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## 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.<sup>1</sup> A registered Republican, Gil believes in conservative family values, limited government, and a strong military.<sup>2</sup> Gil's upbringing molded his values and political ideology, making him a staunch Republican supporter.<sup>3</sup>

Notwithstanding his usual support for the Republican Party, Gil decided that this year he most agreed with James Smith, the Libertarian candidate.<sup>4</sup> Unfortunately for Gil, Oklahoma law prohibits registered Republicans from voting in the Libertarian Party of Oklahoma's ("LPO") primary.<sup>5</sup> In fact, Oklahoma law prohibits all party-affiliated voters from voting in any other party's primary.<sup>6</sup> 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.<sup>7</sup> Under the Oklahoma system, only registered members of a political party can vote in that party's primary.<sup>8</sup> An exception to the Oklahoma law provides that a party may open its

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<sup>1</sup> 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.

<sup>2</sup> See Okla. Republican Party, Oklahoma Republican State Platform 2005, <http://www.okgop.com/images/OK/partyplatform05.pdf> (describing Republican Party's positions on various issues).

<sup>3</sup> 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).

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

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

<sup>6</sup> OKLA. STAT. tit. 26, § 1-104(A) (2006).

<sup>7</sup> *Clingman*, 544 U.S. at 584.

<sup>8</sup> Tit. 26, § 1-104(A).

primary to Independent voters.<sup>9</sup> However, voters affiliated with specific parties, such as the Republican Party, cannot vote in another party's primary.<sup>10</sup> This rule prevails regardless of whether the party desires to invite nonparty members to participate in its primary.<sup>11</sup> The *Clingman* decision allows the state, not the party, to decide who will vote in the LPO's primary election.<sup>12</sup>

This Note argues that the *Clingman* holding represents a detrimental policy shift that disturbs democratic ideals and disempowers voters.<sup>13</sup> 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.<sup>14</sup> To ensure this liberty, the Court should reevaluate its decision in *Clingman* and establish clearer guidelines for applying strict scrutiny in primary election cases.<sup>15</sup>

Part I of this Note describes the American primary election system, First Amendment associational rights jurisprudence, and the current state of primary election law.<sup>16</sup> Part II describes the facts, procedure, and rationale of *Clingman*.<sup>17</sup> Part III analyzes the flaws in the *Clingman* decision and highlights the negative effects these flaws have on the fundamental principles of democracy.<sup>18</sup> Finally, this Note

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<sup>9</sup> *Id.* § 1-104(B)(1). Research shows that the number of Independents has increased since the 1950s. See 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).

<sup>10</sup> See tit. 26, § 1-104(A)-(B)(1).

<sup>11</sup> See *id.*

<sup>12</sup> 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 *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).

<sup>13</sup> See *infra* Part III.C.

<sup>14</sup> See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (stating that Constitution protects party's determination of its own boundaries and structure that best allows it to pursue its political goals); Lenore Chester, Editorial, *Parties Can't Run Presidential Debates*, N.Y. TIMES, Mar. 11, 1987, at A26 (stating that palpable presence of third parties benefits electorate).

<sup>15</sup> The *Clingman* decision undesirably limited the autonomy of parties. Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277, 1313 (2005).

<sup>16</sup> See *infra* Part I.A-C.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> 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.<sup>19</sup>

## 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.<sup>20</sup> The Supreme Court gave political parties a large degree of associational freedom during the past several decades, preventing states from controlling parties' associational rights.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup> Each state implements its own primary election system through state statutes.<sup>24</sup> While no single

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<sup>19</sup> See *infra* Part III.C.

<sup>20</sup> See Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3-4 (Amy Gutmann ed., 1998) (listing various associations, covering many aspects of life); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 656-67 (2002) (stating that freedom of association includes party's ability to select people who constitute association). See generally ROBERT J. BRESLER, FREEDOM OF ASSOCIATION: RIGHTS AND LIBERTIES UNDER THE LAW (2004) (discussing freedom of association and its relation to political issues).

<sup>21</sup> 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).

<sup>22</sup> 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).

<sup>23</sup> See JAMES M. BURNS, THE DEADLOCK OF DEMOCRACY 82-83 (1967) (explaining that primary elections arose after election of 1896); Robin Miller, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5TH 125, § 2, at 138 (2004) (noting that voters, at primary election, select party's candidate for general election).

<sup>24</sup> 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.<sup>25</sup> Distinguishing between these classifications is important because the type of primary determines who may vote in which party's primary election.<sup>26</sup>

In a closed primary, only party-registered voters may vote.<sup>27</sup> However, some primary systems exhibit varying degrees of "closedness."<sup>28</sup> For instance, a semi-closed primary allows both party members and Independents — voters not affiliated with a recognized party — to vote.<sup>29</sup> In contrast, an open primary system allows registered voters to vote in any one party's primary.<sup>30</sup> 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.<sup>31</sup>

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.<sup>32</sup> When Independents vote in a primary, they may

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<sup>25</sup> See *Beaver v. Clingman*, 363 F.3d 1048, 1052 n.1 (10th Cir. 2004), *rev'd*, 544 U.S. 581 (2005) (listing various primary categories); Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 306 (1998) (describing various types of primaries).

<sup>26</sup> See Gerber & Morton, *supra* note 25, at 306 (describing how type of primary determines which segments of electorate can and cannot participate).

<sup>27</sup> 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).

<sup>28</sup> See Gerber & Morton, *supra* note 25, at 306; Raymond J. Laraja, *Running for Office? Get a Lawyer*, 4 ELECTION L.J. 223, 224 (2005) (stating that only party members may vote in truly closed primary).

<sup>29</sup> See Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187, 2188 (2006); Laraja, *supra* note 28, at 224. The Oklahoma legislature defined "Independents" as people who do not indicate a recognized party on their voter registration application. OKLA. STAT. tit. 26, § 4-112(A) (2006).

<sup>30</sup> 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.").

<sup>31</sup> See Gerber & Morton, *supra* note 25, at 306 (describing difference between open and blanket primaries).

<sup>32</sup> See *id.* (describing open primaries as allowing larger segment of electorate to

choose a candidate less aligned with the party's platform.<sup>33</sup> Therefore, the degree of openness can alter the nature of the candidate selected in the primary.

### B. 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.<sup>34</sup> The importance of associational rights lies in the fact that modern life requires the assemblage of individuals to conduct daily activities.<sup>35</sup> Courts often deal with associational rights issues in the context of election law and politics.<sup>36</sup>

Freedom of association plays an important role in politics because it allows citizens to seek change by furthering common political beliefs.<sup>37</sup> Political parties have a First Amendment right to freely

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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.

<sup>33</sup> See Lowell J. Schiller, *Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases: Clingman v. Beaver*, 125 S. Ct. 2029 (2005), 29 HARV. J.L. & PUB. POL'Y 331, 333 n.19 (2005) (noting that party raiding could possibly result in selecting weaker candidate).

<sup>34</sup> 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, 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, *The Value of Association*, in FREEDOM OF ASSOCIATION, *supra* note 20, at 35 (using right to association and right to assembly synonymously); Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 693 (2007) (noting that freedom of association is implicit in right of assembly).

<sup>35</sup> 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).

<sup>36</sup> See DAVID FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 1-2 (1963) (noting that freedom of association has long played important role in American political life); NOWAK & ROTUNDA, *supra* note 34, at 1297-99 (examining various ways freedom of association intersects with political parties' activities); Shannon L. Spangler, Note, *Freedom of Association — Explanation of the Underlying Concepts — Republican Party of Connecticut v. Tashjian*, 34 U. KAN. L. REV. 841, 847 (1986) (noting that "political parties and voters frequently invoke freedom of association to attack state laws regulating" political activity).

<sup>37</sup> See Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CAL. L. REV. 1209, 1256 (2003) (noting that

associate, but certain state regulations infringe this right.<sup>38</sup> A court must conduct a balancing analysis to determine the legitimacy of a regulation that infringes upon a constitutional right.<sup>39</sup> Courts weigh the regulatory burdens placed on individuals' rights against state interests that the regulation seeks to promote.<sup>40</sup> When the regulation imposes severe burdens on the aggrieved party's rights, a court strictly scrutinizes the asserted state interest.<sup>41</sup>

Under a strict scrutiny analysis, the state must narrowly tailor the regulation to meet compelling state interests.<sup>42</sup> Courts undertake a

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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).

<sup>38</sup> See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (holding that California's blanket primary system unconstitutionally burdens party's First Amendment rights); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 225 (1986) (holding that Connecticut's enforcement of its closed primary system burdens parties' First Amendment rights); Joseph E. Haviland, *Recent Decision: Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364 (1997), 36 DUQ. L. REV. 207, 218 (1997) (describing how statute at issue in *Tashjian* infringed Republican Party's First Amendment right of association by limiting who Republican Party could associate within its primary); Michael L. Stokes, *When Freedoms Conflict: Party Discipline and the First Amendment*, 11 J.L. & POL. 751, 776 (1995) (stating that parties have First Amendment right to determine their own membership).

<sup>39</sup> See JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 688-89 (2d ed. 2005) (explaining how courts balance burdens on associational rights against variety of state interests to determine legitimacy of laws that restrict political parties' freedom of association); Robert C. Wigton, *American Political Parties Under the First Amendment*, 2 J.L. & POL'Y 411, 441 (1999); James J. Lawless, Jr., Note, *Roy v. Cohen: Social Security Numbers and the Free Exercise Clause*, 36 AM. U. L. REV. 217, 223 (1986) (stating that Supreme Court established balancing test in cases dealing with state regulations on religious freedom). See generally Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 776 (2000) (describing framework of analysis for constitutional cases).

<sup>40</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 787-90 (1983).

<sup>41</sup> 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).

<sup>42</sup> 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,



less exacting review when the regulation imposes only minimal burdens on constitutional rights.<sup>43</sup> This intermediate scrutiny only requires the state to assert important, but not necessarily compelling, state interests to justify the regulation.<sup>44</sup>

Because freedom of association is a fundamental right, courts often require applying strict scrutiny analysis to laws that infringe upon it.<sup>45</sup> Courts, however, do not always apply strict scrutiny, especially when the law imposes only minimal burdens on individuals' or political

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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).

<sup>43</sup> *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.

<sup>44</sup> See *Timmons*, 520 U.S. at 358; 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 it 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).

<sup>45</sup> *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.<sup>46</sup> 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.<sup>47</sup>

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

### C. Constitutionality of Various Primary Systems

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

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<sup>46</sup> 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); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (stating that when laws impose 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 other. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (stating that interfering with party's freedom simultaneously interferes with its members' freedoms).

<sup>47</sup> See *Persily & Cain*, *supra* note 39, at 776 (noting that courts must determine burdens on individuals' rights in constitutional rights cases).

<sup>48</sup> 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).

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

<sup>50</sup> *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.

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

<sup>52</sup> 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.<sup>53</sup> In *Tashjian v. Republican Party of Connecticut* and *California Democratic Party v. Jones*, the Court invalidated election systems that gave states control over parties' voter pools.<sup>54</sup>

1. *Tashjian v. Republican Party of Connecticut*

In *Tashjian*, the Republican Party allowed Independent voters to vote in Republican primary elections.<sup>55</sup> However, Connecticut's closed primary system only allowed party members to vote in that party's primary.<sup>56</sup> Consequently, the Republican Party sued the Connecticut Secretary of State, challenging the constitutionality of Connecticut's closed primary law.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup>

In its analysis, the Court found that Connecticut's closed primary system severely burdened the Party's ability to define its member base.<sup>60</sup> Connecticut asserted that the primary system protected the state's interest in preventing party raiding.<sup>61</sup> Party raiding occurs

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*Tashjian*, 479 U.S. at 208 (deciding constitutionality of closed primary); *Terry v. Adams*, 345 U.S. 461 (1953) (invalidating state law preventing African Americans from participating in primaries).

<sup>53</sup> See Richard Briffault, *Clingman v. Beaver and the First Amendment Right of a Minor Political Party to Open Its Primary to Major Party Voters*, 4 *ELECTION L.J.* 51, 52-53 (2005) (including *Tashjian* and *Jones* among "growing list" of cases dealing with right of parties to control their own primaries). This Note uses the terms "voter pool" and "voter base" to refer to the group of people that may vote in a party's election.

<sup>54</sup> See *Tashjian*, 479 U.S. at 211; *Jones*, 530 U.S. at 586.

<sup>55</sup> *Tashjian*, 479 U.S. at 210.

<sup>56</sup> See *id.* at 210-11.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* at 211.

<sup>59</sup> See *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.

<sup>60</sup> See *Tashjian*, 479 U.S. at 214, 217.

<sup>61</sup> See *id.* at 219.

when voters from Party A vote in Party B's primary to skew B's primary.<sup>62</sup> 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.<sup>63</sup> Because Connecticut lacked any compelling interest to justify the regulation, the Court struck down Connecticut's closed primary system.<sup>64</sup>

## 2. *California Democratic Party v. Jones*

Fourteen years after invalidating the closed primary system in *Tashjian*, the Court struck down a blanket primary system in *California Democratic Party v. Jones*.<sup>65</sup> The blanket primary system allowed any voter to vote for any candidate regardless of party affiliation.<sup>66</sup> The Democratic Party challenged the law as violating its associational rights because the law forced it to include unwanted voters in its primary.<sup>67</sup> The Court found that the blanket primary severely burdened the Party's right to select its representative.<sup>68</sup>

The Court ruled that California failed to assert compelling state interests as required under strict scrutiny.<sup>69</sup> California asserted interests in ensuring the "representativeness" of elected officials, increasing voter participation, and protecting privacy.<sup>70</sup> These interests, however, were not compelling enough to withstand strict scrutiny.<sup>71</sup> Even if the state asserted compelling interests, the Court found the statute failed to meet the requirement of a "narrowly tailored means."<sup>72</sup> The Court stated that a less restrictive primary system could protect all the asserted interests and invalidated the California law.<sup>73</sup>

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<sup>62</sup> See *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983); *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973).

<sup>63</sup> *Tashjian*, 479 U.S. at 219 (citing *Kusper v. Pontikes*, 414 U.S. 51, 59-60 (1973); *Rosario*, 410 U.S. at 761).

<sup>64</sup> *Id.* at 229.

<sup>65</sup> See 530 U.S. 567, 586 (2000).

<sup>66</sup> See *id.* at 570.

<sup>67</sup> See *id.* at 571.

<sup>68</sup> See *id.* at 581-82.

<sup>69</sup> See *id.* at 582-85 (rejecting seven asserted state interests).

<sup>70</sup> See *id.* at 582-84.

<sup>71</sup> *Id.* at 584-85.

<sup>72</sup> *Id.* at 585. For a discussion of the narrowly tailored requirement in a strict scrutiny analysis, see *supra* note 42 and accompanying text.

<sup>73</sup> See *Jones*, 530 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.<sup>74</sup> In these two cases, the Supreme Court prevented states from determining political parties' voter pools in primary elections.<sup>75</sup> 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*.<sup>76</sup>

## 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.<sup>77</sup> In *Clingman*, the Court announced that a state could limit a party's primary to registered voters and Independents.<sup>78</sup> 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.<sup>79</sup>

In *Clingman*, the LPO wanted to open its primary election to all registered voters in Oklahoma.<sup>80</sup> However, Oklahoma's election laws only allowed LPO members and Independents, but not Republicans or

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restrictive means of achieving asserted state interests and invalidating blanket primary).

<sup>74</sup> See *id.* at 582-85; *Tashjian*, 479 U.S. at 214, 217.

<sup>75</sup> See *Jones*, 530 U.S. at 586; *Tashjian*, 479 U.S. at 224-25.

<sup>76</sup> 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, 585, 598 (2005).

<sup>77</sup> See *infra* Part I.C.1-2.

<sup>78</sup> See *Clingman*, 544 U.S. at 598.

<sup>79</sup> 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).

<sup>80</sup> See *Clingman*, 544 U.S. at 585; Respondent's Brief in Opposition at 1-2, *Clingman v. Beaver*, 544 U.S. 581 (2004) (No. 04-37), available at 2004 WL 1791361 (stating LPO felt that opening its primary to all registered voters in Oklahoma would encourage growth of LPO and produce more viable Libertarian candidate for general election).

Democrats, to vote in the LPO primary.<sup>81</sup> 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.<sup>82</sup> The LPO argued that the Oklahoma primary system burdened its First Amendment right to determine its group's composition.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

The Court of Appeals for the Tenth Circuit reversed the district court's judgment.<sup>87</sup> 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.<sup>88</sup> The court applied strict scrutiny and rejected Oklahoma's asserted interests.<sup>89</sup>

The Supreme Court reversed the Tenth Circuit's judgment.<sup>90</sup> 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.<sup>91</sup> 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

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<sup>81</sup> 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).

<sup>82</sup> *Clingman*, 544 U.S. at 585.

<sup>83</sup> See *Beaver v. Clingman*, 363 F.3d 1048, 1055 (10th Cir. 2004), *rev'd*, 544 U.S. 581 (2005).

<sup>84</sup> *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. 03-6058), available at 2003 WL 23758205 (arguing that Oklahoma statute protects parties and integrity of their selection processes).

<sup>85</sup> *Clingman*, 544 U.S. at 585.

<sup>86</sup> *Id.*

<sup>87</sup> *Beaver*, 363 F.3d at 1061.

<sup>88</sup> *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).

<sup>89</sup> *Beaver*, 363 F.3d at 1058-61.

<sup>90</sup> *Clingman*, 544 U.S. at 598.

<sup>91</sup> See *id.* at 590.

rights.<sup>92</sup> Because the Court found that the regulation only imposed minimal burdens on the LPO's rights, it refused to apply strict scrutiny.<sup>93</sup>

Finding only minimal burdens, the Court applied a less rigorous analysis than strict scrutiny.<sup>94</sup> Under intermediate scrutiny, Oklahoma only had to show important state interests, rather than stronger, compelling state interests as required under strict scrutiny.<sup>95</sup> 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.<sup>96</sup> The Court, however, did not address whether these interests would withstand strict scrutiny.<sup>97</sup> 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.<sup>98</sup>

### III. ANALYSIS

The *Clingman* decision hinged on the Court's refusal to apply strict scrutiny to Oklahoma's primary election law.<sup>99</sup> 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*.<sup>100</sup> As a result, the Court applied a lower level of scrutiny than it applied in its precedent cases.<sup>101</sup> Second, because the Court applied intermediate scrutiny, it accepted certain state interests that would not have survived strict scrutiny analysis.<sup>102</sup> Third, by

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<sup>92</sup> See *id.* at 590-91 (explaining registration only requires filling out form).

<sup>93</sup> *Id.* at 593.

<sup>94</sup> See *id.*

<sup>95</sup> 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.

<sup>96</sup> See *Clingman*, 544 U.S. at 593-94.

<sup>97</sup> See *id.* (recognizing stated interests as "important" but not as "compelling").

<sup>98</sup> See *supra* note 40.

<sup>99</sup> See *Clingman*, 544 U.S. at 593-97 (finding mere legitimate interests justified Oklahoma law after deciding not to apply strict scrutiny).

<sup>100</sup> See *infra* Part III.A.1.

<sup>101</sup> See *supra* notes 94-95 and accompanying text.

<sup>102</sup> Strict scrutiny requires a state to allege compelling interests to justify the regulation's burdens on associational rights. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Regulations imposing severe burdens on [parties'] rights must be narrowly

upholding the Oklahoma primary under intermediate scrutiny, the Court prevented the LPO from expanding its support base.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> This section presents two reasons why the Court improperly reached this conclusion.<sup>107</sup> First, the Court should have recognized the similarity between *Clingman* and various precedent cases in which the Court applied strict scrutiny.<sup>108</sup> 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.<sup>109</sup>

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

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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”).

<sup>103</sup> 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.

<sup>104</sup> See *infra* Part III.C (identifying LPO's need to expand its voter base to achieve its political goal of obtaining representation in government).

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

<sup>106</sup> See *Clingman*, 544 U.S. at 593; *infra* Part III.A.2.

<sup>107</sup> See *infra* Part III.A.1-2.

<sup>108</sup> See *infra* Part III.A.1.

<sup>109</sup> 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).



*Tashjian* and *Jones*.<sup>110</sup> In *Tashjian*, the Court found that Connecticut's closed primary system severely burdened the Republican Party's right to expand its support base and applied strict scrutiny.<sup>111</sup> In *Jones*, the Court found that California's blanket primary system severely burdened the Democratic Party's right to define its support base and applied strict scrutiny.<sup>112</sup> The *Clingman* Court, however, 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.<sup>113</sup> 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.<sup>114</sup> The burdens, however, were not dissimilar.<sup>115</sup>

In all three of these cases, the state regulation at issue prevented the party from determining its voter base.<sup>116</sup> In *Tashjian*, the state prevented a party from inviting any nonmember into its primary.<sup>117</sup> In *Jones*, the state required a party to allow all voters into its primary.<sup>118</sup>

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<sup>110</sup> See *Clingman*, 544 U.S. at 593; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582-85 (2000); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214, 217 (1986); Briffault, *supra* note 53, at 54.

<sup>111</sup> See *Tashjian*, 479 U.S. at 215-16.

<sup>112</sup> See *Jones*, 530 U.S. at 581-82.

<sup>113</sup> See *Clingman*, 544 U.S. at 593 (finding burdens on political parties' associational rights did not warrant applying strict scrutiny). Both *Clingman* and *Tashjian* involved statutes that burdened a party's right to broaden the base of public support for its activities. See *id.* at 612-13 (Stevens, J., dissenting) (noting that Oklahoma statute burdened LPO's associational opportunities); *Tashjian*, 479 U.S. at 214 (stating that freedom of association includes party's right to broaden support base).

<sup>114</sup> Severe burdens require courts to apply strict scrutiny, whereas minimal burdens only require application of a lower level of scrutiny. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 893 (1994) (stating that Court applies strict scrutiny if burden on constitutional right is substantial, and minimum rationality review burden "is of some lesser degree of severity").

<sup>115</sup> See *infra* note 120 and accompanying text.

<sup>116</sup> See *Clingman*, 544 U.S. at 584-85 (describing how Oklahoma statute limited LPO's ability to determine who could vote in its primary by limiting who could vote in a party's primary); *Jones*, 530 U.S. at 570-71 (describing how California statute limited political parties' abilities to determine who could vote in their primaries by allowing anyone to vote in party's primary even if party wanted to limit who could vote in its primary); *Tashjian*, 479 U.S. at 210-11 (describing how Connecticut statute prevented political parties from determining who could vote in their primaries by limiting who could vote in party's primary).

<sup>117</sup> See *Tashjian*, 479 U.S. at 210-11.

<sup>118</sup> See *Jones*, 530 U.S. at 581.

In *Clingman*, the state prevented a party from inviting members of other parties into its primary.<sup>119</sup> 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.<sup>120</sup>

A party has the right to associate with people of its choice, including the right to include and the right to exclude individuals.<sup>121</sup> 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.<sup>122</sup> Therefore, California's mandatory inclusion of individuals and Oklahoma's and Connecticut's mandatory exclusion of individuals similarly burden a party's associational freedom.<sup>123</sup> 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*.<sup>124</sup>

## 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*.<sup>125</sup> First, the Oklahoma law severely burdens a party's ability to broaden its voter base.<sup>126</sup> A political party forms in order to elect a

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<sup>119</sup> See *Clingman*, 544 U.S. at 598.

<sup>120</sup> See *supra* notes 116-19 and accompanying text.

<sup>121</sup> See *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989); Benjamin D. Black, Note, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 118 (1996).

<sup>122</sup> 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 CONSPICUOUS 71, 72 (2001) (referencing Tribe's discussion of how government can burden right of association).

<sup>123</sup> See *supra* notes 121-22 and accompanying text.

<sup>124</sup> 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*).

<sup>125</sup> For a discussion of some of the burdens, see *infra* Part III.A.2.

<sup>126</sup> See OKLA. STAT. tit. 26, § 1-104(A)-(B)(1) (2006) (limiting who may vote in party's primary).

person to public office.<sup>127</sup> In furtherance of this purpose, a party might logically attempt to increase the number of voters within its voter pool.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> Therefore, the Court improperly declined to acknowledge and characterize the Oklahoma law as a severe burden on the LPO and its members' associational rights.<sup>131</sup>

Second, the Court failed to adequately address the inherent burdens when one dissociates from one party and affiliates with a new one.<sup>132</sup>

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<sup>127</sup> See Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 345 (2004) (stating that political parties exist to win elections); Chester, *supra* note 14, at 26.

<sup>128</sup> 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).

<sup>129</sup> 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).

<sup>130</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 n.1 (1997) (Stevens, J., dissenting) (describing party's right to increase its support base as "core element" of party's associational rights); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (stating right of association requires state to allow party to increase its support base so it can grow); William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 692 (1995) (stating that infringement on party's ability to broaden its support base impinges on party's associational rights).

<sup>131</sup> 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).

<sup>132</sup> 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.<sup>133</sup> Voters might hesitate to dissociate from a party they have identified with since childhood or that remains the dominant party within their social community.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> Because having to falsely repudiate one's political association is a severe burden, the *Clingman* Court improperly characterized the burden of dissociating from one's party as minor.<sup>137</sup>

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.<sup>138</sup> When parties participate in electoral

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dissociate and re-affiliate. See Persily & Cain, *supra* note 39, at 799-800 (cautioning that judges should not consider any single law in isolation).

<sup>133</sup> See *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).

<sup>134</sup> See Carol A. Cassel, *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, *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 758 (finding that voters remain loyal to party preference espoused by those people living in close proximity to them).

<sup>135</sup> See Gary D. Allison, *Protecting Our Nation's Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 333 (2005).

<sup>136</sup> See *id.* at 334; see also *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).

<sup>137</sup> See Allison, *supra* note 135, at 333. In *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 *Tashjian*, 479 U.S. at 216 n.7.

<sup>138</sup> 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 *Clingman*, 544 U.S. at 587.

activities to elect a candidate, they fulfill their purpose and goal.<sup>139</sup> 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.<sup>140</sup>

The problem with this argument is that the Oklahoma law indirectly hinders the LPO from engaging in political activities.<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

#### 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

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<sup>139</sup> See *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) (“[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections.”); *Foley*, *supra* note 127, at 345 (noting that political party's objective is to win election).

<sup>140</sup> See *Clingman*, 544 U.S. at 590 (noting that Oklahoma law did not burden LPO because it did not regulate LPO's internal processes or prohibit LPO from communicating with society).

<sup>141</sup> Compare *supra* note 138 (noting that Oklahoma law does not regulate LPO's political activities), with *infra* notes 142-44 and accompanying text (noting increased costs associated with LPO's inability to expand its voter base).

<sup>142</sup> Oklahoma law only allows recognized political parties to hold primary elections. See tit. 26, § 1-102 (2006). For Oklahoma to recognize a party, the party must collect signatures from registered voters equaling five percent of votes cast in the previous general election. See *id.* § 1-108(A)(2) (2006). If a party's nominee fails to receive 10% of the total votes cast for that office, the party loses its status as a recognized party. See *id.* § 1-109(A) (2006).

<sup>143</sup> The LPO presidential candidate never received more than 1.2% of the vote in any of the presidential elections between 1980 and 2000. See Okla. Libertarian Party, Past Electoral Results of Oklahoma Libertarians, <http://www.oklp.org/pastresults.html> (last visited Jan. 30, 2007) (providing election results for Libertarian presidential candidates).

<sup>144</sup> See *Evseev*, *supra* note 15, at 1286 (identifying substantial expense minor party must endure to achieve state recognition).

partially justified the regulation.<sup>145</sup> The Court feared that Democrats might vote in the LPO primary to select an LPO candidate that Republicans might vote for, and vice versa.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup> For instance, Professors R. Michael Alvarez and Jonathan Nagler conducted a study of party raiding and found it occurs infrequently for two reasons.<sup>149</sup> First, Alvarez and Nagler state

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<sup>145</sup> See *Clingman*, 544 U.S. at 596-97 (describing antiraiding interest as one of three interests justifying Oklahoma law).

<sup>146</sup> See *id.* at 596 (providing example of Democrats voting in LPO primary for candidate most likely to siphon votes from Republicans in general election).

<sup>147</sup> See Paul Boudreaux, *The Electoral College and Its Meager Federalism*, 88 MARQ. L. REV. 195, 241 (2004) (stating that presence of third party in election can change outcome of election as between two major parties); Lili Levi, *Professionalism, Oversight, and Institution-Balancing: The Supreme Court's "Second Best" Plan for Political Debate on Television*, 18 YALE J. ON REG. 315, 328 (2001) (stating that third parties can draw votes away from major parties, thus influencing outcome of election between two major parties).

<sup>148</sup> Brian P. Marron, *One Person, One Vote, Several Elections?: Instant Runoff Voting and the Constitution*, 28 VT. L. REV. 343, 364-65 (2004) (describing party raiding as "highly unlikely" and "speculative"); John R. Petrocik, *The Blanket Primary: Candidate Strategy, Voter Response, and Party Cohesion*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY 270, 277 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) (stating that raiding is not common and has only limited effect that is more apparent than real); R. Michael Alvarez & Jonathan Nagler, *Analysis of Crossover and Strategic Voting* 7-8, 24-26 (Cal. Inst. of Tech., Div. of Humanities and Soc. Scis., Working Paper No. 1019, 1997) (finding few instances, and minimal effect, of raiding behavior); see *Cal. Democratic Party v. Jones*, 530 U.S. 567, 599 (2000) (Stevens, J., dissenting) (observing nearly unanimous agreement among political scientists that party raiding does not influence elections in blanket primary context); cf. Teresa McDonald, Note, *California Democratic Party v. Jones: Invalidity of the Blanket Primary*, 29 PEPP. L. REV. 319, 332 (2002) (describing paucity of empirical evidence regarding effect of party raiding).

<sup>149</sup> See Alvarez & Nagler, *supra* note 148, at 7. Jonathan Nagler is a Professor of Politics at New York University. See Wilf Family Dep't of Politics, Jonathan Nagler's Homepage, [http://www.nyu.edu/gsas/dept/politics/faculty/nagler/nagler\\_home.html](http://www.nyu.edu/gsas/dept/politics/faculty/nagler/nagler_home.html) (last visited Jan. 30, 2007). R. Michael Alvarez is a Professor of Political Science at California Institute of Technology. See Div. of Humanities & Soc. Scis., R. Michael Alvarez's Homepage, <http://www.hss.caltech.edu/people/faculty/rma> (last visited Jan. 30, 2007). Other scholars have also identified similar factors that explain why party raiding is unlikely to occur. See *Cal. Democratic Party v. Jones*, 169 F.3d 646, 656-57 (9th Cir. 1999), *rev'd*, 530 U.S. 567 (2000) (recounting Professor Donald Olson's

that party raiding only occurs when the voter chooses to elect the most likely loser for the opposing side.<sup>150</sup> This type of strategic voting behavior occurs very infrequently because of the complex chain of inquiries and decisions a voter must make.<sup>151</sup> Second, Alvarez and Nagler reason that the voter must have information about the relative chances of success of each candidate in the general election.<sup>152</sup> People cannot obtain this necessary information, however, because it would require extremely accurate predictive powers.<sup>153</sup> Therefore, party raiding rarely happens, and research shows sparse empirical evidence to support a state's asserted interest in curtailing such raiding.<sup>154</sup>

The 2000 and 2004 elections provide additional empirical evidence of the weak effect of party raiding and siphoning.<sup>155</sup> 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.<sup>156</sup> Some people believed that Nader siphoned liberal votes away from the Democratic nominee, thus helping Bush win the

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reasons why raiding is unlikely to occur).

<sup>150</sup> Alvarez & Nagler, *supra* note 148, at 7.

<sup>151</sup> *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).

<sup>152</sup> Alvarez & Nagler, *supra* note 148, at 7.

<sup>153</sup> *Id.*

<sup>154</sup> See *id.* at 7-8, 24-25; Guttman, *supra* note 42, at 131 n.68 (1984) (noting scarcity of evidence showing negative effects of raiding); Gary L. Scott & Craig L. Carr, *Political Parties Before the Bar: The Controversy over Associational Rights*, 5 U. PUGET SOUND L. REV. 267, 280 (1982) (noting difficulty of proving occurrence of party raiding).

<sup>155</sup> There is little doubt that siphoning occurred in the 2000 election. See Robert G. Kaiser, *Political Scientists Offer Mea Culpas 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.

<sup>156</sup> In 2000, George W. Bush defeated Al Gore, winning 271 electoral votes and 48% of the popular vote. See CNN.com, Election 2000 Results, <http://www.cnn.com/ELECTION/2000/results> (last visited Jan. 30, 2007). In 2004, George W. Bush defeated John Kerry, winning 286 electoral votes and 51% of the popular votes. See CNN.com, Election 2004 Results, <http://www.cnn.com/ELECTION/2004/pages/results/president> (last visited Jan. 30, 2007). Ralph Nader won a significant number of votes, especially in Florida. See Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 26 n.15 (2002) (noting that 92,000 Floridians voted for Nader).

election.<sup>157</sup> Many political scientists and commentators, however, believe the media overstated Nader's effect.<sup>158</sup> For instance, Michael McDonald of the Brookings Institution, an independent research and policy institute, described Nader's effect as minimal and overblown.<sup>159</sup> Such research suggests that raiding only minimally affects elections, and thus empirical evidence does not support a state's interest in curtailing raiding.<sup>160</sup>

Proponents of Oklahoma's primary system may argue that Oklahoma could assert its inherent power to regulate elections to justify the law.<sup>161</sup> The U.S. Constitution gives states the power to regulate the time, place, and manner of elections.<sup>162</sup> The Court recognizes this power but states that it does not justify infringing fundamental rights unless coupled with additional interests.<sup>163</sup> Oklahoma's antiraiding interest could serve as the additional interest needed in order for Oklahoma's regulatory powers to justify the law.<sup>164</sup>

However, opponents of Oklahoma's primary system would argue that Oklahoma's regulatory interest can only justify a procedural

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<sup>157</sup> See Guinier, *supra* note 156, at 26 n.15 (suggesting that Nader might have determined outcome of election).

<sup>158</sup> See *Factors*, CHI. SUN TIMES, Nov. 12, 2000, at 14 (implying Nader's absence from 2000 election would have had no effect on outcome of election); cf. David Leonhardt, *The Election: Was Buchanan the Real Nader?*, N.Y. TIMES, Dec. 10, 2000, § 4, at 4 (calling into question view that Nader caused Gore to lose 2000 election). Scholars experience difficulty in determining the existence and effect of party raiding. See Guttman, *supra* note 42, at 131 n.68; Scott & Carr, *supra* note 154, at 280. The number of votes for Nader in the 2000 election did not directly correspond to lost votes for Gore. See Marc J. Randazza, *The Constitutionality of Online Vote Swapping*, 34 LOY. L.A. L. REV. 1297, 1303 n.35 (2001).

<sup>159</sup> Daniel Miller, *Fringe Candidates Challenge Main Presidential Contenders: Other Hopefuls Offer New Ideas, Struggle with Ballot Access*, DAILY BRUIN (Los Angeles), Sept. 26, 2004, available at <http://dailybruin.com/news/articles.asp?id=29956> (quoting Michael McDonald of Brookings Institution: "In truth if you look at polls closely, Nader's effect is overblown.").

<sup>160</sup> See sources cited *supra* note 154 (describing paucity of empirical evidence for state's interest in preventing party raiding).

<sup>161</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (stating that state's important regulatory interests might justify reasonable regulations).

<sup>162</sup> U.S. CONST. art. I, § 4, cl. 1 (granting state legislatures power to prescribe times, places, and manner of holding elections). See generally RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 9.3, at 502 (1986) (discussing Time, Place, and Manner Clause).

<sup>163</sup> *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (citing *Wesberry v. Sanders*, 376 U.S. 1, 6-7 (1964)).

<sup>164</sup> See *Clingman v. Beaver*, 544 U.S. 581, 593-94 (2005).



regulation, and the Oklahoma law is a substantive regulation.<sup>165</sup> 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.<sup>166</sup> Because the Oklahoma law is a substantive regulation, Oklahoma cannot assert its regulatory interest to justify the law.<sup>167</sup> 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.<sup>168</sup>

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.<sup>169</sup> One fundamental democratic principle is to ensure representation for all citizens.<sup>170</sup> This principle of representation allows citizens to cast

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<sup>165</sup> 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.*

<sup>166</sup> 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).

<sup>167</sup> See *supra* note 165 and accompanying text.

<sup>168</sup> 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).

<sup>169</sup> 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).

<sup>170</sup> See Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 32 (1991) (noting that political interaction of entire citizenry is fundamental principle of democracy).

effective ballots that aggregate with ballots of like-minded voters to achieve proportional representation.<sup>171</sup> 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.<sup>172</sup> The Constitution protects this fundamental aspect of democracy and allows a party to determine the best structure to accomplish the party's political goals.<sup>173</sup> The *Clingman* Court, however, stifled democracy because it prevented parties from

determining which structure could most increase representation for all citizens.<sup>174</sup>

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

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<sup>171</sup> 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).

<sup>172</sup> See Respondent's Brief in Opposition, *supra* note 80, at 1-2 (stating that LPO felt inviting all registered voters into its primary 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).

<sup>173</sup> 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 . . .").

<sup>174</sup> See *Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (noting that until Oklahoma takes legislative action, LPO cannot associate with registered voters of other parties).

<sup>175</sup> 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.<sup>176</sup> Allowing third parties to invite additional voters into their primaries gives greater force to these parties' messages.<sup>177</sup> 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.<sup>178</sup>

#### CONCLUSION

Prior to *Clingman*, the Court granted parties control over whom could vote in their respective primaries.<sup>179</sup> The *Clingman* Court, however, departed from that precedent and shifted power from the parties to the states.<sup>180</sup> This shift damages our democratic system.<sup>181</sup>

Specifically, it inhibits citizens' opportunities to exercise their fundamental right to vote for their most favored candidates.<sup>182</sup>

In *Clingman*, the Court inaccurately found that the law only minimally burdened parties' associational rights and that the state

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associate to elect a person to speak to nation on their behalf); Irwin P. Stotzky, *The Indispensable State*, 58 U. MIAMI L. REV. 201, 217 (2003) (stating that democracy allows individuals to choose among competing interests and to express their choice).

<sup>176</sup> 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).

<sup>177</sup> 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, *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).

<sup>178</sup> See *supra* notes 175 and 177 and accompanying text.

<sup>179</sup> See Briffault, *supra* note 53, at 52 (describing *Clingman* as illustrative of line of cases protecting party autonomy).

<sup>180</sup> The *Clingman* Court rejected the analysis in *Tashjian*. See *Clingman v. Beaver*, 544 U.S. 581, 591 (2005). After rejecting the analysis in *Tashjian*, the *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).

<sup>181</sup> See Evseev, *supra* note 15, at 1313 (criticizing Court's decision in *Clingman* as detrimental to common voter).

<sup>182</sup> See *id.* (noting that Oklahoma statute upheld by Court in *Clingman* prevented voters from voting in primary of their choice).

asserted important interests justifying those burdens.<sup>183</sup> 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.<sup>184</sup> In light of the inconsistent analyses in *Tashjian*, *Jones*, and *Clingman*, the Court should reconsider its analysis of primary election law cases.<sup>185</sup> The Court needs to establish clearly what constitutes a severe burden and what constitutes a substantial or compelling state interest.<sup>186</sup> Only then can the Court fairly decide future primary election law cases.<sup>187</sup>

American democracy stands for more than the two-party system.<sup>188</sup> It depends on people expressing a diverse range of viewpoints.<sup>189</sup> Unfortunately, democracy can hardly hear the viewpoints of third parties such as the LPO whimpering under the crushing pressure of *Clingman*.

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<sup>183</sup> See *Clingman*, 544 U.S. at 593 (describing burdens in case as "minor barriers" and Oklahoma's interests as "important").

<sup>184</sup> See *supra* Part III.A.1.

<sup>185</sup> 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).

<sup>186</sup> See *id.*; SAMUEL KRISLOV, *THE SUPREME COURT AND POLITICAL FREEDOM* 127 (1968) (criticizing current balancing analysis as amorphous and vague).

<sup>187</sup> 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).

<sup>188</sup> 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).

<sup>189</sup> 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.