

# TOWARD A FUNCTIONAL DEFENSE OF POLITICAL PARTY AUTONOMY

NATHANIEL PERSILY\*

*In its recent decision in California Democratic Party v. Jones, the Supreme Court struck down California's "blanket primary," which allowed any voter to vote in any race in any party's primary. The decision has propelled questions of primary voter qualifications to the forefront of constitutional analysis of political parties. This Article analyzes the case law on state regulation of primary elections and argues in favor of constitutional protection for party organizational autonomy in determining qualifications for primary voters. Legal scholars have been almost unanimous in their condemnation of the Court's decision in Jones. This Article takes a different view. Agreeing with the critics that traditional First Amendment rights of expression and association largely are inapplicable to party primaries, this Article advocates an approach that pays less attention to parties' status as state actors or private associations and more attention to the functions they play in American democracy. In particular, the Article argues that autonomous parties are a necessary check against one party's manipulation of the electoral process to its advantage and an indispensable means of aggregating interest groups into the American political system. Recognizing that in the context of primary elections, today's major political parties are, nevertheless, state actors, the Article concedes that explicit constitutional guarantees preventing discrimination in the right to vote ought to apply to major-party primaries.*

## INTRODUCTION

America's political parties have spent a lot of time in court over the past few years. The parties have sued each other, they have sued various states, and they have been sued by candidates and voters. The multitude of suits arising out of the contested presidential election results in Florida are only the most recent examples of the rising tide of litigation involving political parties. In the midst of the 2000 primary campaign, Senator John McCain's successful lawsuit against the New York Republican Party challenged barriers to candidate access to the presidential primary ballot and showed how individuals can use the courts and the Constitution to resolve intraparty disputes.<sup>1</sup> And just

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\* Staff Attorney, Brennan Center for Justice at New York University School of Law; Assistant Professor, University of Pennsylvania Law School. Earlier drafts of this paper were presented at the 2000 Meeting of the American Political Science Association, the Institute of Governmental Studies at U.C. Berkeley, and Stanford Law School. Thanks go to Bruce Cain, Jack Citrin, Pam Karlan, Dan Lowenstein, Rick Pildes, Nelson Polsby, and Kathleen Sullivan for their helpful comments, and to Eliza Sporn, P.K. Runkles-Pearson, and the entire *New York University Law Review* staff for their editing.

<sup>1</sup> *Molinari v. Powers*, 82 F. Supp. 2d 57 (E.D.N.Y. 2000). Senator John McCain sued the New York Boards of Elections and the New York Republican Party to gain statewide

this past summer, the Supreme Court issued a landmark ruling in *California Democratic Party v. Jones*<sup>2</sup> (the “blanket primary case”), striking down a California law that forced the political parties to accept nonparty members as voters in their primaries.<sup>3</sup>

As the political party case law has burgeoned in recent years, legal scholars who have been studying the law of the political process have begun to shift their attention from the study of voting rights, redistricting, and campaign finance to the study of the regulation of political parties.<sup>4</sup> The new wave of scholarship has been almost uniformly hostile to notions of party “rights” and to alleged values furthered by the two-party system.<sup>5</sup> Those scholars tend to view parties as public utilities with a tendency toward collusive, duopolistic behavior on the one hand, and minority disenfranchisement on the other.<sup>6</sup>

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access to the Republican presidential primary ballot. *Id.* The U.S. District Court for the Eastern District of New York held that certain provisions of New York’s ballot access regime were irrational, held that the totality of the primary ballot access law imposed an undue burden on candidates’ and voters’ First Amendment rights, and ordered McCain and all Republican candidates onto the ballot statewide. *Id.* at 71, 77–78.

<sup>2</sup> 120 S. Ct. 2402 (2000).

<sup>3</sup> *Id.* at 2414.

<sup>4</sup> See generally Symposium: Law and Political Parties, 100 Colum. L. Rev. 593 (2000).

<sup>5</sup> See, e.g., Richard L. Hasen, Do the Parties or the People Own the Electoral Process?, 149 U. Pa. L. Rev. 815 (2001) (suggesting that judicial protection of party rights gives too much power to party organizations at expense of majority of voters) [hereinafter Hasen, Electoral Process]; Richard Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition, 1997 Sup. Ct. Rev. 331 (criticizing Supreme Court’s decision upholding bans on fusion candidates) [hereinafter Hasen, Entrenching the Duopoly]; Richard L. Hasen, Parties Take the Initiative (and Vice Versa), 100 Colum. L. Rev. 731 (2000) (arguing against special judicial scrutiny for initiatives regulating parties since parties can exploit initiative process); Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 Colum. L. Rev. 274 (2001) (treating associational rights claims of major political parties with skepticism); Samuel Issacharoff & Richard H. Pildes, Politics As Markets: Partisan Lockups of the Democratic Process, 50 Stan. L. Rev. 643 (1998) (arguing for shift from focus on defining rights to emphasis on background markets in partisan control); Daniel R. Ortiz, Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties, 100 Colum. L. Rev. 753 (2000) (arguing that privileged position of two major parties diminishes their autonomy); Adam Winkler, Voters’ Rights and Parties’ Wrongs: Early Political Regulation in the State Courts, 1886-1915, 100 Colum. L. Rev. 873 (2000) (exploring early case law on political party regulation and suggesting how courts could uphold party reforms in name of voters’ rights). But see, e.g., Bruce E. Cain, Party Autonomy and Two Party Electoral Competition, 148 U. Pa. L. Rev. 793 (2001) (defending protection of party autonomy); Nathaniel Persily & Bruce E. Cain, The Legal Status of Political Parties: A Reassessment of Competing Paradigms, 100 Colum. L. Rev. 775 (2000) (defending both judicial protection of party autonomy and virtues of two-party system).

<sup>6</sup> See, e.g., Issacharoff, *supra* note 5 at 277 (arguing that “in a district system with a first-past-the-post, winner-takes-all rule, two—and only two—relatively centrist parties will emerge”); Issacharoff & Pildes, *supra* note 5, at 668-90 (describing monopolistic and anticompetitive barriers in two-party system); Ortiz, *supra* note 5, at 763-66 (arguing that

The role of judges, according to the prevailing wisdom, ought to be quite activist in striking down barriers to competition between the two parties, but quite docile when it comes to scrutinizing state laws that rein in the parties' autonomy.<sup>7</sup>

With regard to a specific slice of the political party case law, this Article takes a different view. It argues in favor of broad judicial protection for political parties' First Amendment right to determine who should be allowed to vote in party primaries. This argument in favor of party autonomy, however, grows out of a set of values similar to those underlying the anti-party arguments: namely, values of competition and minority representation. The opponents of party autonomy, I argue, misunderstand the true dangers in granting "the state" the power to determine party primary voter qualifications. "The state" is rarely, if ever, a neutral, nonpartisan lawgiver that enacts unbiased rules of party membership. Much more likely are the scenarios where one party holding the reins of formal state power uses its position to enact primary voting rules that disadvantage its opponents, or where the majority (in the legislature or the electorate) cripples parties' ability to craft coalitions among minority groups that otherwise are left voiceless in an electoral system already predisposed toward representation of the majority.

In making the pro-party autonomy argument, this Article examines all the cases where parties have sought to include or exclude voters from the primary electorate. Part I discusses the precedent governing state regulation of primary elections and situates it in the larger case law on state action and the right of expressive association. The Court has been quite aggressive in protecting parties' rights to define their primary electorate so long as the party is not seeking the freedom to discriminate on the basis of race, or the party is not a minor party whose rights are viewed as disruptive to the electoral or governmental process.

Part II examines the "blanket primary case," *California Democratic Party v. Jones*.<sup>8</sup> The California blanket primary law required

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duopolistic system gives parties too much control, distorts public choice, and enriches parties at voters' expense).

<sup>7</sup> See, e.g., Issacharoff & Pildes, *supra* note 5, at 716 (arguing that, despite Supreme Court jurisprudence dealing with political equality, its "efforts to fill the gaps of the American Constitution's framework for democratic politics have remained tentative and uncertain, and its conception of an appropriately competitive democratic system has remained unsophisticated and underdeveloped"); Ortiz, *supra* note 5, at 766-74 (arguing that where only two political parties can compete, party arguments for more absolute autonomy are democratically unacceptable).

<sup>8</sup> 120 S. Ct. 2402 (2000).

parties to allow any voter to vote in any primary in any race.<sup>9</sup> Thus, any voter, regardless of party, could vote in the Republican primary for Senator, then the Democratic primary for Governor, and then switch to the Libertarian primary for state legislator. All of California's political parties objected to the blanket primary, and the Supreme Court, in a 7-2 decision, found in their favor. Part II examines the politics and empirics of the blanket primary as well as the district court and Supreme Court opinions. It concludes with a discussion of the state of the law after *Jones* and the implications of the decision for other primary election systems.

Part III presents the functional argument for party organizational autonomy. I argue that judicial protection for party organizations' rights to control the boundaries of their association is necessary to preserve parties' functions of enhancing competition and fostering representation of minorities and interest groups. Judicial protection for party organizational autonomy prevents the party-in-government from crafting electoral rules that disadvantage its opponents and further add to the advantages of incumbency. Moreover, such protection allows party organizations to build coalitions among minorities, crafting bargains (in effect) between the median voter in a district and less "popular" factions to produce candidates that appeal to a broad audience and therefore have a chance at winning the election. Although these functional arguments as to competition and minority representation seem detached from the Constitution, Part IV suggests that they should be read as defining and distinguishing a political party's First Amendment right of association. Traditional rights of expression and association may not be involved in the cases examined here, but this functional argument still hangs on the First Amendment hook. The First Amendment protects more than an organization's mere expression or expressive association. Even when associations are not speaking, printing, or petitioning for redress of grievances, they may be assembling for other purposes, to perform other functions equally integral to the associational mission. A political party's primary represents an assembly of sorts that allows the party to perform its unique function of aggregating groups of voters into competitive electoral coalitions. Laws that impair the party's ability to include or exclude voters from the primary cripple it in performing this special function that sets it apart from other types of organizations. Despite parties' distinct position of power in elections and government and the lack of any traditional expression involved in a party primary, the First

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<sup>9</sup> Id. at 2406.

Amendment should be read as protecting their ability to define the contours of the party association.

The special relationship between the party and the state is not irrelevant to the party's claim of autonomy and associational rights, however. Because they often exercise state power in organizing their nomination processes, the textual constraints generally applicable to state action that infringes on the right to vote should apply to party primaries. The protections against race, gender, or age-based discrimination in voting contained in the Fifteenth, Nineteenth, and Twenty-Sixth Amendments should apply to party primaries, as should the Twenty-Fourth Amendment's prohibition on poll taxes. Recognizing that parties have unique associational rights does not leave them free from the constitutional constraints their state actor status earns them. These specific textual provisions trump the functional arguments.

This Article concludes with some observations on what the case law on party nomination methods can teach us about larger questions in the legal regulation of the political process. Although this Article advocates a particular functional argument, it concludes by suggesting that courts and scholars, at a minimum, should shift their focus away from traditional questions of state action and expression and toward a richer and more honest inquiry concerning how constitutional rules can help political parties play their critical role in American democracy.

## I

### FROM WHITE PRIMARIES TO BLANKET PRIMARIES: THE PRECEDENT FOR REGULATION OF THE PRIMARY ELECTORATE

#### A. *State Action, Freedom of Association, and the Brooding Omnipresence of the White Primary Cases*

A rigid adherence to traditional and largely inapplicable constitutional categories plagues the current case law and legal analysis of party primaries. This unfortunate development flows naturally from the origin of the modern case law: the *White Primary Cases*.<sup>10</sup> Those cases thrust the "state actor question" to the forefront of constitutional analysis of party primaries. Operating under the paradigm developed there, courts first determine whether parties are state actors or private associations. Then they reflexively conclude either that parties are subject to constitutional and statutory restraints, or that the

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<sup>10</sup> *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

parties may avail themselves of constitutional rights against the state. This categorical reasoning does a disservice to honest discussion of parties' unique and somewhat unanticipated constitutional position, and evades some of the difficult questions arising from state regulation of party primaries.

I present a condensed discussion of what I consider to be largely unhelpful case law to highlight the tension in the doctrine and explain why the debate has been framed this way. Although one cannot escape the fact that today's major political parties resemble other state actors and primaries pass the traditional tests for state action, courts nevertheless ought to recognize political parties' First Amendment rights to define the contours of their organization. This right of partisan association differs from the right of expressive association used to defend the rights of organizations such as the Boy Scouts, Rotary Clubs, and Saint Patrick's Day parades. A political party's unique right to exclude or include voters in its nominating process arises from the distinctive democratic functions that political parties perform by aggregating groups into competitive electoral coalitions.

### 1. *A Racist Party With State-Like Power*

Advocates of judicial protection for party autonomy always run up against a wall of opposition based on the atrocious history of African American disenfranchisement promoted by Southern Democratic parties. The *White Primary Cases*<sup>11</sup> have provided a template for characterizing primary elections as state action and for setting constitutional limits on parties' power to define the bounds of their membership. These cases grew out of unique historical conditions, but their holdings have had lasting importance even for cases not involving race discrimination.

Alongside poll taxes, grandfather clauses, literacy tests, and other more violent and coercive tactics of disenfranchisement, white primaries were used by Southern states and the Democratic Party and its subdivisions to prevent African Americans from voting in what turned out to be the critical and determinative election in those one-party states.<sup>12</sup> Between 1927 and 1953, the Court overruled its previous precedents and struck down a state statute that forbade the participation of African Americans in the Democratic primary,<sup>13</sup> and a statute that delegated to the party executive committee the power to deter-

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

<sup>12</sup> For a more extensive discussion of the *White Primary Cases*, see Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 79-95 (1998) (excerpting and commenting on *White Primary Cases*).

<sup>13</sup> *Herndon*, 273 U.S. at 540-41.

mine qualifications to vote in a party primary which it then exercised to ban African Americans from the primary.<sup>14</sup> Moreover, drawing on its decision in *United States v. Classic*,<sup>15</sup> a case that upheld the prosecution under federal law of those stuffing primary ballot boxes because the primary was “an integral part of the election machinery,”<sup>16</sup> the Court struck down the Democratic Party’s practice (not mandated by state law) of excluding African Americans from primaries.<sup>17</sup> The Court held that “the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party’s action the action of the State.”<sup>18</sup> Considering the primary in this way, the Court interpreted the Fifteenth Amendment as preventing a state from “casting its electoral process in a form which permits a private organization to practice racial discrimination in the election.”<sup>19</sup> Then, in a highly fractured decision in the last of the *White Primary Cases*, *Terry v. Adams*,<sup>20</sup> the Court extended this reasoning even to the conduct of a party’s unofficial subdivision or alter ego, whose candidate selection mechanism effectively determined the Democratic nominee that appeared on the ballot.<sup>21</sup>

The following factors, present in one or more of these cases, helped make the primary or the pre-primary a state action:

- *State law*: The statute itself prohibited African Americans from participating in the primary;<sup>22</sup>
- *State delegation of responsibility*: The state delegated to the party the power to fix voter qualifications;<sup>23</sup>
- *State control*: The state required primary voters to pay a poll tax and directed the selection of party officers;<sup>24</sup>
- *Place of the primary in the electoral scheme*: The primaries were a “part of the machinery for choosing officials.”<sup>25</sup> The pre-primary involved a “duplication of the [state’s] election

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<sup>14</sup> *Condon*, 286 U.S. at 81–82, 89.

<sup>15</sup> 313 U.S. 299 (1941).

<sup>16</sup> *Id.* at 318.

<sup>17</sup> *Smith v. Allwright*, 321 U.S. 649 (1944).

<sup>18</sup> *Id.* at 660.

<sup>19</sup> *Id.* at 664.

<sup>20</sup> 345 U.S. 461 (1953).

<sup>21</sup> *Id.* at 484.

<sup>22</sup> *Nixon v. Herndon*, 273 U.S. 536, 539–40 (1927).

<sup>23</sup> *Smith v. Allwright*, 321 U.S. 649, 653 n.6 (1944).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 664.

processes" and the state-sponsored primary merely "ratified]" the results of the pre-primary;<sup>26</sup>

- *Coincidental voter qualifications*: The same state-specified qualifications for participating in the primary election were the qualifications for participation in the "private" pre-primary, except African Americans were prohibited from voting in the pre-primary;<sup>27</sup>
- *Substantial political effects*: The pre-primary election was an "election in which public issues [were] decided or public officials selected."<sup>28</sup> It was the only election that had "counted" for fifty years and the "effect" of the pre-primary plus primary system was to strip African Americans of "every vestige of influence in selecting . . . officials"<sup>29</sup> and make their vote an "empty vote;"<sup>30</sup>
- *Implicit state sanction*: The state "permit[ted] within its borders the use of any device that produce[d] an equivalent of the prohibited election;"<sup>31</sup>
- *Action and sanction by state officials*: Officials "panoplied with state power," "clothed with the authority [of the State]," and charged with conducting elections, voted in the pre-primary, which itself was a "device to defeat the [primary] law."<sup>32</sup>

There are at least two ways to view the *White Primary Cases*.<sup>33</sup> The first is to dismiss them as sui generis holdings limited to the egregious practices of disenfranchisement, the unique party monopoly conditions of the South, and the fundamental importance of race to the post-Civil War amendments. The Democratic primary in various Southern states constituted, for all practical purposes, the general election. The incumbent officeholders, the party functionaries in the cloak of state law, and the individuals with power equal that of official state actors to determine the content of the ballot used the primaries

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<sup>26</sup> Terry v. Adams, 345 U.S. 461, 469 (1953) (opinion of Black, J.); see also id. at 484 (Clark, J., concurring) ("Whether viewed as a separate political organization or as an adjunct of the local Democratic Party, the Jaybird Democratic Association is the decisive power in the county's recognized electoral process. Over the years its balloting has emerged as the locus of effective political choice.").

<sup>27</sup> Id. at 469 (opinion of Black, J.).

<sup>28</sup> Id. at 468.

<sup>29</sup> Id. at 470.

<sup>30</sup> Id. at 484 (Clark, J., concurring); see also id. ("[T]he Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.").

<sup>31</sup> Id. at 469 (opinion of Black, J.) (emphasis added).

<sup>32</sup> Id. at 473, 475 (Frankfurter, J., concurring).

<sup>33</sup> Various modern interpretations of the *White Primary Cases* emerged in the five opinions produced by Morse v. Republican Party of Va., 517 U.S. 186 (1996).



to disenfranchise the class of voters that the Fourteenth and Fifteenth Amendments were enacted to protect. In addition, one cannot separate the white primaries from the apartheid conditions that existed in the South at the time. It is pure folly to discuss party rights or the right to vote in a primary election when the state indirectly or directly prohibits virtually all African Americans in the jurisdiction from participating in the general election. To be sure, the Democratic Party assisted the "state" in its policy of complete disenfranchisement, but the state poisoned its electoral process in all respects. Despite its democratic façade, the primary election was a mere microcosm of the racial oligarchy cementing its power.<sup>34</sup>

A second way to view the *White Primary Cases*, however, is to consider them definitive interpretations of the constitutional status of party primaries. Much of the language in cases applying such an approach suggests that when the primary forms an integral part of the electoral machinery used to select governing officials, constitutional restrictions applicable to general elections would apply.<sup>35</sup> Thus, because today's major parties remain creatures of state law that exercise remarkable power, and because the primary continues to be decisive for many, if not most, elections, parties' state actor status even outside the context of race discrimination remains intact. Thus, the Constitution provides no haven for party rights, but requires that primaries pass all the tests of nondiscrimination applicable to other forms of state action.

## 2. *Party Primaries and State Action Doctrine*

Although this second view of the *White Primary Cases* may generally prevail, noticeably absent in the recent case law and the litera-

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<sup>34</sup> See generally V.O. Key, Jr., *Southern Politics in State and Nation* 619-43 (1984) (discussing place of white primary in Jim Crow South).

<sup>35</sup> See *id.* at 624. A short step away from that rule is a corollary maintaining that state or federal laws seeking to preserve those constitutional rights are also valid, meaning that the party (viewed as a state actor rather than a private association) cannot assert its First Amendment rights as a barrier to the enforcement of such a law. For example, when the Virginia Republican Party required the payment of a registration fee in order to participate in the party's nominating convention for United States Senator, the Court held that Section Five of the Voting Rights Act applied. See *Morse*, 517 U.S. at 190, 203-07. Of course, as the various opinions in *Morse* confirm, that case could fall squarely under the first view of the *White Primary Cases* as well. After all, the whole purpose of the Voting Rights Act was to prevent states from using "standard[s], practice[s], and procedure[s]" with respect to voting that they had used to disenfranchise racial minorities. See 42 U.S.C. § 1973c. One of the questions confronting the Court in *Jones* was whether the blanket primary law—to the degree that it, like the Voting Rights Act, was expanding the franchise and enriching the constitutional protection of the right to vote—was similarly immune to the parties' associational rights claims. See *infra* notes 151-153 and accompanying text.

ture on primaries and parties is any honest appraisal that incorporates these cases into the larger doctrine of case law on state action. I do so only briefly here. As a general rule, state action will not be found unless: (1) the actor is an agent of the government;<sup>36</sup> (2) the actor performs a function “traditionally exclusively reserved to the State;”<sup>37</sup> or (3) the government “jointly participates” with the private actor.<sup>38</sup>

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<sup>36</sup> See *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (explaining that despite authorizing statute's language suggesting it was not agency of state, Amtrak was considered state actor because President appointed directors, and because it was established to pursue federal objectives). See also *id.* at 399 (“[A] corporation is an agency of the Government . . . when the State has specifically created that corporation for the furtherance of governmental objectives . . .”).

<sup>37</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (holding that private utility does not need to provide due process before cutting off service). See also *NCAA v. Tarkanian*, 488 U.S. 179, 197 n.18 (1988) (holding that NCAA does not perform traditional or exclusive state function); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) (holding that private special education school is not state actor); *Flagg Bros. v. Brooks*, 436 U.S. 149, 156–57 (1978) (holding that warehouseman's proposed sale of goods entrusted to him for storage as permitted by state law not state action); *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (finding shopping center is not state actor); *Evans v. Newton*, 382 U.S. 296, 301–02 (1966) (finding that running public park constitutes public function); *Marsh v. Alabama*, 326 U.S. 501, 502, 509–10 (1946) (holding that city run by private company is subject to First Amendment).

<sup>38</sup> The classic case here, of course, is *Shelley v. Kraemer*, 334 U.S. 1 (1948), which held that judicial enforcement of racially restrictive covenants constituted state action violating the Fourteenth Amendment. *Id.* at 20. The limits of *Shelley*'s seemingly all-encompassing principle are difficult to determine. See Erwin Chemerinsky, *State Action*, at 210 (PLI Litig. & Admin. Practice Course, Handbook Series No. 618, 1999), WL 618 PLI/Lit 183 (“*Shelley* remains controversial because ultimately everything can be made state action under it. If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution.”); Comment, *The Impact of Shelley v. Kraemer on the State Action Concept*, 44 Cal. L. Rev. 718, 733 (1956) (“If obtaining court aid to carry out ‘private’ activity ‘converts’ such private action into ‘state’ action, then there could never be any private action in any practical sense.”). This “entanglement,” “state involvement,” “encouragement,” or “joint participation” exception has been applied in a wide variety of cases. See *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982) (holding that judicial enforcement of prejudgment attachment constitutes state action, and applying two-part test for state action: “First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State . . . or by a person for whom the State is responsible. . . .” and second, the actor must be “a state official, [someone who] acted together with or has obtained significant aid from state officials, or [someone whose] conduct is otherwise chargeable to the State”). See also *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622–28 (1991) (finding peremptory challenges of jurors based on race in civil cases to constitute state action); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350, 358–59 (1974) (finding that extensive and detailed government regulation of private utility does not by itself constitute state action); *Norwood v. Harrison*, 413 U.S. 455, 463–68 (1973) (finding state lending of textbooks to racially segregated schools—i.e., “giving significant aid”—sufficient to constitute state action); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171–77 (1972) (holding that state-conferred liquor license does not turn private club into state actor); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725–26 (1961) (holding that government lease of parking space to private restaurant created symbiotic relationship sufficient to create state action). But

What the *White Primary Cases* showed, and what the current laws establishing and regulating major-party primaries further demonstrate, is that such primaries may possess all three qualifications for state action and certainly would satisfy at least one of them. Again, I do not want to emphasize these tests as important for settling the party autonomy issue or as generally useful in deciding questions of state action, but parties' state actor status according to traditional doctrine forces those of us defending party autonomy to develop a unique explanation for why these particular state actors deserve heightened associational protections.

First, one might argue that the party primary, run as it is by the government to serve governmental interests, constitutes state action regardless of whether party organizations themselves constitute state actors. State officials, usually from the boards of elections,<sup>39</sup> oversee the primary. State laws specify in exhaustive detail how to qualify for candidacy (i.e., primary ballot access requirements), how to run the primary, and how to nominate candidates.<sup>40</sup> Indeed, because party organizations play the decisive role in proposing the language of the primary election statute that they, in effect, impose on themselves, the organization as a putatively private entity takes itself out of the formal administration of the primary. To be sure, the leaders of the parties are not appointed like the board of directors of Amtrak, a state-sponsored and state-chartered corporation, but the state has "specifically created [party primaries] for the furtherance of governmental objectives."<sup>41</sup> Among other state interests they further, the major-party primaries serve the government's objective of winnowing out candidates for the general election ballot.<sup>42</sup> The state could choose many

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see *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57-58 (1999) (finding no joint participation between insurer and state government despite extensive regulation).

<sup>39</sup> See, e.g., Del. Code Ann. tit. 15, § 3101A (Michie 1999) ("The nominations of candidates by all major political parties for all offices to be decided at a general election shall be conducted by direct primary. All such primaries shall be conducted by the county departments of election . . .").

<sup>40</sup> See, e.g., W. Va. Code Ann. § 3-5-4 (Michie 1999) ("In primary elections a plurality of the votes cast shall be sufficient for the nomination of candidates for office.").

<sup>41</sup> *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995) (emphasizing presidential appointment of Amtrak's Board). Cf. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543-47 (1987) (holding that USOC was not state actor despite government charter and funding).

<sup>42</sup> Primaries arguably serve other governmental interests, because they are part of the state machinery of elections more generally. For example, some courts have found that primaries serve the rather amorphous interests of fostering legitimacy, increasing civic participation, and enhancing representation. See, e.g., *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992) (noting that primaries "enhanc[e] the democratic character of the election process").

means toward that end,<sup>43</sup> but almost all have codified in law a primary system that specifies qualifications for party membership and primary election candidacy.<sup>44</sup>

Second, even if the party organization, rather than the state, operates the primary, the function it performs—namely, the administration of an election—is one “traditionally exclusively reserved to the State.”<sup>45</sup> Election administration is unlike providing electricity,<sup>46</sup> running a collegiate athletic association,<sup>47</sup> or opening a shopping center;<sup>48</sup> it is a function that, over the last century of American history, at least, only the government has performed.<sup>49</sup> Of course, part of the unspoken disagreement in the case law discussed in the next section revolves around whether the primary is even an election, *per se*. A host of private actors can meet to “nominate” and endorse candidates, and perhaps the libertarian might argue that the state-sponsored primary acts merely as a large meeting place in which private actors come together to endorse a candidate.<sup>50</sup> Thus, the function of party nomination and endorsement that the primary serves is explicitly nongovernmental. The argument becomes a bit circular at this point. If one characterizes a primary as explicitly a party affair in which a party endorsement occurs as it would in a meeting of private citizens, then the primary’s function is neither traditionally nor exclusively reserved to the state. On the other hand, if one considers the primary a first-stage election, or if one concentrates on those aspects specified by law that distinguish it from a private meeting for candidate endorsement, then the only entity that has ever served such a function

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<sup>43</sup> See Nathaniel Persily, *Candidates v. Parties: Constitutional Constraints on Primary Ballot Access Requirements*, 88 Geo. L.J. (forthcoming 2001) (manuscript at 46, on file with the *New York University Law Review*) (“[T]he Constitution does not *require* political parties or states to run nomination processes by primary election.”).

<sup>44</sup> See E. Joshua Rosenkranz, Brennan Center for Justice, *Voter’s Choice ’96: A 50-State Report Card on the Presidential Elections 20-22 (1996)* (describing deadlines for party membership registration and describing ways to register for primary ballot candidacy); see generally Winkler, *supra* note 5, at 876-91 (describing development of state regulations of primary elections and their early judicial treatment).

<sup>45</sup> *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

<sup>46</sup> *Id.*

<sup>47</sup> *NCAA v. Tarkanian*, 488 U.S. 179 (1988).

<sup>48</sup> *Hudgens v. NLRB*, 424 U.S. 507 (1976).

<sup>49</sup> For a discussion of the more private nomination processes of the last century, see generally John H. Aldrich, *Why Parties? The Origin and Transformation of Political Parties in America* 68-156 (1995) (describing formation of political parties as means by which rational political actors sought to achieve political goals), Larry D. Kramer, *The Confidence of the People: Political Parties and the Constitution* (unpublished manuscript, on file with the *New York University Law Review*) (describing central role of political parties in electoral process).

<sup>50</sup> Cf. Persily & Cain, *supra* note 5, at 782-85 (discussing libertarian paradigm).

has been the state. The level of generality at which one defines the function of a primary thus will determine whether one considers it traditionally and exclusively reserved to the state. The Court, however, has had little trouble in describing the current regime of primary elections as serving traditional and exclusive state functions.<sup>51</sup>

Finally, one might argue that the extensive regulatory scheme for primary elections amounts to state endorsement, encouragement, and entanglement, and thus, state action. As mentioned above, states define political parties, specify the criteria for membership and candidacy, fund and run the primaries, and, most importantly, confer a preferred status of automatic general election ballot access to party nominees and allow party names to appear on the ballot. Of course, the mere fact that parties and primaries are regulated extensively does not create state action.<sup>52</sup> But even if one does not view the state as acting by itself in administering the primary, surely the running of a primary election creates a relationship that rises to the level of state action as would, for example, the state's leasing of a parking space.<sup>53</sup> Judicial enforcement of a party's exclusion of blacks from its primary, moreover, does not differ materially from situations where judges allow individuals to conduct race-based peremptory challenges in civil cases,<sup>54</sup> where states lend textbooks to a segregationist school,<sup>55</sup> or

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<sup>51</sup> See *Flagg Bros. v. Brooks*, 436 U.S. 149, 158-59 (1978) (comparing *White Primary Cases* with other state action cases); Chemerinsky, *supra* note 38, at 207 ("In many ways, the *White Primary Cases* are the paradigm instance of the public functions exception, but also an example from which it is difficult to generalize. Running an election is a task that has been, traditionally, exclusively done by the government."). Perhaps the litmus test could be whether the primary serves as the de facto general election, as did the Jaybird primary in *Terry v. Adams*, 345 U.S. 461, 469 (1953). When the primary is decisive in producing the nearly unbeatable general election victor, it performs the traditionally exclusive function that the general election otherwise performs. It is beyond dispute that general elections constitute a traditional governmental function. If the primary serves as the decisive election because of gerrymandering or because it occurs in a one-party state as in the *White Primary Cases*, then the primary subsumes all of the general election's traditionally exclusive functions. Thus, whether the primary passes this test of the state action doctrine becomes an empirical question; the answer depends on how the particular primary, rather than primaries in general, operate in a given electoral scheme. Therefore, the fact that either the Jaybird or Democratic primary may have been the decisive election in Texas in the 1950s would no longer bear on whether the primary constituted state action once two-party competition arose to make the general election meaningful.

<sup>52</sup> See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57-58 (1999) (holding that "an insurer's decision to withhold payment . . . is not fairly attributable to the State").

<sup>53</sup> See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725-26 (1961) (holding that government lease of parking space to private restaurant created symbolic relationship sufficient to create state action). Cases subsequent to *Burton* have strictly limited its holding. See *supra* notes 37-38.

<sup>54</sup> *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 631 (1991) (finding that peremptory challenges of jurors based on race in civil cases constituted state action).

<sup>55</sup> *Norwood v. Harrison*, 413 U.S. 455, 463-68 (1973).

where private parties create racial covenants.<sup>56</sup> Again, if the parties are more like the Jaybirds in the last of the *White Primary Cases*, as opposed to the statutorily defined and supported state creations that we have today or that existed in the early *White Primary Cases*, then the issue becomes more complex.

This listing and application of state action case law should not be read as a general defense or reconciliation of the inconsistencies in this larger doctrine. The discussion merely should clarify why today's major-party primary elections probably pass current tests used to identify state action. Indeed, it is difficult to construct a test that would cover all of the obvious forms of state action but would consider major-party primaries to be private affairs. To a certain degree, one's answer to the state action question depends on whether one focuses on the party or on the primary: A party focus would tend toward private associational status, while a primary focus would tend toward nearly pure state action. Because today's primaries present relatively easy cases of state action, finding examples of truly private primaries requires spinning off hypotheticals (e.g., what if the Democratic primary actually took place among a small group of people in their living room?) or searching back to a time when America's political parties were very different types of organizations. This Article will eventually question whether the detailed regulation of parties violates parties' rights, but, for the moment, the parties' acquiescence to, and sanction of, this privileged and symbiotic relationship with the state earns them state actor status.

### 3. *Parties, Primaries, and the Right of Expressive Association*

Although today's major-party primary elections may constitute state action, it does not follow that parties in all their forms become state actors. At times, political party organizations exhibit features identical to other private associations or interest groups: They meet to discuss issues of collective concern, they formulate policy programs, and in a literal sense they "speak," "print," "assemble," and "petition for redress of grievances" in ways identical to other collections of individuals.<sup>57</sup> When courts (or anyone else) focus on parties exhibiting such behaviors, the First Amendment's capture of parties within its

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<sup>56</sup> *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

<sup>57</sup> See U.S. Const. amend. I. In fact, some states legally recognize the expressive character of political parties. See, e.g., Haw. Rev. Stat. Ann. § 11-61(a) (1993) ("A political party shall be an association of voters united for the purpose of promoting a common political end or carrying out a particular line of political policy and which maintains a general organization throughout the State, including a regularly constituted central committee and county committees in each county . . .").

ambit seems most obvious. Courts have considered the central question in these cases to be whether a party's First Amendment right of "expressive association" necessarily entails the party organization's right to exclude or include certain voters from the process of candidate nomination through the state-sponsored primary.<sup>58</sup>

The case law on freedom of expressive association evolved in tandem with the law of party primaries in 2000. Two days after issuing its decision in the California blanket primary case, the Court held in *Boy Scouts of America v. Dale*<sup>59</sup> that New Jersey's public accommodations law banning discrimination on the basis of sexual orientation could not be applied to the Boy Scouts of America.<sup>60</sup> Deferring to the Boy Scouts's assertions that homosexuality is inconsistent with its teachings and that the presence of a gay scoutmaster would undermine that expression, the Court in *Dale* relied on classic precedent regarding freedom of association<sup>61</sup> as well as a political party association case, *Democratic Party of United States v. Wisconsin ex rel. La Follette*,<sup>62</sup> to find that the public accommodations law violated the Boy Scouts's freedom of expressive association.<sup>63</sup>

In most cases dealing with the freedom of expressive association, the inquiry requires both characterizing the organization that claims the right and explaining how the law will affect organizational membership so as to burden severely the organization's expression. Because maintaining an all-male membership was insubstantial to the Rotary Club and Jaycees's expression, for example, a law preventing gender discrimination could be applied.<sup>64</sup> A different result would

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<sup>58</sup> Because I am in general agreement with Professor Issacharoff's expert and comprehensive treatment of these issues, see Issacharoff, *supra* note 5 at 282-98, once again I provide only a condensed discussion here.

<sup>59</sup> 120 S. Ct. 2446 (2000).

<sup>60</sup> *Id.* at 2457.

<sup>61</sup> See *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (finding that First Amendment protected right of St. Patrick's Day parade to exclude gays despite state's public accommodations law); *N.Y. State Club Ass'n v. City of N.Y.*, 487 U.S. 1 (1988) (finding public accommodations law did not infringe on private club's constitutionally protected right to exclude); *Bd. of Dirs. of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) (holding that application of public accommodations law to require organization to admit women did not violate right of expressive association); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (same); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (holding that judicial order to produce membership lists violated members' right of expressive association).

<sup>62</sup> 450 U.S. 107 (1981).

<sup>63</sup> *Dale*, 120 S. Ct. at 2451-57.

<sup>64</sup> See *Rotary Club*, 481 U.S. at 548 ("[T]he evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various purposes."); *Roberts*, 468 U.S. at 627 ("There is . . . no basis . . . for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views.").

follow if the gender issues were central to the associational mission. Thus, in *Dale*, the Court considered teachings regarding sexuality to be central to the Boy Scouts's mission, and concluded that forced inclusion of homosexuals as scoutmasters would alter fundamentally the nature of the organization.<sup>65</sup> In addition to characterizing the organization and the intrusion, of course, the state must also prove that the law serves a compelling interest, such as the interest in preventing discrimination.<sup>66</sup>

At one level, applying the inquiry to political parties appears quite easy. Parties are the quintessential political organizations, and state laws that force the inclusion of unwanted members would seem to undermine fundamentally the purpose of the organization. Forcing the Republican Party to include Democrats, for example, would eviscerate what it means to be a Republican. Because parties, more than any other political organization, exist to advance an ideological program and elect adherents to that program, state action that hinders the party mission through forced inclusion of outsiders would seem to intrude on the party's freedom of expressive association. As we will see, the *Jones* majority subscribed to this view.<sup>67</sup>

This argument sounds sensible and uncomplicated until one attempts to tie it to the modern conception of party membership and the unique legal regime of primary elections. Unlike Rotary Clubs, the Jaycees, or the Boy Scouts, party organizations do not prevent anyone from enrolling as a member.<sup>68</sup> Party "membership" is a creature of state law, with qualifications usually no greater than those required of voters generally.<sup>69</sup> The process of becoming a party member usually involves interactions with the state (i.e., checking off a party on the voter registration form) that are completely outside of the view of the party organization. To be sure, no state (to my knowledge) allows individuals to be members of two parties at once, but many states allow people to claim any party membership on primary election day, while some require no declaration of party affiliation in order to participate in a party's primary.<sup>70</sup> States vary considerably in

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<sup>65</sup> *Dale*, 120 S. Ct. at 2453-57.

<sup>66</sup> See *Roberts*, 468 U.S. at 622-26.

<sup>67</sup> See *infra* text accompanying notes 138-149.

<sup>68</sup> It might appear I am assuming the conclusion of the argument at the start (i.e., that parties do not have the right to object to laws defining party membership). I only mean to draw attention to the unique character of a party organization as one whose membership is defined by state law and where no test relevant to the parties' associational expression generally impedes anyone from joining.

<sup>69</sup> See, e.g., Kan. Stat. Ann. § 25-215(1) (1994) (requiring only that voters be at least age eighteen, registered to vote, citizens, and residents of voting area).

<sup>70</sup> See *infra* note 155 and accompanying text.



the "meaningfulness" of party membership as it relates to primary voter qualifications, but it is state law, rather than some action by the party organization, that determines the electoral relevance of such membership.

Furthermore, as the discussion of the state actor question suggested, a primary election differs considerably from the election of the president of a private club or the choice of the scoutmaster of a troop. Primaries are the first stage in a state-sponsored process of selection of those who will hold state power and often, because of gerrymandering or regional patterns in partisanship, represent the decisive election. What really sets primaries apart, however, is that they are not the means used by parties for choosing their leadership. They are the means for nominating candidates. The primary election does not produce the chairman of the party; party rules usually govern that process. The primary produces the candidates who can run on the party's line in the general election. To be sure, state laws that have the effect of changing who can run on the party's ballot line affect the "message" of the party by tying the party label to a candidate who may misrepresent it in the campaign or in elective office.<sup>71</sup> But expression of the association qua association is unrelated to the candidates who run. Party members can organize, advertise, assemble, endorse, and in all other ways express themselves individually and collectively outside the voting booth. Nothing in the laws regulating the primary electorate affects parties' ability to do all the things other organizations do in exercising their right of expressive association.

This discussion should not be read as suggesting that regulation of the primary electorate does not affect parties' ability to perform critical functions. I argue precisely the opposite, and I believe that the freedom of association should be the constitutional home for a more functional theory of party autonomy. The functions political parties perform, however, differ from those of the Rotary Club, Jaycees, or Boy Scouts, and relate to the parties' unique and critical position in the democracy and the electoral system. Constitutional analysis of parties' associational claims must be sensitive to their uniqueness and must ground itself in the parties' role in interest group representation and electoral competition.

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<sup>71</sup> As will become clear later, even those who believe in the theory of primary elections as associational expression run up against a problem when the party wants to include non-members in its primary. While it may be true that associations have a right to coalesce with members of other groups, it would be difficult to claim a right of expressive association to include individuals who specifically have disavowed membership.

### B. *Distinguishing Between Major and Minor Parties*

Despite the robust protection it has accorded major-party claims of expressive association, even the Supreme Court, as its consideration of associational claims of minor parties reveals, recognizes the difference between a political party and a normal association.<sup>72</sup> The duplicity in the case law is all the more surprising, given that minor parties can present a much more persuasive argument that they are not state actors and behave more like purely expressive associations.<sup>73</sup> The Libertarian Party and the Peace and Freedom Party appear more like interest groups—rarely holding a position of formal state power, dedicated to a much more defined ideological program, conducting nomination processes that will have virtually no actual political impact on the system, and usually unrepresented in the process of crafting state laws governing nominations. In an ironic and telling move, however, the Supreme Court has accorded minor parties fewer associational rights than major parties.

The Supreme Court has shown hostility to claims of party associational rights in only two types of cases: those already discussed dealing with race, and those where minor-party claims threaten to destabilize the election.<sup>74</sup> In contrast to classic expressive association cases or to the major-party autonomy cases discussed in the next section,<sup>75</sup> the Court in the minor-party cases has applied a balancing test: weighing the severity of the rights deprivation against the importance of the state interests, and then determining whether the law is properly tailored toward the achievement of those interests. In the most recent case on point, *Timmons v. Twin Cities Area New Party*,<sup>76</sup> the Court rejected a claim brought by the Minnesota New Party challenging the state's ban on "fusion" candidacies, which prohibited a candidate from appearing on the ballot as the candidate of more than one party.<sup>77</sup> Despite finding that the party had the right to choose its own "standard bearer," the majority ruled that the fusion ban did not burden severely the party's right to expression and association (principally because the New Party's preferred candidate would still appear

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<sup>72</sup> See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357-58 (1997).

<sup>73</sup> See Brief for the Brennan Center for Justice at New York University School of Law as Amicus Curiae in Support of Neither Party at 24-26, *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402 (2000) (No. 99-401) [hereinafter Brennan Center Brief] (arguing that Court should recognize minor parties as pure First Amendment associations, but should recognize major parties as state actors subject to state control).

<sup>74</sup> See *infra* note 79.

<sup>75</sup> See *infra* Part I.C.

<sup>76</sup> 520 U.S. 351 (1997).

<sup>77</sup> *Id.* at 353-54.

on the ballot, only on a different party's line).<sup>78</sup> Thus, the state easily could justify the ban as serving important interests in preserving the integrity of the ballot and stabilizing the two-party system.<sup>79</sup>

Such a decision to begin "balancing" is often the saving grace for an election law, and cases involving minor-party autonomy are not an exception to this rule. When counterposed against state interests in stability, preserving the integrity of the ballot, or even preserving the two-party system, voters', candidates', or minor parties' rights tend to lose in the balance. Applying such balancing, the Court has upheld prohibitions on write-in voting,<sup>80</sup> "sore loser" candidacies,<sup>81</sup> and, to a lesser extent, restrictions on minor-party and independent candidate ballot access.<sup>82</sup> As we will see in the discussion of the blanket primary case, one can view the varied opinions in *Jones* as arising largely from a disagreement as to what constitutional test—balancing or strict scrutiny—applies to laws intruding on a major party's rights of association and autonomy.

*Timmons* is instructive because the Court was painfully honest in defining the bizarreness of associational rights claims in the electoral arena. Although the case dealt with a general election ballot, the issue was whether the ballot would list the chosen candidate of the minor party (i.e., the one for whom the *association* wished to *express* its preference).<sup>83</sup> Were the Court to analogize to the expressive association cases just discussed, it would compare it to the state telling parade organizers that they could not choose a certain person to be the grand marshal,<sup>84</sup> or telling the Boy Scouts they could not have a certain person as troopmaster.<sup>85</sup> Nevertheless, Chief Justice Rehnquist's opinion for the *Timmons* majority concluded:

Minnesota has not directly precluded minor political parties from developing and organizing. Nor has Minnesota excluded a particu-

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<sup>78</sup> Id. at 360-63.

<sup>79</sup> Id. at 364, 369-70.

<sup>80</sup> *Burdick v. Takushi*, 504 U.S. 428, 430 (1992).

<sup>81</sup> *Storer v. Brown*, 415 U.S. 724, 735 (1974). "Sore loser" refers to a candidate who loses a primary election and then tries to run as an independent.

<sup>82</sup> See *Munro v. Socialist Workers Party*, 479 U.S. 189, 199 (1986) (upholding requirement that minor-party candidate must receive one percent of total votes cast in primary in order to appear on general election ballot); *Am. Party v. White*, 415 U.S. 767, 780-81 (1974) (upholding similar requirement). But see *Anderson v. Celebrezze*, 460 U.S. 780, 805-06 (1983) (striking down early filing deadline for independent presidential candidate); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) (holding that ballot access restriction was not "least restrictive means" of achieving state goal).

<sup>83</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997).

<sup>84</sup> *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

<sup>85</sup> *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446 (2000).

lar group of citizens, or a political party, from participation in the election process. The New Party remains free to endorse whom it likes, to ally itself with others, to nominate candidates for office, and to spread its message to all who will listen.<sup>86</sup>

Thus, the right to nominate candidates for the general election ballot is, in the end, quite different from the right to associate. *Timmons* draws out the distinctions quite well: Political parties' ability to nominate candidates is what sets them apart from, rather than what brings them logically closer to, other organizations laying claim to associational rights. State regulation of parties' nomination processes infringes on a right (to the degree that there is one) enjoyed by parties because of their place in the electoral scheme, not because of anything in their associational nature, which primary election laws leave untainted.

### C. *Strict Scrutiny for Intrusions on Major-Party "Freedom of Association"*

For those who have watched the Court's jurisprudence in this area closely, the *Jones* decision was the natural consequence of a series of decisions emanating from the Court over the last half-century. When *Jones* came before the U.S. District Court for the Eastern District of California in 1997, a few issues regarding the legal regulation of participation in party nomination processes had become settled: (1) Unaffiliated voters did not have a constitutional right to vote in a party's primary; (2) State laws could not force a national party to accept at its convention delegates chosen in ways violative of the party's rules; (3) States could not force a party to close its primary to independents that the party organization wanted to include; (4) States could not prohibit a party organization from issuing endorsements in a primary; and (5) States could not prescribe the organizational form for a party.

First, in *Nader v. Schaffer*,<sup>87</sup> the Supreme Court summarily affirmed a lower court ruling<sup>88</sup> that held that state laws requiring party membership to vote in a primary did not violate voters' rights.<sup>89</sup> The plaintiffs in that case sued the state of Connecticut, and the Republican and Democratic parties, arguing that the primary election was an integral part of the state's electoral machinery and thus that their right to vote was impaired by a law that conditioned primary participation

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<sup>86</sup> *Timmons*, 520 U.S. at 361 (citations omitted).

<sup>87</sup> 429 U.S. 989 (1976).

<sup>88</sup> 417 F. Supp. 837 (D. Conn. 1976).

<sup>89</sup> *Id.* at 849-50.

on an affiliation with a party whose beliefs they did not share.<sup>90</sup> Had the plaintiffs prevailed, all such closed primary systems would have been unconstitutional. The Court rejected their claim, however, holding that the right to limit primary participation inheres in the party's associational right, and that the state has an interest in preserving those rights.<sup>91</sup> The case is an interesting one, even if rarely cited and not too difficult to resolve, because it highlights the constitutionally relevant actors in cases challenging restrictions on primary participation: a party organization, a voter, and the state. The plaintiffs in these cases challenge either a party rule or a state statute that sometimes, but not always, incorporates a party rule. Sometimes, as in *Nader*, individual voters will sue both the state and the parties to gain access to the primary, while in other cases, such as in *Tashjian v. Republican Party*,<sup>92</sup> a party will challenge an identical state law alleging that it violates the party's freedom of association.

The seeds for the *Tashjian* decision were sown with the Court's decision in *Democratic Party v. Wisconsin ex rel. La Follette*.<sup>93</sup> The *La Follette* Court adjudicated a challenge brought by the state of Wisconsin to the rules governing the seating of delegates at the 1980 Democratic National Convention. Those rules, in effect, prohibited the seating of delegates selected through primary systems that allowed the participation of nonparty members.<sup>94</sup> Wisconsin employed an open primary, meaning that any voter, regardless of party affiliation, could vote in the presidential preference primary. Because Wisconsin's primary allowed Independents and Republicans to vote in the Democratic primary, delegates bound to vote in conformity with the results of the primary were not "qualified" to sit at the Democratic Convention.<sup>95</sup>

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<sup>90</sup> Id. at 840.

<sup>91</sup> Id. at 847.

<sup>92</sup> 479 U.S. 208 (1986). For a discussion of *Tashjian*, see *infra* notes 98-101 and accompanying text.

<sup>93</sup> 450 U.S. 107 (1981).

<sup>94</sup> Id. at 109-10.

<sup>95</sup> Id. at 109, 112. This description glosses over many nuances of both the state and national Democratic Party rules and the Wisconsin electoral law, such as the fact that Wisconsin employed both an open presidential preference primary and a separate caucus limited to Democratic party members. Because the delegates selected by the caucus were bound by Wisconsin law to vote according to the presidential preference primary, the Court still viewed the state law as conflicting with the rules of the Democratic National Convention. Id. at 112. The case was thus somewhat similar to an earlier case, *Cousins v. Wigoda*, 419 U.S. 477 (1975), in which the Supreme Court held that Illinois state courts did not have the power to force the seating of delegates elected through state party procedures that violated the national party's rules. Id. at 483-84.

The facts of the case presented the party in its purest form of association—i.e., as an assembly of delegates from across the nation united by a common partisan purpose. Much of the language of the *La Follette* opinion, therefore, has become standard (even when logically inapplicable) for opinions in party autonomy cases. “[T]he freedom to associate for the ‘common advancement of political beliefs,’” the Court held, “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.”<sup>96</sup> “[T]he inclusion of persons unaffiliated with a political party may seriously distort its collective decisions—thus impairing the party’s essential functions—and . . . political parties may accordingly protect themselves ‘from intrusion by those with adverse political principles.’”<sup>97</sup> Although the *La Follette* opinion itself had a federalism spin—that is, the facts of the case presented a unique conflict between an individual state law and national party rules—the Court exploited the opportunity to hint at a party’s robust First Amendment right of association, which included the right to exclude outsiders from participating in its nomination methods.

The stage thus was set for a case with facts converse to *Jones, Tashjian v. Republican Party*,<sup>98</sup> in which the Court held that a law preventing a party from opening its primary to independent voters violated the party’s associational freedoms.<sup>99</sup> In *Tashjian*, Connecticut articulated state interests familiar to most election law cases, namely “administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.”<sup>100</sup> As weighty and determinative as these concerns often are in the context of electoral regulation, the Court found them to be paternalistic in this particular context—a subterfuge for the state, which was dominated by one party (the Democrats), determining what was best for the party out of power (the Republicans). As Justice Marshall’s opinion for the majority explained:

Under these circumstances, the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, as to the optimum methods for preserving party integrity lose much of their force. The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point “even if the State were correct, a State, or a court, may

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<sup>96</sup> *La Follette*, 450 U.S. at 122 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)).

<sup>97</sup> *Id.* (quoting *Ray v. Blair*, 343 U.S. 214, 221-22 (1952)).

<sup>98</sup> 479 U.S. 208 (1986).

<sup>99</sup> *Id.* at 210-11.

<sup>100</sup> *Id.* at 217.

not constitutionally substitute its own judgment for that of the Party." The 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.<sup>101</sup>

Thus, after *Tashjian*, it was clear that the state could not force a party to restrict participation in its primary to party members. The precise question in *Jones*, however—whether a state could force a party to *expand* participation in its primary—remained unanswered.

Although it did not involve a regulation of the primary electorate per se, one other pre-*Jones* case protecting party autonomy deserves comment. In *Eu v. San Francisco County Democratic Central Committee*,<sup>102</sup> the Supreme Court once again sided with the party, this time in the face of a state law that prohibited a party organization from endorsing a candidate in a primary election and that mandated a certain organizational form for the party's governing bodies.<sup>103</sup> The anti-endorsement law at issue in *Eu*, more than those at issue in most cases of regulation of party nomination processes, squarely posed a core First Amendment issue. After all, a law prohibiting candidate endorsements quite nakedly restricts political speech: It prohibits what an organization can *say* or *print*. The Court found that the laws regulating party organizational structure, limiting the term of office to two years for state central committee chairs and requiring that the chair rotate between residents of northern and southern California, also infringed upon the party's First Amendment rights—in this case (as in *Tashjian*), the party's freedom of association. "By regulating the identity of the parties' leaders," the Court stated, "the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message."<sup>104</sup> Thus, the *Eu* decision removed any doubt that laws regulating internal party organization—even apart from those specifying the process of primary election—could trigger strict scrutiny under the First Amendment.

This brief recounting of the precedent governing major-party freedom of association should help distinguish between at least two types of nomination methods cases. There are the core expression cases, such as *Eu*, *La Follette*, and *Timmons*, in which a state attempts to regulate the message or organization of the party itself. The state law, in effect, dictates that certain people must be included in the

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<sup>101</sup> Id. at 224 (quoting *La Follette*, 450 U.S. at 123-24 (citation omitted)).

<sup>102</sup> 489 U.S. 214 (1989).

<sup>103</sup> Id. at 216.

<sup>104</sup> Id. at 231 n.21.

party association, that the association must be organized in one way only, or that the organization may not say certain words.<sup>105</sup>

Then, there are the candidate selection or "true" nomination cases, such as the *White Primary Cases*, *Nader*, *Tashjian*, and, as we will see, *Jones*. In these cases, judges must decide whether the state, the party, or the Constitution dictates whether a given voter can participate in a party's primary. An individual's "expression" is impaired only in the sense that she may not enter a polling booth and declare on the ballot the name of her preferred candidate. Her "association" with her preferred candidate may also suffer if the party or the state prevents her from aggregating her vote with others to aid in the nomination of a certain candidate. To the degree that it loses the power to specify who can choose the party's standard bearer, the party organization may also confront a curtailment of its expressive or associational rights. The message a state-regulated primary sends may misrepresent the nature of the association on whose ballot line the candidate will run in the general election. Thus, while one cannot say that the expressive and associative functions are not implicated in the "true" nomination methods cases, it strains the normal definitions of the concepts to say that such laws necessarily invade the core of such rights. More to the point, the injury that occurs in major-party nomination methods cases is chiefly an instrumental one—candidates preferred by a certain group of voters will have a lessened probability of advancing to the general election and eventually to the office they seek. This instrumental injury is one that only a party association can suffer. No other association plays a role in elections and government such that regulation of membership affects formal representation in government.

## II

### THE BLANKET PRIMARY AND THE PARTIES' RIGHT OF DISASSOCIATION

As the California blanket primary case made its way to the Supreme Court, the unanswered question in the case law remained whether the Court's prior holdings that forbade a state from forcing a

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<sup>105</sup> Those who would argue that *La Follette* was about nomination methods as opposed to pure association overlook the fact that the issue there was not the constitutionality of the Wisconsin law; it was whether Wisconsin could force the party to seat certain delegates chosen through the open primary. A party's national convention is the party-as-association in its purest form. The group of delegates votes on the party platform (determining its message, in a sense) as well as on its nominee. Had the Wisconsin Democratic Party sued the state for imposing the open primary law, then the case would be more like *Jones*, in which the selection method itself was at issue.



party to close a primary to "outsiders" also prevented a state from opening a primary to "outsiders" when the party objected. In typical rights parlance, the question was posed as a conflict between a state law that expanded voters' rights to express themselves in the primary of their choice and the constitutional rights of parties (1) to exclude voters from "associating" with them on the ballot or in the voting booth that bears the party's name or (2) to prevent outsiders from warping the "expression" of the party by causing the nomination of a candidate less preferred by "true" party members. This rights talk that necessarily became the language of the advocates in court masked a larger political battle between competing preferences for electoral design and representation of interests.

### *A. The Politics and Empirics of the "Open Primary Initiative"*

Despite public-spirited intentions of expanding participation and eliminating gridlock in government, Proposition 198, "the California Open Primary Initiative," began as a self-serving attempt by one politician to improve his chances of gaining access to the general election ballot. Congressman Tom Campbell, a moderate Republican who had lost an earlier senatorial primary to a more conservative opponent, saw in the blanket primary an opportunity to moderate the primary electorate of his own party and thereby increase his chance of victory in the primary.<sup>106</sup> As stated earlier, the blanket primary allows all voters to vote in any party's primary and even to switch primaries for each race on the ballot.<sup>107</sup> In theory and as intended, one party's voters can vote in the other's primary and thus produce more moderate nominees from both parties. Accompanied by a rag-tag group of political scientists and activists (and the money of Hewlett-Packard) Campbell got behind Proposition 198 and shepherded it through the initiative process.<sup>108</sup> The proponents argued that the initiative would eliminate gridlock and the dominance of the party elite while increasing participation and making the state government and California's congressional delegation more representative.<sup>109</sup>

All of California's political parties opposed the initiative because they feared that the blanket primary would distort their nomination

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<sup>106</sup> See Sherry Bebitch Jeffe, *Why Lungren, So Far, Has Only Attracted Republicans*, L.A. Times, May 3, 1998, at M6; Charles Price, *The Virtual Primary*, Cal. J., Nov. 1995, at 39.

<sup>107</sup> See *infra* note 155.

<sup>108</sup> See Jeffe, *supra* note 106, at M6.

<sup>109</sup> *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1290 (E.D. Cal. 1997), *aff'd*, 169 F.3d 646 (9th Cir. 1999), *rev'd*, 120 S. Ct. 2402 (2000).

processes and make them electorally irrelevant.<sup>110</sup> They thought the blanket primary would weaken parties by allowing outsiders to determine party nominees. In the words of the ballot pamphlet page opposing the initiative, “[a]llowing members of one party a large voice in choosing another party’s nominee—which Proposition 198 would do—is like letting UCLA’s football team choose USC’s head coach!”<sup>111</sup> The initiative’s opponents warned of “raiding” of one party by another—i.e., the deliberate attempt of a party’s membership to cross over and cause the other party to nominate a weaker candidate for the general election.<sup>112</sup> Equally nefarious, perhaps, from the parties’ perspective, were “hedgers”—namely, outsiders who choose to enter another party’s primary in order to ensure that their second choice makes it to the general election ballot.<sup>113</sup> In those districts where one party has a lopsided advantage in registration, for example, partisans of the minority party might enter the majority party’s primary to try and nominate the least offensive of the candidates running there so that their top two candidates might advance to the general election. A related strategic dynamic occurs when voters in one party face a no-choice primary, in which a candidate runs unopposed. Such voters rightfully believe that their vote would be more effective (i.e., not wasted) in the other party’s primary since they might actually help determine that primary’s winner and thus decrease the probability that their least favorite candidate might end up the general election victor. Finally, there are the “sincere” crossover voters, who enter another party’s primary to vote for their favorite candidate—the same one they plan to vote for in the general election.<sup>114</sup> The parties were unsuccessful in persuading the electorate, let alone their own members, of the dangers of the open primary initiative. The initiative passed by an aggregate vote of 59.51% to 40.49%, with sixty-one percent of Democrats, fifty-seven percent of Republicans, and sixty-nine percent of independents supporting it.<sup>115</sup> California thus joined Washington and Alaska as the third state to conduct its elections under the

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<sup>110</sup> *Jones*, 984 F. Supp. 1288 at 1297. The California Democratic Party, the Peace and Freedom Party, and the Libertarian Party of California brought the action against the initiative and the California Republican Party intervened as plaintiffs. *Id.* at 1292.

<sup>111</sup> *Id.* at 1290 (quoting ballot pamphlet).

<sup>112</sup> *Id.* at 1297.

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

<sup>114</sup> See generally Jonathan Cohen, Thad Kousser & John Sides, *Sincere Voting, Hedging, and Raiding: Testing a Formal Model of Crossover Voting in Blanket Primaries* (Sept. 1999) (unpublished manuscript on file with the *New York University Law Review*) (analyzing crossover voting in Washington State Senate primaries from 1986-1998 and California State Assembly and Senate races in 1998).

<sup>115</sup> *Jones*, 984 F. Supp. at 1291.

blanket primary. In the wake of the 1998 election, the first one run under blanket primary rules, analysts rushed to measure the effect of the blanket primary on California politics across a number of dimensions. Although a single election provides little in the way of robust proof, the results even from that single election were consistent with the trend observed in Washington and Alaska:<sup>116</sup>

- On average, about fifteen to twenty percent of voters crossed over in each election in the 1998 primary. Most voters (at least in Los Angeles County) crossed over at least once on the ballot—i.e., more than fifty percent of Democrats cast at least one vote for a non-Democratic candidate.
- No evidence of organized “raiding” appeared in any election.
- All other things being equal, the blanket primary aided in the election of slightly more moderate candidates.
- Republicans were more likely than Democrats to cross over, but crossover voters, in general, were somewhat less ideological than other primary voters.
- Incumbency appears to be the strongest explanation for voters’ crossing over. Voters were much more likely to vote in another party’s primary if the incumbent was of that party, and to stay in their own party’s primary if the incumbent was of their own party. To a lesser extent, if another primary was more competitive than their own, and if the partisan balance in a district favored the other party, voters were more likely to cross over.
- Most voters who crossed over into the opposing party for the primary appear to have continued to support that party’s nominee in the general election (although continued allegiance in the general election depended on why a voter crossed over in the primary—i.e., whether they were hedging or sincerely crossing over). In the 1998 gubernatorial race, for example, approximately sixty-three percent of Republican voters who crossed over into the Democratic primary ended up voting for the Democratic nominee, Gray Davis. Moreover, approximately seventy-five percent of Republicans who crossed over and voted specifically for Davis in the primary also voted for

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<sup>116</sup> The empirical analysis presented in the following bullet points comes from *Voting at the Political Fault Line: California’s Experiment with the Blanket Primary* (Bruce E. Cain & Elisabeth R. Gerber eds.) (forthcoming 2001) (unpublished manuscript on file with the *New York University Law Review*).

For analysis of the effect of various primary systems on candidate ideology and behavior, see generally Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 *J.L. Econ. & Org.* 304 (1998); Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in *Nomination Politics and Congressional Representation* 116 (Peter Galderisi et al. eds., forthcoming 2001).

him in the general election. A similar trend was observed in the race for U.S. Senate, but scholars disagree on the extent of loyal crossover voting in elections to the state legislature.

- Voter turnout in the 1998 primary was only about 1.2% higher than in the preceding midterm election (2.4% higher than in the average midterm election). However, some suggest that the rise was a mere artifact of the Secretary of State's purging of voter rolls. Turnout in the 1998 general election was consistent with previous elections.
- Primary campaign costs appeared to have remained constant. Some had feared that blanket primary candidates would need to spend as much money in the primary as they would in the general election, because they needed to fight for the vote of every voter rather than only the votes of those sharing the candidate's party affiliation.
- Scholars came to different conclusions about the blanket primary's potential effect on the fortunes of women and minority candidates. (The 1998 primary provided little in the way of conclusive evidence.) Some point out that the party organizations weakened by the blanket primary could help compensate for the lack of money and organizational connections that often hurt women and minority candidates. Others argue that women and minority candidates (particularly Latino Republicans in California) benefit from the blanket primary because women and minority voters will defect from their party to cast a vote for the woman or minority candidate running in the other primary.
- The number of voters voting in minor-party primaries skyrocketed. As compared to the historic mean, the 1998 minor-party primaries had between three and thirty times the number of voters traditionally participating in them.

To a large extent, then, California's blanket primary lived up to its promises and warnings. The effect on California's party system as a whole could never be adequately assessed, however, because the Supreme Court cut short California's experiment with democracy before the long-term effects could be measured and evaluated.

### *B. The District Court Decision in California Democratic Party v. Jones*

The district court that initially heard the challenge to California's blanket primary law relied heavily on the case law that upheld restrictive state laws against First Amendment challenges by fringe candi-

dates and minor parties. Performing the balancing test familiar to cases such as *Timmons*, Judge David F. Levi found that the blanket primary imposed "a significant but not severe burden on [the parties'] associational rights," and that the state's interest in "enhanc[ing] the democratic nature of the election process and the representativeness of elected officials" was "substantial, indeed compelling."<sup>117</sup> On the constitutional scales, as Judge Levi viewed them, the balance appeared to tip in favor of the state, and thus he upheld the blanket primary.<sup>118</sup>

The district court opinion in *Jones* is revealing because, on the one hand, it appears to be the most honest attempt yet to perform the balancing test typical of election law cases, and on the other, it shows why such "balancing" inevitably masks a threshold determination on the importance of party autonomy under the First Amendment. After pointing out that neither *Tashjian* nor *La Follette* dealt with the precise question at issue and that the Alaska and Washington Supreme Courts had already upheld the blanket primaries against similar constitutional challenges,<sup>119</sup> the district court proceeded to state the *Timmons* balancing test:

When deciding whether a state election law violated 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 nondiscriminatory restrictions."<sup>120</sup>

En route to characterizing the rights deprivation at issue, the court then distinguished parties' associational rights from those of other private clubs and associations. Emphasizing the distinctive tripartite nature of the party (at times part of the government, at others a subset of the electorate, and sometimes an organization similar to other private associations),<sup>121</sup> the court pointed out that states have

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<sup>117</sup> *Jones*, 984 F. Supp. at 1300-01, 1303.

<sup>118</sup> *Id.* at 1303.

<sup>119</sup> *O'Callaghan v. Alaska*, 914 P.2d 1250, 1252 (Ala. 1996); *Heavey v. Chapman*, 611 P.2d 1256, 1257 (Wash. 1980).

<sup>120</sup> *Jones*, 984 F. Supp. at 1294 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354 (1997)).

<sup>121</sup> *Id.* at 1296 ("Unlike other private associations, at least in one of their avatars—the party in the government—the political parties are very much like the government itself. And the parties perform functions that are fairly characterized as governmental in nature,

substantial regulatory authority over parties that they could not exercise over other private associations.<sup>122</sup> States define the qualifications for membership, such as needing only to be a registered voter. They specify the form of the selection process, such as mandating primary elections as the sole mechanism for nomination, and the majority of states have laws that allow nonparty members the right to choose any party's ballot on primary election day.<sup>123</sup> Thus, parties' associational rights are neither absolute, nor of the same character as "true" out-of-government private associations.

Although not absolute, the rights at issue were not to be dismissed out of hand by the court. Judge Levi therefore engaged in a detailed factual inquiry—of both the probable consequences of the blanket primary for California and the experiences of Washington and Alaska—to determine the extent of the deprivation of party autonomy. He found concerted party raiding to be unlikely and "benevolent cross-over voting" to hover, on average, at between ten and twenty-five percent and rarely to change the outcome of an election.<sup>124</sup> While admitting that the purpose of the blanket primary was to "wrest . . . control" from the party and its members and thus impose a "significant" burden on their First Amendment rights,<sup>125</sup> the court found that the evidence from strong parties in Washington and the open primary states suggested that inclusion of nonmembers in the primary "will not diminish the efficacy or strength of the political parties in California by any substantial degree."<sup>126</sup>

Placing on one side of the scales this "significant," though "not severe," burden, Judge Levi then turned toward weighing the state's interest to discover whether it was sufficiently "important."<sup>127</sup> He viewed the blanket primary as akin to other Progressive Era reforms (e.g., direct election of senators, the innovation of the primary itself, and the referendum and initiative) that sought to open up the electoral process and restore popular accountability to a system plagued by party bosses and machines.<sup>128</sup> The blanket primary "enfranchised"

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such as the nomination of candidates." (citations omitted)). See also V.O. Key, Jr., *Politics, Parties, and Pressure Groups* 163-65 (5th ed. 1964) (describing three components of party); Persily & Cain, *supra* note 5, at 778-79 (applying Key's tripartite scheme to political party case law).

<sup>122</sup> *Jones*, 984 F. Supp. at 1295-96.

<sup>123</sup> Cf. Gerber & Morton, *supra* note 116, at 307 tbl.1. (testing effects of closed and open primaries on political positions of elected officials, and showing that more states than not have open or semi-open primaries).

<sup>124</sup> *Jones*, 984 F. Supp. at 1297-99.

<sup>125</sup> *Id.* at 1300

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

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 1301.

independent voters and members of minority parties in safe districts by allowing them to participate in the critical election that determined the identity of the officeholder without affiliating with a particular party.<sup>129</sup> An intended side benefit of this enfranchisement would be the election of more moderate candidates who are more “representative” of their districts and less beholden to party members and activists.<sup>130</sup>

Thus, as in *Timmons* and various ballot access cases, the state articulated an interest deeply rooted in the American constitutional tradition: the prevention of factionalism.<sup>131</sup> Like measures that enhanced the stabilizing forces of America’s two-party system (e.g., heightened ballot access requirements for third parties and independent candidates, prohibitions on “sore loser” and fusion candidacies), so too the blanket primary sought to mute the divisive forces of even the two-party system by organizing the electorate in such a way as to produce the candidate most likely to be representative of the median voter in a given constituency. These interests in expanding participation and enhancing representation, combined with the significant and unique fact that a majority of the members of both political parties (i.e., the parties-in-the-electorate) supported Proposition 198, were sufficiently “important,” “substantial,” and even “compelling” in the court’s view that parties could not use the First Amendment as a veto to strike down measures endorsed by popular vote.<sup>132</sup>

### C. *The Supreme Court Decision in Jones*

Observers may look at the lopsided (seven to two) Supreme Court decision in *Jones* as somehow suggestive that this was an easy case.<sup>133</sup> Not only did Judge Levi sustain the blanket primary, as did

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<sup>129</sup> Id. at 1301-03.

<sup>130</sup> See id. at 1301-02.

<sup>131</sup> Cf. *The Federalist* No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

<sup>132</sup> *Jones*, 984 F. Supp. at 1303.

<sup>133</sup> Only Justice Stevens, joined by Justice Ginsburg, dissented. But Justice Kennedy filed a concurring opinion which recalled his opinion in *Colorado Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), which argued for heightened protection of a party’s right to spend its funds in cooperation with its preferred candidate. Id. at 626 (Kennedy, J., concurring in judgment and dissenting in part). The blanket primary at issue in *Jones* would compound the injury he saw in regulations on party spending. Kennedy saw the addition of the blanket primary as giving the State the power to control parties at two vital points in the election process. First, it could mandate a blanket primary to weaken the party’s ability to defend and maintain its doctrinal positions by allowing nonparty members to vote in the primary. Second, it could impose severe restrictions on the amount of funds and resources the party could spend in efforts to counteract the State’s doctrinal intervention. *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2416 (2000) (Kennedy, J., concurring).

the three-judge panel of the Ninth Circuit Court of Appeals that affirmed and adopted his opinion as their own,<sup>134</sup> but four justices on Alaska's Supreme Court and nine on Washington's had also found the blanket primary constitutional within the last twenty years.<sup>135</sup> Moreover, an eclectic group of amici filed briefs on both sides in the case.<sup>136</sup> Given the Supreme Court precedents in *Tashjian*, *La Follette*, and *Eu*, though, the trend in the law seemed clear, and Justice Scalia's opinion for the seven-member majority treated it as such.

However, the Supreme Court's decision was striking for a number of reasons. First, its author, Justice Scalia, joined by Justice O'Connor and Chief Justice Rehnquist, dissented in *Tashjian*. They believed that a state had the right to *close off* a primary, even when a party demanded the right to include independents, but in *Jones* they said that the state had no right to *open up* the primary to include independents and other partisans. Second, the mode of inquiry differs substantially from the obsessive balancing and hand-wringing engaged

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<sup>134</sup> 169 F.3d 646 (9th Cir. 1999).

<sup>135</sup> Counting the lower court opinions in the Washington and Alaska cases (*O'Callaghan v. Alaska*, 914 P.2d 1250 (Ala. 1996); *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980)), a total of twenty judges and justices have voted to sustain blanket primary laws. Nine (seven U.S. Supreme Court justices, plus one dissenting Alaska Supreme Court justice and one Alaska Superior Court judge) have voted to strike them down. Including a much earlier unanimous opinion of the Washington Supreme Court upholding the blanket primary when it was first instituted increases the number by nine more judges (a grand total of twenty-nine) who thought the blanket primary was constitutional. See *Anderson v. Millikin*, 59 P.2d 295, 295, 298 (Wash. 1936).

<sup>136</sup> The groups filing amicus briefs on behalf of the political parties challenging the initiative included: The Northern California Committee for Party Renewal (a collection of political scientists and law professors); the Republican and Democratic National Committees, the Eagle Forum Education and Legal Defense Fund (a conservative public interest organization associated with Phyllis Schlafly); and every political party in Alaska except for the Democrats. The following filed briefs supporting the blanket primary on behalf of the State of California: Senators John McCain and William Brock; various law professors; the Hispanic Republican Caucus; Alaskan Voters for an Open Primary; California Governor Gray Davis; and the states of Washington and Alaska. See Brief of Amicus Curiae Alaskan Voters for an Open Primary (AVOP), *Jones* (No. 99-401); Brief of Amicus Curiae William E. Brock and John McCain, and Hispanic Republican Caucus et al., *Jones* (No. 99-401); Brief of Amicus Curiae Governor Gray Davis, *Jones* (No. 99-401); Brief of Amicus Curiae Eagle Forum Education & Legal Defense Fund and Claremont Institute Center for Constitutional Jurisprudence, *Jones* (No. 99-401); Brief of Amicus Curiae Northern California Committee for Party Renewal et al., *Jones* (No. 99-401); Brief of Amicus Curiae Republican National Committee and Democratic National Committee, *Jones* (No. 99-401); Brief of Amicus Curiae Republican Party of Alaska, Libertarian Party of Alaska, Alaskan Independence Party et al., *Jones* (No. 99-401); Brief of Amicus Curiae States of Washington and Alaska, *Jones* (No. 99-401). The Brennan Center for Justice at New York University School of Law (where this author is currently employed) filed a brief on behalf of neither party, arguing that the blanket primary was constitutional as applied to the Democrats and Republicans, but unconstitutional as applied to the minor political parties. See Brennan Center Brief, *supra* note 73.



in by Judge Levi. The *Timmons* balancing test barely presents itself, reduced to a blurb that says “[r]egulations imposing severe burdens . . . must be narrowly tailored and advance a compelling state interest”<sup>137</sup> and implying that no interest could justify the type of intrusion on party rights portended by the blanket primary.

The Supreme Court considered the same evidence of the threat to party autonomy as did the district court, but it just came to a different conclusion. Whereas the district court focused on the primary as a highly regulated activity, the Supreme Court viewed the “candidate-selection process” as the “‘basic function of a political party’” that was “adulterate[d]” “by opening it up to persons wholly unaffiliated with the party.”<sup>138</sup> Whereas the district court saw the blanket primary as causing the infrequent scenario of nonparty members casting decisive primary votes, the Supreme Court viewed the blanket primary as having the intended effect of “changing the parties’ message,”<sup>139</sup> “hijack[ing] the party,”<sup>140</sup> and presenting a “clear and present danger” of “having a party’s nominee determined by adherents of an opposing party.”<sup>141</sup> The Court could “think of no heavier burden on a political party’s associational freedom.”<sup>142</sup> “There is simply no substitute for a party’s selecting its own candidates,”<sup>143</sup> the Court concluded.

The Court did not find any of the seven state interests California used to justify Proposition 198 sufficiently compelling to justify the blanket primary’s imposition on the parties’ associational freedoms. Those interests included: (1) producing elected officials who better represent the electorate; (2) expanding candidate debate beyond the scope of partisan concerns; (3) enfranchising independents and voters in “safe” districts; (4) promoting fairness by allowing any voter, regardless of party affiliation, equal choice at the ballot box; (5) expanding choices by allowing any voter to vote from an array of candidates; (6) increasing voter participation; and (7) protecting privacy by not forcing voters to reveal their party affiliation.<sup>144</sup>

All of these interests depended on a characterization of the primary election as a public, government-sponsored, first-stage general election—a characterization the Court rejected at the outset.<sup>145</sup> After all, how could increasing debate, representation, choice, or participa-

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<sup>137</sup> *Jones*, 120 S. Ct. at 2412.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2413.

<sup>140</sup> *Id.* at 2412.

<sup>141</sup> *Id.* at 2410.

<sup>142</sup> *Id.* at 2412.

<sup>143</sup> *Id.*

<sup>144</sup> See *id.* at 2412-13.

<sup>145</sup> *Id.* at 2406-07 & 2407 n.4.

tion be a *state* interest when that increase would occur wholly within a selection process the Court (and therefore the Constitution) considers a “private” decision? Indeed, not only was there no state interest in changing the character of a primary election to produce a particular result, but it was that very feature of the blanket primary which made it unconstitutional.

The real nail in the coffin of the blanket primary, though, came when the Court considered whether the means used by the state were appropriately tailored to achieve the ends the state listed. Given the rigor of its analysis in executing the balancing test, one cannot help but be mystified by the district court’s suggestion 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.”<sup>146</sup> Justice Scalia prepared the appropriate response: A nonpartisan primary could achieve all of the alleged state interests without the concomitant hijacking of the party’s candidate selection process.<sup>147</sup> Such a primary allows voters to choose from the entire field of candidates and winnow them down to two for the general election. A nonpartisan primary operates like a two-stage general election. All candidates run against each other in the primary and the top two vote-getters, regardless of party, advance to the general election. Unlike the blanket primary, however, the nonpartisan primary does not “forc[e] the political parties to associate with those who do not share their political beliefs.”<sup>148</sup> For the Supreme Court majority, then, the blanket primary cut out the heart of the party where the First Amendment was supposed to be its shield. Or, as Justice O’Connor put it at oral argument, the primary is “precisely the point at which the associational interest of the party is at its zenith . . . . What’s left [of any associational rights], if this can stand?”<sup>149</sup>

Justice Stevens’s dissent, joined by Justice Ginsburg, relied on a wholly different interpretation of the constitutional character of a party primary. Drawing on the *White Primary Cases*, the dissent considered California’s primary, funded as it is by public money and conducted by state officials, the “quintessential form[ ] of state action” and “an election, unlike a convention or a caucus, . . . a public af-

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<sup>146</sup> Cal. Democratic Party v. Jones, 984 F. Supp. 1288, 1303 (E.D. Cal. 1997) (emphasis added).

<sup>147</sup> Jones, 120 S. Ct. at 2414.

<sup>148</sup> Id.

<sup>149</sup> U.S. Supreme Court Official Transcript, Jones, 120 S. Ct. 2402 (2000) (No. 99-401), 2000 WL 486738, at \*26.

fair.”<sup>150</sup> Party associational rights thus take on a completely different character in this context, as opposed to a case, such as *Eu*, or perhaps *La Follette*, where the parties’ core First Amendment rights to expression and association were at stake.

Moreover, for the dissent, the motivation behind the law—to encourage electoral participation—distinguished this case from *Tashjian* where the law sought to restrict participation. “When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process,” the dissent argued, “it is acting not as a foe of the First Amendment but as a friend and ally.”<sup>151</sup> First Amendment “interests” fell on both scales of the constitutional balance, according to the dissent.<sup>152</sup> While limiting the power of party activists to control primary outcomes, the blanket primary expanded expression by allowing all voters the opportunity to pledge their support to the candidate of their choice. That same pro-participation justification underlies states’ decisions to intrude on party autonomy by mandating, for example, the primary as the form of nomination method and the majority of state laws that allow some nonmembers to choose the ballot of the party of their choice on election day. Justice Stevens therefore warned: “The Court’s reliance on a political party’s ‘right not to associate’ as a basis for limiting a State’s power to conduct primary elections will inevitably require it either to draw unprincipled distinctions among various primary configurations or to alter voting practices throughout the Nation in fundamental ways.”<sup>153</sup>

#### *D. The Impact of Jones on the Range of State Regulation of Party Nomination Processes*

The “legal” story of the blanket primary is, in the end, one pitting the ultrademocracy of California’s initiative process against the ultimate antidemocracy of the unelected federal judiciary, with political parties (at times, exhibiting both oligarchic and democratic tendencies) caught somewhere in between. The task thus confronting the courts became how to reconcile political party autonomy, which all

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<sup>150</sup> *Jones*, 120 S. Ct. at 2418-19; see also *Storer v. Brown*, 415 U.S. 724, 735 (1974) (“The direct primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers.”).

<sup>151</sup> *Jones*, 120 S. Ct. at 2419; Cf. *Nixon v. Shrink Mo. Gov’t PAC*, 120 S. Ct. 897, 911 (2000) (Breyer, J., concurring) (finding that “constitutionally protected interests lie on both sides of the legal equation” in campaign finance case).

<sup>152</sup> *Jones*, 120 S. Ct. at 2421-22 (Stevens, J., dissenting) (contrasting majority’s analysis of parties’ associational interests with associational interests of nonmembers of party seeking to participate in party primaries).

<sup>153</sup> *Jones*, 120 S. Ct. at 2420.

agree is indispensable, at some level, to American democracy, with the democratic mandate announced by the majority of California's voters to rein in that autonomy at the crucial stage of candidate nomination. As it had so frequently done in the past, the Supreme Court sided with the parties' right to determine the content of their "message" and the identity of their standard bearer.

The Supreme Court's decision in *Jones* was unsurprising, in one sense, as it followed a long string of decisions bolstering party associational rights, such as *La Follette*, *Tashjian*, and *Eu*. So long as the issue was neither race nor a third party's assertion of rights that might destabilize the two-party system or confuse the ballot, the Court generally sided with the political party against either a state law trying to rein it in, as in *Tashjian*, or against an individual claiming that the party rules violate his First or Fourteenth Amendment rights, as in *Nader*.<sup>154</sup> But *Jones* represents the most emphatic defense yet of a robust First Amendment right of party autonomy, and in the coming years state governments may scramble to reconfigure their electoral laws to comply with it. Approximately thirty-eight states<sup>155</sup> "force" parties to accept independents and/or nonparty members as primary

<sup>154</sup> 417 F. Supp. 837 (D. Conn.), summarily aff'd, 429 U.S. 989 (1976).

<sup>155</sup> The number changes every election, and sometimes different rules are used for different parties or different offices. Kanthak & Morton describe the following types of primary systems existing in nominations for Congress in 1996:

- Closed primary: Only voters registered with the party some time in advance of the primary can participate. Kanthak & Morton, *supra* note 116, at 118-19. Twelve states (Arizona, California, Connecticut, Delaware, Florida, Kentucky, Maryland, Nevada, New Mexico, New York, Pennsylvania, South Dakota) use the closed primary. *Id.* at 121.
- Semiclosed primary: Like the closed primary, except that new or unaffiliated voters (i.e., independents) may choose any party's primary ballot. *Id.* at 119. A variant on that system is used in thirteen states: Arkansas, Colorado, Kansas, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, Rhode Island, and West Virginia. In Arkansas, North Carolina, Oregon, and West Virginia, the Republican Party is open to unaffiliated voters, but the Democratic Primary remains closed. *Id.* at 119.
- Open primary: Any voter can choose any party's entire ballot in an open-primary state. *Id.* at 119. Twenty-two states have some type of open primary. In nine states (Hawaii, Idaho, Michigan, Minnesota, Montana, North Dakota, Utah, Vermont, Wisconsin), the voter chooses the ballot in secret in the voting booth. Ten others (Alabama, Georgia, Illinois, Indiana, Mississippi, Missouri, South Carolina, Tennessee, Texas, Virginia) employ a "semi-open" primary where the voter must request publicly a certain ballot from the official at the polls. Three states (Iowa, Ohio, and Wyoming) allow voters to change party membership on election day and thus, in practice, any voter may choose any party's ballot on election day. *Id.* at 121.
- Blanket primary: Any voter can vote in any primary for any office. The blanket primary operates like the open primary, except voters may switch parties as they go down the ballot. *Id.* at 119-20. For example, a voter can vote in the Democratic primary for governor and the Republican primary for senator. Only Alaska and Washington used the blanket primary in 1996. *Id.* at 121.

election voters. Although party organizations tend to support the laws governing primaries in their states (demonstrated in no small measure by the fact that they usually wrote the laws and have not challenged them in court), the reasoning in *Jones* would extend to all types of primary systems.

### 1. What About "Open Primaries"?

The first question states will ask is the one Justice Stevens posed in his dissent: What about open primaries? Open primaries only differ from blanket primaries in that voters must commit to an entire ballot of a given party—i.e., they cannot vote in one party's primary for senator and another's for governor as they can in a blanket primary—but like blanket primaries, they force parties to accept "outsiders" in their primary. While stating quite specifically that *Jones* "does not require us to determine the constitutionality of open primaries," Justice Scalia tried to distinguish them from blanket primaries by arguing that, at least in an open primary, voters "affiliate" with a party—that is, they confine themselves to a single party's primary ballot for the time they spend in the voting booth.<sup>156</sup> That distinction may have been necessary to avoid the invalidation of the primary systems in most states, but when juxtaposed with the broad declarations of the party's First Amendment right not to associate with those who share different beliefs, it loses much of its force.

More damaging to the argument than its inconsistency, however, is its inaccuracy. There are many different types of open primaries, some of which explicitly do not require affiliation. Some states hold what appear to be closed primaries, but allow voters to change their party affiliation up until election day; other states do not ask, or even keep records of, voters' party affiliation and allow voters to walk into any party's polling booth; still others give voters all parties' ballots when they enter the voting booth and allow them privately to cast votes on their choice of party ballot.<sup>157</sup> The only real difference between an open primary and a blanket primary is that the blanket primary allows voters to change their "party affiliation" as they go down the ballot, whereas the open primary forces voters to commit to one party's entire ballot.

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\* Nonpartisan primary: Used only in Louisiana, it allows all voters to vote for any candidate in any primary. The top two vote-getters (regardless of their partisan affiliation) in the primary advance to the general election. *Id.* at 118.

<sup>156</sup> *Jones*, 120 S. Ct. at 2410 n.8.

<sup>157</sup> Kanthak & Morton, *supra* note 116, at 119-20 (defining different primary rules based on ease with which primary voters can alter or ignore their party affiliations).

Even closed primaries are not free from constitutional doubt, however. Any system that requires party affiliation as a prerequisite for participation necessarily establishes legal criteria for party membership that can intrude on a party's rights if the party considers the criteria too lax or too stringent. A closed primary, which arguably protects party autonomy to the utmost by requiring voters to declare their affiliation some time in advance of the primary in order to vote, forces parties to accept voters who may only recently have chosen to become "members." For example, a law that allows voters to change parties up until a week before the election infringes on the party's right to require more than an ephemeral one-election commitment for membership. The Court has not yet been presented with an opportunity to adjudicate a *party's* challenge to an affiliation requirement that it considers too lenient—i.e., a party's claim that the state law makes it too easy for outsiders to change their affiliation. The Court has vindicated an *individual's* right to change his affiliation when the state law required a twenty-three month waiting period,<sup>158</sup> although it upheld an eleven-month waiting period as justified by a state's interest in preventing raiding.<sup>159</sup>

The current stopping point—allowing a state to require open primaries, but not blanket ones—may be arbitrary, but easier to specify than others. In addition to the Court's contention that open primaries require at least a day's worth of affiliation, one possible rationale for choosing this stopping point would be an empirical argument that blanket primaries make crossover voting (i.e., "coloring of the parties' message") much more likely,<sup>160</sup> thus making a "severe" intrusion on

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<sup>158</sup> The Court struck down an Illinois law that prevented a voter from voting in a party's primary if that voter had voted in another party's primary within the previous twenty-three months. *Kusper v. Pontikes*, 414 U.S. 51, 61 (1973).

<sup>159</sup> See *Rosario v. Rockefeller*, 410 U.S. 752 (1972). Technically, the law provided that the voter must change affiliation thirty days before the general election that preceded the primary in order to vote in that primary. The rationale behind the law was prevention of "raiding." *Id.* at 761-62. Notice that *Rosario* involved a challenge by voters against a state law, which was justified by a party interest—i.e., the prevention of raiding. Had one of the parties challenged the law, the result likely would have been different.

<sup>160</sup> See *Jones*, 120 S. Ct. at 2410-11. Although the Court found this empirical argument persuasive, an equally strong argument could be made that open primaries actually can cause greater mischief-making and skewing of the party's message. For example, in open primary states where Democrats chose to vote in the 2000 Republican primary in order to cast a presidential ballot for John McCain, the down-ballot races (i.e., the last races to appear on the ballot, such as school board or dog catcher) were polluted by outsiders who would have returned to their party's ballot under a blanket primary. In other words, the open primary binds unwilling voters to a primary ballot for which they only may have wanted to cast a vote in a single race. Now having "entered the party" by choosing its ballot, they remain in it to cast votes in races for which they may know or care very little. At least with the blanket primary, a voter can enter one party's primary to cast a vote in

party autonomy a more "clear and present danger."<sup>161</sup> An even stronger case might be made for those states that allow only independents to "cross over" on election day—a system known as the semi-closed primary. One could argue that such a system is the best marriage between the state's interest in increasing participation (i.e., allowing everyone to cast a ballot on primary day) with the party's interests in preventing as few "outsiders" as possible from casting probable decisive votes. Nevertheless, the language of *Jones* will be nearly impossible to get around:

[A] "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." The voter's desire to participate does not become more weighty simply because the State supports it. . . . The voter who feels himself disenfranchised should simply join the party.<sup>162</sup>

These same arguments will apply with equal force to open and semi-closed primaries.

One final way to distinguish California's system from others open to nonmembers is to focus on the larger electoral scheme in which the blanket primary system was situated.<sup>163</sup> Unlike many other states, California does not allow parties to run their nomination processes through any means other than a primary.<sup>164</sup> Thus, before the Supreme Court's decision in *Jones*, the law dictated both the means and the membership for a party's nomination of its candidates. The Court thus did not have occasion to answer the question: What if the law empowered parties to select their own means of nomination, but required that if a party elects to use the state-funded and state-regulated primary, it must allow any voter to vote in any race (i.e., a blanket primary by "choice")? Such a set of facts would present a much harder case. The party then would need to base its objection to the blanket primary on some theory of unconstitutional conditions—sug-

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only the races she cares about and then can return to her own party for the rest of the races.

<sup>161</sup> *Id.* at 1210.

<sup>162</sup> *Id.* at 2413 (quoting *Tashjian v. Republican Party*, 479 U.S. 208, 215-16 n.6 (citations omitted)).

<sup>163</sup> See generally Persily & Cain, *supra* note 5, at 779 (urging courts to judge constitutionality of any individual regulation based on how it operates given entire system of electoral regulation).

<sup>164</sup> See Cal. Const. art. 2, § 5 ("The Legislature *shall* provide for primary elections for partisan offices . . . ." (emphasis added)); Cal. Elec. Code § 337 (West 1996) (defining partisan office as "an office for which a party may nominate a candidate"); Cal. Elec. Code § 15451 (West 1996) ("The person who receives the highest number of votes at a primary election as the candidate of a political party for the nomination to an office is the nominee of that party at the ensuing general election.").

gesting that the state really has not offered the party a choice since state-sponsored primaries have become the expected practice (indeed, almost a right) for all party members. The party's argument would be much, much weaker in such a case, and states seeking to preserve their more open primaries may choose to experiment with such a formula in the wake of *Jones*.

## 2. *What About the Requirement of a Primary Itself?*

*Jones* appeared to take one issue off the table by upholding the right of states to mandate primaries as the format for selecting party nominees. Quoting dicta in its earlier decision in *American Party v. White*,<sup>165</sup> a largely irrelevant third-party ballot access case, the *Jones* Court hinted: "We have considered it 'too plain for argument,' for example, 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."<sup>166</sup> Thus, the Court agrees that the democratizing or participation-enhancing effect of state laws that transfer nominating power from the party organizations to the parties-in-the-electorate justifies the correlative imposition on the parties' freedom of association.

The Court's willingness to dig in its heels at this point on the slippery slope of democratization-as-state-interest can be attributed best to pragmatic considerations and a fear of overturning the most significant of Progressive Era reforms. If parties truly were akin to private associations, and if candidate nomination processes were equal to the

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<sup>165</sup> 415 U.S. 767 (1974).

<sup>166</sup> *Jones*, 120 S. Ct. at 2407 (quoting *Am. Party v. White*, 415 U.S. 767, 781 (1974)). The full quote from *American Party* reads: "It is too plain for argument, and it is not contested here, that the State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention." 415 U.S. at 781. Other courts specifically have upheld the requirement of a primary. See, e.g., *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992) (upholding application of state's primary requirement to minor party and holding that "the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates"). *Lightfoot* gave broad power to states in determining the mechanism of their nomination process, even suggesting that states could forbid parties from conducting their selection process through primaries. See *id.* at 873 n.2 ("Our holding should not be read to imply that a state could not demonstrate a compelling interest in requiring political parties to nominate candidates via convention. A state might conclude, for instance, that nominating conventions produce more qualified candidates than do primaries and as a consequence produce better government."); see also *id.* at 873 ("Turning the entire electoral apparatus over to political parties would pose as great a threat to the integrity of our system of government as would the state's unprincipled meddling in the political process."). For a wonderful catalogue of state court decisions upholding regulations of primary elections, see Winkler, *supra* note 5, at 876-91.



selection of private organizational leaders, the First Amendment would prevent mandating a particular type of leadership selection mechanism. Indeed, the state laws at issue in *Eu* trespassed into the core of the First Amendment precisely because they mandated how the party organization was to be constructed and how its leaders (the leaders of the party, not the candidates for public office) would be chosen. As explained earlier, all organizations can select their leaders, but only parties have the ability to nominate candidates for public office and have them appear on the general election ballot. For most organizations, the "standard bearers" are the organization's leaders. But according to the Court, the standard bearers for parties are their nominees.<sup>167</sup>

The inexact fit of the analogies between leaders and candidates and between leadership selection processes and nominations does not necessarily mean that parties should have less First Amendment or other constitutional protections. But parties' sui generis organizational character forces a different type of constitutional analysis. Either one takes the Court's view and erects a superstructure of uncomfortable parallels to truly private organizational expression and association,<sup>168</sup> or one takes the more honest approach that the constitutionality of such intrusions on party autonomy ought to depend on a theory about how American democracy should be organized and about the place of parties in the scheme. Before turning to those questions, however, one final aspect of the *Jones* holding deserves comment.

### 3. *The Vitality of the White Primary Cases after Jones*

In addition to casting doubt on the primary systems used in most states, *Jones* cast doubt on, or at least refined the holdings of, the *White Primary Cases*. Through their alternative interpretations of those cases, the majority and dissent presented clear differences as to the constitutional character of a primary election. Justice Stevens's dissent emphasized that the election was state-run and publicly

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<sup>167</sup> *Jones*, 120 S. Ct. at 2408 (describing way in which nominee becomes party's ambassador to general electorate).

<sup>168</sup> In *Jones*, the majority opinion drew on the Court's earlier decision in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), which upheld the right of the South Boston Allied War Veterans Council to exclude a gay group from its Saint Patrick's Day parade. *Id.* at 559. Applying the state's public accommodations law in this context to prevent such discrimination, the Court held, would "'require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own.'" *Id.* at 578 (quoted in *Jones*, 120 S. Ct. at 2412).

funded.<sup>169</sup> He believed, as did the Court in the *White Primary Cases*, that the commingling of state and party functions had progressed to the point that in the primary election, the state and party had merged.<sup>170</sup> Party primaries, argued the dissent, should be subject to the same constitutional restrictions as general elections, and that outside those restrictions, states have near plenary authority to regulate their “Times, Places, and Manner.”<sup>171</sup>

The majority opinion took a different view of the *White Primary Cases*. According to Justice Scalia,

[t]hese cases 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 . . . 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 . . . . Those cases simply prevent exclusion that violates some independent constitutional proscription.<sup>172</sup>

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<sup>169</sup> *Jones*, 120 S. Ct. at 2416-23 (Stevens, J., dissenting).

<sup>170</sup> *Id.* at 2418 (Stevens, J., dissenting) (“[B]oth the general election and the primary are quintessential forms of state action. It is because the primary is state action that an organization—whether it calls itself a political party or just a ‘Jaybird’ association—may not deny non-Caucasians the right to participate in the selection of its nominees.”).

<sup>171</sup> *Id.* at 2422-23 (quoting U.S. Const. art. I, § 4, cl. 1).

<sup>172</sup> *Id.* at 2407 & n.5 (emphasis added) (citations omitted) (quoting *Terry v. Adams*, 345 U.S. 461, 482 (1953)). The notion of an “independent constitutional proscription” that could apply to primaries is an interesting and ambiguous one that I take up later. See *infra* text accompanying notes 239-244. The majority opinion includes among those proscriptions the Fourteenth and Fifteenth Amendments, and by extension one would suspect that the Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments’ protections for women, residents of the District of Columbia, people unwilling to pay a poll tax, and persons over the age of eighteen similarly would apply to parties. Cf. *Bachur v. Democratic Nat’l Party*, 836 F.2d 837 (4th Cir. 1987) (upholding party rule (codified in state law), called Equal Division Rule, that forced voters to choose equal numbers of male and female delegates to the 1984 convention). One difficulty with this approach is that the Court’s opinions in the patronage cases have established an “independent constitutional proscription” against discrimination based on party affiliation. See *O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996) (“Absent some reasonably appropriate requirement, government may not make public employment subject to the express condition of political beliefs or prescribed expression.”); *Elrod v. Burns*, 427 U.S. 347 (1976) (establishing First Amendment bar to patronage-based dismissals for low-level employees). In most arenas of state action, government discrimination against private citizens on the basis of ideology or partisanship violates the First Amendment because the state is punishing citizens for their beliefs or associations. *O’Hare*, 518 U.S. at 717 (1996). Taken to perhaps an absurd extreme, a combination of the patronage cases and the *White Primary Cases* would suggest that open primaries are constitutionally required, not just permissible—that “separate but equal” primaries for Democrats and Republicans are unconstitutional. Given that the party autonomy argument that killed the blanket primary was itself a First Amendment argument, presumably Justice Scalia means proscriptions independent of the First Amendment.

For the majority, the holdings in the *White Primary Cases* were not so broad as the dissent's interpretation, nor was their formulaic application to the case at hand so apparent. The majority considered them limited to a *special* type of relationship existing between the parties and the state—perhaps even limited to the incestuous party-state relationship in Texas and the Deep South at the time—and of questionable relevance outside the context of race-based disenfranchisement.

*Jones* shows the futility of an approach to party rights that depends on a threshold determination of state action. Although state primary laws and party systems are remarkably varied (an important fact generally overlooked in the Court's sweeping pronouncements), the Republican and Democratic primaries, as I described earlier,<sup>173</sup> fairly could be called state action. State laws define political parties, they grant nominees from the major parties automatic general election ballot access, primary elections (especially in safe districts) are often more important than the general election in determining the eventual victor,<sup>174</sup> party leaders hold elective office, one or both parties write the laws for the primary and general elections,<sup>175</sup> party officials often allocate state funds toward party functions including primaries, and party leaders gerrymander districts in order to preordain the party affiliation of representatives or the partisan balance in the legislature.

Even among state-actor hybrids, however, parties are a special species. They occupy a unique political and social space where government power is acquired and distributed. A constitutional theory of political parties and their nomination processes must recognize this uniqueness and, as the next section argues, pay close attention to the functions political parties play in American democracy.

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<sup>173</sup> See *supra* Part I.A.2.

<sup>174</sup> See *Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring in part) ("As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations [by the major political parties] have been made."). See also *United States v. Classic*, 313 U.S. 299, 319 (1941) (noting that "the practical influence of the choice of candidates at the primary may be so great as to affect the choice at the general election").

<sup>175</sup> See *Morse v. Republican Party*, 517 U.S. 186, 218 (1996) ("Voting at the [primary] nomination stage is protected regardless of whether it 'invariably, sometimes or never determines the ultimate choice of the representative.' The operative test . . . is whether a political party exercises power over the electoral process." (citation omitted)).

### III

#### A FUNCTIONAL DEFENSE OF POLITICAL PARTY AUTONOMY

Parties perform at least four critical functions for American democracy: They promote a competitive electoral environment ("competitiveness"); they aggregate interest groups and minorities into electoral and policymaking coalitions ("representation"); they coordinate between officials in each branch and level of government ("governance"); and they sometimes behave like other types of political organizations that exist mainly to express their members' policy positions and beliefs ("expression"). At least for the major parties, the expressive function, while important, is neither their distinctive quality, nor is it the one most threatened by laws that regulate who can vote in the primary election. The specific intent of state regulation of voter access to party primaries is to affect the types of candidates who make it onto the general election ballot and, in turn, take office. Such laws—whether they expand or contract the range of people who can vote in a primary—seek to organize the electoral process in a way that favors one party over another or one *type* of party over another. Party autonomy stands as a bulwark against state attempts to skew electoral probabilities toward certain favored outcomes. Those doing the skewing (i.e., the "state") could be a party in control of the government, a bipartisan initiative or legislative majority, or the party organizations themselves acting through their governmental arm.<sup>176</sup> A constitutional theory of primary ballot access rights must either be consistent among these altering states, or it must ground its distinctions between different "states of the state" in some functional justification as to when judicial intervention is necessary.

The functional theory presented here grants the party organizations near-absolute First Amendment rights<sup>177</sup> to determine who can vote in their primaries. Values of competition and/or representation justify aggressive judicial protection of the party's right to include or exclude voters from its nomination process. This argument is not as extreme as it initially sounds. The "state" always may opt out of the party primary system by eliminating primaries altogether (thus using a general election and perhaps a runoff) or may use a nonpartisan pri-

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<sup>176</sup> Of course, the same group of people could be called the "party": It could be the party-in-the-electorate, party-in-the-government, or the party organization. See Key, *supra* note 121, at 163-65 (describing different dimensions of political party).

<sup>177</sup> At the end of this Article I explain why I still would hang this functional theory on a First Amendment hook despite my lengthy criticism that primary ballot access regulation jeopardizes neither expression, nor association, in the traditional sense. See *infra* Part IV.A.

mary that pushes party organizations' influence over the nomination process outside of the state-sponsored process.

Not only is this argument not so extreme, it is also not so conservative. I hope the reader sees it as a liberal defense of party autonomy. The argument grounds itself in the constitutional values of preventing incumbent entrenchment through manipulation of the rules of the game and of protecting the interests of numerical minorities in the face of an electoral system that caters (obsessively) to the majority and the median voter (i.e., that voter who can cast the critical vote in a two-person race to put the candidate into office). The American electoral system naturally produces two parties and allocates enormous power to the median voter in each jurisdiction. The question for constitutional theorists is what role, if any, judges should play in preventing the state from using the parties to enhance further the electoral power of the median voter or the legislative power of the governing majority.

#### *A. Party Autonomy As Regulator of the Political Marketplace*

Most scholars conceive of the pro-party autonomy argument as one arising either from nostalgia for the party machines of yesteryear or from a general elitist mistrust of unmediated mass rule.<sup>178</sup> Rarely does one hear the argument I make here: namely, that judicial protection of party autonomy is actually a prerequisite to ensuring that those in power cannot further entrench themselves. This initial step in the argument is crucial because it demonstrates the necessity for a theory based on party functions rather than on tenuous notions of expression and association. It shows that, *at some level*, we all would agree that judges should intervene to protect parties from the "state," and that they should do so because basic tenets of democratic competition require such intervention. Despite the clear need for some judicial role, neither the source nor the contours of such authority is easily discernable.

The argument begins from the simple, though not textually based, normative position that those in a position of power ordinarily ought not be able to rig the rules of the electoral game to disadvantage those who seek to replace them.<sup>179</sup> Those holding the reins of government

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<sup>178</sup> See *supra* note 5 and accompanying text.

<sup>179</sup> See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 116-34 (1980) (discussing federal judiciary's role in removing restrictions to equal political access); Issacharoff & Pildes, *supra* note 5 (examining how those in control of state power may alter rules to entrench themselves, and how courts should intervene to promote competition). In most contexts of political regulation, though, neutral constitutional principles are unavailable to identify and regulate the self-serving behavior of incumbents. This is

can do this in a number of ways. Gerrymandering favorable districts, extorting campaign contributions, and raising the hurdles to ballot access for their opponents are just a few examples. Specifying the qualifications for primary voters is another. Some of these phenomena are amenable to constitutional regulation; others are not.

Absent a judicially protected sphere of party autonomy, however, the party in power can enact several types of primary election rules that ensure the diminished competitiveness of its opponent. First, it could prevent an opponent's party organization from opening up its primary to voters not affiliated with the party. Consider a variant on the *Tashjian* case, in which a Democratically controlled state government passes a law preventing independents and nonparty members from voting in party primaries.<sup>180</sup> The Republican Party, seeking to

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Bruce Cain and my main critique of the market approach: It provides no criteria for determining a "sufficient" level of political competition. Persily & Cain, *supra* note 5, at 789-90 & n.56. It thus vests judges with the awesome task of measuring whether the array of political choices offered to voters is sufficiently anemic to deserve a judicial remedy. *Id.* Moreover, it elevates this ambiguous notion of competitiveness above and at the expense of all other democratic values, including interest group aggregation, efficient government, and effective representation. *Id.* For example, as the Supreme Court's murky criteria attest, a partisan gerrymander, while evoking a visceral reaction based on abstract notions of fairness and competition, is immune to any easily enforceable constitutional rule, such as the one-person, one-vote principle. *Cf. Badham v. Eu*, 694 F. Supp. 664, 672 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989) (refusing to find gross partisan gerrymander unconstitutional, in part because state's governor, senator, and President from state were from party challenging it); *Davis v. Bandemer*, 478 U.S. 109, 132, 143 (1986) (holding partisan gerrymanders justiciable and noting that partisan gerrymanders are unconstitutional only if they "consistently degrade a voter's or a group of voters' influence on the political process as a whole"). The only reported case to have made out a partisan gerrymandering claim is *Republican Party v. Martin*, 980 F.2d 943, 961 (4th Cir. 1992). That decision was later vacated, however, because the allegedly injured party proved to be victorious in the next election. See *Republican Party v. Hunt*, No. 94-2410, 1996 WL 60439 (4th Cir. Dec. 12, 1996) (remanding in light of 1994 elections). See generally Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 *Colum. L. Rev.* 1325 (1987) (providing overview of Supreme Court case law on political gerrymandering and arguing against its judicial regulation). True partisan gerrymanders arguably have their own internal regulation mechanism. By spreading its support as thinly as possible (i.e., attempting to create as many fifty-one percent districts as possible), a party risks a dramatic loss in seats resulting from a small, unforecasted electoral shock (such as a state-wide swing of five percent, or a landslide victory by the top of the ticket with coattails that tip the results in each district ever so slightly).

<sup>180</sup> Recall that in *Tashjian* the Democrats who controlled both houses of the legislature voted to defeat the Republicans' proposed plan for a more open primary. See *Tashjian v. Republican Party*, 479 U.S. 208, 212-13 (1986). In a sense, *Tashjian* presents an even worse case of "oppression" because a party that did not even have control of government prevented its opponent from bringing in independents to strengthen the opposition party nominees' chances of winning. See *id.* at 212-13 & n.4. By exercising their veto power in the legislature (i.e., their ability to block any new legislation), the Democrats enforced a "tyranny of the status quo." In the hypothetical presented here, the Democrats enforce a "tyranny of the majority" on the minority party. See Bruce E. Cain & Nathaniel Persily,

elect candidates with broader electoral appeal, objects. The law does not prevent the organization's expression, per se—if anything, it ensures that the nominee is the pure expression of the organization's members. Nor does the law really affect Republicans' ability or right to "associate." Republicans can continue to meet and assemble as a collective or even include outsiders in such assemblies; they just cannot have nonparty members' ballots counted toward the nomination of their candidate.

The stated reason for the law could be to strengthen the party system, to prevent "raiding," to uphold any number of other stability-preserving values, or even to respect and give meaning to voters' associational choices. And even assuming some intrusion on an associational right, is the party organization's decision to include those who have specifically chosen not to associate with them (i.e., to register as members of another party) in its primary so weighty when compared to those state interests?

We attach such significance to this "right" to include nonmembers because its exercise might enhance the competitive position of the party-out-of-power. Democracy entails, at a minimum, that those who control government not be able to use their power to freeze the political status quo.<sup>181</sup> Judicial protection for party autonomy is indispensable in counteracting this form of self-dealing by incumbents; it "frees up" a party organization to sacrifice ideological purity (should it choose to do so) in favor of competitive opportunity.

What makes this an easy case, for some, is that the "participation expansion" argument happens to overlap with the party autonomy argument. The Republicans in *Tashjian* and in this hypothetical wanted to bring voters into the process, not to keep people out. What possible state interest could justify cabining off of a party's primary when the party itself wants more people to participate in it? But for those who argue against any judicial protection for party rights, what possible constitutional principle, save for a First Amendment right of party autonomy, would prevent a dominant party from strategically skewing the nomination process of its opponents?<sup>182</sup>

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Creating an Accountable Legislature: The Parliamentary Option for California Government, in *Constitutional Reform in California: Making State Government More Effective and Responsive* 163, 172-77 (Bruce E. Cain & Roger G. Noll eds., 1995) (distinguishing between tyrannies of majority and status quo).

<sup>181</sup> Cf. *Williams v. Rhodes*, 393 U.S. 23, 31, 39 (1968) (striking down state law that limited ability of new political parties to place candidates on ballot).

<sup>182</sup> Some might try to derive such an antientrenchment principle from the Equal Protection Clause. But for a case like *Tashjian*, that shift would not work. The law at issue there was one that the state applied equally to all parties, indeed, with their initial consent. It was only later, when the Republicans wanted to change the law, that the Democrats in the

Opponents may argue that the pro-party autonomy argument has a constitutional home so long as it is not used as a veto against state laws that seek to broaden the range of voters in the primary (i.e., a one-way ratchet). Party autonomy is fine when it results in expanding participation, the argument goes, but not when it allows the party to "disenfranchise" voters to whom the state wishes to grant additional voting rights. This position makes two critical and, I believe, erroneous assumptions: First, it assumes that one easily can identify the types of policies that further an alleged state interest in expanding participation; and second, it assumes that "expanding participation" is a politically neutral concept that, unlike restricting participation, could not be used to serve partisan ends.

The state interest in "expanding political participation" proves to be a tricky and elastic concept. For the state, the district court, and Justice Stevens's dissent in *Jones*, the blanket primary, quite obviously, expanded participation—that is, it increased the number of points for influence in the electoral process for every voter. Blanket primary voters, regardless of party affiliation, could now cast two ballots to express their candidate preferences: one for their top choice among all candidates in the primary and another for their preferred candidate in the general election. But there are many different ways to define as well as to increase participation. Had the Court taken the invitation of the state and found such an interest compelling, there is no reason to believe that it only could justify elements of the Progressive program such as the blanket primary.<sup>183</sup>

The Progressive argument underlying the Open Primary Initiative overlooks the fundamental, indeed irreplaceable, role that strong party organizations have played as the primary institutions fostering

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legislature refused. See *Tashjian*, 479 U.S. 208, 212-13. In traditional equal protection terms, there was neither discriminatory intent nor effect. *Tashjian*, in many respects, presented a claim against the dog that never barked. The plaintiffs were challenging the legislature's decision to refuse to pass a law that would codify the Republicans' new preference when it came to primary voter qualifications.

<sup>183</sup> Of course, the Progressive program of institutional reform of the late 1800s and early 1900s contained several internal contradictions. Most of the reforms I describe here as Progressive were part of the Populist subset of Progressive reforms that sought to bring "power back to the people" and remove it from the corporate trusts and party machines. See generally Nathaniel Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 Mich. L. & Pol'y Rev. 11 (1997) (examining origins and evolution of direct democracy in United States). Another camp of Progressives, mainly situated in the eastern states, expressed their hostility to legislatures and party machines in a different way than the Populists did in the West; those Progressives sought to transfer power to the executive branch and to an unelected civil service. See *id.* at 26-27.



participation in American democracy<sup>184</sup> and throughout the world.<sup>185</sup> In particular, when parties are more easily identified with other social groupings—what political scientists call “party-group linkages”<sup>186</sup>—voter turnout tends to be higher. When party differences are blurred, parties become less relevant as electoral institutions and voters become less connected to parties. As a result, participation both at the polls and in other aspects of the democracy tends to decline.<sup>187</sup> The same counterintuitive effects are found in other aspects of the Progressive program, such as direct democracy. The more propositions and offices that are placed to a popular vote, the longer the ballot, and the less likely that a given voter will actually complete the entire ballot. Indeed, the mere existence of primary elections has contributed, some argue, to lower voter turnout at the general election.<sup>188</sup> And few could dispute the overall trend that, as the power of party machines has decreased since the Progressive Era, political participation—measured at least by voter turnout—has also declined.<sup>189</sup>

These contentions about the relationship between party autonomy, turnout, and participation are not uncontroversial,<sup>190</sup> but neither are the Progressive arguments about the seemingly obvious pro-par-

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<sup>184</sup> See generally Angus Campbell et al., *The American Voter* 89-115 (1960) (describing conditions that motivate people to vote); Sidney Verba & Norman H. Nie, *Participation in America: Political Democracy and Social Equality* 2-94, 209-28 (1972) (describing different types of political participants and role of political parties in fostering participation). Cf. Stephen Ansolabehere & James M. Snyder, Jr., *Soft Money, Hard Money, Strong Parties*, 100 *Colum. L. Rev.* 598, 617 (2000) (arguing that party soft money allocations contribute substantially to “get out the vote” drives).

<sup>185</sup> See Sidney Verba et al., *Participation and Political Equality: A Seven Nation Comparison* 94-111 (1987) (explaining parties’ roles in political participation in seven nations); Steven E. Finkel & Karl-Dieter Opp, *Party Identification and Participation in Collective Political Action*, 53 *J. Pol.* 339, 66 (1991) (discussing relationship between party identification and political participation in Germany).

<sup>186</sup> See G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 *Am. Pol. Sci. Rev.* 17, 22 & n.3 (1986) (describing measurement of party loyalty of demographic groups in different countries).

<sup>187</sup> See generally Finkel & Opp, *supra* note 185.

<sup>188</sup> See Richard W. Boyd, *The Effects of Primaries and Statewide Races on Voter Turnout*, 51 *J. Pol.* 730, 737 (1989) (summarizing data showing that existence of primary depresses voter turnout at general election).

<sup>189</sup> See Steven J. Rosenstone & John Mark Hansen, *Mobilization, Participation, and Democracy in America* 128-60 (1993) (identifying reasons, including influence of parties, why some citizens are politically active while others are not); Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 *Amer. Pol. Sci. Rev.* 502, 509-10 (1982) (concluding that erosion of voters’ partisan affiliation can explain reduced turnout in 1952-1980 period).

<sup>190</sup> Indeed, the blanket primary did not decimate the party organizations in Alaska or Washington, and voter turnout in those states is not markedly different from the other forty-eight. See Federal Election Commission, *Voter Registration and Turnout 1998*, at <http://www.fec.gov/pages/reg&to98.htm> (listing voter turnout by state in 1998).

ticipation consequences of certain institutional reforms. In the constitutional balance, then, the state interest in "expanding participation" could be offered in support of all types of primary systems.

But opponents of party autonomy nevertheless ask, "What's the harm?" The Constitution should not stand in the way of states' efforts to expand participation through experimentation with different types of nomination processes. What else are "laboratories of democracy" for? This position is particularly well supported by the facts in *Jones*, where the party organizations lined up on one side of the case to oppose a system that majorities of their members supported.<sup>191</sup> The blanket primary appeared as a classic anti-entrenchment measure, liberating the voters from policies favored only by those in power.

Although the facts in *Jones* are unique, had the Supreme Court upheld the blanket primary, it may have also delivered a tool to governing majorities that would have aided them in frustrating the efforts of their opponents at the stages of election and governance—once again, the anti-entrenchment argument. To the reader only familiar with the initiation and early experience with the blanket primary in California, this argument seems farfetched. How could a neutral (i.e., applicable to and opposed by all parties), pro-participation electoral system favor one party over another? To be sure, the argument on behalf of party autonomy here is much weaker than it was in *Tashjian* or *Eu*, but the opportunity for hobbling minority parties still arises.

In Alaska, the blanket primary has been a partisan issue for the last decade, with the Democrats in favor and the Republicans and minor parties twice going to court in failed attempts to strike it down.<sup>192</sup> In fact, the Republican, Libertarian, and Alaskan Independence Parties (but not the Democratic Party) filed an amicus brief in *Jones* urging the Court to find the blanket primary unconstitutional.<sup>193</sup> Whether blame accurately is cast at the blanket primary for the chaos the brief describes in recent Republican primary elections—indeed, the diatribe in the brief seems to go over the edge in attributing effects

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<sup>191</sup> See *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1291-92 (E.D. Cal. 1997).

<sup>192</sup> When it was first instituted in 1947, the Democrats opposed the law (based on fears of raiding) and the Republicans supported it. Memorandum from Virginia Breeze, Election Projects Coordinator, State of Alaska, Alaska's Primary Election History (on file with the *New York University Law Review*).

<sup>193</sup> See Brief for The Republican Party of Alaska, Inc.; The Alaska Libertarian Party; the Alaskan Independence Party; Wayne Anthony Ross; Mark Chryson; and Linda S. McKay, as Amicus Curiae in Support of Appellants, *Cal. Democratic Party v. Jones*, 120 S. Ct. 2404 (2000) (No. 99-401), microformed on CIS No. 99-401 (Cong. Info. Serv.). The brief supplies a series of horror stories suggesting raiding by the Democrats, but also describes how a split in the Republican vote plus crossover voting by Democrats in a multi-candidate gubernatorial primary can produce bizarre Republican nominees who command little Republican support. *Id.* at 5-14.

to the blanket primary as cause—is less interesting than the fact that one major party, but not the other, favored overturning the blanket primary law. This naturally suggests, as one may have suspected, that even primary election systems seeking to expand participation could find support from only one party because of the system's disparate impact on that party's opponents.

These partisan effects from a pro-participation law may derive either from the different ways that parties are organized or from the differing character of the parties' respective electoral bases. The effect of a blanket primary could depend, for example, on whether a party's membership is more or less ideologically unified than that of its opponent. The relative effects of different primary systems might also depend on the partisan balance across districts or on the number of incumbents from each party expected to run for reelection. One interesting feature of the blanket primary is its bias in favor of incumbents. As Cohen, Kousser, and Sides observed in the data from Washington and California state legislative races, voters are much more likely to cross over into the primary in which an incumbent is running, and more likely to stay in their own party's primary if the incumbent is of their own party.<sup>194</sup> Salvanto and Wattenberg observe that in the 1998 California elections, nearly a third of party members crossed over to support an incumbent in a state legislative primary, regardless of the competitiveness of their own party's primary.<sup>195</sup> Why would primary voters "waste" their vote by piling on an incumbent who probably can win the primary anyway? The question itself reveals a misconception about voting behavior that underlies the theoretical model of the blanket primary. When voters are confronted with a long list of names on the primary ballot, many, if not most, will look first for a name they recognize, often that of an incumbent. The blanket primary appears to many voters as functionally indistinguishable from a general election, where the operative strategy is to cast a vote for the most preferred candidate. Thus, while those who advance

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<sup>194</sup> See Cohen, Kousser & Sides, *supra* note 114 at 17, 28 tbl.3. While the conclusion depends somewhat on other variables added into the model (such as levels of competitiveness of each primary and the expected general election margin of victory), the authors found that crossover voting for Washington Republicans would increase by 9% in the presence of a Democratic incumbent, while crossover voting for Democrats would decrease by 9.2%. *Id.* at 28 tbl.3. In California, the incumbency effect was much stronger. *Id.*

<sup>195</sup> Anthony M. Salvanto & Martin P. Wattenberg, *Peeking Under the Blanket: A Direct Look at Crossover Voting in the 1998 Primary*, in Cain & Gerber, *supra* note 116 (manuscript at ch.7, p.10); see also R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting in California Assembly Races*, in *Voting at the Political Fault Line*, *supra* note 116 (manuscript at ch.6) (determining extent of crossover voting in California Assembly races and explaining why crossover voters defected).

from the blanket primary are the *party's* nominees (i.e., not the two top vote-getters in the primary), the voter treats the blanket primary election as just one more opportunity to express a preference. Aside from the general aversion one might have to adding yet one more advantage to incumbency,<sup>196</sup> the problem from the perspective of one who values party autonomy is that the party's choice has been skewed by the happenstance factor of whether the other party's incumbent also happens to be running. Thus, the candidate who emerges as the party's nominee is really not the party's nominee at all, but rather is the product of seemingly arbitrary factors that push and pull voters from one primary to another.<sup>197</sup>

Related to this fact is the obvious consequence that voters who cross over to vote for the incumbent are skewing their own party's primary toward the nomination of a candidate that could be even less competitive than one nominated through a closed primary. To state it another way, because voters can only vote in one primary, disproportionate crossover based on idiosyncratic phenomena such as the presence of an incumbent or the degree of relative competition between party primaries can favor one party over another or add a greater amount of noise and uncertainty to one party's primary than another's. Other idiosyncrasies that can skew results include the number of candidates expected to run in a primary, the probability of a competitive third-party candidate at the general election, and even the relative ability of different parties or candidates to spend the requisite amount of money to appeal to the entire electorate during the primary election. It is difficult to predict in a vacuum how blanket primary rules or any primary rules will affect the competitive position of different parties. It is thus all the more important that party organizations be given the flexibility to adapt to changing circumstances and to avoid falling prey to the whims of those with the transient power to codify in law their preferences for organizing the party system.

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<sup>196</sup> See generally David R. Mayhew, *Congress: The Electoral Connection* (1974) (describing advantages of incumbency).

<sup>197</sup> The dynamic described here regarding the relationship between the blanket primary and incumbency advantages suggests one more distinction between blanket and open primaries. See *supra* notes 160-161. Because the blanket primary lists all candidates next to each other in each race, the voter can choose incumbents more easily. When a voter commits to a ballot under an open primary, the voter foregoes the opportunity to switch in each race to vote for the incumbents. However, as with this year's Republican primary, a high-profile race at the top of the ballot (such as that between George W. Bush and John McCain) could cause voters to select one party's ballot specifically to vote for a single candidate (incumbent or challenger). Having done so, however, the voter cannot then vote in the down-ballot races only based on incumbency.

But even were one to concede that policies seeking to expand participation in primaries will have the identical effect on both parties in certain respects (such as by pulling them both toward the ideological center, perhaps making them both more competitive), the core functions of the parties may be differentially impaired. The instrumentalist injury that the blanket primary can inflict on a party does not stop at the point of election; perhaps the most serious consequences occur at the point of governance. The key features of the party system in this respect are that the parties seek to achieve their policy ends through different means, and that the influx of outsiders to elect candidates will impair certain *types* of programmatic strategies more than others. Although later I argue that the blanket primary can make governance in a heterogeneous society more difficult, here I suggest that it could also destroy a minority party's ability to defend its own interests in the legislature. Intending to make legislators more alike, the blanket primary tries to undermine the veto threat sometimes enjoyed by factions that may have captured a political party. The blanket primary does this, according to its advocates, by pulling the party toward the center, countering party discipline, and letting candidates "think for themselves" (which actually means letting them cater to the interests of the median voter in their district).<sup>198</sup> The blanket primary targets the cohesiveness of strong minority factions or parties and attempts to diminish their power relative to the group occupying the ideological middle ground.<sup>199</sup> As the blanket primary assumes, a party hell-bent on seeking a majority in the legislature will sacrifice ideological cohesion in favor of attaining governmental power. But other parties will try to preserve their ideological commitment both to remain a cohesive and obstructionist voting bloc in the legislature and, perhaps more importantly, to craft a consistent message that they hope will win votes in some later election. The blanket primary seeks to undermine minority parties' ability to do both.<sup>200</sup>

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<sup>198</sup> See *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1302 (E.D. Cal. 1997).

<sup>199</sup> See *id.*

<sup>200</sup> Although he concentrated more on expressive purposes rather than on the function served by party autonomy, Justice Scalia made a similar point at oral argument in *Jones*:

[W]hat about the party that does not want to be representative? It thinks the country is going in the wrong direction. It knows the majority wants to go that way, but it wants to send a message, a clarion call to call the country back to the right road, and it wants to select a candidate who will do that, and your system [the blanket primary system] says, ah no, we'll have massive participation, so the majority will come in and say, ah, we like the road we're going on. Is that what the democratic system is supposed to produce? . . .

I don't mind majoritarian rule at the point of election, but at the point of campaigning, and of trying to persuade the people, you're saying you cannot

Not only should the blanket primary's intended impact on *minority* parties trouble those bothered by majority manipulation of the political process, but the effect on *minor* parties, such as the Libertarian or Peace and Freedom parties, should concern all those who believe that a diverse marketplace of ideas serves an electoral function. As noted above, participation in California's minor-party primaries jumped to levels between three and thirty times the enrolled membership of the party.<sup>201</sup> The swamping of minor-party primaries that occurs in a blanket primary undermines their instrumental and expressive functions. Falling more clearly into the Supreme Court's theory of party autonomy as expression, minor political parties exist to send particularized messages and to demonstrate their organizational strength. Such a demonstration, while almost never sufficient actually to win an election, exists as a threat to one or both of the major parties, warning them that the minor party could take away a sufficient number of general election votes from their coalitions to result in electoral defeat.<sup>202</sup>

The blanket primary undermines this threat of defection and alters the message that the minor party can express in the general election. To be clear, the emphasis on minor-party expression does not represent a wholesale shift from the functional, process-based argument urged here. The functions of minor parties in the American two-party system are to offer ideas, demonstrate which and how many voters support them, and with luck, to become absorbed by the major parties.<sup>203</sup> They only can serve these functions when their rights to determine their "standard bearer" are protected from an overwhelming influx of outsiders who have little commitment to or even knowledge of the party's principles.

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even have a party candidate who wants to go in the wrong direction. The majority will decide what's the right direction.

U.S. Supreme Court Official Transcript, *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402 (2000) (No. 99-401), 2000 WL 486738, at \*25.

<sup>201</sup> Christian Collet, *Openness Begets Opportunity: Minor Parties and the First Blanket Primary in California*, in Cain & Gerber, *supra* note 116 (manuscript at ch.11).

<sup>202</sup> See Persily & Cain, *supra* note 5, at 796-98.

<sup>203</sup> See Steven J. Rosenstone et al., *Third Parties in America: Citizen Response to Major Party Failure* 8-9 (1996). Consider also Justice Breyer's question at oral argument in *Jones*:

[H]ere we have a party that's committed to an ideal, and if we can stay committed to it, we will, in fact, eventually persuade people. But we cannot stay committed to that ideal when, because of random considerations, basically, we find ourselves saddled with a gubernatorial candidate who may not even share that ideal, and all of the compelling reasons you've given really have nothing to do with us, say the small parties.

U.S. Supreme Court Official Transcript, *Jones*, 120 S. Ct. 2402 (2000) (No. 99-401), 2000 WL 486738, at \*31.

To navigate around the argument made so far, perhaps opponents of party autonomy would craft a series of exceptions.<sup>204</sup> They might argue that the "state" can impose a rule (over the party's objection) regulating who can vote in a primary so long as: (1) minor parties are exempted; (2) the measure is not used to prevent parties from expanding the number of voters who can vote in their primary (e.g., to include independents and other "outsiders" in their primary à la *Tashjian*); (3) the measure is not passed by the majority party with the intent of hobbling the competitive position of, or otherwise "oppressing," the minority party;<sup>205</sup> and (4) one party's attempt to enact its own rules is not obstructed by the other party-in-government (also like *Tashjian*). At this point it seems to me that the exceptions have come close to swallowing the anti-party-autonomy rule.<sup>206</sup> But two

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<sup>204</sup> See, e.g., Hasen, Electoral Process, *supra* note 5, at 837-41 (articulating antiparty autonomy approach with several exceptions).

<sup>205</sup> Nothing in this exception should be limited to acts of the legislature versus acts executed through the initiative process. A partisan initiative majority that "oppresses" a minority party-in-the-electorate (e.g., a party-line initiative vote where all Democratic voters vote to open a primary and all Republican voters vote to close it) brings forth the same issues of majoritarian tyranny as would a measure passed by a partisan controlled legislature.

<sup>206</sup> In all honesty, I believe that, in their quest to give states power to determine primary electoral qualifications, reformers and their defenders are motivated less by ideology and more by hostility to the two-party system (and the two parties themselves) and by an emotional attachment to (if not glorification of) the initiative process. Those who object to judicial protection of party autonomy also seem to advocate judicial intervention to lower the hurdles of ballot access or otherwise encourage the creation of minor parties. See, e.g., Issacharoff & Pildes, *supra* note 5, at 681-87 (criticizing judicial deference to "stability-enhancing" rationale for ballot access restrictions that entrench major parties); Hasen, Entrenching the Duopoly, *supra* note 5, at 342-44 (summarizing argument that laws to protect two-party system lack adequate justification); Ortiz, *supra* note 5, at 774 (arguing for blanket primary and other reforms to "avoid the strong dangers of the two-party system"). Therefore, the decision rule for reformers becomes: "If the two parties are both against it, then we must be for it." After all, bipartisan agreement alerts one to the possibility of collusive bargaining to "lock up" the political process. What I find ironic about this position is that several of these same scholars have dedicated their careers to studying voting rights and the disenfranchisement that occurs when minority votes are diluted during legislative redistricting. The argument presented here views measures such as the blanket primary as similarly dilutive of minority votes. My hunch is that the reformist positions can be reconciled if we focus on the platform from which reformers have jumped into the study of political parties: namely, the *White Primary Cases*. Operating under a paradigm that views party organizations as inherently hostile not only to the majority but also to minorities, those who focus on the *White Primary Cases* see party autonomy as a device used to thwart popular will and to oppress minorities. My own biases come from five years spent living in California when popular majorities passed initiatives that eliminated affirmative action, see Corinne E. Anderson, A Current Perspective: The Erosion of Affirmative Action in University Admissions, 32 Akron L. Rev. 181, 209-10 (1999) (describing passage of California Civil Rights Initiative, Proposition 209); removed health care and other benefits for undocumented aliens, see Paul Feldman & Patrick J. McDonnell, Prop. 187 Backers Elated—Challenges Imminent, L.A. Times, Nov. 9, 1994, at A1 (describing Proposition

other scenarios still may breathe life into the struggling theory justifying state regulation of political parties: those which occur when either a bipartisan legislative majority or a popular initiative majority "opens" up the primary. The bipartisan legislative majority scenario rarely presents itself because the party organizations almost always have consented to the law. It would be a rare case indeed where a group of Democrats and a group of Republicans in the legislature get together to pass a law to which the party organizations object. Nevertheless, the following theory, which assumes a bipartisan initiative majority similar to that which passed the blanket primary, would apply in those cases as well. The critical issue is whether a bipartisan (or non-partisan) majority ought to have the power to craft electoral rules over the party organizations' objections. Even in these cases—where it appears that it is the "people" versus the "parties"—party organizational autonomy ought to prevail.

### *B. Party Autonomy or Tyranny of the Median Voter?*

Defenders of the blanket primary in *Jones* argued that the state had an interest in making its electoral system more representative.<sup>207</sup> By "representative," the advocates meant that the general election candidates would be ideologically closer to the median voter in each district. Because blanket primaries are intended to nominate candidates that cater to crossover voters rather than to party stalwarts (or even members), the argument goes, the general election choices that emerge more closely resemble the preferences of the voter who could cast the crucial vote to put the winning candidate over the top. In addition to the questionable empirical assumptions underlying this argument,<sup>208</sup> the "representation enhancement" argument has two other

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187, passed in 1994); and created life imprisonment after three felony convictions (the so-called "Three Strikes and You're Out" law), see Dan Morain & Virginia Ellis, Voters Approve "Three Strikes" Law, Reject Smoking Measure, *L.A. Times*, Nov. 9, 1994, at A3 (describing California voters' approval of Proposition 184). The representative and deliberative character of political parties appeared to me then, as it does now, to outweigh any loss to some abstract and misguided definition of "democracy" that protection of party autonomy caused.

<sup>207</sup> *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1302 (E.D. Cal. 1997).

<sup>208</sup> This empirical argument on the workings of the blanket primary has drawn some criticism, one source of which is the incumbency argument presented in the previous subsection. Others have argued that the blanket primary actually leads to more extreme nominees because it places a premium on mobilizing turnout. Thus, David King argues that candidates in blanket primaries take positions that they think will bring out the most voters. These are usually particularistic positions that cater to voters most likely to participate in low information primary elections. See David C. King, *Party Competition, Primaries, and Representation in the U.S. Congress* (manuscript at 34-35) (Oct. 1999) (unpublished manuscript on file with the *New York University Law Review*) (noting that:



flaws: (1) a system targeted toward producing candidates with preferences close to the median voter in each district enhances only a particular and limited vision of representation; (2) the blanket primary, like other populist majoritarian measures, cripples parties in the performance of their critical and historic function of integrating interest groups into the American political system.

Like "expanding participation," "enhancing representation" is not a state interest that lends itself to easy definition or to an obvious set of means to achieve it. Why is a system that intends to channel elections toward the choice of the median voter in each district necessarily more representative than one that represents the diversity and extremes of opinion throughout the state? Are "Tweedledee and Tweedledum" parties—those that straddle the ideological middle ground instead of seeking some differentiation—more "representative" than ones catering to more divergent interests? Political theorists could advance good arguments for both sides.<sup>209</sup> However, had the Court deemed "enhancing representation" a compelling state interest, a law seeking party differentiation, such as that at issue in *Tashjian*, also may have been able to latch onto that justification.

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In open primaries . . . candidates are advised to take particularly strong positions on single issues, trying to increase voter turnout. Open primaries . . . are more divisive than closed primaries because candidates play to the wingnuts who can be brought to the polls on single issues like gun control, rent control, abortion, and union rights).

Most who have analyzed the data on the relationship between primary systems and the ideology of nominees they produce have concluded that blanket primaries tend toward more moderate nominees. See, e.g., Gerber & Morton, *supra* note 116, at 321-22; Kanthak & Morton, *supra* note 116, at 127 (reporting empirical data "suggesting that blanket primaries lead to more moderate candidates").

Nevertheless, every election under the blanket primary is different, and various factors can confound its intended operation. As described above, the choice of a candidate in a blanket primary often depends on how much "action" or competition there is in the opposing party's primary. Some argue that John McCain's support from Democratic and Independent voters in open primary states contributed to the early demise of Bill Bradley in the 2000 Democratic presidential primary. Walter R. Mears, *Bradley Finds Himself in McCain's Shadow*, S.D. Union-Trib., Feb. 20, 2000, at A1, available at 2000 WL 13949522. Were they forced to stay in the Democratic primary, many of these McCain supporters might have voted for Bradley. *Id.* Finally, multiple-candidate primaries may skew the result away from the median voter. If two conservative candidates split the crossover and conservative vote in a Democratic primary, for example, a Democrat more liberal than the average Democratic party member could win the nomination. Of course, worst-case scenarios analogous to these also can wreak havoc in a closed primary, or in any other type of primary. See generally Gary W. Cox, *Making Votes Count: Strategic Coordination in the World's Electoral Systems* (1997) (discussing strategic electoral coordination that reduces number of electoral competitors).

<sup>209</sup> See generally Hannah Pitkin, *The Concept of Representation* 168-208 (1967) (examining different theories of representation).

Whole areas of American constitutional law have as their focus counteracting the myopia of political institutions that are biased toward satisfying majoritarian preferences. The concept of vote dilution itself<sup>210</sup> assumes that there is something faulty in an approach to voting rights that merely tallies ballots and ensures that the winner garners more support than the loser. A system's representation of *more* voters does not qualify as a sacrosanct state interest if it fails to account for *which* voters are represented. The structure of our American political institutions, even apart from political parties, reminds us of the importance both of procedural constraints on majority rule and of judicial review based on the guarantees in the Bill of Rights. Federalism, bicameralism, districted elections, the congressional committee system, the filibuster, and the separation of powers are just a few examples of how institutions are organized to account for values other than the quantity of support for a policy or candidate.

Using the Progressive paradigm of representation to justify measures such as the blanket primary is particularly injurious in the context of party nomination methods. Progressives minimize parties' traditional role of building coalitions among interest groups and striking a balance between minority interests and majority rule. Despite the elitist shadow it casts in most court opinions, reminding voters of an era of boss rule, party autonomy is not a concept at odds with a liberal, pluralist conception of democracy.

Of course, party organizations themselves involve, by necessity, hierarchy and oligarchy in order to accomplish their tasks of mobilizing voters, winning elections, and executing policy. But en route to performing these central tasks, party organizations build coalitions among interest groups and, in effect, craft bargains between the median voter and minority groups.<sup>211</sup> Political parties are a countermajoritarian check on a system highly skewed toward representation of the median voter. The constitutional protection for freedom of association should be interpreted as recognizing that fact and preserving parties' ability to define their association in ways that include and give power to less popular groups with preferences far away from those of

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<sup>210</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986) (applying Section 2 of Voting Rights Act to find vote dilution challenge through use of multimember districts with at-large elections); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (establishing current constitutional rules for vote dilution claims); *White v. Regester*, 412 U.S. 755 (1973) (finding multimember at-large districts unconstitutional based on theory of vote dilution derived from Equal Protection Clause); *Whitcomb v. Chavis*, 403 U.S. 124, (1971) (finding no constitutional violation because of use of multimember districts). See generally Issacharoff et al., *supra* note 12, at 367-409 (providing primer on vote dilution law).

<sup>211</sup> See Persily & Cain, *supra* note 5, at 791-96 (describing pluralist paradigm of parties as vehicles for aggregation of interests).

the median voter. This feature is the defining characteristic of party associations and thus of parties' associational right.

This process of coalition building that innovations like the blanket primary retard is a complicated, but essential, feature of American democracy.<sup>212</sup> Robert Dahl's description of what he saw in the parties of the late 1960s easily can be updated:

Democrats use rhetoric and advocate policies designed to appeal to their followers in working-class occupations and the big cities; Republicans use rhetoric and advocate policies designed to appeal to their followers in the business community and small towns. When the Democrats place more emphasis on equality and the virtues of the underprivileged, and Republicans on opportunity and the virtues of the more privileged, they are appealing to their respective hard cores of loyal followers. Yet neither party wishes to ignore potential votes in other social strata; hence each party designs its rhetoric and its program not only to retain the loyalty and enthusiasm of its hard core of zealous adherents but at the same time to win over less committed voters in all the major categories of the population.<sup>213</sup>

Racial, religious, regional, and other types of groups would find a more noticeable place in an updated description of the party coalitions, but the coalition-building process remains the same: Parties aggregate groups into relatively consistent teams that compete in elections. The power of the teams—measured by their ability to translate votes into policy outcomes—depends on consistency in membership for the party and in support for party candidates. Party organizations thus strike a unique balance between the preferences of the median voter, which in the end govern the outcome of the general election, and the preferences of individual groups, each of which by

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<sup>212</sup> The argument presented here draws from the rich literature on pluralism and the American party system. See, e.g., Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* 213-38, 243-57, 450-56 (1967) (describing party organization and function); Pendleton Herring, *The Politics of Democracy: American Parties in Action* 100-13 (1965) (discussing role of political parties in American democratic scheme); William J. Keefe, *Parties, Politics, and Public Policy in America* 34-35 (8th ed. 1998) (discussing parties' ability to mediate interest group conflicts); Nelson W. Polsby, *Consequences of Party Reform* 64-68 (1984) (analyzing effect of primary elections on presidential candidate selection); Austin Ranney & Willmoore Kendall, *Democracy and the American Party System* 502-04 (1956) (noting popular satisfaction with pluralistic parties); Jack L. Walker, Jr., *Mobilizing Interest Groups in America: Patrons, Professions, and Social Movements* 144-47, 156 (1991) (reporting data indicating "increased ideological diversity within the group structure underlying the two parties"); Gerald M. Pomper, *The Contributions of Political Parties to American Democracy, in Party Renewal in America: Theory and Practice* 1, 5-7 (Gerald M. Pomper ed., 1980) (describing "interest aggregation" as important party function).

<sup>213</sup> Dahl, *supra* note 212, at 229.

nature is defined by an interest that does not garner majority support. If state law takes party organizations (and, for that matter, party members) out of the electoral equation, candidates would be left to their own devices to cobble together a plurality sufficient to win an election.<sup>214</sup>

But why should we care? Or, to put the question more dramatically, why should the *Constitution* care? It is one thing to say that blanket primaries are bad policy or that they skew elections toward undesirable outcomes; it is quite another to say that the Constitution prohibits (or ought to prohibit) states from experimenting with various nomination procedures. The answer to these questions derives from the other half of political process theory: the protection of “discrete and insular minorities.”<sup>215</sup> In their defense, the Progressives argue that the only minorities favored by closed primaries are those few people in real positions of power in the parties—hardly a “discrete and insular” group. But the intended effects of the blanket primary,

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<sup>214</sup> The consistency and coherence of party coalitions advance purposes other than assembling groups into winning teams and crafting messages for elections. Strong parties allow for coordination between partisans in different branches and levels of government—a necessary condition for effective policymaking. In the face of the cumbersome policymaking machinery of the American system of separation of powers and federalism, political parties are the only agents capable of shepherding policy from beginning to end through the labyrinthine obstacle course of the constitutional system.

Under blanket primary rules and other measures seeking to mute partisanship, a winning candidate’s electoral coalition may have little resemblance to the necessary governing coalition. Each candidate—in both the primary and the general election—may attempt to draw support from the entire political spectrum. A Democrat in one district may have little in common with (indeed, may even have an incentive to be dissimilar from) Democrats running in other districts. Lastly, the electoral promises of particular candidates to their unique coalitions have much less in the way of institutional support to back them up. See Persily & Cain, *supra* note 5, at 793-95.

<sup>215</sup> See Ely, *supra* note 179, at 75-77, 135-79 (discussing judicial protection of minorities). The phrase comes from footnote four of the Supreme Court’s opinion in *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

I am not so naïve as to think all minorities in party coalitions are discrete and insular. Unions, business groups, the Christian Coalition, Jews, Cuban Americans, the NRA, and the AARP often gain disproportionate influence because of their powerful presence in one of the parties. Extremist, well-organized, or well-financed “minorities” can capture a party and skew the party’s nominees and platform toward the preferences of a small faction. Although such powerful minorities may exploit the party system to their advantage, discrete and insular ones still are better off than they would be under a system of unmediated majoritarian control. The only real loser in the coalition-building game the parties play may be the silent masses that feel unrepresented by either political party. Those voters, however, are the ones who ultimately will determine the victor in the general election.

let us not forget, are to represent the median voter in every district as accurately as possible. The chief defect that the blanket primary's advocates saw in the system as it existed was its tendency to produce candidates with allegiance to the interest groups and party organizations at the poles, not at the center, of the political spectrum.

Clinging to a religion of majoritarianism and catering to the preferences of the supposedly voiceless "minority" of independent voters, the Progressives treat each "interest" and vote as equal. On its face, this argument appears uncontroversial: What else are equal protection and the one-person, one-vote rule about, if not treating individuals as political equals? The Pluralist response to this argument is that "interests" are not all equal: Some are intensely felt, others only weakly so. Democracy is more than a math problem. The *number* of people favoring a particular candidate or proposition is only one factor for which an electoral system needs to account. The intensity of preferences also must weigh in the balance.<sup>216</sup> And that is where political parties come in.

Parties, by their nature, do not consider all interests as equals. The relative influence and importance of any given intraparty faction is certainly a function of the size of the group, but it is also a function of the intensity of the group members' beliefs and the resources (e.g., money, skills, time, personnel, effort) that they have and are willing to commit toward furthering their own and the party's interests.<sup>217</sup> Over time, parties form electoral and governing coalitions from an array of groups defined by region, race, ethnicity, religion, background, and a variety of economic and occupational interests. These groups come into the party coalition because the party organization and party-in-government can deliver the goods—policies, power, patronage, support for the election of group members—in return. The parties can only do this when they stand for something, or more specifically, for some defined set of interests.<sup>218</sup> When individual primary candidates

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<sup>216</sup> See Sidney Verba et al., *Voice and Equality: Civic Voluntarism in American Politics* 179-82 (1995) (explaining importance of intensity of preference for democratic theory, and citing Robert A. Dahl, *A Preface to Democratic Theory* 90-119 (1956) and Lani Guinier, *Tyranny of the Majority: Fundamental Fairness in Representative Democracy* 14-18, 94-101 (1994)).

<sup>217</sup> Of course, this Pluralist argument rightly draws fire for assuming that all interests have an equal chance of penetrating the party system. E.g., E.E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in America* 25-36 (1960) ("The vice of the groupist theory is that it conceals the most significant aspects of the system. The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent. Probably about 90 percent of the people cannot get into the pressure system.").

<sup>218</sup> See Walker, *supra* note 212, at 156 ("As ideological polarization pushes interest groups into large contending camps, political parties emerge as the only agencies logically capable of exercising leadership and providing coordination.").

are left adrift to corral together on their own, in each election, in each district, a somewhat random collection of groups drawn from the entire electorate, the power of any given minority group across districts, candidates, and branches of government diminishes. Parties become less relevant in elections and in turn less powerful as integrating forces among the elected politicians carrying the party label. For those who want to make partisan coordination, and therefore policymaking, more difficult, the blanket primary, because it creates candidate-specific primary coalitions that vary based on the chance circumstances described above, fits the bill.

To reiterate, the team-building feature of autonomous political parties has a constitutional component. Party autonomy, located (albeit uncomfortably) in the First Amendment, acts as a critical mechanism for counteracting the majoritarian bias of America's plurality-based electoral systems. Parties give a voice to interest groups in the American political system who are ideologically or otherwise distant from the median voter.<sup>219</sup> The central question the courts must face when adjudicating cases like *Jones*, *Tashjian*, and *La Follette* is whether parties should be allowed to experiment with different means of coalition building. Some, as in *Tashjian*, will want to expand the primary electorate so as to craft bargains between independent voters and party stalwarts. Others, like the parties in *Jones*, reserve the appeal to independent and other voters for the general election. Through the closed primary, they seek a means of solidifying the party's message, thus accommodating the forces that will provide crucial support in a larger electoral and governing coalition and reducing the unpredictability that comes from systems that offer outsiders the option to intervene. The state is free to experiment with different means of encouraging participation or enhancing representation, but in doing so it must avoid co-opting the party organizations in the process.

### C. *The Nonpartisan Primary as Safe Harbor*

At first glance, the "state" appears helpless in this constitutional framework. Party organizations seem to hold all the cards in the game of constructing rules of nomination of candidates to the general election ballot. Because the state need not hold a partisan primary at all, however, the state always has the power to craft rules that "expand

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<sup>219</sup> See generally Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970) (explaining concepts of voice and exit with regard to organizations); Persily & Cain, *supra* note 5 (applying Hirschman's concepts to American party system).

participation" to include every voter and to remove from parties all formal power in the selection of nominees. The nonpartisan primary, under this theory, remains the state's trump card.

Unlike other primary rules, a nonpartisan primary removes all party organizational involvement from the formal nomination process. Candidates qualify for the primary ballot under a neutral signature requirement or other criterion, and the top two candidates who garner votes in the primary advance to the general election.<sup>220</sup> Those two candidates who advance to the general election may be from the same party or from different parties. The rule for nomination is simply that a candidate receiving the most or second-most votes in the primary earns a space on the general election ballot.<sup>221</sup> The nonpartisan primary is used commonly in most local elections. Louisiana uses a nonpartisan primary for its elections to statewide office and Nebraska uses it for legislative elections.<sup>222</sup> Moreover, a state does not need to have a primary at all. A state could merely hold a general election and if one candidate does not get a majority then hold a subsequent runoff election between the top two vote-getters. Once again, all voters participate in every stage of the process. Under both types of systems, no voter is "disenfranchised," party bosses play no formal role, candidates must cater to the whims of the median voter twice, candidate-specific coalitions will develop for each election, and the winner will have proven to be the preferred choice of the majority. However, the parties will be forced outside the formal process of candidate selection, and the state will not hijack the parties' nomination processes.

For some, the creation of this constitutional safe harbor for the nonpartisan primary appears inconsistent with a robust theory of partisan autonomy because, like a blanket primary, a nonpartisan primary threatens to undermine parties by removing them from the formal nomination process.<sup>223</sup> If one is to make a functional argument, should not state imposition of either primary system be considered unconstitutional? Understanding why this question misses the point is critical to understanding how the building blocks of this functional theory of party autonomy fit together.

First, we all must recognize that the Constitution does not *require* a state to hold primary elections of any sort, let alone to fund a party's

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<sup>220</sup> See Gerber & Morton, *supra* note 116, at 306 & n.5.

<sup>221</sup> *Id.*

<sup>222</sup> See Neb. Const. art. III, § 7; La. Rev. Stat. Ann. § 18:481 (West 1979).

<sup>223</sup> See Issacharoff, *supra* note 5 at 307 (arguing that, under fully open primary system, "candidates could no longer succeed by appealing to a relatively narrow segment of the electorate in the nomination process [which] undermines activists' incentive to participate").

nomination process. Political parties are absent from the constitutional text, and it would be an activist judge indeed who would suggest that the Constitution *obligates* states to provide a formal role for parties in their nomination processes. Saying that parties have no *right* to be part of the formal nomination process, however, does not mean that states have carte blanche to regulate them should the state wish to craft and fund institutions, such as primary elections, that provide parties with a special role in filtering candidates for the general election ballot.<sup>224</sup> This functional theory strikes a balance: On one hand, it gives states the ultimate authority to decide if parties will play a role in candidate nomination, but on the other, it ensures that once a state erects a nomination process that confers a special status on parties, it cannot impose restrictions that either benefit one party over another or ruin parties' ability to bring minorities into coalitions.

Those attracted to game theory might view this model as a bargaining game between the state (meaning the median voter in an initiative state or the critical legislator with the power to pass a law<sup>225</sup>) and the party organization (meaning the median voter in the party or whoever has the ultimate power to craft party nomination rules). Whenever it considers party leaders to have gone "too far" in closing off the nomination process, the state can always threaten the party with a nonpartisan primary—i.e., threaten to remove them from the process altogether. In general, however, voters want parties to be part of the electoral process. They value the voting cue and the reduction in information costs that the party label provides, and they want real choices in the general election, rather than nearly identical candidates who arrive onto the general election ballot by appealing to the general electorate in the primary.<sup>226</sup> At the same time, voters may not want party bosses to close off the nomination process, preventing Republicans from voting in Democratic primaries and preventing independents from voting in any party primary. Thus, the negotiation begins. The parties offer to open up their nomination process just enough to satisfy the "state" and to prevent it from adopting a nonpartisan pri-

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<sup>224</sup> But cf. Ortiz, *supra* note 5, at 756 (arguing that "party arguments for more absolute autonomy are democratically perverse").

<sup>225</sup> Who such a legislator is will depend on whether divided or unified government exists. In a case of divided government, in which a two-thirds majority in each house is required to override the governor's veto, the critical legislators are those who can provide the final vote to override a veto (i.e., in the federal model, the 67th Senator and the 290th House member). In a unified government, the critical legislator will be the median voter in each House (i.e., the 51st Senator or the Vice President, and the 268th House member). Divided and unified may be inapt descriptions here; the distinctive feature of the two scenarios is whether the chief executive will exercise his veto power.

<sup>226</sup> See Persily & Cain, *supra* note 5, at 787.



mary. The parties may offer to include independents in their primary, they may offer an open or blanket primary, or perhaps they may be unwilling to open up their primary at all and thus they may offer the closed primary and ask the state to "take it or leave it." Of course, the parties may make different offers. Their offers will depend on where they estimate the preferences of the median voter to be, how much they fear a nonpartisan primary, and how much they value restricting the nomination process to party leaders or members.

Then, the state must decide if the parties' offers are preferable to a nonpartisan primary. In other words, have the parties agreed to open up their processes enough such that the state prefers the parties' offer to a system where the parties do not play a formal nominating role? The state's preferences for institutional design will depend on all types of factors—e.g., the ideological dispersion of the electorate, the intensity of partisan feelings, the history of party boss overreaching, or the current value of partisanship as opposed to other voting cues as a useful cognitive shortcut for distinguishing among candidates. In the end, however, the state makes the ultimate decision, deciding between a system of total inclusion and participation and one that accords party associations the autonomy they desire in choosing their candidates.

Lest the observer find this bargaining model farfetched, it is worth noting that the fallout from the blanket primary case showed a remarkably similar series of negotiations to craft the rules for California's nomination process. The vote on Proposition 198 showed that the median voter in the electorate preferred a blanket primary to the closed primary system that existed at the time. After the Court struck down the blanket primary, different politicians and groups presented a flurry of proposals to move toward a middle ground that could accommodate the preferences expressed in the initiative vote.<sup>227</sup> Party leaders considered an open primary, in which voters could choose to vote in any primary on election day, as going too far in the direction of undermining party autonomy. The closed primary was clearly unacceptable to the majority of the voters. But would something less than a blanket primary satisfy the median voter? Ultimately, Governor Gray Davis, who had supported the blanket primary, proposed opening the primaries to independents but prohibiting party members from crossing over into another party's primary—what some have described as a semiclosed primary.<sup>228</sup> The leaders of the party organiza-

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<sup>227</sup> Editorial, *Primary Reform Won't Die*, L.A. Times, July 3, 2000, at B6 (endorsing proposed alternative primary system).

<sup>228</sup> See Kanthak & Morton, *supra* note 116, at 119 (defining semiclosed primary).

tions agreed, and the legislature appears poised to open both primaries to independents.<sup>229</sup>

California is not exceptional. Thirty-eight states allow outsiders (either independents or other party members) to vote in one or both primaries,<sup>230</sup> and the party organizations have not challenged those laws (indeed, as in *Tashjian*, many advocated strongly for them). A party closes its primary at its peril. It risks nominating candidates that are less competitive because of their limited appeal to the median party voter as opposed to the median voter in the electorate. But the organization that risks electoral loss in order to bring more groups into its nominating coalition crafts a bargain between competition and representation, and between representation of each *voter* equally and equal representation of each *interest* based on its volume and intensity. The First Amendment steps in to preserve party associations' ability to craft these unique coalitions when the state wants to prevent them. With the nonpartisan primary always an option and a trump card to be played by the state, states have no interest that could justify forcing voters into a party's primary against the party organization's will.<sup>231</sup>

#### IV

##### TEXTUAL SUPPORT AND CONSTRAINTS FOR THE FUNCTIONAL THEORY

###### A. *The Textual Hook*

Thus far, this Article has asserted that some kind of functional argument is necessary to adjudicate conflicts between state laws and party "rights." Judicial intervention in every case is inevitable, either to uphold the state law or to strike it down, and some theory based on the desired functions of parties will draw the line between permissible and impermissible state intrusions into the parties' decisions as to who can vote in their primaries. Functional theories are not mere policy arguments, however. They emerge from background principles of constitutional law to resolve unanticipated conflicts between actors, such as political parties, for which the constitutional text provides no clear direction. Nevertheless, there is great danger in judicial enactment of such functional theories because they appear so much like

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<sup>229</sup> Scott Lindlaw, *Calif. Lawmakers Mull New Primary*, AP Newswire, Aug. 30, 2000, 2000 WL 25992153.

<sup>230</sup> See Kanthak & Morton, *supra* note 116, at 121 tbl.8.1 (providing data as of 1996 establishing that thirty-eight states used semiclosed, semiopen, pure-open, or nonpartisan primary systems, while eighteen states used pure-closed systems).

<sup>231</sup> I would even go so far as to say that the state has no interest in mandating a partisan primary because a nonpartisan primary is always a less intrusive option.

amendments to the Constitution rather than interpretations of it. Therefore, to avoid the charge of judicial legislation and to provide some limit on the range of theories that might be offered in other areas of constitutional law, functional theorists ought to attempt to cleave their principles to the most analogous textual provisions so as to minimize the distance between their theories and the text itself.

Although there are several viable candidates for the job of textual "hook" for this functional theory,<sup>232</sup> the First Amendment remains the most legitimate source for analogous principles of autonomy and association. The protections for speech, press, assembly, petition for redress of grievances, and, implicitly, association, are the principal sources in the Constitution for organizational autonomy and collective self-expression. After chastising the Court for characterizing party autonomy as following naturally from traditional First Amendment protections for expression and association, this move in the argument might seem hypocritical, or at least unfulfilling. What I wish to suggest here, however, is that these functional principles of competition and representation form the core of a unique First Amendment freedom of association that distinguishes political parties from other organizations.

As the primary textual source for constitutional protection of organizations, the First Amendment requires less torturing than other clauses in the Constitution when we add a different type of organization (i.e., one with control of state power and a special role in the electoral system) to the list of associations within its purview. Moreover, as the introductory discussion of freedom of expressive association detailed, the Court already entertains a kind of functional argument in these types of cases. In *Roberts*, for example, the Court explained: "[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with

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<sup>232</sup> One could locate these functional values in several places in the Constitution. The heretofore nonjusticiable Republican Guarantee Clause, for example, could be read as requiring the kind of party autonomy urged in this Article. See U.S. Const. art. IV, § 4. Or, one could insert these party "rights" into the word "liberty" in the Due Process Clause of the Fourteenth Amendment, thus creating a substantive due process right of party autonomy. Or, one could extrapolate these principles from the fundamental interests prong of the Equal Protection Clause, which is where the Court has often derived voting rights protections. See *Bush v. Gore*, 121 S. Ct. 525, 526 (2000) (using Equal Protection Clause to prevent allegedly discriminating recount process), *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment"). Larry Kramer has suggested disposing of a textual requirement altogether and reading party autonomy into the structure of the Constitution itself. See Kramer, *supra* note 49 (manuscript at 5-8, 10) (arguing that constitutional rights of political parties extend beyond those of individuals and are rooted separately and distinctly in Constitution).

others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>233</sup> In *Rotary Club*, it concluded that “the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members’ ability to carry out their various purposes.”<sup>234</sup> The minimalist version of the argument presented here would require judges merely to recognize that a party’s First Amendment right of association in the context of primary voter qualifications serves unique “ends,” “purposes,” or functions that I have described in this Article.

Attaching the right of partisan association to the First Amendment, while rejecting the expressive nature of that association, presents some obvious difficulties. We tend to view the First Amendment as protecting a right of association when the exercise of that right is necessary for the achievement of other values, such as speech and press, that are specifically mentioned in the text. In other words, forced inclusion of a gay advocacy group in a Saint Patrick’s Day parade, for example, would change the “message” delivered by such a parade. Taking the expression out of the association by concentrating on the association’s less verbal functions would appear to break the link connecting the right of association to the text.<sup>235</sup> If the associa-

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<sup>233</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1983) (emphasis added).

<sup>234</sup> *Bd. of Dirs. of Rotary Int’l v. Rotary Club*, 481 U.S. 537, 548 (1987) (emphasis added).

<sup>235</sup> Of course, the Court has recognized a substantive due process right of intimate association, but political parties are hardly intimate institutions like marriages and families. The Court described the right of intimate association in *Rotary Club*, 481 U.S. at 545-46 (1987):

The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights. Such relationships may take various forms, including the most intimate. See *Moore v. East Cleveland*, 431 U.S. 494, 503-504, (1977) (plurality opinion). We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage, *Zablocki v. Redhail*, 434 U.S. 374, 383-386; the begetting and bearing of children, *Carey v. Population Services International*, 431 U.S. 678, 684-686 (1977); child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); and cohabitation with relatives, *Moore v. East Cleveland*, supra, [431 U.S.] at 503-504. Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the First Amendment protects those relationships, including family relationships, that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.” *Roberts v. United States Jaycees*, supra, [468 U.S.] at 619-620. But in *Roberts* we observed that “[d]etermining the limits of state authority over an individual’s freedom to enter into a particular association . . . unavoidably entails a careful assessment of where that relationship’s objective characteristics locate

tion is not one whose very existence "speaks" or "prints" a message, then how could the First Amendment cover it?

This conceptualization of the First Amendment as limited to expression is woefully anemic. The First Amendment includes a lot more—the religion clauses, the right to petition, and perhaps most relevantly for our purposes, the right of assembly.<sup>236</sup> The argument for a right of partisan association that I present here derives from an under-

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it on a spectrum from the most intimate to the most attenuated of personal attachments." 468 U.S., at 620 (citing *Runyon v. McCrary*, 427 U.S. 160, 187-189 (1976) (Powell, J., concurring)). In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship. 468 U.S., at 620.

For the argument that inspired the Court's recognition of such a right, see generally Kenneth L. Karst, *The Freedom of Intimate Association*, 89 *Yale L.J.* 624 (1980).

<sup>236</sup> The Court tends to view the "right to peaceably assemble" as intertwined with the other rights of expression. See, e.g., *United Mine Workers, District 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("[T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press."); *Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance." (citation omitted)); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental. . . . [T]he right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions"). But when the Court has explored the nature of the right to assemble by itself, it has accorded the provision a liberal construction extending well beyond the expression inherent in a given assembly. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78 (1980) (plurality opinion) ("From the outset, the right of assembly was regarded not only as an independent right but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. . . . People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may 'assemble[e] for any lawful purpose.'" (quoting *Hague v. CIO*, 307 U.S. 496, 519 (1939) (opinion of Stone, J.)); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) ("The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government, is an attribute of national citizenship. . . . The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." (emphasis added)). The right peaceably to assemble was thought by some of the Framers to be redundant with the freedom of speech and by others to be indispensable to it. See *Richmond Newspapers*, 448 U.S. at 577-78 nn.13-14 (excerpting debates over whether to include right to assemble in First Amendment). Despite the fact that it overlaps and enables core rights of expression, the right to assemble, even as originally intended, adds at least some constitutional protection not guaranteed by rights of speech, press, and petition for redress of grievances. See *id.* at 578 n.14 ("The very purpose of the First Amendment is to guarantee all facets of each right described; its draftsmen sought both to protect the 'rights of Englishmen' and to enlarge their scope.").

standing of the First Amendment as concerned with the protection of certain organizational forms directed toward the same political ends as individual rights of speech, press, petition, and assembly. Political parties, even when they do not "express" themselves, exist as the primary collective enterprises for the achievement of political goals in modern American society. Their right to define themselves in a way best suited to achieve those goals must be found, admittedly, at the interstices of the various First Amendment rights. When it comes to primary elections, however, we might view political parties as representing the most important of assemblies. By regulating who can show up and participate in this unique, somewhat anonymous meeting, the party makes its collective strategic decisions. To be sure, it may define itself and its message in the process. But the First Amendment does not stop when the expression does. It continues to protect the parties' other decisions as to how best to achieve the organization's collective goals.

The parties' rights to include and exclude voters from their primaries, however, derive not from traditional considerations of enforcing a line between state authority and individual liberty, but from the democratic necessity of preventing incumbent entrenchment and tyranny of the majority. What makes political parties special associations is their ability to serve as competing channels for interest group coalitions seeking a share of state power. They are the principal means through which groups of people can join together to gain office and influence the formal institutions of government. Their associational freedom entails an ability to bring enough people into the organization so that the coalition can both gain power and accurately represent the interests of the various groups that form the coalition.

These values of representation and competition are in tension in a plurality-based electoral system like that dominant in the United States. Robust party associations offer a way out. The tension derives from the fact that the two parties always must appease the median voter in order to gain elective office, and in doing so they risk blurring their differences and converging at the electorate's ideological midpoint.<sup>237</sup> Consequently, the great danger under our electoral system (as opposed to a system of proportional representation) is that groups with preferences distant from those of the median voter will be left without any voice whatsoever throughout an entire representative body. Parties counteract that danger by extending their coalition from the median voter to the ideological poles of the electorate, crafting a

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<sup>237</sup> See generally Anthony Downs, *An Economic Theory of Democracy* 114–41 (1957) (describing tendency toward convergence in two-party system).

bargain (in essence) between each group and the median voter so as to enlarge the coalition while remaining electorally competitive. Certain groups, because of their unpopular stances or the general electorate's remarkable ideological homogeneity, will inevitably be left out. But the probability of them (or any given group) being represented at all is greater when party associations are free from state interference in building their electoral coalitions.

When we speak of a party's associational right, then, we are talking about the party organization's freedom to craft these varied electoral coalitions. Sometimes the coalition will include only party members; other times it will include independents and/or members of the opposition party. But it is the party organization, rather than the state, that should decide how best to mediate between the competing demands of competition and representation. As with other associations, judges should use the First Amendment to protect the organization's right to include and exclude members. The rationale for protecting this "right" is different, however, for political parties. It depends on a theory of how the electoral system should be organized to protect minorities' ability to band together into electoral coalitions with a real chance of gaining access to power.

### *B. Textual Trumps to the Functional Theory*

Much as one would like to analogize political parties to private associations for the purpose of granting them First Amendment rights, one cannot escape the state action inherent in modern primary elections and the real dangers of political exclusion that party organizational autonomy can pose. In its many protections against discrimination in the right to vote, however, the Constitution anticipates and protects against these dangers. The functional theory presented here (or anywhere) must give way to explicit textual provisions that protect against discrimination in the right to vote. Just because we are concerned with primaries rather than general elections does not mean that the right to vote is unaffected or that explicit constitutional protections are irrelevant in defining the contours of party organizational discretion. Text trumps function because amendment to the Constitution represents the ultimate expression of newfound preferences for institutional design. Through amendments, the Congress and the states can protect against a judiciary reading unwritten words into the Constitution.

Thus, the *White Primary Cases* and the Fifteenth Amendment's protection against voter discrimination on the basis of race are not problematic for the functional theory. Because they operate as state

actors with the capacity to alter election rules so as to deprive groups of an effective voice in politics, political parties cannot exclude voters from their primaries based on their race. To a certain extent, the *White Primary Cases* are easier for the functional theorist than they were for the Court that adjudicated them.<sup>238</sup> Once we admit the obvious—that modern primaries constitute state action—the textual provisions preventing disenfranchisement based on protected characteristics serve as clear bounds on the interest group aggregation function of parties. In other words, the Constitution says to parties: “You can aggregate groups together as much as you want, so long as you never exclude groups based on characteristics that the text specifically protects.”<sup>239</sup>

Other textual protections besides the Fifteenth Amendment provide constraints on the party’s ability to exclude voters based on some class status. A party’s discrimination based on gender or age would fall within the respective prohibitions of the Nineteenth<sup>240</sup> and

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<sup>238</sup> Those who rely on the expressive component of a party’s primary, analogizing it to a private club or parade, need to explain why a party doesn’t have the right possessed by other private organizations to exclude on the basis of race or other protected characteristics. If the Boy Scouts can exclude on the basis of sexual orientation, why can’t the Democrats exclude on the basis of race?

<sup>239</sup> At least with regard to race, one could argue that even the functional theory as to interest group aggregation might support an exception to the general rule of party autonomy. Political scientists have long established that “race is different” when it comes to the potential for coalition building and the dynamics of political attitude formation. V.O. Key’s seminal work, *Southern Politics in State and Nation* (1949), explained how the racism and political attitudes of southern whites varied in proportion to the number of African Americans in their proximity. The dynamic has been described as the “racial threat hypothesis,” which holds that whites become more conservative as the number of African Americans in their proximity grows. Mark A. Fossett & K. Jill Kiecolt, *The Relative Size of Minority Populations and White Racial Attitudes*, 70 Soc. Sci. Q. 820, 833 (1989) (describing findings of study supporting this hypothesis). This dynamic provides for a counterintuitive political effect: that African Americans, unlike other interest groups, lose power and representation as their numbers increase. Cf., e.g., Donald Phillip Green & Jonathan A. Cowden, *Who Protests: Self-interest and White Opposition to Busing*, 54 J. of Pol. 471, 479 (1992) (finding that white Boston parents whose children were affected by busing desegregation program in 1970s were more likely to politically protest than other Boston residents). As the number of African Americans in the population grows, the political attitudes of the whites in the given locality or district shift to the right, as do the ideological positions of median voters and majority-elected representatives. See Lawrence Bobo, *Group Conflict, Prejudice, and the Paradox of Contemporary Racial Attitudes*, in *Eliminating Racism: Profiles in Controversy* 85, 95-98 (Phyllis Katz & Dalmas Taylor, eds. 1988) (summarizing literature on group conflict between whites and blacks in United States). Hence, racial interest groups, as they grow in numerical strength, actually manufacture their own opposition and make the process of coalition building more difficult. Id. A functional theory could account for such a dynamic. Fortunately, the Fifteenth Amendment makes such a non-text-based exception to the functional theory unnecessary.

<sup>240</sup> U.S. Const. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).



Twenty-Sixth<sup>241</sup> Amendments. Thus, should the Democrats wish to become the "soccer mom" party, they must ensure that all soccer parents over the age of eighteen can join as well. The Twenty-Fourth Amendment's prohibition against poll taxes also would apply (indeed, the text refers to primaries specifically), and perhaps one could read into it a generalized prohibition against discrimination in the right to vote against the poor.<sup>242</sup> After all, requiring that one must have a certain amount of money to vote has the effect of forcing voters to demonstrate their wealth as a precondition to participation.

Relying on textual prohibitions may seem a convenient way out of the difficult questions that enforcing a strong principle of party autonomy naturally leads opponents to ask.<sup>243</sup> But to be fair to the argument made here, party discrimination based on identity rather than ideology raises a different set of questions than those involved in cases such as *Tashjian* and *Jones*. In the cases discussed up until now, the party autonomy argument was used as a sword to strike down state laws that force parties to accept or reject someone in their primary. In contrast, in cases such as the *White Primary Cases*, the party autonomy argument is used as a shield against individual lawsuits seeking to break down barriers imposed by exclusionary party rules. This postural distinction may translate into no constitutional difference,<sup>244</sup> but

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<sup>241</sup> U.S. Const. amend. XXVI ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

<sup>242</sup> U.S. Const. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, . . . or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."). Note that this Amendment applies specifically to primaries. *Id.*

<sup>243</sup> I am often asked whether discrimination against gays and lesbians would be permitted. Let me note first that the current state of the law arguably leaves them without protection. See *Republican Party v. Dietz*, 940 S.W.2d 86 (Tex. 1997) (rejecting challenge by Log Cabin Republicans of Texas to Texas Republican Party's decision to prevent them from having booth at state party convention). My reliance on explicit textual prohibitions would seem to do so as well. But while discrimination may be possible, penumbral rights of privacy might be interpreted as preventing enforcement of a ban based on sexual orientation. Of course, were one to apply the Equal Protection Clause to party behavior, then a whole host of groups might garner protection. I am somewhat concerned where this might lead, however, because even rational basis scrutiny might prove deadly to party membership decisions that deserve protection. Party decisions on whom to include and exclude are often based on interests that, if proffered by the state, might seem illegitimate. Nevertheless, should the approach urged here be adopted by the Court, a somewhat different form of equal protection scrutiny focusing on party interests might prove useful. At this point, I would limit the constitutional restrictions on political parties to those textual provisions that deal specifically with the right to vote.

<sup>244</sup> For example, one's answer to the question whether the Constitution prevents parties from excluding women also implies a principle as to whether the state can impose a law of gender neutrality on the party against its wishes. In one case the discriminated-against

it helps to separate the typical from the atypical cases. These worst-case scenarios should also be tempered by the reality of party competition. With each group that a party excludes from its primary, it not only loses support from members of that group, but it also repels any number of other voters who now find that this racist, sexist, homophobic, or otherwise hateful party stands for something antithetical to their beliefs. These group-based objections are fair criticisms of the strong principle of party autonomy, but critics also must recognize that the recent history of parties after the *White Primary Cases* shows very little impulse to discriminate against voters because of anything except membership in another party.

The functional theory presented here is, I admit, somewhat weaker when it comes to party discrimination against protected classes of individuals. But even in these cases, the theory is stronger than the one currently guiding the Court. Moreover, as I hope the discussion of interest group aggregation and representation proved, minority groups are much better off under a regime where judges protect party autonomy than they would be in a system where the majority has the final say at both the primary and general election.

### CONCLUSION

The argument in favor of party autonomy is a hard one to make. Party organizations appear antithetical to democracy. They remind us of periods of boss rule or white primaries, where party organizations sought to agglomerate power by implicitly or explicitly disenfranchising voters. Thus, to rein in parties, reformers look to either the "state," which is usually one party in its most dangerous form, or the judiciary, which has its own partisan predispositions and lacks institutional competence to enforce an ad hoc approach that separates parties' evils from their necessary role in the democracy.

Regardless of whether one would place primacy, as this Article has, on parties' role in fostering competition and interest group aggregation, I hope the need for a shift in focus away from questions of state action and expression and toward functional arguments has become readily apparent. Political parties are unlike traditional private associations or state actors, and primary elections are unlike meetings of a Rotary Club or a congressional committee. Parties occupy a space in the American political system at the interstices of government, civil society, and individual identity. We ought to read the Con-

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individual sues the party, and in the other the party sues the state, but the question ultimately boils down to whether this type of discrimination is within the ambit of a party's protected sphere of autonomy.

stitution, the framers of which never anticipated a party system like the one that has developed, as providing crude but necessary tools for judicial line-drawing between state authority, party autonomy, and individual rights. The more that scholars and courts recognize the unique constitutional position of political parties and the need to construct rules that account for their uniqueness, the richer the debate will become on which party functions, if any, judges ought to protect.