, Wash. Sec'y of State, Reed Predicts Strong 46 Percent Turnout for Primary (Aug. 4, 2008), [http://www.secstate.wa.gov/office/osos\\_news.aspx?i=X%2FFDTiLtBQGOGv%2FPUCUMtw%3D%3D](http://www.secstate.wa.gov/office/osos_news.aspx?i=X%2FFDTiLtBQGOGv%2FPUCUMtw%3D%3D) [hereinafter Reed Predicts].

<sup>196</sup> Top 2, *supra* note 195; Reed Predicts, *supra* note 195.

reaction of the parties to the top-two system may affect choice in the primaries. Given the important role that parties have assumed today in Oregon politics, the party organizations might decide to become involved in campaigns prior to the primary if a top-two system were adopted in the future. If party organizations endorsed candidates and provided campaign support, other candidates might be reluctant to run against those receiving endorsements. In addition, some third parties might decide to endorse a major-party candidate rather than put a separate candidate on the primary ballot, which would have been allowed under Measure 65. If these events happened, the number of choices in the primary election might not change significantly, or would even decline. However, if party organizations refrained from endorsing candidates, or if a party were divided on whom to endorse, then the voters might be presented with a wider selection of choices on the ballot.

In the general election, on the other hand, the voters would be limited to choose between just two candidates at most.<sup>197</sup> This means that the choices would be fewer, because it is unlikely that there would be many third-party candidates in the general election. Moreover, in districts that are heavily dominated by one of the major parties, it would be possible that the top-two finishers would be from that party. Thus, many voters would not find their preferred party on the ballot.

Choice is not simply measured by the number of names on the ballot, however. Choice also means that voters are given the option to choose between candidates who have different policy preferences. What effect would the top-two primary have on this type of choice? One of the arguments that the supporters of Measure 65 make is that the top-two primary would encourage candidates to move to the ideological center in their districts on policy issues so they could maximize voter support. If this argument were right and the top candidates moved to the center, the voters would not be given a choice between different policies and ideological perspectives. Rather, the election campaign would present candidates who are advocating the same moderate platform.<sup>198</sup> One of the benefits that political scientists see in the partisan primary is that it has the potential to produce candidates who hold different policy preferences,

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<sup>197</sup> LEAGUE OF WOMEN VOTERS, *supra* note 95, at 18.

<sup>198</sup> Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 800–01 (2001).

providing voters with a meaningful choice in the general election on the direction of government.<sup>199</sup>

There are reasons to believe, however, that primary candidates would not move to the ideological center of the district, as the proponents argue. This brings us to the next question: would top-two primaries produce more moderate candidates and thus reduce the partisan conflict in the legislature? If the proponents were correct, and the candidates moved to the middle, the legislature would be likely to see more moderates and a reduction in conflict. On the other hand, legislative candidates may decide it makes more sense strategically to focus on getting enough votes in the primary to move on to the second round of voting rather than trying to maximize the total number of votes they receive. For example, if a district were closely split between Republicans and Democrats, it might encourage Republican candidates to appeal to Republican voters and Democratic candidates to appeal to Democrats. If this were the case, the results of the top-two primary may not be significantly different from partisan primaries, with the runoff pitting a Republican against a Democrat.

Even if the candidates pursued this strategy of appealing either to the Republican or Democratic block of voters, it is possible that more moderate candidates would be elected if voters under the top-two system behave similarly to those under open primaries. As mentioned above, research has found that more open systems tend to elect more moderate winners. The reason for this is that the use of open primaries tends to include more moderate voters as independents and partisans cross over party lines to support preferred candidates.<sup>200</sup> If Republican and Democratic candidates target partisan blocks of voters under the top-two system, some candidates may decide to inch closer to the middle in order to gain the votes of independent and crossover voters. The candidates would not move to the absolute ideological center of the district but to a point closer to it.

The structure of the top-two system is different from open primaries, however, and thus the election results under the top-two system may not parallel the results in open primaries. To be sure, the most common criticism of the top-two system in Louisiana is that it may harm moderate candidates.<sup>201</sup> The most cited example is the

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<sup>199</sup> *Id.* at 810.

<sup>200</sup> *Id.* at 799–800.

<sup>201</sup> See PARENT, *supra* note 184, at 43–44; Greg Garland, *Political Moderates See Runoff as Painful Choice*, ADVOCATE (Baton Rouge, La.), Oct. 27, 1995, at 1A

success of Republican David Duke, a former Klansman.<sup>202</sup> Duke was one of the top two finishers in a U.S. Senate race in 1990 and the Louisiana gubernatorial race in 1991.<sup>203</sup> The Republican Party was considered likely to win both contests, but Duke's presence on the ballot caused many Republicans to cross party lines, leading the Democrats to victory.<sup>204</sup> Another prominent example is the Louisiana 1995 gubernatorial race when the moderate candidates split the middle-of-the-road vote, enabling two more extreme candidates to make the runoff.<sup>205</sup> The problem of more extreme candidates advancing to the second round of voting is considered to be more common in open seat races in which many candidates are running.<sup>206</sup> In those circumstances, the more moderate candidates may split the vote, which can help an extreme candidate with a dedicated group of supporters advance to the runoff.<sup>207</sup> While it does not have the same political culture as Louisiana, Oregon would undoubtedly see some popular moderates lose to extremists if the top-two system were adopted.

Finally, the last aspect of the top-two system worth considering is how the proposal would affect partisan politics in Oregon. The supporters of Measure 65 championed the top-two system as a way to reduce the partisan conflict in the state and, in so doing, improve the legislature's ability to solve pressing policy problems.<sup>208</sup> For these supporters, Louisiana's experiences may provide some reasons to be optimistic. There is a sense among political observers in Louisiana that the introduction of the top-two primary has reduced the importance of political parties and has been particularly hard on the Republican Party.<sup>209</sup> The primary system is considered to have weakened parties because the members of the Louisiana legislature are not " beholden to their party officials" to get elected.<sup>210</sup>

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[hereinafter *Political Moderates*]; Greg Garland, *Voters in the Middle Feel Disenfranchised*, ADVOCATE (Baton Rouge, La.), Nov. 1, 1995, at 7B [hereinafter *Voters*].

<sup>202</sup> See, e.g., PARENT, *supra* note 184, at 44–45.

<sup>203</sup> *Id.* at 45.

<sup>204</sup> *Id.*

<sup>205</sup> *Political Moderates*, *supra* note 201; *Voters*, *supra* note 201.

<sup>206</sup> PARENT, *supra* note 184, at 43–44.

<sup>207</sup> *Id.*

<sup>208</sup> See *Inside the Capitol*, *supra* note 182; Keisling & Paulus, *supra* note 96.

<sup>209</sup> Edward F. Renwick, T. Wayne Parent & Jack Wardlaw, *State's Quirky Ways in Politics*, NEW ORLEANS TIMES-PICAYUNE, Nov. 7, 1999, at B7.

<sup>210</sup> Jan Moller, *Party Politics Played Rare Role in Legislature During Session*, NEW ORLEANS TIMES-PICAYUNE, June 26, 2005, at 1.

Oregon's politics are different from Louisiana's, thus the top-two system may not have the same effect in Oregon as it had in Louisiana. In particular, Oregon has been engulfed in partisan conflict for at least fifteen years,<sup>211</sup> whereas partisanship has been less important historically in Louisiana, which was overwhelmingly dominated by Democrats for decades.<sup>212</sup> The existence of this strong partisan conflict may encourage Oregon parties to look for ways to remain involved in elections if the top-two system were ever adopted. In addition, Measure 65 would have allowed party endorsements on the ballot, which are not permitted in Louisiana.<sup>213</sup> The parties' ability to endorse candidates provides them with a formal means to remain involved in elections.

One of the factors likely to determine how the top-two system affects partisanship is how the party organizations respond to the opportunity to make endorsements. If the parties decided to refrain from endorsing candidates, it would weaken their impact on politics. Yet given how important the parties have become in Oregon politics in recent years, it seems likely that the party organizations would try to continue to play an active role in elections if the top-two primary were adopted. If the parties remained involved, their impact would likely be felt the greatest in state legislative elections, rather than in statewide elections, because of the low visibility of legislative campaigns and the lack of name recognition of legislative candidates. If the parties decided to provide these candidates with support prior to the primary, it would help establish a frontrunner while possibly discouraging serious challenges from within the party. Moreover, a pre-primary endorsement would act as a type of anointment that legitimizes candidates, which could help the candidates raise money and build support in the community. Under this scenario, it is likely that the party organizations would adapt to the new rules and that partisanship would continue to affect the legislature's operation.

One other aspect to consider about this scenario is what it would mean in terms of Oregon's progressive heritage. The introduction of partisan primaries in the Progressive era was meant to remove the nomination of candidates from the party organization and give that power to the people. If the parties remained active in campaigns in a top-two primary system, it would mean that the selection of party

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<sup>211</sup> See discussion *supra* Part I.D.

<sup>212</sup> See PARENT, *supra* note 184, at 44–45.

<sup>213</sup> LEAGUE OF WOMEN VOTERS, *supra* note 95, at 19.



nominees would revert back to the party organization, upending the Progressive-era reform. Even if this scenario does not unfold, the top-two system offers no clear benefits to Oregon politics that make it worth adopting.

### C. Fusion Voting

The last party reform differs from the other two by focusing on improving the position of third parties in Oregon rather than finding a way to constrain the role of parties. Fusion voting proposes to change the political system by allowing candidates to be nominated by more than one party.<sup>214</sup> Supporters argue that fusion voting will increase voter participation, decrease the number of wasted votes, provide more information to voters, reduce partisan conflict in the legislature, and improve accountability.<sup>215</sup>

Under fusion voting, the current primary system would remain unchanged. However, the general election ballot would look different.<sup>216</sup> For any given office, the new ballots would give each party a separate line for its nominee.<sup>217</sup> If more than one party nominated the same candidate, then the candidate's name would appear on each party's line.<sup>218</sup> Voters would then choose the line for their preferred candidate and party.<sup>219</sup> The votes would then be tallied separately for each party and combined to attain the candidates' total votes.<sup>220</sup>

The use of fusion voting has a long history in the nation and in Oregon. Fusion voting was permitted in a majority of states in the nineteenth century.<sup>221</sup> However, as states began to introduce the Australian ballot in the late 1800s, many began to require that a candidate's name be listed only once, which led to the decline in the use of fusion voting.<sup>222</sup> In Oregon, the existence of fusion voting

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<sup>214</sup> OR. BALLOT FREEDOM PROJECT, FUSION VOTING: WHAT IT IS, HOW IT WORKS, AND WHY IT'S THE RIGHT CHOICE FOR OREGON, <http://www.oregonwfp.org/resources/Whatisfusion.pdf> (last visited May 9, 2009).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Howard A. Scarrow, *Duverger's Law, Fusion, and the Decline of American "Third" Parties*, 39 W. POL. Q. 634, 635–36 (1986).

<sup>222</sup> *Id.* at 637–38.

played an important role in some early state elections. Perhaps the most important instance of fusion voting in the state's history was the election of Sylvester Pennoyer as governor in 1886 and 1890 under both the Democratic and the Populist Party labels.<sup>223</sup> Oregon banned fusion voting in 1891.<sup>224</sup>

Fusion voting remains legal in a few states, though New York is the only one that uses it regularly.<sup>225</sup> However, political activists have been pushing for its adoption elsewhere, including in Ohio, Massachusetts, and Missouri.<sup>226</sup> The leading advocate of fusion voting in Oregon is the Oregon Working Families Party, which was organized in 2006.<sup>227</sup> The Working Families Party originated in New York in the 1990s and is a major voice for fusion voting nationwide.<sup>228</sup>

Is fusion voting likely to attain the goals of its supporters? What effect would it have on political parties in the state? Looking at the research on comparative election systems can give some clues to how fusion voting may affect Oregon's politics. Studies have found that voter turnout tends to be higher under different forms of proportional representation than it is in the plurality system, which is used in Oregon.<sup>229</sup> Under a plurality system, there is one elected position per district and the candidate who receives the most votes is elected.<sup>230</sup> There are a wide range of proportional systems including party lists and single transferable votes.<sup>231</sup> Many of the studies that examine turnout rates do not look explicitly at why the rates are higher in proportional systems, but many scholars believe that the use of these systems increases voters' feelings of efficacy and satisfaction with democracy.<sup>232</sup> The problem with plurality systems is that voters may

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<sup>223</sup> See DODDS, *supra* note 1, at 158–61.

<sup>224</sup> Peter H. Argersinger, "A Place on the Ballot": *Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 293 (1980).

<sup>225</sup> Louis Jacobson, *Mass. Measure Could Be Turning Point for 'Fusion Voting,'* ROLL CALL (Wash., D.C.), Oct. 5, 2006.

<sup>226</sup> *Id.*

<sup>227</sup> McIntosh, *supra* note 98.

<sup>228</sup> Greg Sargent, *First Among Thirds*, AM. PROSPECT, May 2006.

<sup>229</sup> DOUGLAS J. AMY, REAL CHOICES, NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION ELECTIONS IN THE UNITED STATES 7–9 (1993); Shaun Bowler, David Brockington & Todd Donovan, *Election Systems and Voter Turnout: Experiments in the United States*, 63 J. POL. 902, 902–15 (2001).

<sup>230</sup> AMY, *supra* note 229, at 1.

<sup>231</sup> *Id.* at 14–20.

<sup>232</sup> Bowler, *supra* note 229, at 904.

feel their vote is wasted because all the votes beyond a plurality do not affect the results. On the other hand, in a proportional system each vote has the potential to improve a party's chances of gaining another seat.

There has not been any research on the impact of fusion voting on turnout, so we cannot know for certain how it will affect participation rates. If voters began to see the vote for a third party as affecting election outcomes as in proportional systems, then the effect of fusion voting might be similar to that of proportional representation and turnout may rise. However, fusion voting is different from proportional representation. While it may allow some third parties to influence election outcomes, the reform is unlikely to bring third-party candidates into office. Based on the experiences in New York, it appears more likely that third parties would use fusion voting to endorse preferred major-party candidates.<sup>233</sup> Thus, voters may not feel increased efficacy in or more satisfaction with the political system. Moreover, the use of fusion voting would still be conducted in a plurality system, which means it would not remove all the factors that are considered causes for low turnout in these systems. As a result, it is likely that fusion voting would only increase turnout marginally at best. It is worth noting that New York's turnout is the twelfth lowest in the nation.<sup>234</sup> While there are many factors that influence participation, New York's low participation rate provides little reason to believe that fusion voting would improve turnout in Oregon.

Fusion voting would reduce wasted votes, supporters argue, because it would mean that votes for a third-party candidate could affect election results, which is not the case under the current electoral system. However, the introduction of fusion voting does not get rid of some of the main elements of plurality voting that produce wasted votes. In a plurality system, all votes that go to a losing candidate are wasted in that they have no effect on the election outcome or on representation.<sup>235</sup> The surplus votes that a candidate receives can also be considered wasted. By these definitions, the only time fusion voting would reduce wasted votes is when the third-party vote provides a majority-party candidate with the margin of support

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<sup>233</sup> See BRUCE F. BERG, *NEW YORK CITY POLITICS: GOVERNING GOTHAM* 164–66 (2007); Sargent, *supra* note 228.

<sup>234</sup> Bibby & Holbrook, *supra* note 193, at 93.

<sup>235</sup> AMY, *supra* note 229, at 21–23.

needed for victory. If the majority-party candidate did not need those votes, then the votes would be wasted. Moreover, even if the third-party votes provided the margin of victory, the votes cast for the losing candidate would still be wasted under fusion voting. The only way to eliminate wasted votes is to introduce some type of electoral system so that the distribution of party seats in the legislature is proportionate to the number of votes cast in the electorate.<sup>236</sup> In other words, some type of proportional representation is needed.<sup>237</sup>

Fusion voting would provide additional information to voters. The value of that knowledge, however, depends on voters' awareness of the third party. While the partisan label provides one of the main sources of information to Americans, it is important to note that many voters know very little about where the two major parties stand on issues. For the minor-party nomination to be of value on the ballot, it would require voters to make an effort to learn about the party, which many voters would not. Thus, while fusion voting will provide some additional information, the impact of that information should not be overemphasized.

Would the introduction of fusion voting reduce partisan conflict and enable the legislature to solve pressing state problems? Supporters point at the success of the Working Families Party of New York as an example of how fusion voting can improve the legislative environment. The Party is considered to have played an instrumental role in recent years in helping raise the minimum wage in New York and reforming New York's drug laws.<sup>238</sup> The leaders of the Working Families Party argue that the presence of fusion voting allows the party to build coalitions on selected issues that would otherwise be stifled by partisan conflict.<sup>239</sup>

Despite this anecdotal evidence, there is reason to be skeptical that fusion voting would improve the legislative process. If fusion voting enabled a third party to influence legislative outcomes, then Oregon's legislature might function more like a multiparty system than a two-party system. In general, multiparty systems are considered to produce less-effective government because the largest party may not

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<sup>236</sup> See *id.* at 21–26.

<sup>237</sup> *Id.*

<sup>238</sup> Sargent, *supra* note 228, at 38–40.

<sup>239</sup> Oregon Working Families Party, *Five Ways Fusion Voting Is Good for Oregon*, <http://www.oregonwfp.org/fusion.html> (last visited May 9, 2009).

control a majority in the legislature.<sup>240</sup> In a two-party system, a cohesive majority party can simply enact what it wants into law. The presence of a third party adds another player to the legislative process, a player that is just as likely to stymie legislation as to help it be enacted. To be sure, one of the main complaints about multiparty systems is that they can give too much power to third parties because the third parties are needed to get legislation passed.<sup>241</sup>

Finally, it is important to note that despite the Working Families Party efforts to work occasionally with members of both major parties in New York, it has also been known to force the Democratic Party further to the left on some issues.<sup>242</sup> Thus its presence in New York's legislature has not always been to moderate politics. Moreover, the Liberal Party, which used fusion voting to become perhaps the most successful third party in New York, was ideologically to the left of the Democratic Party.<sup>243</sup>

None of these considerations gives any reason to believe that fusion voting would moderate Oregon's politics. Moreover, the addition of more parties in the legislature would actually reduce accountability because it would become even more difficult to know who to credit when things go well and who to blame when they go poorly. However, if fusion voting allowed third parties to play a real role in the legislature, it would benefit the state by expanding the representation of different interests in society.

#### CONCLUSION

Since the emergence of the Democratic Party in the 1850s, political parties have frequently played a central role in Oregon politics. During early statehood, the party machines dominated the state, controlling the government and sharing the spoils of offices among their allies. The Progressive reforms brought an end to the machines and changed the position of political parties in state politics. While the passion for party reform became less prominent after the Progressive Movement, it was reawakened recently when many Oregon residents grew disenchanted with the partisan tone of debate in the state. Given how severe the conflict has seemed in the

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<sup>240</sup> Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18 INT'L POL. SCI. REV. 297, 304 (1997).

<sup>241</sup> AMY, *supra* note 229, at 167–68.

<sup>242</sup> Sargent, *supra* note 228, at 38.

<sup>243</sup> BERG, *supra* note 233, at 165–66.

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legislature, it is easy to understand why modern reformers want change. Despite this unhappiness, Oregon legislators and voters should be cautious before following in the Progressive Movement's footsteps in reforming the party system.

There are many reasons to be wary. In the sections above, I explained why each of the proposals likely would not solve the state's problems. However, there is one other factor to consider in evaluating these reforms: the political situation today is quite different from what it was in the late 1880s. When the Progressives were championing party reform, the state was dominated by corrupt political machines. Today the complaint against the government is that the dialogue has become too partisan, which has made it difficult for the state to address many of its most pressing issues. During the Progressive Era, the reformers' determination to reform parties made sense; they knew that because the party system enabled the machine to prosper, the solution was to reform the parties.

In the current era, however, it is less clear that the party organizations are the culprit. The underlying assumption of those championing reform is that the partisan conflict in the legislature is caused by the structure of the political system, especially the use of partisan primaries. Reformers argue that the partisan conflict would decline if the state changed the structure. However, if the partisan conflict were a product of the party primaries, then why was there not similar conflict in Oregon before the rancorous 1993 session? The answer is that there is something else going on. By looking at legislative politics across the nation, one can build a better understanding of what is happening in Oregon.

Research on Congress and state legislatures has found that the internal character of legislative politics is strongly influenced by the external political environment, especially the degree of partisan polarization within the electorate.<sup>244</sup> When there is widespread agreement within the public on the direction of public policy, legislatures work remarkably efficiently and effectively. But when the public is polarized along partisan lines the legislative parties work as teams, concentrating power in the hands of their leaders and

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<sup>244</sup> DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 35–37 (1991); Richard A. Clucas, *The Contract with America and Conditional Party Government in State Legislatures*, 62 POL. RES. Q. 317, 325–26 (June 2009); Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 424 (1981).

battling each other over public policy.<sup>245</sup> What one finds looking across the United States since the 1980s is that there has been a polarization of voters. As a result of this change, the legislators coming out of rural areas are generally very conservative while the urban legislators are very liberal. The result is partisan conflict and a centralization of power into the hands of party caucus leaders across the nation.<sup>246</sup> The character of Oregon politics is consistent with this research. By examining trends in voting patterns, it is clear that the state is strongly divided, especially along regional lines. The more rural areas tend to support conservative candidates and conservative positions on ballot initiatives. Urban voters support liberal candidates and liberal initiative positions. Given the divide in the public, the legislature is understandably divided as well.<sup>247</sup> To be sure, there is considerable evidence that the intense partisan conflict in the legislature reflects ideological differences between rural and urban Oregonians.<sup>248</sup>

Oregon's adoption of a new election system, whether it is the top-two primary or a nonpartisan legislature, will not end the divide within the public. Perhaps one of the proposals might lead to some reduction in conflict within the legislature. But if a new system caused the conflict to end entirely, then one would have to question how well voters were being represented under the new system.

Beyond ending partisan conflict, there are several other benefits that these reforms promise to bring to Oregon politics such as increased participation, improved representation, and the assurance that winning candidates would enjoy the support of a majority of voters. In this Article, I explained the reasons to be skeptical of the proponents' broad claims. Rather than looking for a panacea, however, the state would be wise to examine specific types of reforms that would target these specific problems. If the state wanted to improve participation, it could consider returning to same-day registration, which it had prior to 1986, or it could take a more

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<sup>245</sup> ROHDE, *supra* note 244, at 35–37; Clucas, *supra* note 244; Cooper & Brady, *supra* note 244, at 424.

<sup>246</sup> Richard A. Clucas, Mark Henkels & Brent S. Steel, *The Politics of One Oregon: The Causes, Consequences and Prospects of Overcoming the Rural-Urban Divide* (prepared for Toward One Oregon Conference, Nov. 14, 2008, Salem, Or.).

<sup>247</sup> Elsewhere, I have examined how the voting behavior of state legislators in Oregon reflects the ideological divide in the public. See OREGON POLITICS AND GOVERNMENT: PROGRESSIVES VERSUS CONSERVATIVE POPULISTS (Richard A. Clucas, Mark Henkels & Brent S. Steel eds., 2005) (especially chapters 1 and 8).

<sup>248</sup> *Id.*

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proactive role in making sure citizens are registered. If the state seriously wanted to improve representation, then it might consider introducing some form of proportional representation.

William U'Ren, the leader of Oregon's Progressive Movement, saw proportional representation as an essential component of his Oregon Plan. In 1908, voters approved a constitutional amendment allowing for proportional representation in Oregon, yet voters later turned down specific proportional plans put forward by U'Ren and other Progressives.<sup>249</sup> The current fusion proposal may help some third parties, but it is only through a true proportional system that one would have fair representation of the state's diverse interests.

If the state wanted to ensure that election winners enjoyed a majority of support in their district, then it might consider "Instant Runoff Voting," which requires voters to rank order candidates. To win, a candidate must be ranked number one by a majority of voters. If no candidate received a majority, then the system would call for automatically considering second-place votes.

Of course, like all reform proposals, each one of these alternative reforms has drawbacks. Yet the benefit of these alternatives is that they allow political parties to continue being a crucial part of the state's politics. Despite the disenchantment that has emerged, political parties play an essential role in making democracy work in Oregon, as the early residents of the state understood. While the Progressives had good reason to go after the machines, these recent reform proposals are not likely to solve the state's problems, and in many ways, they are likely to do more harm than good.

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<sup>249</sup> James D. Barnett, *Reorganization of State Government in Oregon*, AM. POL. SCI. REV. 287, 287-93 (1915).