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ELECTION LAW: "THREE'S A CROWD": SUPREME COURT PROTECTION FOR THE TWO-PARTY SYSTEM

Clingman v. Beaver, 544 U.S. 581 (2005)

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Oklahoma's semiclosed primary law permits a political party to invite voters registered as Independent to vote in that party's primary election.[1] The Libertarian Party of Oklahoma (LPO) notified state election officials of its intent to open its primary to all voters, regardless of their registered party affiliations.[2] Pursuant to the semiclosed primary law, the election board secretary restricted approval to only voters registered with the LPO or as Independents.[3] Respondents, members of the LPO joined by registered Republicans and Democrats, sued in district court.[4] The court found that the statute did not substantially burden Respondents' First Amendment associational rights.[5] Thus, the district court held the law constitutional in light of the state's interests in strong political parties and representative election results.[6] The Tenth Circuit Court of Appeals disagreed, finding the state had offered no interest compelling enough to justify the statute's severe burden on Respondents' associational rights.[7] The United States Supreme Court granted certiorari,[8] recognizing the potentially widespread impact of the court of appeals' decision to enjoin the statute.[9] The Court reversed,[10] and, HELD, Oklahoma's semiclosed

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* This Comment is dedicated to my parents, Bill and Darla, and my sister, Emily. I am boundlessly grateful for their consistent love and encouragement, and most of all, for their interminable tolerance of my inadvertent attempts to turn each family dinner into a political roundtable.

** This Comment won the George W. Milam Award for best Comment in Spring 2006.

1. OKLA. STAT. ANN. tit. 26, § 1-104(B)(1) (West 2006).
2. Clingman v. Beaver, 544 U.S. 581, 585 (2005).
3. *Id.*
4. Beaver v. Clingman, No. CIV-00-1071-F, 2003 WL 745562, at *1-2 (W.D. Okla. Jan. 24, 2003).
5. *Id.* at 19; *see also* U.S. CONST. amend. I.
6. *Clingman*, 2003 WL 745562, at *19, *21.
7. Beaver v. Clingman, 363 F.3d 1048, 1057 (10th Cir. 2004).
8. *Clingman*, 544 U.S. at 586.
9. *Id.* (observing that twenty-three other states had versions of the semiclosed primary law). The Supreme Court granted certiorari less than six weeks before the 2004 presidential election. *Compare* Clingman v. Beaver, 542 U.S. 965, 965 (2004) (granting certiorari on Sept. 28, 2004), *with* National Archives and Records Administration, Office of the Federal Register, U.S. Electoral College, 2004 Presidential Election, http://www.archives.gov/federal-register/electoral-college/2004/dates.html (2004) (listing the election as occurring on Nov. 2, 2004). Thus, in light

primary law did not violate Respondents' First Amendment associational rights[11] and therefore was a reasonable restriction justified by important state interests.[12]

The Constitution grants states authority to regulate elections.[13] However, absent the most critical of state interests, this authority does not permit state regulation to infringe on constitutionally-protected individual rights.[14] In *Tashjian v. Republican Party of Connecticut*, the Court confronted such an issue.[15] Appellees, the Connecticut Republican Party and affiliated party officials, claimed Connecticut's closed primary statute[16] violated their First Amendment associational rights.[17] The district court agreed, granting a motion for summary judgment,[18] and the court of appeals affirmed.[19] The Supreme Court noted probable jurisdiction[20] to determine if the abridgement of voters' fundamental rights could be upheld in light of asserted state interests.[21]

While the Court acknowledged Connecticut's Article I authority to

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of the Supreme Court's controversial role in the recent 2000 election, it seems the Court had a valid interest in ensuring that if judicial action affected election law at all, it only increased the likelihood of an *undisputed* 2004 presidential election. *See* Editorial, *Beyond the Election; Supreme Court Faultlines*, N.Y. TIMES, Dec. 14, 2000, at A38 (opining that the Supreme Court must work to rebuild the nation's trust in the Court's ability to be a supreme arbiter of ultra-controversial affairs).

10. *Clingman*, 544 U.S. at 598.

11. *Id.* at 584.

12. *Id.* at 593-94. The instant Court's reference to important state interests signals the use of an intermediate level of scrutiny. *Id.* However, the Court not only fails to delineate how this largely undefined standard of review differs in application from a treatment of rational basis review or strict scrutiny, but the Court also declines to address why this intermediate standard is most appropriate in the instant case. The Court's decision to avoid expressly addressing the question of standard of review may reflect judicial uncertainty over the appropriate standard for cases presenting political issues of this nature. In *United States v. Carolene Products Co.*, the Court noted that legislation restricting political processes may be subject to a more "exacting judicial scrutiny," but similarly went no further in discussing what level of review was most appropriate. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938). Thus, the instant Court may have hesitated to expressly address the issue of standard of review where time-honored legal precedent had declined to go further than to indicate that a higher standard may be most appropriate.

13. U.S. CONST. art. I, § 4.

14. Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986).

15. *Id.*

16. CONN. GEN. STAT. § 9-431 (1985) (allowing only registered party members to vote in their respective primaries).

17. *Tashjian*, 479 U.S. at 211. The Republican Party adopted a rule permitting Independent voters to vote in Republican primaries for federal and statewide office, an invitation the Republican party members believed to be within their First Amendment right to extend. *Id.* at 210.

18. *Id.*

19. *Id.*

20. Tashjian v. Republican Party of Conn., 474 U.S. 1049, 1049 (1986).

21. *Tashjian*, 479 U.S. at 214.

draft the challenged statute,[22] the Court also emphasized that even that authority, absent a compelling state interest, did not justify a statute infringing upon voters' associational rights.[23] Applying strict scrutiny,[24] the Court weighed each of the state's four asserted interests.[25] The Court dismissed the first two proffered interests succinctly, finding administrative convenience to be an illegitimate state interest,[26] and the prevention of party raiding[27] to be unrelated to the statute in question.[28] The Court found the third interest—avoiding voter confusion—to be a worthy concern,[29] though still not compelling enough to justify abridgment of a fundamental right.[30] Most significantly, the Court interpreted the final asserted interest as aimed at protecting the effectiveness and integrity of political parties[31] and found this rationale less than compelling when asserted to protect a party against itself.[32] Thus, finding no state interest

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22. *Id.* at 217.

23. *Id.*

24. *Id.* While the Court did not expressly characterize the test used in *Tashjian* as a traditional strict scrutiny test, the standard of review is exceedingly similar in both application and explanation to the Court's express use of strict scrutiny in other cases involving voters' associational rights. *Compare id.* (noting appellant's characterization of Connecticut's closed primary statute as a narrowly tailored regulation furthering compelling state interests), *with* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 207 (1999) (Thomas, J., concurring) (expressly defining strict scrutiny as a standard of review requiring narrowly tailored legislation serving a compelling government interest).

25. *Tashjian*, 479 U.S. at 217-20, 222.

26. *Id.* at 218.

27. *Id.* at 219 (defining party raiding as when "'voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary'" (quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973))).

28. *Id.*

29. *Id.*

30. *Id.* at 220-22. In addressing the interest of avoiding voter confusion, the Court enhanced the merit of the state's asserted interest by liberally interpreting it as an interest in creating an educated and participatory electorate. *See id.* Yet, even with the added strength of the Court's generous interpretation, the Court did not find the third asserted interest significant enough to justify intrusion on appellees' associational rights. *Id.* at 221-22. While the analysis perhaps exceeds the scope of the question presented in *Tashjian*, the dictum provides an effective counterpoint to the instant Court's contradictory approval of the similar interest in enhancing "electioneering and party-building efforts." *See* Clingman v. Beaver, 544 U.S. 581, 596 (2005) (finding that encouraging the electorate to vote is an important and sufficient state interest).

31. *Tashjian*, 479 U.S. at 224. The Court also took a liberal interpretation with the fourth asserted interest in construing it to address the effectiveness of political parties, despite the appellant's express contention that the statute was intended to further a compelling interest in protecting the two-party system. *Id.* at 222. The Court's decision to expansively interpret the interest in this manner permitted it to avoid ruling on the merits of two-party protectionism as a state interest. *See infra* note 32 and accompanying text.

32. *Tashjian*, 479 U.S. at 224. Interestingly, the Court's analysis of the appellant's final interest avoided addressing the merits of a two-party system by ignoring the appellant's

compelling enough to offset the great infringement on voters' fundamental rights,[33] the Court upheld the decision of the lower courts and adjudged the Connecticut closed primary statute unconstitutional for its impermissible burden on appellees' First Amendment right to associate.[34]

Two years later,[35] the Court, in *Eu v. San Francisco County Democratic Central Committee*, echoed the *Tashjian* Court's determination to protect the associational rights of political parties by requiring a compelling state interest to uphold any restriction of the right to politically associate.[36] Appellees, committees and individuals affiliated with a variety of political parties,[37] brought suit in federal court, alleging that the California Elections Code violated the associational rights of their members.[38] Aligning with the decision in *Tashjian*, the Court defined a

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presentation of that interest. *See supra* note 31 and accompanying text. Instead, the Court interpreted the state's fourth asserted interest as an impermissible interest in protecting parties from internally disrupting their own processes and effectiveness. *Tashjian*, 479 U.S. at 224. The Court was presented with the opportunity to bring the state interest in two-party protectionism to the surface and declare it impermissible but declined, perhaps realizing that expressly stating what the Court had only implied in previous decisions would create controversy unnecessary to the holding in *Tashjian*. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 31-32 (1968) (expressing discomfort with justifying state action intended to protect a two-party monopoly, though failing to find that protection of a two-party system is completely impermissible). Furthermore, in finding none of the three previously asserted state interests compelling, the Court already had sufficient reason to find that the statute failed strict scrutiny without striking down the last interest. *See, e.g.*, First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (applying strict scrutiny and noting that any statute that is justified by a compelling government interest must still "employ means 'closely drawn to avoid unnecessary abridgement'"). Thus, the Court likely found no reason to immerse this decision in further controversy by declaring an interest in maintaining a two-party system to be invalid. Such a controversial decision would not only have run contrary to respected precedents, like *Williams*, but it also would have likely opposed the pull of the personal party allegiances responsible for placing each justice on the nation's highest bench. One can assume the Court found it less contentious to side-step evaluating an interest in two-party protectionism by recasting the invalid interest as one of protecting parties from disorganization and disruption.

33. *Tashjian*, 479 U.S. at 225. While *Tashjian* addressed a challenge to voters' associational rights under the First Amendment, the Court implied that the holding could be applied to both the fundamental right to associate and the equally fundamental right to vote. *See id.* at 217.

34. *Id.* at 225.

35. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 214 (1989); *Tashjian*, 479 U.S. at 208.

36. *Compare Eu*, 489 U.S. at 222 (requiring a state to show a compelling state interest in order for the law to survive scrutiny), *with Tashjian*, 479 U.S. at 217 (noting the implication of a fundamental right, leading to the appellant's contention of a narrowly tailored statute and a compelling state interest). *See also supra* note 24 and accompanying text (characterizing the *Tashjian* standard of review as strict scrutiny).

37. *Eu*, 489 U.S. at 219.

38. *Id.* at 219, 233. Appellees claimed that the California Elections Code violated their rights to free association by regulating the internal affairs of political parties without demonstrating the need to do so. *Id.* Appellees specifically asserted that the statute regulated internal party governance by banning various endorsements, dictating the composition of state central committees, regulating

political party's right to associate in part as a right to determine the people who comprise the association.[39] Thus, the implication of the fundamental right to associate led the Court to analyze the state's asserted interests by applying strict scrutiny.[40]

While agreeing that an interest in a stable government was compelling, the Court found the statute's regulation of internal party activities an impermissible method of regulating government stability.[41] The Court similarly dismissed the state interest in protecting primary voters from confusion and undue influence, prohibiting the state from protecting voters by restricting the flow of information to them.[42] In sum, the Court found none of the state's asserted interests compelling enough to justify regulation of a party's internal affairs and the resulting infringement on that party's associational rights.[43]

In *Timmons v. Twin Cities Area New Party,*[44] the Court finally expressly addressed whether an election regulation enacted to protect the two-party system would be permissible under a state's Article I authority.[45] Faced with conflicting lower court decisions,[46] the Supreme Court granted certiorari[47] and found that Minnesota's fusion ban[48] did not overly burden the associational rights of the New Party.[49] Rejecting strict scrutiny for a

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committee meetings (including the time and location of meetings), and setting the amount of dues members were required to pay. *See id.* at 219.

39. *Id.* at 224 (quoting *Tashjian*, 479 U.S. at 214).

40. *Id.* at 222.

41. *See id.* at 226-28 (holding that a state may not enact laws to prevent parties from internally regulating their own process for candidate selection, even if the state's "substituted judgment" by statute would potentially save a political party from self-destruction).

42. *Id.* at 228-29. Again, the Court had an opportunity to inquire into the objectives of the California Election Code and to address the appropriateness of election regulations mainly enacted to protect the two-party system. However, the Court again avoided the controversial issue entirely, focusing instead on an impermissible regulation of "internal" activities. *Id.* at 227-28. Yet, even in addressing this state interest, the Court failed to make the "internal" test operational by neglecting to define exactly which activities would be external (and therefore open to state regulation), and which would be internal (and therefore untouchable). Thus, after *Eu,* states were still left with a substantially incomplete framework of ideas with which to determine the constitutionality of election laws.

43. *Id.* at 229.

44. 520 U.S. 351 (1997).

45. *Id.* at 367 (holding that state regulations may "favor" the two-party system if they are reasonable). In expressly addressing the interest in two-party protectionism, the Court precisely articulated the interest that, though unstated, motivated much of the Court's analysis in both *Tashjian* and *Eu. See supra* notes 31-32, 42 and accompanying text.

46. *Timmons,* 520 U.S. at 355.

47. *Id.* at 356.

48. *See id.* at 353-54 (explaining that Minnesota's anti-fusion law prohibited a candidate from appearing on the ballot as a candidate of more than one party).

49. *Id.* at 363.

"less exacting review," the Court only required important state interests to justify the legislation.[50] The Court found that both the state's interests in the stability of the election process and the two-party system sufficiently met this less stringent standard.[51] However, the Court qualified this conclusion with a somewhat ambiguous warning against restrictions purposed to insulate the two-party system from competing minority parties.[52] The Court approved of Minnesota's reasonable hurdles to third-party participation, but it also intimated that an interest in protecting the two-party system would not justify overly exclusionary action.[53]

The *Timmons* Court took an important first step by expressly addressing the previously disguised motive of two-party protectionism[54] underlying the decisions in both *Tashjian*[55] and *Eu*.[56] Yet, the Court failed to complete the analysis when it did not clearly illustrate how far states could permissibly go in limiting third-party participation to protect the current political scheme.[57] Against the backdrop of these ambiguous precedents, the instant Court declined to heed the warning of the *Timmons* Court and overturn Oklahoma's semiclosed primary law as an impermissible restriction.[58] Finding the statute did not severely burden Respondents' associational rights,[59] the instant Court required only

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50. *Id.* at 358.

51. *Id.* at 363.

52. *See id.* at 367. This warning against placing excessive weight on an interest in two-party protectionism was absent from both *Tashjian* and *Eu*, though the logic applied in both cases. *See supra* notes 31-32, 42 and accompanying text. Notably, the Court finally chose to address this underlying state interest when applying a "less exacting review," where underlying purposes for state interests are usually not sought, rather than when using a strict scrutiny standard, where state interests are traditionally very closely analyzed.

53. *Timmons*, 520 U.S. at 367.

54. *Id.*

55. *See supra* notes 31-32 and accompanying text.

56. *See supra* note 42 and accompanying text.

57. *See Timmons*, 520 U.S. at 366-69. The Court approved of reasonable state restrictions to protect the two-party system, while noting that unreasonably exclusionary restrictions cannot be tolerated. *Id.* at 367 (citing Williams v. Rhodes, 393 U.S. 23, 31-32 (1968)). The Court's lenient standards and express favoritism toward a two-party system invite states essentially to legislate as they wish with little fear of overstepping this ambiguous boundary.

58. *See* Clingman v. Beaver, 544 U.S. 581, 598 (2005). Justice Thomas delivered the opinion of the Court except as to Part II-A, which concluded that Oklahoma's semiclosed primary system only minimally burdened Respondents' First Amendment associational rights, if the law even infringed upon these rights at all. *See id.* at 583, 589-90. Justices O'Connor and Breyer joined Justice Thomas' opinion except as to Part II-A. *Id.* at 583. Justice O'Connor filed an opinion concurring in part and concurring in the judgment. *Id.* Justice Stevens filed a dissenting opinion, which was joined in full by Justice Ginsburg and in part by Justice Souter. *Id.*

59. *See id.* at 593. Comparing the instant case to *Tashjian*, the Court offered two reasons for finding that the statute did not constitute a severe burden on Respondents' associational rights. First and most importantly, the Court found that the statute did not require an individual to publicly

"important regulatory interests" in finding the statute constitutional.[60]

The instant Court first approved the state's asserted interest in maintaining viable, identifiable interest groups that produce candidates representative of the group's voting populace.[61] In this vein, the Court emphasized that because many voters rely on the party label as a sign of candidate ideology,[62] the semiclosed primary law alleviated voter confusion.[63] Secondly, the Court affirmed the state's asserted administrative interest in contributing to successful party growth and increasing voter contact,[64] reasoning that voter registration rolls must accurately reflect the party membership to assure party-building resources are not misdirected.[65] Lastly, the instant Court approved of the state's asserted interest in avoiding party raiding,[66] suggesting that by working to prevent this disturbance, the state will in turn guard against further "party-splintering and . . . factionalism."[67] Thus, considering the semiclosed primary statute to be reasonable and politically even-handed in

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affiliate with a party to vote in its primary, but instead only required that the voter declare himself or herself to be an independent. *See id.* at 592. Secondly, the Court found that while, like the closed primary law in *Tashjian*, the Oklahoma semiclosed primary law did forbid parties from expanding the party "by their own act, without any intervening action by potential voters," even the *Tashjian* court did not characterize this burden alone as severe. *Id.* at 592-93.

60. *Clingman*, 544 U.S. at 593. The factual similarity between *Tashjian* and the instant case, coupled with the Court's failure to distinguish the two cases, causes the instant Court's decision to apply a "less exacting review" and avoid the strict scrutiny test utilized in *Tashjian* to seem irrational and arbitrary. This decision, however, hardly seems unintentional. By applying a heightened form of rational basis review the Court could avoid discussing the propriety of two-party protectionism, as this lesser standard only requires delving into the state's asserted interests, rather than into the state's true, and often hidden, purposes.

61. *Id.* at 594.

62. *Id.* at 594-95. *But see* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 229 n.18 (1989) (refuting the idea that voters are swayed by a party's endorsement, which implies that voters must not be as dependent on party labels as the instant Court assumed).

63. *Clingman*, 544 U.S. at 594.

64. *See id.* at 595.

65. *See id.* at 595-96. The Court hypothesized that if the semiclosed primary statute was overturned and voters were no longer required to disaffiliate from one political party before participating in a different party's primary election, voter registration rolls would cease to accurately reflect the group of voters likely to participate in any given primary. *See id.* Thus, the Court asserted that inaccurate voter registration rolls would make it likely that a party may expend resources reaching out to voters who have no intention of casting a vote in its primary election at all. *But see id.* at 617 n.9 (Stevens, J., dissenting) (proposing that parties may actually develop more accurate voter registration rolls under the semiclosed primary law by gaining insight into which party members side more strongly with other political groups, and thus which members should not be targeted).

66. *See id.* at 596 (majority opinion) (defining party raiding as a practice when groups of voters from one party vote in another party's primary intending to select the candidate most likely to detract votes from the candidate their party would face in the general election).

67. *Id.*

application,[68] the Court found the asserted state interests important enough to uphold the law against Respondents' challenge.[69]

Writing for the dissent, Justice Stevens detected the connection between the Court's warning in *Timmons*[70] and the application of the statute in the instant case.[71] The dissent maintained that by relying on impermissible state interests[72] and failing to weigh accurately the burden on Respondents' associational rights,[73] the majority had established a dangerous precedent. Under the holding in the instant case, the dissent argued, courts could now consider two-party protectionism to be a permissible state interest, capable of overriding voters' fundamental rights both to associate and to vote.[74] Moreover, the dissent expressly questioned whether the Court would have found the same associational interests insubstantial if a majority party had alleged the infringement.[75]

The dissent's assertion that the majority was seeking to serve an impermissible purpose in upholding Oklahoma's semiclosed primary law[76] explains the instant Court's incongruous rejection of the *Tashjian* Court's strict scrutiny test, despite the factual similarity between *Tashjian* and the instant case.[77] The Court deviated from precedent[78] by dismissing an intrusive burden on the right to associate as inconsequential,[79] and almost

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68. *Id.* at 597.

69. *Id.*

70. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997).

71. *See Clingman*, 544 U.S. at 609 (Stevens, J., dissenting) (noting that states have no valid interest in protecting major parties from third party growth).

72. *Id.* at 615 (asserting that state election power under Article I was not designed to permit the state to protect a party from itself nor to regulate the party's internal activities, thus discrediting both state actions the Petitioner qualifies as valid state interests in the instant case).

73. *Id.* at 610 (stating that the semiclosed primary law too heavily burdens Respondents' associational rights).

74. *See id.* at 619 n.11 (arguing that the majority's decision in the instant case rests primarily on an intent to protect the two-party system from the growth of third parties).

75. *Id.*

76. *See id.*

77. *Id.* at 592-93 (majority opinion). Finding that the semiclosed primary law did not severely burden Respondents, the Court determined that the constitutionality of the challenged law could be resolved by application of a heightened form of rational basis review, requiring merely "important regulatory interests." *See id.* at 593. The Court attempted to distinguish the use of this lesser standard of review in the instant case from the *Tashjian* Court's use of strict scrutiny by finding the statute in *Tashjian* to more severely burden associational rights. *See id.* at 592 (distinguishing *Tashjian* from the instant case). *But see* Tashjian v. Republican Party of Conn., 479 U.S. 208, 214-15 (1986) ("[T]he freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'" (quoting Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122 (1981))).

78. *See supra* note 77 and accompanying text (detailing the Court's inappropriate rejection of the strict scrutiny test used in *Tashjian*).

79. *See Clingman*, 544 U.S. at 593 (holding that the right to associate is not infringed where

established a lawful duty to register officially with a political party[80] before Respondents' First Amendment associational rights would merit constitutional protection.[81] The Court's arbitrary refusal to acknowledge a fundamental right[82] led it improperly to reject strict scrutiny,[83] principally to avoid deep analysis into potentially unacceptable state interests. If the instant Court had adjudicated the burden on Respondents' rights accurately, it would have been forced to apply strict scrutiny and to seek the true purpose behind Oklahoma's semiclosed primary statute.[84] Thus, under the proper level of scrutiny, the Court would have discovered that the only state interest supporting the semiclosed primary law was an impermissible interest: insulating a two-party system from the competition of the LPO and other similarly situated third parties.[85]

By approving Oklahoma's interest in identifiable political parties, the Court implicitly adds the role of "ideological guarantor"[86] to state election responsibilities, vastly extending state authority beyond the limits envisioned under Article I.[87] The Court's analysis naively depicts political

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voters are required to register as Independent in order to participate in a party primary). The Court's analysis ignores the idea that requiring voters to register as Independent, rather than as Republican or Democrat, still entails a public affiliation with a sort of political organization, and thus makes the law similarly unconstitutional to the system the Court struck down in *Tashjian*. *See id.* at 592 (distinguishing *Tashjian* by claiming the public affiliation requirement causing the law to be unconstitutional was absent in the instant case).

80. *Id.* at 588 (noting that voters "do not want to associate with the LPO, at least not in any formal sense"). While this analysis of the right to associate did not command a majority of the justices, it remains surprising that any of the justices would designate the act of registering with a political party to be the fundamental manner of constitutionally associating with that party without explaining why other forms of association, like the act of voting, are less significant. *See id.* For instance, this analysis overlooks the act of voting, which is the very act prohibited by Oklahoma's semiclosed primary law, as the most formal associational act of all.

81. *See id.* at 591. In interpreting the right to associate in this manner, the justices qualifying the right to associate with a duty to register overlook the many ways one can associate with a political party. For instance, holding signs, participating in events, contributing financially, and, most importantly, voting are all critical methods of association common to the political process.

82. *Id.* at 593 (explaining that the Oklahoma statute's "minor barriers between voter and party do not compel strict scrutiny[,]" and thus such barriers cannot violate any fundamental right).

83. *Id.* at 593 (requiring important regulatory interests in lieu of a strict scrutiny test, despite the fact that *Tashjian* indicates the instant case's semiclosed primary law greatly burdens Respondents' associational rights).

84. *See supra* note 60.

85. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1996).

86. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 220 (1986) (disapproving of the state's assumed role as "ideological guarantor"). In assuming the challenge of ensuring that candidates are representative of their respective political parties, the state faces the impossible and improper task of first defining what a true member of that party would properly believe and profess. *See id.*

87. Article I, section 4 of the U.S. Constitution grants states limited election powers relating to the "times, places and manner of holding elections." U.S. CONST. art. I, § 4. Yet, by agreeing that

parties as groups of homogenous individuals,[88] while in truth even party leaders often deviate from identified party opinion on certain issues.[89] The somewhat unpredictable nature of political party platforms makes any attempt to codify party ideology an unrealistic, if not an impossible, task. This truth negates the state's interest in protecting the integrity of party labels to avoid voter confusion. Not only does this interest display the Court's lack of faith in an informed electorate,[90] but it overestimates the importance voters place on party labels in casting their votes.[91] Furthermore, even if the state had a valid interest in assuring that a primary election victor was representative of his or her party, the Court's approval of Independent-voter participation in primary elections seems completely contrary to this interest.[92]

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states have an interest in protecting the existing identification of political parties, the Court unconstitutionally extends state election power, approving of state action to regulate and restrict party platforms, merely to avoid voter confusion. *See Clingman,* 544 U.S. at 594-95. Not only would legislation drafted to further this state interest potentially infringe on the free speech rights of a political party wanting to deviate from its previous position on an issue, but this interest extends state election power to authorize intrusion on a political party's right to define its own party platform. It is difficult to imagine an interpretation of state election powers under Article I that could be more "intrusive."

88. *See Clingman,* 544 U.S. at 595-96. In finding that the state has an interest in ensuring that election results represent the votes of the party members, the Court must be assuming that a political party's membership is generally able to come to a consensus on every issue. Because political party ideology is not so precise, to assure that election results are truly reflective of a party's ideology, the state would be required to determine party ideology by conducting comprehensive polling. It is unlikely this is the role the drafters of the Constitution envisioned for states under Article I. *See* U.S. CONST. art. I, § 4 (limiting state election powers to regulating the "times, places, and manner of elections").

89. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 226 (1989) ("Simply because a legislator belongs to a political party does not make her at all times representative of party interests.").

90. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 220 (1986) (discrediting the appellant's argument that voters can be easily misled by party labels and advancing the idea of a more informed electorate); *see also* Anderson v. Celebrezze, 460 U.S. 780, 797 (1983) (providing a history of the state interest in voter education to illustrate that voters no longer rely heavily on party labels for candidate information). This interest is also disturbing from a public policy standpoint. Rather than encouraging voters to vote for candidates after researching their stances on issues, the Court's approval of a state interest in consistent party platforms encourages voters to cast their votes based on a party name. In other words, the majority is content with a system that elects leaders based on politics, rather than on policy.

91. *See Eu,* 489 U.S. at 229 n.18 ("The State makes no showing, moreover, that voters are unduly influenced by party endorsements. . . . [V]oters may consider the parties' views on the candidates but still exercise independent judgment when casting their vote.").

92. Independent voters do not claim to be a member of any particular party. Thus, if the state permits an Independent voter to participate in any primary, it is doing so without any knowledge whatsoever of that Independent voter's ideology and therefore without any means of determining if the Independent voters will vote similarly or dissimilarly to the majority of the party's voters. Therefore, the Court cannot decide to approve Independent voter participation in any primary, as

As proper analysis reveals the implausible nature of the asserted state interests in the instant case, the state interest in two-party protectionism that concerned the *Timmons* Court becomes visible.[93] By allowing Oklahoma to regulate party ideology through the semiclosed primary law, the Court denied the LPO and similar third parties the opportunity to create a platform attractive to a more median voter.[94] This restriction on the development of party philosophy further protects the two major political organizations from the growth of a third party.[95]

Oklahoma's semiclosed primary law, permitting only Independent voters to participate in a primary without registering, is ill-fit to address the state's asserted interest in party viability. For third parties lacking the numerical strength of their mainstream counterparts, viability will be attained only by successful party-building efforts—efforts rendered impossible by a restrictive focus on Independent voters invading Oklahoma's election laws.[96] In defense of the interest, the Court placed an absurd importance on accurate voter registration rolls,[97] overlooking the fact that voters' registration affiliations often fail to accurately reflect their political preferences.[98] In fact, by allowing the electorate to cast their singular votes in a different primary, voter registration rolls would likely

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it did in *Tashjian*, and then exclude other would-be primary voters by validating a state interest in assuring a primary victor is representative of the views of only the party faithful.

93. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997).

94. *See* Clingman v. Beaver, 544 U.S. 581, 615 (2005) (Stevens, J., dissenting) ("Rightly or wrongly, the LPO feels that the best way to produce a viable candidate is to invite voters from other parties to participate in its primary.").

95. If the Court successfully restricts minor political parties from developing platforms attractive to a wider range of voters, there is little opportunity for these third parties to grow, which in turn protects the two-party system.

96. The semiclosed primary statute is not the only Oklahoma election law provision inhibiting the growth of third parties. Other Oklahoma state law provisions provide that if a party fails to receive at least ten percent of the total votes cast in a gubernatorial or presidential election, the state will automatically change the affiliation of all registered members of that party to Independent. *See* OKLA. STAT. ANN. tit. 26, §§ 1-109, 1-110 (West 2006); *Clingman*, 544 U.S. at 605-06 (O'Connnor, J., concurring) (noting that no minor party has garnered such a vote percentage in recent history). If voters register with the LPO, only to have their registration affiliation changed to Independent after each major election, there is minimal incentive to register with the LPO at all. It is unlikely a minor party would experience any growth from year to year under such oppressive election law, considering every member must re-register after every major election. *See id.*

97. *See Clingman*, 544 U.S. at 595-96 (majority opinion). While this is no more than a carefully disguised administrative interest, the Court places excessive importance on accurate voter registration rolls by claiming this allows parties to plan better for their primaries. *Id.* Though this may be true, this interest is not compelling enough to uphold a law that so greatly infringes on voters' rights to associate. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 218 (1986) (noting that while a state can consider administrative concerns in asserting a state interest, a state cannot infringe on associational rights for mere administrative convenience).

98. *See supra* note 89 and accompanying text.

become more accurate, as parties would be made aware of the levels of loyalty of their memberships.[99]

Regardless of whether a state interest in bolstering the growth of political parties is constitutionally permissible, Oklahoma's semiclosed primary law crosses the line by permitting state regulation of internal activities, including the most critical internal function: selecting a candidate.[100] Other equally discriminatory Oklahoma election law provisions, similarly affecting internal activities,[101] add to the likelihood that an ulterior motive is behind these asserted state interests. In practice, Oklahoma's semiclosed primary law quells the Court's fear that the LPO and other similarly situated minority parties will successfully convince a larger percentage of the electorate to support their candidates instead.[102]

The last asserted state interest, preventing party raiding,[103] is no more related to state Article I powers than the two previously addressed interests[104] and is similarly focused on protecting the two-party system. Additionally, the *Tashjian* Court's approval of Independent voter participation in party primaries discredits the idea that party raiding is a major concern.[105] The Court failed entirely to address precedents questioning the validity of party raiding,[106] justifying an interest that

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99. *See Clingman,* 544 U.S. at 617 (Stevens, J., dissenting). Only a slight extension of the dissent's reasoning here similarly discredits the majority's assertion that party-building and electioneering would be hindered if Oklahoma's semiclosed primary statute was invalidated. By striking down the law and permitting a party to invite non-registered members to participate in its primary, all parties would be able to distinguish loyal from disloyal members. This would allow parties to develop a more accurate list of supporters to target for upcoming elections and events.

100. *See Tashjian,* 479 U.S. at 224 (holding that a state may not meddle in a party's internal affairs or, especially, in a party's process of selecting candidates).

101. *See supra* note 96 and accompanying text.

102. *See Clingman,* 544 U.S. at 617-18 (Stevens, J., dissenting) (emphasizing that though the administrative interest does serve its asserted purpose for the two majority parties, it has exactly the opposite effect on the LPO, and intimating that this disparity should be viewed not as an unintentional coincidence, but rather as another safeguard for the two-party system).

103. *Id.* at 596 (majority opinion).

104. State action to protect against party raiding is not within the constitutional election powers allocated to states. *See* U.S. CONST. art. I, § 4; *see also supra* notes 87-88 and accompanying text.

105. If party raiding is actually possible, see *infra* note 106 and accompanying text, Independent, Republican, and Democratic voters alike would all pose a danger. In assuming that Independent voters could not be guilty of party raiding because they are not registered with one of the two major parties likely to have a stake in the general election, the Court once again ignores the possibility that the allegiance of an Independent voter may very well lie with a majority party, despite a registered affiliation to the contrary.

106. *See Tashjian,* 479 U.S. at 219 n.9 (noting that survey research has failed to prove conclusively the existence of party raiding (quoting Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 122-23 n.23 (1981))).

essentially enables states to impermissibly protect a party from itself.[107] Defending Oklahoma's semiclosed primary law, by clothing it as an attempt to guard against a practice that may not even exist, only belies the weak foundation of the law and highlights the true, impermissible purpose of two-party protectionism.

Tashjian and *Eu* demonstrate the sort of state interest necessary to justify an infringement on both the fundamental right to associate and the equally protected right to vote.[108] In *Timmons*, the Court perceived a trend and cautioned against legislation enacted merely to protect the two-party system.[109] The instant Court ignored the wisdom of *Tashjian* and *Eu* by incorrectly applying a lesser standard of review[110] and ignored the warning in *Timmons* by recharacterizing a protectionist state interest as permissible under the state's Article I election powers.[111] In essence, the Court incorrectly interpreted the semiclosed primary law's burden on Respondents to avoid delving into the state interests driving the law.[112] Had it fulfilled that obligation, the Court would have found only one explanation for the law: an impermissible desire to protect the two-party system at the expense of the associational interests of a third-party.

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107. Even assuming that party raiding does exist, see *supra* note 106 and accompanying text, the LPO's decision to allow voters registered with other parties to cast a vote in its primary, despite any potential for election manipulation, should be a decision left to the LPO. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 227-28 (1989) (noting that even if the state "saves a political party from pursuing self-destructive acts, that would not justify a state substituting its judgment for that of the party").

108. *See Eu*, 489 U.S. at 229 (requiring a compelling governmental interest to uphold the challenged election code); *Tashjian*, 479 U.S. at 217 (requiring compelling state interests to uphold a Connecticut closed primary statute); *supra* note 33 and accompanying text.

109. *See* Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997).

110. By choosing a "less exacting review," the instant Court only needed to find a legitimate interest to uphold the semiclosed primary law. *See* Clingman v. Beaver, 544 U.S. 581, 591-93 (2005). As the same interests asserted in the instant case were raised and summarily dismissed in both *Tashjian* and *Eu* under strict scrutiny, the Court must have been aware that the Oklahoma statute would similarly fail under the more rigid test. Thus, by downplaying the burdens to the First Amendment associational rights asserted by Respondents, the Court was able to justify the lesser examination of state interests and to uphold a statute designed solely to protect the two-party system.

111. *See id.* at 593-97.

112. *See supra* notes 77, 79-81 and accompanying text (examining the Court's blatant disregard for precedent in composing an extremely narrow definition of associational rights to avoid finding a fundamental right).