



4-2017

# Reevaluating the Constitutionality of Blanket Primaries

Soren J. Schmidt

*Brigham Young University*, [sorenjschmidt@gmail.com](mailto:sorenjschmidt@gmail.com)

Follow this and additional works at: <http://scholarsarchive.byu.edu/byuplr>



Part of the [Legal Studies Commons](#), and the [Political Science Commons](#)

---

### BYU ScholarsArchive Citation

Schmidt, Soren J. (2017) "Reevaluating the Constitutionality of Blanket Primaries," *Brigham Young University Prelaw Review*: Vol. 31 , Article 12.

Available at: <http://scholarsarchive.byu.edu/byuplr/vol31/iss1/12>

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact [scholarsarchive@byu.edu](mailto:scholarsarchive@byu.edu).

## REEVALUATING THE CONSTITUTIONALITY OF BLANKET PRIMARIES

*Soren J. Schmidt<sup>1</sup>*

Contemporary voters in the United States have good reason to worry about the health of the democratic process and their ability to participate meaningfully in it. While more people than ever consider themselves political independents,<sup>2</sup> the parties have simultaneously reached the greatest levels of polarization in modern history.<sup>3</sup> The consequences of these trends are disturbing. Today, more than a third of the American population lives in “safe” districts where one party inevitably wins the elections,<sup>4</sup> denying the minority even a hope for representation and depressing

---

1 Soren J. Schmidt will graduate with a B.A. in Political Science from Brigham Young University in April 2017. He plans to study constitutional law with an emphasis on U.S. elections and political institutions. He is grateful for the assistance of Alyssa Nielsen, Brett Peper, and the BYU Prelaw Review Board in providing helpful comments and suggestions for this paper. All mistakes are his own. Please direct correspondence to [sorenjschmidt@gmail.com](mailto:sorenjschmidt@gmail.com).

2 *A Deep Dive Into Party Affiliation*, PEW RESEARCH CENTER (2015), <http://www.people-press.org/2015/04/07/a-deep-dive-into-party-affiliation>.

3 *Political Polarization in the American Public*, PEW RESEARCH CENTER (2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

4 Chris Cillizza, *Want to know why the government is shut down? This chart explains it*, WASH. POST, (Oct. 7, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/10/07/want-to-know-why-the-government-is-shut-down-this-chart-explains-it/?utm\\_term=.491e70993089](https://www.washingtonpost.com/news/the-fix/wp/2013/10/07/want-to-know-why-the-government-is-shut-down-this-chart-explains-it/?utm_term=.491e70993089).

turnout.<sup>5</sup> Elected officials are increasingly polarized<sup>6</sup> and now more ideologically extreme than 90 percent of their constituents.<sup>7</sup> Not coincidentally, the most recent congressional sessions have been the least productive of any during the past sixty years.<sup>8</sup> In light of these alarming patterns, it is critical that the people seek solutions that can promote better representation and efficacy in government.

Primary election reform could help states to enhance political processes and outcomes, and blanket primaries should be held as a constitutional reform option for several reasons. First, the quasi-public role of parties during the nomination process pares the associative rights they normally retain as private organizations. Second, blanket primaries do not severely burden party rights, so blanket primaries should be subject to a constitutional test that balances the injuries claimed by the parties and the interests asserted by the states. And third, the state interests driving blanket primary reform are compelling and cannot be met through any other means. Consequently, the ruling in *California Democratic Party v. Jones*, which found the California democratically instituted blanket primaries to be unconstitutional, should be overturned.<sup>9</sup>

The argument made in this paper requires several steps. Section II gives an introduction to primary election systems, the *Jones* case, and the legal debate over party regulations. Section III outlines the case for using a less strict standard of constitutional review than the one employed by the Court in *Jones*. Finally, Section IV analyzes how blanket primaries would fare under the looser standard, ultimately concluding that they should be found constitutional.

---

5 Benny Geys, *Explaining voter turnout: A review of aggregate-level research*, 25 ELECTORAL STUDIES 264, 267 (2006).

6 *Vital Statistics on Congress*, THE BROOKINGS INSTITUTION Table 8-3 (Jan. 9, 2017), <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/>.

7 Joseph Bafumi and Michael C. Herron, *Leapfrog representation and extremism: A study of American voters and their members in Congress*, 104 AMERICAN POLITICAL SCIENCE REVIEW 519, 528 (2010).

8 BROOKINGS, *supra* note 6, at Table 6-4.

9 *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

---

## I. BACKGROUND

### A. Primary Election Systems

Recent electoral reforms such as blanket primaries are part of a larger trend of seeking solutions to the predicaments developing in American politics. The last few decades have showcased the problems of political polarization, unrepresentativeness of elected officials, and low civic engagement. As a result, policymakers, academics, and advocacy groups actively seek alternatives to past electoral institutions in a hope to incentivize improved behavior among citizens and those in public office. Often, these alternatives have been tested at the state level, such as independent redistricting commissions, easier voter registration, and vote-by-mail. Blanket primaries are one of these attempts.

To illustrate the differences between primary systems, I describe the voting restrictions imposed on a hypothetical woman named Mary.<sup>10</sup>

- *Closed primaries* limit participation the most. In a state with closed primaries, Mary faces two restrictions. First, she must register as a party member before voting. Second, once she has committed to that party, the ballot she is given only has candidates from that party for each of the offices being elected. For example, if Mary is registered as a Republican, she could only choose from among the Republican candidates for senator, governor, etc.
- *Open primaries* eliminate the party registration requirement for voting. For example, even though Mary is registered as a Republican, she could vote in the Democratic primary. However, she could not then vote in the Republican primary—Mary would still be forced to choose from only the Democratic candidates for all offices.

---

10 It is important to note that these distinctions do not refer to the *form* that the primary election takes (i.e., whether it is a direct primary election or a party caucus) but rather the *accessibility* of that process (i.e., which voters are allowed to participate, and for whom they are allowed to vote).

- *Blanket primaries* both eliminate the party registration requirement and also allow for multi-party ballots. All voters are given a common ballot and are allowed to select whomever they like from any party for each office. Therefore, Mary could choose to vote for a Republican governor and a Democratic senator. The highest-voted candidate of each party goes on to the general election. Mary would be guaranteed that a candidate from each party would be on the general election ballot for all offices.
- *Nonpartisan top-two primaries*, also known as jungle primaries, are similar to blanket primaries in that all voters are given a common ballot for the primary stage of the election. However, primary candidates are non-partisan—i.e., they do not technically run for their party’s nomination (though they may list their party preference on the ballot)—and only the two candidates receiving the most votes go on to the general election. Consequently, the general election could end up being a contest between two candidates who claim to prefer the Democratic Party.

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

In 1996, California voters passed the ballot initiative Proposition 198, which transitioned the system from a closed primary to a blanket primary.<sup>11</sup> The California Democratic and Republican parties united to challenge the law in the case of *Jones*. The parties asserted that, as private organizations, their First Amendment rights entitled them to mandate that only party members participate in the party nomination process.<sup>12</sup> The defendant—California’s Secretary of State Bill Jones—argued that the party interests were not substantially

---

11 California allows for ballot initiatives, which are legislative propositions that citizens vote on directly, generally at the same time as elections of public officials.

12 Ballotpedia, *California Proposition 198, the Open Primary Act (1996)* 567, Web (2016) [https://ballotpedia.org/California\\_Proposition\\_198\\_the\\_Open\\_Primary\\_Act\\_\(1996\)](https://ballotpedia.org/California_Proposition_198_the_Open_Primary_Act_(1996)).

burdened because their own members still had the chance to vote for party leaders and that instituting a blanket primary served substantial state interests.<sup>13</sup> Both the district and appellate courts sided against the parties, ruling that the statute was not in direct conflict with freedom of association. But the Supreme Court granted the appeal a hearing in May of 2000, and in a 7-2 decision, the lower court rulings were overturned.

### *C. The Contemporary Legal Debate*

Contemporary legal debates surrounding the questions addressed in *Jones* have typically centered on three issues. First, and most importantly, should political parties be treated as public or private? Second, how much weight should the various interests advanced by the government merit? And third, should the court even adjudicate this kind of dispute?

The judiciary has grappled with the permissibility of regulating parties since the Progressive Era. On the one hand, the Supreme Court has allowed states to impose ballot inclusion criteria,<sup>14</sup> establish party registration processes,<sup>15</sup> abolish discriminatory party membership requirements,<sup>16</sup> institute primary elections for party nominations,<sup>17</sup> and oversee the processes of elections.<sup>18</sup> On the other hand, the Court has also been clear that there are distinct constitutional limits to state interference,<sup>19</sup> that parties retain freedom to

---

13 *Id.*

14 *Jeness v. Fortson*, 403 U.S. 431, 442 (1971).

15 *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973).

16 *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

17 *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974).

18 *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

19 *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214 (1989); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

association,<sup>20</sup> and that the ability to select a party nominee deserves special protection.<sup>21</sup> It is in light of these decisions that we must make our evaluation of the constitutionality of blanket primary reform.

The most heated legal dispute is over the private or public status of parties. Proponents of the private designation argue the importance of protecting political freedoms,<sup>22</sup> the similarity of parties to other private organizations,<sup>23</sup> and the necessity of party autonomy in the democratic process.<sup>24</sup> Critics of private designation note the possibility of intraparty fraud,<sup>25</sup> the potential for unconstitutional discrimination,<sup>26</sup> and the extensive precedent of some party regulation being allowed.<sup>27</sup>

Advocates for classifying parties as public cite the importance of securing voters' rights in primary elections,<sup>28</sup> the need to maintain a competitive political market,<sup>29</sup> and the preference to locate

- 
- 20 *Tashjian*, 479 U.S. at 214-215; *La Follette*, 450 U.S., at 122.
- 21 *Timmons v. Twin Cities Area New Party*, 520 U.S. 359 (1997).
- 22 John G. Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735, 757 (1974).
- 23 Brian Patrick Bronson, *The California Open Primary Act Unconstitutionally Burdens Political Parties' Associational Rights: California Democratic Party v. Jones*, 39 DUQ. L. REV. 845, 853 (2001); Nathaniel Persily, *Towards a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 763 (2001).
- 24 Adam Winkler, *Voters' Rights and Parties' Wrongs: Early Political Regulation in the State Courts, 1886-1915*, 100 COLUM. L. REV. 873, 889 (2000); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 801 (2000).
- 25 V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 411 (1958).
- 26 Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1748-9 (1993).
- 27 Samuel Isaacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 275-6 (2001).
- 28 Winkler, *supra* note 24, at 874.
- 29 Isaacharoff, *supra* note 27, at 299.

power in answerable state institutions, rather than in unaccountable party officials.<sup>30</sup> This approach, however, is vulnerable to criticism on the grounds of clear distinctions between parties and government agencies,<sup>31</sup> the need for parties to act independently in order to represent the people,<sup>32</sup> and the tendency of parties in power to use regulation to unfairly disadvantage opponents.<sup>33</sup>

The next relevant debate is the validity and weight of government interests in regulating primary elections. The states assert interests in ensuring each voter access to a meaningful ballot,<sup>34</sup> fostering competitive elections,<sup>35</sup> improving the representativeness of elected officials,<sup>36</sup> increasing public debate,<sup>37</sup> and shifting power from party leaders to the electorate.<sup>38</sup> If blanket primaries are found to infringe upon the rights of parties, it must be shown that these interests are both compelling objectives and are achieved through narrowly tailored means. The claims of injury and state interests for blanket primaries are examined in more detail in Section IV.

Finally, some scholars question whether the courts should adjudicate party regulation at all. The Framers were not only hostile to parties but thought they were creating a Constitution “inhospitable” to parties.<sup>39</sup> Though they were sorely mistaken about the second point, their intentions suggest that the Constitution was not

---

30 Lowenstein, *supra* note 26, at 1771.

31 *Id.* at 1750.

32 *Id.*

33 Michael S. Kang, *The Hydraulic and Politics of Party Regulation*, 91 IOWA L. REV. 131, 173 (2006).

34 Winkler, *supra* note 24, at 874.

35 Isaacharoff, *supra* note 27, at 299.

36 *California Democratic Party v. Jones*, 530 U.S. 567, 571 (2000).

37 *Id.* at 582.

38 Kang, *supra* note 33, at 142.

39 Winkler, *supra* note 24, at 874. Even those who foresaw the formation of parties viewed them as a necessary evil of democracy that should be suppressed and limited wherever possible. See R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 16-17, 24 (1969).

meant to speak on matters of parties or their regulation, implying the courts should abstain from rulings in that sphere. Furthermore, resorting to legal definitions in settling these disputes deprives citizens of a democratic outlet for resolving the problem<sup>40</sup> and decisions made by judges could be inherently biased by those judges' personal conceptions of good governance, which is ultimately irrelevant to evaluations of constitutionality.<sup>41</sup> I do not attempt to resolve the justiciability question because both answers are compatible with my central thesis that *Jones* should be overturned: either party regulation is a political question and the Court should not have ruled on Proposition 198 at all, or party regulation is not and the Court was right to take the case but simply erred in its judgment.

#### *D. The Case-by-Case Approach*

Neither the public nor the private classification options alone provide a satisfactory standard for defining the legal nature of political parties. Each has its uses in some spheres but is clearly problematic in others. As such, the law relying on classification remains susceptible to inconsistent legal decisions that depend on one's conception of the party.<sup>42</sup>

In practice, the Supreme Court has taken a fairly flexible approach when evaluating any party regulation. Rather than taking a rigid stand on the public or private legal status of parties, or whether party regulation cases are even justiciable, the Court has consistently held that government interventions in party affairs "cannot be resolved by any litmus paper test that will separate valid from invalid restrictions."<sup>43</sup> Instead, the circumstances surrounding the regulation, the state interests, and the injuries claimed by parties must all

---

40 Lowenstein, *supra* note 26, at 1787.

41 Elizabeth Garrett, *Is the Party Over? The Court and the Political Process* 57 (U. of Chicago, Public Law and Legal Theory Working Papers No. 29, 2002).

42 Persily and Cain, *supra* note 24, at 778.

43 *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). See also *Storer v. Brown*, 415 U.S. 724, 730 (1974).

be examined specifically when dealing with most election laws under review.<sup>44</sup> As a result, my review of *Jones* must similarly be grounded in the details of California's Proposition 198. The remainder of this paper seeks to make such an express appraisal.

## II. WHICH CONSTITUTIONAL TEST SHOULD BE USED?

### A. Guidelines for Level of Scrutiny

The first step in evaluating the *Jones* decision is determining whether it employed the correct constitutional test. I argue that it did not. Selecting a constitutional test and its accompanying level of scrutiny is crucial to the final ruling—indeed, it is often tantamount to it.<sup>45</sup> A government action that could easily pass a loose constitutional test could certainly fail a stricter one. As a result, the Court has developed guidelines that can direct judges to the appropriate level of scrutiny.<sup>46</sup>

Fortunately, the Court has outlined in *Timmons v. Twin Cities Area New Party* the procedural steps for selecting a constitutional test in cases of party regulation:

Regulations imposing severe burdens 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>47</sup>

---

44 Williams v. Rhodes, 393 U.S. 23, 30 (1968). See also *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

45 See, e.g., *Reed v. Town of Gilbert, Arizona*, 576 U.S. \_\_\_, 236 (2015) (Breyer, J., concurring) (“Strict scrutiny [leads] to almost certain legal condemnation”), or *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (“We . . . essentially apply [intermediate scrutiny] when it seems like a good idea to load the dice”).

46 See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938) (Footnote 4) (“Prejudice against discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry”).

47 *Timmons v. Twin Cities*, 520 U.S. 351, 351 (1997).

In short, the stringency of the scrutiny applied to party regulation is primarily a function of the weight of the burden imposed upon the party. Once that weight is determined, it must be balanced against the strength of the state's interests balancing the burden and the necessity of the burden to achieve those interests.

Thus, two main options emerge as possible tests for the party regulation considered in *Jones*. If the burden of blanket primary reform upon parties is severe, the measure faces the nearly impossible task of passing strict scrutiny: it must be narrowly tailored to serve a compelling state interest. If, however, the burden is less than severe, a more moderate option should be employed, such as the seminal three-part test developed in *Anderson v. Celebrezze*, which balances (1) the character and magnitude of the injury to party rights, (2) the interests of the state in creating the legislation, and (3) the extent to which those interests necessitate injuring party rights.<sup>48</sup> My analysis suggests that the burden of blanket primary reform is less severe than characterized by the Court in *Jones* and the test employed was too strict. The Court should have used the *Anderson* test instead.

### *B. Reasons to Prefer the Anderson Test*

The *Jones* opinion used strict scrutiny instead of the *Anderson* test because it concluded “there is no heavier burden on a political party’s associational freedom” than that imposed by Proposition 198, which established the blanket primary system.<sup>49</sup> This conclusion relied on two assertions: First, the nomination stage of elections is a “crucial juncture” for the party’s association. Second, the regulation changes the party’s message.<sup>50</sup> However, both of these justifications for ruling the burden “severe” are flawed.

The argument of primary elections being a crucial juncture for parties is an essential one for the majority opinion in *Jones*. If such were not the case, it would be extremely difficult for the Court to classify the associational burden as severe. Undoubtedly,

---

48 *Anderson v. Celebrezze*, 460 U.S. 780, 780 (1983).

49 *California Democratic Party v. Jones*, 530 U.S. 567, 568 (2000).

50 *Anderson*, 460 U.S. at 780 (1983).

the candidate-selection stage of elections is important for parties—it is the mechanism through which they choose the party ambassadors and the views that will be expressed through those leaders.<sup>51</sup>

However, the argument that primary elections are a crucial juncture for parties, while true, neglects another essential consideration: primary elections are a crucial juncture for the people too. For most of the population, the candidate selection process is just as important as the general election because it determines the options available to voters later.<sup>52</sup> If party control over U.S. politics were weak, perhaps this would matter little—independent candidates for elected office would be more common and successful, and voters in the general election would have an unabridged range of choices when casting a ballot. But such is not the case; the two major parties dominate control of government. For example, in the United States, less than one half of one percent of legislators are independent.<sup>53</sup> Therefore, the choices made by the parties in primary elections are effectively the choices voters must accept in general elections,<sup>54</sup> which is why the candidate selection process has been designated as “integral” to the public process of elections.<sup>55</sup>

It follows, then, that the people should be given substantial latitude to structure primary elections, and the people spoke their democratic will clearly through Proposition 198. The district court noted that a majority of every party and demographic subgroup in California supported the initiative.<sup>56</sup> Consequently, the majority in *Jones* erred in only recognizing the stake of parties, and not of the people, in the nomination process. The state, through instituting

---

51 *Id.*

52 *Morse v. Republican Party*, 517 U.S. 186, 205-06 (1996).

53 Author calculation from National Conference of State Legislatures, STATE & LEGISLATIVE PARTISAN COMPOSITION (PRE-ELECTION), [http://www.ncsl.org/Portals/1/Documents/Elections/Legis\\_Control\\_2016\\_Nov7.pdf](http://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_2016_Nov7.pdf) (Nov. 7, 2016).

54 *Morse v. Republican Party* 517 U. S. 186, 205-206 (1996); *United States v. Classic*, 313 U. S. 299, 319 (1941).

55 313 U.S. 299, 314 (1941).

56 *California Democratic Party v. Jones*, 169 F. 3d 646, 649 (9<sup>th</sup> Cir. 1999).

blanket primaries that preserve and promote the democratic will of the people, was “acting not as a foe of the First Amendment but as a friend and ally.”<sup>57</sup>

The second reason that the *Jones* decision labeled blanket primary reform a severe burden—because it could possibly alter the candidates nominated and the positions that they would take otherwise<sup>58</sup>—while also facially true, flies in the face of decades of precedent allowing election reform. It is difficult to even imagine *any* form of party regulation (e.g., anti-discrimination statutes, minimum threshold requirements, write-in candidate prohibitions, and independent candidacy limitations) that would not have at least *some* effect on the candidates ultimately nominated and their positions as a result of the primary election process. And yet, all of these regulations have been upheld in the past.<sup>59</sup> If the Court’s logic were extended to other cases, all of these previously legitimate forms of state intervention would necessarily also be struck down.

Indeed, “the very fact that political parties hold primaries for the nomination of candidates is a product of state compulsion under laws dating back to the turn of the last century . . . [and compelling] nomination-by-primary itself incontestably alters both the candidate mix and the political messages that emerge from the political parties.”<sup>60</sup> Therefore, the majority’s reasoning regarding effects on candidate selection and message in *Jones* must either be taken as an undefended exception to more than a century of legal precedent or as a sweeping repudiation of the entire nationwide systems of primaries, caucuses, and other regulations. Both options are clearly unacceptable.

The flaws in the *Jones* decision’s classification of the imposed burden as severe are crippling. Not only did the majority ignore the

---

57 California Democratic Party v. Jones, 530 U.S. 567, 596 (2000) (Stevens, J., dissenting).

58 California Democratic Party v. Jones, 530 U.S. 567, 568, 577, 581–2 (2000).

59 See discussion of these cases in Section II.

60 Samuel Isaacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 275–76 (2001).

general population's stake in the "crucial juncture" of primaries, but it also relied on a definition of burden that proved far too much—one that would both repudiate well-rooted legal precedent and invalidate the entire system of primary elections as we know it. Accordingly, the majority overestimated the severity of the burden imposed by Proposition 198 and subsequently applied too strict a level of scrutiny on the regulation. Given the interests of the people in the primary process and the lack of a defensible proof of severe burden, we should instead employ the looser constitutional test developed in *Anderson*. This test will allow us to balance the interests of both the parties and the people while better upholding principles of *stare decisis*.

### III. DOES BLANKET PRIMARY REFORM PASS THE CONSTITUTIONAL TEST?

Much of the evidence from political science, legal precedent, and logical argumentation, outlined as follows, was included in party briefs and original district court decision, which was affirmed in its entirety by the federal appeals court. However, sketching the main points here serves as a confirmation that, had the Court applied the correct constitutional test in *Jones*, it would have reached a different conclusion.

#### *A. Character and Magnitude of Asserted Injury*

As explored in the foregoing section, political parties in *Jones* assert that blanket primaries burden their associative right to self-organization and autonomy during the candidate selection process.<sup>61</sup> Having refuted those claims of the burden being severe in general, I now turn to the specifics of what parties contend to be the central

---

61 Brief for Respondents at 19, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99–401). This point was also articulated in Justice Kennedy's concurrence: "The true purpose of this law, however, is to force a political party to accept a candidate it may not want and, by so doing, to change the party's doctrinal position on major issues." 530 U.S. 567, 597 (2000).

cause of that injury: crossover voting.<sup>62</sup> The parties take greatest issue with blanket primaries because “non-party members play a role, on occasion a decisive role, in choosing a party’s nominee.”<sup>63</sup> This complaint is flawed in several ways.

Crossover voting under a blanket primary system presents little additional danger to the associative rights of parties, despite the *Jones* majority’s claim that it could “destroy the party.”<sup>64</sup> Testimonies from political scientists during the original hearing indicate that while the rate of crossover voting in blanket primary states is between 11 and 15 percent, crossover voters already constitute about 10 percent of the electorate in open primary states.<sup>65</sup> In Washington, which had a blanket primary system for more than half a century, crossover voting “rarely change[d] the outcome of any election,” especially in comparison to an open primary.<sup>66</sup> Crossover voting in blanket primary systems is therefore very similar to patterns in other voting systems that the court has repeatedly found acceptable.<sup>67</sup>

Furthermore, crossover voting is rarely “raiding.” Political scientists estimate that 90 to 95 percent or more of any crossover voting that does occur is an expression of real preferences rather than an attempt to disadvantage that party by deliberately selecting a candidate who might be easier to defeat in the general election.<sup>68</sup> This is principally because intentional raiding requires a prohibitively large amount of pre-election information, coordination between conspirators, abandonment of party loyalty, and precise own-party primary

---

62 I.e., people who are typically members of one party participate in the primary election of another party.

63 Brief for Respondents at 28, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99–401).

64 *California Democratic Party v. Jones*, 530 U.S. 567, 579 (2000).

65 *California Democratic Party v. Jones*, 169 F. 3d 646, 657 (9th Cir. 1999).

66 *Id.*

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

68 *California Democratic Party*, 169 F. 3d at 656 (9th Cir. 1999).

election conditions.<sup>69</sup> In practice, these requirements are “simply too demanding” for any kind of significant raiding to occur.<sup>70</sup>

Finally, blanket primaries are less injurious than parties claim because of what the primaries do *not* affect and the tools that parties retain during the candidate nomination process. For example, parties can still participate in the election by producing their own platforms, registering new voters, and executing get-out-the-vote programs during election season.<sup>71</sup> They can guide the selection of their desired candidate through both giving direct financial assistance and endorsing their preferred candidate, both of which can have a substantially determinative effect on the nomination.<sup>72</sup> And parties can establish tests that limit both who can be a member of their party and who can run under their labels.<sup>73</sup> In short, parties still maintain a great deal of control over candidate selection during a blanket primary and their associative rights are not seriously injured.

### *B. Interests Asserted by the State*

The second stage of the *Anderson* test asks us to consider the state interests at stake with the party regulation, which in this case is blanket primary reform. Given that these should be balanced against the injuries claimed by the parties, the greater the strength and number of state interests, the more the balance tilts toward allowing the regulation to stand. As outlined in the following paragraphs, the combined force of the state interests at play in instituting blanket primaries provides more than enough justification to outweigh the asserted party injuries, which were significantly tempered in the previous two sections.

---

69 *Id.*

70 *Id.*

71 Brief for Respondents at 35, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99–401).

72 *Secretary of State of California v. San Francisco*, 489 U.S. 214, 223–24 (1989).

73 *Duke v. Smith*, 13 F.3d 388, 391 fn.3 (11th Cir. 1994).

The first state interest is accurate representation. One of the most fundamental principles of republican government is that elected officials ought to stand in the place of their constituents as lawmakers and translate public will into policy.<sup>74</sup> Given the public's differences in opinion and ideology, elected officials clearly cannot represent each person perfectly. But they come closest to perfect representation when they reflect the views of "the median voter"—more or less the consensus of the electorate.<sup>75</sup> Political scientists have found that blanket primaries, by allowing a broader portion of the population to participate in candidate selection, produce elected officials that represent the median voter better than they do under other systems.<sup>76</sup> Consequently, states have a strong warrant for establishing blanket primaries in order to promote the core democratic principle of representation.

Second, the state has a strong interest in providing a meaningful vote to everyone, not only in the general election but also during the nomination process.<sup>77</sup> Currently, over 23 percent of registered California voters are declared independents.<sup>78</sup> This means that if non-party members were unable to participate in primary elections, nearly a quarter of the electorate would be effectively disenfranchised. Similarly, about 25 percent of Californian voters live in "safe" districts—those in which the same party inevitably wins the general election every time—meaning the outcome of the primary election of the dominant party is inexorably the outcome of the

---

74 THE FEDERALIST NO. 9 (Alexander Hamilton) ("The representation of the people in the legislature, by deputies of their own election . . . are means, and powerful means, by which the excellencies of republican government may be retained").

75 Anthony Downs, *An economic theory of political action in a democracy*, 65 THE JOURNAL OF POLITICAL ECONOMY 135–150 (1957).

76 Brief for Respondents at 40, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99–401).

77 See, e.g., *Roth v. United States*, 345 U.S. 476 (1953).

78 Mark Baldassare et al., *California Voter and Party Profiles*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (2016). [http://www.ppic.org/main/publication\\_show.asp?i=526](http://www.ppic.org/main/publication_show.asp?i=526) (last visited Jan. 17, 2017).

general election.<sup>79</sup> Voters not belonging to the dominant party in safe districts are also effectively disenfranchised. The state is therefore more than justified in structuring primary elections such that independents and minority-party voters in safe districts have meaningful opportunities to participate in the election process.

Third, the state interest in providing better choices for voters should also be respected by the court. Here it is again important to note that Proposition 198 constituted not a top-down government decree to limit party freedom but a grassroots initiative by the people to influence their own options for elections. There is significant and well-established legal precedent that voters have the right to vote for the candidate they prefer.<sup>80</sup> The blanket primary evaluated in *Jones* was simply an expression of that desire on the part of Californian voters to enhance that right to choose.<sup>81</sup> The *Jones* opinion erred in deviating from protecting that crucial right.

The fourth state interest is increasing political participation of Californian citizens. The primary form of political participation for most citizens is voting, and blanket primaries have proved an effective way to boost turnout. The first year that California used a blanket primary, the state recorded a dramatic increase in turnout—the highest in twenty years.<sup>82</sup> And California's case is not unique; blanket primary states consistently have higher turnout than states using other forms of primary elections.<sup>83</sup> Higher participation is both a sign of healthy democracy and a means of improving outcomes such as representation, and the courts have consistently protected state action to encourage it (e.g., vote-by-mail or absentee ballot provisions).<sup>84</sup> The *Jones* court, however, failed to do so.

---

79 California Democratic Party v. Jones, 169 F. 3d 646, 660 (9th 1999).

80 See, e.g., Lubin v. Panish, 415 U.S. 709, 715 (1974); U.S. Term Limits v. Thornton, 514 US 779, 780 (1995).

81 Brief for Respondents at 41, California Democratic Party v. Jones, 530 U.S. 567 (2000) (No. 99–401).

82 *Id.* at 45.

83 *Id.* at 46.

84 John C. Fortier, *Absentee and Early Voting: Trends, Promises, and Perils* 42 (The AEI Press 2006).

Finally, the state has an interest in mitigating government gridlock. Blanket primaries produce elected officials significantly less polarized than their counterparts from other nomination systems.<sup>85</sup> The greater the polarization of elected officials, the more government bodies are paralyzed.<sup>86</sup> This significantly impedes their ability to craft and implement policy on behalf of constituents.<sup>87</sup> The state therefore has a critical interest in protecting its own efficacy through facilitating the election of officials that won't make the government dysfunctional, and the courts should allow reasonable regulation to that end.

### *C. Relation Between State Interests and Burden*

Although the injury asserted by parties has already been shown to be far weaker than claimed, we must still examine how state interests necessitate that burden. To do this, we must consider whether the state might pursue the same interests through alternative means. The more direct and exclusive the connection between the interest and the burden, the stronger the case for allowing the regulation.<sup>88</sup> My analysis suggests that not only is there reasonable justification for blanket primaries as the means to achieve the ends outlined in the previous section but also that there are no less intrusive alternatives.

Neither the process nor results of blanket primaries can be replicated in open, closed, or even jungle primaries. These three alternatives lack the crucial component of allowing voters to differentiate between offices in choosing which party nominee to select.<sup>89</sup>

---

85 Brief for Respondents at 40, *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (No. 99–401).

86 Sarah A. Binder, *The Dynamics of Legislative Gridlock, 1947-96*, 93 AMERICAN POLITICAL SCIENCE REVIEW no. 3, 519–533 (1999).

87 George C. Edwards III, Andrew Barrett, and Jeffrey Peake, *The Legislative Impact of Divided Government*, 41 AMERICAN JOURNAL OF POLITICAL SCIENCE no. 2, 545–563 (1997).

88 *Timmons v. Twin Cities*, 520 U.S. 351, 351 (1997).

89 Benjamin D. Black, *Developments in the State Regulation of Major and Minor Political Parties*, 82 CORNELL L. REV. 109, 175 (1996).

A blanket primary is therefore “the least drastic means available” to secure that choice for voters.<sup>90</sup> Moreover, blanket primaries are unique in producing desirable outcomes; as noted earlier, they consistently yield the best representation, highest participation, and least government gridlock among contemporary primary systems. Thus, the connection between blanket primaries and the state interests is exclusive and direct.

Finally, the *Jones* majority suggests that if voters would like to cast a ballot in another party’s primary, they should “simply join the party.”<sup>91</sup> While that option may seem intuitively straightforward, the logic supporting it breaks down when applied to safe districts. In those districts, requiring party registration to vote in the determinative primary stage of the election is effectively requiring partisan affiliation to gain participatory rights—“the right to vote becomes dependent on ideological commitments”<sup>92</sup>—which is unconstitutional.<sup>93</sup> Since 25 percent of California voters (and a higher percentage nationwide) live in safe districts, the *Jones* majority is telling a quarter of voters that they are disenfranchised merely because of “differences of opinion.”<sup>94</sup> This *de facto* discrimination is clearly an unacceptable alternative and thus fails to preserve voter choice.

#### IV. CONCLUSION

Though far from an electoral panacea for problems in representation, polarization, and voters’ rights in the United States, blanket primaries present one promising avenue of exploration. Their unique capacity to expand voter choice, encourage participation, and improve representation makes them of substantial and well-tailored state interest. Furthermore, the burdens they impose upon parties

---

90 Heavey v. Chapman, 93 Wn.2d 700, 611 P.2d 1256, 1259 (1980).

91 California Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

92 Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 353–354 (2004).

93 See, e.g., Dunn v. Blumstein, 405 U.S. 330, 357–58 (1972); Carrington v. Rash, 380 U.S. 89, 95–97 (1965).

94 Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969).

are much lighter than the *Jones* majority ruled, meaning that the decision erred both in the selection of an appropriate constitutional test and in the determination of the severity of the injury to associational rights. Given the stakes for democratic outcomes, the Court would be wise to reconsider the ruling.