Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Voting Rights/Regulating Elections

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

California voters in 1996 passed Proposition 198, a measure that mandated blanket primaries. In such elections, every ballot in the primarily election lists all candidates running for the office in question. Both Republicans and Democrats voting in the 2012 California primary, for example, would have Barack Obama and Mitt Romney on their ballot. The member of each party who obtains the most votes is that party's nomination for the general election. If in a blanket primary, Fred Flintstone (Bedrock Party) gets 15,000 votes, Barney Rubble (Bedrock Party) gets 14,000 votes, and Yogi Bear (Jellystone Party) gets 13,000 votes, then Flintstone is the Bedrock Party candidate and Bear is the Jellystone Party candidate. The California Democratic Party, California Republican Party, California Libertarian Party, and California Peace and Freedom Party brought a lawsuit against Bill Jones, the California Secretary of State, claiming that state mandated blanket primaries violated their First Amendment Rights, as incorporated by the due process clause of the Fourteenth Amendment. The local federal district court sustained the California law, as did the Court of Appeals for the Ninth Circuit. The coalition of California political parties appealed to the Supreme Court of the United States.

The interest group response suggests that primary politics makes strange bedfellows. Both the Democratic and Republican Parties wrote a joint brief urging the Court to declare the blanket primary unconstitutional. Several leading conservative public interest groups submitted amicus briefs endorsing that position. Several Republicans in Congress, joined by prominent conservative scholars, filed an amicus brief urging the Court to sustain the blanket primary. The brief filed by the conservative Eagle Forum Education & Legal Defense Fund asserted,

> *California's Proposition 198 effectively commandeers private associations and puts them into the service of an enforced public orthodoxy. The law compels political parties to open their doors to their ideological opponents and allows those opponents to compel each party to endorse candidates other than those whom the party members themselves desire to represent them. This grotesque assault on the core freedoms of political speech and association offends the Constitution.*

The brief filed by Senator John McCain and conservative scholars declared,

> *The blanket primary actually advances important constitutional interests of parties and their adherents and members. These interests are advanced by opening the election process to allow broader candidate selection by voters which allows the development of competing parties in states and areas where single parties have dominated. Long term, the parties will and have benefitted from this open system.*

The Supreme Court by a 7–2 vote declared state mandated blanket primaries unconstitutional. Justice Scalia's majority opinion asserted that a blanket primary interfered with the right of parties not to have non-members influence their candidate selection. Why did he reach that conclusion? Why did Justice Stevens believe that states are free to permit anyone to vote in a party primary? Is California Democratic Party *a liberal or conservative decision? On what basis would you choose one of those labels?*

JUSTICE SCALIA delivered the opinion of the Court.

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. . . States have a major role to play in structuring and monitoring the election process, including primaries. We have considered it "too plain for argument," for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion. . . . [I]n order to prevent "party raiding"—a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary—a State may require party registration a reasonable period of time before a primary election.

What we have not held, however, is that the processes by which political parties select their nominees are, as respondents would have it, wholly public affairs that States may regulate freely. To the contrary, we have continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution. . . .

Representative 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. The formation of national political parties was almost concurrent with the formation of the Republic itself. . . . Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." . . .

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views. . . .

Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences." . . .

California's blanket primary violates the principles set forth in [past precedents]. Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary. Under that system, even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to "cross over," at least he must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party.

The evidence in this case demonstrates that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party is far from remote—indeed, it is a clear and present danger. For example, in one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary. . . .

The record also supports the obvious proposition that these substantial numbers of voters who help select the nominees of parties they have chosen not to join often have policy views that diverge from those of the party faithful. . . .

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In any event, the deleterious effects of Proposition 198 are not limited to altering the identity of the nominee. Even when the person favored by a majority of the party members prevails, he will have prevailed by taking somewhat different positions—and, should he be elected, will continue to take somewhat different positions in order to be renominated. As respondents' own expert concluded: "The policy positions of Members of Congress elected from blanket primary states are . . . more moderate, both in an absolute sense and relative to the other party, and so are more reflective of the preferences of the mass of voters at the center of the ideological spectrum." . .

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In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process—the "basic function of a political party,"—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. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest. . . .

Respondents proffer seven state interests they claim are compelling. Two of them—producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns—are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. . . .

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Respondents' third asserted compelling interest is that the blanket primary is the only way to ensure that disenfranchised persons enjoy the right to an effective vote. By "disenfranchised," respondents do not mean those who cannot vote; they mean simply independents and members of the minority party in "safe" districts. These persons are disenfranchised, according to respondents, 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 they have an "effective" vote is to force the party to open its primary to them. . . . We have said, however, that a "nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications." . . . [E]ven if it were accurate to describe the plight of the non-party-member in a safe district as "disenfranchisement," Proposition 198 is not needed to solve the problem. The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon his freedom of association, whereas compelling party members to accept his selection of their nominee is a state-imposed restriction upon theirs.

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The aspect of fairness addressed by Proposition 198 is presumably the supposed inequity of not permitting nonparty members in "safe" districts to determine the party nominee. If that is unfair at all (rather than merely a consequence of the eminently democratic principle that—except where constitutional imperatives intervene—the majority rules), it seems to us less unfair than permitting nonparty members to hijack the party. As for affording voters greater choice, it is obvious that the net effect of this scheme—indeed, its avowed purpose—is to reduce the scope of choice, by assuring a range of candidates who are all more "centrist." This may well be described as broadening the range of choices favored by the majority—but that is hardly a compelling state interest, if indeed it is even a legitimate one. The interest in increasing voter participation is just a variation on the same theme (more choices favored by the majority will produce more voters), and suffers from the same defect. As for the protection of privacy: The specific privacy interest at issue is not the confidentiality of medical records or personal finances, but confidentiality of one's party affiliation. Even if (as seems unlikely) a scheme for administering a closed primary could not be devised in which the voter's declaration of party affiliation would not be public information, we do not think that the State's interest in assuring the privacy of this piece of information in all cases can conceivably be considered a "compelling" one. . . .

Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot—which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"—all without severely burdening a political party's First Amendment right of association.

JUSTICE KENNEDY, concurring.

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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. . . . It may be that organized parties, controlled—in fact or perception—by activists seeking to promote their self-interest rather than enhance the party's long-term support, are shortsighted and insensitive to the views of even their own members. A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free association, however, this is an issue for the party to resolve, not for the State. Political parties advance a shared political belief, but to do so they often must speak through their candidates. When 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. For these reasons I agree with the Court's opinion.

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Were the views of those who would uphold both California's blanket primary system and limitations on coordinated party expenditures to become prevailing law, the State could control political parties at two vital points in the election process. First, it could mandate a blanket primary to weaken the party's ability to defend and maintain its doctrinal positions by allowing nonparty members to vote in the primary. Second, it could impose severe restrictions on the amount of funds and resources the party could spend in efforts to counteract the State's doctrinal intervention.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

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A State's power to determine how its officials are to be elected is a quintessential attribute of sovereignty. This case is about the State of California's power to decide who may vote in an election conducted, and paid for, by the State. The United States Constitution imposes constraints on the States' power to limit access to the polls, but we have never before held or suggested that it imposes any constraints on States' power to authorize additional citizens to participate in any state election for a state office. In my view, principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198.

The blanket primary system instituted by Proposition 198 does not abridge "the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." . . .

When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private expressive associational activity that the First Amendment protects. . . .

[H]owever, the associational rights of political parties are neither absolute nor as comprehensive as the rights enjoyed by wholly private associations. I think it clear . . . "that a State may require parties to use the primary format for selecting their nominees." The reason a State may impose this significant restriction on a party's associational freedoms is that both the general election and the primary are quintessential forms of state action. . . . The protections that the First Amendment affords to the "internal processes" of a political party do not encompass a right to exclude nonmembers from voting in a state-required, state-financed primary election.

. . . In my view, while state rules abridging participation in its elections should be closely scrutinized, the First Amendment does not inhibit the State from acting to broaden voter access to state-run, state-financed elections. When a State acts not to limit democratic participation but to expand the ability of individuals to participate in the democratic process, it is acting not as a foe of the First Amendment but as a friend and ally.

. . . A meaningful "right not to associate," if there is such a right in the context of limiting an electorate, ought to enable a party to insist on choosing its nominees at a convention or caucus where nonmembers could be excluded. In the real world, however, anyone can "join" a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined

reasonable period of time before an election; neither past voting history nor the voter's race, religion, or gender can provide a basis for the party's refusal to "associate" with an unwelcome new member. There is an obvious mismatch between a supposed constitutional right "not to associate" and a rule that turns on nothing more than the state-defined timing of the new associate's application for membership. . . .

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In my 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. It is not this Court's constitutional function to choose between the competing visions of what makes democracy work-party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials—that are held by the litigants in this case.

Even if the "right not to associate" did authorize the Court to review the State's policy choice, its evaluation of the competing interests at stake is seriously flawed. For example, the Court's conclusion that a blanket primary severely burdens the parties' associational interests in selecting their standard-bearers does not appear to be borne out by experience with blanket primaries in Alaska and Washington. . . . Following a bench trial and the receipt of expert witness reports, the District Court found that "there is little evidence that raiding [by members of an opposing party] will be a factor under the blanket primary. On this point there is almost unanimity among the political scientists who were called as experts by the plaintiffs and defendants." . . .

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On the other side of the balance, I would rank as "substantial, indeed compelling," just as the District Court did, California's interest in fostering democratic government by "[i]ncreasing the representativeness of elected officials, giving voters greater choice, and increasing voter turnout and participation in [electoral processes]." . . . In an era of dramatically declining voter participation, States should be free to experiment with reforms designed to make the democratic process more robust by involving the entire electorate in the process of selecting those who will serve as government officials. Opening the nominating process to all and encouraging voters to participate in any election that draws their interest is one obvious means of achieving this goal. . . .

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