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Elections - Nominations and Primary Elections: The Supreme Court Finds That California's Blanket Primary Violates Political Parties' First Amendment Right of Association

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ELECTIONS—NOMINATIONS AND PRIMARY ELECTIONS: THE SUPREME COURT FINDS THAT CALIFORNIA'S "BLANKET PRIMARY" VIOLATES POLITICAL PARTIES' FIRST AMENDMENT RIGHT OF ASSOCIATION

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

I. FACTS

California has two different ways a candidate can get on the general ballot for most state and federal elective offices.[1] He or she can win the primary of a qualified political party and thereby receive its nomination.[2] Alternatively, he or she can file as an independent by obtaining a certain percentage of the signatures of the state's electorate or the voting population of the area represented by the office in contest, depending on whether or not the election is for statewide office.[3]

Prior to 1996, California utilized a so-called "closed" primary system.[4] Under this system, only members of a political party could vote for that party's candidate.[5] Through the adoption of Proposition 198 in 1996, this system was changed to a so-called "blanket" primary.[6] Under this blanket primary system, "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote . . . for any candidate regardless of the candidate's political affiliation."[7] The ballot each voter receives now lists every candidate, regardless of the voter's party affiliation, and the voter has the option of voting for any of them.[8] Under the closed primary system previously utilized by California, the ballot each voter

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1. CAL. ELEC. CODE §§ 8400 & 15451 (West 1996).

2. *Id.* § 15451. A party is qualified if one of the following three conditions are met: (1) in the last gubernatorial election, one of its statewide candidates polled at least two percent of the statewide vote; (2) the party's membership is at least one percent of the statewide vote at the last preceding gubernatorial election; or (3) voters numbering at least 10 percent of the statewide vote at the last gubernatorial election sign a petition stating that they intend to form a new party. *Id.* § 5100 (West 1996 and Supp. 2000).

3. *Id.* § 8400.

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

5. *Id.* at 569 (citing CAL. ELEC. CODE §§ 2150, 2151 (West 1996 & Supp. 2001)). At the time of this decision, four states used a blanket primary system, either partisan or nonpartisan, including California. *See* discussion *infra* Part II.B.1.

6. *Cal. Democratic Party*, 530 U.S. at 568-71. Proposition 198 was adopted by initiative; the results being 59.51% (3,340,642 votes) in favor and 40.49% (2,273,064 votes) opposed. California Democratic Party v. Jones, 169 F.3d 646, 649 (9th Cir. 1999).

7. CAL. ELEC. CODE § 2001 (repealed 2000).

8. *Cal. Democratic Party*, 530 U.S. at 570.

received only had candidates listed from the party with which that particular voter was affiliated.[9] The result under the new system is the same as under the old: the candidate of each party who gets the greatest number of votes becomes that party's candidate.[10]

As a result of the adoption of Proposition 198, four political parties (Parties)[11] brought suit in the United States District Court for the Eastern District of California.[12] These Parties all had a rule stating that only members of the party could vote in the party's primary while non-members were prohibited from doing so.[13] The Parties primarily alleged that the blanket primary adopted by the voters of California violated their First Amendment right of association.[14]

In its decision, the United States District Court for the Eastern District of California upheld the blanket primary.[15] According to the court, the inquiry does not end once the court establishes that the interest in determining who will vote in a party's primary is protected by the First Amendment.[16] If this were the case, an open primary would also be invalidated as unconstitutional if a party objected to it since an open primary allows voters who are not registered members of a party to vote in that party's primary, just as in a blanket primary.[17] The court was also concerned that if the Parties had their way, this would unduly restrict the power of the states to require that political parties use primary elections to select their candidates for general elections.[18] Furthermore, the state's authority to establish voter registration requirements as to who can vote in primaries would be infringed upon by the party member qualification rules.[19] According to the court, political parties are like the government

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9. *Id.*

10. CAL. ELEC. CODE § 15451 (West 1996). However, the blanket primary instituted through Proposition 198 did not apply directly to the apportionment of presidential delegates. *Cal. Democratic Party*, 530 U.S. at 570 (citing CAL. ELEC. CODE §§ 15151, 15375, 15500 (West 1996 & Supp. 2001)).

11. These parties were the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party. *Cal. Democratic Party*, 530 U.S. at 571.

12. *Id.* Californians for an Open Primary also intervened as a party defendant. *Id.*

13. *Id.*

14. *Id.* The Parties sought declaratory and injunctive relief. *Id.*

15. California Democratic Party v. Jones, 984 F. Supp. 1288, 1289 (E.D. Cal. 1997).

16. *Id.* at 1295.

17. *Id.* If political parties had an "unfettered" power to determine who could be a party member and how to select their candidates, states could infringe on this power through the requirement that the parties select their candidates through primary elections. *Id.*

18. *Id.* Just as a state requiring candidate selection through primary elections would infringe on the power of political parties, so would a state's requirement that any registered voter be allowed to vote in a party's primary. *Id.*

19. *Id.* at 1295-96.

itself, performing governmental functions, and should therefore be subject to state election regulations.[20]

The district court did recognize that the regulation would have the effect of a "substantial amount of cross-over voting" in a party's primary; this could result in a candidate being selected who is different from the one candidate party members would select or, at least, may cause the same candidate to commit himself to different positions.[21] However, the district court upheld the blanket primary established through Proposition 198, finding that the burden imposed on the Parties through the blanket primary was not severe and that it was outweighed by the compelling interests of California, primarily "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in the primary process."[22]

The Court of Appeals for the Ninth Circuit affirmed the decision, adopting the district court's opinion as its own.[23] The Parties appealed to the Supreme Court of the United States which *held* that the burden Proposition 198 placed on the Parties' right of political association was both severe and unnecessary, and it therefore violated a political party's First Amendment right of association.[24]

II. LEGAL BACKGROUND

The freedom of association is a fundamental right protected by the First Amendment, even though it is not one of the freedoms expressly enumerated within the language of the First Amendment.[25] Since the freedom of association was expressed in *NAACP v. Alabama ex rel. Patterson*,[26] the Supreme Court has considered at least three different sides of this right.[27] One is the right to associate to achieve economic or other

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20. *Id.* at 1296.

21. *Id.* at 1298-99. Voters, who have a party preference or affiliation, can vote in another party's primary in order to influence the choice of candidate for that party. *Id.* at 1299. In addition, since not only party members can vote in the party's primary, the candidates will have to appeal to voters from the entire electorate and might, as a result, take different positions on political issues. *Id.*

22. *Id.* at 1303 (citing Lightfoot v. Eu, 964 F.2d 865, 872 (9th Cir. 1992)).

23. Cal. Democratic Party v. Jones, 169 F.3d 646, 647-48 (9th Cir. 1999).

24. Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000).

25. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 943 (1995). For an overview of the history of primary elections, see 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).

26. 357 U.S. 449 (1958).

27. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1199-1200 (6th ed. 2000).

goals that are not related to any other right guaranteed by the Constitution.[28] Second is that freedom of association which "is protected by the concept of liberty in the due process clauses."[29] This aspect of the freedom of association is an implicit part of the Bill of Rights guarantees.[30] Third is the right to associate for the purpose of engaging in those types of activity that are expressly protected by the First Amendment.[31]

A. ESTABLISHING THE STANDARD OF REVIEW FOR ELECTION LAW CASES

The Supreme Court has developed a test to be used when determining whether an election law infringes upon a political party's First Amendment right of freedom of association.[32] When determining the constitutionality of a state election law, a court has to weigh the "character and magnitude" of the burden imposed on the rights protected by the First and Fourteenth Amendments with the interests set forth as justifications by the state.[33] A court has to consider the extent to which the state's interests made the burden necessary.[34] The level of review depends on the weight of the burden: if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest, but if it is a lesser burden, "important regulatory interests" will generally be enough "to justify reasonable, nondiscriminatory restrictions."[35]

The Court recognized early that voters cannot be excluded from the election process in a way that violates a right set forth in the Constitution.[36] Even though party affairs are not public affairs, if political parties are given a special role in an election process and the parties have a discriminatory process, this discriminatory action by the parties becomes state action under the Fifteenth Amendment.[37]

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28. *Id.* at 1200.

29. *Id.*

30. *Id.*

31. *Id.* The freedom of association discussed in this article is of this last type.

32. *See, e.g.*, Timmons v. Twin Cities New Area Party, 520 U.S. 351, 358-59 (1997) (summarizing the test to be used when election laws are challenged as unconstitutional).

33. *Id.* at 358 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

34. *Id.* (citing *Burdick*, 504 U.S. at 434).

35. *Id.* at 358-59 (citing *Burdick*, 504 U.S. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983) and Norman v. Reed, 502 U.S. 279, 288-89 (1992))).

36. *See* Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (emphasizing that a state cannot infringe on its citizen's First Amendment rights when regulating elections); *see also* Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 121 (1981) (reiterating that the Fourteenth Amendment protects the First Amendment freedom of association from infringement by a state).

37. *See* Terry v. Adams, 345 U.S. 461, 484 (1953) (Clark, J., concurring) (concluding that, in action against political organization for excluding blacks from its primary, an organization "takes

Included in the right of political association is the freedom of political parties and their members to associate with others for the common advancement of political beliefs and ideas.[38] This freedom contains a freedom not to associate with those who do not share the same views.[39]

In *Anderson v. Celebrezze*,[40] the Court set forth a test to use when determining constitutional challenges to election laws.[41] In this case, an Ohio statute imposed an early deadline for independent candidates for President to file a statement of candidacy; however, this deadline was not required for candidates of existing political parties.[42] The Court found that the state only had a minimal interest in imposing the earlier deadline.[43] According to the Court, the statute particularly placed a burden on the associational rights of independent voters and candidates.[44] This significant restriction on an electoral process with nationwide implications clearly outweighed the minimal interest of the state, and the Court accordingly found the Ohio statute in question to be unconstitutional.[45]

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on those attributes of government which draw the Constitution's safeguards into play" when the organization's nominees generally won in the primaries and the ensuing general election); *see also* Smith v. Allwright, 321 U.S. 649, 664 (1944) (noting that a state cannot circumvent constitutional rights by letting a private organization conduct primary elections). When a state, through the establishment of an election process, "endorses, adopts and enforces" certain practices of a political party, that action by the political party is in effect the action of the state. *Allwright*, 321 U.S. at 664. Only if something is considered a state action do the constitutional safeguards come into play. *Terry*, 345 U.S. at 484 (Clark, J., concurring) (citing *Allwright*, 321 U.S. at 664).

38. *See* Cousins v. Wigoda, 419 U.S. 477, 487 (1975) ("There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments" (quoting Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973) (reviewing First and Fourteenth Amendment case law))).

39. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

40. 460 U.S. 780 (1983).

41. *Anderson*, 460 U.S. at 789-90; *see also* Illinois Elections Bd. v. Socialist Workers Party, 440 U.S. 173, 183 (1979) (setting forth the different factors to consider for determining whether there has been a violation of the Equal Protection Clause); American Party of Texas v. White, 415 U.S. 767, 780-81 (1974) (emphasizing that while the validity of the challenged ballot qualification systems depended on whether the qualifications were necessary to further compelling state interests, these limitations were "reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways" and therefore constitutionally valid); Storer v. Brown, 415 U.S. 724, 730 (1974) (noting that there is no "litmus-paper test" and decisions are instead a "matter of degree"); Bullock v. Carter, 405 U.S. 134, 142-43 (1972) (emphasizing that there are different standards of review depending on the impact on the rights of the voters); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (failing to show the required compelling state interests when the state favored established parties over new ones, burdening both the right to vote and the right to associate).

42. *Anderson*, 460 U.S. at 780. An independent candidate was required to file in March in order to appear on the general election ballot in November. *Id.*

43. *Id.* at 806.

44. *Id.* at 795.

45. *Id.* at 806.

As to the test used, the Court emphasized that when a state's election laws are challenged, there is no "litmus-paper test" that can be used to determine whether a provision is constitutional or not.[46] A court must instead weigh the injury to the rights of the plaintiff, protected by the First and Fourteenth Amendments, with the interests asserted by the state as a justification for the burden that is placed on the plaintiff.[47] There is no black-letter rule that can be automatically applied.[48] Instead, "[i]n passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."[49]

The Court thereafter applied the *Anderson* test to invalidate a state's closed primary statute.[50] In *Tashjian v. Republican Party of Connecticut*,[51] the original plaintiffs, a political party and some of its officers, challenged a statute which required that a person, to be able to vote in a party's primary, be a registered member of that party.[52] This statute had previously been challenged and upheld as constitutional.[53] Now however, the Supreme Court, applying the test set forth in *Anderson*, found that the Connecticut statute in question limited "the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community."[54]

Connecticut asserted four interests as compelling: "ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government."[55]

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46. *Id.* at 789 (citing *Storer*, 415 U.S. at 730).

47. *Id.* at 789.

48. *Id.* at 789-90.

49. *Id.* at 789.

50. Tashjian v. Republican Party of Conn., 479 U.S. 208, 225 (1986).

51. 479 U.S. 208 (1986).

52. *Tashjian*, 479 U.S. at 210.

53. *Id.* at 212 (citing Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976)).

54. *Id.* at 216.

> [C]onstitutional challenges to specific provisions of a State's election laws cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions. Instead, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 213-14 (citations omitted).

55. *Id.* at 217.

However, the Court concluded that these interests were "insubstantial."[56] Consequently, the Connecticut statute failed the *Anderson* test and was declared unconstitutional.[57]

Thereafter, in *Eu v. San Francisco County Democratic Central Committee*,[58] the Supreme Court reviewed a challenge to California's election laws, for the second time.[59] The Court appeared to state that strict scrutiny was to be used regardless of the severity of the burden imposed on rights protected by the First and Fourteenth Amendments, as long as there was a burden.[60] After determining that there was indeed a burden, the Court noted that the statute would be constitutionally valid only "if the

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56. *Id.* at 225. Connecticut's argument that the administration of the system preferred by the plaintiff would cost the state too much was rejected because according to the Court, a state "can no more restrain the Republican Party's freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party." *Id.* at 218. As for the interest of preventing raiding, the Court noted that while it had previously recognized that a state does have a legitimate interest in preventing party raiding, that interest was not implicated here. *Id.* at 219. Under the challenged state statute, independents could merely register as Republicans to be eligible to vote in the Republican primary, with the statute then actually assisting in raiding by independents. *Id.* In addition, raiding typically does not refer to acts by independent voters but to registered voters of another party. *Id.* Reviewing the argument that a closed primary system avoids voter confusion, the Court emphasized that its previous cases reflected "a greater faith in the ability of individual voters to inform themselves about campaign issues" than that accorded them by Connecticut. *Id.* at 220 (quoting Anderson v. Celebrezze, 460 U.S. 780, 797 (1983)). Furthermore, the plaintiff's rule would give plaintiff and its members a "substantial benefit" when it chose its candidate. *Id.* at 221. Lastly, the Court responded to the fourth compelling interest asserted by Connecticut, protecting the responsibility of party government; the Court noted that it was not its role to determine whether the Connecticut legislature made the right decision in adopting the closed primary system, since the plaintiff's right to decide itself how to pursue its political goals is protected by the First Amendment. *Id.* at 222-24.

57. *Id.* at 225.

> After *Tashjian* it is clear that political parties have a constitutional right to permit unaffiliated voters to participate in their primaries, even in states with election statutes restricting voting in primaries to registered party members. Insofar as closed primary statutes bar participation of unaffiliated voters in party primaries despite party rules permitting the participation of such voters, these statutes are unconstitutional. Pursuant to party rules, then, a state must permit independent/unaffiliated voters as well as party members to vote in the party primary, even if state law establishes a closed primary.

Brian M. Castro, *Smothering Freedom of Association: The Alaska Supreme Court Errs in Upholding the State's Blanket Primary Statute*, 14 ALASKA L. REV. 523, 534 (1997).

58. 489 U.S. 214 (1989).

59. *Eu*, 489 U.S. at 219-22. The Supreme Court had previously heard the case and remanded it to the Court of Appeals for the Ninth Circuit for "further consideration in light of *Tashjian*." *See* Eu v. San Francisco County Democratic Cent. Comm., 479 U.S. 1024, 1024-25 (1987). The court of appeals on remand again affirmed the decision of the district court that had struck down all the challenged regulations as unconstitutional. San Francisco County Democratic Cent. Comm. v. Eu, 826 F.2d 814, 817 (9th Cir. 1987). On appeal, the Supreme Court once more heard the case. *Eu*, 489 U.S. at 216.

60. *See Eu*, 489 U.S. at 222 (setting forth the test to be used). To use strict scrutiny, which requires a compelling state interest, regardless of the severity of the burden imposed, would not be in accord with the Court's previous First Amendment cases. *Anderson*, 460 U.S. at 789-90.

State shows that it advances a compelling state interest and is narrowly tailored to serve that interest."[61]

For one of the statutes at issue, wherein primary endorsements by the political official governing bodies of political parties were banned, California set forth as one of its compelling interests the preservation of party unity during a primary.[62] According to the Court, however, this was not a compelling state interest.[63] California's second justification for the challenged ban on party endorsements and statements of opposition was "that it [was] necessary to protect primary voters from confusion and undue influence."[64] Noting that California does have "a legitimate interest in fostering an informed electorate," the Court found that California had produced no evidence of the ban on party endorsements fulfilling that purpose.[65]

The Court next turned to the challenges to the restrictions California had imposed on how official governing bodies can be organized and composed, the term limits of the office for state central committee chair, and the requirement that this chair rotate between residents of different parts of the state.[66] Here again, California could not show that the regulations were necessary in the sense of making sure that elections are "orderly and fair."[67] Thus, those laws were also struck down.[68]

Following *Eu*, the Court applied strict scrutiny to strike down Illinois election laws.[69] The Court found that requirements of collecting a certain

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61. *Eu*, 489 U.S. at 222 (citations omitted).

62. *Id.* at 226.

63. *Id.* at 228. Another compelling interest offered by California was to maintain a stable government. *Id.* at 226. While the Court found this to be a compelling state interest, California had not explained how this interest would be promoted by its election laws. *Id.* Instead, the explanation offered by California was that this interest also included a similar interest in party stability. *Id.* at 227. The Court pointed out that it had previously recognized that a state may not enact "laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'" *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 224 (1986)).

64. *Id.* at 228.

65. *Id.* at 228-29.

66. *Id.* at 229.

67. *Id.* at 233.

68. *Id.*

69. Norman v. Reed, 502 U.S. 279, 289-90 (1992). Under Illinois statutes, organizers of a new political party must (1) canvass the electoral area where they wished to run candidates; (2) when running candidates for statewide office, obtain the signatures of 1 percent of the voters at the last statewide election or 25,000 voters, whichever is less; and (3) when running candidates solely for offices within a political subdivision of the state, circulate petitions containing a complete list of candidates for all offices to be filled in the subdivision at large, and obtain signatures (a) from five percent of the voters at the last election in the subdivision or 25,000 voters, whichever is less, or (b) if the subdivision is divided into separate districts from which some officers are elected,

amount of signatures in order to establish a new political party were broader than necessary to advance electoral order and therefore violated the right of political association under the First Amendment.[70]

In *Burdick v. Takushi*,[71] Hawaii's ban on write-in voting was challenged as violating the First and Fourteenth Amendments.[72] There, the prohibition was upheld.[73] The Court started by stating that not every burden on the right to vote is entitled to strict scrutiny, making clear that this was supported by previous case law.[74] It then went on to note that there will always be burdens imposed on the voters through election laws but to mandate that all election laws pass strict scrutiny "would tie the hands of States seeking to assure that elections are operated equitably and efficiently."[75]

Emphasizing more than once that the test set out in *Anderson* is to be used,[76] the Court found that the burdens imposed on voters by Hawaii's ban on write-in voting were constitutional.[77] Since the burdens were limited, Hawaii did not need compelling interests to uphold the law.[78] Hawaii's two asserted interests, "avoiding the possibility of unrestrained factionalism at the general election" and guarding against party raiding, were found to be legitimate interests, and the ban imposed on write-in voting was found to be a "reasonable way of accomplishing this goal."[79]

Finally, in *Timmons v. Twin Cities Area New Party*,[80] the Court applied strict scrutiny to uphold a Minnesota statute prohibiting a candidate from appearing on the ballot as the candidate of more than one party, or

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from five percent of the voters at the last election in each district or 25,000 voters, whichever is less. *Id.* at 282-83.

70. *Id.* at 290 (citing Anderson v. Celebrezze, 460 U.S. 780, 793-94 (1983) and Williams v. Rhodes, 393 U.S. 23, 30-34 (1968)).

71. 504 U.S. 428 (1992).

72. *Burdick*, 504 U.S. at 430.

73. *Id.*

74. *Id.* at 433. The Court accordingly seemed to reject the contention from *Tashjian* that all burdens are subject to strict scrutiny. *Id.* The Court referred, among other things, to its decisions in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) and *Tashjian* in which it stated

> the right to vote in any manner and the right to associate for political purposes through the ballot are [not] absolute. The Constitution provides that States may prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives" and the Court therefore has recognized that States retain the power to regulate their own elections.

Id. (citations omitted).

75. *Id.*

76. *Id.* at 434, 438.

77. *Id.* at 441-42.

78. *Id.* at 439.

79. *Id.* at 439-40.

80. 520 U.S. 351 (1997).

"fusion."[81] Again, the Supreme Court set forth the test to be applied.[82] It first noted that when determining the constitutionality of a state election law, the Court has to weigh the "character and magnitude" of the burden imposed on the rights protected by the First and Fourteenth Amendments with the interests set forth as justifications by the state.[83] The Court considered the extent to which the state's interests made the burden necessary.[84] The level of review depends on the heaviness of the burden: if the burden is severe, the regulation must be narrowly tailored and advance a compelling state interest; if it is a lesser burden, an "important regulatory interest" will generally be enough to justify "reasonable, nondiscriminatory restrictions."[85] There is no "bright line" by which valid election laws can be distinguished from those that violate the rights guaranteed by the First Amendment.[86]

The Court went on to emphasize "that a party is [not] absolutely entitled to have its nominee appear on the ballot as that party's candidate" and that a party's association rights are not severely burdened by a particular individual possibly not appearing on the ballot as that party's candidate.[87] As opposed to the regulations challenged in *Tashjian* and *Eu*, Minnesota's prohibition on fusion did not involve "regulation of political parties' internal affairs and core associational activities."[88] Just because fusion might make it easier for third parties to succeed does not require Minnesota or any other state to permit it.[89] Concluding that the burdens imposed by the fusion ban were not severe, the Court found that those burdens were

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81. *Timmons*, 520 U.S. at 353-54. Fusion, also called "cross-filing" or "multiple-party nomination," is when more than one party supports the same candidate. *Id.* at 353-54 & n.1 (quoting Agersinger, *"A Place on the Ballot": Fusion Politics and Antifusion Laws*, 85 AMER. HIST. REV. 287, 288 (1980)).

82. *Id.* at 358-59.

83. *Id.* at 358 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

84. *Id.* (citing *Burdick*, 504 U.S. at 434).

85. *Id.* (quoting *Burdick*, 504 U.S. at 434; *see also* Norman v. Reed, 502 U.S. 279, 288-89 (1992)). The Court stated:

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

Id. at 358 (citations omitted).

86. *Id.* at 359 (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

87. *Id.* (citing *Burdick*, 504 U.S. at 440 & n.10).

88. *Id.* at 360.

89. *Id.* at 361-62.

justified by "correspondingly weighty" valid state interests in ballot integrity and political stability.[90]

When the Court has been confronted with state laws that conflict with party rules, the Court has upheld the validity of the party rules.[91] In both *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*,[92] and *Cousins v. Wigoda*,[93] the Court found that the state could not force a party to seat a delegation chosen in a way that violates that party's rules.[94]

B. USE OF PRIMARY ELECTIONS IN OTHER STATES

While the systems for primary elections vary from state to state, they fall into four general categories.[95] These are the closed primary, the semi-closed primary, the open primary, and the blanket primary.[96]

1. The Different Types of Primaries

First, there is the traditional closed primary where participation in a party's primary election is only for voters who are registered voters of that party.[97] Twelve states have such closed primaries.[98]

Twenty-one states use the so-called semi-closed primary.[99] Here, only registered party members and independents can vote in a party's primary.[100]

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90. *Id.* at 363, 369-70.

91. *See* Democratic Party v. Wis. *ex rel.* LaFollette, 450 U.S. 107, 126 (1981); Cousins v. Wigoda, 419 U.S. 477, 483 (1975).

92. 450 U.S. 107 (1981).

93. 419 U.S. 477 (1975).

94. *See LaFollette*, 450 U.S. at 126 (holding that when the Democratic Party of the United States had rules under which delegates to its national convention were to be chosen through procedures in which only Democrats participated, Wisconsin could not force the convention to seat delegates from Wisconsin when Wisconsin allowed members of other parties and independents to vote in the Democratic primary); *Cousins*, 419 U.S. at 483 (reversing decision of appellate court which held that Illinois state law governed how parties selected their delegates, not the parties' internal rules).

95. Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 306 (1998).

96. *Id.*

97. *Id.*

98. DEL. CODE ANN. tit. 15, § 3161 (1999); FLA. STAT. ANN. § 101.021 (West 1982 & Supp. 2002); KAN. STAT. ANN. §§ 25-3301, 25-3304 (2000); KY. REV. STAT. ANN. § 116.055 (Michie 1998 & Supp. 2001); MD. ANN. CODE art. 33, §§ 3-101 to 8-711 (1997); NEB. REV. STAT. § 32-912 (1998); NEV. REV. STAT. ANN. § 293.287 (Michie 1997); N.M. STAT. ANN. § 1-5-12 (Michie 1978 & Supp. 2001); N.Y. ELEC. LAW §§ 1-104, 5-302 (McKinney 1998); PA. STAT. ANN. tit. 25, § 2832 (West 1994); W. VA. CODE § 3-1-35 (1999); WYO. STAT. ANN. § 22-5-212 (Michie 2001).

99. ALA. CODE § 17-16-14 (1995); COLO. REV. STAT. § 1-7-201 (2001); CONN. GEN. STAT. ANN. §§ 9-23a, 9-431 (West 1989 & Supp. 2001); 10 ILL. COMP. STAT. ANN. 5/7-43 (West 1993 & Supp. 2001); IND. CODE ANN. § 3-10-1-24 (Michie 1998 & Supp. 2001); IOWA CODE ANN. §§ 43.38, 43.41, 43.42 (West 1999); MASS. GEN. LAWS. ANN. ch. 53, §§ 37, 37A, 38 (West 1991 & Supp. 2001); ME. REV. STAT. ANN. tit. 21-A, §§ 111, 340 (West 1993); MISS. CODE ANN. § 23-

The difference as compared to the closed primary is that independents can vote in a semi-closed primary but are not allowed to do so in a closed primary system.[101] Registered voters of other parties cannot vote in that party's primary.[102]

An open primary is one in which a registered voter can, on the day of the primary election, request the ballot of any party, regardless of whether or not the voter is a registered member of that party.[103] However, the voter cannot vote for candidates from more than one party.[104] Thirteen states have open primaries, among them North Dakota.[105]

Finally, at the time of the decision in *California Democratic Party v. Jones*,[106] two states other than California had blanket primaries.[107] Here, a registered voter can vote for the candidates of any party; the voter is not limited to voting for candidates of just one party, and all voters receive the same ballot.[108] Louisiana uses a nonpartisan blanket primary which is different from the blanket primary in the other three states in that the candidates with the most votes, regardless of party affiliation, go on to the general election.[109]

15-575 (2001); MO. ANN. STAT. § 115.397 (West 1997); N.H. REV. STAT. ANN. § 654:34 (1996); N.J. STAT. ANN. § 19:23-45 (West 1999); N.C. GEN. STAT. § 163-39 (2000); OHIO REV. CODE ANN. §§ 3513.18, 3513.19 (Anderson 1996); OKLA. STAT. ANN., tit. 26, § 1-104 (West 1997); OR. REV. STAT. § 254.365 (1999); R.I. GEN. LAWS §§ 17-9.1-23, 17-9.1-24 (2000); S.C. CODE ANN. § 7-9-20 (Law. Co-op. 1977 & Supp. 2000); S.D. CODIFIED LAWS § 12-6-26 (Michie 1995 & Supp. 2000); TENN. CODE ANN. § 2-7-115 (1994 & Supp. 2001); TEX. ELEC. CODE ANN. § 162.003 (Vernon 1986 & Supp. 2002). Included are states with statutes that explicitly allow the political parties themselves to determine whether independent voters are to be able to vote in their primaries. *See, e.g.*, TENN. CODE ANN. § 2-7-115.

100. Gerber & Morton, *supra* note 95, at 306.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. ARIZ. REV. STAT. ANN. § 16-467 (West 1996 & Supp. 2001); ARK. CODE ANN. § 7-7-308 (Michie 2000); GA. CODE ANN. § 21-2-224 (1998); HAW. REV. STAT. § 12-31 (1993); IDAHO CODE § 34-904 (Michie 2001); MICH. COMP. LAWS ANN. §§ 168.575, 168.576 (West 1989 & Supp. 2001); MINN. STAT. ANN. § 204D.08 (West 1992 & Supp. 2001); MONT. CODE ANN. § 13-10-301 (2001); N.D. CENT. CODE § 16.1-11-22 (1997); UTAH CODE ANN. § 20A-3-104.5 (Supp. 2001); VA. CODE ANN. § 24.2-530 (Michie 2000); VT. STAT. ANN. tit 17, § 2363 (1982); WIS. STAT. ANN. § 5.37 (West 1996 & Supp. 2001).

106. 530 U.S. 567 (2000).

107. ALASKA STAT. § 15.25.060 (Michie 2000); WASH. REV. CODE ANN. § 29.18.200 (West 1993).

108. Gerber & Morton, *supra* note 95, at 306.

109. LA. REV. STAT. ANN. § 18:521 (West 1979 & Supp. 2001).

2. *State Court Decisions Upholding Blanket Primary Statutes*

Some state courts have upheld blanket primary statutes.[110] In *Heavey v. Chapman*,[111] the Supreme Court of Washington found that the state's blanket primary statute was constitutional because it did not infringe on the right of association guaranteed under both the state and federal constitutions.[112] The court referred to the Supreme Court's decision in *Storer v. Brown*[113] for the proposition that the plaintiffs, the Washington State Democratic Central Committee and individuals, had the burden of proof to show that the statute imposed a substantial burden on the right to associate for political purposes.[114] Only if the plaintiffs had fulfilled this burden would the state have had the burden of showing a compelling state interest.[115] The court referred to the standard it used as the substantial burden test.[116]

The court noted that as compared to the statutes challenged in *Rosario v. Rockefeller*[117] and *Nader v. Schaffer*,[118] the statute challenged in *Heavey* was one that encouraged and facilitated participation in the electoral process.[119] The plaintiffs also conceded that there was no substantial burden imposed on them and that the state did indeed have compelling interests.[120] The compelling interests identified by the court were secrecy, greater voter participation, and maximizing voter choice.[121] The court noted that even if the blanket primary might be defective any action to be taken would have to be through the legislature or by popular initiative, not by the court.[122]

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110. O'Callaghan v. State, 914 P.2d 1250, 1252 (Alaska 1996); Heavey v. Chapman, 611 P.2d 1256, 1257 (Wash. 1980).

111. 611 P.2d 1256 (Wash. 1980).

112. *Heavey*, 611 P.2d at 1257. The statute in question, WASH. REV. CODE § 29.18.200, now sets forth that "[e]xcept as provided otherwise in chapter 29.19 RCW, all properly registered voters may vote for their choice at any primary held under this title, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."

113. 415 U.S. 724 (1974).

114. *Heavey*, 611 P.2d at 1257 (citing Storer v. Brown, 415 U.S. 724, 729 (1974)).

115. *Id.*

116. *Id.* at 1257-58. This standard varies somewhat from that used by the Supreme Court in *Cal. Democratic Party*, which demands that when there is a severe restriction on the freedom of association, the regulation must be narrowly drawn to advance a state interest of compelling importance. Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000).

117. 410 U.S. 752 (1973).

118. 417 F. Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976).

119. *Heavey*, 611 P.2d at 1258-59.

120. *Id.* at 1258.

121. *Id.* at 1259.

122. *Id.*

Likewise, in *O'Callaghan v. State* (*O'Callaghan I*),[123] the Supreme Court of Alaska upheld Alaska's blanket primary in 1996, holding that a blanket primary system is not per se unconstitutional merely because it conflicts with a party rule regarding selection of political party candidates.[124] The court expressly referred to the approach set forth by the Supreme Court of the United States in *Burdick* as that to be used when determining the constitutionality of election laws.[125] This led the court to use the same test as that used by the Supreme Court.[126] The court also pointed to *Heavey* as being the case most on point from a factual standpoint.[127] The plaintiffs claimed two harms to their interests: that a blanket primary system would make it more difficult for the party to protect itself against raiding than it would be under a partially-closed primary system, and that the latter system would make the candidates more accountable to party principles and platform.[128] The court recognized that raiding was a legitimate concern and that it was more likely to occur in a blanket primary system than in a partially closed primary.[129] Nonetheless, the court found that these alleged harms were outweighed by the justifications set forth by the state: encouraging voter turnout, maximizing voters' freedom of choice among candidates, and ensuring that elected officials have relatively broad-based constituencies.[130]

C. SUMMARY OF LEGAL BACKGROUND

The determination of whether a statute that infringes on the associational rights protected by the First and Fourteenth Amendments is unconstitutional is a two-step process.[131] First, the Court determines how

123. 914 P.2d 1250 (Alaska 1996).

124. *O'Callaghan I*, 914 P.2d at 1263. A single blanket primary election was provided for, allowing a voter to vote for any candidate, regardless of the party affiliation of the voter or the candidate. *Id.* at 1252 (citing ALASKA STAT. §§ 15.25.010 to 15.25.130 (2000)). However, as a result of the decision in *Cal. Democratic Party*, the statute at issue has since been declared unconstitutional. O'Callaghan v. State (*O'Callaghan II*), 6 P.3d 728, 730 (Alaska 2000).

125. *O'Callaghan I*, 914 P.2d at 1253 (citing Burdick v. Takushi, 504 U.S. 428, 433-34 (1992)). The section in *Burdick* the court refers to in turn summarizes the Supreme Court's previous case law, primarily citing the balancing test set forth in *Anderson*. *See Burdick*, 504 U.S. at 433-34.

126. *O'Callaghan I*, 914 P.2d at 1253.

127. *Id.* at 1256-57.

128. *Id.* at 1261. The plaintiffs included, among others, the Republican Party of Alaska. *Id.* at 1253. The partially closed primary system, which was the rule of the Republican Party of Alaska, only allowed registered Republicans, registered Independents, and registered voters who had not stated any party affiliation, to vote in the Republican Party's primary election. *Id.* at 1252.

129. *Id.* at 1261.

130. *Id.* at 1261-63.

131. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997).

severe the burden is on these rights.[132] Second, depending on how severe the burden is, the Court applies the appropriate standard of review: if the burden is severe, the regulation in question must "be narrowly tailored to advance a compelling state interest."[133] If the burden is not severe, there is a less exacting review.[134] There is no "bright line [that] separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."[135]

III. ANALYSIS

In *California Democratic Party*, the Supreme Court declared California's blanket primary unconstitutional.[136] Justice Scalia, who authored the opinion for the seven-to-two majority, emphasized that since political parties are associations protected by the First Amendment freedom of association, states violate this freedom by forcing the parties to allow nonparty members to participate in their primary elections.[137] Justice Stevens dissented, believing that primary elections are public affairs which can be regulated by the states.[138]

A. MAJORITY OPINION

Writing for the majority,[139] Justice Scalia found California's Proposition 198 unconstitutional since the proposition infringed on the Parties' right of political association.[140] The Court held that the burden the California statute imposed on the Parties' rights was not only severe, but also unnecessary.[141]

The Court started by describing the background of Proposition 198 and how the primary elections would now work.[142] Since California claimed

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132. *Id.* at 358 (citing Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

133. *Id.* (quoting *Burdick*, 504 U.S. at 434; citing Norman v. Reed, 502 U.S. 279, 288-89 (1992)).

134. *Id.* (citing *Burdick*, 504 U.S. at 434 and *Norman*, 502 U.S. at 288-89).

135. *Id.* at 359 (citing Storer v. Brown, 415 U.S. 724, 730 (1974)).

136. Cal. Democratic Party v. Jones, 530 U.S. 567, 584-86 (2000).

137. *Id.*

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

139. Justice Scalia was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, Souter, Thomas, and Breyer. *Id.* at 568. Justice Kennedy also filed a concurring opinion. *Id.*

140. *Id.* at 586.

141. *Id.*

142. *Id.* at 570. The ballot that voters received under Proposition 198 listed all candidates, no matter what their party affiliation was, and the voters could chose between all of them. *Id.* Under the previously used closed primary, each voter would receive a ballot that only listed candidates from that voter's party. *Id.* at 571. Nonetheless, it is the candidate from each party who receives the greatest number of votes who becomes that party's candidate in the general election. *Id.* at 570.

that Proposition 198 was just one of the ways a state can regulate elections, the Court thereafter described the states' role in the electoral process as it had developed through its prior decisions.[143]

The Court acknowledged that it had previously recognized the major role the states have "in structuring and monitoring the election process, including primaries."[144] However, this did not mean that political parties' internal candidate selection processes are something that states can regulate in whatever way they see fit; candidate selection processes are not completely public affairs.[145] The Court emphasized that states must always act within the boundaries of the Constitution when they attempt to "regulate parties' internal processes."[146] The Court found it vital in a representative democracy that citizens can organize with others to promote the candidate of their choice if they want to.[147] This also encompasses a right not to associate since it is well established that "a corollary of the right to associate is the right not to associate."[148]

The Court thereafter reviewed what burdens were imposed on the Parties through Proposition 198.[149] According to the Court, one of the most important functions of a political party is selecting a candidate to represent it.[150] This is therefore the area in which the political party's right to exclude is most essential.[151] The Court emphasized that its previous cases have "vigorously affirm[ed] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party

143. *Id.*

144. *Id.* at 572 (citing Burdick v. Takushi, 504 U.S. 428, 433 (1992); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)).

145. *Id.* at 572-73. Justice Stevens, in his dissent, disagreed with this part of the majority's opinion, reasoning that primary elections are indeed wholly public affairs. *Id.* at 594-95 & n.4 (Stevens, J., dissenting).

146. *Id.* at 573 (citing Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) and Democratic Party of United States v. Wis. *ex rel.* LaFollette, 450 U.S. 107, 122 (1981)).

147. *Id.* at 574. According to the Court, "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *Id.* There have been political parties in the United States since the country was first formed. *Id.* (citing CUNNINGHAM, *The Jeffersonian Republican Party, in* 1 HISTORY OF U.S. POLITICAL PARTIES 239, 241 (A. Schlesinger ed., 1973)).

148. *Id.*

149. *Id.* at 574-82.

150. *Id.* at 574. This is an important area because selecting a candidate may impact the party's position on different issues, and the candidate also serves as the party's "ambassador" to the voters. *Id.*

151. *Id.*

'selects a standard bearer who best represents the party's ideologies and preferences.'"[152]

Accordingly, the Court unequivocally stated that the blanket primary adopted by Proposition 198 violated the principles that the Court established through its line of election law cases.[153] Not only did Proposition 198 force political parties to associate with—to have their candidates, and therefore their positions, determined by—those who had not affiliated with the party, but it might also have forced a party to associate itself with those who had expressly affiliated themselves with a rival.[154] This made Proposition 198 "qualitatively" different from a closed primary system.[155] The blanket primary established by Proposition 198 was different from a closed primary in that in the latter system, even though a voter can easily change his party affiliation on the day of the election, he or she must at least formally become a member of that party and is also limited to voting only for candidates of that party.[156] The Court also noted that the blanket primary "may be constitutionally distinct from the open primary."[157]

As for the impact of Proposition 198 on the outcome of the primary elections, the Court believed that the evidence presented in the case demonstrated that there was a "clear and present danger," not just a remote prospect, that a party's candidate may indeed be determined by voters who share the views of another party.[158] This impact would be greatest on smaller parties.[159]

Furthermore, not only would Proposition 198 work to alter the identity of the candidate selected in a party's primary election, it would also work to

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152. *Id.* (quoting Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 224 (1989)).

153. *Id.* at 576.

154. *Id.*

155. *Id.*

156. *Id.* at 576-77.

157. *Id.* at 577 & n.8. The Court here cited to Justice Powell's dissent in *LaFollette*, wherein he described the act of voting in a open primary as an affiliation with the party the individual chooses to vote for. *Id.* Voting in a blanket primary might be different however, according to Justice Powell, since a voter is not limited to candidates of just one party but can vote for candidates from different parties for each office. *Id.* Nonetheless, the *Cal. Democratic Party* Court emphasized that it did not have to determine the constitutionality of open primaries. *Id.*

158. *Id.* at 578. The Court pointed to a survey from 1997 that showed that thirty-seven percent of California's Republicans said that they planned to vote in the 1998 Democratic primary for governor and that twenty percent of California's Democrats said that they planned to vote in the 1998 Republican United States Senate primary. *Id.* The Court also found support from surveys conducted in other states that utilize blanket primaries. *Id.* According to the Court, it could be enough to destroy a party that nonparty members select its candidate on one occasion. *Id.*

159. *Id.*

alter the identity of the party itself.[160] When a candidate is selected through a blanket primary, he or she will have done so by taking somewhat different positions than those held by the party, as the candidate must appeal to all voters, not just party members.[161] If he or she won in the general election, the candidate would continue to take these different positions in order to be renominated.[162]

Next, the Court addressed the finding by the court of appeals that since the Parties were "free to endorse and financially support the candidate of their choice in the primary," there was only a minor burden imposed upon them.[163] The Court did not accept this, noting that the fact that the party leadership could endorse a candidate did not make up for the imposition that the party was not able to choose its own candidate.[164] Furthermore, the Court did not accept California's claim that since the Parties could engage in other traditional party behavior, the burden of Proposition 198 was not severe.[165]

The Court emphasized that it had "consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired."[166] The Court concluded that Proposition 198 forced the political parties in question "to adulterate their candidate-selection process . . . by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties' message."[167] Since the Court could think of no heavier burden on a political party's associational freedom, it found Proposition 198 unconstitutional unless it was narrowly tailored to serve a compelling state

160. *Id.* at 580. In fact, California's expert concluded that members of Congress who have been elected through blanket primaries in other states are "more moderate," therefore being "more reflective of the preferences of the mass of voters at the center of the ideological spectrum." *Id.* This was the purpose behind Proposition 198, to produce candidates with more "moderate" positions that would appeal to a broader range of voters. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* (citing Cal. Democratic Party v. Jones, 169 F.3d 646, 659 (9th Cir. 1999)).

164. *Id.*

165. *Id.* Examples of such other traditional party behavior are ensuring "orderly . . . party governance, maintaining party discipline in the legislature, and conducting campaigns." *Id.* at 581. In addition, the Court believed it was "highly questionable" whether the parties could still successfully engage in this traditional party behavior. *Id.* However, the Court found that the effect Proposition 198 might have on these activities was beside the point. *Id.* at 582.

166. *Id.* at 581 (citing Spence v. Washington, 418 U.S. 405, 411 (1974) and Kusper v. Pontikes, 414 U.S. 51, 58 (1973)).

167. *Id.* at 581-82.

interest.[168] Accordingly, the Court applied the strict scrutiny established through its line of cases.[169]

In the third part of the opinion, after describing the background of Proposition 198 and determining the standard of review, the Court analyzed the seven interests set forth by California.[170] Ultimately, all of the interests argued by California as compelling were rejected by the Court.[171] The first two interests, "producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns," were dismissed by the Court because California itself admitted that they were "simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices."[172] The Court found that these interests "reduce to nothing more than a stark repudiation of freedom of political association" since a majority of the voters will not have the same views as candidates chosen by the Parties themselves.[173]

The third interest California had set forth as compelling was "that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote."[174] California's definition of "disenfranchised" did not encompass people who could not vote; rather, this term referred to independents and members of minority parties living in districts where there was a secure majority for one of the major parties.[175] The Court referred to its previous decisions in which it had stated that a "nonmember's desire to participate in the party's affairs is overborne by the

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168. *Id.* at 582 (citing Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

169. *Id.* (setting forth the standard to be used).

170. *Id.* These interests were (1) producing elected officials who better represented the electorate, (2) expanding candidate debate beyond the scope of partisan concern, (3) ensuring that disenfranchised persons enjoy a right to an effective vote, (4) promoting fairness, (5) affording voters greater choice, (6) increasing voter participation, and (7) protecting privacy. *Id.* at 582-84.

171. *Id.* at 582-86. The Court noted that the last four interests could be compelling but were not so in the circumstances of the case. *Id.* at 584.

172. *Id.* at 582. According to two commentators, these interests were seen as demonstrating the law's impermissible effect of "'dampening' and 'diluting' and otherwise moisturizing the party's message." Jeff Bleich & Kelly Klaus, *Group Dynamics, Dissent and Intrigue: A Look at the Supreme Court, 1999-2000*, 60 OR. ST. B. BULL. 15, 16 (Aug./Sept. 2000).

173. Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000). The Court also noted that it had previously, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), rejected this sort of "interest" as not admissible. *Cal. Democratic Party*, 530 U.S. at 582. This is a type of ideologically non-neutral interest that is not admissible to challenge the right of association. *See The Supreme Court, 1999 Term Leading Cases*, 114 HARV. L. REV. 259, 272 (2000).

174. *Cal. Democratic Party*, 530 U.S. at 583.

175. *Id.* California believed these people were disenfranchised "because under a closed primary they are unable to participate in what amounts to the determinative election—the majority party's primary; the only way to ensure that they have an 'effective' vote is to force the party to open its primary to them." *Id.*

countervailing and legitimate right of the party to determine its own membership qualifications."[176] Accordingly, the Court did not believe that Proposition 198 was needed "to solve the problem"; a voter merely had to join the party to be able to cast his or her vote.[177]

As for the four remaining interests asserted by California, the Court found that these were not compelling in the circumstances of the case.[178] These asserted interests—"promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy"—were not immediately discarded by the Court, but after consideration, the Court found that the aspects of these interests addressed by Proposition 198 were not "highly significant."[179] California argued that the blanket primary would promote fairness in that in a non-blanket primary, nonparty members in "safe" districts would not have a chance of determining the party candidate.[180] However, the Court found that this would not be more unfair than allowing nonparty members to "hijack" the party.[181]

Furthermore, according to the Court, the blanket primary would not afford a voter greater choice, as asserted by California.[182] On the contrary, there would be less choice for the voters because all candidates would have more "centrist" views.[183] This possible broadening of the range of choices favored by the majority perhaps would not even be a legitimate state interest, let alone a compelling one.[184]

The same reasoning, and the same defects, applied to the alleged interest of increasing voter participation.[185] According to the Court, this interest was merely another way to say that California could manipulate primary elections to ensure that political parties nominate general election candidates more to the liking of the voting majority, thereby increasing voter turnout.[186]

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176. *Id.* (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 215-16 & n.6 (1986) and Nader v. Schaffer, 417 F. Supp. 837 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976)).

177. *Id.* at 584. The Court noted that this might be a hard choice but that having to become a member of a party was not a restriction imposed by the state on the voter's freedom of association. *Id.* However, if party members have to accept the nonaffiliated voter's selection of the party's candidate, it would be a "state-imposed restriction upon [their freedom of association]." *Id.*

178. *Id.*

179. *Id.*

180. *Id.* A "safe district" is a district in which one party is dominant. Cal. Democratic Party v. Jones, 169 F.3d 646, 661 (9th Cir. 1999).

181. Cal. Democratic Party v. Jones, 530 U.S. 567, 584 (2000).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 584-85.

186. *Id.* at 585.

Lastly, California's interest in protecting the confidentiality of a person's party affiliation could not be considered a compelling one.[187] If it were compelling, federal statutes would have to stop requiring a declaration of party affiliation as a condition for being appointed to certain offices.[188]

Finally, Proposition 198 was not a narrowly tailored means of furthering these interests, even if they were compelling.[189] In the Court's opinion, these interests asserted by California could all be protected by a state's use of a nonpartisan blanket primary.[190] The state would determine the qualifications it would require of a candidate before he or she is put on the ballot.[191] Voters would then be able to vote for any candidate and the winner (or winners) would proceed to the general election.[192] According to the Court, a nonpartisan blanket primary would allow California to "ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'" without infringing on a party's First Amendment right of association.[193] At the same time, such a system has most of the characteristics of the partisan blanket primary.[194] It would, however, eliminate the element of the voters determining a party's candidate.[195]

The Court concluded that the legitimate interests of California and the First Amendment rights of the Parties were not "inherently incompatible."[196] However, they were incompatible in this case due to California "forcing political parties to associate with those who do not share their beliefs."[197] The Court therefore found that the burden Proposition 198 imposed on the parties' constitutional right of political association was both severe and unnecessary.[198]

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187. *Id.* In the Court's view, it would most likely be possible to have a closed primary election in which a voter's party affiliation would not have to be divulged to the public; but even if that were not possible, California's interest in protecting this particular information was not compelling. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* This is the type of primary previously utilized by Louisiana. LA. REV. STAT. § 18:521 (1979 & Supp. 2001); *see also* Allison, *supra* note 25, at 111-14, for criticism of this part of the Court's opinion.

191. Cal. Democratic Party v. Jones, 530 U.S. 567, 585 (2000).

192. *Id.*

193. *Id.* at 586.

194. *Id.* at 585.

195. *Id.*

196. *Id.*

197. *Id.* at 586.

198. *Id.*

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy, in his concurrence, stated his belief that "[e]ncouraging citizens to vote is a legitimate, indeed essential, state objective."[199] However, he asserted that the real purpose behind Proposition 198 was "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."[200] Since Proposition 198 therefore was subject to "careful scrutiny," he agreed with the opinion of the majority.[201]

However, Justice Kennedy had an additional concern regarding Proposition 198.[202] He reasoned that Proposition 198 might not withstand scrutiny because "of the Court's denial of First Amendment protection to a political party's spending of its own funds and resources in cooperation with its preferred candidate, . . . the Federal Government or the State has the power to prevent the party from using the very remedy California now offers up to defend its law."[203] California had defended the blanket primary by asserting that a party was free to endorse and spend money on the candidates it favored, thereby "defending its doctrinal positions by advising the voters of its own preference."[204]

C. JUSTICE STEVENS' DISSENT

Justice Stevens started his dissent by proclaiming that the Court must respect the policy choice made by the voters of California when they adopted Proposition 198, based on principles of federalism.[205] In Justice Stevens' view, the majority blurred the distinction between a private

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199. *Id.* at 587 (Kennedy, J., concurring). Justice Kennedy went as far as to say that it might be a close call if Proposition 198 was simply a way to make elections more fair and open or addressed matters purely of party structure. *Id.*

200. *Id.*

201. *Id.* As to the standard of review to be used, Justice Kennedy simply noted that "[w]hen the State seeks to direct changes in a political party's philosophy by forcing upon it unwanted candidates and wresting the choice between moderation and partisanship away from the party itself, the State's incursion on the party's associational freedom is subject to careful scrutiny under the First Amendment." *Id.*

202. *Id.*

203. *Id.* at 588 (citing Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604 (1996)). "[T]he Court had recently suggested that states could constrict or eliminate parties' ability to engage in coordinated spending and thereby to defend themselves against the states' 'doctrinal intervention' through blanket primaries." *The Supreme Court 1999 Term Leading Cases*, *supra* note 173, at 273-74 (citing Cal. Democratic Party v. Jones, 530 U.S. 567, 589 (2000) (Kennedy, J., concurring)).

204. *Cal. Democratic Party*, 530 U.S. at 588.

205. *Id.* at 591 (Stevens, J., dissenting). Justice Stevens was partially joined in his dissent by Justice Ginsburg. *Id.* at 590. Justice Ginsburg did not join in Part II of Justice Stevens' dissent, which discusses Proposition 198's validity under the Election Clause. *Id.* at 590, 602.

organization's right to define itself and its messages and the right of a state to define the obligations of citizens and organizations performing public functions.[206]

Justice Stevens' fundamental disagreement with the Court seemed to be that he considered primary elections to be public affairs.[207] He noted that the court of appeals correctly observed that political parties are not wholly private associations, and if they were, their associational rights would be more absolute and comprehensive.[208] According to Justice Stevens, however, the right not to associate that the majority relied on was "simply inapplicable" to participation in state elections, since primary elections, unlike most party affairs, are in fact state action.[209] Justice Stevens here argued that since primary elections are not private affairs, the majority misconstrued the First Amendment by limiting a state's power to broaden voter participation in the electoral process.[210]

Justice Stevens also questioned whether the remaining open primaries used by many states would withstand scrutiny under the majority's reasoning.[211] "This Court's willingness to invalidate the primary schemes of 3 States and cast serious constitutional doubt on the schemes of 29 others at the parties' behest is," Justice Stevens continued, "an extraordinary intrusion into the complex and changing election laws of the States."[212] In his view, "the First Amendment does not mandate that a putatively private association be granted the power to dictate the organizational structure of state-run, state-financed primary elections."[213] Finally, Justice Stevens concluded by suggesting that Proposition 198 might be questionable under

206. *Id.* at 591-92.

207. *Id.* at 595. Justice Stevens disagreed with the Court's reading of *Terry* and *Allwright*. *Id.* at 594 & n.5. The majority did not find that previous case law held "that party affairs are [wholly] public affairs, free of First Amendment protections," and on this point, Justice Stevens agreed; however, he also asserted that the case law stood for the proposition that primary elections are indeed state action. *Id.* at 573, 594-96.

208. *Id.* at 593 (citing Cal. Democratic Party v. Jones, 169 F.3d 646, 654-55 (9th Cir. 1999)).

209. *Id.* at 593-96.

210. *Id.* at 594-95. Justice Stevens here averred that the efforts of the states to broaden voter participation in state-run elections should be virtually free from judicial scrutiny. *Id.* However, state rules that diminish voter participation are subject to strict scrutiny. *Id.*

211. *Id.* at 597.

212. *Id.* at 598. Justice Stevens relied on figures from the Ninth Circuit's opinion, according to which fifteen states have closed primaries, eight have semi-closed, twenty-one have open primaries, and four have blanket primaries. *Id.* (citing *Cal. Democratic Party*, 169 F.3d at 650). The Ninth Circuit based these findings on, among other things, the Supreme Court's opinion in *Tashjian*, which is from 1986. *Cal. Democratic Party*, 169 F.3d at 650-51.

213. Cal. Democratic Party v. Jones, 530 U.S. 567, 598 (2000).

the Elections Clause, at least as applied to congressional elections, since it had been adopted by initiative rather than by the state legislature.[214]

IV. IMPACT

The Court noted that the blanket primary is "qualitatively different" from the closed primary because in a closed primary a person adverse to the party must at least register with the party to become a member and is also limited to voting for candidates of that party.[215] This statement indicates that the closed primary systems would not be found unconstitutional under the Court's ruling in *California Democratic Party*.[216]

Regarding open primaries, the Court suggested that these "may" be constitutionally different from the blanket primaries since a voter is limited to one party's ballot in the open primary.[217] Voting for only one party can be seen as an act of affiliation with that party, making it different from the blanket primary.[218] However, the Court expressly stated that it was not required to determine the constitutionality of open primaries in the case before it.[219] Nonetheless, Justice Stevens asserted that there is a danger that open primaries will also be struck down with the reasoning the Court used because open primaries, in his view, are supported by many of the same state interests as those asserted by California in *California Democratic Party*.[220] It has also been suggested that because the Court strongly emphasized how important it is for parties' identities to select candidates who share party views and will fight for those views, states may not be allowed to require parties to participate in open primaries.[221] States may not even be allowed to require parties to select their candidates through

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214. *Id.* at 602. This is the part Justice Ginsburg did not join. *Id.* at 590. Justice Stevens reasoned that it would be proper for the California Legislature to adopt a blanket primary system under the Elections Clause of the United States Constitution, which 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." *Id.* at 602 (quoting CONST. art. I, § 4, cl. 1) (emphasis added). However, Justice Stevens found it unclear whether a state election system adopted by popular initiative, not by the legislature, is constitutional when applied to the election of United States Senators and Representatives. *Id.* Under the California Constitution, a statute adopted by popular initiative cannot be amended or repealed by the California Legislature, without the consent of the voters. *Id.* The text of the Election Clause implies, according to Justice Stevens, that this is unconstitutional since there is no review by the legislature. *Id.*

215. *Id.* at 576.

216. *See id.* (distinguishing closed primaries from blanket primaries).

217. *Id.* at 577 & n.8 (citing Democratic Party of the United States v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 130 & n.2 (1981) (Powell, J., dissenting)).

218. *Id.* (quoting *LaFollette*, 450 U.S. at 130 & n.2 (Powell, J., dissenting)).

219. *Id.*

220. *Id.* at 597. Justice Stevens also reasoned that Proposition 198 may be invalid as it pertains to elections of United States Senators and Representatives. *Id.* at 602.

221. Allison, *supra* note 25, at 116.

primary elections at all.[222] Others, however, believe that states can still use open primaries.[223]

After the decision in *California Democratic Party*, Arizona's attorney general issued an opinion stating that Arizona's open primary law was constitutional in light of the Supreme Court's holding.[224] The opinion noted that the open primary law in effect in Arizona did not burden political parties to the extent that Proposition 198 did.[225] The attorney general emphasized that the purpose behind the Arizona law was to allow voting by some registered voters who were excluded from the closed primary.[226] Because it applied only to independents and others who were not able to vote in a closed primary, there was less risk of a party's candidate being selected by party opponents.[227] Members of a party were also limited to voting the ballot of that party.[228] Concluding that the burdens imposed by Arizona's law on the rights of political parties were not severe, the law was subject to the less stringent standard applied in *Timmons*.[229] Since Arizona's open primary law promoted voter participation, promoted fairness, and ensured that all registered voters had an opportunity to vote, the burden placed on political parties in Arizona was justified.[230]

While it may seem clear that other state statutes providing for a blanket primary system would be struck down under the Court's ruling in *California Democratic Party*,[231] the Court's opinion suggests that the nonpartisan version of the blanket primary used in Louisiana would not violate a party's associational rights as protected by the First Amendment.[232] Before this ruling, two other states, besides California, had a partisan blanket primary system.[233]

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222. *Id.*

223. *The Supreme Court 1999 Term Leading Cases*, *supra* note 173, at 278.

224. I00-019 Ariz. Op. Att'y. Gen., 2000 WL 1179774, at *3 (2000).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* According to the attorney general, "important regulatory interests" justify reasonable, nondiscriminatory restrictions pursuant to *Timmons*. *Id.* (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997)).

230. *Id.*

231. Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (striking down California's blanket primary as placing a severe and unnecessary burden on the right of political association).

232. *Id.* The argument that the type of nonpartisan blanket primary used in Louisiana would not violate a party's associational rights has been criticized as being "ludicrous." Allison, *supra* note 25, at 113. According to Professor Allison, recent Louisiana elections show that its blanket primary likely injures both the interest of the parties and the state. *Id.* at 112. Others, however, are of the opinion that states can use nonpartisan blanket primaries. *The Supreme Court 1999 Term Leading Cases*, *supra* note 173, at 278.

233. ALASKA STAT. § 15.25.060 (2000); WASH. REV. CODE ANN. § 29.18.200 (1993).

As a direct result of the Court's ruling, the Supreme Court of Alaska found Alaska's blanket primary statute "clearly unconstitutional."[234] In *O'Callaghan v. State* (*O'Callaghan II*),[235] the Supreme Court of Alaska noted that it could not find any "constitutionally significant differences" between the primary election statute in effect in Alaska and California's statute that was declared unconstitutional in *California Democratic Party*.[236] Declaring that it was bound to adhere to the decisions of the Supreme Court, pursuant to the Supremacy Clause, the court overruled the previously decided *O'Callaghan I* and declared Alaska's blanket primary system unconstitutional.[237] However, in March of 2002, a federal judge in Washington upheld Washington's blanket primary system as constitutional, distinguishing it from the primary system found unconstitutional in *California Democratic Party*.[238] Political parties in Washington plan to appeal the ruling.[239]

California Democratic Party has also been cited by several other cases, essentially for the propositions that the freedom of association includes a right not to associate,[240] that a party "has an important constitutional interest in selecting candidates who represent it in a general election,"[241] that the states have authority "to structure and monitor primary elections,"[242] and for the standard of review to be used when there is a burden on political speech and association.[243]

North Dakota uses an open primary in which a voter can only vote in one party's primary election, but he or she does not have to be a registered member of that party.[244] It is not clear at this point what the impact will be on open primaries as a result of the Supreme Court's ruling in *California*

234. O'Callaghan v. State (*O'Callaghan II*), 6 P.3d 728, 730 (Alaska 2000).

235. 6 P.3d 728 (Alaska 2000).

236. *O'Callaghan II*, 6 P.3d at 730.

237. *Id.* The court also noted that the partially closed primary system, adopted by the Department of Elections, did not in itself violate the First Amendment. *Id.* at 731.

238. Neil Modie & Angela Galloway, *"Blanket" Primary is Ruled Legal; Political Parties Expect to Appeal Judgment That Upholds Present System*, SEATTLE POST-INTELLIGENCER, March 28, 2002, at A1.

239. *Id.*

240. Krislov v. Rednour, 226 F.3d 851, 858 (7th Cir. 2000); Hole v. N.C. Bd. of Elections, 112 F. Supp. 2d 475, 480 (M.D. N.C. 2000).

241. Marion County Comm. of the Ind. Democratic Party v. Marion County Election Bd., 2000 WL 1206740, at *6 (S.D. Ind. Aug. 3, 2000).

242. *Krislov*, 226 F.3d at 859; Gelb v. Bd. of Elections, 224 F.3d 149, 154 (2d Cir. 2000).

243. Lerman v. Bd. of Elections, 232 F.3d 135, 149 (2d Cir. 2000).

244. N.D. CENT. CODE § 16.1-11-22 (1997 & Supp. 2001). Registration is not required at all for voting in North Dakota. *Id.* § 16.1-01-04 (1997) (setting forth voter qualifications).

Democratic Party.[245] Since it appears that open primaries possibly may not withstand a constitutional challenge, North Dakota may have to change its primary election system.[246] However, this question will most likely remain unresolved until the Supreme Court again reviews a primary election law case.[247]

V. CONCLUSION

In *California Democratic Party*, the Supreme Court reaffirmed the strict scrutiny standard of review for a state law infringing on a political party's First Amendment freedom of association.[248] Using such a strict standard, California's Proposition 198 was clearly struck down.[249]

The decision leaves some uncertainty however as to the future of the other types of primary election systems.[250] While it appears that closed primaries would survive constitutional scrutiny, the future of the open primaries is uncertain and will likely remain so until the Supreme Court reviews that type of primary election system.[251]

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245. *See* Allison, *supra* note 25, at 115-16 (stating that the broadness of the *Cal. Democratic Party* precedent is unclear).

246. *See id.* at 116 (discussing the impact of *Cal. Democratic Party* on open primary elections).

247. *See id.* (proposing that the Court's assertion that open primaries are distinguishable, and therefore constitutional, from blanket primaries will have to be ratified in a later case).

248. Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (2000) (setting forth the standard of review to be used); *see also The Supreme Court 1999 Term Leading Cases*, *supra* note 173, at 275 (noting the difference in standard of review depending on whether the restriction is viewpoint-neutral or ideologically motivated).

249. *Cal. Democratic Party*, 530 U.S. at 586.

250. *See, e.g.*, Allison, *supra* note 25, at 115-116 (noting that it is possible that states might be forbidden "from requiring parties to participate in open primaries"); *see also The Supreme Court 1999 Term Leading Cases*, *supra* note 173, at 278 (reasoning that open primaries are constitutional).

251. *See Cal. Democratic Party*, 530 U.S. at 576 (noting that blanket primaries "may" be constitutionally different from open primaries).

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