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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

by Gary D. Allison*

The true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular elections, should be perfectly pure, and the most unbounded liberty allows.¹

I. INTRODUCTION

On June 26, 2000, in *California Democratic Party v. Jones*,² the United States Supreme Court, by a vote of 7 to 2,³ declared California's blanket primary law a violation of political parties' First Amendment rights of association.⁴ Blanket primaries offer all voters "the same ballot, and a voter is not limited to the candidates of any single party but may vote, as to each office contested, for any candidate regardless of party affiliation."⁵ Under California's version of the blanket primary, which was voted into law in 1996 by overwhelming voter approval of Proposition 198,⁶ "the candidate of each political party who receives the most votes for a state elective office becomes the nominee of that party at the next general election."⁷ Thus, unlike the more traditional closed primaries,⁸ which

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1. Alexander Hamilton, *quoted in* 2 ELLIOTT'S DEBATES 257 as replicated in *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969).

2. 120 S. Ct. 2402 (2000) [hereinafter *Jones*].

3. Justice Scalia wrote the majority opinion, which was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas and Breyer. Justice Breyer filed a concurring opinion. Justice Stevens wrote a dissenting opinion, which was joined in part by Justice Ginsburg. *Jones*, 120 S. Ct. at 2405.

4. *See Jones*, 120 S. Ct. at 2414.

5. *California Democratic Party v. Jones*, 984 F. Supp. 1288, 1292 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 120 S. Ct. 2402 (2000) [hereinafter *Jones District*].

6. Proposition 198, an initiative petition, was approved by a vote of "59.51 percent (3,340,642 votes) to 40.49 percent (2,273,064 votes)." *Jones District*, 984 F. Supp. at 1291.

7. *Jones District*, 984 F. Supp. at 1290.

permit only voters affiliated with a political party to participate,⁹ and limit their participation to choosing among the candidates of the party to which they are affiliated,¹⁰ blanket primaries permit unaffiliated voters, and voters from other parties, to help determine a party's general election nominees.¹¹

"Opponents of Proposition 198 contended that [permitting voters affiliated in one party to participate in the primaries of other parties] would work an unconstitutional interference with the right of the parties to choose their nominees."¹² Both the United States District Court and the United States Court of Appeals rejected the opponents' challenge,¹³ essentially holding that "the burden [imposed by blanket primaries] on [political parties'] rights of association was not a severe one, and was justified . . . [because blanket primaries] 'enhance[] the democratic nature of the election process and the representativeness of elected officials.'"¹⁴

In overturning the lower courts' decisions, the U.S. Supreme Court, per Justice Scalia, held that Proposition 198 imposed a severe burden on political parties because it "force[d them] to adulterate their candidate selection process . . . by opening it up to persons wholly unaffiliated with [them]," thereby producing the "likely outcome . . . of changing [their] message."¹⁵ It further held that state interests purportedly served by the blanket primary were not compelling, and in any event the blanket primary was not narrowly tailored to serve them.¹⁶

This article will demonstrate that *Jones* is a very significant case because the Court struck a new balance between the associational rights of political parties to define themselves and their messages and States' constitutional authority to regulate the time, place and manner of elections that appears to favor greatly political partisanship. It will do so by providing:

1. a brief history of primary elections that illustrates how public policy in the United States has moved increasingly in the direction of reducing

8. Proposition 198 ended California's use of closed primaries, which it had conducted continuously since 1909. *Jones District*, 984 F. Supp. at 1290 n.2.

9. See Federal Election Commission, PARTY AFFILIATION AND PRIMARY VOTING 2000, <<http://www.fec.gov/voteregis/primaryvoting.htm>> [hereinafter referred to as PRIMARY VOTING 2000] which defines the closed primary as one where "[v]oters receive a ballot listing only those candidates for office in the party with which they are registered [, and u]naffiliated voters may not vote."

10. *Id.*

11. *Jones District*, 984 F. Supp. at 1290, wherein District Judge Levi observed that "it is possible under the blanket primary for independent voters, and voters registered in one party to participate in the primary election of another party." For example, "a registered Democratic Party voter . . . could vote for a Republican candidate for Governor." *Id.*

12. *Jones District*, 984 F. Supp. at 1290. Opponents buttressed their contention with this colorful Southern California analogy: "Allowing members of one party a large voice in choosing another party's nominee . . . is like letting UCLA's football team choose USC's head coach." *Id.*

13. See *id.* at 1289; *California Democratic Party v. Jones*, 169 F.3d 646, 647-48 (9th Cir. 1999), rev'd, 120 S. Ct. 2402 (2000) (adopting verbatim District Judge Levi's opinion as its own).

14. Justice Scalia's characterization of the District and Circuit Courts' holdings, *Jones*, 120 S. Ct. at 2406.

15. *Jones*, 120 S. Ct. at 2412.

16. See *id.* at 2412-14.

political party influence on elections and governance since the turn of the century,

2. an account of the competing arguments raised in this case that connects them to the nation's two hundred year debate about the merits of political parties,
3. a constitutional analysis of the *Jones* decision that shows it is somewhat surprising and not very well protective of the valid interests of either the political parties or the States despite its tilt in favor of partisan politics.

II. A BRIEF HISTORY OF PRIMARY ELECTIONS

A. *Origins of the Primary Election*

Traditionally, states have used primary elections to determine general election nominees for each qualified political party¹⁷ that has more than one candidate seeking an elective office.¹⁸ At the turn of the century, in response to the so-called Progressive movement, the States adopted the mandatory primary election to democratize the process of selecting the parties' general election nominees.¹⁹ Prior to the advent of primary elections, parties selected their general election nominees at party conventions or caucuses²⁰ that were allegedly controlled by small numbers of party insiders tied to powerful, well-organized interest groups.²¹ Reformers believed that primary elections would reduce the

17. Qualified political parties are those which have demonstrated enough support among the electorate so that States will place their nominees for public office on general election ballots under their designation. For example, in California a political party is qualified

if it meets one of three conditions: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party.

Jones, 120 S. Ct. at 2405 n. 1, citing to CAL. ELEC. CODE ANN. § 5100 (West 1996 and Supp. 2000).

18. For example, see below Oklahoma's primary election statute, found at OKLA. STAT., tit. 26, § 1-102:

§1-102. Primary elections

A Primary Election shall be held on the fourth Tuesday in August of each even-numbered year, at which time each political party recognized by the laws of Oklahoma shall nominate its candidates for the offices to be filled at the next succeeding General Election, unless otherwise provided by law. No candidate's name shall be printed upon the General Election ballot unless said candidate shall have been nominated as herein provided, unless otherwise provided by law; provided further that this provision shall not exclude the right of a nonpartisan candidate to have his name printed upon said General Election ballots. . . .

19. See, James M. Burns, *THE DEADLOCK OF DEMOCRACY* 82-83 (1967) [hereinafter *DEADLOCK*].

20. See *id.* at 81.

21. Professor James MacGregor Burns has explained that the primary election arose out of the collapse of the Democratic Party as an effective competitor of the Republican Party after the election of 1896. *Id.* at 82-83. The Democratic Party's collapse eliminated the competition that mitigated the excesses of the convention system which had prior to 1896 provided "a good deal of democracy 'between' the parties in that each had to be on its best behavior to please a majority of voters." *Id.* at

82. But, "[w]hen the pendulum swung heavily to the Republicans . . . the great safeguard against

influence of party insiders and powerful interest groups on electoral politics by giving every party member eligible to vote under state law an equal opportunity to help determine his or her party's nominees for elective offices.²² Consistent with this view, a fragmented Wisconsin legislature voted in 1903 to submit a mandatory primary law to a vote of the people during the elections of 1904.²³ In 1904, the people of Wisconsin voted overwhelmingly in support of the mandatory primary,²⁴ thereby placing the nation's first mandatory primary law on the books. "[W]ithin a dozen years virtually all but a handful of the states had established primaries, most of them mandatory."²⁵

B. *Blanket & Open Primaries*

For some reformers, simply forcing political parties to choose their nominees for elected offices through a direct primary was not enough to excise the corrupting influence of party politics on the electoral process. In 1898, John R. Commons, a Wisconsin social scientist, spoke for many . . . Progressives . . . when he declared:

now that the official ballot is secret, so that a voter's declaration and oath of [party] affiliation at the primary are not binding, it would seem to be the true interest of the parties in framing a primary election law in order to protect themselves from nominations by voters under duress, to make the primary also secret. This could be done by a blanket ballot containing the names of all candidates for nomination by all parties, and by dispensing with all declarations or oaths of party affiliation.²⁶

Obviously Commons favored the blanket primary, but his view has prevailed in only four (4) states: Alaska, California, Louisiana, and Washington.²⁷

Scant support for the blanket primary does not mean the States have

convention excesses disappeared." *Id.* "[T]he 'one party era' . . . coincided with the upthrust of . . . the progressive . . . revolt against the oligarchs that had ruled American business and politics since the Civil War." *Id.* "[P]rogressives . . . revolt[ed] against 'machines' that supposedly controlled the conventions, the Senate, and the cities, just as they controlled food packing, oil and the utilities." *Id.* at 83. The revolt "focused on the conventions, where the party bosses in the back rooms made their corrupt deals with one another and with their fellow-oligarchs in the citadels of big business." DEADLOCK, *supra* note 19, at 82.

22. "The remedy [to the excesses of the convention system] was . . . abolition. . . . [W]isconsin passed the first state-wide primary with teeth in 1903 . . ." *Id.* at 83. This remedy served the Progressive agenda of facilitating "direct participation of the people in managing political affairs, with as little control by leaders as possible." *Id.*

See also William J. Crotty, *The Philosophies of Party Reform*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 31, 33-34 (1980 Gerald M. Pomper ed.) [hereinafter *Philosophies in RENEWAL*]; Austin Ranney, CURING THE MISCHIEFS OF FACTION: PARTY REFORM IN AMERICA 17-19, 25-26, 80-82, 119-26 (1975) [hereinafter *MISCHIEFS*].

23. Allen F. Lovejoy, LA FOLLETTE AND THE ESTABLISHMENT OF THE DIRECT PRIMARY IN WISCONSIN: 1890-1904 76-82 (1941) [hereinafter *LA FOLLETTE PRIMARY*].

24. The outcome of the referendum was 61.9 percent (130,699 votes) in favor of the direct primary to 38.1 percent (80,192 votes) against it. *Id.* at 91.

25. DEADLOCK, *supra* note 19, at 83.

26. MISCHIEFS, *supra* note 22, at 167-68, quoting a John R. Commons' address published in the PROCEEDINGS OF THE NATIONAL CONFERENCE ON PRACTICAL REFORM OF PRIMARY ELECTIONS, JANUARY 20-22 (1898).

27. See *Jones District*, 984 F.Supp. at 1292.

continued to support strongly partisan closed primaries. The Wisconsin primary approved in 1904 was an open primary,²⁸ which permits voters, regardless of party affiliation, to decide on primary election day which party's primary they wish to participate in.²⁹ Blanket and open primaries permit "any person, regardless of party affiliation, . . . [to] vote for a party's nominee."³⁰ They differ in that the voter's "choice is limited to that party's nominees for all offices. He may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general."³¹

Although open primaries were not immediately popular,³² now

- twenty (20) states now have fully open primaries;³³
- two (2) states are for all practical purposes fully open primary states in that any voter can declare or change a party affiliation on primary day through same-day registration at the polls;³⁴
- eleven (11) states have partially open primaries, which permit independents the opportunity to vote in primary elections but require partisans to participate only in primaries of their own parties;³⁵
- and Florida's primaries are closed unless all of the candidates for an office are from one party, in which case all voters, regardless of party affiliation, may vote for their favorite candidate.³⁶

This means that in these open primary states, political parties face the risk that the outcome of their primaries will be determined by the votes of voters unaffiliated with them,³⁷ a risk Justice Scalia found in *Jones* to be a severe burden on the

28. See *MISCHIEFS*, *supra* note 22, at 161.

29. See definition of Open Primary in PRIMARY VOTING 2000, *supra* note 9.

30. *Jones*, 120 S. Ct. at 2409 n.6.

31. *Id.*

32. As late as 1975, only Michigan, Minnesota, Montana, North Dakota, Utah, and Vermont had joined Wisconsin in implementing them. *Jones* at 5 n.6.

33. These states include Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin. See PRIMARY VOTING 2000, *supra* note 9.

34. These states are Iowa, a purportedly partially open primary state, and Wyoming, a purportedly closed primary state. See PRIMARY VOTING 2000, *supra* note 9.

35. In Arizona, Colorado, Kansas, Massachusetts, New Hampshire, North Carolina, Rhode Island, and Utah, independent voters may choose on election day which party's primary to participate in. See *id.* In Maryland and Oregon, independent voters may choose to participate in one party's primary among all of the parties who consent to having independents vote in their primaries, but in 2000 only the Republican Party has consented in Maryland and only the Democratic Party has consented in Oregon. *Id.* In West Virginia, independents may participate in only the Republican Party's primaries. *Id.*

36. See PRIMARY VOTING 2000, *supra* note 9.

37. Beyond extending participation in a party's primary to persons unaffiliated with it, several of the states with blanket, fully open, or partially open primaries have adopted laws making it even more difficult for political parties to recruit and retain loyal members. All four (4) blanket primary states, and nine (9) of the fully open primary states, protect the privacy of the voters' choices as to which party's primary to participate in by allowing them to make the choice "within the privacy of the voting booth." These states are Alaska, California, Hawaii, Idaho, Louisiana, Michigan, Minnesota, Missouri, Montana, North Dakota, Vermont, Washington, and Wisconsin. See *generally id.*, plus its definition of O(pc) = Open (Private Choice).

Twenty-two (22) of the twenty-four (24) blanket and fully open primary states do not require

political parties' rights of association.³⁸ As a consequence, *Jones* arguably nullifies open primaries.³⁹

C. *Anti-Partisan Policies Behind Blanket & Open Primaries*

Reasons why certain States have supported open and blanket primaries are illustrative of how public policy has disfavored partisanship increasingly since the turn of the century. Generally, persons favoring the open primary have tended to "vote for the man and not the party" and to believe that "the open primary guarantees freedom of voting for everyone by allowing independents to vote in primaries and partisans to change their minds."⁴⁰ Opening primaries to independent voters makes the voter's choice to be unaffiliated more attractive.⁴¹ Letting voters affiliated with one political party choose to vote in the primaries of other parties sets up a potential contest between the voter's party loyalty and her desire to support a very attractive candidate in another party.⁴²

voters to state their party affiliation when registering to vote. These states include Alabama, Alaska, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. *See id.* Only the blanket primary states of California and Louisiana require voters to state their party affiliation when registering. *See id.*

Conversely, some fully open and partially open primary states impose certain conditions on voters that may discourage or limit their participation in primary elections and/or help parties secure information useful to gathering support for themselves and their candidates. In seven (7) states, independents are deemed by law to have registered as a member of a party by participating in its primary. These states are Arizona, Colorado, Kansas, North Carolina, Rhode Island, New Hampshire, and Texas. *See id.* Massachusetts also imposes this condition, but only in presidential primaries. *Id.* But, the voter can reverse the registration before leaving the polling place in New Hampshire and Massachusetts, *id.*, and the registration is informal and effective only for the current election year in Texas. *Id.*

Four (4) states require voters to vote the same party ballot during a run-off election that they voted during the immediately preceding primary election. These states are Arkansas, Georgia, North Carolina, and Texas. *See Primary Voting 2000, supra note 9.*

The voters' choices of which party's primary to participate in are publicly recorded in ten (10) states. These states include Arkansas, Georgia, Illinois, Indiana, Mississippi, North Carolina, Ohio, South Carolina, Vermont, and Virginia, but the choice is recorded only for presidential primaries in Vermont. *Id.* Seven (7) of these states, Arkansas, Georgia, Illinois, Indiana, Ohio, South Carolina, and Virginia, explicitly make such records available to the political parties. *Id.*

38. *See Jones*, 120 S. Ct. at 2412.

39. Indeed, Judge Levi stated that if blanket primaries were unconstitutional on their face because they violated the parties' associational rights to limit "candidate selection to their own members, . . . [then] open primaries would also be unconstitutional upon any party's objection, [for] an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary. *Jones District*, 984 F. Supp. at 1295. As a consequence, Judge Levi declined to find blanket primaries facially unconstitutional in part because "many of the States have some version of an open primary and to invalidate them all on this theoretical ground would be an extraordinary intrusion into the complex and changing election laws of the States and would remove from the American political system a method for candidate selection that many States consider beneficial and which in the uncertain future could take on new appeal and importance." *Id.*

40. MISCHIEFS, *supra* note 22, at 168.

41. For example, "Massachusetts, a state where Democrats hold 82 percent of the state House and Senate seats, . . . [is] second only to Alaska in its percentage of independent voters. That is partly because the Bay State's unusual election laws allow independents to vote in party primaries." Michael Grunwald, *Voters Shunning Party Identification, Loyalty*, WASHINGTON POST, January 03, 1999, A01 (final ed.) [hereinafter *Shunning Loyalty*]. In fact, the registered electorate in Massachusetts is 49% Independents, 37% Democrats, 13% Republicans. *Id.*

42. This is a contest many registered Democrats in Michigan resolved in favor of Senator John

Washington was the first state to adopt the blanket primary, doing so in 1935 in order to “allow all properly registered voters to vote for their choice at any primary election, for any candidate for office, regardless of party affiliation and without a declaration of political faith or adherence on the part of the voter.”⁴³ In sustaining Washington’s blanket primary against constitutional attack, the Washington Supreme Court stated in 1936 that “[t]his declaration of policy clearly indicates the purpose of affording secrecy to the individual voter as to his party affiliations as well as to his choice of individual candidates.”⁴⁴ Forty-four (44) years later, the Washington Supreme Court rebuffed another constitutional attack on Washington’s blanket primary by finding that it serves the compelling state interests of “allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in a primary.”⁴⁵

Alaska first enacted the blanket primary through a referendum in 1947.⁴⁶ Those who supported it largely were persons “who [we]re not firmly aligned with a political party, and who believe[d] that the voter should have maximum independence in balloting matters”⁴⁷ However, the debate over the blanket primary also contained an element of partisanship, for Democrats opposed it out of belief that it would erode party loyalty and permit Republicans to cross-over to support the weakest Democratic candidates,⁴⁸ and Republicans supported it “in hopes that Republican candidates would benefit by attracting conservative Democrats and non-aligned voters.”⁴⁹

“[Alaska’s] blanket primary was replaced by the single ballot open primary” in 1959 after the Democrats took control of both houses of the legislature and won the Governor’s office.⁵⁰ It was restored in 1967, after the Republicans’ swept the state elections of 1966.⁵¹ Supporters of the restoration contended that the blanket primary fit Alaska’s political environment in that “[darned few] . . . people actually are active workers in the two parties,”⁵² and that “probably nine of every

McCain, the reform-Republican candidate for President, during the 2000 presidential primary season, for Democrats constituted eighteen percent (18%) of the Michigan Republican presidential primary vote. R. W. Apple, Jr., *THE 2000 CAMPAIGN: NEWS ANALYSIS; On a Rocky Road, the Race Tightens*, Feb. 23, 2000, A, at 1 (final ed.) [hereinafter *Rocky Road*]. Moreover, independents constituted 35% of the Michigan Republican presidential primary vote, meaning that Republican voters constituted less than half of those who voted in the Michigan Republican presidential primary. *Id.* As a consequence, Senator McCain’s popularity among independent and cross-over voters enabled him to win the Michigan primary despite losing 2/3ds of the Republican vote to Governor George W. Bush. *Id.*

43. 1935 Wash. Laws Ch. 26, §5.

44. *Anderson v. Millikin*, 59 P.2d 295, 296 (1936).

45. *Heavey v. Chapman*, 611 P.2d 1256, 1259 (1980).

46. *See O’Callaghan v. State of Alaska*, 914 P.2d 1250, 1255 (Ak. Sup. Ct. 1996), *cert. denied sub. nom.*, *Republican Party of Alaska v. O’Callaghan*, 520 U.S. 1209 (1997).

47. *Id.* at 1256.

48. *See id.* at 1255.

49. *Id.*

50. *Id.* at 1256.

51. *See id.*

52. *O’Callaghan*, 914 P.2d at 1256. State Senator Robert Blodgett, a Democrat, explaining his support for the blanket primary.

ten voters want to vote for the man, not the party.”⁵³

In 1990, the Alaska Republican Party adopted a rule that conflicted with Alaska’s blanket primary by permitting only Republicans and independents to vote in its primaries.⁵⁴ This rule led to constitutional challenges being brought against Alaska’s blanket primary that began in 1992 and ended in 1996.⁵⁵ Alaska successfully defended its blanket primary with three major justifications: “it encourages voter turnout, maximizes voters’ freedom of choice among candidates, and tends to ensure that the officers elected are representative of the people to be governed in that it forces the major political parties to have a broad cross-section of support from the voters.”⁵⁶ Alaska also gave great emphasis to the fact that most voters in Alaska are nonpartisan or undeclared.⁵⁷

Unlike Washington and Alaska, Louisiana appears not to have had any noble goals in mind when it adopted its version of the blanket primary. It was “adopted in advance of the 1975 elections at the behest of then-Governor Edwin Edwards, who was annoyed in 1971 when he had to take on Republican David Treen in the general election after fighting through two tough Democratic primaries.”⁵⁸ Given its purpose, to prevent front-runners from having to endure two or more elections, the Louisiana blanket primary is in reality a non-partisan primary which confronts all voters with a list of all candidates running for an office, elects to office anyone getting more than 50% of the primary vote, and sends to the general election the two top vote-getters, irrespective of party, if no one achieves a majority.⁵⁹

53. *Id.* State Senator Robert Ziegler, a Republican, explaining his support for the blanket primary.

54. *See id.* at 1252.

55. *See id.* at 1250, 1252-53.

56. *Id.* at 1262-63 (internal quotation omitted).

57. *See id.* at 1263. In fact, as of 1994:

there were 340,464 registered voters in Alaska. Of these more than 182,000 voters were registered as nonpartisan or undeclared. By contrast, there were 78,212 registered Republicans, 59,782 registered Democrats, 12,936 registered Alaskan Independence Party members, 2,558 Green Party members, and 4,595 “other” party members. Thus approximately fifty-four percent of all registered voters in Alaska were nonpartisan or undeclared, whereas approximately twenty-three percent were registered Republicans and approximately eighteen percent were registered Democrats.

Id. at 1256.

58. Jack Wardlaw, *Open Primary System Debated; Legislature Considering Change by '98*, THE TIMES-PICAYUNE, December 13, 1996, at A3 (3d ed.) [hereinafter *Primary Change*].

Governor Edwards was a Democratic governor at a time when the Democratic Party dominated Louisiana politics, as it had since the end of Reconstruction. *See* Jack Wardlaw, *Party Lines Remained Blurred: Foster Reinforces Trend in Louisiana Politics*, TIMES-PICAYUNE, Nov. 1, 1999, at A1 [hereinafter *Party Blurred*] (noting that David Treen became the first Republican Governor since Reconstruction in 1980, and that until recently “almost everyone in public life was a Democrat, but the party was sharply divided between supporters and opponents of Huey and Earl Long”). Therefore, it was not anticipated that the non-partisan primary would facilitate the revival of the Republican Party, with David Treen becoming the first Republican governor since Reconstruction in 1980, *id.*, and the percentage of voters registering Republican quintupling from five (5%) to twenty-five (25%) since the advent of the non-partisan primary. *See Primary Change*, *supra* note 58 (quoting Republican State Representative Peppi Bruneau extolling the gains in Republican registration since the initiation of Louisiana’s non-partisan primary).

59. *See Jones District*, 984 F.Supp. at 1292; *See also Primary Change*, *supra* note 58.

Federal statutes established “[t]he Tuesday next after the 1st Monday in November, in every

The prime backers of California's blanket primary were moderate Republicans who had tried unsuccessfully for over twenty years to enact a blanket primary⁶⁰ as a means of helping moderates defeat hard-right conservatives in Republican primaries.⁶¹ Impetus for the successful Proposition 198 venture came from the defeat of Tom Campbell, a moderate Republican Congressman, by Bruce Herschensohn, an extremely right-wing well-known television commentator, in the 1992 Republican United States Senate Primary.⁶² Herschensohn went on to lose the general election to "Barbara Boxer, a representative who was as far to the left on the political spectrum as Herschensohn was to the right,"⁶³ and who had also defeated a moderate in the Democratic United States Senate primary.⁶⁴ Believing that Campbell would have won had he survived the Republican primary,⁶⁵ disappointed moderate Republicans enlisted him to lead the Proposition 198 effort.⁶⁶

even numbered year, . . . as the day for the election . . . of Representatives[,] Delegates [and Senators] to the Congress . . ." 2 U.S.C. § 7 (quoted in part, and modified in part to account for the elections of Senators as provided in 2 U.S.C. § 1), and requiring that all elections for Congress and President be held on the same day. 3 U.S.C. § 1. In 1997, the United States Supreme Court held that Louisiana's blanket primary, as applied to the elections of United States Senators and Representatives, violates these statutes. *Foster v. Love*, 522 U.S. 67, 68-69, 73-74 (1997). The violation resulted from the fact that under all congressional primaries held since 1975, 48 of the 57 "contested elections for United States Representative," and 5 of 6 "contested elections for United States Senator" were decided by a candidate receiving a majority vote during the October primary. *Love*, 522 U.S. at 71 n.1. As a consequence, the Court found that Louisiana's blanket primary produced results contrary to the policies behind the federal statutes establishing the general election days for Congress and the Presidency in that it "had the effect of conclusively electing more than 80% of the State's Senators and Representatives before the election day elsewhere, and, in presidential election years, having forced voters to turn out for two potentially conclusive federal elections." *Love*, 522 U.S. at 74. To date, the author has found no indication that either Louisiana or the United States has changed its election laws to alleviate the conflict.

60. The early prime movers were Susan Harding, a moderate Republican activist, and Houston Flournoy, a moderate Republican and former state controller. See Ed Mendel, *Proposition 198 Would Widen Voter Choices*, THE SAN DIEGO UNION-TRIBUNE, March 11, 1996, at A-1, A-13 of News Section [hereinafter *Widen Choices*]. When he was state controller, Flournoy "sponsored an unsuccessful open-primary bill in the early 1970s." *Id.* Harding worked on unsuccessful attempts to get open-primary initiative petitions to a vote of the people in 1979, 1984, and 1986. *Id.* The latter day prime-movers, the key sponsors of Proposition 198, were United States Representative Tom Campbell, a moderate Republican politician who lost the 1992 Republican United States Senate Primary by a hard-right candidate who went on to lose big to a Democratic liberal candidate, See David S. Broder, *A Sea Change in California Politics*, THE SAN DIEGO UNION-TRIBUNE, Apr. 3, 1996, at B6 of Opinion Section [hereinafter *Sea Change*], and the late computer magnate David Packard, who Campbell persuaded "to put up \$200,000 in matching money." *Widen Choices*, *supra* note 60.

61. See *Widen Choices*, *supra* note 60. See also James O. Goldsborough, *Voters Deserve a Better Choice than Tweedledee and . . .*, THE SAN DIEGO UNION-TRIBUNE, Mar. 4, 1996, at B7 of Opinion Section [hereinafter *Tweedledee*], which noted that the 1992 California Senate race was very similar to the 1968 Senate race, in which a well-thought-of moderate Republican U.S. Senator, Tom Kuchel, was defeated by a right-winger in the Republican primary after being targeted by John Birchers. The Bircher candidate, Max Rafferty, went on to lose to a very liberal Democrat, Alan Cranston. See *id.* Many observers believed Cranston could not have defeated Kuchel. See *id.*

62. See *Sea Change*, *supra* note 60.

63. *Id.*

64. See *id.*

65. See *id.*

66. See *Widen Choices*, *supra* note 60. Campbell's efforts on behalf of the blanket primary paid off, for he won the 2000 California U.S. Senate Primary by defeating two more conservative candidates. See David Broder, *Approval of the Blanket System Could Bury Party System*, THE DENVER POST, May 3, 2000, at B11 [hereinafter *Bury Party*]. Unfortunately for Congressman Campbell, he is running

To broaden their base of support to include all moderates and independents, Proposition 198 proponents argued that a blanket primary “would help end partisan gridlock in the Legislature and congressional delegation by electing moderate candidates who appeal to both parties and want to solve problems, not wage ideological warfare.”⁶⁷ To make this case, they asserted that both Democrats and Republicans tended to nominate highly partisan ideologues under the closed primary system,⁶⁸ thereby producing general elections featuring “a Leon Trotsky Democrat and [an] Attila the Hun Republican.”⁶⁹ They then alleged that a closed primary system “that rewards partisanship and ideological extremism” creates state government gridlock because it leads to the election of ideological officeholders who “spen[d] more time fighting with each other and promoting narrow political agendas than they spend doing their jobs.”⁷⁰ Similarly, it was charged that as a result of the closed primary system, “California is known for sending the most divided and divisive congressional delegation to Washington of any state.”⁷¹

Proposition 198 proponents also characterized their campaign as a crusade to end voter disenfranchisement. They asserted that the blanket primary would enfranchise independent voters denied the right to vote in closed primaries.⁷² Noting that the primary elections of the dominant party are the only ones that count in safe districts,⁷³ and that two thirds of California’s legislative districts are safe,⁷⁴ the promoters charged that the closed primary had effectively disenfranchised the many California voters who lived in safe districts and were not affiliated with the dominant party.⁷⁵ Finally, the proponents claimed that the blanket primary would end the disenfranchisement of the disaffected, thereby reversing declining voter participation, by giving “the 60 percent of Americans, who describe themselves as moderates,”⁷⁶ general elections that are contests among moderate candidates instead of battles among extremists nominated in

against Senator Feinstein, California’s most popular politician. Evelyn Nieves, *The California Senate Race: G.O.P. Long Shot Offers A Touch of the Radical*, NEW YORK TIMES, Aug. 24, 2000, at A21, col. 1, 2. As of August 24, 2000, he trailed Senator Feinstein fifty-two percent (52%) to thirty-three (33%). *Id.*, at col. 1. Besides Senator Feinstein’s popularity, Congressman Campbell faced two other huge issues: He has been unable to secure the core Republican base because he “supports abortion rights in a state where conservative, anti-abortion Republicans rule the roost[.] . . . [and] Democrats and independents don’t trust his party label.” *Id.*

67. *Widen Choices*, *supra* note 60.

68. *See Tweedledee*, *supra* note 61.

69. *Id.* (quoting from an unidentified article in the CALIFORNIA JOURNAL).

70. Lucy Killea & Rebecca Q. Morgan, *Open Primary Could Open Gridlock*, THE SAN DIEGO UNION-TRIBUNE, March 21, 1996, at B9 of Opinion Section [hereinafter *Gridlock*].

71. *Tweedledee*, *supra* note 61.

72. At that time, California had 1.5 million independent voters, *see Gridlock*, *supra* note 70, which constituted about 10% of persons registered to vote. *See Widen Choices*, *supra* note 60.

73. *See Gridlock*, *supra* note 70. Safe districts are defined as districts in which one party is so dominant that its nominees are virtually guaranteed victory in the general election. *See id.*

74. *See id.*

75. *See id.*

76. James O. Goldsborough, *Avoiding Governing from the Margins*, THE SAN DIEGO UNION-TRIBUNE, March 25, 1996, at B7 of Opinion Section [hereinafter *Avoiding Margins*].

closed primaries.⁷⁷

In sum, analysis of the policies behind the spread of open and blanket primaries reveals a progressive public hostility toward parties and the basic functions they have historically performed. Parties historically helped aggregate, coordinate, and reconcile the countless interests around which have coalesced individuals “who are interested more in power than in principles.”⁷⁸ Primary elections were created expressly to impede this party function, since they were implemented to reduce the governmental influence of powerful coalitions between party insiders and well-organized interest groups by democratizing the selection of party nominees for general elections.⁷⁹ Parties also have provided voters with a choice of competing visions of how government should operate and issues should be resolved.⁸⁰ Increasingly, the public, by implementing open and blanket primaries, has subordinated the parties’ political choice function to its desire to enhance the voting rights of unaffiliated voters, protect the privacy of

77. *See id.* wherein James O. Goldborough makes this argument by envisioning the following scenario:

Consider the cases of two voters: Joe Blow, moderate Republican; Mary Doe, centrist Democrat. Statistically, Joe and Mary represent 60 percent of Americans, who describe themselves as moderates.

Joe and Mary believe in many of the same things: hard work, strong families, a good education system, a responsible foreign policy, good roads, a balanced budget. Like most Americans, they are willing to pay taxes for good government.

Their central difference is the central difference between Republicans and Democrats for the past half-century: the relative size of government: Joe wants a little less; Mary is willing to pay slightly higher taxes for a little more government.

Joe and Mary used to vote in the primaries, but found their candidates rarely won. Joe’s candidate would be defeated by an anti-abortion or anti-gun-control advocate with lots of money and little else.

Mary’s candidate would be defeated by an anti-free-trade populist drawing primarily on trade union support.

Result: Joe and Mary have been voting less lately, both in primary and general elections. They sit on the sidelines more, frustrated that so few of the candidates speak to their concerns.

They are as mainstream as Grover’s Corners or Gopher Prairie, yet the California system is failing them.

Under open primaries, all the candidates, with their party affiliations, will be listed together. The top Republican wins, the top Democrat wins. Everybody, including independents, has a chance to vote for “the better person.”

Far from working against the two-party system, Proposition 198 will bring Joe and Mary back, re-energizing the system. The single-interest candidates now winning the primaries will have a tougher time once Joe and Mary are joined in the voting booth by disenfranchised independents.

The result will be fewer general elections between protectionists and gun advocates, and more between mainstream Republicans and Democrats.

78. *See* Gerald M. Pomper, *The Contributions of Political Parties to American Democracy*, PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 1, 5-7 (1980, Gerald M. Pomper, ed.) [hereinafter *Party Contributions*].

79. *See id.* at 4-6, especially n.21.

80. *See id.* at 7-8.

voters, and muffle ideological differences among elected officials.⁸¹ As reformers moved from trying to prevent corrupt ties between government and vested interests to attempting to shape the ideological messages of political parties, they began intruding on the associational rights of political parties that the U.S. Supreme Court sought to protect in *Jones*.

III. THE COMPETING ARGUMENTS

A. *The Basic Conflict*

The basic conflict between the *Jones* adversaries was raised by “a simple question: what is the purpose of a primary election?”⁸² Petitioners, consisting of the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party,⁸³ answered by asserting that “the primary is the major theater for resolving ideological struggles within a political party.”⁸⁴ A broader perspective was offered by the Respondents, Bill Jones, California Secretary of State, and Californians for an Open Primary.⁸⁵ They insisted that “primary elections are an integral part of the democratic process by which public officials are elected to administer government, a fundamentally public activity that narrows the field of candidates facing voters.”⁸⁶ These differing answers to a simple question reflect profoundly different political philosophies.

Petitioners believe that parties “exist to advance their members’ shared political beliefs,”⁸⁷ and by doing so “play a unique role in promoting our national commitment to the principle that debate on public issues should be wide-open and robust.”⁸⁸ Recognizing that “in the context of particular elections, candidates are necessary to make the party’s message known and effective . . . ,”⁸⁹ the Petitioners argued that “[t]he nomination of candidates is the central function of a political party,” and that “[a] political party’s right to choose its own nominees is core associational activity” protected by the First Amendment.⁹⁰ Concerned that “the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions,”⁹¹ Petitioners alleged that “California’s . . . blanket

81. *See id.* at 9-19.

82. Respondents’ Brief at 7, in *California Democratic Party v. Jones*, (No. 99-401) [hereinafter Respondents’ Brief].

83. *See id.* at ii.

84. Petitioners’ Brief at 19-20, in *California Democratic Party v. Jones* (No. 99-401) [hereinafter Petitioners’ Brief] (quoting from the heading of the Petitioners’ first argument).

85. *See* Respondents’ Brief at ii.

86. *Id.* at 7.

87. Petitioners’ Brief at 17, quoting from J. Kennedy’s opinion in *Colorado Republican Federal Election Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 629 (1996) (J. Kennedy, concurring and dissenting).

88. *Id.*

89. *Id.* (quoting J. Kennedy’s opinion in *Colorado Republican Federal Election Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 629 (1996) (J. Kennedy, concurring and dissenting)).

90. *Id.*

91. *Id.* (quoting *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122

primary... strikes at the very heart of party associational rights” by “allow[ing]... voter[s] to join in a party’s nominating process without requiring any act of affiliation with the party.”⁹²

Projecting from their belief that the “primary [election] is the first, critical step in... allow[ing] the citizens to choose their public officers,”⁹³ and the fact that “[o]nly political parties are given automatic ballot placement for their candidates,”⁹⁴ Respondents argued that political parties are “public and governmental actors” subject to the States’ powers to prescribe the manner of holding elections for United States Senators and Representatives and to regulate elections for state offices.⁹⁵ Therefore, they contended that political parties do not have an absolute right to “limit[] candidate selection to their own members,”⁹⁶ for the States have sovereign rights to “structure [their]... government[s], which include determining how their “citizens select those to govern.”⁹⁷ Noting that the citizens of California exercised California’s power to regulate elections by approving Proposition 198,⁹⁸ the Respondents asserted that “[t]he State’s interests here are directly those of the people,” and “spring ultimately from the citizens’ own First Amendment interests in effective democratic government.”⁹⁹ Thus, the Respondents alleged that the people believed their interests in effective democratic government required the implementation of a blanket primary because “California’s closed primary system effectively disenfranchised millions of voters, producing government officials unrepresentative of the public at large.”¹⁰⁰ Moreover, the Respondents argued that since “parties exist to advance their members’ shared political beliefs,”¹⁰¹ the Court should hold that the political parties were estopped from challenging California’s blanket primary because of the overwhelming approval their rank-and-file members gave to Proposition 198 in the initiative election.¹⁰²

The Respondents’ goal of producing more responsive government officials by extending the primary election franchise certainly echoes the Progressives’ case for primary elections – that the process of selecting party nominees for general elections had to be democratized in order to reduce the corrupting influences of

(1981)).

92. *Id.*

93. Respondents’ Brief at 14.

94. *Id.* at 15.

95. *Id.* at 14, 15 (quoted part at 15), *citing to* U.S. CONST., Art. I, § 4, cl. 1, and *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986).

96. *Id.* at 17.

97. *Id.* at 15-16 (quoted part at 16).

98. *See id.* at 15-17, especially n.4.

99. Respondents’ Brief at 17.

100. *Id.* at 13.

101. *Id.* at 16 n.4, quoting Justice Kennedy’s opinion in *Colorado Republican Federal Election Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 629 (1996) (J. Kennedy, concurring and dissenting).

102. *See id.* at 15-16 n.4, wherein the Respondents alleged that “61 percent of Democrats and 57 percent of Republicans voted for the initiative and it is ‘likely that a majority of the members of [minor] parties also favored the initiative.’” (citation omitted).

party insiders and powerful interest groups on electoral politics.¹⁰³ But, the basic conflict in *Jones* also reflects debates about the merits of political parties that commenced prior to the ratification of the Constitution and have continued to this day.

In FEDERALIST No. 10, Madison decried faction, by which he meant “a number of citizens . . . who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”¹⁰⁴ He identified many mischiefs of faction, including unstable governments, governmental disregard for the public good, and injustice inflicted on the deserving minority “by the superior force of an interested and overbearing majority.”¹⁰⁵ These mischiefs certainly share a kinship with the complaints against political parties that have lead States to adopt ever-more open primary elections.¹⁰⁶

Madison believed there were only two ways to “cur[e] the mischiefs of faction: . . . remov[e] its causes . . . [or] control its effects.”¹⁰⁷ He argued persuasively that the causes of faction could not be eliminated, because they arose from the combination of liberty, man’s inherent “zeal for different opinions concerning religion, . . . government, . . . attachment [to] . . . leaders,” and the “various and unequal distribution of property among men.”¹⁰⁸ Differences of opinion, he said, could not be extinguished because they are “sown in the nature of man.”¹⁰⁹ He proclaimed, rightly, that extinguishing liberty was a “remedy . . . that . . . was worse than the disease.”¹¹⁰ The *Jones* Petitioners intensely ascribed to this proclamation, for they fought for the liberty to maintain the effectiveness of ideology-based political parties as effective means of turning their political beliefs into action by electing like-minded officeholders.¹¹¹

103. See DEADLOCK, *supra* note 19, at 82-83; *Philosophies* in RENEWAL, *supra* note 22, at 33-34; MISCHIEFS, *supra* note 22, at 17-19, 25-26, 80-82, 119-26.

104. THE FEDERALIST NO. 10 (James Madison), *quoted in* 43 GREAT BOOKS OF THE WESTERN WORLD 49, 50 (Robert Maynard Hutchins, ed., 1978) [hereinafter FEDERALIST No. 10].

105. FEDERALIST NO. 10 at 49, *supra* note 104.

106. See discussion *infra* Part II.B.-C. and accompanying footnotes.

107. FEDERALIST NO. 10, *supra* note 104, at 50.

108. *Id.*

109. *Id.*

110. Proclaiming that “[l]iberty is to faction what air is to fire,” Madison carried through with the analogy by stating that: “it could not be less folly to abolish liberty, which is essential to political life, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.” *Id.* at 50.

111. See Petitioner’s Brief at 17. Historically, however, there have been some extreme proposals put forward as means of eliminating political parties. For example, James Hillhouse, a Federalist U.S. Senator from Connecticut, argued in 1808 that:

[The office of President] serves as the rallying point of party . . . and cannot fail to bring forth and array all the electioneering artillery of the country; and furnish the most formidable means of organizing, concentrating, and cementing parties. And when a President shall be elected by means of party influence, thus powerfully exerted, he cannot avoid party bias, and will thence become the chief of a party, instead of taking the dignified attitude of a President of the United States. If some other mode of filling the Presidential chair than that of a general election throughout the United States were devised and adopted, it would be impossible to form national parties.

How then can the effects of faction be controlled? Madison said there were only two means available: preventing “the existence of the same passion or interest in a majority at the same time,” and rendering any “majority . . . having such co-existent passion or interest . . . [incapable of] concert[ing] and carry[ing] into effect schemes of oppression.”¹¹² He believed a republican form of government, by which he meant “a government in which the scheme of representation takes place,” would provide the controlling mechanisms.¹¹³

How would a republican form of government control the effects of faction? Madison expressed the hope that “refin[ing] and enlarg[ing] the public views, by passing them through the medium of a chosen body of citizens” would cause “the public voice, pronounced by the representatives of the people, . . . [to] be more consonant to the public good.”¹¹⁴ Ever the realist, he admitted that this would not happen unless the chosen body of citizens were comprised of persons “whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.”¹¹⁵ He further admitted that the people chosen to be the people’s representatives could turn out to be “[m]en of factious tempers, of local prejudices, or of sinister designs, [who] may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests, of the people.”¹¹⁶ With their focus on preventing corrupt ties between party leaders and vested interests, and in avoiding ideological extremism, the arguments of the Progressives for primary elections and the latter day reformers for more open primary elections appear to be based on the premise that Madison’s fears about the nature of the people’s representative came to pass.¹¹⁷

How then can the republican form of government be refined to avoid the selection of, or the problems created by the selection of, factious persons to be the people’s representatives? Madison’s answer was that enlarging the republic would

MISCHIEFS, *supra* note 22, at 33. Nathan Cree, a political critique writing in the late 1800s, advocated eliminating all legislative bodies and placing the lawmaking function directly in the hands of the people through the initiative and referendum processes. *Id.*, at 35-36. And another late 19th Century writer, Albert Stickney, believing that parties were the evil effects of recurring elections, proposed allowing the people to elect legislators only when there were open seats to fill, with the winners being able to stay in office for life unless removed by the legislative body for poor performance. *Id.* at 36. Mounting a more direct attack on parties, and allowing for the continuation of elections, yet another late 19th Century writer, James Sayles Brown, promoted “a law declaring any candidate nominated by any . . . political organization ineligible to the office for which he is designated.” *Id.* at 36-37.

112. FEDERALIST NO. 10, *supra* note 104, at 51. It could be argued that, in seeking to prevent the coalescence of a factious majority, Madison was advocating for the governmental gridlock so attacked by the proponents of Proposition 198. But, in a recent book, the historian Garry Wills argues persuasively that Madison and other Framers of the Constitution designed a new government they hoped would be much more efficient than the government created by the Articles of Confederation. Garry Wills, *A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT* 71-82 (1999).

113. FEDERALIST NO. 10, *supra* note 104.

114. *Id.* at 52.

115. *Id.*

116. *Id.*

117. See discussion *infra* Part II.A.-B. (progressive arguments), Part II.C. (latter day reformer arguments).

prevent or reduce these problems because in large republics there will be a greater “proportion of fit characters” relative to the number of representatives to be selected and each representative will be chosen by a greater number of citizens.¹¹⁸ Enlarging the republic is not particularly relevant to the current debate over parties, but increasing the number of citizens who will select the people’s representatives clearly is. Madison argued that when “a greater number of citizens” choose a representative “it will be more difficult for unworthy candidates to practise with success the vicious arts by which elections are too often carried; and the suffrages of the people being more free, will be more likely to centre in men who possess the most attractive merit and the most diffusive and established character.”¹¹⁹ This argument is reflected strongly in the claim of Proposition 198 supporters that a blanket primary, by subjecting each primary candidate to the scrutiny of every primary voter, will prevent the selection of general election candidates who are highly partisan ideologues.¹²⁰

Madison as an anti-faction political theorist provided great philosophical support for the anti-party sentiments driving the crusade for open and blanket primary elections. But, Madison as one of the most effective politicians of his day provided a remarkable demonstration of the usefulness of political parties to those who wish to see their political beliefs reflected in government structure and policy. Faced with Alexander Hamilton organizing a congressional caucus to put forward domestic policies they believed put too much power in the hands of the federal government, Madison and Jefferson formed their own congressional caucus as a means of organizing effective opposition to Hamilton’s schemes.¹²¹ Hamilton’s original caucus had attained a congressional majority,¹²² so Madison and Jefferson formed committees of correspondence involving non-officeholders as a means of organizing campaigns to elect more congressmen and senators who shared their views.¹²³ This in turn forced Hamilton and his allies to act in kind.¹²⁴ As a result, the United States’ first nation-wide political parties were born: The Republican Party of Jefferson and Madison and the Federalist Party of Hamilton and Adams.¹²⁵ A precedent had been set: party organization had proved useful, even essential, to the furtherance of important political ideas and the ambitions of many politicians.¹²⁶ Building on this precedent, a group of political scientists,

118. See FEDERALIST No. 10, *supra* note 104.

119. *Id.*

120. See *Widen Choices*, *supra* note 60; *Tweddledee*, *supra* note 61; *Gridlock*, *supra* note 70; and *Avoiding Margins*, *supra* note 76.

121. See John H. Aldrich, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA 78-80 (1995) [hereinafter WHY PARTIES].

122. See *id.* at 80.

123. See *id.* at 80-81.

124. See *id.* at 81.

125. See *id.* at 81-82.

126. In WHY PARTIES, *supra* note 121, Professor Aldrich convincingly documented that this precedent has held true through out America’s political history, even as individual parties waxed and waned and America’s party system changed form. In this regard, Professor Aldrich provides an excellent account of the development of the two party system featuring the Democratic and Republican Parties as the major players. See *id.* at 98-99 (describing the demise of the Federalist Party

organized under the name of Northern California Committee for Party Renewal, filed an amicus brief in *Jones* in which they eloquently argued that the blanket primary will damage the ability of parties to continue playing their “unique and crucial role in our democratic system of government,”¹²⁷ a role they described as follows:

Parties enable citizens to participate coherently in a complex system of government, allowing for substantial number of popularly elected offices. They bring fractured and diverse groups together as a unified force, provide a necessary link between the distinct branches and levels of government, and provide continuity that lasts beyond terms of office. Parties also play important roles in encouraging active participation in politics, . . . holding politicians accountable for their actions, and encouraging debate and discussion of important issues.¹²⁸

B. *The Legal Format*

Though essentially philosophical in nature, the basic conflict between the Petitioners and the Respondents had significant constitutional and legal dimensions. These dimensions are reflected in the two key issues addressed by the courts.¹²⁹

and the disuniting of the Jeffersonian Republican Party); *See id.* at 99-125 (describing the emergence of the Democratic Party as the first true mass political party based on Martin Van Buren’s call to revive the states’ rights principles of Jefferson, to establish the primacy of party over individuals and to exploit the personal popularity and policy vagueness of Andrew Jackson in order to develop a winning presidential campaign around which to organize); *See id.* at 125-34 (describing the emergence of the Whig Party as the second mass political party and the operation of a two party system in which elections were organized by two intersectional parties anxious to avoid the controversial issue of slavery); *See id.* at 135, 140-44 (describing the demise of the Whigs); *See id.* at 135, 144-56 (describing the emergence of the new Republican Party organized around opposing slavery and the resulting disintegration the Democratic Party’s intersectional base, all of which led to a new two party system featuring electoral competition between two sectionalist based parties over the issue of slavery).

127. Brief of Amicus Curiae Northern California Committee for Party Renewal, et. al., at 15 [hereinafter Renewal Amicus Brief].

128. *Id.*

129. The fact that the parties’ rank-and-file members overwhelmingly approved Proposition 198 in the initiative election gave rise to two additional issues of substantial interest to political theorists: (1) Who may assert the associational rights of political parties? and (2) By what means must those authorized to so do assert the political parties’ associational rights? *See* Respondents’ Brief at 15-16 n.4. Unfortunately for political junkies, the Courts gave little or no attention to these issues, so they will not be discussed outside of this note.

In a footnote, Judge Levi dismissed the Respondents’ arguments that the parties’ rank-and-file members voting in the initiative election gave Proposition 198 their parties’ official approval. *District Jones*, F. Supp. at 1294 n.16. The “votes” of Republicans and Democrats cast in the initiative election were estimated through exit polls, but the “turnout by California’s six minor parties was too small to sample.” *Id.* at 1291. As a consequence, Judge Levi would not conclude that the members of minor parties had approved Proposition 198. *Id.* at 1294 n.16. Moreover, he would not accept the exit poll results as proof that Democratic and Republican voters had approved Proposition 198 on behalf of their parties because “[i]n no other context do we accept the results of polling for the act of voting.” *Id.* Most importantly, after noting that all political “parties have selected certain procedures for the modification of their rules,” he held that “a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party.” *Id.*

Neither Justice Scalia, writing for the Court, nor Justice Kennedy, writing in concurrence, mentioned these issues. *Jones*, 120 S. Ct. at 2405-14 (Scalia, J., writing for the majority), 120 S. Ct. at 2414-16 (Kennedy, J., concurring). Perhaps they ignored them because the Respondents’ gave them a low priority by relegating arguments on them to a footnote. Respondent’s Brief at 15-16, n.4.

1. Do political parties have associational rights protected by the First Amendment to determine who participates in selecting their nominees for elective offices?
2. If so, to what extent do their constitutional powers to regulate federal and state elections permit the States to override a party's decisions as to who is entitled to participate in its primary elections?

The Petitioners' and Respondents' agreed that political parties do have associational rights protected by the First Amendment with respect to who participates in the selection of their nominees. This agreement was not explicit. Rather, it was implicitly entered into by both sides debating the relevance of three key U.S. Supreme Court decisions that recognized the associational rights of political parties in resolving conflicts between State primary election laws and party nominating rules:

1. *Eu v. San Francisco County Democratic Central Committee*,¹³⁰ wherein the Court held that a California law prohibiting the endorsement of primary candidates by governing bodies of political parties violated the parties' speech and association rights under the First Amendment;¹³¹

2. *Tashjian v. Republican Party of Connecticut*,¹³² wherein the Court held that Connecticut's prohibition against parties choosing to permit independent voters to participate in their primary elections violated the parties' association rights under the First Amendment;¹³³

3. *Democratic Party of the United States v. Wisconsin ex rel. La Follette*,¹³⁴ wherein the Court held that State presidential primary laws requiring national political parties to honor the results of binding primaries in selecting delegates to their national conventions, even though they violated the parties' delegate selection rules, violated the parties' association rights under the First Amendment.¹³⁵

The Petitioners and Respondents also agreed that States have considerable authority to regulate elections. This agreement was explicit,¹³⁶ primarily because it

130. 489 U.S. 214 (1989) [hereinafter referred to as *Eu*]. See Petitioners' Brief at 22, 26, 33, 38, 39; Respondents' Brief at 9, 16, 20, 22, 35.

131. *Eu*, 489 U.S. at 222-29.

132. 479 U.S. 208 (1986) [hereinafter referred to as *Tashjian*]. See Petitioners' Brief at 21-26, 39; Respondents' Brief at 9, 15, 16, 20-22, 28, 49.

133. *Tashjian*, 479 U.S. at 213-25.

134. 450 U.S. 197(1981). See Petitioners' Brief at 17, 21, 26, 29, 30; Respondents' Brief at 9, 20, 22, 23, 28, 29, 32.

135. *La Follette*, 450 U.S. at 120-26.

136. Thus, the Petitioners admitted that "states have broad regulatory power over the conduct of election." Petitioners' Brief at 22. They also allowed that "[t]he State certainly has wide latitude to regulate elections to ensure that they are fair and honest." *Id.* at 39.

The Respondents argued that "[t]he State's power to regulate elections for public office is a fundamental attribute of the State's sovereignty and its democratic character." Respondents' Brief at 15-17 (quote taken from argument heading I.B. at 15). They also cited to cases they claimed stood for the propositions that States may require party nominations to be determined in primary elections, citing to *Lightfoot v. Eu*, 964 F.2d 865 (9th Cir. 1992), *cert. denied*, 507 U.S. at 919; parties may not bar blacks from participating their primaries, citing to *Smith v. Allwright*, 321 U.S. 649 (1944); parties "engage[d] in the nominating process . . . are subject to a wide range of state regulation," citing to *Morse v. Republican Party*, 517 U.S. 186 (1996), *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157-58

was compelled by the constitutional authority of the States to regulate elections.¹³⁷

Finally, both sides agreed that the case should be decided by the Court applying the following flexible standard:

[w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the ‘character and magnitude’ of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s ‘important regulatory interests’ will usually be enough to justify ‘reasonable, non-discriminatory restrictions.’¹³⁸

As a consequence, the bulk of the arguments presented to the Court were concerned with whether California’s blanket primary imposed severe burdens on the parties’ associational rights,¹³⁹ advanced compelling state interests,¹⁴⁰ and was narrowly tailored to advance compelling state interests.¹⁴¹ But, the adversaries also engaged in a vigorous debate over the Petitioners’ assertion that a blow-by-blow application of the flexible standard was not necessary because prior U.S. Supreme Court case law applying it dictated a decision in favor of the political parties.¹⁴²

(1978); and parties “do not have unfettered control over who can vote in primary elections,” citing to *Terry v. Adams*, 345 U.S. 461 (1953).

See Respondents’ Brief at 19.

137. “The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.” U.S. CONST., art. I, § 4, cl. 1. As to the power of States to regulate state elections, the U.S. Supreme Court observed in *Tashjian* that the States’ power to regulate federal elections under the Constitution “is matched by state control over the election process for state offices.” 479 U.S. at 217.

138. Petitioners’ Brief at 23, and Respondents’ Brief at 24, citing to *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358.

139. See Petitioners’ Brief at 23-38, presenting arguments that “Proposition 198 is a severe burden on party associational rights because it forces a political party to open its nominating procedure to voters who have absolutely no affiliation with the party.” *Id.* at 23 (quoting argument heading II). See Respondents’ Brief at 26-38, presenting arguments that “the political parties assert burdens that are insubstantial or speculative.” *Id.* at 26 (quoting argument heading III.A.).

140. See Petitioners’ Brief at 38-42, presenting arguments that amount to an assertion that “the State’s interests . . . reduce down to several which are speculative and one – the desire to produce more ‘mainstream’ or ‘moderate’ candidates – which is fundamentally at odds with the First Amendment Rights of each political party to choose a representative which best represents the ideological views of the party, as defined by the party.” *Id.* at 41-42. See Respondents’ Brief at 38-47, presenting arguments that “the blanket primary advances compelling state interests.” *Id.* at 38 (quoting argument heading III.B.).

141. See Petitioners’ Brief at 40-41, presenting arguments that there are less restrictive means than blanket primaries for increasing voter participation and preserving voter privacy. See Respondents’ Brief at 47-50, presenting arguments that “the blanket primary is narrowly tailored to advance the State’s compelling interests.” *Id.* at 47 (quoting argument heading III.C.).

142. See Petitioners’ Brief at 19-26, presenting arguments that “a party’s right to define its membership and to choose its own nominees is a basic freedom of association protected by the First Amendment.” *Id.* at 19 (quoting part of argument heading I), and “*Tashjian* controls the result here.” *Id.*, at 23 (quoting argument heading II.A.). See Respondents’ Brief at 20-23, presenting arguments that “the cases cited by the political parties do not support their theory of an absolute right to restrict who can vote in selecting candidates for public office.” *Id.* at 17 (quoting argument heading II.B.).

C. *The Debate Over the Existence of Controlling Case Law*

The Petitioners argued that California's blanket primary could not be reconciled with the prior cases recognizing the associational rights of political parties, because it forced parties to allow persons unaffiliated with them to participate in their nominating processes.¹⁴³ This argument sprung from the premise articulated in *La Follette* that "the freedom to associate 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit association to those people only,' . . . because 'the exclusion of persons unaffiliated with a political party may seriously distort its collective decisions.'"¹⁴⁴ The Petitioners tied *La Follette's* premise to the nominating process through *Eu*, which they contended stood for the proposition that the First Amendment protects the political parties' "right to choose a standard bearer who best represents the party's ideologies and preferences."¹⁴⁵

Seeking a knockout blow, the Petitioners' asserted that *Tashjian* controlled the outcome of this case.¹⁴⁶ Like *Jones*, *Tashjian* involved a State primary law in conflict with a party's nominating rules. But, *Tashjian* was in some ways the polar opposite of *Jones*, because it involved a conflict between Connecticut's closed primary statute and the Connecticut Republic Party's desire to permit independent voters to vote in its primary elections.¹⁴⁷ Still, Petitioners found *Tashjian* to be controlling because in it "[t]he Court observed that '[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution,'"¹⁴⁸ and held that:

[t]he closed primary law trenched on the party's associational rights by plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the 'basic function' of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.¹⁴⁹

To the Petitioners, this holding sealed the fate of California's blanket primary without the necessity to discuss in detail the burdens it imposed on political parties or the State interests it served.¹⁵⁰ They even had the audacity to suggest that:

143. See Petitioners' Brief at 23.

144. *Id.* at 21-22, (quoting *La Follette*, 450 U.S. at 122).

145. *Id.* at 21-22, citing to *Eu*, 489 U.S. at 224, wherein the Court stated that "a political party has a right to . . . select 'a standard bearer who best represents the party's ideologies and preferences'" (quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in result), *cert. denied*, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341 (1976)).

146. See Petitioners' Brief at 23-26.

147. *Tashjian*, 479 U.S. at 211-13. Petitioners' acknowledged this difference, Petitioners' Brief at 23, 24, and discussed its significance. *Id.* at 26.

148. Petitioners' Brief at 24 (citing to and quoting from *Tashjian*, 479 U.S. at 224).

149. *Id.* (citing to and quoting from *Tashjian*, 479 U.S. at 215-16).

150. In this regard, the Petitioners asserted that "[t]here is nothing peculiar to California's parties that would make them less entitled than Connecticut parties to protection of their associational rights at the time of nominating their candidates, . . . [n]or is there anything peculiar to California about the

the associational right asserted [in *Jones* is] . . . much stronger than the right asserted in *Tashjian* . . . [because the California political parties sought] to choose *their own* nominees [by] limit[ing] the nominating process to those who have affiliated with a party . . . [while] the Connecticut Republican Party sought to allow *outsiders* to join in the nomination process.¹⁵¹

Respondents countered the Petitioners' assertion that the outcome of *Jones* is controlled by prior case law with an analysis of the significant factual differences among *Jones*, *Tashjian*, *Eu*, and *La Follette*.¹⁵² Attacking *Tashjian* first, the Respondents characterized the associational interest it established "as one against having the party's electoral base restricted contrary to the party's wishes," rather than "a sweeping right to control who may vote in primaries."¹⁵³ In so doing, the Respondents pointed out that the Connecticut legislature that insisted on having closed primaries was controlled by the Democratic Party.¹⁵⁴ In that light, they reformulated the question considered in *Tashjian* as being "whether Democrats could act through the State to bar Republicans from expanding their electoral base" ¹⁵⁵

Turning to *Eu*, the Respondents observed that the statute at issue there "prohibit[ed] parties from endorsing candidates in primaries . . . , [and therefore] the case did not involve who could vote in primaries, but only whether parties could speak to their members" ¹⁵⁶ How a party speaks to its members is an internal matter, so the Respondents argued that *Eu* does not control *Jones* since in *Eu* "the Court noted that a party's interest in controlling its internal organization was much different from *and stronger than* the party interests at stake in the primary election in *Tashjian*." ¹⁵⁷

Finally, the Respondents distinguished *La Follette* on the basis that the issue it resolved was whether State presidential primary laws or national party rules govern the selection of delegates to a presidential nominating convention, "not whether a State may choose a particular primary system over a political party's objection."¹⁵⁸ This issue, said the Respondents, "rests heavily on the special nature of national party conventions, which . . . implicate interests beyond the reach of any individual state, and reflect the need for national uniformity in our one single national race."¹⁵⁹ Moreover, the Respondents pointed out that "*La Follette* did not overturn Wisconsin's open primary law . . . ,"¹⁶⁰ [but instead] acknowledged [that] Wisconsin has a substantial interest in the manner in which its elections are conducted . . . that was not incompatible with the national party's

numerous state interests allegedly served by the blanket primary." Petitioners' Brief at 25.

151. *Id.* at 26.

152. Respondents' Brief at 20-25.

153. *Id.* at 21.

154. *See id.*

155. *Id.*

156. *Id.* at 22.

157. *Id.* at 22 (citing to *Eu*, 489 U.S. at 230).

158. Respondents' Brief at 22-23.

159. *Id.* at 23.

160. *Id.* at 23 (citing to *La Follette*, 450 U.S. at 120).

interest.”¹⁶¹

D. *The Debate Over Burdens*

The essence of the Petitioners’ burdens argument was that California’s blanket primary “is the nominating process most intrusive into party associational rights because it denies the very existence of those rights.”¹⁶² To drive this point home, the Petitioners set up a side-by-side comparison of their definition of the party’s associational rights at issue and key wording from Proposition 198, as follows:¹⁶³

The Constitutionally Protected Right: “[T]he [party], and not someone else, has the right to select the [party’s] ‘standard bearer.’” *Timmons*, 520 U.S. at 359.

Proposition 198: The voter registration card shall inform the affiant that . . . all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance.

CAL. ELEC. CODE § 2151 (emphasis added)

This comparison, said the Petitioners, reveals that “Proposition 198 is not a slight restraint, it is not a minor imposition, it is not a glancing blow. It is a full-scale, head-on, point-blank assault.”¹⁶⁴

Respondents cited expert opinion and empirical evidence to demonstrate that in practice cross-over voting¹⁶⁵ allowed by blanket primaries was rarely engaged in by improperly-motivated persons¹⁶⁶ or decisive to the outcome of elections.¹⁶⁷ Obviously, the implication of this information was that crossover voting did not severely harm the associational rights of political parties.¹⁶⁸ Petitioners sought to blunt this implication by arguing that it was probable that at sometime cross-over voters would decide the outcome of a primary, and this probability was itself a severe burden on the political parties’ associational

161. *Id.* at 23 (citing to *La Follette*, 450 U.S. at 126).

162. Petitioners’ Brief at 33.

163. The columns reproduced below are taken verbatim from Petitioners’ Brief at 27.

164. Petitioners’ Brief at 27.

165. Crossover voter was defined as “one who votes for a candidate of a party in which the voter is not registered, [which means] the cross-over voter could be an independent voter or one who is registered to a competing political party.” *District Jones*, 984 F. Supp. at 1297.

166. *See* Respondents’ Brief at 27-30, especially n.7 at 27-28, where improper motive is described as voters of one party voting in the primary of another party for persons they believed would be the weakest general election candidates.

167. *See* Respondents’ Brief at 30.

168. *See id.* at 27-30.

rights.¹⁶⁹

Petitioners strongly proclaimed that Proposition 198's purpose to "produc[e] more moderate candidates" is an illegitimate legislative goal. Decrying the prediction that more moderate candidates may indeed be produced by blanket primaries, the Petitioners asserted that "a constitution that holds that '[t]he *independent* expression of a political party's views is 'core' First Amendment Activity' does not permit California to force upon a party a nominating process that robs it of that independence,"¹⁷⁰ for "[a]ny other conclusion raises the troubling specter of state-run parties."¹⁷¹

Finally, Petitioners alleged that the blanket primary would impose particularly severe impacts on minor parties. To the Petitioners, minor "parties are explicitly ideological[,] . . . outside the mainstream of American politics, [and] . . . see no significant difference between the two major parties."¹⁷² Thus, the Petitioners praised the minor parties for "play[ing] an important part in a democracy" by expressing "political ideas [that] cannot and should not be channeled into the programs of our two major parties . . . [and which historically have often been] ultimately accepted."¹⁷³ Demonstrating that in the 1998 primary the total vote for each of three minority party candidates was more than twice the party's registration in the relevant district,¹⁷⁴ Petitioners expressed the fear that California, by permitting persons registered with the major parties to vote in the minor parties' primaries, had "take[n] a major step toward stifling the voices of minor parties."¹⁷⁵

Taking a much more empirical approach, the Respondents cited data, or the absence of it, to support their contention that the political parties' had asserted burdens "that are insubstantial or speculative."¹⁷⁶ They first attacked the allegation that cross-over voting would harm the parties.¹⁷⁷ According to them, the most harmful cross-over voting would be done by raiders—persons "who mischievously (sic) switch[] sides to vote for the candidate perceived weakest in another party."¹⁷⁸ There was, they said, no empirical evidence that raiding will be

169. See Petitioners' Brief at 28, emphasizing that no matter what the strength or motive of the cross-over vote, the parties' core associational rights will be severely harmed because "non-party members [will] play a role, on occasion a decisive role, in choosing a party's nominee."

170. *Id.* at 33 (citing Colorado Republican Federal Election Comm'n v. Federal Election Comm'n, 518 U.S. 604, 616 (1996)).

171. Petitioners' Brief at 33.

172. *Id.* at 33-34.

173. *Id.* at 37 (citing to *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957)).

174. There were 159,307 votes cast in the Peace & Freedom Party's Insurance Commissioner Primary, but the Peace & Freedom Party had only 71,620 registered voters eligible to vote for that office. See Petitioner's Brief at 36. Similarly, 4,333 votes were cast in the Libertarian Party's First District Congressional Primary, but only 1,939 persons were registered as Libertarians in that district. *Id.* at 37. Finally, 3,469 votes were cast in the Libertarian Party's 77th District Assembly Primary, but only 1,294 persons were registered as Libertarians in the 77th District. *Id.*

175. Petitioners' Brief at 38.

176. Respondents' Brief at 26-38 (quote taken from argument heading III.A. on 26).

177. See *id.* at 27-31.

178. *Id.* at 27.

a factor in any California race.¹⁷⁹ Respondents then cited the parties' own experts for the proposition that "90 to 95 percent of crossover voters are voting for the candidate of their choice,"¹⁸⁰ and characterized such voters as having "no intent to create mischief."¹⁸¹ Moreover, they contended that "crossover voting makes little difference if it does not change the outcome of the election,"¹⁸² and the evidence showed that crossover voting generally does change election outcomes.¹⁸³

Curiously, the Respondents claimed that crossover voting in open and closed primaries do more damage to parties than it does in blanket primaries.¹⁸⁴ According to this claim, many voters become so attracted to a candidate of a party with which they are unaffiliated that they find a way to be able to vote for him or her in the primary election.¹⁸⁵ Such voters are then "*locked into the other party's ballot* for all other races,"¹⁸⁶ causing them to face a "choice of not voting, voting for candidates about whom they have no knowledge or interest, or voting mischievously."¹⁸⁷ Having theorized that crossover voting potentially damaging to parties occurs in open and closed primaries, the Respondents' warned that "the consequence of accepting the political parties' arguments on crossover voting jeopardizes almost all forms of primaries currently in use."¹⁸⁸

Under the heading "Proposition 198 does not burden parties' traditional activities," the Respondents characterized as "speculative at best and not substantial in any case" certain burdens the political parties had raised during the District Court proceedings but had not pressed on appeal.¹⁸⁹ These burdens were allegedly on internal party governance,¹⁹⁰ party discipline,¹⁹¹ campaign activities,¹⁹²

179. *See id.* at 28. Indeed, the Respondents cited expert findings that successful raiding is all but impossible to achieve because "(1) the raider's own primary must be uncontested; (2) the race in the opposing party must be tightly contested; (3) the raider must be able to tell which candidate in the target party will be weakest in the general election; and (4) the raider must be part of a concerted action." *Id.* at 27-28 n.7. Given these conditions, the experts "concluded that less than 2 percent of voters ever engage in raiding" and that the lack of information on the day of the primary as to who will be the weakest on general election day makes successful raiding all but impossible. *Id.*

180. Respondents' Brief at 29-30.

181. *Id.* at 30.

182. *Id.*

183. *See id.* To that end, Respondents noted that the political "parties had cited only three races in the past 60 years under the Alaska and Washington blanket primaries which arguably were determined by crossover voting . . ." *Id.* at 30 n.9.

184. *See id.* at 30-31. The Respondents believed this crossover voting would occur because of the tendency of open primary states and some closed primary states to provide for same-day registration at the primary election polls that permitted voters to receive the primary ballot of any party, "whether or not the voter previously has registered as a member of that party . . ." *Id.* at 30-32 (citation omitted).

185. *See id.* at 30.

186. Respondents' Brief at 31.

187. *Id.*

188. *Id.* at 31-33. The primaries referred to include those "in states where voter registration is not required or recorded, and in . . . states where the voter may request any ballot on the day of the primary . . . , [which enables] any voter . . . [to] obtain any party's ballot on the day of the primary and 'switch' parties, or cross over, with ease." *Id.* at 33.

189. *Id.* at 33-36 (quoted part at 33).

190. *See id.* at 34.

191. *See id.*

192. *See* Respondents' Brief at 35.

protecting the party from false candidates,¹⁹³ and defining party membership.¹⁹⁴

At the District Court, the parties had complained that nominees elected with outside support under the blanket primary system would adulterate their parties' governing bodies because the parties "permit[ted] their nominees to serve on and make appointments to their central committees."¹⁹⁵ Respondents' refuted this complaint by noting that:

[(1)] all nominees and their appointees must be members of the party[; (2)] . . . nothing prevents the parties from changing how their central committees are constituted[; (3)] . . . nothing suggests that nominees who win crossover votes will be less dedicated to party ideals and activities[; and (4)] this scenario exists in closed primaries . . . where a candidate can also receive the nomination with less than majority support from party members.¹⁹⁶

Most tellingly, the Respondents noted that party rules give party officeholders "more appointments to the central committee *in recognition of their demonstrated ability to appeal across party lines*[,]"¹⁹⁷ thereby insinuating that the parties' fears that California's blanket primary would lead to the adulteration of their central committees was insincere.¹⁹⁸

The parties had expressed concern that under the blanket primary officeholders would be more likely to "break from the parties' positions on issues."¹⁹⁹ On appeal, the Respondents asserted that "[t]his is a harm only if the party has a greater claim to the candidates than do the constituents."²⁰⁰ More practically, the Respondents pointed out that party discipline is a problem even under closed primary systems, because "many elected officials, especially those from competitive districts, vote[] against their party leadership."²⁰¹

Respondents claimed that Proposition 198 did not affect party campaign activities. Blanket primaries, they said, still let parties "develop platforms, register new voters, endorse candidates, provide financial support, and conduct get-out-the-vote activities"²⁰²

Respondents also listed many protections available to keep parties from being victimized by the nomination of "false candidates' who will carry the party's label but not its politics." These protections included the requirement that party candidates be party members,²⁰³ the ability of parties to endorse preferred

193. See *id.*

194. See *id.* at 35-36.

195. *District Jones*, 984 F.Supp. at 1299.

196. Respondents' Brief at 34.

197. *Id.*

198. See *id.*

199. Respondent's Brief at 34.

200. *Id.* at 34. They also contended that "the balance struck between party caucus discipline and permitting legislators to 'vote their districts' is a question of public policy and it is not a function of any court to resolve them [sic]." *Id.*

201. *Id.* at 34.

202. *Id.* at 35.

203. See *id.*

candidates,²⁰⁴ and the power of parties to impose certain tests on those who would run under their banners.²⁰⁵

The membership definition issue was essentially labeled a “red herring” by the Respondents. As they pointed out, “[i]n California, both before and after Proposition 198, citizens become members of parties simply by registering to vote as members of [their preferred] party.”²⁰⁶

Finally, the Respondents sought to refute the Petitioners’ claim that California’s blanket primary especially burdened minor parties.²⁰⁷ To that end, they asserted that “[t]he interest minor parties have in elections is largely an expressive one,”²⁰⁸ presumably because their candidates have little chance to win. Respondents then proclaimed that “expressive interests . . . fail to rise to the level of protected associational interests in elections . . . [because ‘b’]allots serve primarily to elect candidates, not as fora for political expression.”²⁰⁹

E. *The Debate Over The Existence of Compelling State Interests*

For litigation purposes, the Respondents characterized the “ending partisan gridlock” and “rescuing voters from disenfranchisement” election campaign themes of Proposition 198’s proponents²¹⁰ as compelling state interests.²¹¹ They also alleged that the State had a compelling interest in three other purported effects of a blanket primary: expanding the debate,²¹² protecting voter privacy,²¹³ and promoting electoral fairness.²¹⁴

Respondents reformulated the partisan gridlock argument by asserting that “[t]he blanket primary aims not to produce more ‘moderate’ candidates, but rather candidates who are *more representative of the electorate*.”²¹⁵ They then

204. *See id.*

205. *See* Respondents’ Brief at 35 (citing to *Duke v. Smith*, 13 F.3d 388, 391 n.3 (11th Cir. 1994)).

206. *Id.* at 35.

207. *See id.* at 36-38.

208. *Id.* at 37.

209. *Id.* at 36-37, citing to and quoting *Timmons*, 520 U.S. at 363.

210. *See* discussion of the Proposition 198 campaign themes at *supra* note 77 and accompanying text at 65-66.

211. Respondents argued that ending partisan gridlock was a compelling state interest under the headings of *The Blanket Primary Will Produce Elected Officials Who Better Represent the Electorate*, Respondents’ Brief at 39-42 (quoted heading at 39), and *The Blanket Primary Affords Voters More Choice*. Respondents’ Brief at 42-43 (quoted heading at 42). Respondents argued that the State has a compelling interest in protecting voters from disenfranchisement under the headings of *The Blanket Primary Provides An Effective Vote to Disenfranchised Voters*, Respondents’ Brief at 43-45 (quoted heading at 43), and *The Blanket Primary Increases Voter Participation*. Respondents’ Brief at 45-46 (quoted heading at 45).

212. *See* Respondents’ Brief at 46, under the heading of *The Blanket Primary Expands Debate*.

213. *See* Respondents’ Brief at 47, under the heading of *The Blanket Primary Protects Voter Privacy*.

214. *See* Respondents’ Brief at 47, under the heading of *The Blanket Primary Promotes Fairness*.

215. Respondents’ Brief at 41-42. In this respect, Respondents argued that “‘reflective’ and ‘moderate’ are not synonymous. The political parties’ own experts pointed to numerous candidates who benefited from crossover voting who are not ‘moderates’: George Wallace, Eugene McCarthy, Gary Hart, Ronald Reagan, and Jerry Brown.” *Id.* at 42. Nevertheless, Respondents admitted that “the more representative candidate will often appear the more moderate,” because “most of the electorate lies near the center of the ideological spectrum.” *Id.*

argued that three benefits in which States have compelling interests would flow from this effect: (1) “elections [will] effectively translate the will of the electorate,”²¹⁶ (2) the integrity of the electoral process will be promoted by reducing the risks that “voter[s] will stagger[] from election to election picking between candidates who do not reflect . . . [their] views,”²¹⁷ and (3) “more representative ‘problem solvers’ who are less beholden to party officials and ‘special interest groups’” will be elected.²¹⁸ According to the Respondents, the greater reflectiveness of the officeholders would flow from another policy promoted by the blanket primary—affording general election voters more acceptable choices by enabling “every [primary] voter to select the best candidate for each office, regardless of party affiliation.”²¹⁹ In this regard, Respondents rejected the Petitioners’ charge that blanket primaries would reduce meaningful choice by narrowing the ideological differences between general election candidates, asserting that “[t]he parties[] . . . mistakenly take[] the distance between candidates themselves, not the candidates’ closeness to the voters, as the measure of a healthy political system.”²²⁰ Revealing a xenophobic streak, the Respondents grumped that “this view of ‘meaningful choice’ reflects a European, not an *American*, model.”²²¹

Respondents largely reasserted the disenfranchisement arguments—that closed primaries disenfranchise independent voters, voters living in safe districts who are not members of the dominant party, and disaffected voters—made by the Proposition 198 proponents during the initiative election.²²² The substantive basis for these arguments is that the State has a compelling interest in providing all voters the opportunity to “have a meaningful say in who represents them without also forcing them to abandon their political affiliation.”²²³ To buttress these arguments, the Respondent presented evidence showing that in California the percent of independent voters had increased from 11 to 14,²²⁴ the percent of voters living in a safe district who were not affiliated with the dominant party was

216. Respondents’ Brief at 39 (citing *Storer v. Brown*, 415 U.S. 724, 732 (1974), for the proposition that “the state may regulate the election process to assure that elections effectively translate the will of the electorate”). Respondents buttressed this argument by citing cases they assert permit “[t]he State . . . [to] insist that candidates demonstrate a significant level of support before qualifying for the general election.” Respondents’ Brief at 39-40 (citing to *American Party of Texas v. White*, 415 U.S. 767, 782 (1973); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

217. *Id.* at 40 (citing to *Rosario v. Rockerfeller*, 410 U.S. 752, 761 (1973), for the proposition that “the state has a valid interest in preserving the integrity of the electoral process”).

218. Respondents’ Brief at 41.

219. *Id.* at 42 (quoting from the ballot pamphlet used during the initiative election).

220. Respondents’ Brief at 41.

221. *Id.* at 41 (emphasis added) (citing to “concessions” allegedly made by the political parties experts).

222. *See id.* at 43-46, where these arguments are presented under the headings of *The Blanket Primary Provides An Effective Vote to Disenfranchised Voters and The Blanket Primary Increases Voter Participation*. The disenfranchisement arguments of Proposition 198 proponents are presented at *supra* note 77, and accompanying text at 66-67.

223. *Id.* at 44.

224. *See id.* at 43-44.

about 25,²²⁵ and voter participation in primary elections had increased dramatically in the two primary elections held since the blanket primary went into effect.²²⁶ They also cited empirical evidence “that other blanket primary states exhibited the highest levels of turnout, open primary states the next highest levels, and closed primaries the lowest turnout.”²²⁷

Finally, the Respondents added three new window-dressing policy arguments to their defense of blanket primaries. First, they asserted that blanket primaries “expand debate beyond the narrow scope of partisan concerns,” by “compel[ling] candidates to appeal to a larger segment of the electorate.”²²⁸ Second, taking their cue from the State of Washington, the Respondents argued that blanket primaries protect voter privacy by ending the publicizing of voters’ party affiliations that could expose them to hostility.²²⁹ Third, they reiterated the District Court’s finding that “voters of California believe the [electoral] system is fairer when all voters . . . may participate in framing the choice of candidates at the general election,”²³⁰ and its holding that “[t]he voters’ belief in the fairness of the electoral process is itself a ‘substantial state interest.’”²³¹

The Petitioners charged that “the State’s interests . . . reduce down to several which are speculative and one – the desire to produce more ‘mainstream’ or ‘moderate’ candidates – which is fundamentally at odds with the First Amendment rights of each political party”²³² Accordingly, after equating reflective candidates with moderate candidates,²³³ they insisted that “[p]ursuing moderation in party nominations is not a legitimate state interest[, because it violates the] . . . parties[’] associational rights . . . to choose the standard bearer that best represents [their] ideolog[ies].”²³⁴

Petitioners insisted that no registered voter in California is disenfranchised because “all registered voters in California can vote in the general election, and all can choose to affiliate with a party and then participate in that party’s primary election.”²³⁵ Thus, they concluded that “if [voters] find themselves unable to vote

225. *See id.* at 44.

226. *See* Respondents’ Brief at 45. “In fact, in the March 2000 election, California experienced the highest voter turn-out in a primary election in 20 years,” whereas in “the thirty years prior to the blanket primary’s adoption, California had witnessed a 15-20 percent decline in voter participation in both primary and general elections.” *Id.*

227. *Id.* at 46.

228. *Id.* To support this argument, the Respondents noted that during the 1998 California gubernatorial election, “the virtually unchallenged Republican Candidate . . . participated in unprecedented debates with the three principal contenders for the Democratic nomination,” and that a Democratic state senator had complained that the “blanket primary would require Democrats to ‘reopen’ discussion of abortion.” *Id.*

229. *See id.* at 47 (citing to *Tashjian*, 479 U.S. at 215 n.5., for the proposition that publication of voters’ party affiliations expose voters to hostility, and *Heavey*, 611 P.2d 1256, 1259 (1980), for the general proposition that blanket primaries protect voter privacy).

230. *Id.* at 47 (quoting from *Jones District*, 984 F.Supp. at 1303).

231. *Id.*

232. Petitioners’ Brief at 41-42.

233. *See id.* at 38.

234. *Id.* at 38-39 (citing to *Eu*, 489 U.S. at 224).

235. *Id.* at 40.

in a particular party primary, it is the result of their own decision.”²³⁶ Contending that “[t]he very concept of a political party presupposes the exclusion of those who do not share [its] interests . . . [.]”²³⁷ the petitioners proclaimed that the effort to enhance certain voters’ franchise through “a blanket primary law . . . run[s] head-on into the First Amendment.”²³⁸

Finally, the Petitioners dismissed the States’ interests in increasing voter participation, broadening the debate on public issues, and preserving voter privacy on grounds that there is little or no evidence that they will be promoted by a blanket primary. To that end, they stated that any assertion that a blanket primary will increase voter turnout “is simply a predictive judgement.”²³⁹ As to broadening the debate, they pointed out that “many informed observers lament the lack of distinct choices in American politics and feel that the system shuts out legitimate points of view that do not fall in the middle of the ideological spectrum.”²⁴⁰ Noting that there was “no mention of . . . [preserving voter privacy] in the ballot pamphlet[,]” and that “[t]here is . . . no evidence . . . that invasions of voter privacy have been a problem in California[,]” the Petitioners dismissed California’s interest in voter privacy as “post-hoc rationalization.”²⁴¹

F. *The Tailoring Debate*

In reliance on the District Court’s finding that “the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary,” the Respondents claimed that the fit between this goal and the blanket primary was perfect.²⁴² Respondents buttressed this claim by pointing out that in other flexible primaries – open, semi-closed, and closed with same day registration – “voters must still forfeit their desired political affiliation or forego effective participation in the democratic process.”²⁴³

The Petitioners did not raise the tailoring issue with respect to the State’s interests in producing reflective candidates and providing a voice to disenfranchised voters, choosing instead to rely on their arguments that these interests were either unconstitutional intrusions on the associational rights of political parties,²⁴⁴ or non-existent.²⁴⁵ They proclaimed that the voter privacy

236. *Id.* To support their disenfranchisement arguments, Petitioners cited *Nader v. Schaffer*, 417 F. Supp. 837, 847 (D. Conn. 1976), *aff’d*, 429 U.S. 989 (1976), for the proposition that “requiring party enrollment before voting in partisan primary is not an absolute barrier to voting.” *Id.* (quoting from Petitioners’ Brief).

237. Petitioners’ Brief at 40.

238. *Id.*

239. *Id.*

240. *Id.* at 41 (citing to expert opinion).

241. *Id.*

242. Respondents’ Brief at 47-48 (citing to and quoting *District Jones*, 984 F.Supp. at 1303).

243. *Id.* at 48 (citations omitted).

244. See Petitioners’ Brief at 38-39, (arguing that the goal of producing more reflective candidates destroyed the parties’ associational rights to choose their own standard bearers); Respondents’ Brief at 40, (arguing that the goal of giving voice to disenfranchised voters “run[s] head-on into the First Amendment”).

interest was also non-existent,²⁴⁶ but further argued that voter privacy could be protected by less restrictive means such as minimizing public access to voter registration records.²⁴⁷ Petitioners also insisted that there were more narrowly tailored and less restrictive means available for increasing voter participation, such as “allowing registration closer to the date of the primary.”²⁴⁸ Finally, the Petitioners alleged that the blanket primary would narrow rather than broaden the debate.²⁴⁹

IV. ANALYSIS OF THE JONES DECISIONS

A. *Posture of the Case On Arrival At the Supreme Court*

As the briefs in *Jones* arrived at the U.S. Supreme Court, Respondents must have felt good about their chances of winning. The blanket primary had been judicially reviewed three times by state supreme courts, twice in Washington and once in Alaska, and each time had survived vigorous constitutional challenges.²⁵⁰ In 1997, the year the Respondents prevailed in Federal District Court, the U.S. Supreme Court declined to review the Washington Supreme Court’s decision upholding Washington’s blanket primary.²⁵¹

More importantly, the Respondents had successfully defended California’s blanket primary in Federal District Court and the Federal Court of Appeals.²⁵² District Judge Levi’s opinion, which was adopted verbatim by the Court of Appeals,²⁵³ strongly upheld the Respondents’ positions on all major issues.

Judge Levi blocked the political parties’ attempted knockout blow by rejecting their contentions that their associational rights entitled them to exclude non-members from their candidate nomination procedures “no matter what the State’s interest and no matter how Proposition 198 will work in practice.”²⁵⁴ Key determinants of this holding included Judge Levi’s concerns that accepting the parties’ position would:

245. See Petitioners’ Brief at 39-40 (arguing that the blanket primary does not help disenfranchised voters because no California voter is disenfranchised).

246. See *id.* at 41 (arguing that there did not exist any proof that voter privacy was a problem in California).

247. See *id.* at 41.

248. *Id.* at 40, where petitioners also quoted one expert as saying “if you were looking for the best tool to increase turnout this [the blanket primary] is not what you would pick.”

249. See *id.* at 41.

250. The Washington Supreme Court had upheld the blanket primary twice *Heavey v. Chapman*, 611 P.2d 1256 (1980); *Anderson v. Millikin*, 59 P.2d 295 (1936). Alaska’s Supreme Court had upheld the blanket primary in 1996. *O’Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), cert. denied sub. nom. *Republican Party of Alaska v. O’Callahan*, 520 U.S. 1209 (1997).

251. See *Republican Party of Alaska v. O’Callahan*, 520 U.S. 1209 (1997).

252. See *District Jones*, 984 F. Supp. 1288 (E.D. Cal. 1997), *aff’d*, *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999).

253. See *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir. 1999), where Appellate Judge Fletcher stated that “[w]e have reviewed . . . the careful, detailed, and eloquent opinion of the district court. Because we concur in it in every respect, we have elected to adopt it as the opinion of our court . . . [and] attach it as an appendix.”

254. *District Jones*, 984 F.Supp. at 1295-97 (quote at 1295).

- require the invalidation of the open primaries used in many states,²⁵⁵
- unduly restrict States' powers to require the use of primary elections to select general election candidates,²⁵⁶
- permit party member qualification rules to override State voter registration requirements as to who can vote in primaries.²⁵⁷

Perhaps the most important determinant, however, was Judge Levi's view that political parties should be subject to State election regulations because, unlike private associations, they "are very like the government itself" and "perform functions[, such as the nomination of candidates,] that are . . . governmental in nature . . .".²⁵⁸

During the District Court proceedings, the political parties predicted that the blanket primaries would induce a great deal of cross-over voting and contended that

the cross-over vote, and the prospect of a large cross-over vote, will affect the selection and behavior of party nominees and elected officials; weaken party discipline; increase the costs of primary elections by causing candidates to compete as if it were a general election; dampen the morale of party activists; and disrupt internal party structure and governance.²⁵⁹

The District Court made findings that essentially affirmed the political parties' belief that enough cross-over voting would take place to produce the harms they feared.²⁶⁰ Nevertheless, the District Court concluded that the burdens imposed on

255. *Id.* at 1295.

256. *Id.*

257. *Id.* at 1295-96. In this regard, Judge Levi expressed concern that party qualification rules could either prevent voters from participating in primaries who were eligible to do so under State voter registration laws, *Id.* at 1295, or permit persons to vote who were ineligible to vote under State voter registration laws or who had lost their right to vote by operation of other State laws. *Id.* at 1295-96. For example, Judge Levi noted that the California Libertarian Party recognizes as members only persons who "pay dues and sign a pledge [of nonviolence]," *Id.* at 1295 n.18, and "the Peace and Freedom Party confers party membership on persons who are 'deprived of the right to vote by the State of California because of age, citizenship, or prior social behavior.'" *Id.* Most dramatically, Judge Levi cited the "White Primary Cases", wherein the U.S. Supreme Court had upheld the government's power to prohibit parties from denying persons the opportunity to participate in their candidate selection processes on account of race or ethnicity, to negate the idea that party membership rules should control who can participate in the selection of party general election candidates. *Id.* (citing *Smith v. Allwright*, 321 U.S. 649 (1944)).

258. *District Jones*, 984 F. Supp. at 1296.

259. *Id.* at 1297.

260. The Court found that "[t]he experience in Washington suggests that as to the election for any particular office, approximately 10% of the voters are cross-over voters, excluding independents, while in some . . . cases this figure may rise as high as 20-25%." *Id.* at 1298. With respect to whether cross-over votes would decide elections, the Court found that:

Given that in Washington, cross-over rates occasionally reach levels as high as 20-25%, and that the crossover rate in California could be higher than Washington, it is likely that in the fullness of time some California primary races will be decided by cross-over voters, even if the number of such occasions is not large. Depending on the circumstances, the swing of even one seat could give a legislative majority to one party.

Id. at 1299. As to whether blanket primaries would affect candidate and officeholder behavior and the costs of campaigns, the Court found that

Candidates will perceive a need or opportunity to attract support from the entire electorate, not simply from members of their respective parties. This will affect not only the cost of the

the parties associational rights by California's blanket primary were significant but not severe.²⁶¹ This conclusion stemmed in part from the Court's finding that, despite the negative consequences of the blanket primary on their associational rights, the major parties "continue to be strong political parties in [the State of] Washington."²⁶² It also apparently stemmed from the Court's beliefs that "in the typical election, the cross-over vote will not be decisive,"²⁶³ and "the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations."²⁶⁴

Judge Levi made findings that largely affirmed the Respondents' assertions that the blanket primary would advance a number of State interests.²⁶⁵ These interests included: extending the primary election franchise to disenfranchised voters (independents and persons living in safe districts who are unaffiliated with the dominate party),²⁶⁶ reducing partisanship among elected officials by reducing the influence of party members in selecting major party nominees,²⁶⁷ increasing voter turnout,²⁶⁸ increasing the competitiveness of elections,²⁶⁹ and protecting voter privacy.²⁷⁰ Although Judge Levi merely recited the Respondents' offers of evidence supporting their disenfranchisement and privacy assertions,²⁷¹ he expressly found that blanket primaries would improve the representativeness of elected officials.²⁷² Noting that "[t]urnout rates in blanket primary states have been higher than in California,"²⁷³ Judge Levi opined that "there is reason to expect that by providing more choice, the blanket primary may encourage more voters to participate at the primary election."²⁷⁴ As to whether the blanket primary would increase competitiveness of elections, Judge Levi found "there

primary—which is likely to increase . . . — but may affect the positions that candidates take on political issues as they seek to attract cross-over voters.

Id. As a consequence, said the Court, "A blanket or open primary weakens the 'disciplining effect' of the primary challenge in requiring 'the officeholder [to] carry out the party philosophy and support the majority position of the party caucus.'" *Id.* (citation omitted). Finally, the Court found that "[t]he corollary to this loss of discipline is a loss of power to party activists such that the ardor of party volunteers and activists may be dampened in a system that permits non-party members to exert influence over the party's selection of a candidate." *Id.*

261. *See District Jones*, 984 F. Supp. at 1300-01.

262. *Id.* at 1300.

263. *Id.*

264. *Id.* at 1296. The point of this finding is that party membership is a fluid concept that can be changed at will without much effort, *Id.* n.20, even in closed primary states, *Id.*, so that the parties' contention that "Proposition 198 permits non-party members to vote in a party's primary . . . covers over much of the imprecision in the political reality." *Id.* at 1296.

265. *See District Jones*, 984 F. Supp. at 1301-03.

266. *See id.* at 1301-02.

267. *See id.* at 1302.

268. *See id.* at 1302-03.

269. *See id.*

270. *See id.* at 1303.

271. *See District Jones*, 984 Supp. at 1301-02 (disenfranchisement), 1303 (privacy).

272. *See id.* at 1302. In making this finding, Judge Levi stated that "[a]lthough th[is] assertion[] [is] not readily susceptible of proof, many [we]re not contested, or are supported by persuasive opinion evidence from defendants' experts." *Id.*

273. *Id.*

274. *Id.*

[wa]s reason to expect some increase in the number of candidates . . . [and] the closeness of elections . . .”²⁷⁵ even though he had determined that “the empirical case for th[ese] assertion[s] . . . [was] not conclusive.”²⁷⁶

Based on his findings, Judge Levi held that “[t]aken as whole the State’s interests that support the blanket primary [we]re substantial, indeed compelling.”²⁷⁷ To back this holding, he quoted *Storer v. Brown*²⁷⁸ for the proposition that there is a “substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community.”²⁷⁹ Referencing FEDERALIST No. 10 (Madison) as an expression of how “factionalism . . . deeply troubled the framers of the Constitution,”²⁸⁰ Judge Levi held that “[a] State’s interest in ameliorating ‘unrestrained factionalism’ is a compelling one.”²⁸¹ After pronouncing that “[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary processes [we]re all interests of the first order,”²⁸² he held that “[t]he voters’ *belief* in the fairness of the electoral process [wa]s also a substantial state interest” that was promoted by the blanket primary.²⁸³ In short, Judge Levi held that the blanket primary “advances interests that are uniquely those of the State and its electorate as opposed to the parties . . . [which] outweigh the also substantial interests that the political parties have in controlling who votes in the primary”²⁸⁴

Judge Levi said little about the tailoring issue. Prior to making his compelling state interests findings, he compressed all of the States’ interests into “one fundamental contention: . . . [the blanket primary] . . . enhances the democratic nature of the election process and the representativeness of elected officials.”²⁸⁵ True to this view of the State’s interests, Judge Levi held that “the fundamental goal of enhancing representativeness by providing all voters with a choice that is not predetermined by party members alone can only be advanced by the blanket primary.”²⁸⁶

In effect, Judge Levi compressed the *Jones* controversy into a stark choice: “the States’ constitutional powers to regulate elections in a manner that “enhances the democratic nature of the election process”²⁸⁷ versus the political parties’ First Amendment rights “to choose their own nominees [by] limit[ing] the nominating

275. *Id.* at 1303.

276. *Id.*

277. *District Jones*, 984 F. Supp. at 1303.

278. 415 U.S. 724 (1974).

279. *District Jones*, 984 F. Supp. at 1303.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *District Jones*, 984 F. Supp. at 1301.

286. *Id.* at 1303.

287. *Id.* at 1301.

process to those who have affiliated with a party”²⁸⁸ This compression of the issues was essentially ratified by the arguments made to the U.S. Supreme Court by the Petitioners and Respondents. The Petitioners’ arguments could be summed up in two phrases:

1. the goal of producing more moderate candidates is illegitimate because it violates the parties’ associational “right[s] to choose [the] standard bearers that best represent[] [their] ideologies,”²⁸⁹ and
2. “[t]he very concept of a political party presupposes the exclusion of those who do not share [its] interests”²⁹⁰

Similarly, two phrases summed up the Respondents’ views:

1. States have a compelling interest in regulating elections so that they will “effectively translate the will of the electorate”²⁹¹ by producing officeholders who are “more representative ‘problem-solvers’ . . . [and] less beholden to party officials and special interest groups,”²⁹² and
2. The State has a compelling interest in providing all voters the opportunity to “have a meaningful say in who represents them without also forcing them to abandon their political affiliation.”²⁹³

Given the Petitioners’ heavy reliance on *Tashjian*, the compressed version of the *Jones* controversy seemed to favor the Respondents. It is true that the majority opinion in *Tashjian* facially supported the Petitioners by recognizing a broad right of political parties and their members “to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success.”²⁹⁴ But, the *Tashjian* majority recognized this right in order to allow the Connecticut Republican Party to escape the strictures of Connecticut’s closed primary law so it could broaden its base of support by inviting independents to participate in its primaries.²⁹⁵ Thus, *Tashjian* enhanced the democratic nature of the election process, for it was more concerned with helping a party reach out to non-members than it was with controlling who may vote in primaries.²⁹⁶

Moreover, the *Tashjian* majority was a thin one, since it was comprised of only five Justices.²⁹⁷ It was also an ephemeral one, since none of its members were still on the Court last term.²⁹⁸ As a consequence, *Tashjian*’s weak associational

288. Petitioners’ Brief at 26.

289. *Id.* at 38-39.

290. *Id.* at 40.

291. Respondents’ Brief at 39.

292. *Id.* at 41.

293. *Id.* at 44.

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

295. *Id.* at 212-13.

296. See Respondents’ Brief at 21, making this precise argument to distinguish *Tashjian* from *Jones*.

297. The *Tashjian* majority opinion was written by Justice Marshall, and joined by Justices Brennan, White, Blackman and Powell. *Tashjian*, 479 U.S. at 209.

298. The membership of the U.S. Supreme Court when *Jones* was decided included Chief Justice Rehnquist, and Justices Stevens, O’Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. See *Jones*, 120 S. Ct. at 2405.

rights holding was without adherents as *Jones* arrived at the U.S. Supreme Court.

Better yet for the Respondents, three Justices,²⁹⁹ all of whom were on the Court last term,³⁰⁰ joined in a dissent that seemed to give States' *carte blanche* in regulating primary elections. Writing for himself, Chief Justice Rehnquist, and Madam Justice O'Connor, Justice Scalia rejected flatly the Republican Party's demand that the State honor its desire to include independents in its primaries by stating:

[T]here is no reason why the State is bound to honor that desire – any more than it would be bound to honor a party's democratically expressed desire that its candidates henceforth be selected by a convention rather than a primary, or by the party's executive committee in a smoke-filled room. [T]he validity of the state-imposed primary requirement . . . , which we have hitherto considered "too plain for argument," . . . presupposes that . . . *Connecticut may lawfully require that significant elements of the democratic election process be democratic* – whether the Party wants that or not.³⁰¹

And yet, *Tashjian* contained warning signs indicating that it could supply more than facial support to the Petitioners. The majority took pains to remind readers that in cases where nonmembers had sought to participate in a party's affairs against its will, the Court had found that the "nonmember's desire to participate . . . [wa]s overborne by the countervailing and legitimate right of the party to determine its own membership qualifications."³⁰² More ominously, the majority indicated that it might have taken a different view if the Republican Party had sought "to open its primary to all voters, including members of other parties."³⁰³ This, the majority asserted, "would . . . [have] threaten[ed] other parties with the disorganization effects [of independent candidacies launched by unsuccessful putative nominees' and cross-over voters engaged in raiding]³⁰⁴ which [restrictive] statutes . . . [approved by the Court in other cases] were designed to prevent."³⁰⁵ Furthermore, the dissenters expressed their dim view of permitting persons unwilling to commit any act of affiliation to vote in a party's primary by

299. These Justices were Chief Justice Rehnquist, and Justices Scalia and O'Connor. See *Tashjian*, 479 U.S. at 234.

300. See *District Jones*, 984 F. Supp. at 1302.

301. *Tashjian*, 479 U.S. at 237 (emphasis added) (citation omitted). Interestingly, the dissenters also seemed to provide support for the Respondents' suggestion that Proposition 198 was virtually adopted by the major political parties because it received an overwhelming support from the rank-in-file members of both parties who voted in the initiative election. Justice Scalia complained that there was "no way of knowing that a majority of the Party's members . . . favor[ed] allowing ultimate selection of its candidates for federal and statewide office to be determined by persons outside the Party." *Tashjian*, 479 U.S. at 237. The Court lacked this knowledge, said Justice Scalia, because "[t]hat decision was not made by democratic ballot, but by the Party's state convention—which . . . may have been dominated by officeholders and office seekers whose . . . [views] diverged significantly from . . . [those] of the Party's rank-in-file." *Id.*

302. *Tashjian*, 479 U.S. at 216 n.6 (citing to *Rosario v. Rockefeller*, 410 U.S. 752(1973); *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989(1976)).

303. *Id.* at 224 n.13.

304. *Id.* at 224.

305. *Id.* at 224 n.13 (citing to *Storer*, 415 U.S. 724 (1974), and *Rosario v. Rockefeller*, 410 U.S. 752 (1973)).

stating their reluctance to apply the term associational freedom to the Republican Party's desire to "leave the selection of its candidate to persons who are not members of the Party, and are unwilling to become members."³⁰⁶ Thus, they opined that "[t]he Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster."³⁰⁷ From all this, one could imply that both the majority and dissenting justices in *Tashjian* would have agreed that parties have a strong First Amendment right not to have the association of nonmembers forced on them by state law.

Finally, *Tashjian* contained one unique factual element that could be used to distinguish it from *Jones* in a manner disfavoring the Respondents. Connecticut election laws would not permit anyone to appear as a candidate in a party's primary who had not won at least twenty percent (20%) of the delegate vote at a prior party convention. The *Tashjian* majority asserted that this requirement would insure that the general election nominees produced by the Republicans' open primary would have more than a little in common ideologically with the party's members.³⁰⁸ In contrast, California's blanket primary law did not permit parties to protect themselves from "false candidates" by using conventions to limit which candidates could claim affiliation with them on primary election ballots.

La Follette was the only other case heavily relied on by the Petitioners that involved a direct conflict between state election laws and party nomination rules. In *La Follette*, the Court invalidated a Wisconsin statute requiring delegates to the Democratic Party's National Convention to cast votes for Democratic Party presidential candidates in proportion to the votes they received in Wisconsin's open presidential primary.³⁰⁹ Relying on *Cousins v. Wigoda*,³¹⁰ in which the Court invalidated an Illinois court order requiring the Democratic National Convention to seat Illinois delegates chosen in violation of the Democratic Party's rules,³¹¹ the Court held that national parties have the associational right to limit who may "participate in their processes leading to the selection of delegates to their National Convention."³¹² In doing so, the Court refused to consider Wisconsin's burden argument, stating that "a State, or a court, may not substitute its own judgment for that of the Party [because a] political party's choice among the various ways of determining the make up of a State's delegation to the party's national convention is protected by the Constitution."³¹³ It also found the interests cited as compelling by the State – "preserving the overall integrity of the electoral process, providing secrecy of the ballot, increasing voter participation in

306. *Id.* at 235 (Scalia, J., dissenting).

307. *Id.* at 235 (Scalia, J., dissenting).

308. *Tashjian*, 479 U.S. at 220-21.

309. *La Follette*, 450 U.S. at 110-12.

310. 419 U.S. 477 (1975).

311. *See Cousins*, 419 U.S. at 483, 487.

312. *La Follette*, 450 U.S. at 121-22.

313. *Id.* at 123-24.

primaries, and preventing harassment of voters” – were not served by the “imposition of voting requirements upon those who . . . are eventually selected as delegates.”³¹⁴ Nevertheless, as the Respondents pointed out in their brief,³¹⁵ *La Follette’s* strong support for the associational rights of political parties was provided “in the context of the selection of delegates to the National Party,”³¹⁶ and therefore did not concern the constitutionality of the “‘open’ feature of the state primary election law as such.”³¹⁷ Arguably, then, *La Follette* should not be relevant to the question of whether States’ can force political parties to nominate candidates for public offices through primaries in which nonmembers are allowed to participate.

Four other cases seemed to support the Petitioners’ side of the *Jones* controversy. Two, *Storer v. Brown*,³¹⁸ and *Rosario v. Rockefeller*,³¹⁹ imposed limitations on the flexibility of candidates and voters to participate in elections after changing party affiliations in order to promote the States’ compelling interest in “preserv[ing] . . . the integrity of the electoral process.”³²⁰ Two others, *Colorado Republican Federal Campaign Committee v. Federal Election Comm’n*,³²¹ and *Eu v. San Francisco County Democratic Central Committee*,³²² struck down statutes the Court felt violated the free speech and free association rights of political parties.³²³

In *Storer*, the Court upheld a California statute requiring that persons wishing to be included on general election ballots as independent candidates must be disaffiliated from all parties a year before the primaries are held for the offices they seek.³²⁴ The Court upheld this statute in part because it found that it served California’s compelling interest in protecting the “stability of its political system” from damage caused by “splintered parties and unrestrained factionalism.”³²⁵ The statute served this purpose, according to the Court, by forcing the “contending forces within [each] party [to] employ the primary campaign and primary election to finally settle their differences,” thereby insuring that the general election “is not a forum for continuing intraparty feuds.”³²⁶ This vision of the purpose of primary elections was vigorously advocated by the Petitioners.³²⁷

314. *Id.* at 124-25.

315. Respondents’ Brief at 22-23.

316. *La Follette*, 450 U.S. at 121.

317. *Id.* at 120-21.

318. 415 U.S. 724 (1974).

319. 410 U.S. 752 (1973).

320. *Rosario*, 410 U.S. at 761; *accord*, *Storer*, 415 U.S. at 733, 736.

321. 518 U.S. 604 (1996).

322. 489 U.S. 214 (1989).

323. *See Colorado Republican*, 518 U.S. at 615-16 (Breyer, J., plurality opinion); *Eu*, 489 U.S. at 223-25.

324. *Storer*, 415 U.S. at 726, 728.

325. *Id.* at 736.

326. *Id.* at 735. The statute was effective because it prevented “defeated primary candidates [from] running as independents . . . to continu[e] the struggle . . .” *Id.*

327. *See* Petitioners’ Brief at 19-23, wherein the Petitioners argued that: “The Primary Is the Major Theater for Resolving Ideological Struggles Within a Political Party.” *Id.* at 19 (quoting part of the

Rosario concerned the validity of New York's requirement that "a voter . . . enroll in the party of his choice at least 30 days before . . . [a] general election in November in order to vote in the subsequent party primary."³²⁸ Although this requirement imposed a lengthy time period on voters' decisions to change parties, the Court upheld it because it served the State's particularized legitimate purpose of protecting parties, and the integrity of the electoral process, from the damaging effects of raiding.³²⁹ Concern over the potentially debilitating effects of raiding on political parties was raised with intensity by the political parties during the District Court proceedings.³³⁰

In *Colorado Republican*, a splintered Court held that restrictions on political parties' campaign expenditures "made independently, without coordination with any candidate," violated the parties' First Amendment free speech and association rights.³³¹ The plurality opinion by Justice Breyer, which was joined by Justices O'Connor and Souter, simply extended to political parties the benefit of previous cases in which the Court ruled that limitations on independent expenditures by individuals and groups were unconstitutional.³³² In doing so, the plurality Justices extolled the electoral function of political parties by observing that:

[a] political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure. The independent expression of a political party's views is "core" First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees.³³³

They bolstered this observation by noting that the legislative history of the campaign finance laws "demonstrate[d] Congress' general desire to enhance what was seen as an important and legitimate role for political parties in American elections,"³³⁴ and reflected Congress' view that "a vigorous party system is vital to American politics . . ."³³⁵

The role of political parties was exalted further in an opinion by Justice Kennedy, which was joined by Chief Justice Rehnquist and Justice Scalia, that concurred in the judgement but dissented in part by asserting that political parties should be free to make coordinated expenditures on behalf of their candidates.³³⁶

title to Petitioners' Argument I).

328. *Rosario*, 410 U.S. at 754, 761-62.

329. *See id.*

330. *See District Jones*, 984 F. Supp. at 1297.

331. *Colorado Republican*, 518 U.S. at 608, 614-20 (plurality opinion of Justice Breyer in which Justices O'Connor and Souter joined); *Id.* at 628-31 (opinion by Justice Kennedy concurring in the judgement but dissenting in part, which was joined by Chief Justice Rehnquist and Justice Scalia); *Id.* at 635-48 (opinion by Justice Thomas concurring in the judgement but dissenting in part, which was joined by Chief Justice Rehnquist and Justice Scalia).

332. *See id.* at 608, 614-20.

333. *Id.* at 615-16 (citation omitted).

334. *Id.* at 618 (citation omitted).

335. *Colorado Republican*, 518 U.S. at 618 (citations omitted).

336. *See id.* at 628-31.

To justify this assertion, Justice Kennedy demonstrated how the function of political parties served well the purposes of the First Amendment, by stating that

[t]he First Amendment embodies a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” . . . Political parties have a unique role in serving this principle; they exist to advance their members’ shared political beliefs. A party performs this function, in part, by “identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only.” . . . Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates. A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular elections, candidates are necessary to make the party’s message known and effective, and vice versa.³³⁷

Writing for himself, Chief Justice Rehnquist, and Justice Scalia, Justice Thomas declared his belief that it was unconstitutional to limit anyone’s political contributions and expenditures.³³⁸ But, he further declared that he would lift all restrictions on political parties’ political contributions and expenditures even if he were convinced that “a principled distinction between contributions and expenditures” existed.³³⁹ He justified this declaration on grounds that the anti-corruption rationale of the campaign finance laws “loses its force” “[a]s applied in the specific context of campaign funding by political parties,”³⁴⁰ since

[t]he very aim of a political party is to influence its candidate’s stance on issues and, if the candidate takes office or is reelected, his votes. When political parties achieve that aim, that achievement does not, in my view, constitute ‘a subversion of the political process;’ . . . that is successful advocacy of ideas in the political marketplace and representative government in a party system.³⁴¹

Taken together, the three opinions constituting the decisional majority in *Colorado Republican* expressed forcefully the view that political parties play a vital role in the American electoral process by binding together persons of common political ideology and then using their combined resources to express their political beliefs through the election of candidates supporting those beliefs. This view largely parallels the Petitioners’ arguments that political parties have First Amendment associational rights to choose standard bearers who support their ideological beliefs and to insure that ideologically compatible standard bearers will be selected by barring non-members from their nominating processes.³⁴² It also rejects the Respondents’ assertion that “expressive interests . . . fail to rise to the level of protected associational interests in elections . . . [because ‘b]allots serve primarily to elect candidates, not as fora for

337. *Id.* at 629 (citations omitted).

338. *See id.* at 635-48.

339. *Id.* at 644.

340. *Id.* at 646.

341. *Colorado Republican*, 518 U.S. at 646.

342. *See* Petitioners’ Brief at 38-40.

political expression.”³⁴³

In *Eu*, California, relying heavily on *Storer*, defended its ban on governing bodies of political parties endorsing candidates in primaries by asserting that it had a compelling interest in preventing the “significant damage to the fabric of government” that may arise from “splintered parties and unrestrained factionalism.”³⁴⁴ After finding that the endorsement ban suffocated the right of political parties to “select a ‘standard bearer who best represents the party’s ideologies and preferences,’”³⁴⁵ the Court rejected California’s justification for it by stating that “[o]ur decision in *Storer* . . . does not stand for the proposition that a State may enact election laws to mitigate intraparty factionalism *during a primary campaign*.”³⁴⁶ “To the contrary,” said the Court, “[a] primary is not hostile to intraparty feuds; rather it is an ideal forum in which to resolve them.”³⁴⁷ Again, the Court expressed a view as to the purpose of primary elections that perfectly matched the Petitioners’ arguments.³⁴⁸

Even though the weight of sentiment expressed in key U.S. Supreme Court cases seemed to favor the Petitioners, the Respondents still had reasons to feel optimistic. Only one of these cases, *Tashjian*, involved a direct confrontation between state election laws and party nominating rules, and it favored enhancing the democratic nature of the election process.³⁴⁹ Respondents had done a credible job of distinguishing the facts of *Eu* from those of *Jones*.³⁵⁰ More importantly, Respondents had made a strong case, empirically and through credible expert opinion witnesses, that the blanket primary would rarely alter the outcomes of elections³⁵¹ or produce outcomes significantly different than those produced by open primaries and closed primaries with liberal registration rules.³⁵² In short, Respondents had demonstrated rather convincingly that blanket primaries in fact do not impose severe burdens on the political parties’ associational rights. As a consequence, under the *Timmons* standard, they needed only to show that the blanket primary reasonably served an important State interest.³⁵³ Of the State interests they cited, one – providing all voters with “a meaningful say in who represents them without also forcing them to abandon their political affiliation”³⁵⁴ – seemed especially to qualify as the magic important State interest, and it could in reality be served only by a blanket primary.³⁵⁵ Thus, while the outcome of *Jones*

343. Respondents’ Brief at 36-37 (citation omitted).

344. *Eu*, 489 U.S. at 227-28.

345. *Id.* at 224-25.

346. *Id.* at 227 (emphasis added).

347. *Id.*

348. See Petitioners’ Brief at 19-23, wherein the Petitioners argued that: “The Primary Is the Major Theater for Resolving Ideological Struggles Within a Political Party.” *Id.* at 19 (quoting part of the title to Petitioners’ Argument I).

349. See *District Jones*, 984 F. Supp. at 1301.

350. See Respondents’ Brief at 22.

351. See *id.* at 27-31.

352. See *id.* at 30-33.

353. *Timmons*, 520 U.S. at 358.

354. Respondents’ Brief at 44.

355. See *id.* at 48.

was not shocking, the Respondents and dispassionate observers could have been forgiven for feeling somewhat surprised.

B. *The Oral Arguments*

The oral arguments did not go well for the Respondents. Justice O'Connor asked "Is the fundamental assumption that it's for the voters to tell the Republican Party or the Democratic Party what those parties should stand for?"³⁵⁶ When he answered negatively, stating that "the fundamental assumption is that the election belongs to the voters," Justice O'Connor replied that "The very essence of the party's First Amendment right is to define its own message and send out its own candidate."³⁵⁷

Other justices also weighed in with commentary unfavorable to the blanket primary. Justice Scalia denounced it as "democracy carried to an extreme."³⁵⁸ Justice Breyer came to the defense of minor parties, proclaiming that they "are committed to an ideal" and "do not want to be saddled with a candidate who doesn't reflect their ideals."³⁵⁹ Chief Justice Rehnquist and Justice Kennedy were also reported as being "openly skeptical about the impact [of the blanket primary] on parties' policy messages."³⁶⁰

Justices' questions and comments during oral arguments are not necessarily determinative of a case's outcome. In this case, however, a majority of justices expressed support for the political parties, causing news reporters to conclude that blanket primaries would be declared unconstitutional.³⁶¹

C. *The Decision*

Justice Scalia wrote a majority opinion that in many ways reads as if it were drafted by the Petitioners. He first rejected Judge Levi's broad holding that the processes for nominating general election candidates is such a public function that States have pervasive authority to regulate how parties select their nominees.³⁶² In doing so, Justice Scalia carefully distinguished past cases vindicating the States' authority to regulate nominating processes from *Jones*, finding that they did not hold "that the processes by which political parties select their nominees are . . .

356. *Bury Party*, *supra* note 66.

357. *Id.*

358. Lyle Denniston, *Supreme Court Hints At Curbs On Crossover Primary Voting; Calif's "Blanket" System Penalizes Parties*, *O'Connor Says*, THE BALTIMORE SUN, Apr. 25, 2000, at A6 [hereinafter *Penalizes Parties*].

359. *Id.*

360. *Id.*

361. See *Penalizes Parties*, *supra* note 358; Joan Biskupic, *Justices Question California Primary Law*, THE CHICAGO SUN TIMES, Apr. 25, 2000, at News 22; David G. Savage, *Justices Sound Dubious of "Blanket Primary"*, LOS ANGELES TIMES, Apr. 25, 2000, at A1; Marc Sandalow, *Court Hears Challenge to State's Voting Law: Justices Seem Skeptical About Open Primaries*, THE SAN FRANCISCO CHRONICLE, Apr. 25, 2000, at A1.

362. See *Jones*, 120 S. Ct. at 2406-07 (countering Judge Levi's holding found at *District Jones*, 984 F. Supp. at 1296).

wholly public affairs that States may regulate freely.”³⁶³ Conceding that an election is a public affair, he nevertheless concluded that “when the election determines a party’s nominee it is a party affair as well, and . . . the constitutional rights of those composing the party cannot be disregarded.”³⁶⁴

Turning to the task of defining generally the political parties’ associational rights, Justice Scalia proclaimed that “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”³⁶⁵ Alluding to the nation’s long tradition of political parties serving the political interests of the politically active,³⁶⁶ Justice Scalia noted that the Court had honored this tradition by “recogniz[ing] that the First Amendment protects ‘the freedom to join together in furtherance of common political beliefs,’³⁶⁷ which ‘necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.’”³⁶⁸ He then opined that “a corollary of the right to associate is the right not to associate.”³⁶⁹ Thus, Justice Scalia affirmed the Petitioners’ contention that “[t]he very concept of a political party presupposes the exclusion of those who do not share [its] interests”³⁷⁰

Applying his corollary to the process of nominating general election candidates, Justice Scalia asserted that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.”³⁷¹ He justified this assertion by observing that the nomination process “often determines the party’s positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party’s ambassador to the general electorate in winning it over to the party’s views.”³⁷² As a consequence, Justice Scalia held that “California’s blanket primary violate[d] the [political parties associational rights] . . . [because it] forces

363. *Id.* at 2406-07, where Justice Scalia cited past cases as recognizing the right of States to force parties to use primary elections as the means of choosing their general election candidates, “require parties to demonstrate ‘a significant modicum of support’ before allowing their candidates a place on that ballot;” and “prevent ‘party raiding’ [by] requir[ing] party registration a reasonable period of time before a primary election.”

Justice Scalia took particular pains to distinguish the prior cases in which the Court invalidated party actions impeding the participation of African-Americans in nominating processes. These cases, he said held only that, “when a State prescribes an election process that gives a special role to political parties, it ‘endorses, adopts and enforces the discrimination against Negroes,’ that the parties (or . . . organizations that are ‘part and parcel’ of the parties . . .) bring into the process—so that the parties’ discriminatory action becomes state action under the Fifteenth Amendment. . . . They do not stand for the proposition that party affairs are public affairs, free of First Amendment protections”

Id. at 2407 (citations omitted).

364. *Id.* at 2407 n.4.

365. *Id.* at 2408.

366. *See id.*

367. *Jones*, 120 S. Ct. at 2408 (citing to *Tashjian*, 479 U.S. at 214-215).

368. *Id.* at 2408 (citing to *La Follette*, 450 U.S. at 122).

369. *Id.* at 2408.

370. Petitioners’ Brief at 40.

371. *Jones*, 120 S. Ct. at 2408.

372. *Id.*

political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.”³⁷³ In so doing, he essentially ratified the Petitioners’ contention that the political party’s associational rights especially include the right to use primary elections to settle intraparty differences by selecting general election candidates who will best present the ideology of the party’s dominant group to the general public.³⁷⁴

Justice Scalia sided completely with the Petitioners in the burdens battle. Essentially, he found the Respondents’ evidence that cross-over voting would rarely change the outcome of elections to be irrelevant to whether the blanket primary imposed a severe burden on the associational rights of political parties.³⁷⁵ He did so because he adopted the Petitioners’ view that blanket primaries severely burden political parties’ associational rights by causing primary candidates to take “somewhat different positions” than they would have in a closed primary in order to win primary elections.³⁷⁶ Moreover, Justice Scalia did not require evidence that position shifting would occur to support his conclusion that it would.³⁷⁷ It was proof enough for him that the purposes of California’s blanket primary “w[ere] to favor nominees with ‘moderate’ positions . . . [and] encourage[] candidates—and officeholders who hope to be renominated—to curry favor with persons whose views are more ‘centrist’ than those of the party base.”³⁷⁸

Having found that blanket primaries will produce the “likely outcome—indeed . . . the intended outcome—of changing [a] parties’ message,”³⁷⁹ Justice Scalia held that it was not constitutionally relevant that they would leave unimpeded the parties’ rights to endorse candidates, financially support candidates, maintain “orderly internal party governance, maintain[] party

373. *Id.* at 2409. To support this holding, Justice Scalia cited empirical and expert opinion evidence tending to show that “the prospect of having a party’s nominee determined by adherents of an opposing party is far from remote . . .” *Id.* at 2410, and that “[t]he impact of voting by nonparty members is much greater upon minor parties . . .” *Id.*

374. Petitioners’ Brief at 17, 19-20, 26, 38-40. Justice Scalia also rejected the Respondents’ contention that invalidation of blanket primaries would also invalidate open primaries and closed primaries with liberal registration rules because they all have about the same effect on the associational rights of political parties. *Jones*, 120 S. Ct. at 2409-10 (liberal closed primaries); *Id.* at 2410 n.8 (open primaries) (See Respondents’ Brief at 10, 30-33, for Respondents’ arguments about the comparative effects of blanket, open, and liberal closed primaries on political parties’ associational rights). Justice Scalia distinguished the liberal closed primary by noting that it requires a voter intending to cross-over to “formally become a member of the party,” *Id.* at 2409, and then limits the voter to voting only “for candidates of that party.” *Id.* at 2410. He distinguished the open primary on grounds that the act of voting in the primary of party to which one is not affiliated is in a sense “an act of affiliation with . . . [that] party.” *Id.* at 2410 n.8 (citing to J. Powell’s dissent in *La Follette*).

375. See *Jones*, 120 S. Ct. at 2410-11.

376. See *id.* at 2411. See Petitioners’ Brief at 33-38. Justice Scalia also expressed his belief that a party could be destroyed if the votes of nonmembers altered even one primary election, *Id.* at 2410-11, and illustrated it by suggesting that the “fledgling Republican party” would have disintegrated in 1860 if its “opponents . . . had been able to cause its nomination of a pro-slavery candidate in place of Abraham Lincoln.” *Id.* at 2410.

377. See *id.* at 2411.

378. *Id.*

379. *Id.* at 2412.

discipline in the legislature, and conduct[] campaigns.”³⁸⁰ He supported this holding by observing that “[the Court has] consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired.”³⁸¹

Justice Scalia’s holding that California’s blanket primary severely burdened the associational rights of political parties meant that the State had to demonstrate that the blanket primary “is narrowly tailored to serve a compelling state interest.”³⁸² Finding the State’s demonstration to be wanting, he held that the blanket primary did not serve any legitimate compelling interest and was not narrowly tailored to do so if in fact it did.³⁸³

The Respondents’ had argued that States have compelling interests in “producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns.”³⁸⁴ Justice Scalia characterized these interests as “simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices.”³⁸⁵ As a consequence, he forcefully held them to be unlawful after concluding that they “reduce to nothing more than a stark repudiation of freedom of political association . . . [since they are premised on the belief that p]arties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.”³⁸⁶

Justice Scalia also found that the Respondents’ desire to expand the voting rights of so-called disenfranchised voters was an illegitimate interest.³⁸⁷ First, he rejected the notion that independent voters and members of minority parties in safe districts were in any meaningful sense disenfranchised by closed primaries. Closed primaries, he observed, do not deny such voters the right to vote *per se*, but rather they merely deny nonmembers of the majority party the opportunity “to participate in . . . the majority party’s primary.”³⁸⁸ He acknowledged that in safe districts this denial could result in nonmembers of the majority party being deprived of the opportunity to influence who will take office,³⁸⁹ but he found this to be of no constitutional significance since such voters could cure their problem

380. See *Jones*, 120 S. Ct. at 2411.

381. *Id.* at 2412. For the record, Justice Scalia expressly rejected the endorsement and financial backing arguments on grounds that endorsements often have little impact on voters and “do[] not assist the party rank and file, [since they] may not agree with the party leadership . . . but do not want the party’s choice decided by outsiders.” *Id.* at 2411. He also found it highly improbable “[t]hat party nominees will be equally observant of internal party procedures and equally respectful of party discipline when their nomination depends on the general electorate rather than on the party faithful . . .” *Id.*

382. *Id.* at 2412.

383. See *id.* at 2412-14.

384. *Id.* at 2412. See Respondents’ Brief at 39-42 (blanket primary produces better representatives), 46 (blanket primary expands debate).

385. *Jones*, 120 S. Ct. at 2412.

386. *Id.*

387. See *id.* at 2412-13.

388. *Id.* at 2412-13.

389. See *id.*

simply by joining the majority party.³⁹⁰ More importantly, he invoked past precedent to hold “that a ‘nonmember’s desire to participate in [a] party’s affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications.”³⁹¹

Justice Scalia granted the Respondents a small measure of satisfaction by finding that “four [other] asserted state interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – [we]re not . . . automatically out of the running.”³⁹² But, he immediately proclaimed that none of these interests was compelling given “the circumstances of this case.”³⁹³

With respect to the supposed unfairness of forbidding nonmembers living in safe districts to vote in the majority party’s primaries, Justice Scalia commented that “[i]f that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene—the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party.”³⁹⁴ Equating the Respondents’ desire to afford voters greater choice with “reduc[ing] the scope of choice . . . by assuring a range of candidates who are more ‘centrist,’” he found that the State did not have a compelling, and maybe not even a legitimate, interest in promoting choice.³⁹⁵ He then found that the interest in increasing voter participation suffered from the same defect as the interest in affording voters greater choice, because it “is just a variation on the same theme (more choices favored by the majority will produce more voters).”³⁹⁶ Finally, he simply declared that the privacy interest in preserving the “confidentiality of one’s party affiliation” was not a compelling State interest.³⁹⁷

In the end, Justice Scalia held that California’s version of the blanket primary was not narrowly tailored to further the State’s interests in promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy. He did so out of belief that nonpartisan blanket primaries would serve all of these interests without violating the associational rights of political parties because voters in such primaries do “not choos[e] a party’s nominee.”³⁹⁸

390. *See id.* In this regard, Justice Scalia admitted that the “cure” put the so-called disenfranchised voter “to a hard choice,” but he found this to be of no constitutional import because the choice to join the majority party “is not a state-imposed restriction upon [the so-called disenfranchised voter’s] freedom of association, whereas compelling party members to accept his selection of their nominee is a state-imposed restriction on theirs.” *Id.*

391. *Jones*, 120 S. Ct. at 2413 (citing to *Tashjian*, 479 U.S. at 215-216 n.6, which in turn cited *Rosario and Nader*).

392. *Id.*

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Jones*, 120 S. Ct. at 2413-14, where he supported this declaration by citing to a number of federal statutes requiring “a declaration of party affiliation as a condition of appointment to certain offices.”

398. *Id.* at 2414. Justice Scalia described such nonpartisan primaries as follows:

[T]he State determines what qualifications it requires for a candidate to have a place on the

D. A Critique

This critique is a blend of two perspectives: That of a constitutional law professor who is not wedded to any particular legal philosophy; and that of a person who has been a Democratic Party nominee for Congress, a Chairman of Oklahoma's First District Democratic Party, and a member of the Oklahoma State Democratic Party Executive Committee. The first perspective provides a quasi-dispassionate check on the second, which is explicitly pro-partisan. Curiously enough, both perspectives lead to the same conclusion: Justice Scalia's determination that blanket primaries are unconstitutionally destructive of the political parties' association rights is quite justified, but his supportive reasoning fails to acknowledge legitimate State concerns borne of current political realities, and suggests a solution for serving legitimate State interests while protecting the parties' associational rights that in reality will do neither.

Based on the arguments presented in *Jones*, the nation's political history, and current political trends, *Jones* should be viewed as a conflict over the rights of three distinct groups of voters, which for purposes of this critique will be called partisans, the apathetic, and individualists. As will be demonstrated, the political nature of each group has lead partisans to oppose blanket primaries and the apathetic and individualists to support them.

Partisans are persons who are motivated to be politically active by strong political beliefs and socio-economic interests and believe their political goals can best be achieved through the formation of ideologically-based political parties.³⁹⁹ They have derived their great faith in the efficacy of political parties from American political history, for since the formation of Hamilton's Federalist Party and Jefferson's Republican Party, partisans have used parties effectively to focus public attention on their political beliefs and their material desires.⁴⁰⁰

Most partisans have been members of a major party, and therefore were inspired to do the hard work of party-building by the very real expectations that their parties would, by winning elections, convert their political beliefs into public

primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

Id. This description is nearly identical to the blanket primary used in Louisiana; *See Jones District*, 984 F. Supp. at 1292; *Primary Change*, *supra* note 58, at A3, so presumably Louisiana's blanket primary survives *Jones*.

399. This definition was derived from the Petitioners' arguments that parties "exist to advance their members' shared political beliefs," Petitioners' Brief at 17. "Candidates are necessary to make the party's message known and effective" and that minor parties are especially burdened by blanket primaries because they exist to give expression to political ideas out of the mainstream. *Id.* at 33-38. It also is derived from the Professor Aldrich's description of how parties have been an essential feature of the nation's political history because they have been the most effective means for ambitious politicians to promote their political beliefs and careers. *See WHY PARTIES*, *supra* note 121, at 78-82, 98-156. *See also* Renewal Amicus Brief, *supra* note 127, at 15 (the description of the role of parties in American politics as described by the Northern California Committee for Party Renewal).

400. For a brief review of the efficacy of American political parties in all their forms; *See WHY PARTIES*, *supra* note 121, at 278-83.

policy and their material desires into government benefits.⁴⁰¹ A few have been among those hardy political souls who have emerged periodically to form minor parties, even though they knew their efforts would not likely result in political victories, in order to focus public attention on political beliefs the major parties rejected and/or socio-economic problems the major parties neglected.⁴⁰²

By engaging in the tasks of party building, partisans exhibit four characteristics that separate them from the other two groups:

1. They have a highly developed interest in government and politics;
2. They are willing to work for an overall program of governing, even if it includes some proposals to which they are indifferent or opposed, in order to advance the common good of all members of the coalition;
3. They are willing to work for the election of nominees that may not have been their first choice, because to them advancing the program is more important than advancing the political careers of particular individuals;
4. They expect the officeholders they helped elect to put the parties' platform into effect.⁴⁰³

In short, partisans want to present to the voting public a coherent program for governing that represents the ideals and needs of those party members who actively support the party with their capital assets and their labor.⁴⁰⁴ They know this requires the selection of nominees willing and able to promote their platforms.⁴⁰⁵ But, blanket primaries increase the chances that maverick candidates can secure the combined support of disaffected members within their own parties, cross-over voters from other parties, and independents necessary for winning party nominations by adopting positions in defiance of their parties' platforms.⁴⁰⁶ As a result, partisans are violently opposed to blanket primaries out of fear that they will lead to the nomination of candidates who will not represent the views of those whose efforts have been most instrumental in building effective political parties.⁴⁰⁷

The apathetic are persons who are not only turned off by the platforms and/or candidates of existing political parties, but also lack the strength of political beliefs or socio-economic interests necessary for forming alternative political parties or electing independent candidates.⁴⁰⁸ For example, the apathetic may include disaffected Republicans who are anti-union on labor relations issues and

401. See WHY PARTIES, *supra* note 121, at 180–82.

402. See John C. Berg, *Beyond a Third Party: The Other Minor Parties in the 1996 Elections*, in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 216–18 (John C. Green & Daniel M. Shea, eds., 3d ed. 1999).

403. See WHY PARTIES, *supra* note 121, at 180–82.

404. See *id.*

405. See *id.* at 182.

406. See Petitioners' Brief at 17.

407. See *id.*

408. This definition was derived from description of the disaffected voter in *Avoiding Margins*, which created the scenario of moderate Republicans and Democrats reacting to being turned off by the more extreme views of their parties' nominees by not voting rather than getting more involved politically either to attempt to moderate their parties' views or to form a new moderate party more to their liking. See *supra* note 76.

pro-choice on the abortion issue, disaffected Democrats who are pro-union on labor relations issues and anti-choice on the abortion issue, and independents whose beliefs are the same on these issues as either disaffected Republicans or disaffected Democrats.⁴⁰⁹ In other words, the apathetic often find a few proposals among the many contained in the platform of each existing party they just will not support, and as a consequence they tend not to support their parties' nominees.⁴¹⁰

Faced with this dilemma, disaffected Republicans and disaffected Democrats could choose to attempt to reform their parties' platforms or influence the selection of more exciting nominees by getting more involved in party affairs. Alternatively, they could reach out to independents and the disaffected in other parties who share their views to form new parties or support independent candidacies. But, given the low intensity of their political interests, such activities are too burdensome for the apathetic to undertake.⁴¹¹ Instead, they tend to vote for party mavericks in primary elections and increasingly sit out general elections if their preferred primary candidates do not win.⁴¹² It is therefore predictable that the blanket primary is very attractive to the apathetic, for it will permit the disaffected within each party to vote for any maverick regardless of his or her party affiliation and let independents cast what may be the deciding votes that put maverick candidates into general elections.

Best of all, the blanket primary gives a free ride to the apathetic and the maverick candidates they support. The nomination of a major party is still one of the most important assets a candidate can have in a general election, for it provides her with a potent political name brand that has been invested with great electoral value by the dollars and sweat of partisans.⁴¹³ As Senator John McCain's recent presidential primary victories in open primary states illustrate, blanket primaries give maverick candidates a very real chance of winning the nominations of their parties, despite receiving poor support from their party faithful, by capturing the votes of outsiders.⁴¹⁴

Individualists are hybrids of the other two voter groups. Like the partisans, individualists have strong political beliefs or economic interests they want converted into public policies and government benefits.⁴¹⁵ Like the apathetic,

409. *See id.* at B7.

410. *See* The Pew Research Center for the People & the Press, *Retro-Politics: The Political Typology – Version 3.0, Section IX. The Disaffecteds*, <<http://www.people-pres.org/typo99sec9.html>> which describes this voting group as “distrustful of government, politicians and business corporations,” favoring the creation of a third major party, “anti-immigrant, and intolerant of homosexuals.” They also have a poor voting record. *Id.*

411. *See id.*

412. *See Avoiding Margins*, *supra* note 76, at B7. *See also* Otis White, *So Who Answered Duke's Call*, ST. PETERSBURG TIMES, Dec. 1, 1991, at 1D [hereinafter *Duke's Call*].

413. *See WHY PARTIES*, *supra* note 121, at 289-90.

414. *See Rocky Road*, *supra* note 42, at A1 (describing how John McCain won the Michigan Republican Primary despite losing 2/3rds of the Republican vote because he captured the lion's share of the vote from cross-over Democrats and Independents, which collectively constituted more than 50% of the Republican Primary vote).

415. *See* Jeffrey M. Berry, *THE NEW LIBERALISM: THE RISING POWER OF CITIZENS GROUPS 2* (1999).

their political interests are narrower than those served by the platforms of most political parties, so they have little interest in forming broad-based coalitions and working for common good of all who are within them.⁴¹⁶

Given these political perspectives, individualists rarely involve themselves in party-building.⁴¹⁷ Instead, they tend to support special interest political action committees and lobbying organizations that interact directly with candidates and officeholders to influence their views and votes.⁴¹⁸ This encourages candidates to become political parties unto themselves by adopting the combination of political positions most favored by the general election electorate and raising the necessary campaign war chest from the contributions of special interest political action committees.⁴¹⁹ Such free agent candidates should, if nominated, have a better chance of winning general elections than those who feel obligated to run on party platforms, because party platforms rarely consist of the combination of political positions most favored by the general election electorate.⁴²⁰ More importantly, should a majority of a legislative body be comprised of such candidates, there would be substantial agreement among its members on major policy issues, and its members would have every incentive to enact legislation favorable to all the special interest groups that helped elect them.⁴²¹

Individualists see the blanket primary as the best means of producing free agent candidates, for it enables, indeed requires, all primary candidates to solicit support from the general electorate, not just from their parties' members. Not only does the outcome of such primaries insure that the individualists' preferred candidates have adopted the set of positions most attractive to the general electorate, it also increases the chance that the nominees of both major parties will favor the individualists' political views. Like the apathetic, the individualists will also enjoy a free ride, for their preferred candidates will have secured major party nominations, despite possibly not being preferred by the builders of their parties.

Viewing *Jones* as a conflict of voting rights among partisans, the apathetic, and individualists makes it clear that Justice Scalia's decision to invalidate California's blanket primary was correct constitutionally, politically and ethically. The desire of the apathetic and individualists to pursue their interests by coopting major party nominations instead of doing the heavy lifting necessary to change a party from within, start a new party, or support independent candidates, signifies

416. *See id.* at 2, 167.

417. *See id.*

418. *See* Don Van Natta, Jr. and John M. Broder, *The Democrats: The Lobbyists; A Trend Toward Ambidextrous Investments*, THE N.Y. TIMES, Aug. 16, 2000, at A23, describing the strategy of high-rolling lobbying firms as they increase political support to the organizations and officeholders of the two major parties so "they will have access and influence, no matter who wins . . ." *Id.*

419. *See* John J. Coleman, *Party Images and Candidate-Centered Campaigns in 1996: What's Money Got to Do With It?* in THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES 337-53 (John C. Green & Daniel M. Shea, eds., 3d ed. 1999) explaining how in this candidate-centered political era politicians seek to raise and spend the resources necessary to establish a public image independent of his party label.

420. *See id.* at 337-42.

421. *See Party Blurred*, *supra* note 58, at A1.

that the purpose of California's blanket primary was to alter the speech content of the political parties' nominees. That the blanket primary would probably have this effect was confirmed by the District Court, which found that blanket or open primaries "may affect the positions that candidates take on political issues" and "weaken[] the 'disciplining effect' of the primary challenge in requiring 'the officeholders to carry out the party philosophy...'"⁴²² This finding amply supports Justice Scalia's holding that California's blanket primary imposed a direct expressive injury on the associational rights of the political parties⁴²³ that had to be justified by California demonstrating that its blanket primary was narrowly tailored to serve a compelling state interest.⁴²⁴ It also supports his holdings that the major purposes to be served by the blanket primary – electing more representative officeholders and expanding the political debate – were unconstitutional because they were just other ways of stating a desire to regulate the content of the political parties' speech.⁴²⁵

Reflecting the desires of the apathetic and individualists to coopt the nominations of major political parties, California's blanket primary was crafted to produce party nominations, not just general election candidates.⁴²⁶ Otherwise, as Justice Scalia pointed out, it would have been designed to send only the two top vote getters for each office to the general election rather than declare that the top vote-getter in each party would appear on the general election ballot as his party's nominee.⁴²⁷ This nominating feature set up the delicate question of whether States have the right to force parties to let outsiders help select their nominees in order to give every voter, regardless of party affiliation, the opportunity to cast a meaningful vote for her preferred candidate.

From a strictly legal viewpoint, Justice Scalia answered this question correctly with a resounding NO! His caustic observation that a different outcome would combine with *Tashjian* to skew the First Amendment so it would "guarantee a party's right to lose its identity, but not to preserve it"⁴²⁸ exposed the absurdity of holding that the associational rights identified in *Tashjian* work only in one direction. His implication that every State would be constitutionally required to adopt a blanket primary if voters had a "'fundamental right' . . . to cast

422. *District Jones*, 984 F. Supp. at 1299 (citation omitted). These findings effectively counter Justice Stevens complaint that Justice Scalia failed to honor the district court's findings of fact and holdings concerning whether the blanket primary severely injured the political parties' associational rights. See *Jones*, 120 S. Ct. at 2421-22 (Stevens, J., dissenting).

423. See *Jones*, 120 S. Ct. at 2412.

424. See *id.*

425. See *id.* Justice Scalia supported this holding by analogizing *Jones* to *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), wherein the Court invalidated the use of Massachusetts' public accommodation law to force the South Boston Allied War Veterans Council to include openly gay, lesbian and bisexual persons in their parade on grounds that a parade is an expressive activity the speech content of which would be altered by the forced inclusion of outsiders.

426. See *Jones*, 120 S. Ct. at 2413-14.

427. See *id.* at 2414.

428. *Id.* at 2409 n.7.

a meaningful vote for the candidate of their choice,⁴²⁹ revealed the potential for the Respondents' position to limit the States' options as well as those of the political parties.

Nevertheless, Justice Scalia only hinted at the fundamental unfairness, and the potential political unsoundness, of imposing blanket primaries on unwilling political parties. He did acknowledge that the "inequity of not permitting nonparty members in 'safe districts' to determine the party nominee . . . [was] less unfair than permitting nonparty members to hijack the party."⁴³⁰ He also observed that nonparty members who wish to participate in a party's primary "have refused to affiliate with the party" [or] "have expressly affiliated with a rival."⁴³¹ And, he vaguely alluded to the possible negative political consequences of sapping the vigor of political parties through blanket primaries when he declared that "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views."⁴³² Still, he failed to emphasize the arduous nature of the party-building activities performed by partisans and assiduously avoided by independents and cross-over voters from other parties (the apathetic and the individualists). He did not recall how the first Congress, which was dominated by the type of free-agent representatives and senators the individualists desire to elect through the blanket primary, was so plagued by "unstable, shifting and chaotic" voting majorities that what little policy evolved therefrom did so "with no guarantee of long-term consistency or clarity of principle."⁴³³ Nor did he discuss the difficulty that free-agent legislators would experience in attempting to form cohesive governing coalitions based on coherent governing strategies because each of them would be beholden to unique bebies of interest groups that would shift in composition from issue to issue.⁴³⁴

On the other hand, Justice Scalia's failure to drive home the justness and political soundness of denying nonmembers the right to participate in a party's nominating process was matched by his seeming insensitivity to the plight of persons living in safe districts. That the safe seat phenomenon has become fixture in many legislative districts has been graphically demonstrated by the increasingly non-competitive congressional elections of the last quarter of a century. Only six (6) incumbent members of Congress lost their seats in 1998,⁴³⁵ and it has been over

429. *Id.* at 2407 n.5.

430. *Id.* at 2413.

431. *Id.* at 2409.

432. *Jones*, 120 S. Ct. at 2408.

433. *WHY PARTIES supra* note 121, at 70-77 (quotes from 76-77).

434. *See id.* at 28-61 (developing theories that there are great incentives to form parties to solve the problems of collective policymaking, social choice, electoral mobilization and political ambition); *Id.* at 194-240 (discussing how the candidate centered/candidate service parties of today still are capable of forming governing coalitions to solve the problems of collective policy making, social choice and political ambition); *Id.* at 287-96 (discussing how the current candidate centered/candidate service parties still perform the coordinating functions required for coherent governing despite being of substantially different form than the parties of Jefferson, Hamilton, Van Buren, and Lincoln).

435. *See* Craig Gilbert, *Freshmen in House Likely to Win Again; Ryan, Baldwin, Green Have 'Done Their Homework,' Raised Campaign Cash*, MILWAUKEE JOURNAL SENTINEL, July 2, 2000, at 01A.

twenty-five (25) years since “the re-election rate for incumbents dipped below 90 percent.”⁴³⁶ The 2000 campaign will be no exception, since analysts believe no more than 50 of the 435 seats will be competitive,⁴³⁷ a number that seems too high given an early July analysis by ROLL CALL that only seventeen (17) races were a toss-up.⁴³⁸ Things are even more uncompetitive in Louisiana, a blanket primary state, where it is anticipated that six (6) of its seven (7) incumbents “will run unopposed or face only token challenges from underfinanced and little-known opponents.”⁴³⁹ Yet, Justice Scalia simply advised nonmembers of dominant parties living in safe districts to change their registration if they wanted to cast meaningful primary election votes.⁴⁴⁰

Justice Scalia’s advice is not likely to be taken by many voters. The same State that has non-competitive Congressional elections may also have very competitive races for statewide executive offices. If so, voters in safe Congressional districts may be loathe to disqualify themselves from voting in the statewide primaries of their preferred party simply to gain the right to vote in the Congressional primary of the dominant party.⁴⁴¹ Moreover, in many election years such a trade-off would be a poor bargain, for most Congressional seats are safe due to the advantages of incumbency, which means that competitive primaries will occur in most Congressional districts only when the incumbent does not seek re-election.⁴⁴² Perhaps this dearth of meaningful primary election opportunities induced Justice Scalia to conclude that nonmembers of dominant parties living in safe districts rarely suffer any real disadvantages by remaining ineligible to vote in the dominant party’s primaries. Still, it seems that democracy would be furthered, and little harm would be done to political parties, if every voter, regardless of affiliation, could vote in the primary of the dominant party when candidates from that party are the only persons who file for a specific office. Justice Scalia’s opinion appears not to leave this option open. This is unfortunate, for a strong case could be made that the main function served by primary elections that determine who wins a public office is the predominantly public function of electing a public official rather than the quasi-private function of establishing a party’s identity through the nomination of a general election candidate.

436. Eric Schmitt, *The 2000 Campaign: The House; Former Incumbents Try to Reclaim Seats*, THE N.Y. TIMES, July 3, 2000, at A11.

437. See Catalina Camia, *House, Senate Races Attracting Attention, Too; Democrats Stress Winning Majority*, THE DALLAS MORNING NEWS, Aug. 18, 2000, at 23A.

438. See *At a Glance: Races for U.S. House*, STAR TRIBUNE, July 6, 2000, at 12A (giving data from an issue of ROLL CALL the date of which was not stated).

439. Bruce Alpert, *LA. House Delegation Looking at Cakewalk*, THE TIMES-PIYAYUNE, July 16, 2000, at A01 [hereafter referred to as *LA. Cakewalk*].

440. See *Jones*, 120 S. Ct. at 2413.

441. This trade-off will be forced because voters may only vote in the primaries of one party in closed and open primary states. See *id.*

442. See Eric Schmitt, *supra* note 436, at A11, noting that “[t]he powers of incumbency, including paid government staff and free postage for mailing, are so potent that defeating a sitting member of Congress has become very difficult.” That difficulty was illustrated by the fact that 98% of incumbents won in 1998, and the “re-election rate for incumbents [has not] dipped below 90 percent” since 1974. *Id.*

Justice Scalia's opinion failed to give proper attention to two persistent trends in American politics over the last forty (40) years—the decline in voter participation⁴⁴³ and the decline in party loyalty among voters.⁴⁴⁴ As noted previously, Justice Scalia summarily rejected California's claim that it had a compelling interest in increasing voter participation because he found it was just another way of saying that the State manipulated primary elections to insure that the political parties nominate general election candidates more to the liking of the voting majority.⁴⁴⁵ He failed to mention the decline of party loyalty and the fact that persons identifying themselves as Independents have constituted a plurality of the total American electorate for a decade⁴⁴⁶ and approaches or exceeds a majority of the electorate in some states.⁴⁴⁷ As a consequence, he missed the

443. See Committee for the Study of the American Electorate (CSAE), *Final Post Election Report* (visited Aug. 8, 2000) <<http://www.gspm.org/csae/cgans5.html>>, which found there has been a persistent downward trend in voter turnout during non-Presidential election years since 1962. This trend was reflected in the following table contained in the CSAE report:

<u>Year</u>	<u>Percentage Voted</u>
1998	36.06
1994	38.79
1990	36.53
1986	36.42
1982	40.09
1978	37.77
1974	38.78
1970	46.78
1966	48.61
1962	47.57

Id. at Chart II.

444. See Paul Allen Beck, *The Changing American Party Coalitions*, in *THE STATE OF THE PARTIES: THE CHANGING ROLE OF CONTEMPORARY AMERICAN PARTIES* 28, 31 fig. 3.1 Party Loyalties, 1952-1996 (John C. Green & Daniel M. Shea, eds. 3d ed. 1999), which shows that the percentage of voters identifying themselves as Independents has increased from about 22% in 1962 to about 35% in 1996. See also The Pew Research Center for the People & the Press, *Retro-Politics: The Political Typology-Version 3.0*, Section III. Parties (visited Aug. 3, 2000) <<http://www.people-press.org/typo99sec3.html>> [hereafter referred to as *Pew Typology*] which reported the following trends in party identification from 1989 to 1999:

<u>Year</u>	<u>% Republican</u>	<u>% Democrat</u>	<u>% Independent/Other</u>
1999	27	34	39
1998	27	33	40
1997	28	33	39
1996	29	33	38
1995	32	30	38
1994	30	32	38
1993	27	34	39
1992	28	33	39
1991	31	32	37
1990	31	33	36
1989	33	33	34

445. See *Jones*, 120 S. Ct. at 2413.

446. See *Pew Typology*, *supra* note 446, at Section III. Parties (which contains a table showing that from 1989 through 1999 the Independent vote has constituted a plurality of the American electorate with a percentage ranging from 34% to 40%).

447. See *Shunning Loyalty*, *supra* note 41, at A1, which reported that the 1999 Massachusetts electorate was 49% Independents, 37% Democrats, 13% Republicans, and *O'Callahan*, 914 P.2d at 1256, which reported that the 1994 Alaska electorate was 54% non-partisans or undeclareds, 23%

opportunity to connect the two phenomena, for recent polling data confirm that Independent voters are less likely to vote than voters who identify themselves as Democrat or a Republican.⁴⁴⁸ This connection suggests that a State wanting to increase voter turnout should adopt policies conducive to increasing the percentage of voters who identify with one of the major parties. Blanket and open primaries appear to have the opposite effect,⁴⁴⁹ a fact Justice Scalia could have used to make an important political policy argument against them.

By far, the most woeful part of Justice Scalia's opinion was his suggestion that California could accomplish all of its interests, without violating the political parties' associational rights, by adopting Louisiana's non-partisan version of the blanket primary.⁴⁵⁰ However, recent elections in Louisiana demonstrate that its variant of the blanket primary is prone to harming the interests of both the parties and the State.

Louisiana's non-partisan blanket primary has harmed the political parties by selecting general election candidates who ran under the label of parties which did not want to be associated with them. The most egregious example was the 1991 governor's primary, which from eleven candidates produced a general election featuring Republican David Duke, a neo-Nazi⁴⁵¹ who was a former Grand-Dragon of the Ku Klux Klan,⁴⁵² and Democrat Edwin Edwards, a notorious gambler and womanizer who had "barely survived two federal racketeering trials" after enduring "sixteen corruption investigations."⁴⁵³ An anti-Duke faction, featuring the slogan "Vote for the Crook: It's Important," rallied reluctantly to Edward's cause, helping him defeat Duke handily.⁴⁵⁴ But Edwards victory did not erase the damage done to the credibility of Louisiana's political system, for Edwards ultimately was convicted of racketeering crimes committed in his last term as Governor.⁴⁵⁵ Nor did it end the woes of the Republican Party, for just four years

Republicans, and 18% Democrats.

448. See The Gallop Organization, *Poll Releases: The 2000 Presidential Election – A Mid Year Gallop Report* (visited Aug. 3, 2000) <<http://www.gallop.com/poll/releases/Pr000t22q9.asp>> indicating that less than 19% of persons deemed likely to vote are not identified with one of the two major parties. When this figure is compared with *Pew Typology* report that independents constituted 39% of the electorate in 1999, it is seen that independents are not very dependable voters. Reinforcing this conclusion is information compiled in Section IX of *Pew Typology* (visited Aug. 3, 2000) <<http://www.peoplepress.org/typo99sec9.html>>, which found that Independents constitute 73% of a voter group with the second poorest voting participation record (*The Disaffecteds*) and 54% of a group that barely participates in elections (*Bystanders*).

449. See *O'Callaghan*, 914 P.2d at 1256.

450. See *Jones*, 120 S. Ct. at 2414.

451. See Otis White, *So Who Answered Duke's Call*, ST. PETERSBURG TIMES, Dec. 1, 1991, at 1D.

452. See Charles Cook, *Why David Duke Can Actually Win Louisiana's Runoff*, ROLL CALL, Oct. 24, 1991, cited in Political Surveyor Section [hereinafter *Duke Can*]. Duke's candidacy embarrassed the Republican party for the second time in two years, for he had defeated the "official GOP contender" for the U.S. Senate in 1990. See Tim Curran, *In Wake of Success by Edwards, Duke in La. Gov. Primary, Republicans Face Bleak Future–If Flamboyant Democrat Wins 4th Term, GOP Could Lose Two Seats in Redistricting*, ROLL CALL, Oct. 24, 1991.

453. Joe Drape and Christina Cheakalos, *Edwards Says Duke's Rise is Over; He Decries Media Spotlight*, THE ATLANTA JOURNAL & CONSTITUTION, Nov. 18, 1991, at A01 [hereinafter *Duke's Over*].

454. *Id.*

455. See Hugh Aynesworth, *Edwards Fights On as Legal Woes Grow*, THE WASHINGTON TIMES,

later, Mike Foster, a Democrat who switched parties just in time for the election, was elected Governor as a Republican.⁴⁵⁶ Consistent with his non-Republican past, Foster has since aggressively refused to do anything to build-up the Louisiana Republican Party.⁴⁵⁷ In the most recent Louisiana election, the eight state-wide officeholders running for re-election entered into a pact agreeing not to interfere in each others' elections despite their parties opposition to it and the fact that one candidate was facing a corruption investigation.⁴⁵⁸ Partisan organization of the Louisiana legislature has almost expired,⁴⁵⁹ with coalitions based on interest group support rather than parties controlling the outcomes of most legislative issues.⁴⁶⁰ Given this experience in Louisiana, it is ludicrous for Justice Scalia to suggest that a non-partisan blanket primary will not harm the associational rights of political parties simply because it does not select "a party's nominee."⁴⁶¹ Such a holding would truly exalt form over substance.

Louisiana's non-partisan blanket primary has also harmed some of the interests California invoked in defense of Proposition 198. Governor's primaries have drawn such crowded fields that persons have been voted into the general election with a vote total in the low thirties.⁴⁶² The last five governors produced by this system have been political mavericks not known for the ability to produce a cohesive governing coalition.⁴⁶³ Worse yet, the corrupt Edwin Edwards won twice during this period,⁴⁶⁴ and the 1991 governor's primary, occurring during a time of economic stress, gave the public a choice between a crook and a neo-Nazi.⁴⁶⁵ All this belies the claim that blanket primaries produce middle of the road general

Aug. 28, 2000, at A4.

456. See *Party Blurred*, *supra* note 58, at A1.

457. "He refused to attend the 1996 GOP convention in San Diego and has feuded with state GOP Chairman Mike Francis. Though he has played a role in persuading some Democratic legislators to switch parties, his populist-tinged policies do not always sit well with traditional Republicans." *Party Blurred*, *supra* note 58, at A1.

458. See *Party Blurred*, *supra* note 58, at A1.

459. See *id.* (noting that the president of the Senate was "expected to be a [R]epublican even though Democrats held "26 of the 39 Senate seats", and the number two position in the House was also expected to be a Republican "even though Democrats . . . [hold] 73 of 105 House seats").

460. See *Party Blurred*, *supra* note 58, at A1.

461. *Jones*, 120 S. Ct. at 2414.

462. In the notorious 1991 crook v. neo-Nazi primary, the two general election candidates, Edwin Edwards and David Duke, won 34% and 32% of the primary vote respectively out of a field of 11 candidates. See *Duke Can*, *supra* note 452, at Political Surveyor Section.

463. The notorious Edwin Edwards won in 1983 and 1991. See Robert Buckman, *Louisiana Governor in Sight of Landslide; First Election Without Runoff Since '83*, THE WASH. TIMES, Oct. 24, 1999, at C3 [hereinafter *Louisiana Landslide*]; See *Duke's Over*, *supra* note 453. Buddy Roemer's maverick ways may have made the David Duke general election nomination possible in 1991, for he won in 1987 as a Democrat, switched parties mid-term, and failed to coalesce Republican leaders around him in 1991 for failure to reach out to Republican leaders, a failure that was perhaps predictable because as "a quintessential maverick [he] never got along with Democratic leaders." See *Duke Can*, *supra* note 452. Mike Foster, "a pro-business, pro-gun, rough-talking duck hunter whose actions – such as passing a law allowing adults to ride motorcycles without helmets – give him a kind of maverick appeal," won in 1995 and 1999. Anne Rochell Konigsmark, *Governors' Races Show Party Ties Weakening; Three Southern Contests Hinge More on Individual Strengths Than Affiliation*, THE ATLANTA JOURNAL & CONSTITUTION, Oct. 17, 1999, at 1B.

464. See *Louisiana Landslide*, *supra* note 463, at C3.

465. See *Duke's Over*, *supra* note 453.

election candidates more representative of the electorate.

Meanwhile, on the legislative side, the safe district syndrome and special interest politics appear to have expanded. Congressional races have become almost entirely non-competitive,⁴⁶⁶ and the State legislature seems to function through the formation of ad hoc majorities organized by special economic interests rather a coherent governing coalition borne of political parties organized to promote competing visions of a stable governing philosophy.⁴⁶⁷ Not only has Louisiana's blanket primary not produced the greater choices of candidates and ideas promised by proponents of California's blanket primary, but the legislature has become vulnerable to the problem of shifting majorities that prompted Madison and Hamilton to form the nation's first two major parties.

Finally, from a partisan point of view, the boundaries of the political parties' rights of association recognized in *Jones* are disappointingly narrow. At the outset of his opinion, Justice Scalia closed off the possibility that the parties' associational rights would include the right to choose their own nominating processes by stating that "[w]e have considered it 'too plain for argument' . . . that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion."⁴⁶⁸ But, as Justice Stevens pointed out in his dissenting opinion, this "point has never been decided by [the Supreme] Court."⁴⁶⁹

Given the rationale for the *Jones*' decision, that parties may not be able to preserve their identities if they cannot exclude from their nominating processes persons with little or no commitment to their political ideals,⁴⁷⁰ the belief that States can force political parties to nominate their general election candidates through primary elections should be reconsidered. Mere party registration, or the satisfaction of state requirements for voting in the primary of a specific party, does not necessarily signify a strong identity with the principles of a party. As Justice Stevens noted in his dissent, a person can fulfill these membership-conferring tasks

merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member.⁴⁷¹

Ironically, it is he, rather than the defenders of the parties' associational rights,

466. See *LA. Cakewalk*, *supra* note 439, at A01.

467. See *Party Blurred*, *supra* note 58, at A1.

468. *Jones*, 120 S. Ct. at 2407 (citing *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974)) [hereinafter *American Party*].

469. *Id.* at 2418 (Stevens, J., dissenting). This is confirmed by *American Party*, for the portion of it cited by Justice Scalia actually allows for the possibility that parties could nominate their general election candidates through conventions rather than primaries. See *American Party*, 415 U.S. at 781, where the Court stated "It is too plain for argument . . . that the State may . . . insist that intraparty competition be settled before the general election by primary election or by party convention (emphasis added).

470. *Jones*, 120 S. Ct. at 2408-12.

471. See *id.* at 2419-20 (Stevens, J., dissenting).

who recognized the “obvious mismatch between a supposed constitutional right ‘not to associate’ and a rule that turns on nothing more than the state-defined timing of the new associate’s application for membership.”⁴⁷² This led him to comment that “[a]lthough I would not endorse it, I could at least understand a constitutional rule that protected a party’s associational rights by allowing it to refuse to select its candidates through state-regulated primary elections.”⁴⁷³ Such a result would return the nomination decisions to the deliberations of party activists and officeholders, who after all are the persons who have built the parties and shaped their identities.

What then of the assertions that open primaries and closed primaries with liberal voter registration requirements also subject political parties to the risk of having their nominees and messages shaped by persons with little or no attachment to their political philosophies? Senator John McCain’s presidential primary victories in open primary states, where he won despite losing most of the registered Republican vote, certainly demonstrated the potential for open primaries to strip away from party members the ability to select their own nominees. And yet, Justice Scalia found great constitutional significance in the fact that in closed primary states voters “must formally become a member of the party” and then are “limited to voting for candidates of that party.”⁴⁷⁴ Going one step further, he then intimated that open primaries may also survive *Jones* simply because they limit the voter “to one party’s ballot.”⁴⁷⁵ Being limited to one party’s ballot seems to be the flimsiest of connections to a party, one that Justice Scalia rightly derided in *Tashjian* when he summed up his view of the open primary so greatly sought by Connecticut Republicans by stating: “[t]he Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an ‘association’ with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster.”⁴⁷⁶ It will be interesting to see which Scalia shows up when a post-*Jones* constitutional test of open primaries reaches the Court.

V. CONCLUSION

The big news from *Jones* is that the political parties’ expressive rights were given priority over the States’ interest in expanding the voting options of primary election voters. Key factors in this outcome were the overt desire of those backing California’s blanket primary to moderate the views of major party nominees, which made it clear that blanket primaries were intended to be a means of regulating the content of political speech, and the Court’s unwillingness to treat primary elections as purely public functions.

Left unclear is whether *Jones* established a broad or narrow precedent. The

472. *Id.* at 2420 (Stevens, J., dissenting).

473. *Id.* at 2419 (Stevens, J., dissenting).

474. *Id.* at 2409-10.

475. *Id.* at 2410 n.8.

476. *Tashjian*, 479 U.S. at 235 (Scalia, J., dissenting).

Court gave great emphasis to the importance of letting political parties preserve their identities by selecting nominees willing and able to champion their visions for governing. Carried to its logical extreme, this principle could forbid States from requiring parties to participate in open primaries. In fact, it could be extended far enough to forbid States from requiring parties to select their nominees through primary elections. Such outcomes would be welcomed by those who wish to help political parties become more vital in ordering our nation's political debates. They will not materialize, however, if Justice Scalia's speculation that open primaries are distinguishable from blanket primaries, because they limit primary voters to one party's ballot, is ratified in a later case.

Of greater concern is Justice Scalia's suggestion that Louisiana's non-partisan blanket primary does not infringe on the associational rights of political parties. With its potential to kill all vestiges of partisanship, Louisiana's non-partisan blanket primary reflects the Framers' dreams of a government without faction. In practice, it has produced an endless stream of maverick governors and a legislature subject to the shifting majority problem that induced Hamilton and Madison to form the nation's first political parties.