NOTE

Clingman v. Beaver: Shifting Power from the Parties to the States

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INTRODUCTION

Gil, a forty-year-old native Oklahoman, lives and works in Tulsa. A registered Republican, Gil believes in conservative family values, limited government, and a strong military. Gil's upbringing molded his values and political ideology, making him a staunch Republican supporter.

Notwithstanding his usual support for the Republican Party, Gil decided that this year he most agreed with James Smith, the Libertarian candidate. Unfortunately for Gil, Oklahoma law prohibits registered Republicans from voting in the Libertarian Party of Oklahoma's (“LPO”) primary. In fact, Oklahoma law prohibits all party-affiliated voters from voting in any other party's primary. This law aggravated Gil because it prevented him from voting for the candidate of his choice.

Gil's situation illustrates the adverse effects of Clingman v. Beaver, in which the Supreme Court upheld Oklahoma's semi-closed primary election system. Under the Oklahoma system, only registered members of a political party can vote in that party's primary. An exception to the Oklahoma law provides that a party may open its...

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1 This hypothetical presents a variation of the facts in Clingman v. Beaver, 544 U.S. 581, 584-85 (2005). See infra Part II for a discussion of Clingman. The hypothetical illustrates the negative effects of the Clingman decision. Gil's character highlights some of the ways that Clingman might undesirably burden individual voters and interfere with the basic underpinnings of a democratic electoral system.


3 Children often form their own beliefs based on the beliefs of their parents. See Emily Buss, The Adolescent's Stake in the Allocation of Educational Control Between Parent and State, 67 U. CHI. L. REV. 1233, 1267 (2000); Charles J. Helm, Party Identification as a Perceptual Screen: Temporal Priority, Reality & the Voting Act, 12 POLITY 110, 110 (1979); see also Herbert McClosky & Harold E. Dahlgren, Primary Group Influence on Party Loyalty, 53 AM. POL. SCI. REV. 757, 758 (1959) (finding that primary social groups and intimate associations with others establish individuals' party preferences).

4 See, e.g., Clingman, 544 U.S. at 585, 588 (involving Republicans and Democrats who wanted to vote for Libertarian candidate in primary).

5 Under Oklahoma's semi-closed primary system, Republicans and Democrats cannot vote in the LPO's primary. See id. at 584-85.


7 Clingman, 544 U.S. at 584.

8 Tit. 26, § 1-104(A).
primary to Independent voters. However, voters affiliated with specific parties, such as the Republican Party, cannot vote in another party’s primary. This rule prevails regardless of whether the party desires to invite nonparty members to participate in its primary. The \textit{Clingman} decision allows the state, not the party, to decide who will vote in the LPO’s primary election.

This Note argues that the \textit{Clingman} holding represents a detrimental policy shift that disturbs democratic ideals and disempowers voters. In order to protect democracy and the associational rights of third parties, the party, not the state, should determine its composition and its voter pool. To ensure this liberty, the Court should reevaluate its decision in \textit{Clingman} and establish clearer guidelines for applying strict scrutiny in primary election cases.

Part I of this Note describes the American primary election system, First Amendment associational rights jurisprudence, and the current state of primary election law. Part II describes the facts, procedure, and rationale of \textit{Clingman}. Part III analyzes the flaws in the \textit{Clingman} decision and highlights the negative effects these flaws have on the fundamental principles of democracy. Finally, this Note

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\footnotesize{9 Id. § 1-104(B)(1). Research shows that the number of Independents has increased since the 1950s. See \textit{Bruce E. Keith, The Myth of the Independent Voter} 16-23 (1992) (showing statistics of increasing number of Independents). Therefore, election systems like the Oklahoma primary system, in which parties may open their primaries to Independents, could become increasingly more important. See id. (noting that rising number of Independents could reshape partisan politics).

\footnotesize{10 See tit. 26, § 1-104(A)-(B)(1).

\footnotesize{11 See id.

\footnotesize{12 In ruling that states may regulate who can vote in a primary election, the Court denied parties the ability to determine their voter pools. See \textit{Clingman}, 544 U.S. at 598 (giving Oklahoma power over LPO as to whether registered voters of other parties may vote in LPO’s primary).

\footnotesize{13 See infra Part III.C.


\footnotesize{16 See infra Part I.A-C.

\footnotesize{17 See infra Part II.

\footnotesize{18 See infra Part III.}
concludes that to ensure voters’ ability to cast their desired votes, the party, not the state, should determine its voter pool.19

I. BACKGROUND

Freedom of association pervades many aspects of American life and can rise to the forefront when parties seek to define the bounds of their associations.20 The Supreme Court gave political parties a large degree of associational freedom during the past several decades, preventing states from controlling parties’ associational rights.21 The power struggle between parties and states came to a head in 2005 when the Court in Clingman transferred power from the parties to the states.22 This Part introduces the primary election system and basic First Amendment jurisprudence, and then discusses two cases preceding the Clingman shift in power.

A. Primary Election Systems

The modern primary system, where parties determine which candidate will represent their party in the general election, developed in the late nineteenth century.23 Each state implements its own primary election system through state statutes.24 While no single

19 See infra Part III.C.
21 See BRESLER, supra note 20, at 78-81 (stating that since 1976, Court has upheld party autonomy and prevented states from dictating composition of party).
22 Whereas the Court had consistently given parties the power to determine their associational bounds since 1976, it shifted this power to the state in Clingman. Compare id. (describing Court’s practice of consistently upholding party autonomy), with Clingman v. Beaver, 544 U.S. 581, 598 (2005) (granting Oklahoma power to determine whether LPO can invite nonmembers into its primary).
24 See BRESLER, supra note 20, at 75-76 (describing nature and structure of primary systems).
primary election classification scheme exists, scholars generally classify primaries as closed, open, blanket, or semi-closed.\(^{25}\) Distinguishing between these classifications is important because the type of primary determines who may vote in which party’s primary election.\(^ {26}\)

In a closed primary, only party-registered voters may vote.\(^ {27}\) However, some primary systems exhibit varying degrees of “closedness.”\(^ {28}\) For instance, a semi-closed primary allows both party members and Independents — voters not affiliated with a recognized party — to vote.\(^ {29}\) In contrast, an open primary system allows registered voters to vote in any one party’s primary.\(^ {30}\) In addition, while open primaries allow voters to vote in only a single party’s election, blanket primaries allow voting in every party’s primary at the same time.\(^ {31}\)

The degree of closedness or “openness” of a given primary system determines who may vote in a party’s primary and thus who selects a party’s candidate.\(^ {32}\) When Independents vote in a primary, they may


\(^{26}\) See Gerber & Morton, supra note 25, at 306 (describing how type of primary determines which segments of electorate can and cannot participate).

\(^{27}\) See Aimee Dudovitz, California Democratic Party v. Jones: The Constitutionality of Blanket Primary Laws, 44 N.Y.L. SCH. L. REV. 13, 17 (2000) (noting that closed primary restricts participation in party’s primary to those voters registered as members of that party); see also Charles E. Borden, Primary Elections, 38 HARV. J. ON LEGIS. 263, 264 (2001) (defining “closed primary” as primary permitting only party members to vote).


\(^{30}\) See Priya Chatwani, Retro Politics Back in Vogue: A Look at How the Internet Can Modernize the Reemerging Caucus, 14 S. CAL. INTERDISC. L.J. 313, 318 (2005) (“In an open primary, a registered voter can vote in either primary regardless of party membership, but cannot participate in more than one.”).

\(^{31}\) See Gerber & Morton, supra note 25, at 306 (describing difference between open and blanket primaries).

\(^{32}\) See id. (describing open primaries as allowing larger segment of electorate to
choose a candidate less aligned with the party’s platform.\textsuperscript{33} Therefore, the degree of openness can alter the nature of the candidate selected in the primary.

B. \textit{First Amendment Associational Rights}

Associational freedom, the freedom to belong to an association of individuals, derives from the First Amendment freedoms of speech and assembly.\textsuperscript{34} The importance of associational rights lies in the fact that modern life requires the assemblage of individuals to conduct daily activities.\textsuperscript{35} Courts often deal with associational rights issues in the context of election law and politics.\textsuperscript{36}

Freedom of association plays an important role in politics because it allows citizens to seek change by furthering common political beliefs.\textsuperscript{37} Political parties have a First Amendment right to freely vote in primary and describing closed primaries as more restrictive on who may vote in primary). Those people who vote in a party’s primary select that party’s candidate for the general election. See Miller, supra note 23, § 2, at 138.


\textsuperscript{34} See U.S. CONST. amend. I (stating that Congress shall make no law abridging freedom of speech or “the right of the people peaceably to assemble”); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (basing right of association on “the close nexus between the freedoms of speech and assembly”); John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law 1292-93} (7th ed. 2004) (describing how Supreme Court derived right of association from First Amendment freedoms of speech and assembly); George Kateb, \textit{The Value of Association}, in \textit{Freedom of Association}, supra note 20, at 35 (using right to association and right to assembly synonymously); Adam Winkler, \textit{Scrutinizing the Second Amendment,} 105 Mich. L. Rev. 683, 693 (2007) (noting that freedom of association is implicit in right of assembly).

\textsuperscript{35} See Gutmann, supra note 20, at 3-4 (listing examples of associations and noting social benefits of such associations); Kateb, supra note 34, at 37 (stating that people associate to achieve innumerable ends).


associate, but certain state regulations infringe this right. A court must conduct a balancing analysis to determine the legitimacy of a regulation that infringes upon a constitutional right. Courts weigh the regulatory burdens placed on individuals' rights against state interests that the regulation seeks to promote. When the regulation imposes severe burdens on the aggrieved party's rights, a court strictly scrutinizes the asserted state interest.

Under a strict scrutiny analysis, the state must narrowly tailor the regulation to meet compelling state interests. Courts undertake a

scholars believe people best realize their ability to participate in politics and have their interests represented by acting in association with others); Gutmann, supra note 20, at 3 (noting access to associations allows individuals to influence political process).


41 See Jones, 530 U.S. at 582 (noting that only law narrowly tailored to meet compelling state interests can justify severe burdens on associational rights); Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 496 (1985) (inquiring whether government narrowly tailored statute to address evil purportedly regulated); Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (applying strict scrutiny to limitation on core First Amendment rights of political expression); Lincoln Club of Orange County v. Irvine, 292 F.3d 934, 938 (9th Cir. 2002).

42 See Jones, 530 U.S. at 582; Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (stating legislature must narrowly tailor regulation to achieve compelling state interests when that regulation imposes severe burdens on parties' rights); JAMES A. PALMER ET AL., ELECTION CASE LAW 97, at 5 (1997); Julia E. Guttman,
This intermediate scrutiny only requires the state to assert important, but not necessarily compelling, state interests to justify the regulation. Because freedom of association is a fundamental right, courts often require applying strict scrutiny analysis to laws that infringe upon it. Courts, however, do not always apply strict scrutiny, especially when the law imposed only minimal burdens on individuals' or political

Note, Primary Elections and the Collective Right of Freedom of Association, 94 YALE L.J. 117, 130 (1984) (stating if regulation expands or contracts participation in primary against party's wishes, regulation stands only if legislature narrowly tailors it to achieve compelling state interest); see also The Supreme Court, 2004 Term — Leading Cases, 119 HARV. L. REV. 268, 270 n.17 (2005) [hereinafter Election Law] (stating that if regulation imposes severe burden on associational rights, Court applies strict scrutiny).

43 Timmons, 520 U.S. at 358-59; Lincoln Club of Orange County, 292 F.3d at 938; see Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386-88 (2000) (discussing circumstances under which Court applies various levels of scrutiny); Buckley, 424 U.S. at 20-21, 25; PALMER ET AL., supra note 42, at 5.

44 See Timmons, 520 U.S. at 338; NOWAK & ROTUNDA, supra note 39, at 689; PALMER ET AL., supra note 42, at 5. Although the Timmons Court did not refer to this standard of review as “intermediate scrutiny,” this Note refers to this less exacting review as intermediate scrutiny in order to distinguish it from strict scrutiny. The term “intermediate scrutiny” does not define any single standard or test, but rather describes any standard of review that is less rigorous than strict scrutiny and more rigorous than rational basis review. See Katherine C. Den Bleyker, The First Amendment Versus Operational Security: Where Should the Milblogging Balance Lie?, 17 FORDHAM INTELL. PROP, MEDIA & ENT. L.J. 401, 413-14 (2007) (stating that courts give inconsistent labels to levels of scrutiny, but there are three general levels of scrutiny: rational basis, intermediate, and strict). Because the standard that the Timmons Court articulated involved balancing the state’s interest against the harm inflicted upon political party’s associational rights, this less exacting review is a form of intermediate scrutiny. See NOWAK & ROTUNDA, supra note 39, at 689 (explaining various standards of review and describing “important state interest test” as balancing burdens on associational rights against important state interests); PALMER ET AL., supra note 42, at 5 (defining intermediate level of scrutiny as “balancing of interests” test).

45 NAACP v. Button, 371 U.S. 415, 438 (1963) (stating U.S. Supreme Court precedent consistently holds that only compelling state interest in regulation of constitutionally protected subject matter can justify limiting First Amendment freedoms); see PALMER ET AL., supra note 42, at 5 (noting likelihood that courts will apply higher levels of scrutiny in election cases because they usually have major impact upon individuals’ constitutional rights); Joseph A. Pull, Questioning the Fundamental Right to Marry, 90 MARQ. L. REV. 21, 55-56 (2006) (identifying freedom to associate as fundamental right); Michelle A. Daubert, Comment, Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights, 54 BUFF. L. REV. 1299, 1314 (2007) (listing freedom of association as one category of fundamental rights warranting strict scrutiny).
parties’ rights.46 As a result, courts focus their analysis on how much
the state's regulation burdens associational rights in order to
determine which level of scrutiny to apply.47

The First Amendment clearly prohibits regulations that abridge the
right to assemble, but the applicable standard of review for such
regulations remains unclear.48 When a regulation severely burdens an
individual’s associational rights, courts apply strict scrutiny.49 When
the burdens are minimal, courts apply a less exacting level of
scrutiny.50 These rules are clear, but in practice it is difficult to apply
them to primary election law cases.51

C. Constitutionality of Various Primary Systems

Throughout the years, the Supreme Court has examined many cases
dealing with the constitutionality of various primary systems.52 Two

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46 See Timmons, 520 U.S. at 364 (finding Minnesota’s law did not impose severe
enough burdens on political party’s associational rights to warrant strict scrutiny);
minimal, or less than severe, burdens on individuals’ First Amendment rights, courts
err in applying strict scrutiny); cases cited supra note 43. It does not matter if the law
burdens the party’s rights or individuals’ rights because burdening one burdens the
interfering with party’s freedom simultaneously interferes with its members’ freedoms).

47 See Persily & Cain, supra note 39, at 776 (noting that courts must determine
burdens on individuals’ rights in constitutional rights cases).

48 The First Amendment protects individuals’ right to assemble peaceably. U.S.
CONST. amend. I (“Congress shall make no law . . . abridging . . . the right of the
people peaceably to assemble . . . .”). Some cases receive strict scrutiny, while others
receive a lesser level of scrutiny. Compare Cal. Democratic Party v. Jones, 530 U.S.
567, 582-85 (2000) (applying strict scrutiny), and Tashjian v. Republican Party of
Conn., 479 U.S. 208, 214, 217 (1986) (same), with Clingman v. Beaver, 544 U.S. 581,
593 (2005) (applying lower level of scrutiny), and Timmons, 520 U.S. at 364 (same).

49 See Jones, 530 U.S. at 582 (noting that presence of severe burdens results in
application of strict scrutiny).

50 Timmons, 520 U.S. at 358-59; Lincoln Club of Orange County v. Irvine, 292
F.3d 934, 938 (9th Cir. 2002); see Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 386-
88 (2000) (discussing circumstances under which Court applies various levels of
scrutiny); Buckley v. Valeo, 424 U.S. 1, 20-21, 25 (1976); PALMER ET AL., supra note
42, at 5.

51 See infra Part III.A.1 (arguing Court inconsistently characterized same burden
as severe in some cases and as minimal in other cases).

52 See, e.g., Jones, 530 U.S. at 569 (deciding constitutionality of blanket primary);
cases in the past twenty years particularly dealt with the issue of who controlled a major party’s voter pool and the ramifications of that control on associational rights. In \textit{Tashjian v. Republican Party of Connecticut} and \textit{California Democratic Party v. Jones}, the Court invalidated election systems that gave states control over parties’ voter pools.\footnote{See \textit{Tashjian v. Republican Party of Connecticut}, 479 U.S. at 211; \textit{Jones}, 530 U.S. at 386.}

1. \textit{Tashjian v. Republican Party of Connecticut}

In \textit{Tashjian}, the Republican Party allowed Independent voters to vote in Republican primary elections.\footnote{See \textit{Tashjian v. Republican Party of Connecticut}, 479 U.S. at 210.} However, Connecticut’s closed primary system only allowed party members to vote in that party’s primary.\footnote{See \textit{Id.} at 210-11.} Consequently, the Republican Party sued the Connecticut Secretary of State, challenging the constitutionality of Connecticut’s closed primary law.\footnote{See \textit{Id.} at 211.} The Republican Party argued that the law violated its First Amendment rights because the state restricted the Party’s ability to associate with unaffiliated voters.\footnote{See \textit{Id.} at 213, 229. Where a party wants to open its primary to unaffiliated voters, a closed primary violates the party’s, its members’, and the unaffiliated voters’ rights. Miller, supra note 23, § 9, at 159.} The Supreme Court agreed and held that Connecticut’s closed primary law unconstitutionally burdened the Party’s associational rights because Connecticut’s asserted interests were not strong enough to justify the restriction.\footnote{See \textit{Id.} at 219.}

In its analysis, the Court found that Connecticut’s closed primary system severely burdened the Party’s ability to define its member base.\footnote{See \textit{Tashjian}, 479 U.S. at 210-11.} Connecticut asserted that the primary system protected the state’s interest in preventing party raiding.\footnote{See \textit{Id.} at 214, 217.} Party raiding occurs
when voters from Party A vote in Party B's primary to skew B's primary.\textsuperscript{62} In applying strict scrutiny, the Court noted that preventing party raiding was an important interest, but not a compelling one as required to satisfy strict scrutiny.\textsuperscript{63} Because Connecticut lacked any compelling interest to justify the regulation, the Court struck down Connecticut's closed primary system.\textsuperscript{64}

2. \textit{California Democratic Party v. Jones}

Fourteen years after invalidating the closed primary system in \textit{Tashjian}, the Court struck down a blanket primary system in \textit{California Democratic Party v. Jones}.

\textsuperscript{65} The blanket primary system allowed any voter to vote for any candidate regardless of party affiliation.\textsuperscript{66} The Democratic Party challenged the law as violating its associational rights because the law forced it to include unwanted voters in its primary.\textsuperscript{67} The Court found that the blanket primary severely burdened the Party's right to select its representative.\textsuperscript{68} The Court ruled that California failed to assert compelling state interests as required under strict scrutiny.\textsuperscript{69} California asserted interests in ensuring the “representativeness” of elected officials, increasing voter participation, and protecting privacy.\textsuperscript{70} These interests, however, were not compelling enough to withstand strict scrutiny.\textsuperscript{71} Even if the state asserted compelling interests, the Court found the statute failed to meet the requirement of a “narrowly tailored means.”\textsuperscript{72} The Court stated that a less restrictive primary system could protect all the asserted interests and invalidated the California law.\textsuperscript{73}


\textsuperscript{63} \textit{Tashjian}, 479 U.S. at 219 (citing Kusper v. Pontikes, 414 U.S. 51, 59-60 (1973); Rosario, 410 U.S. at 761).

\textsuperscript{64} Id. at 229.

\textsuperscript{65} See 530 U.S. 567, 586 (2000).

\textsuperscript{66} See id. at 570.

\textsuperscript{67} See id. at 571.

\textsuperscript{68} See id. at 581-82.

\textsuperscript{69} See id. at 582-85 (rejecting seven asserted state interests).

\textsuperscript{70} See id. at 582-84.

\textsuperscript{71} Id. at 584-85.

\textsuperscript{72} Id. at 585. For a discussion of the narrowly tailored requirement in a strict scrutiny analysis, see supra note 42 and accompanying text.

\textsuperscript{73} See Jones, 330 U.S. at 585-86 (suggesting nonpartisan blanket primary as less
In both Tashjian and Jones, the Court analyzed primary election laws under strict scrutiny.74 In these two cases, the Supreme Court prevented states from determining political parties’ voter pools in primary elections.75 However, despite this established precedent, the Court most recently departed from strict scrutiny analysis and granted states more power to determine parties’ voter bases in Clingman v. Beaver.76

II. CLINGMAN V. BEAVER

In Tashjian and Jones, the Supreme Court affirmed parties’ rights to determine their voter bases and limited states’ powers to delineate the parties’ composition.77 In Clingman, the Court announced that a state could limit a party’s primary to registered voters and Independents.78 This contradicts the holding in Tashjian because states can now proscribe a party’s ability to invite more voters to participate in its primary. Clingman represents a shift towards granting states more power in determining who may vote in a primary, highlighting the tension between political parties and states with respect to control over primary elections.79

In Clingman, the LPO wanted to open its primary election to all registered voters in Oklahoma.80 However, Oklahoma’s election laws only allowed LPO members and Independents, but not Republicans or restrictive means of achieving asserted state interests and invalidating blanket primary).

74 See id. at 582-85; Tashjian, 479 U.S. at 214, 217.
75 See Jones, 530 U.S. at 586; Tashjian, 479 U.S. at 224-25.
76 In Clingman, the Court allowed Oklahoma to regulate who could vote in the LPO’s primary, despite the LPO’s desire to include additional voters. See 544 U.S. 581, 583, 598 (2005).
77 See infra Part I.C.1-2.
78 See Clingman, 544 U.S. at 598.
79 See Spangler, supra note 36, at 846-47 (identifying party’s challenge of state primary election scheme as exemplary of common conflict between parties and states). Compare Clingman, 544 U.S. at 598 (granting Oklahoma power to determine LPO’s primary voter pool), with Bresler, supra note 20, at 81 (stating that Tashjian and its predecessors established that state cannot regulate party organization and cannot dictate composition of party).
Democrats, to vote in the LPO primary.\textsuperscript{81} Frustrated by this limitation on their associational rights, the LPO, along with several Republican and Democratic voters, sued Oklahoma to prevent enforcement of the primary law.\textsuperscript{82} The LPO argued that the Oklahoma primary system burdened its First Amendment right to determine its group’s composition.\textsuperscript{83} In response, Oklahoma asserted three interests justifying the primary laws: (1) preserving parties as viable interest groups, (2) aiding party-building efforts, and (3) preventing party raiding.\textsuperscript{84} The District Court for the Western District of Oklahoma found for Oklahoma, holding that Oklahoma’s primary law did not severely burden the LPO’s rights.\textsuperscript{85} In addition, the court concluded that Oklahoma’s interest in preserving parties as viable interest groups justified any burden on the LPO’s associational rights.\textsuperscript{86}

The Court of Appeals for the Tenth Circuit reversed the district court’s judgment.\textsuperscript{87} The Tenth Circuit found that the Oklahoma statute severely burdened the LPO’s associational rights because the law regulated the internal composition of the group.\textsuperscript{88} The court applied strict scrutiny and rejected Oklahoma’s asserted interests.\textsuperscript{89}

The Supreme Court reversed the Tenth Circuit’s judgment.\textsuperscript{90} The Court held that the Oklahoma statute only minimally burdened the LPO’s associational rights because the statute did not regulate the LPO’s internal processes.\textsuperscript{91} The Court also rejected the LPO’s argument that requiring nonmembers to dissociate from their parties and register with the LPO severely burdened voters’ associational

\textsuperscript{81} OKLA. STAT. tit. 26, § 1-104(A)-(B)(1) (2006); see Clingman, 544 U.S. at 584-85 (explaining that Republicans and Democrats could not vote in LPO primary under Oklahoma law).
\textsuperscript{82} Clingman, 544 U.S. at 585.
\textsuperscript{83} See Beaver v. Clingman, 363 F.3d 1048, 1055 (10th Cir. 2004), rev’d, 544 U.S. 581 (2005).
\textsuperscript{84} Clingman, 544 U.S. at 594-96; see Beaver, 363 F.3d at 1058 (listing Oklahoma’s asserted state interests); Brief of Appellees at 19-20, Beaver v. Clingman, 363 F.3d 1048 (10th Cir. 2004) (No. 03-6098), available at 2003 WL 23738205 (arguing that Oklahoma statute protects parties and integrity of their selection processes).
\textsuperscript{85} Clingman, 544 U.S. at 585.
\textsuperscript{86} Id.
\textsuperscript{87} Beaver, 363 F.3d at 1061.
\textsuperscript{88} Id. at 1057-58; see Clingman, 544 U.S. at 585 (acknowledging that Tenth Circuit concluded Oklahoma’s primary system severely burdened LPO’s associational rights).
\textsuperscript{89} Beaver, 363 F.3d at 1058-61.
\textsuperscript{90} Clingman, 544 U.S. at 598.
\textsuperscript{91} See id. at 590.
rights.92 Because the Court found that the regulation only imposed minimal burdens on the LPO’s rights, it refused to apply strict scrutiny.93

Finding only minimal burdens, the Court applied a less rigorous analysis than strict scrutiny.94 Under intermediate scrutiny, Oklahoma only had to show important state interests, rather than stronger, compelling state interests as required under strict scrutiny.95 The Court held that preserving parties as interest groups, enhancing party-building efforts, and preventing party raiding amounted to important interests that justified the law.96 The Court, however, did not address whether these interests would withstand strict scrutiny.97 Therefore, a careful critique of the Court’s decision requires examining the severity of the associational burdens and the weight of the state’s asserted interests.98

III. ANALYSIS

The Clingman decision hinged on the Court’s refusal to apply strict scrutiny to Oklahoma’s primary election law.99 First, the Court rejected precedent and failed to notice the findings of social research relating to voter registration when it analyzed the burdens in Clingman.100 As a result, the Court applied a lower level of scrutiny than it applied in its precedent cases.101 Second, because the Court applied intermediate scrutiny, it accepted certain state interests that would not have survived strict scrutiny analysis.102 Third, by

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92 See id. at 590-91 (explaining registration only requires filling out form).
93 Id. at 593.
94 See id.
95 See id.; see also Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997); PALMER ET AL., supra note 42, at 5. For a discussion of intermediate scrutiny, see supra note 44 and accompanying text.
96 See Clingman, 544 U.S. at 593-94.
97 See id. (recognizing stated interests as “important” but not as “compelling”).
98 See supra note 40.
99 See Clingman, 544 U.S. at 593-97 (finding mere legitimate interests justified Oklahoma law after deciding not to apply strict scrutiny).
100 See infra Part III.A.1.
101 See supra notes 94-95 and accompanying text.
upholding the Oklahoma primary under intermediate scrutiny, the Court prevented the LPO from expanding its support base. This inability to expand its support base, which inhibits the LPO’s goal of achieving representation in government, exemplifies how Clingman squashed the potential for a viable third party in U.S. politics. In this way, the Court infringed voters’ and political parties’ rights by preventing parties from selecting their representatives. The Court should have applied strict scrutiny and invalidated the Oklahoma law.

A. The Court Inappropriately Minimized the Severity of the Burdens the Oklahoma Law Placed on the LPO’s and Voters’ Associational Rights

The Court refused to apply strict scrutiny in Clingman because it mischaracterized the law’s burdens on associational rights as minor. This section presents two reasons why the Court improperly reached this conclusion. First, the Court should have recognized the similarity between Clingman and various precedent cases in which the Court applied strict scrutiny. Second, the burdens of changing one’s party affiliation and preventing a party from expanding its voter base are more significant than the Court suggested.

1. The Court Undervalued the Similarity of Previous Primary Election Law Cases

Given the similarities among Clingman, Tashjian, and Jones, the Court should have applied strict scrutiny in Clingman as it did in both tailored and advance a compelling state interest.”); Palmer et al., supra note 42, at 5; Guttman, supra note 42, at 130. Oklahoma failed to assert compelling interests. See Clingman, 544 U.S. at 593 (describing asserted interests merely as “important”).

103 Under the Clingman decision, only the state may empower the LPO to invite registered voters of other parties to its primary. Clingman, 544 U.S. at 598.

104 See infra Part III.C (identifying LPO’s need to expand its voter base to achieve its political goal of obtaining representation in government).

105 See Briffault, supra note 53, at 54 (arguing that Court should have applied strict scrutiny in Clingman as it did in Tashjian).

106 See Clingman, 544 U.S. at 593; infra Part III.A.2.

107 See infra Part III.A.1-2.

108 See infra Part III.A.1.

109 See Briffault, supra note 53, at 52 (recognizing burden that inability to associate with nonmembers places on party); Miller, supra note 23, § 4, at 145-46 (noting potential burden arising from privacy concerns associated with party affiliation).
In *Clingman* v. *Beaver*, the Court found that Oklahoma's semi-closed primary did not severely burden the LPO's right to expand its support base and refused to apply strict scrutiny. The Court could have rationalized this disparate treatment of the Republican and Democratic Parties on the one hand and the LPO on the other hand if the burdens on these parties actually were dissimilar. The burdens, however, were not dissimilar.

In all three of these cases, the state regulation at issue prevented the party from determining its voter base. In *Tashjian*, the state prevented a party from inviting any nonmember into its primary. In *Jones*, the state required a party to allow all voters into its primary.
In Clingman, the state prevented a party from inviting members of other parties into its primary. These three systems presented different methods of burdening a party, but each produced the same burden of preventing a party from defining its associational boundaries.

A party has the right to associate with people of its choice, including the right to include and the right to exclude individuals. A prohibition on either the party’s right to exclude or to include individuals amounts to a burden on the party’s right to freely associate. Therefore, California’s mandatory inclusion of individuals and Oklahoma’s and Connecticut’s mandatory exclusion of individuals similarly burden a party’s associational freedom. Because the cases present equivalent burdens, the Court erred by finding the burden severe enough to warrant strict scrutiny in Jones and Tashjian, but not in Clingman.

2. The Burdens Are More Severe Than the Court Suggested

Even if the Clingman Court refused to follow Tashjian and Jones on other grounds, it should still have found severe burdens in Clingman. First, the Oklahoma law severely burdens a party’s ability to broaden its voter base. A political party forms in order to elect a

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119 See Clingman, 544 U.S. at 598.
120 See supra notes 116-19 and accompanying text.
122 See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1015 (2d ed. 1988) (stating that government abridges freedom of association by preventing group from excluding individuals it does not want as members); see also Seamus K. Barry, Note, Stealing the Covers: The Supreme Court’s Ban on Blanket Primary Elections and Its Effect on a Citizen’s First Amendment Right “to Petition the Government for a Redress of Grievances,” 9 COMMLAW CONSPECTUS 71, 72 (2001) (referencing Tribe’s discussion of how government can burden right of association).
123 See supra notes 121-22 and accompanying text.
124 See Beaver v. Clingman, 363 F.3d 1048, 1056-57 (10th Cir. 2004), rev’d, 544 U.S. 581 (2005) (stating court should follow Tashjian and Jones in deciding Clingman); Briffault, supra note 53, at 54 (arguing that Court should have decided Clingman same way it decided Tashjian and Jones).
125 For a discussion of some of the burdens, see infra Part III.A.2.
person to public office. In furtherance of this purpose, a party might logically attempt to increase the number of voters within its voter pool. The Oklahoma law inhibits a party from electing its candidate to office by limiting the party's ability to invite more voters into its primary. According to this law, groups can never grow because they cannot add members to their ranks, and this directly contravenes the central purpose of a party's freedom of association. Therefore, the Court improperly declined to acknowledge and characterize the Oklahoma law as a severe burden on the LPO and its members' associational rights.

Second, the Court failed to adequately address the inherent burdens when one dissociates from one party and affiliates with a new one.


128 See Charles E. Merriam & Harold Foote Gosnell, The American Party System 364-68 (4th ed. 1969) (noting that parties, in focusing their efforts on winning election, work to ensure they have large number of party supporters). Because party members usually vote for their party's candidate, increasing the number of party members increases the number of votes for the party's candidate. See Larry M. Bartels, Partisanship and Voting Behavior, 1952-1996, 44 AM. J. POL. SCI. 35, 35 (2000) (finding that impact of party membership on voting behavior has strengthened in recent years).

129 The Oklahoma statute prevents parties from increasing the number of voters in its primary. See tit. 26, § 1-104(A)-(B)(1). By preventing parties from increasing the number of voters in their primaries, the Oklahoma law prevents parties from increasing the number of party supporters necessary to win an election. See supra note 128 and accompanying text (asserting that in seeking electoral success, parties attempt to increase their support bases).


131 See Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 590 (6th Cir. 2006) (finding that burdens on party's ability to recruit supporters are severe and warrant strict scrutiny).

132 See Clingman v. Beaver, 544 U.S. 581, 610 n.1 (2005) (Stevens, J., dissenting) (arguing that plurality's opinion understates burdens involved with registration). Registration imposes nontrivial burdens on voters. See Stanley Kelley, Jr. et al., Registration and Voting: Putting First Things First, 61 AM. POL. SCI. REV. 359, 360 (1967) (identifying three costs associated with registering to vote). The Court should take into consideration other regulations limiting a person's ability to readily
Requiring nonmembers to affiliate with the LPO in order to vote in its primary may cause severe social repercussions for those people.\textsuperscript{133} Voters might hesitate to dissociate from a party they have identified with since childhood or that remains the dominant party within their social community.\textsuperscript{134} In addition, having to dissociate to vote in another party’s primary might signal a false repudiation of a person’s affiliation with his party’s platform.\textsuperscript{135} Specifically, a voter might support another party’s candidate in one election to signal to his party the types of changes he desires, not to repudiate his support for his party.\textsuperscript{136} Because having to falsely repudiate one’s political association is a severe burden, the \textit{Clingman} Court improperly characterized the burden of dissociating from one’s party as minor.\textsuperscript{137}

Critics of this view might argue that Oklahoma’s law does not technically prevent the LPO from engaging in any electoral activity and does not burden the LPO.\textsuperscript{138} When parties participate in electoral
dissociate and re-affiliate. See Persily & Cain, supra note 39, at 799-800 (cautioning that judges should not consider any single law in isolation).

\textsuperscript{133} See \textit{Tashjian}, 479 U.S. at 215 n.5 (noting affiliation may subject party members to hostility or discrimination). See generally Miller, supra note 23, § 4, at 145-46 (noting potential privacy concerns associated with disclosing or declaring one’s party affiliation).

\textsuperscript{134} See Carol A. Cassel, \textit{Predicting Party Identification, 1956-80: Who Are the Republicans and Who Are the Democrats?}, 4 POL. BEHAV. 265, 265 (1982) (noting that voters in community have longstanding political loyalties to one party); Jane Jenson, \textit{Party Loyalty in Canada: The Question of Party Identification}, 8 CAN. J. POL. SCI. 543, 548 (1975) (stating party loyalty remains stable over time and such loyalty stems from family influence). See generally McClosky & Dahlgren, supra note 3, at 738 (finding that voters remain loyal to party preference espoused by those people living in close proximity to them).


\textsuperscript{136} See id. at 334; see also \textit{Clingman}, 544 U.S. at 601 (O’Connor, J., concurring) (expressing belief that voter affiliated with major party might vote in minor party’s primary during particular election without intending to repudiate his affiliation with major party).

\textsuperscript{137} See Allison, supra note 135, at 333. In \textit{Tashjian}, the Court rejected Connecticut’s argument that its primary did not severely burden associational rights in part because Connecticut required voters to publicly affiliate with a party to vote in its primary. See \textit{Tashjian}, 479 U.S. at 216 n.7.

\textsuperscript{138} The Oklahoma primary system only prevented the LPO from inviting nonmembers into its primary; it did not expressly prevent the LPO from conducting election activities. OKLA. STAT. tit. 26, § 1-104(A) (2006); see \textit{Clingman}, 544 U.S. at 387.
activities to elect a candidate, they fulfill their purpose and goal. Because the LPO can engage in electoral activities such as communicating its positions and support for its candidate, the Oklahoma law does not burden its rights.

The problem with this argument is that the Oklahoma law indirectly hinders the LPO from engaging in political activities. For example, if the LPO did not receive ten percent of the vote in the previous election, it would have to expend resources gathering petition signatures to hold a primary in the current election cycle. The LPO's weak electoral performance record suggests that the LPO may never receive ten percent of the vote and qualify for recognized status in Oklahoma. This would force the LPO to endure the cost of petitioning Oklahoma for recognized status every election, thus severely burdening its ability to participate in electoral activities.

B. The Court Overstated Oklahoma's Interest in Preventing Party Raiding

Under the Clingman Court's intermediate scrutiny analysis, the Court decided that Oklahoma's interest in preventing party raiding...
partially justified the regulation. The Court feared that Democrats might vote in the LPO primary to select an LPO candidate that Republicans might vote for, and vice versa. This would effectively siphon votes from the opposing party, which might make a difference when only a few votes separate the Republicans from the Democrats. In the abstract, the consequences of siphoning do seem troubling.

However, political scientists who have studied party raiding have found that the phenomenon occurs infrequently and has a limited empirical effect. For instance, Professors R. Michael Alvarez and Jonathan Nagler conducted a study of party raiding and found it occurs infrequently for two reasons. First, Alvarez and Nagler state

145 See Clingman, 544 U.S. at 596-97 (describing antiraiding interest as one of three interests justifying Oklahoma law).
146 See id. at 596 (providing example of Democrats voting in LPO primary for candidate most likely to siphon votes from Republicans in general election).
that party raiding only occurs when the voter chooses to elect the most likely loser for the opposing side.\textsuperscript{150} This type of strategic voting behavior occurs very infrequently because of the complex chain of inquiries and decisions a voter must make.\textsuperscript{151} Second, Alvarez and Nagler reason that the voter must have information about the relative chances of success of each candidate in the general election.\textsuperscript{152} People cannot obtain this necessary information, however, because it would require extremely accurate predictive powers.\textsuperscript{153} Therefore, party raiding rarely happens, and research shows sparse empirical evidence to support a state’s asserted interest in curtailing such raiding.\textsuperscript{154}

The 2000 and 2004 elections provide additional empirical evidence of the weak effect of party raiding and siphoning.\textsuperscript{155} In both elections, the Democratic nominee lost to George W. Bush, and a number of liberal voters crossed over and voted for Ralph Nader, the Green Party candidate.\textsuperscript{156} Some people believed that Nader siphoned liberal votes away from the Democratic nominee, thus helping Bush win the

reasons why raiding is unlikely to occur).

\textsuperscript{150} Alvarez & Nagler, supra note 148, at 7.

\textsuperscript{151} Id. at 24-26; see Gary Simson, A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause, 29 Stan. L. Rev. 663, 690 (1977) (observing that raiding is inconsequential because voters do not take time “to weigh the strategic possibilities” necessary for raiding).

\textsuperscript{152} Alvarez & Nagler, supra note 148, at 7.

\textsuperscript{153} Id.


\textsuperscript{155} There is little doubt that siphoning occurred in the 2000 election. See Robert G. Kaiser, Political Scientists Offer Mea Culpa for Predicting Gore Win, WASH. POST, Feb. 9, 2001, at A10 (noting that Nader “took many more votes” from Gore than from Bush and caused Bush to win election). However, certain commentators doubt the significance of siphoning in the 2000 election. See infra notes 158-59 and accompanying text.

Many political scientists and commentators, however, believe the media overstated Nader’s effect. For instance, Michael McDonald of the Brookings Institution, an independent research and policy institute, described Nader’s effect as minimal and overblown. Such research suggests that raiding only minimally affects elections, and thus empirical evidence does not support a state’s interest in curtailing raiding.

Proponents of Oklahoma’s primary system may argue that Oklahoma could assert its inherent power to regulate elections to justify the law. The U.S. Constitution gives states the power to regulate the time, place, and manner of elections. The Court recognizes this power but states that it does not justify infringing fundamental rights unless coupled with additional interests. Oklahoma’s antiraiding interest could serve as the additional interest needed in order for Oklahoma’s regulatory powers to justify the law.

However, opponents of Oklahoma’s primary system would argue that Oklahoma’s regulatory interest can only justify a procedural
regulation, and the Oklahoma law is a substantive regulation. The Oklahoma law regulates a party’s associational bounds, which the Court found cannot be justified by a state’s interest in regulating the time, place, and manner of elections. Because the Oklahoma law is a substantive regulation, Oklahoma cannot assert its regulatory interest to justify the law. Therefore, the Court should reevaluate the constitutionality of Oklahoma’s primary election laws because neither Oklahoma’s interest in preventing party raiding, nor its regulatory power, is as strong or valid as the Court assumed.

C. Clingman Stifles Democracy by Preventing People from Choosing Their Representatives

As in Tashjian, the Supreme Court should have considered the policy goal of promoting fundamental democratic principles when it decided Clingman, regardless of which scrutiny analysis it used. One fundamental democratic principle is to ensure representation for all citizens. This principle of representation allows citizens to cast

165 A state’s interest in regulating the time, place, and manner of elections can only justify a procedural regulation. See Cook v. Gralike, 531 U.S. 510, 527 (Kennedy, J., concurring) (citing U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 833-34 (1995)); Blair T. O’Connor, Note, Want to Limit Congressional Terms?: Vote for “None of the Above,” 29 VAL. U. L. REV. 361, 384 (1994) (noting only procedural regulations are constitutional under Time, Place, and Manner Clause). A state’s attempt to justify a substantive regulation under the Time, Place, and Manner Clause must fail. Id.

166 See OKLA. STAT. tit. 26, § 1-104(A) (2006) (allowing only party members to vote in party’s primary); Tashjian, 479 U.S. at 225 (rejecting Connecticut’s argument that interest in regulating time, place, and manner of elections justified its closed primary system).

167 See supra note 165 and accompanying text.

168 The constitutionality of a statute depends on the legitimacy and strength of each asserted interest. See Anderson v. Celebrezze, 460 U.S. 780, 787-90 (1983) (noting that Court can only decide constitutionality of statute after determining legitimacy and strength of each asserted interest).

169 Gary D. Allison, Professor of Law at The University of Tulsa College of Law, argued that the Supreme Court reached its decision in Tashjian in an effort to promote democratic principles. See Gary D. Allison, Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California’s Blanket Primaries and Endanger the Open Primaries of Many States, 36 TULSA L.J. 59, 92 (2000) (arguing that Court invalidated Connecticut law in order to allow Republican Party to expand its support base and to enhance democratic nature of election process).

effective ballots that aggregate with ballots of like-minded voters to achieve proportional representation.171 In accordance with this principle, the LPO believed that opening its primary to all registered voters would increase its chances to win the general election and gain representation.172 The Constitution protects this fundamental aspect of democracy and allows a party to determine the best structure to accomplish the party’s political goals.173 The Clingman Court, however, stifled democracy because it prevented parties from determining which structure could most increase representation for all citizens.174

Democracy endures because individuals are able to express their views to others.175 Associations facilitate democracy because they give

171 See Williams v. Rhodes, 393 U.S. 23, 30 (1968) (noting that Court tries to protect dual right of individuals to associate for advancement of political beliefs and to cast their votes effectively regardless of their political persuasion); Heather K. Gerken, Understanding the Right to an Undiluted Vote, 114 Harv. L. Rev. 1663, 1677 (2001) (arguing for individual’s right “to aggregate her vote with others matters in a representative democracy”); Samuel Issacharoff, Groups and the Right to Vote, 44 Emory L.J. 869, 883 (1995) (arguing that for all citizens, including minority groups, to obtain representation, voters’ ballots must aggregate with those of like-minded voters to claim just share of electoral results); Miller, supra note 23, § 2, at 138 (stating representative democracy requires ability of citizens to promote candidates who espouse their collective political views).

172 See Respondent’s Brief in Opposition, supra note 80, at 1-2 (stating that LPO felt inviting all registered voters into its primary would produce more viable candidate for general election); The American Political Dictionary 75 (Jack C. Plano & Milton Greenberg eds., 9th ed. 1993) (defining “general election” as final selection of public officials); William R. Kirschner, Fusion and the Associational Rights of Minor Political Parties, 95 Colum. L. Rev. 683, 705 (1995) (stating that only candidate who wins most votes wins election).

173 See Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986) (stating Constitution protects party’s determination of structure that best facilitates accomplishing its political goals); Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 123-24 (1981) (stating that courts may not interfere with party’s determination of best methods to pursue its political goals); Ripon Soc’y, Inc. v. Nat’l Republican Party, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (“[A] party’s choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution . . . .”).


175 See Developments in the Law — The Law of Media, 120 Harv. L. Rev. 1019, 1027 (2007) (stating that lack of diverse voices in society may stifle democracy); Gerken, supra note 171, at 1678 (stating that principle of democracy is that individuals can
voice to individuals in a way that attracts society’s attention.\textsuperscript{176} Allowing third parties to invite additional voters into their primaries gives greater force to these parties’ messages.\textsuperscript{177} Therefore, the Court should allow third parties, such as the LPO, to expand their primary election voter pools to strengthen the diversity of voices in the nation, thus strengthening American democracy.\textsuperscript{178}

CONCLUSION

Prior to \textit{Clingman}, the Court granted parties control over whom could vote in their respective primaries.\textsuperscript{179} The \textit{Clingman} Court, however, departed from that precedent and shifted power from the parties to the states.\textsuperscript{180} This shift damages our democratic system.\textsuperscript{181} Specifically, it inhibits citizens’ opportunities to exercise their fundamental right to vote for their most favored candidates.\textsuperscript{182}

In \textit{Clingman}, the Court inaccurately found that the law only minimally burdened parties’ associational rights and that the state

\textsuperscript{176} See Gerken, supra note 171, at 1678 (stating that vote aggregation through associations, which is underpinning of representative democracy, encourages government to pay attention to voters’ concerns); cf. Kateb, supra note 34, at 37 (stating that associations exist to attain ends that individuals could not attain alone).

\textsuperscript{177} See Gerken, supra note 171, at 1678 (stating that voters have greatest effect on political process when they aggregate their votes in cohesive voting group); Keith Darren Eisner, Comment, \textit{Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion}, 141 U. Pa. L. Rev. 973, 997-99 (1993) (describing exposure and voice of third parties as important for bringing alternative viewpoints to public’s attention and democratizing presidential politics).

\textsuperscript{178} See supra notes 175 and 177 and accompanying text.

\textsuperscript{179} See Briffault, supra note 53, at 52 (describing \textit{Clingman} as illustrative of line of cases protecting party autonomy).

\textsuperscript{180} The \textit{Clingman} Court rejected the analysis in \textit{Tashjian}. See \textit{Clingman v. Beaver}, 544 U.S. 581, 591 (2005). After rejecting the analysis in \textit{Tashjian}, the \textit{Clingman} Court upheld the law that gave Oklahoma the authority to restrict the LPO’s voter pool. See id. at 598 (giving Oklahoma power to allow LPO to invite nonregistered members of other parties into its primary).

\textsuperscript{181} See Evseev, supra note 15, at 1313 (criticizing Court’s decision in \textit{Clingman} as detrimental to common voter).

\textsuperscript{182} See id. (noting that Oklahoma statute upheld by Court in \textit{Clingman} prevented voters from voting in primary of their choice).
asserted important interests justifying those burdens.\footnote{See Clingman, 544 U.S. at 593 (describing burdens in case as “minor barriers” and Oklahoma’s interests as “important”).} A proper analysis, consistent with Tashjian and Jones, reveals the severity of the burdens and the weakness of at least one of Oklahoma’s asserted state interests.\footnote{See supra Part III.A.1.} In light of the inconsistent analyses in Tashjian, Jones, and Clingman, the Court should reconsider its analysis of primary election law cases.\footnote{See Election Law, supra note 42, at 268-69 (criticizing Clingman Court for failing to announce clear theory of decision and noting limited precedential value of case).} The Court needs to establish clearly what constitutes a severe burden and what constitutes a substantial or compelling state interest.\footnote{See id.; Samuel Krislov, The Supreme Court and Political Freedom 127 (1968) (criticizing current balancing analysis as amorphous and vague).} Only then can the Court fairly decide future primary election law cases.\footnote{See Election Law, supra note 42, at 268 (noting that Court has failed to announce single theory for resolving future primary election cases); Nathaniel Persily, The Search for Comprehensive Descriptions and Prescriptions in Election Law, 35 Conn. L. Rev. 1509, 1515 (2003) (noting lack of unifying theory in Court’s party autonomy cases).}

American democracy stands for more than the two-party system.\footnote{The Founders of the United States did not intend American democracy to spawn a two-party system. See Steven G. Calabresi, The President, the Supreme Court, and the Founding Fathers: A Reply to Professor Ackerman, 73 U. Chi. L. Rev. 469, 484 (2006) (arguing that two-party system was unintended consequence of Constitution and Founding Fathers did not approve of two-party system).} It depends on people expressing a diverse range of viewpoints.\footnote{Cf. Debora L. Osgood, Note, Expanding the Scarcity Rationale: The Constitutionality of Public Access Requirements in Cable Franchise Agreements, 20 U. Mich. J.L. Reform 305, 312-13 (1986) (stating ability of people to convey diverse viewpoints fulfills principle of democracy that freedom of speech ensures people can make enlightened political decisions); see also sources supra note 175.} Unfortunately, democracy can hardly hear the viewpoints of third parties such as the LPO whimpering under the crushing pressure of Clingman.