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CALIFORNIA DEMOCRATIC PARTY V. JONES: THE CONSTITUTIONALITY OF BLANKET PRIMARY LAWS*

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> If a party cannot make nominations it ceases to be a party . . . he who can make the nominations is the owner of the party.
>
> E.E. Shattschneider[1]

> Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.
>
> L. Tribe[2]

I. INTRODUCTION

Primary elections present both courts and scholars with an unusual legal challenge. To many, primaries appear to be a government function. The United States Constitution grants states the power to proscribe the "Times, Places, and Manner" of elections,[3] and most states have enacted laws that regulate the conduct of primary elections. In actuality, however, primary elections are party-driven activities. Political parties use primaries as a vehicle for selecting a candidate to represent the party in the general election. Primary elections also allow political parties to

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* This article was accepted for publication in late 1999. Since that time, the Supreme Court declared California's blanket primary law unconstitutional. *See* California Democratic Party v. Jones, 120 S. Ct. 2402 (2000). The Court has not directly addressed, however, the many issues raised by the author herein.

1. E.E. SHATTSCHNEIDER, PARTY GOVERNMENT (1942).
2. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1014 (2d ed. 1988).
3. U.S. CONST. art. I, § 4, cl.1.

compromise and reach consensus regarding their own associational goals.[4]

Because primary elections play a central role in defining a party's political purpose and ideals, state control over participation in primaries may profoundly influence, not just a party's choice of candidates, but also the content of a party's political speech.[5] Thus, any state regulation of participation in primaries necessarily implicates a party's First Amendment right to freedom of association. Yet, few would question the need for some form of government oversight. Government regulation ensures that the election process is fair and impartial, and is therefore both constitutionally permissible and desirable.

It is the tension between these two constitutional interests that is at the forefront of the debate over the constitutionality of state-mandated blanket primary laws.[6] Washington, Alaska, Louisiana,[7] and most recently, California,[8] have all enacted so-called "blanket primary" laws. A

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4. *See* Julia E. Guttman, Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 YALE L.J. 117, 125-26 (1984) (discussing critical role of primaries in defining political parties). As Guttman explains, "[s]ince control over participation in primary elections can profoundly influence the content of the compromise emerging from the primary election, a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology." *Id.* at 126.

5. *See* Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986) (discussing state election laws as burdening parties' right to freedom of association); TRIBE, *supra* note 2, at 1112 (stating that "[a]ny state law that circumscribes the discretion of a political party infringes associational interests.").

6. *See* California Democratic Party v. Jones, 984 F. Supp. 1288, 1293 (E.D. Cal. 1997) (stating that "[i]t is the clash of these two constitutionally rooted interests that must be resolved in this case."). Moreover, according to Professor Daniel Lowenstein, because the relationship between the state and the parties is truly unique, their relationship is distinct from any other problem in constitutional law. *See* Daniel Hayes Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV 1714, 1744 (1993) (discussing nature of conflict between states and parties).

7. Although Louisiana technically utilizes a kind of blanket primary, their system is unlike that of the other three blanket primary states. *See California Democratic Party*, 984 F. Supp. at 1292. Under the Louisiana system, all candidates participate in a nonpartisan open primary. *See id.* The two candidates who receive the most votes then meet in a runoff or general election. *See id.* Importantly, the two candidates who receive the most votes are selected without regard to party affiliation. *See id.*

8. The California initiative that instituted the current blanket primary system was labeled an open primary initiative. However, as Judge Levi explained in his opinion upholding the proposition, California's system is more appropriately characterized as a blanket primary. *See California Democratic Party*, 984 F. Supp. at 1291-92. According

blanket primary allows all voters, regardless of their party affiliation, to vote for any candidate for each political office.[9] For example, a voter who is registered as a Republican may vote for a Democrat for President, a Republican for Senate, and a minor party candidate for the House of Representatives.

Although increasing a voter's choices on election day is a laudable goal, this Article asserts that state-mandated blanket primaries violate the parties' First Amendment right to freedom of association and are therefore unconstitutional. Although the conclusion that state-mandated blanket primaries are unconstitutional is compelled by Supreme Court precedent, it also raises a number of potential difficulties. First, there are many scholars who suggest that the notion that state-mandated blanket primaries are unconstitutional is inconsistent with the White Primary Cases, which held that parties cannot discriminate on the basis of race in elections, because in the election context, political parties are state actors.[10] These scholars suggest that political parties cannot be state actors in the equal protection context of the White Primary Cases, and at the same time, demand the First Amendment protections afforded a private association.[11]

The second difficulty raised by the notion that state-mandated blanket primaries are unconstitutional is the effect of such a holding upon government regulation of primaries more generally. This Article asserts that Supreme Court precedent supports the notion that state-mandated blanket primaries are unconstitutional. However, that same precedent arguably supports the conclusion that *all* state-mandated primary struc-

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to Judge Levi, the blanket primary is one *kind* of open primary—one kind of system that does not limit voters to the party with which they are affiliated. *See id.*

9. In the debate over California's blanket primary initiative, Judge Levi defined a blanket primary as an election in which "the voter is not limited to the ballot of any single party." *California Democratic Party*, 984 F. Supp. at 1291. In contrast, the Democratic Party, which opposes the blanket primary, chose to explain the law as one which "forces the parties to open their partisan primaries to unaffiliated voters and to voters with adverse political interests." Appellants Reply Brief at 1, *California Democratic Party* (No. 97-17440).

10. *See* Paul Carman, Comment, Cousins *and* La Follette: *An Anomaly Created by a Choice Between Freedom of Association and the Right to Vote*, 80 NW. U. L. REV. 666, 668-69 (1985) (discussing White Primary Cases and potential conflict with those cases that discuss political parties' rights to freedom of association).

11. *Id.* (discussing potential conflict between the two lines of authority); *see also* Lowenstein, *supra* note 6, at 1747-53 (discussing potential conflict between two lines of authority).

tures are unconstitutional. In other words, a faithful reading of Supreme Court precedent suggests that only the parties themselves can constitutionally decide who may participate in primary elections. Thus, only a primary system selected by the parties would pass constitutional muster.

This second difficulty provides the foundation for the third and final issue raised by the notion that state-mandated blanket primaries are unconstitutional. If the only constitutional primary structure is one selected or ratified by the parties themselves, courts must then confront the issue of who speaks for the party—what voices must be heard before a court may conclude that "the party" has spoken? For example, if the Chairperson of the statewide Democratic party decides that the Democratic party supports a blanket primary, is it appropriate for a court to find that "the party" supports a blanket primary? Similarly, if ninety-five percent of all registered Democrats voted in favor of a state ballot initiative that mandates a blanket primary, does "the party" support the initiative?

This Article asserts that although the conflict with the White Primary Cases is more apparent than real, the remaining two issues raised by the notion that blanket primary laws are unconstitutional cannot be as easily dismissed. Section I of this Article begins by explaining the various primary election systems and the standard of review that applies to First Amendment challenges to state election regulations. Section II argues that the Supreme Court should find state-mandated blanket primary laws unconstitutional because of the severe burden they place on a party's right to freedom of association. Finally, Section III explores three important questions that the Supreme Court may be compelled to address if it reaches this conclusion: (1) can a party's claim for privacy and autonomy in the context of the First Amendment be reconciled with the notion that political parties are agents of the state in the context of the White Primary Cases; (2) does a decision to hold state-mandated blanket primary laws unconstitutional require courts to find that all state-mandated primary systems are unconstitutional; and (3) who must speak before a court may conclude that "the party" has spoken? This Article concludes by suggesting that although the first of these three questions can be answered with ease, the latter two present courts and scholars with unique legal challenges.

II. BACKGROUND

An understanding of the various primary systems and the standard of review that the Supreme Court applies to state election regulations pro-

vides the backdrop for the debate about the constitutionality of blanket primary laws. All states have an open, closed, or blanket primary, or some variation thereof.[12] Part A will set forth each of these three systems and how they differ from one another. Part B will discuss the standard of review which the Supreme Court applies in the context of First Amendment challenges to state election regulations.

A. *The Three Primary Election Systems*

The blanket primary is only one of three basic systems of primary elections. One of the most common systems is the open primary, which allows registered voters to request a ballot for any party's primary on election day, regardless of whether the voter has previously registered with the party.[13] Under an open primary system, however, the voter is only permitted to participate in one party's primary.[14] For example, a registered Democrat may decide on election day to request the primary ballot for the Republican party. Once this voter has requested the Republican ballot, the voter will be unable to vote for a Democrat or independent candidate in any of the primary races on that day. As of 1997, twenty-one states employ open primary systems.[15]

In contrast to an open primary, a closed primary system restricts participation in a party's primary to those voters who have registered as members of the party.[16] Thus, under a traditional closed primary system, only a voter who checked the "Democrat" box on his or her voter registration form is permitted to vote in the Democratic primary. Voters who registered with other parties or declined to state a party affiliation will

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12. *See California Democratic Party*, 984 F. Supp. at 1291-92 (explaining three primary systems); *see also* Brian M. Castro, Note, *Smothering Freedom of Association: The Alaska Supreme Court Errs in Upholding the State's Blanket Primary Statute*, 14 Alaska L. Rev. 523, 524-25 (1997) (discussing three primary systems).

13. *See California Democratic Party*, 984 F. Supp. at 1291.

14. *See id.*

15. *See id.* As Judge Levi explained in a footnote in *California Democratic Party*, some political scientists define an open primary more narrowly. *See id.* at 1292 n.9. These scientists argue that an open primary includes only those systems that do not require a voter to publicly declare their party affiliation. *See id.* There are only 10 states that have such a system. The other 11 states allow voters to request the ballot of any political party, but some record of each voter's request is made, thus requiring some statement of affiliation for the record. *See id.*

16. *See id.* at 1291.

not be able to vote for Democratic candidates on election day.[17] Fifteen states currently have closed primary systems.[18]

In addition to the fifteen closed primary states, eight other states employ a variant of the closed primary which is often referred to as a "semi-closed primary."[19] Unlike the traditional closed primary, the semi-closed system allows both registered members of the party and independent voters to participate in the party's election.[20] Thus, under a semi-closed primary, the voter who checked "decline to state" on her voter registration form in the example above would be permitted to participate in the Democratic party primary.

Finally, four states currently use a blanket primary system.[21] The blanket primary allows all voters, regardless of their party affiliation, to vote for any candidate in any election.[22] Unlike a closed primary, the voter need not register with a party to vote in that party's primary. Yet unlike an open primary, where a voter can only vote in one party's primary, a voter may choose to vote in the Republican party primary for President, and the Democratic party primary for State Assembly. Alaska, Louisiana, Washington, and most recently, California, are the only states that utilize any variation of the blanket primary.[23]

B. *Standard of Review: The Anderson Test*

The modern standard of review for First Amendment challenges to state election regulations was first set forth in *Anderson v. Celebrezze*,[24] a 1983 Supreme Court case involving a constitutional challenge to Ohio's early filing deadline for independent candidates.[25] Anderson was an independent candidate for President in the 1980 general election who was denied a place on the Ohio ballot because he failed to comply with the state's early filing deadline for independent candidates.[26] Anderson and

17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*; *see also* Castro, *supra* note 12, at 525.
24. 460 U.S. 780 (1983).
25. *See id.* at 782.
26. *See id.*

his supporters challenged the law as an unconstitutional burden on their First Amendment right to freedom of association.[27]

The Supreme Court held that the Ohio law was unconstitutional.[28] In so holding, the Court applied what has come to be known as the *Anderson* test.[29] Under the *Anderson* test, a court must first consider the "character and magnitude" of the burden that the state law imposes on a party's First Amendment rights.[30] Second, a court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."[31] Finally, a court must weigh the State's asserted interest against the burden the regulation imposes on a party's constitutional rights.[32]

The *Anderson* balancing test is fairly malleable.[33] Its application depends largely on how a court construes the burden that a regulation places on a party's First Amendment rights. If the court finds that a state law imposes a severe burden, the state regulation must survive strict scrutiny.[34] In contrast, if the regulation imposes a burden on the party that is less than severe, a State's "important regulatory interest" will suffice.[35]

The *Anderson* Court found that Ohio's early filing deadline placed a "particular burden" on the rights of independent voters.[36] The Court rejected the State's various attempts to justify the burden imposed by the regulation and found that Ohio had only a "minimal interest" in the filing deadline provision.[37] Weighing the interests of the voters against the interests of the State, the Court concluded that the Ohio statute placed an

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27. *See id.* at 783.

28. *See id.* at 806.

29. Castro, *supra* note 12, at 532 (referring to "the *Anderson* test").

30. *Anderson*, 460 U.S. at 789.

31. *Id.*

32. *See id.*

33. *See* TRIBE, *supra* note 2, at 1108 (discussing the *Anderson* test). Tribe characterizes the *Anderson* test as more "open-ended" than the Court's traditional "two-tiered equal protection analysis." *Id.* Tribe argues that the *Anderson* decision "perpetuated" rather than settled the confusion regarding the level of scrutiny that courts should apply in First Amendment challenges to state election regulations. *Id.*

34. *See California Democratic Party* 984 F. Supp. at 1294 .

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

36. *See Anderson,* 460 U.S. at 792.

37. *See id.* at 806; *see also* Tribe, *supra* note 2, at 1109 (discussing *Anderson*).

unconstitutional burden on the voting and associational rights of Anderson's supporters.[38]

Since 1983, courts have applied the *Anderson* test to decide the constitutionality of state election regulations that burden a party's First Amendment rights.[39] The Supreme Court recently reaffirmed its commitment to the *Anderson* test in 1997 in the case of *Timmons v. Twin Cities Area New Party.*[40] In a six to three decision, the *Timmons* Court used the *Anderson* test to uphold a Minnesota election law which prohibited candidates from appearing on the ballot as a candidate for more than one party.[41] One of the central issues of contention between the *Timmons* majority and the dissent was the proper application of the *Anderson* test. Justice Stevens argued in his dissent that the majority mistakenly concluded that the Minnesota law at issue placed an "unimportant" burden on the party's First Amendment rights.[42] Because the Court found that the law imposed a minimal burden, the Court applied a fairly deferential standard of review.[43]

However, in his dissent, Justice Stevens argued that the Court should have applied strict scrutiny because the law placed a severe burden on the party's rights.[44] In addition, according to Justice Stevens, The *Timmons* majority failed to assure that the "State's asserted interests ... [actually] bear some plausible relationship to the burdens it places on political parties."[45] Stevens suggested that the *Timmons* majority simply accepted Minnesota's assertion that the law furthered the state's interest.[46] Instead, Stevens argued that the Court should have required something more before it was willing to uphold a law that burdened a party's right to freedom of association.[47]

Although the majority and the dissent disagreed on its application, the *Timmons* Court reaffirmed the importance of the *Anderson* test in

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38. *See Anderson*, 460 U.S. at 806.

39. *See, e.g., Timmons*, 520 U.S. at 369 (applying *Anderson* test); *Tashjian*, 479 U.S. at 213-14 (applying *Anderson* test).

40. *See Timmons*, 520 U.S. at 369-70.

41. *See id.*

42. *See id.* at 1377 (Stevens, J., dissenting).

43. *See id.* at 1372.

44. *See id.* at 1378.

45. *Id.*

46. *See id.*

47. *See id.*

First Amendment challenges to state election regulations. Accordingly, any First Amendment challenge to a state-mandated blanket primary must contend with the *Anderson* test. As *Timmons* illustrates, the result of such a challenge will depend in large part on the way the Supreme Court applies the *Anderson* test and the extent to which the Court scrutinizes the state's asserted interest in the law. As Section II of this Article will demonstrate, the *Anderson* test suggests that the Supreme Court should find state-mandated blanket primary laws unconstitutional.

III. THE CONSTITUTIONALITY OF STATE-MANDATED BLANKET PRIMARY LAWS

As set forth above, the Supreme Court should apply the *Anderson* test in evaluating the constitutionality of California's blanket primary law. Accordingly, Part A will address the first part of the *Anderson* test and assess the "character and magnitude" of a party's First Amendment interests burdened by the regulation.[48] Part B will address the second part of the *Anderson* test, which requires the Court to consider the state's asserted interest in a blanket primary law.[49] Finally, Part C will balance the interests of the parties against those of the state, and conclude by arguing that under the *Anderson* test, state-mandated blanket primary laws unconstitutionally burden a party's right to freedom of association.

A. *Burden on a Party's First Amendment Right to Freedom of Association*

The right to freedom of association was recognized as one of the fundamental guarantees of the First Amendment in *NAACP v. Alabama*.[50] In *NAACP*, the Supreme Court acknowledged the importance an association can play in supporting and furthering the First Amendment activities of its members.[51] The Court expressly extended the right to freedom of association to political parties in both *Kusper v. Pontikes*[52] and *Cousins v. Wigoda*.[53] As the Court explained in *Kusper*:

48. *See Anderson*, 460 U.S. at 789 (setting forth *Anderson* test).
49. *See id.*
50. *See* 357 U.S. 449, 460 (1958).
51. *See id.* at 462-63.
52. *See* 414 U.S. 51, 57 (1973).
53. *See* 419 U.S. 477, 487 (1975).

> There can no longer be any doubt that freedom to associate with others for the advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.[54]

Moreover, as the Court noted in *Cousins*, "[a]ny interference with the freedom of a party is simultaneously interference with the freedom of its adherents."[55]

Thus, freedom of association guarantees political parties the right to associate for the purpose of advancing shared beliefs. Yet, as the Supreme Court stated in *Democratic Party v. Wisconsin*, this freedom "necessarily presupposes the freedom [of the party] to identify the people who constitute the association, and to limit the association to those people only."[56] Selecting a candidate to represent the party in a general election is one of the central ways that political parties advance their shared beliefs.[57] By facilitating the party's selection of a standard bearer, primary elections serve as a vehicle through which political parties are able to compromise and reach consensus regarding their own associational goals.[58] Accordingly, state control over participation in primaries may profoundly influence not just the party's choice of candidates, but also the content of the party's political speech.[59] As one author explained, "a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology."[60]

The Supreme Court confirmed the importance of a party's right to determine its own boundaries in *Tashjian v. Republican Party*.[61] In *Tashjian*, the Republican party argued that a Connecticut closed primary law unconstitutionally infringed upon the party's right to freedom of as-

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54. *Kusper*, 414 U.S. at 56-57.

55. *Cousins*, 419 U.S. at 487 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

56. Democratic Party v. Wisconsin *ex rel.* LaFollette, 450 U.S. 107, 122 (1981).

57. *See* Guttman, *supra* note 4, at 122-25 (discussing role of primaries in creating party ideology).

58. *See id.* at 125-26.

59. *See id.* at 126.

60. *Id.* at 126.

61. 479 U.S. at 214.

sociation by limiting the group of registered voters that the party could invite to participate in its primary.[62] The Court agreed with the Republican Party and struck down the closed primary law. As the Court explained, such a regulation "limits 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."[63] Furthermore, although the *Tashjian* Court never expressly defined the burden that the Connecticut regulation placed on the Republican party as severe, the Court implicitly accepted the severity of the burden when it proceeded to apply strict scrutiny.[64]

Connecticut advanced a number of interests in support of its state-mandated closed primary system including administrative convenience and savings, preventing voter raiding, preventing voter confusion, and protecting the integrity of the two-party system.[65] The *Tashjian* Court found all of these asserted interests "insubstantial" and struck down the law as unconstitutional.[66]

In contrast to the closed primary statute at issue in *Tashjian*, which *prohibited* parties from inviting unaffiliated voters to participate in their primaries,[67] a blanket primary *requires* parties to permit unaffiliated voters to participate in their primaries.[68] Nonetheless, *Tashjian* requires the Court to also find a state-mandated blanket primary unconstitutional.[69]

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62. *See id.* at 211-13.

63. *Id.* at 216.

64. *See id.* at 217.

65. *Id.* at 217-25 (discussing various interests advanced by Connecticut in support of closed primary statute).

66. *See id.* at 225.

67. *See id.* at 211-13 (explaining statute at issue in *Tashjian*).

68. *See California Democratic Party* , 984 F. Supp. at 1290 (explaining California's blanket primary system).

69. *But see id.* at 1303 (distinguishing *Tashjian* from blanket primary law in California). In *California Democratic Party*, Judge Levi sought to distinguish *Tashjian* based on the different political contexts in which the two laws were adopted:

> Unlike *Tashjian* in which the Democratic Party controlled the legislature and attempted to tell the Republican Party who could vote in its primary, and where the State's purported interest in a closed primary was to protect the parties from disruption from without, Proposition 198 [the California blanket primary law] is a non-discriminatory measure that was adopted by a clear majority of voters, with a convincing margin from both major parties, and which advances interests

Like the closed primary law at issue in *Tashjian*, blanket primary laws prevent a party from defining its own boundaries. Whether state law requires parties to include certain voters or prohibits parties from doing the same, the state imposes a burden on the parties' associational rights.[70]

Thus, state-mandated blanket primaries, like closed primaries, severely burden a political party's First Amendment right to freedom of association. As the *Tashjian* court explained, "[a]ny effort by the state to substitute its judgment for that of the party on . . . who is and is not sufficiently allied in interest with the party to warrant inclusion in its candidate selection process . . . *substantially* impinges on First Amendment rights."[71] Because of this substantial burden, the Supreme Court should apply strict scrutiny in evaluating the constitutionality of state-mandated blanket primary laws.

> that are uniquely those of the [S]tate and its electorate as opposed to the parties. *Id.*

However, Judge Levi's attempt to distinguish *Tashjian* is not persuasive. Assuming Judge Levi's statement regarding the support that Proposition 198 received from voters of both major political parties is correct, Levi is essentially arguing that a blanket primary system is permissible as long as the parties themselves approve of the system. In other words, the difference between *Tashjian* and the situation in *California Democratic Party* is that in the former, the statute at issue defined the Republican party's boundaries *for the party*, while in the latter, the parties (i.e. the voters affiliated with each party) *defined their own boundaries.*

Here, Judge Levi is equating exit polls indicating support for the proposition by voters of both major parties with the notion that the parties themselves supported the proposition, and thus defined their own boundaries. However, as Levi stated earlier in his opinion, one cannot equate the results of exit polls with a formal decision by a political party. *See id.* at 1294 n.16. And, if poll results cannot replace formal party decisions, then it is not clear whether the political context of *Tashjian* was truly that different from the political context of *California Democratic Party.*

70. In *California Democratic Party*, California argued for a narrower reading of *Tashjian*. California argued that *Tashjian* stands for the proposition that the state cannot *limit* who a party may include in their primary. Thus, a blanket primary law, which requires parties to *open* their primaries to additional voters, would not be unconstitutional under *Tashjian*. *See* Appellee's and Intervenor's Brief at 22-23, *California Democratic Party* (No. CIV. S-96-02038 DFL). At best, this is a strained reading of Supreme Court precedent. In order to conclude that *Tashjian*'s holding was so limited, one must overlook the many passages in *Tashjian* regarding the importance of a party's ability to determine its own boundaries. Such language suggests a more expansive interpretation of *Tashjian.*

71. *Tashjian*, 479 U.S. at 213 (emphasis added). This quote was included in the Republican Party's Post-Trial Brief appealing the District Court's ruling in *California Democratic Party*. *See* Post-Trial Brief at 7, *California Democratic Party* (No. CIV-S-96-2038 DFL).

Yet the fact that a state election regulation places a severe burden on a party's First Amendment rights is not the end of the inquiry. Under the *Anderson* test, the Court must next examine the state's asserted interest in regulating primaries.[72]

B. *Possible State Justifications for Blanket Primary Laws*

California offered the following four essential state interests[73] in support of its newly adopted blanket primary law: (1) increasing competition among the candidates; (2) producing elected officials who best represent the electorate; (3) increasing voter participation by opening the candidate selection process to include both independent and minor party voters; and (4) preserving the integrity of the electoral process.[74] Each of these interests will be examined in turn.

1. Increasing Competition Among the Candidates

One argument California advanced in defense of its blanket primary law was that the voting system "encourages healthy competition."[75] The premise of this argument is that by giving voters greater choice among candidates in a primary election, the candidates will be forced to compete more aggressively for each available vote. Proponents of this argument suggest that this increased competition will lead to greater and more substantial political debates, thereby fostering the democratic process.[76]

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72. *See Anderson* 460 U.S. at 789.

73. California actually advanced more than four interests in support of the blanket primary law, but Judge Levi found that most of California's interest could be reduced to the assertion that blanket primaries "enhance[] the democratic nature of the election process and representativeness of elected officials." *California Democratic Party*, 984 F. Supp. at 1301. Judge Levi's opinion focused on the following arguments asserted by California: (1) the contention that blanket primaries will increase voter participation by opening the candidate selection process to minor party and independent voters; (2) the notion that blanket primaries will produce officials who best represent the electorate; and (3) the idea that blanket primaries will ultimately increase voter participation in general. *See id.* at 1301.

74. Appellee's and Intervenor's Brief at 49, *California Democratic Party* (No. CIV. S-96-02038 DFL).

75. *Id.*

76. *See id.*

This argument is flawed for two reasons. First, a number of cases addressing the constitutionality of election regulations have considered and rejected the theory that the First Amendment rights of some should be limited for the benefit of the democratic process. For example, in *Buckley v. Valeo*,[77] the Supreme Court struck down a federal law restricting campaign contributions and expenditures. According to *Buckley*, the notion that the government may restrict the First Amendment rights of one segment of the population in order to increase the relative voice of others is "wholly foreign to the First Amendment."[78] Yet California's attempt to justify a blanket primary law on the grounds that it increases competition is vulnerable to the same analysis—California is essentially arguing that the state should restrict the First Amendment rights of political parties in order to obtain the systemic benefits that flow from increased competition among the candidates.[79]

The notion that increased competition is a compelling state interest was also rejected in *Bates v. Jones*,[80] a district court case which addressed the constitutionality of term limits for state elected officials. According to the *Bates* court, increased competition is not a compelling state interest because it is not clear that it will produce a better democracy:

> [as] used by the State, the term "electoral competition" refers to increasing the number of candidates running for office and decreasing the margins by which candidates win elections. Neither of these interests, by themselves, are compelling interests because it is not self-evident that they have a desirable effect on government.[81]

In other words, even if blanket primary laws do increase competition, this alone is not a compelling state interest because it is not clear that candidate competition benefits the state.

Thus, courts have considered and rejected the notion that increased competition is a compelling state interest. But the "increased competi-

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77. 424 U.S. 1 (1976).

78. *See Buckley*, 424 U.S. at 48-49 (rejecting argument that term limits level playing field as compelling state interest).

79. This author expresses no opinion about the merits of the *Buckley* decision.

80. 958 F. Supp. 1446 (N.D. Cal. 1997).

81. *Id.* at 1468.

tion" argument also fails for a second reason. Even assuming that increased competition is a compelling state interest, California must still demonstrate a nexus between the blanket primary system and increased competition. The mere assertion that increased competition will result from the institution of a blanket primary is not sufficient in light of the severe burden that the system places on a party's First Amendment rights. In the absence of empirical evidence of a nexus, the Supreme Court should reject the argument that blanket primaries increase competition among candidates.

2. Producing Elected Officials Who Best Represent the Electorate

Proponents of state-mandated blanket primaries also contend that a blanket primary system will lead to the election of more centrist officials who are more representative of their districts. For example, California asserts that officials elected via a blanket primary system "stand closer to the median" in their districts than officials elected through a closed primary system.[82] California further asserts that a blanket primary system will result in elected officials who more accurately reflect the political views of all of the voters they represent.[83]

Like the argument that blanket primaries increase competition, this argument too is flawed. The notion that the state has an interest in supporting the election of candidates who stand closer to the median is tantamount to asserting that the state has an interest in supporting the election of candidates with certain ideologies. A state clearly does not have a legitimate, let alone compelling, interest in promoting the election of more moderate candidates. Favoring any election system because of the content or viewpoint of the speech that may result from those officials who are elected is not a proper government interest.[84]

Supporters of this viewpoint often attempt to cloak this argument in language which suggests that the state is merely supporting a system that

82. Appellee's and Intervenor's Brief at 51, *California Democratic Party* (No. 97-17440); *see also* Elisabeth R. Gerber and Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 304 (1998) (arguing that open primary systems lead to election of more moderate candidates).

83. *See* Appellee's and Intervenor's Brief at 51, *California Democratic Party* (No. 97-17440).

84. *Cf.* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 387 (1992) (discussing concern that government's content discrimination may drive certain viewpoints from the "marketplace" of ideas).

ensures that the "election winner will represent a majority of the community."[85] But this argument confuses the function of the primary election with the function of the general election. It is the candidate who wins the general election that is charged with the responsibility of representing the district as a whole. The primary election winner is charged only with the responsibility of representing the ideals and beliefs of his or her party.[86]

3. Increasing Participation by Opening the Primary Process to Independent and Minor Party Voters

Perhaps the most persuasive justification for state-mandated blanket primaries is the notion that the system will further democratize elections by opening the primary process to both minor party and independent voters. Proponents argue that these two growing groups are effectively disenfranchised in a closed primary system.[87] Especially in so-called "safe districts," in which one party is clearly dominant, many think that independent and minor party voters would be more involved and better represented through a blanket primary system.[88]

For example, in a Democratic safe district where Democrats represent at least sixty percent of registered voters, the Democratic candidate will almost always win the general election. In such districts, the critical election becomes the primary rather than the general.[89] Therefore, many

85. *California Democratic Party*, 984 F. Supp. at 1303.

86. *See* Guttman, *supra* note 4, at 125-26 (discussing importance of primary elections in formation of political parties' ideologies).

87. *See California Democratic Party*, 984 F. Supp. at 1301-02 (discussing argument that blanket primary opens primary process to include "disenfranchised" voters); Appellee's and Intervenor's Brief at 53, *California Democratic Party* (No. 97-17440) (arguing that California's closed primary disenfranchises one-quarter million minor party and independent voters).

88. *See California Democratic Party*, 984 F. Supp. at 1302 (defining safe districts and discussing notion that minor party voters in safe districts have little voice in elections); *see also* Appellee's and Intervenor's Brief at 53, *California Democratic Party* (No. 97-17440) (explaining safe districts and arguing that disenfranchised voters in safe districts have "no say in the overall election"). According to California's Brief to the Ninth Circuit in *California Democratic Party*, a majority of congressional, state senate, and assembly districts in California are "safe" for one major party or the other. *See id.*

89. *See California Democratic Party*, 984 F. Supp. at 1302 (explaining impact of general election in safe districts).

argue that voters who are unable to participate in the Democratic primary are effectively disenfranchised.[90]

This argument is not without force. Perhaps if states adopt a blanket primary system, voter participation in primary elections would increase as a result of the participation of minor party and independent voters — so called "unaffiliated voters." Moreover, a blanket primary would clearly allow unaffiliated voters to participate in and influence the outcome of the major party primaries in safe districts.

Nonetheless, this argument is not persuasive. Political parties have a constitutional right to freedom of association, a right that includes the ability of each party to define its own boundaries and select its own nominees.[91] As long as the state provides unaffiliated voters with alternative methods of nominating general election candidates, unaffiliated voters do not have a constitutional right to participate in other parties' primary elections.[92] As one author explained, "[t]he party member's constitutional right takes precedence over unaffiliated voters' non-constitutional interest in primary outcomes."[93]

In addition, even assuming that states have an interest in increasing the influence of unaffiliated voters more generally, instituting a blanket primary is not the least restrictive means of accomplishing this goal. For example, states could relax the requirements for obtaining access to the general election ballot so that any candidate who can demonstrate some minimal level of support could appear on the general election ballot.[94] This would increase the likelihood that unaffiliated voters would find a candidate in the general election who represents their political beliefs.

Finally, to the extent that the state has an interest in increasing voter participation in general, there are more effective and more narrowly tailored means of doing so than instituting a blanket primary. States that do not currently have "same day registration" could implement such a system.[95] In addition, every state could move election day to Sunday, make

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90. *See id.*

91. *See Tashjian*, 479 U.S. at 215.

92. *See* Guttman, *supra* note 4, at 133-34 n.10 (discussing constitutional rights of unaffiliated voters).

93. *Id.* at 133.

94. *See id.* at 134.

95. It is interesting to note that under a same day registration system, the differences between the three primary systems are arguably de minimus. Because voters can decide the day of the election which party they chose to affiliate with and thus which

election day a holiday, or allow polls to remain open for two or three days.[96] All of these changes would likely increase voter turnout without infringing the constitutional rights of political parties.

4. Preserving the Integrity of the Electoral Process

The final argument advanced in support of blanket primary laws is the notion that blanket primaries somehow strengthen the integrity of the electoral process.[97] Supporters maintain that a blanket primary is more likely than a closed primary to lead the public to believe that primary elections are an open and fair process.[98] However, this argument is also flawed. Rather than preserving the integrity of elections, a blanket primary may actually diminish the integrity of the electoral process. Preserving the integrity of the electoral process presumably includes insuring that voters have confidence in the state's election system. However, as a result of a conflict with the Republican and Democratic National Parties' rules, California's decision to adopt a blanket primary may shake this confidence.

Both the Democratic and Republican parties have national party rules that forbid non-party members from participating in the selection of each party's national convention delegates.[99] The delegates officially nominate and select each party's nominee at the national nominating

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ballot to request at the polls, there is little difference between an open primary and a closed primary in a state that allows same day registration.

96. Many of these alternatives were suggested by the California Republican Party in their Post-Trial Brief in *California Democratic Party*. *See* Post-Trial Brief at 27-28, *California Democratic Party* (No. CIV. S-96-2038 DFL).

97. Although California did not explicitly utilize this justification in defending its blanket primary system, all of the interests advanced by the state relate to the integrity of the electoral process as a whole.

98. *See, e.g.*, Guttman, *supra* note 4, at 131-32 (discussing notion that preserving integrity of general elections justifies state decision to adopt one primary system as opposed to another).

99. *See* Ballot Material for Proposition 3—November 3, 1998 General Election (discussing parties' rules preventing delegates selected by unaffiliated voters from being seated); Mark Z. Barabak, *Seeking a Presidential Loophole in Blanket Primary Law*, L.A. TIMES, Dec. 27, 1998, at A10 (discussing national party rules and California's various attempts to ensure that California's votes count in presidential primary); *see also La Follette*, 450 U.S. at 109 (explaining National Democratic Party rules and holding that parties have constitutional right to refuse to seat delegates selected by unaffiliated voters).

convention.[100] Thus, the National Republican Party will not permit non-Republicans to participate in selecting the Republican national convention delegates, and the Democratic National Party will not permit non-Democrats to participate in selecting the Democratic national convention delegates. Yet under a blanket primary system, that is precisely what occurs — state law requires both major parties to permit unaffiliated voters to participate in their parties' presidential primary elections.[101] The Supreme Court has held that the national parties have the right to refuse to seat delegates from a state that permits nonaffiliates to vote in the parties' presidential primaries.[102] For example, the National Democratic Party has the constitutional right to refuse to seat the delegates elected by California voters in the March 7, 2000 presidential primary.

Soon after California's blanket primary law was adopted, state officials realized that the new law could prevent California voters from participating in selecting the Democratic and Republican presidential nominees.[103] Accordingly, lawmakers quickly explored various means of ensuring that the national parties would accept California's votes, while at the same time preserving the new blanket primary law approved by the voters.[104]

One solution to the conflict is to allow the blanket primary to proceed, but to select the actual delegates through a party caucus rather than through the election.[105] This solution was adopted by the State of Washington, one of the three other states with a state-mandated blanket pri-

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100. For example, by selecting Bill Clinton in the 1992 presidential primary, voters actually selected a slate of delegates pledged to vote for Clinton at the National Democratic Convention. Each candidate on the presidential primary ballot has a unique list of pledged delegates. The pledged delegation that receives the most votes goes to the nominating convention on behalf of the state. Together with the pledged delegations from other states, the delegates will select the party's presidential nominee. *See* Argument in Favor of Proposition 3—November 3, 1998 General Election (explaining presidential nominating process).

101. *See California Democratic Party*, 984 F. Supp. at 1291-92 (explaining blanket primary system).

102. *See LaFollette Democratic Party*, 450 U.S. at 127 (holding that National Democratic Party need not seat Wisconsin delegates selected through open primary).

103. *See* Dave F. Pike, *High Court to Rule on State's Open Primaries*, L.A. DAILY J., Jan. 24, 2000 at 1.

104. *See id.*

105. *See generally* John Marelius, *Open Primary May Stir State Problem in 2000* at http://www.uniontrib.com (Feb. 8, 1999) (discussing party caucuses as an alternative method of selecting delegates).

mary.[106] In Washington State, for the year 2000 presidential primary, voters will go to the polls and vote in a blanket primary election. However, the election will be little more than a "beauty contest" because the results of the election will not lead to the selection of delegates.[107] Instead, each party will hold a caucus to select delegates to send to its respective national party convention. The party caucuses rather than the voters will decide which Democratic and Republican presidential candidates will receive Washington State's electoral votes in the year 2000 presidential primary.

The use of party caucuses to resolve the conflict between blanket primaries and the major parties' national rules may lead many voters to question the integrity of the electoral process. Under the Washington State system, voters participate in an election that is arguably meaningless, while only a small percentage of the state's population is able to participate in the more meaningful party caucuses. Because the caucus rather than the electorate decides which nominee will receive Washington State's votes, the average voter will not have any voice in selecting the major parties' presidential nominees.

California has adopted a different resolution to this conflict. The California Legislature adopted a law that brings the state into compliance with the national parties' rules in time for the year 2000 primary.[108] The law allows California to conduct a blanket primary and provide the national parties with vote tabulations that do not include the votes of nonaffiliates.[109] Specifically, the Legislature amended the blanket primary law to permit two tallies of the votes for President — one for the blanket primary beauty contest and a second for the parties' delegate selection process.[110] For this second tabulation, computers will count only registered Democrats' votes for the Democratic candidates and registered Re-

106. *See* Brief of Amici Curiae State of Washington and State of Alaska at 1, *California Democratic Party* (No. 97-17440).

107. *See* John Marelius, *Open Primary May Stir State Problem in 2000* at http://www.uniontrib.com, (Feb. 8, 1999) (referring to such elections as "beauty contests").

108. *See* Pike, *supra* note 103, at 1 (discussing amendment to California's blanket primary initiative); *see also* Mark Z. Barabak, *Seeking a Presidential Loophole in Blanket Primary Law*, L.A. TIMES, Dec. 27, 1998, at A10 .

109. *See* Dave F. Pike, *High Court to Rule on State's Open Primaries*, L.A. DAILY J., Jan. 24, 2000 (discussing amendment to California's blanket primary initiative).

110. *See id.*

publicans' votes for the Republican candidates.[111] Although the state will presumably announce the results of both tabulations, the parties are free to use the second tally at their national conventions.[112]

Under this system, the integrity of the electoral process still suffers. Presumably California will have to explain to voters that because they adopted a blanket primary system, they will be permitted to vote in a non-binding beauty contest.[113] California will also have to explain to voters that although they are allowed to vote for any candidate for President, if they chose to vote outside their party, their vote will not be counted in the second delegate selection tally. As a result of this system, voters may not understand how to effectively cast their votes in the presidential primary, and thus may question the fairness of the electoral process.

Thus, rather than increasing the integrity of elections, a blanket primary system, in conjunction with the long-standing rules of both of the major parties, may seriously jeopardize the integrity of the electoral process. Accordingly, preserving the integrity of elections and the electoral process cannot serve as a compelling state interest that justifies the use of a state-mandated blanket primary.

C. *Conclusion: State-Mandated Blanket Primaries Are Unconstitutional*

Under the *Anderson* test, the Supreme Court should find state-mandated blanket primaries unconstitutional. The blanket primary interferes with a political party's ability to define its own boundaries and select its own nominees. Moreover, the process of selecting a nominee may profoundly affect not just a party's choice of candidates, but also the content of the party's political speech. The blanket primary severely burdens a party's First Amendment right to freedom of association as defined by the Supreme Court in *Tashjian.*

Furthermore, this severe burden cannot be supported by a compelling state interest. None of the interests advanced by California truly justifies this burden. First, courts have rejected the notion that increasing competition among candidates can serve as a compelling state interest. Second, even if blanket primaries do lead to more moderate elected officials,

111. *See* S.B. 28, 1999 Cal. Sess., *located at* http://www.sen.ca.gov.

112. *See id.*

113. *See* John Marelius, *Open Primary May Stir State Problem in 2000* at http://www.uniontrib.com (Feb. 8, 1999) (discussing proposed bills).

states do not have a legitimate, let alone compelling, state interest in promoting the election of candidates with certain ideologies. Third, the constitutional rights of political parties take precedence over the non-constitutional rights of unaffiliated voters to participate in party primaries. Finally, rather than preserving the integrity of elections, blanket primaries may actually diminish their integrity.

The final prong of the *Anderson* test requires the Supreme Court to weigh the burden on a party's First Amendment rights against California's asserted justifications. On balance, the state's asserted governmental interests cannot justify the severe burden blanket primary laws impose on a party's First Amendment rights. Accordingly, under existing Supreme Court precedent, the Supreme Court should find California's blanket primary law unconstitutional.

IV. POTENTIAL PROBLEMS RAISED BY THE CONCLUSION THAT STATE-MANDATED BLANKET PRIMARIES ARE UNCONSTITUTIONAL

Although Supreme Court precedent supports the notion that state-mandated blanket primaries are unconstitutional, this holding also raises a number of questions that the Supreme Court may be reluctant to address. First, some scholars have suggested that such a holding would be inconsistent with the White Primary Cases, which held that parties cannot discriminate on the basis of race in elections because in the election context, political parties are agents of the state.[114] Part A of this section will explore the potential conflict between striking down blanket primary laws due to their impact on parties as private associations and the notion that parties are state actors in the context of the White Primary Cases.

Second, although Supreme Court precedent suggests that state-mandated blanket primaries are unconstitutional, that precedent arguably requires the Court to find that *all* state-mandated primary systems are unconstitutional. Under existing Supreme Court precedent, only a primary system selected by the parties would pass constitutional muster. Part B will examine some of the difficulties associated with this conclusion.

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114. *See, e.g.*, Carman, *supra* note 10, at 668-69 (discussing White Primary Cases and potential conflict between this line of cases and those cases that discuss political parties' rights to freedom of association); *see also* Lowenstein, *supra* note 6, at 1747-53 (discussing potential conflict between two lines of authority).

Finally, Part C will explore the related question of who must speak before a court can conclude that "the party" has spoken. If the only constitutional primary system is one selected by the parties, then courts may need to confront the difficult issue of who speaks on behalf of a party.

A. *Consistency with the White Primary Cases*

The premise underlying the idea that political parties have First Amendment associational rights is that political parties are private associations.[115] Indeed, political parties do exhibit many of the attributes of a typical private association. Yet as Laurence Tribe explains, political parties also "seem imbued with a quasi-governmental character."[116] It is this hybrid nature of political parties that has led some scholars to question whether the parties' claim for privacy and autonomy can be reconciled with the notion that political parties can also be state actors.

The leading line of authority holding that parties may be state actors is the so-called "White Primary Cases." In these cases, the Supreme Court invalidated various attempts by the Democratic party to disenfranchise African-Americans.[117] For example, the Court struck down Democratic party rules that prohibited African-Americans from participating in pre-primary party meetings.[118] The Supreme Court held that these rules violate the Fourteenth and Fifteenth Amendments.[119] However, the Fourteenth and Fifteenth Amendments do not regulate private conduct; they only proscribe government behavior.[120] Thus, in order to hold that political parties cannot discriminate on the basis of race, the Court had to find that the party's actions were state actions.[121]

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115. *See* TRIBE, *supra* note 2, at 1118 (discussing political parties and state action doctrine).

116. *Id.*

117. *See id.* at 1118-19 (discussing White Primary Cases).

118. *See generally* Terry v. Adams, 344 U.S. 883 (1952); *see also* Tribe, *supra* note 2 , at 1119 (discussing White Primary Cases).

119. *See* TRIBE, *supra* note 2 , at 1118-19 (discussing political parties and state action doctrine).

120. *See id.* at 1118 (discussing political parties and state action doctrine).

121. *See* Tribe, *supra* note 2, at 1118-20 (discussing state action doctrine and White Primary Cases). This is not to suggest that the Court found state action *because* it wanted to hold the party's actions unconstitutional, but rather that state action is a necessary precondition to such a holding. Still, some authors suggest that state action is just a post hoc label the Court applies to justify striking down regulations in certain situations.

Although the Supreme Court concluded that the Democratic party's actions were equivalent to actions of the state, the Court failed to articulate the legal basis for finding state action in this context. Scholars such as Tribe argue that the Court found state action in the White Primary Cases because the state affords preferential ballot access in the general election to the winner of the Democratic party primary.[122] Under this view, a party's action is a state action "when the state incorporates the party's behavior by automatically placing the primary winners on the general election ballot."[123]

Regardless of the rationale, in striking down the Democratic party rules at issue in the White Primary Cases, the Supreme Court held that in certain circumstances, "activities of political parties are reviewable as actions of the state."[124] However, in order to claim the protections of the First Amendment and enjoy the right to freedom of association, political parties must be private associations, not government actors.[125] Thus, some scholars suggest that by striking down blanket primary laws as a violation of the parties' right to freedom of association, the Supreme Court may threaten the legal underpinnings of the White Primary Cases.[126] As one author explains:

> Thus, by declaring parties to be "public," the White Primary Cases not only prohibited [the parties] from depriving racial minorities of the right to vote but also seemed to deprive the parties of the protections of the Bill of Rights. If instead parties were declared to be "private," they would enjoy constitutional rights,

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See Lowenstein, *supra* note 6, at 1753 (describing state action as a post hoc label rather than an "a priori analytic device").

122. *See* Tribe, *supra* note 2, at 1121 (explaining that state incorporates behavior of parties into general election ballot is most persuasive description of state action doctrine in election context). Although Tribe supports this explanation of the state action doctrine as applied to political parties, the Supreme Court has yet to explicitly endorse this theory. *See* Guttman, *supra* note 4, at 119 n.10 (discussing state action and White Primary Cases).

123. Guttman, *supra* note 4, at 119 n.10

124. TRIBE, *supra* note 2, at 1120.

125. *See id.*

126. *See* Carman, *supra* note 10, at 668-69 (discussing potential conflict between White Primary Cases and notion that parties have rights to freedom of association); Lowenstein, *supra* note 6, at 1748-49 (discussing potential conflict between White Primary Cases and notion that parties have rights to freedom of association).

> but the foundation for the White Primary Cases would be undercut.[127]

Under this view, the notion that state-mandated blanket primary laws are unconstitutional undercuts the legal foundation for the White Primary Cases.

This conflict, however, is more apparent than real. The equal protection context of the White Primary Cases is distinguishable from the First Amendment context of a blanket primary law. In the context of equal protection, discrimination on the basis of race is different than discriminating between affiliated and non-affiliated members of a political party. Excluding voters from a primary election on the basis of race amounts to invidious discrimination and is subject to strict scrutiny.[128] In contrast, a law that discriminates against non-affiliates is not invidious and would only be subject to rational basis review because voters can change their party affiliations any time they please.[129] Thus, it is consistent with constitutional doctrine that a court would allow a party to "discriminate" against voters on the basis of affiliation while condemning discrimination on the basis of race.

It is important to note, however, that there are certain contexts in which the state cannot discriminate against individuals based on party affiliation.[130] For example, the state cannot consider political beliefs or party affiliation when making hiring, firing, or promotional decisions regarding its employees.[131] However, a court's decision to strike down a blanket primary law does not raise such problems. The state can constitutionally deny non-affiliates the right to vote in a party primary as long as the state provides non-affiliates with alternative avenues for placing a candidate on the general election ballot.[132] In other words, the state does not abridge a voter's constitutional right to vote by allowing the parties to limit participation in their respective primaries to only affiliates, pro-

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127. Lowenstein, *supra* note 6, at 1748-49.

128. *See* Guttman, *supra* note 4, at 137 nn.9 & 13 (distinguishing White Primary Cases).

129. *See id.*

130. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 64 (1990).

131. *See id.*

132. *See* Guttman, *supra* note 4, at 137 n.10 (discussing state action and White Primary Cases).

vided every voter has an opportunity to participate in placing candidates on the general election ballot.[133]

Thus, the White Primary Cases can be reconciled with the conclusion that state-mandated blanket primary laws are unconstitutional. Discrimination on the basis of race is suspect, while discrimination on the basis of party affiliation is not.[134] Moreover, the Supreme Court may strike down a party policy permitting racial discrimination, and at the same time, uphold a party rule that permits discrimination on the basis of party affiliation. As long as the state provides voters with an alternative avenue for placing candidates on the general election ballot, prohibiting non-affiliates from voting in a party's primary does not violate the non-affiliates' constitutional rights.[135]

B. *Must Courts Find All State-Mandated Primary Election Systems Unconstitutional*

Although the first issue raised by the notion that state-mandated blanket primaries are unconstitutional is easily resolved, this second issue is more problematic. As discussed above, the Supreme Court's ruling in *Tashjian* supports the conclusion that state-mandated *blanket* primaries are unconstitutional. However, *Tashjian* arguably supports the notion that *all* state-mandated primaries are unconstitutional. If this is in fact the case, only a primary system selected by the parties would pass constitutional scrutiny.

In *Tashjian*, the Republican party challenged a Connecticut closed primary law that forbid the party from opening its candidate selection process to non-affiliates.[136] In striking down the law, the Supreme Court issued a broad statement regarding the right of political parties to determine their own boundaries: "the freedom to join together in furtherance of common political beliefs 'necessarily presupposes the freedom to identify the people who constitute the association.'"[137] The Court ultimately held that Connecticut's closed primary law infringed the Republican party's right to freedom of association by preventing the party from

133. *See id.*

134. *See id.*

135. *See id.*

136. *See Tashjian*, 479 U.S. at 211-12 (discussing closed primary statute at issue in *Tashjian*).

137. *Id.* at 214.

determining "with whom they will associate, [and] whose support they will seek."[138]

It is this broad language in *Tashjian* that requires the Supreme Court to find state-mandated blanket primaries unconstitutional. Although a closed primary limits who may participate in a party primary and a blanket primary requires parties to allow non-affiliates to participate, the constitutional right at issue is the same—the right of a political party to determine its own boundaries. Under *Tashjian*, a party should have the right to decide *not* to include non-affiliates, just as it has the right to invite non-affiliates to participate in its primary.

But such a strict reading of *Tashjian* would presumably mean that all state-mandated primary systems are unconstitutional. If political parties have the absolute right to define their own boundaries, then regardless of whether the state employs an open, closed, or blanket primary, if a party prefers one of the other two alternatives, it can challenge the current system on First Amendment grounds. For example, suppose California's blanket primary law is struck down as unconstitutional and California maintains its previous closed primary system. Next year, the California Republican Party, like the Connecticut Republican Party, may decide to open its primary election to unaffiliated voters. In this case, the Republican party could challenge California's closed primary statute just as it is currently challenging California's blanket primary statute.

In his decision upholding California's blanket primary law, Judge Levi recognized this potential reading of *Tashjian*.[139] As Judge Levi explained, if political parties had the absolute right to define their own boundaries, "then open primaries would also be unconstitutional upon any party's objection: an open primary, every bit as much as a blanket primary, permits voters who are not registered in a party to vote in that party's primary."[140] Levi recognized that the issue is not the primary election system a state chooses, but rather, whether the parties themselves would select the same system.

Moreover, it is possible that the various political parties may not select the same primary system. If the Republican party invites unaffiliated voters to participate in its primary, while the Democratic party exercises

138. *Id.*

139. *See California Democratic Party*, 984 F. Supp. at 1294-95 (discussing logical conclusion of notion that political parties have absolute right to determine their own boundaries).

140. *Id.*

its right to exclude non-affiliates, does the Constitution require the state to accommodate both parties' preferences? Under *Tashjian*, the answer is not clear.

Thus, *Tashjian* leaves both courts and scholars in an difficult place. *Tashjian* suggests that state-mandated blanket primaries are unconstitutional. However, it also suggests that all state-mandated primary systems are unconstitutional. It is not clear whether states will be able to modify their primary systems to accommodate the changing whims of the various parties, or even whether the states should be constitutionally required to do so. If the logical conclusion of *Tashjian* results in an unworkable model, perhaps the *Tashjian* framework for analyzing the relationship between the state and political parties should be reconsidered.

C. *Who Speaks for "The Party"?*

The final question prompted by the conclusion that blanket primary laws are unconstitutional involves the difficult question of who is authorized to speak on behalf of a given political party. If the only constitutional primary election system is one selected by the parties, courts must be able to determine when a party supports a particular voting system. For example, if the California Democratic State Central Committee decides that the Democratic party supports a blanket primary, is it appropriate for a court to find that "the party" supports such a system? Similarly, if a majority of registered Democrats supported Proposition 198, the initiative that instituted a blanket primary system in California, could a court confidently conclude that "the party" has spoken? Although few, if any, court decisions have addressed these questions to date, courts and scholars may soon have to struggle to provide answers.

Judge Levi's opinion in *California Democratic Party* is one of the few opinions to have recognized and addressed some of the difficulties in determining who speaks for a party. In *California Democratic Party*, Judge Levi upheld the California blanket primary initiative as constitutional in the face of challenges by both major parties and two minor parties.[141] Levi's opinion was later affirmed and adopted by the Ninth Circuit Court of Appeals.[142]

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141. *See id.* at 1303.

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

In *California Democratic Party*, California argued that because exit polls demonstrated that a majority of both Democrats and Republicans favored the initiative, "the parties" supported the blanket primary.[143] According to the State, these polls proved that the rank-and-file members of both parties approved of a blanket primary system, and the court should defer to the interests of the members over the interests of Democratic and Republican party leaders.[144] Thus, the State argued that the court should recognize the rank-and-file members, rather than the leadership, as the voice of a party.

Judge Levi did not agree, however. In a lengthy footnote Levi dismissed the State's argument.[145] According to Levi, there are three reasons why California's argument is flawed.[146] Levi's first two reasons are essentially procedural. First, the *Los Angeles Times* poll at issue did not report the votes of minor party candidates.[147] Thus, even if California's argument was theoretically correct, it would not affect the minor parties' complaint regarding the blanket primary initiative because there is no evidence as to the views of their rank-and-file members. Second, Levi questioned California's suggestion that exit polls could be used in place of actual vote tabulations.[148] As Levi stated, "In no other context do we accept the results of polling for the act of voting."[149]

Finally, and perhaps most importantly, Levi dismissed the argument on its merits—he disagreed with California's contention that rank-and-file members are empowered to speak for a party.[150] As Judge Levi stated:

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143. *See* Appellee's and Intervenor's Brief at 10-16, *California Democratic Party*, 984 F.Supp 1288 (E.D. Cal 1997) (No. CIV. S-96-2038 DFL) (arguing that Proposition 198 presents no First Amendment issue because, according to exit polls, rank-and-file Democrats and Republicans supported initiative).

144. *See id.* According to the *Los Angeles Times* exit poll, 61% of Democrats supported Proposition 198, as did 57% of Republicans. *See id.* at 10.

145. *See California Democratic Party*, 984 F. Supp. at 1294 n.16 (discussing State's argument that parties supported proposition because their rank-and-file membership supported proposition).

146. *See id.*

147. *See id.*

148. *See id.*

149. *Id.*

150. *See id.*

> Finally, the parties have certain procedures for the modification of their rules. These procedures require deliberation and decisionmaking by the parties' respective central committees. Other deliberative bodies have similar procedural rules. Such rules may affect the nature of debate—indeed, may cause there to be debate—and may affect the outcome of the decision. We would not accept a poll of legislators as the equivalent of a legislative vote. For much the same reason, a poll of voters is not the equivalent of a decision by a party according to the procedural rules of the party. The court therefore rejects the argument that the "parties," as defined by the electorate, have agreed to Proposition 198 . . . .[151]

Thus, Judge Levi categorically rejected California's argument that the rank-and-file may speak for the party. According to Levi, in order for a court to conclude that "the party" has spoken, the party and its leadership must arrive at a decision by following the party's internal decisionmaking procedures.

Perhaps other courts will follow Judge Levi's lead and conclude that the rank-and-file cannot speak for the party outside of the party's own governance structure. Furthermore, although Levi's view as expressed in *California Democratic Party* is arguably dicta, courts may soon be forced to confront this issue more directly. As long as *Tashjian* requires courts to evaluate First Amendment challenges to state election regulations by focusing on the importance a party's ability to define its own boundaries, courts will continue to confront the difficult issue of who speaks for the party.

V. CONCLUSION

Current Supreme Court precedent suggests that the Court should find California's blanket primary law unconstitutional. Yet this conclusion leaves courts and scholars in an unsettling place, for it raises a number of seemingly difficult issues. Although the legal underpinnings of the White Primary Cases are not threatened by the notion that state-mandated blanket primary laws are unconstitutional, the remaining two issues discussed in this Article cannot be so easily resolved. To date, the Supreme Court has not been forced to squarely address the question of

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151. *Id.*

whether political parties have the First Amendment right to select their own primary election system, or the question of who is authorized to speak for a party. Perhaps when faced with these questions, the Court will be forced to rethink the *Tashjian* model and redefine the unique and evolving relationship between the state and political parties.