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## California Democratic Party v. Jones: Invalidation of the Blanket Primary

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# *California Democratic Party v. Jones: Invalidation of the Blanket Primary*

## I. INTRODUCTION

“While we yet hold and do not yield our opposing beliefs, there is a higher duty than the one we owe political party. . . . This is America, and we put country before party.”<sup>1</sup> The saga prompting this remark was a thirty-six-day-long battle between Republicans and Democrats for the United States’ presidency, fought twice before the Supreme Court.<sup>2</sup> That battle will most likely etch the year 2000 upon the minds of many as an election year. Perhaps many will forget that in the same year the partisan bandying paused while political parties joined forces to oppose primary election law that threatened to meld their opposing beliefs into more moderate views embodied in primary election victors.<sup>3</sup> Signaling that party members could ultimately decide who to place in command of their ranks, the United States Supreme Court handed down their decision in *California Democratic Party v. Jones*, invalidating the blanket primary<sup>4</sup> and bolstering political parties’ constitutional rights.<sup>5</sup>

This note will examine the Supreme Court’s decision in *Jones* and discuss its potential implications. Part II first traces the history of political parties’ rights to freedom of association and subsequently discusses the history of partisan blanket primaries.<sup>6</sup> Part III briefly overviews the facts of

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1. Jeanne Cummings, *Election 2000: Gore Ends Quest and Concedes the Presidency*, WALL ST. J., Dec. 14, 2000, at A16 (quoting Vice President Al Gore’s remarks in his concession speech recognizing Governor George W. Bush as the victor of the United States’ presidential race).

2. Vanessa Blum, *Election 2000: 36 Days of Legal Battle*, LEGAL TIMES, Dec. 18, 2000, at 11.

3. See *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

4. *Id.* at 585-86.

5. See generally Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California’s Blanket Primaries and Endanger the Open Primaries of Many States*, 36 TULSA L.J. 59 (2000).

6. See *infra* notes 11-69 and accompanying text.

the case.<sup>7</sup> Part IV outlines the three opinions by the Court: Justice Scalia's majority opinion, Justice Kennedy's concurring opinion, and Justice Stevens' dissenting opinion.<sup>8</sup> Part V discusses three possible impacts of the Court's decision: invalidation of blanket primaries and the questionable vitality of other primary systems, limitation of political parties' power to place candidates on the general ballot, and evaluation of both the formation and judicial review of initiatives.<sup>9</sup> The article concludes in Part VI.<sup>10</sup>

## II. HISTORICAL BACKGROUND

### A. Political Parties' Rights of Association

The Framers of the Constitution were split on the subject of political party formation and its benefits or detriments to the United States.<sup>11</sup> Notwithstanding the debate, political parties were formed early in the United States' history as a means to disseminate information and gain support for legislation.<sup>12</sup> Even as the role of political parties changed, they were characterized as little more than clubs that selected delegates and nominees using unregulated rules set by ward bosses who single-handedly determined who would gain access to party conventions and caucuses.<sup>13</sup> Political parties in the United States have expanded to networks of thousands, run like multimillion-dollar corporations. Political parties' inherent ties to government have often made the determination of their constitutional rights problematic.<sup>14</sup>

The constitutional right to freedom of association in the First<sup>15</sup> and Fourteenth<sup>16</sup> Amendments not only allows individuals to join together to further common political beliefs but also allows individuals to limit the association to only those people with the commonly held beliefs.<sup>17</sup> Thus,

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7. See *infra* notes 70-77 and accompanying text.

8. See *infra* notes 78-140 and accompanying text.

9. See *infra* notes 141-193 and accompanying text.

10. See *infra* note 194-195 and accompanying text.

11. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE TRANSFORMATION IN AMERICAN POLITICS: IMPLICATIONS FOR FEDERALISM, 12-16 August (1986).

12. See *id.*

13. Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 876 (2000).

14. See Nathaniel Persily, *The Legal Regulation of Party Nomination Methods: California Democratic Party v. Jones, John McCain, and Beyond*, 5 (2000) at <http://pro.harvard.edu/abstracts/085/085002PersilyNat.htm>.

15. U.S. CONST. amend. I.

16. U.S. CONST. amend. XIV.

17. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

political parties, if afforded the right to freedom of association, could limit their membership to whomever they saw fit.<sup>18</sup>

Determining whether or not parties are protected under the Constitution has often been viewed as a question of whether parties are private or public associations.<sup>19</sup>

If political parties are 'pure' state actors, then they have no First Amendment rights to association . . . [a]nd if they are 'pure' private associations then constitutional restrictions such as the Equal Protection Clause would not apply to them, and the state might only be able to regulate their membership with laws narrowly tailored toward the achievement of compelling state interests.<sup>20</sup>

Neither extreme being completely attractive, the Court has labeled political parties according to the issues in particular cases.<sup>21</sup> In the White Primary Cases,<sup>22</sup> the Supreme Court held that political parties were public actors, and their actions were restricted as such by the Court.<sup>23</sup> Yet, political parties are seemingly private institutions with regard to the freedom of association that they have been afforded under the Constitution.<sup>24</sup>

18. *See id.*

19. Persily, *supra* note 14, at 5.

20. *Id.*

21. *See* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1751-54 (1993). Lowenstein argues that

[T]he terms 'public' and 'private' . . . actually function as post hoc labels, rather than as the a priori analytical devices that conventional doctrine supposes them to be. . . We have seen that the distinction leads to perverse results, for it permits parties either to be subject to constitutional rights or to bear them, but not both . . . .

*Id.* at 1753-54.

22. The cases usually assembled under this heading are *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Grovey v. Townsend*, 295 U.S. 45 (1935); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 526 (1927) and represent the Court's willingness to strike down numerous attempts by the state legislature, political parties, and private groups to prevent African Americans from voting in the Democratic primary by ruling that nomination of the party's candidates constituted state action. *See* Persily, *supra* note 14, at 6.

23. Persily, *supra* note 14, at 6; Lowenstein, *supra* note 21, at 1748.

24. *See, e.g.*, *Cousins v. Wigoda*, 419 U.S. 477, 487-91 (1975) (recognizing associational rights of parties and holding that the state's interest in protecting the integrity of its electoral process was not compelling enough to overcome the political party's right to selection of delegates); *see also, e.g.*, *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 125-26 (1981) (holding that Wisconsin violated the party's constitutional rights by compelling it to seat a delegation in a manner contrary to the party's rules); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215-26, 225, 229 (1986) (holding that the state's closed primary violated the party's right to freedom of association and that the party could permit unaffiliated voters to cast votes for its candidates).

The Supreme Court has had many occasions to define the scope of political parties' rights of free association.<sup>25</sup> One seminal case is *Democratic Party of the United States v. Wisconsin ex rel. La Follette*.<sup>26</sup> In *La Follette*, the Democratic Party's manner of voting at their own national convention was at stake.<sup>27</sup> The Democratic Party's charter provided that only registered Democrats could choose delegates to attend the National Democratic Convention.<sup>28</sup> In Wisconsin, delegates were indeed chosen by party members in caucuses.<sup>29</sup> Wisconsin law, however, instituted a primary election system in which voters did not have to declare their party affiliations.<sup>30</sup> Moreover, the state law provided that convention delegates were required to cast votes at the national conventions according to the results of the primary elections.<sup>31</sup> The National Democratic Party refused to seat Wisconsin delegates who were obligated to cast their votes for party nominees in accordance with the wishes of non-party primary voters.<sup>32</sup> The Court clarified, that contrary to the Wisconsin Supreme Court analysis, the issue was not whether Wisconsin's open primary was constitutional.<sup>33</sup> Rather, the issue was "whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party."<sup>34</sup> The test applied by the Court required first, a determination of whether the state law severely burdened a recognized constitutional right and second, whether or not the burden was justified by a compelling state interest.<sup>35</sup> The *La Follette* Court held that parties' rights of free association allowed them, and not the state, to choose the manner in which convention delegates would vote.<sup>36</sup>

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25. See, e.g., *Cousins*, 419 U.S. at 477; *La Follette*, 450 U.S. at 107; *Tashjian*, 479 U.S. at 208.

26. 450 U.S. 107 (1981).

27. See *id.* at 109.

28. *Id.*

29. *Id.* at 112.

30. *Id.* at 110-11.

31. *Id.* at 112.

32. *Id.* at 113.

33. *Id.* at 120-21.

34. *Id.* at 121.

35. See *id.* 123-25. This test follows conventional First Amendment strict scrutiny analysis and is the test used in most subsequent decisions explored in this Note. See Lowenstein, *supra* note 21, at 1745-46.

36. *La Follette*, 450 U.S. at 126. The Court cited *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975), for the proposition that the state's interest in regulating the "election process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." *La Follette* 450 U.S. at 121. This holding was premised on the associational rights of parties, and the Court noted that "[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." *Id.* at 122 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

Interestingly, political parties are not always attempting to limit their membership to affiliated voters.<sup>37</sup> In *Tashjian v. Republican Party of Connecticut*,<sup>38</sup> the Republican Party instituted a measure that allowed independent voters—those not affiliated with any political party—to vote in Republican primary elections.<sup>39</sup> Connecticut, however, employed a closed primary system in which voters had to declare their party affiliation in order to vote.<sup>40</sup> The *Tashjian* Court held that political parties' constitutional rights allowed the Republican Party to associate with independent voters by allowing independents to vote in Republican primary elections.<sup>41</sup> The Court reasoned that “the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important.”<sup>42</sup> Thus, making contributions, volunteering time, or formerly registering with a party are a few ways to associate with it, and after the *Tashjian* decision, voting in the party's primary, when invited to do so, is another permissible way to associate with it.<sup>43</sup>

*Eu v. San Francisco County Democratic Central Committee*<sup>44</sup> is another landmark case defining political parties' constitutional rights of association and how those rights pertain to primary elections.<sup>45</sup> In *Eu*, California law made it illegal for “any primary candidate, or person on her behalf, [including political parties' governing bodies] to claim that she is the officially endorsed candidate of the party.”<sup>46</sup> The Court recognized that it was possible for a candidate to win the primary election and become a political party's nominee although the candidate's views were contrary to those of the political party.<sup>47</sup> The Court stated that “[a] State's broad power

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37. See, e.g., *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

38. *Id.*

39. *Id.* at 212. Seven years prior to adopting this rule, the Republican party opposed an independent voter in *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976), who was attempting to assert his right to vote in the Republican primary. The *Nader* Court upheld the constitutionality of Connecticut's closed primary that required voters to affiliate with a party before voting in its primary. *Id.* at 850; see also *Tashjian*, 479 U.S. at 212.

40. *Tashjian*, 479 U.S. at 210-11.

41. *Id.* at 225.

42. *Id.* at 215.

43. See *id.*

44. 489 U.S. 214 (1989).

45. See *id.*

46. *Id.* at 217 (citing Cal. Elec. Code § 29430 (West 1977)). The *Eu* Court addressed a California law that regulated political parties' internal processes. See *id.* This Note, however, focuses primarily on the Court's decision with regard to California laws that restricted political parties' actions in primary election campaigns.

47. *Id.*

to regulate the time, place, and manner of elections ‘does not extinguish the State’s responsibility to observe the limits established by the First Amendment rights of the State’s citizens.’”<sup>48</sup> Accordingly, the Court held that the California laws prohibiting political parties from endorsing primary candidates not only infringed the party’s freedom of speech but also violated their freedom of association without a compelling state interest to justify the burden.<sup>49</sup>

While these prior cases broadened the rights of political parties, the Supreme Court narrowed the scope of parties’ freedom of association in *Timmons v. Twin Cities Area New Party*.<sup>50</sup> In *Timmons*, Minnesota law prohibited candidates from appearing on the ballot for more than one political party—a process known as fusion.<sup>51</sup> The New Party brought suit when its candidate for office, also the candidate of the Democratic-Farmer-Labor Party, was denied access to the ballot.<sup>52</sup> The New Party claimed that its First Amendment right to freedom of association was violated.<sup>53</sup> The *Timmons* Court held that the New Party’s rights of association were not severely burdened stating “[the State’s] laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like . . . [or] directly limit the party’s access to the ballot.”<sup>54</sup> The Court further reasoned that the state’s prohibition of placing fusion candidates on the ballot was adequately justified by the state’s interest in ballot integrity and political stability.<sup>55</sup>

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48. *Id.* at 222 (quoting *Tashjian* 479 U.S. at 217).

49. *Id.* at 224, 229.

50. 520 U.S. 351 (1997).

51. *Timmons* at 353-54. “‘Fusion,’ also called ‘cross-filing’ or ‘multiple-party nomination,’ is the ‘electoral support of a single set of candidates by two or more parties.’” *Id.* at 354 (quoting Argersinger, *A Place on the Ballot: Fusion Politics and Antifusion Laws*, 85 AM. HIST. REV. 287, 288 (1980) and *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 197-98 (8th Cir. 1996) (defining fusion as “the nomination by more than one political party of the same candidate for the same office in the same general election.”)).

52. *Timmons*, 520 U.S. at 354.

53. *Id.* at 355.

54. *Id.* at 363. Due to the fact that the political party’s rights were not severely burdened, the Court applied a less stringent standard that required the state to show only that their interests were “sufficiently weighty to justify the limitation.” *Id.* at 364.

55. *Id.* at 365-69 (noting Minnesota’s interests—preventing the ballot from becoming a means for candidates and parties to exploit advertisement-like slogans and preventing minor parties from circumventing ballot access laws by bootstrapping on major-party candidates—were specific and justified the fusion ban). *Contra* William R. Kirschner, Note, *Fusion and the Associational Rights of Minor Political Parties*, 95 COLUM. L. REV. 683, 711-12 (1995) (stating that “a state determined to maintain both the integrity of the election process and the stability of the political system would be ill-advised to outlaw multiple party nomination,” because fusion creates competition between political parties instead of within them by allowing minor parties to band together as allies against major parties).

While the Court has had several opportunities to define the parameters of political parties' rights to freedom of association, the prior cases represent the pivotal decisions and showcase the Court's reasoning.

### B. *The History of Blanket Primaries*

Various processes exist—conventions, caucuses, and elections—whereby political parties select their nominees for office. Primary elections were initiated in order to influence candidates who were previously beholden to powerful political party leaders instead of to the electorate.<sup>56</sup> The three most common types of primaries are closed, open, and blanket.<sup>57</sup> Closed primaries are those that require a voter to declare party affiliation prior to the primary and limit voters to casting votes for that party alone.<sup>58</sup> Open primaries require voters to declare on the day of voting the one party for which they will cast their votes but do not require a previous or subsequent affiliation with that party.<sup>59</sup> In a blanket primary, voters are not limited to voting for only one party but may cast votes for any candidate regardless of the voter's or the candidate's party affiliation.<sup>60</sup> A blanket primary is the least restrictive type of primary, followed by the open primary.<sup>61</sup> Some states do not institute one pure form of primary but instead employ characteristics from the various types of primaries.<sup>62</sup>

Traditionally, voter turnout for primary elections has rarely exceeded 35 percent of eligible voters.<sup>63</sup> Additionally, conventional wisdom says that primary voters tend to be those with more ideologically extreme positions.<sup>64</sup>

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56. John R. Petrocik, *The Blanket Primary: Candidate Strategy, Voter Response, and Party Cohesion*, 4 (2000) at <http://pro.harvard.edu/abstracts/035/035008PetrocikJo.htm> (appearing in a volume forthcoming from Bruce Cain and Elizabeth Gerber, editors, consolidating papers prepared for presentation at the Annual Meeting of the American Political Science Association, Washington, D.C. August 30-September 3, 2000).

57. Jason M. Miller, *Chapter 18 and the 2000 Presidential Primary Election: Undermining the Purpose Behind the "Open" Primary Act*, 31 MCGEORGE L. REV. 399, 401 (2000).

58. *Id.*

59. *Id.*

60. *Id.* at 402.

61. See *id.* at 401-02.

62. Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 307 (1998) (listing states' forms of primaries including Louisiana, Maine, Maryland, Massachusetts, New Jersey, Oklahoma, Oregon, and Rhode Island that all institute hybrid forms of primaries); see, e.g., *Tashjian v. Republican Party of Conn.* 479 U.S. 208 (1986) (upholding a semi-closed primary that allowed independent voters to join a party's primary when invited by the party to do so).

63. Petrocik, *supra* note 56, at 4.

64. *Id.*

Thus, in an effort to increase voter participation and diversify participants in primary elections, states have experimented with various forms of primaries.<sup>65</sup> The blanket primary, proponents advance, is a system that encourages more moderate voters to participate in elections,<sup>66</sup> prevents candidates from taking extreme views that they do not necessarily hold but find necessary to espouse in order to get support from primary voters,<sup>67</sup> and allows voters not affiliated with a political party to participate.<sup>68</sup> California adopted the blanket primary system in 1996 through initiative.<sup>69</sup>

### III. STATEMENT OF THE CASE

*Jones* is based upon an initiative, Proposition 198,<sup>70</sup> that California voters passed in 1996.<sup>71</sup> Pursuant to the new law, California's primary election system changed from a closed system to a blanket system.<sup>72</sup>

Proponents of Proposition 198<sup>73</sup> claimed that a blanket primary would increase voter participation and nominate candidates who were reflective of a greater portion of the electorate.<sup>74</sup> Several plaintiffs including the California Democratic Party, California Republican Party,<sup>75</sup> Libertarian Party of California, and Peace and Freedom Party opposed the measure<sup>76</sup> and filed

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65. See Gerber & Morton, *supra* note 62, at 304.

66. See *id.*

67. See *id.*

68. Brief for Respondent at 43-45, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

69. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

70. Proposition 198 was codified in Cal. Elec. Code §§ 2001, 2151 (West 1996 and West Supp. 2000).

71. *Jones*, 530 U.S. at 570.

72. *Id.*

73. Although proponents have diversified since the inception of Proposition 198, "the California Open Primary Initiative, began as a self-serving attempt by one politician to improve his chances in 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." Persily, *supra* note 14, at 32 (citing Charles Price, *The Virtual Primary*, CAL. J., Nov. 1, 1995 at 11 and Sherry Bebitch Jeffe, *Why Lundgren, So Far, Has Only Attracted Republicans*, L.A. TIMES, May 3, 1998, at M6).

74. Brief for Respondent at 39-40, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). *Contra* Brief for Petitioner at 38, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (claiming that Respondents' proposition that blanket primaries will produce candidates more reflective of the electorate is actually a subterfuge for producing more moderate candidates).

75. The California Republican Party was an intervening plaintiff. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1292 (E.D. Cal. 1997).

76. Submitting a brief of amicus curiae, in support of neither party, The Brennan Center For Justice at New York University School of Law outlined the arguments put forth by the opposition of blanket primaries who claim that "[l]imiting participation to party loyalists . . . leads to the selection of candidates that provide the electorate with a clear choice on the issues, preserves the major parties from sabotage or strategic voting, and strengthens the ability of party activists to function at the grassroots level." Brief of Amicus Curiae, *The Brennan Center For Justice at 10-11, Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

a complaint against California's Secretary of State, Bill Jones, claiming that the new primary system violated their constitutional rights of freedom of association.<sup>77</sup>

#### IV. ANALYSIS OF THE COURT'S OPINIONS

##### A. Procedural History

While the United States District Court for the Eastern District of California recognized that voters not affiliated with a party would participate in its primary and that this might result in the nomination of a candidate different from one that the party might choose, it held that the blanket primary did not severely burden parties' rights and that the state interest in creating a more democratic election process justified any slight burden.<sup>78</sup> The Ninth Circuit affirmed and adopted the District Court's opinion.<sup>79</sup>

##### B. Justice Scalia's Majority Opinion

The issue in *Jones* was whether the blanket primary was a constitutional means to select a political party's nominee for office.<sup>80</sup> The Court applied the conventional test espoused in *Timmons* requiring states to prove that regulations were narrowly tailored to advance a compelling state interest when those regulations imposed a severe burden on the constitutional right to freely associate.<sup>81</sup>

##### 1. The Blanket Primary – A Severe Burden

Justice Scalia's opinion first turned to whether California's blanket primary severely burdened political parties' rights of association.<sup>82</sup> The

77. *Jones*, 530 U.S. at 571. Californians for an Open Primary joined the litigation at the trial level as an intervening defendant. *Jones*, 984 F. Supp. at 1292.

78. *Jones*, 530 U.S. at 571. Although District Court Judge David Levi is highly respected, the opponents of Proposition 198 speculated that Judge Levi may have allowed political concerns regarding the judicial review of initiatives to influence his decision. Peter Schrag, *The Initiative, the Courts and the Crocodile in the Bathub*, PUBLIC AFFAIRS REPORT, Sept. 2000, at 3, available at <http://www.igs.berkeley.edu:8880/publications/par/Sept2000/shrag.html>; see also *infra* Part VC and accompanying notes.

79. *Jones*, 530 U.S. at 571.

80. *Id.* at 569.

81. *Id.* at 582.

82. *Id.* at 572-80.

Court recognized that states have a right to regulate and monitor the election process.<sup>83</sup> Turning to earlier decisions, the Court stated that for example, “[s]tate[s] 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>84</sup> Justice Scalia noted, however, that the process by which parties nominate their candidates—whether a primary or other form of nomination—is not a wholly public affair over which states have supreme control.<sup>85</sup> Instead, states must take into consideration the constraints of the Constitution and the rights of political parties that flow from it.<sup>86</sup> Relying on prior decisions, the Court reiterated that political parties have a constitutional right under the First Amendment to freely associate and to limit their association to people with common goals and ideals.<sup>87</sup> Justice Scalia emphasized the significance of the issue by stating “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.”<sup>88</sup>

Not surprisingly after that characterization, the Court held that “Proposition 198 forces political parties to associate with—to have their nominees, and hence their position, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival,” and thus, severely burdened parties’ constitutional rights.<sup>89</sup>

## 2. Non-Compelling Nature And Application Of The State’s Interests

Necessarily, Justice Scalia turned to the issue of whether a narrowly tailored, compelling state interest justified the burden.<sup>90</sup> Respondents advanced seven state interests: elect moderate candidates, force political parties to appeal to a broader base, give disenfranchised people an opportunity to vote, promote fairness, offer the electorate more choices, increase voter participation, and protect voter privacy—claiming that each, by its compelling nature, justified the institution of the blanket primary.<sup>91</sup>

Justice Scalia reduced the first two interests to “a stark repudiation of freedom of political association” because they discouraged political parties from selecting nominees whose ideals were contrary to majoritarian views.<sup>92</sup>

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83. *Id.* at 572.

84. *Id.*

85. *Id.* at 572-73.

86. *See id.* at 572.

87. *Id.* at 574 (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986) and *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

88. *Jones*, 530 U.S. at 575.

89. *Id.* at 577.

90. *Id.* at 582.

91. *Id.* at 582-84.

92. *Id.* at 582-83 (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) in which the Court rejected a similar interest when it determined that an

Thus, Justice Scalia concluded these interests were not legitimate, let alone compelling.<sup>93</sup>

The third interest proffered by Respondents was that the blanket primary provided disenfranchised people an effective vote.<sup>94</sup> The disenfranchised citizens to whom the state referred were independent voters and those affiliated with minority parties in safe districts<sup>95</sup> who would not be allowed to cast a meaningful vote for their choice of representative.<sup>96</sup> Citing *Tashjian* and *Nader*, Justice Scalia admonished the state that a voter's desire to participate in a primary election did not supercede a party's right to limit its association even if the state supported the voter's desire.<sup>97</sup> Discounting Respondents' argument that closed primaries substantially burdened minority voters in safe districts,<sup>98</sup> Justice Scalia noted that minority voters were not disenfranchised because they could simply register with the majority party.<sup>99</sup>

The remaining state interests—"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"—reflected possibly legitimate state interests but not compelling ones.<sup>100</sup> The Court assumed that the fairness argument referred to the inability of minority voters in safe districts to vote in a meaningful way against a majority party candidate and determined that greater unfairness would result by allowing unaffiliated voters to determine a party's nominee.<sup>101</sup>

Next, the Court rejected Respondents' argument that the blanket primary afforded voters a broader choice of candidates because actually,

"openly gay, lesbian, and bisexual [group] (GLIB)" could not compel a veterans' group to allow GLIB to march in the St. Patrick's Day parade, because such compulsion basically forced a group to change the content of their message in accordance with the message preferred by others). *Id.*

93. *Jones*, 530 U.S. at 582-83.

94. *Id.* at 583.

95. Safe districts are those in which the majority of the electorate belongs to one political party and thereby insures that the candidate of that party will be the district's representative. *See Davis v. Bandemer*, 478 U.S. 109, 116-117 (1986) (explaining that parties accused of political gerrymandering are those that apportion legislative districts in a manner that concentrates voters of one political party into a minimum number of districts—thereby diluting that party's representation in the legislature—or that splits one political party's members into districts where the opposition has a narrow but safe majority). Proponents of more open primary systems claim that the primary election is the only time that minorities in a safe district have any chance of effecting the district's representation. Brief for Respondent at 44-45, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

96. *Jones*, 530 U.S. at 583.

97. *Id.*

98. Brief for Respondent at 44, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

99. *Jones*, 530 U.S. at 584.

100. *Id.*

101. *Id.*

ruled the Court, the blanket primary narrowed voters' choices to candidates with more centrist views.<sup>102</sup> Increasing available candidates favored by the majority was simply not compelling to the Court.<sup>103</sup> Justice Scalia summarily dismissed Respondents' interest in increased voter participation as suffering the same defect as the previous interest.<sup>104</sup> Finally, the Court addressed the privacy interest offered by the state.<sup>105</sup> Party affiliation was not a private matter in other contexts, noted Justice Scalia who found the interest was not compelling.<sup>106</sup>

The *Jones* Court found Proposition 198 was not narrowly tailored to meet any of the state's interests, whether compelling or not, and that a more constitutionally appropriate means to achieve the state's ends was a nonpartisan blanket primary.<sup>107</sup> Justice Scalia outlined the parameters of the nonpartisan blanket primary, noting that it was similar to a blanket primary in that each voter could cast a vote for any candidate regardless of the candidate's or voter's party affiliation.<sup>108</sup> The difference was that the top two or three winners of a nonpartisan blanket primary then advanced to the general election without regard to their party affiliation.<sup>109</sup> In essence, the nonpartisan blanket primary would not determine parties' nominees but would determine who advanced to the general election ballot.<sup>110</sup> In conclusion, the Majority reiterated that California's blanket primary was unconstitutional.<sup>111</sup>

#### *B. Justice Kennedy's Concurring Opinion*

Justice Kennedy agreed with the Court's holding but added credence to California's asserted interest in increasing voter participation.<sup>112</sup> He stated that because voter participation and interest may have increased after California instituted the blanket primary, the law was positive in many respects.<sup>113</sup> The burden created by Proposition 198, however, was incurable,

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102. *Id.*

103. *Id.*

104. *Id.* at 584-85.

105. *Id.* at 585.

106. *Id.* Justice Scalia listed several federal statutes in which a person's party affiliation must be divulged including: Federal Communications Commission, Board of Directors of the Corporation for Public Broadcasting, and Equal Employment Opportunity Commission statutes that limit the number of persons affiliated with the same political party who may be seated at one time. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 585-86. This type of primary creates a conflict in a jurisdiction that requires parties to determine nominees in a primary election—a requirement that the Court upheld as valid. *Id.* at 572.

111. *Id.* at 586.

112. *Id.* at 586-87 (Kennedy, J., concurring).

113. *Id.* at 587 (Kennedy, J., concurring) (citing Brief for Respondents at 45-46, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000)).

and Justice Kennedy wrote a concurring opinion to note that one remedy California offered to political parties—using financial resources to market the candidate they preferred—was not available due to campaign finance laws.<sup>114</sup> Prior Court decisions limited the amount of money a political party could spend to support a preferred candidate.<sup>115</sup> Justice Kennedy opined that upholding the blanket primary under the assumption that parties could adequately market their preferred nominee, would compound the injury done to political parties from the Court limitation on their spending power.<sup>116</sup> Thus, he concurred and invalidated California's blanket primary to avoid any further infringement of political parties' First Amendment rights.<sup>117</sup>

### C. Justice Stevens' Dissenting Opinion

Justice Stevens, joined by Justice Ginsburg, dissented.<sup>118</sup> Stevens remarked that although he believed the blanket primary did not violate the First Amendment with regard to the selection of state officials, the strictures of the Elections Clause<sup>119</sup> raised the issue of whether the blanket primary created a violation when used for the selection of federal senators and representatives.<sup>120</sup> Before addressing the Elections Clause issue, Stevens turned first to the majority's analysis.<sup>121</sup>

#### 1. Political Parties' Status As Public Or Private

Justice Stevens implied that political parties' status as either private or public was determined according to the functions they were performing.<sup>122</sup> Thus,

[w]hen a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and

114. *Id.* at 588 (Kennedy, J., concurring).

115. *Id.* at 587-88 (Kennedy, J., concurring) (citing *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 626 (1996) and *Nixon v. Shrink Mo. Gov't Political Action Comm.*, 528 U.S. 377, 405-06 (2000) in which Justice Kennedy dissented in part and in whole respectively because he believed any limitation on political parties' campaign spending was an unjustified infringement of the First Amendment freedom of speech).

116. *Id.* at 589 (Kennedy, J., concurring).

117. *Id.* at 590 (Kennedy, J., concurring).

118. *Id.* (Stevens, J., dissenting).

119. U.S. CONST. art. I, § 4, cl. 1.

120. *Jones*, 530 U.S. at 590 (Stevens, J., dissenting).

121. *See id.* at 591 (Stevens, J., dissenting).

122. *See id.* at 591-96 (Stevens, J., dissenting).

when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects.<sup>123</sup>

Justice Stevens distinguished those activities from involvement in primary elections that were “quintessential forms of state action” because states could mandate,<sup>124</sup> primarily finance, and administer primary elections.<sup>125</sup> Involvement in state actions meant that political parties’ freedom of association was not absolute and thus, could be limited to allow non-affiliated voters to participate in a party’s primary election.<sup>126</sup> Justice Stevens asserted that the blanket primary did not offend the First Amendment but rather attempted to give it depth by increasing voters’ ability to “participate in the democratic process.”<sup>127</sup> Although Justice Stevens did not find a violation of the First Amendment, he considered the state’s asserted interests.<sup>128</sup>

## 2. Compelling State Interests

The state interests advanced support a conclusion that any burden on parties’ associational rights is outweighed by compelling state interests, argued Justice Stevens.<sup>129</sup> He first reiterated that the burden on political parties was not severe because there was no evidence of raiding<sup>130</sup> and little evidence of crossover voting,<sup>131</sup> that would indicate that a party’s nominee was actually chosen by non-affiliated members.<sup>132</sup> Justice Stevens went on to criticize the majority for their short treatment of what he considered

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123. *Id.* at 592 (Stevens, J., dissenting).

124. *Id.* at 594. Stevens argued that the freedom to limit one’s association did not allow political parties to limit the electorate but should instead be asserted “to enable a party to insist on choosing its nominees at a convention or caucus where nonmembers could be excluded.” *Id.* at 596 (Stevens, J., dissenting). Thus, the current law, allowing states to require primaries as the form of nominee selection, coupled with the blanket primary created a constitutional conflict, but the blanket primary alone did not. *See id.* at 596-97 (Stevens, J., dissenting).

125. *Id.* at 595-96 (Stevens, J., dissenting).

126. *Id.* at 595 (Stevens, J., dissenting).

127. *Id.* at 595-96 (Stevens, J., dissenting).

128. *Id.* at 598-600 (Stevens, J., dissenting).

129. *See id.* at 601 (Stevens, J., dissenting).

130. *Id.* at 599 (Stevens, J., dissenting) (explaining that “raiding” described the scenario when a non-affiliated voter chose a candidate in a primary because she or he would likely lose the general election against the voter’s preferred elected official).

131. *Id.* at 599-600 (Stevens, J., dissenting) (quoting the district court’s finding that experience with a blanket primary in Washington and other evidence “suggest[ed] that there will be particular elections in which there will be a substantial amount of cross-over voting . . . although the cross-over vote will rarely change the outcome of any election and in the typical contest will not be at significantly higher levels than in open primary states.”). *Id.*

132. *Id.* at 601 (Stevens, J., dissenting).

compelling state interests, namely, nominating candidates more representative of the electorate, expanding choice, and increasing voter participation.<sup>133</sup> Finally, Justice Stevens' regarded as compelling the state's interest in giving preference to the decision of nearly sixty percent of voters—"including a majority of registered Democrats and Republicans"—by upholding the popularly adopted blanket primary.<sup>134</sup> Consequently, Justice Stevens dissented, holding California's blanket primary did not severely burden political parties' constitutional rights and compelling state interests outweighed any incidental burden.<sup>135</sup>

### 3. Federal Elections Clause Requirements

Finally, Justice Stevens, in dicta, addressed what he thought was a fatal blow to the state in some elections.<sup>136</sup> The Elections Clause of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof."<sup>137</sup> A blanket primary adopted by popular initiative and not by the legislature—like Proposition 198 in California—may be an invalid method of establishing the manner of election of federal senators and representatives.<sup>138</sup> Such a primary would run directly contrary to the strictures of the Elections Clause, which require that the legislature, not a popular vote, determine the manner of elections.<sup>139</sup> Stevens asserted, therefore, that California's blanket primary was arguably unconstitutional with regard to the election of federal congressmen and women, but he

133. *Id.* at 600 (Stevens, J., dissenting) (noting that empirical data presented at trial indicated that there was higher voter turnout in states implementing a blanket primary than in states mandating either open or closed primaries).

134. *Id.* (Stevens, J., dissenting). *But see Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 n. 15 (1989), in which Justice Stevens concurred and in which an analogous argument was made by California. The *Eu* Court rejected the state's argument that "[California] need not show that its endorsement ban [prohibiting parties from endorsing primary candidates] serves a compelling state interest because the political parties have 'consented' to it. In support of this claim, California observes that the legislators who could repeal the ban belong to political parties . . ." *Eu*, 489 U.S. at 226 note 15. The *Eu* Court rejected this argument by stating that (1) consent of a party did not allow violation of the party's constitutional rights; (2) the lawsuit itself was evidence of a lack of consent; and (3) simply being a registered party member did not mean that legislators were acting in a representative capacity for the party at all times. *Id.*

135. *Jones*, 530 U.S. at 602 (Stevens, J., dissenting).

136. *Id.* (Stevens, J., dissenting).

137. U.S. CONST. art. I, § 4, cl. 1.

138. *Jones*, 530 U.S. at 602 (Stevens, J., dissenting).

139. *Id.* (Stevens, J., dissenting).

reserved judgment because neither the parties nor lower courts had raised the issue.<sup>140</sup>

## V. IMPLICATIONS OF THE COURT'S DECISION

### A. Validity of Primary Election Systems

#### 1. The Blanket Primary

Partisan blanket primaries in California, Washington, and Alaska were invalidated by the Court's decision in *Jones*.<sup>141</sup> One impact of the Court's decision is that any benefits linked with the blanket primary format will be lost.<sup>142</sup> From a normative viewpoint it is difficult to determine what type of primary is preferable. The adherents to the blanket primary, however, claim that more open primaries are desirable because they result in the election of candidates who are more reflective of the electorate and who are, accordingly, more moderate.<sup>143</sup> Indeed, objective studies have ascertained that the more open the primary form, the more likely that the elected official will support moderate views.<sup>144</sup>

Empirical data shows that at least some of the anticipated benefits of the blanket primary in California did come to fruition.<sup>145</sup> "All other things being equal, the blanket primary aided in the election of slightly more moderate candidates."<sup>146</sup> Additionally, in California's 1998 primary, overall voter turnout increased 1.2% from the preceding midterm election and 2.4% from the average turnout of midterm elections.<sup>147</sup> Significantly, "[t]he number of

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140. See *id.* (Stevens, J., dissenting).

141. See *id.* at 586, 599.

142. *Id.* at 597-98 (Stevens, J., dissenting).

143. Brief for Respondent at 39-40, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

144. Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON & ORG. 304, 322 (1998).

145. See Persily, *supra* note 14, at 34.

146. *Id.* (citing BRUCE E. CAIN & ELISABETH R. GERBER eds., *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY* (2001)). Proponents of the blanket primary make a distinction and claim that the election of moderate candidates is a benefit only to the extent that these more moderate candidates better represent a moderate electorate. Brief for Respondent at 39-40, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

147. *Id.* at 35. Alaska experienced one of its lowest voter turnouts in its 2000 primary election. *Turnout for 2000 Primary is Lowest Ever*, ELECTION NEWS (Alaska Div. Of Elections, Juneau, Alaska), Sept. 2000, at 1, available at <http://www.gov.state.ak.us/lgov/elections/news/primary.htm>. Officials determined that low turnouts were due to voter confusion caused by the change in Alaska's primary system. *Id.* After the Supreme Court's decision in *Jones*, Alaska modified its primary system by giving voters a choice between two ballots. *Id.*

Under the emergency regulations, choices for the Open or Republican ballot had these requirements attached to them: All candidates except Republicans appeared on the Open

voters voting in minor party primaries skyrocketed. As compared to the historic mean, the 1998 minor party primaries had between 3 and 30 times the number of voters traditionally participating in them.”<sup>148</sup>

Contrary to arguments made by opponents of the blanket primary, many of the anticipated negative impacts were not evident.<sup>149</sup> In each election, there were a significant number of voters—fifteen to twenty percent—that crossed over, and “[m]ost voters . . . crossed over at least once on the ballot . . .”<sup>150</sup> These crossover votes, however, were sincere and not the result of organized, strategic raiding.<sup>151</sup> This was evidenced by the fact that “[m]ost 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.”<sup>152</sup> Further, because the most viable explanation for crossover voting was incumbency, the fear that non-affiliated voters would chose a candidate different from the party’s preference did not come to fruition.<sup>153</sup> Although the blanket primary in California lived up to many of its expectations, long-term effects cannot be known because the Supreme Court invalidated the blanket primary after only one election.<sup>154</sup>

## 2. The Open Primary

Attenuated distinctions between various primary systems may indicate that open primaries, used by a majority of states, are at risk as well.<sup>155</sup> The

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ballot. Any registered voter could vote that ballot. Only Republican candidates appeared on the Republican ballot. To vote that ballot, a voter’s party affiliation had to be Republican, Undeclared or Non-Partisan. Voters were permitted to change their party affiliation in order to receive this ballot.

*Id.* at 2.

148. Persily, *supra* note 14, at 34.

149. *See id.*

150. *Id.*

151. *Id.* Raiding occurs when a voter strategically changes party affiliations in a primary election in order to cast a vote for an opposing party’s weakest candidate, hoping to advance a nominee who has little chance of winning the general election. Susan Yarborough Noe, *North Carolina General Assembly Amends Election Laws to Allow Unaffiliated Voters To Vote In Party Primaries*, 66 N.C.L. REV. 1208, 1213 (1988).

152. Persily, *supra* note 14, at 34.

153. *See id.*

154. *Id.* at 35.

155. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 598 (2000) (Stevens, J., dissenting). *Contra* Constitutionality of the Arizona Open Primary Law, Op. Ariz. Att’y Gen. No. 100-019 (Aug. 11, 2000) (stating that Arizona’s open primary was not invalidated by *California Democratic Party v. Jones* because the Court did not rule on the constitutionality of open primaries and because the open primary was not as great a burden on political parties’ rights and consequently, should be subject to the less stringent test applied in *Timmons*).

rights upheld by the *Jones* Court, as Stevens observed in his dissent, turned only on the timing of a voter's party registration.<sup>156</sup> Open primaries only require that a voter associate with a political party on the day of voting.<sup>157</sup> "As Party affiliation becomes . . . easy for a voter to change [shortly before a particular primary election] in order to participate in [that] election, the difference between open and closed primaries loses its practical significance."<sup>158</sup> Consequently, for the same reasons that the Court invalidated the blanket primary, so too could they render the open primary obsolete.<sup>159</sup> Furthermore, open primaries will not be saved by compelling state interests because the same interests that the Court invalidated in *Jones* support open primaries.<sup>160</sup>

### *B. Nonpartisan Blanket Primaries: Diminishing Party Power*

Although *Jones* is seemingly a victory for political parties, the nonpartisan blanket primary, supported by Scalia as a narrowly tailored means to further state interests, may actually undermine political parties' power to place nominees on the general ballot.<sup>161</sup> In a nonpartisan blanket primary the top vote-getters, regardless of party affiliation, advance to the general ballot.<sup>162</sup> In that manner, voters are not selecting parties' nominees but are merely choosing final candidates.<sup>163</sup> It is logical then that two candidates from the same major party may advance or that only candidates from minor parties may advance.<sup>164</sup> Either result would deal a serious blow to the losing political party.

In California, there are currently two ways for political parties to get their candidates on the general ballot.<sup>165</sup> Candidates may either

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156. *Id.* at 596-98 (Stevens, J., dissenting).

157. *See id.* at 598 (Stevens, J., dissenting).

158. *Id.* at 596 (Stevens, J., dissenting) (quoting *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 133 (1981) (Powell, J., dissenting)).

159. *Id.* at 597-98 (Stevens, J., dissenting).

160. *See id.*

161. Instituting a nonpartisan blanket primary, which is currently followed in Louisiana, will be the next battle for proponents of the Proposition 198 ballot initiative. *See* Edward Walsh & David S. Broder, *Justices Reject "Blanket" Setup for Primaries; California Found to Violate Parties' Right to Choose*, WASH. POST, June 27, 2000 at A01 (reporting that "Representative Tom Campbell (R-Cal.), the major sponsor of the ballot initiative that was invalidated yesterday, said he will try to qualify a ballot measure to adopt the Louisiana system."); *see also* Frank J. Murray & Andrew Canin, *Supreme Court Overturns California's "Blanket Primary"*, WASH. TIMES, June 27, 2000 at A13 (stating that "[s]upporters of the blanket-primary system, including Gov. Gray Davis, a Democrat and Secretary of State Bill Jones, a Republican, pledged separately to seek an alternative that will preserve voters' choices and meet the court's approval.").

162. *Jones*, 530 U.S. at 585.

163. *Id.* at 586.

164. *See id.*

165. *Id.* at 569-70.

receive the nomination of a qualified political party by winning its primary, or [the candidate] may file as an independent by obtaining (for a statewide race) the signatures of one percent of the State's electorate or (for other races) the signatures of three percent of the voting population of the area represented by the office in contest . . . .<sup>166</sup>

If states take Justice Scalia's advice and implement the constitutionally acceptable nonpartisan blanket primary, political parties' power to place candidates on the general ballot is greatly diminished. The most advantageous result for political parties would have been a Supreme Court decision that invalidated the blanket primary only when it was combined with state law that also mandated primaries as the form of general ballot candidate selection. Perhaps that would have given parties the needed legal precedent to argue that the caucus or convention, where non-affiliated members could not participate, are the only manner to give parties' associational rights any meaning.<sup>167</sup> States would be put to a choice of allowing political parties to select nominees in a non-primary forum or amending their primary election laws to open or closed systems. Now, however, the Court has reiterated that states may force parties to avail themselves to primaries as the form of nominee selection,<sup>168</sup> and the Court has condoned the non-partisan blanket primary—a decidedly anti-party form of candidate selection.<sup>169</sup>

### C. *Judicial Review of Initiatives*

A third possible implication from the Court's decision in *Jones* is reinvigoration of competing groups who argue respectively, that the initiative process should be reformed or that the standard for judicial review of initiatives should be stricter. The initiative process is a means whereby citizens directly implement new laws or amendments to the state constitution first, by obtaining the requisite number of signatures to allow the initiative access to the ballot and second, by voting favorably to adopt the measure.<sup>170</sup>

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166. *Id.*

167. *See id.* at 596 (Stevens, J., dissenting).

168. *Id.* at 572.

169. *Id.* at 585-86.

170. Caroline Tolbert et al., *The Effects of Ballot Initiatives on Voter Turnout in the American States*, 4-5 (2000), at <http://pro.harvard.edu/abstracts/036/036015TolbertCar.htm> (consolidating material that was prepared for delivery at the 2000 Annual Meeting of the American Political Science Association, Aug. 31-Sept. 3, 2000). For a more in-depth analysis of the use of initiatives in the United States and California, see REFERENDUMS 67-122 (David Butler & Austin Ranney eds.,

In California, the initiative was adopted<sup>171</sup> in order take power from the political machine dominated by the interests of the Southern Pacific Railroad.<sup>172</sup> The initiative process allowed any group of citizens to place any measure on the ballot as long as they gathered the requisite number of signatures.<sup>173</sup> Over the years the use of the initiative has varied, but in the last twenty years the initiative has become exceedingly popular.<sup>174</sup>

“The merits and defects of the citizen initiative process are the subject of a hotly contested debate in the scholarly and popular literature.”<sup>175</sup> Some argue that reform of the initiative process itself will best protect those measures enacted by popular vote.<sup>176</sup>

They want to build in more checks before a measure goes to voters—  
‘more opportunities . . . for informed deliberation, refinement,  
compromise, and consensus building (including) the ability to  
amend initiatives at various stages of the process, requiring

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1980).

171. See Cal. Elec. Code §§ 102, 9000-9015, codified in conjunction with the California Constitution that states “[t]he legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.” CAL. CONST. art. IV § 1.

172. JIM SHULTZ, *THE INITIATIVE COOKBOOK: RECIPES AND STORIES FROM CALIFORNIA’S BALLOT WARS I* (1998); see also ALICE SHADER ET AL., *PEOPLE’S LOBBY, NATIONAL INITIATIVE AND VOTE OF CONFIDENCE (RECALL): TOOLS FOR SELF-GOVERNMENT* 16 (Joyce Koupal & Edwin Koupal eds., 2d ed. 1975).

173. SHULTZ, *supra* note 172, at 1. When voters adopted the initiative in 1911 the law required that proponents of an initiative amass “signatures equal to 8% of the voters in the most recent election for governor.” *Id.* Later the percentage was changed to 5%, “which in 1996 amounted to more than 430,000 signatures.” *Id.*

174. *Id.* at 3.

Prior to 1980 Californians approved an average of only one in three ballot initiatives. From 1980 to 1990 voters approved nearly half. . . . In November 1996 voters will cast ballots on more initiatives than in all of the elections of the 1960s combined. With the Legislature in a state of almost complete partisan paralysis, the initiative has become the center stage for shaping the course of state policy.

*Id.*

175. Tolbert, *supra* note 170, at 4 (stating that “proponents of direct democracy argue that allowing citizens to vote directly on policy questions should increase citizen participation, citizen efficacy and trust in government, while opponents argue that the process has little impact . . . . [Initiatives] weaken state legislatures, tyrannize minority groups, and even supplant representative democracy.” (citations omitted)); see also Philip Bentley, Note, *Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution From Amendment by Initiative*, 78 OR. L. REV. 1139 (1999) (stating

“[t]here are a variety of reasons behind the recent bounty of measures appearing on the ballot. However, one implication is clear; individuals and political action groups with the financial resources to sell a proposal directly to the voters are able to substitute the deliberate and often cumbersome legislative process with bumper-sticker slogans and thirty-second television commercials.”).

176. Peter Schrag, *The Initiative, the Courts and the Crocodile in the Bathtub*, PUBLIC AFFAIRS REPORT, Sept. 2000, at 3, available at <http://www.igs.berkeley.edu:8880/publications/par/Sept2000/shrag.html>.

supermajority approval, at least for constitutional amendments, or integrating the legislature into the initiative process' (as is the case in most other states).<sup>177</sup>

Other reformers focus on limiting the influence of wealthy, special interest groups by restricting initiative campaign financing or disclosing to the public the source of large campaign contributions.<sup>178</sup>

A second means to protect the initiative has been suggested. Focusing on post-implementation and the judiciary, some argue in favor of limiting judicial power to overturn initiatives and claim that due to the nature of the initiative—a measure adopted directly by the populace and not by representatives—it should be subject to a more stringent standard of review.<sup>179</sup> Stricter standards are favored because the initiative process may have some palpable advantages; for instance, states that frequently exercise the initiative process have higher voter turnout for presidential and midterm elections.<sup>180</sup> In addition, voters have a greater stake in laws passed by initiative than in laws passed by the legislature.<sup>181</sup>

Notwithstanding the support that initiatives generate, in nearly forty years, more than half of all initiatives in California, Oregon, Washington, and Colorado were litigated and courts “invalidated (in whole or in part) half of those that were challenged.”<sup>182</sup> The many judges who have participated in those decisions, however, have been mindful of the political ramifications.<sup>183</sup> State court judges are especially subject to the pressures of populism because voters often have to reconfirm their positions.<sup>184</sup> Nonetheless, as the

177. *Id.*

178. SHULTZ, *supra* note 172, at 89-90. Based on the prices that professional circulation firms charged in 1974 and the necessary number of signatures, it would cost \$130,000 - \$260,000 to gather the requisite number of signatures to place an initiative on the ballot. ALICE SHADER ET AL., PEOPLE'S LOBBY, NATIONAL INITIATIVE AND VOTE OF CONFIDENCE (RECALL): TOOLS FOR SELF-GOVERNMENT, 20 (Joyce Koupal & Edwin Koupal eds., 2d ed. 1975). Thus, small groups with limited resources are not able to finance the balloting of an initiative and “[t]he reform set up to overcome the power of the wealthy interests [the initiative] is now dominated by wealthy interests.” SHULTZ, *supra*, at 89.

179. Craig B. Holman & Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1261 (1998) (proposing that federal review of voter initiatives be conducted by a three judge panel). *But see* Richard L. Hasen, *Judging the Judges of Initiatives: A Comment on Holman and Stern*, 31 LOY. L.A. L. REV. 1267 (1998) (arguing that the appellate process already provides a forum for more stringent review of ballot initiatives).

180. Tolbert, *supra* note 170, at 19-20.

181. Holman & Stern, *supra* note 179, at 1263.

182. Schrag, *supra* note 176, at 2 (citing a scholastic paper written by Kenneth Miller, attorney and doctoral student in political science at University of California Berkeley).

183. *Id.*

184. *Id.* (quoting California Supreme Court Justice Otto Kaus who acknowledged the political

initiative process becomes more prevalent, and courts exercise their vital and hallowed duty of judicial review, disenchantment with the legal system is likely to increase.<sup>185</sup> Judicial invalidation of initiatives can lead to “voter backlash—both against the initiative process and the judicial system.”<sup>186</sup>

Ramifications of invalidating an initiative are arguably more serious than invalidation of other legislation.<sup>187</sup> Where the initiative concerns regulation of political parties, judicial invalidation is especially acute.<sup>188</sup> This is due to the fact that initiatives are often the tool used by the electorate to adopt measures while bypassing legislative and political party bias and entrenchment.<sup>189</sup>

When voters feel at once empowered by and disenchanted with the initiative process, they may think it irrelevant that courts are often the champions of the initiative process.<sup>190</sup> Courts have

[T]ossed out most state legislative attempts to regulate [the initiative], holding unconstitutional not only attempts to outlaw paid signature gathering but most other laws requiring petition circulators to be registered or even to identify themselves. [Courts have] also ruled that any attempt to limit spending or contributions to initiative campaigns violates the First Amendment.<sup>191</sup>

These protections may, likewise, matter little to proponents of stricter judicial standards. In fact, the very protection afforded the initiative process by the courts may signal the process’ candidacy for stricter judicial review.

*Jones* is one example of judicial willingness to overturn ballot initiatives despite the fact that “sixty-nine percent of Independents, sixty-one percent of

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pressures on judges who have to rule on the validity of popular initiatives and noted that trying to ignore the pressure was “like finding a crocodile in your bathtub when you go to shave in the morning. You try not to think about it, but it’s hard to think about much else.”).

185. *Id.* The public’s animus toward a system that would disregard its vote was demonstrated on January 20, 2000 when President Elect George W. Bush was inaugurated and thousands turned out in protest because the popular vote for Al Gore exceeded the popular vote for Bush. Sue Anne Pressley, *One Nation, Still Divided Over Closeness of Election; Across the Country Bush Garner Protest, Approval*, WASH. POST, Jan. 21, 2001, at A22.

186. Holman & Stern, *supra* note 179, at 1263 (citing for example *Jones v. Bates*, 127 F.3d 839, 844 (9th Cir. 1997), *rev’d* 131 F.3d 843 (9th Cir. 1997) (en banc) where “[t]he judicial system was especially cast in a poor light when Judge Stephen Reinhart of the Ninth Circuit invalidated Proposition 140 on state term limits, claiming that voters did not understand the initiative.”). *Contra* Richard L. Hasen, *Judging the Judges of Initiatives: A Comment on Holman and Stern*, 31 LOY. L.A. L. REV. 1267, 1272 (1998) (claiming that *Bates* is a good example of where the en banc review of a prior decision provided the protections needed for initiatives without having to adopt a stricter standard of review).

187. Holman & Stern, *supra* note 179, at 1263.

188. Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 COLUM. L. REV. 731, 749 (2000).

189. *Id.*

190. Schrag, *supra* note 176, at 3.

191. *Id.*

Democrats, and fifty-seven percent of Republicans” supported the measure.<sup>192</sup> This case is more fuel for those that argue greater protections should be given to initiatives whether they support stricter judicial standards of review or reform of the initiative process itself.<sup>193</sup>

## VI. CONCLUSION

The Supreme Court in *California Democratic Party v. Jones* invalidated the partisan blanket primary as an unjustified, severe burden on political parties’ freedom of association.<sup>194</sup> Proponents of the blanket primary will likely seek to advance their interests by other means; interests such as increasing voter participation, providing greater choice to voters, and electing officials more reflective of the moderate populace may give advocates of the blanket primary incentive to adopt the nonpartisan blanket primary and reform of the judicial review of initiatives—especially those that regulate political parties. Minor distinctions between primary systems may motivate political parties to fight for the invalidation of open primaries and the reinstatement of caucuses or conventions as the means of political party candidate nomination. Whatever the continued effects of *Jones*, we can only hope that the non-partisan spirit from the constitutional battle will outlive the partisan litigation—the fruit of the highly contested, presidential election—<sup>195</sup>long enough to truly reform all of the election laws and procedures that faltered in 2000.

Teresa MacDonald<sup>196</sup>

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192. J.Brief for Respondent at 4, *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000).

193. Holman & Stern, *supra* note 179, at 1261.

194. 530 U.S. 567, 586 (2000).

195. See generally Margaret Graham Tebo & Siobhan Morrissey, *A Week in the Hurricane*, A.B.A. J., Jan. 2001, at 42.

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