No. 99-401

IN THE SUPREME COURT OF THE UNITED STATES

CALIFORNIA DEMOCRATIC PARTY, *et al.*,
Petitioners,

v.

BILL JONES,
Respondent.

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Filed March 2, 2000

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INTEREST OF THE *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law is a partnership between the family, friends and former law clerks of Justice William J. Brennan, Jr., and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law.[1] The Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing practical solutions to difficult problems in areas that were of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a nonpartisan, independent center of thought, paying no special deference to his views or to the opinions that he authored. In keeping with Justice Brennan's spirit, the Center has established a Democracy Program, which undertakes projects to promote equal representation and broad-based electoral participation.

The Brennan Center believes that states should be free to experiment with a variety of candidate selection methods, including a blanket primary, in order to encourage voter participation in elections. *Amicus* submits this brief on behalf of neither party, however, in an attempt to bring to the Court's attention empirical data and constitutional analysis that support an approach sensitive to the political and legal differences between major and minor parties.

Amicus submits this brief with the written consent of the parties. The consents have been filed with the Clerk of the Court.

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1. Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *Amicus*, contributed monetarily to the preparation and submission of this brief.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Article IV, section 4 of the Constitution guarantees "to every state in this Union a Republican form of government." The Constitution does not, however, impose a single conception of what it means to have "a Republican form of government." *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). The text of the original Constitution is virtually silent concerning the rules governing elections at the state and local level.[2] Although six Amendments,[3] and numerous decisions of this Court mapping the modern contours of the right to vote, the right to run for office, and the right to fair representation,[4] provide fixed guidance in certain areas, the states of the federal union remain free to experiment broadly within the expansive domain of democratic political theory. States may experiment with, *inter alia*, unicameral legislatures, direct democracy, nonpartisan registration and elections, multimember districts, term limits for state and local officials, proportional representation, parliamentary government, a plural executive, and advisory opinions on the constitutionality of proposed legislation. This

2. The principal textual limitations on state power over elections in the body of the Constitution are the qualification clauses governing the election of members of Congress, and the ban on religious tests for office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

3. The 15th Amendment guarantees the right to vote to racial minorities. The 17th Amendment requires popular election of Senators. The 19th Amendment guarantees the right to vote to women. The 23rd Amendment permits residents of the District of Columbia to vote for President. The 24th Amendment bars the poll tax in federal elections. The 26th Amendment grants the vote to persons over 18. This Court has also construed the 1st and 14th Amendments as protecting basic rights to participate in the democratic process.

4. The principal cases are set forth in Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (1998).

case poses the important question of whether states may similarly experiment with different models of selecting candidates for the general election.

American democracy has adopted multiple techniques to select candidates for the general election. In the earliest days of the Republic before the formation of political parties, candidates were often chosen informally by a consensus of locally prominent persons.[5] With the emergence of political parties, candidates were nominated through a variety of nomination processes, including caucuses, party conventions, and a variety of primary election systems. Today, although about a third of the states use caucuses for one or both parties' nomination of presidential candidates, all states require or make available primary elections for nomination of candidates for elections to the U.S. Congress and state legislatures.[6] These systems vary

5. As initially conceived, the Constitution was designed to govern without political parties. *See, e.g.*, Richard Hofstadter, *The Idea of a Party System: The Rise of Legitimate Opposition in the United States, 1780-1840*, at 40 (1969); Gordon Wood, *The Creation of the American Republic* 506-09 (1969). The consensus of modern political science is that political parties are indispensable elements in a functioning democracy, acting as "intermediate" institutions permitting individuals to aggregate preferences in an effective manner. *See, e.g.*, Maurice Duverger, *Political Parties* (Barbara & Robert North trans., 1964); E.E. Schattschneider, *Party Government* (1942); Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 Colum. L. Rev. (forthcoming Apr. 2000).

6. Some states, such as Virginia, allow for conventions to replace primaries, and others, such as Connecticut, require that candidates first receive a certain percentage of the vote in a convention to be on the primary ballot. Data presented here on primary systems refer to the electoral scheme used for nominating candidates for general elections to the U.S. House of Representatives and is garnered from Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J. L. Econ. & Org. 304 (1998), and Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries, in Nomination Politics and Congressional Representation* (Peter Galderisi & Mike Lyons eds., forthcoming 2000). The information is current as of 1996, except for California, which is current as of 2000.

considerably in their degree of "openness" — that is, how free every voter is to cast a ballot in the primary election for his or her candidate of choice for each elected office.

Although each state employs a distinctive set of primary rules and different parties in the same state will sometimes opt for a different set of rules for nominating candidates, state primary systems fall into several categories.

- *Closed primary*: Only registered party members can vote in a closed party primary. Closed primaries vary depending on how far in advance of an election a voter must affiliate with a party to earn the right to participate in that party's primary. At one extreme stands New York, which limits its primary to voters registered as members of the political party eleven months prior to the primary election. Under such a system, voters must declare their party affiliation often long before knowing the identities of the candidates or the scope of the issues.[7] At the other extreme is Delaware, which allows voters to register with parties 10 days in advance of the primary. Closed primary states include: Arizona, Connecticut, Delaware, Florida, Kentucky, Maryland, Nevada, New Mexico, New York, Pennsylvania, and South Dakota.
- *Independent voter option primary*: While the closed primary states limit primary voting to party members, several states seek to ensure that both newly registered and independent voters may participate in their primary of choice. Colorado, Maine, Massachusetts, Nebraska, New Hampshire, New Jersey, Oklahoma, and Rhode Island grant to previously unaffiliated voters the right to choose on election day the party primary in which they wish to participate. Formally affiliated party members in these states remain limited in their choice of primary.

7. The constitutionality of New York's extremely restrictive 11 month waiting period for party affiliation was narrowly upheld in *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Illinois' 23 month waiting period was invalidated in *Kusper v. Pontikes*, 414 U.S. 51 (1973).

- *Open primary*: Almost half the states use some version of the open primary,[8] in which every voter is allowed to choose on election day the primary in which they wish to vote. These states vary in whether they merely allow voters to affiliate with a party on election day, whether they give all voters every primary ballot as they enter the voting booth, or whether they ask voters before entering to choose the party primary in which they wish to vote on that day. But the bottom line is the same: any voter can vote in any primary regardless of their partisan registration status prior to the election.
- *Blanket primary*: Used in Alaska, California, and Washington, the blanket primary differs from the open primary only in that it allows voters to switch primaries for each office. A Democratic voter, for example, can vote in the Republican primary for Governor, the Libertarian primary for U.S. Representative, and the Democratic primary for State Assembly. Under the blanket primary, therefore, voters are not constrained by their partisan affiliation on the day of the election, nor are they forced to "commit" to a party by requesting only one party's primary ballot. The lower courts have uniformly upheld the constitutionality of blanket primaries. *See Callaghan v. Alaska*, 914 P.2d 1250 (Alaska 1996); *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980).

8. *See* Gerber & Morton, *supra* note 6, at 306 (listing Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming as using some version of the open primary as of 1990). Louisiana employs a nonpartisan primary election, which lists all primary candidates on the same ballot. The two highest vote-getters in a Louisiana primary, regardless of party affiliation, then advance to the general election. *See Foster v. Love*, 118 S. Ct. 464, 469 (1997) (holding that Louisiana's primary must comport with federal law requiring decisive election for federal offices to occur on specified day).

As the heated exchanges between the ballot pamphlets accompanying the initiative vote[9] and the disagreement between the political scientists who testified in the district court demonstrate, controversy exists over the relative merits of the various candidate selection techniques. There is, of course, no definitive answer to the question of which nominating technique best serves democracy: each approach has its own costs and benefits. The range of nomination techniques currently in use is, however, mute testimony to the fact that reasonable people deeply committed to democracy can disagree over which of the competing models best serves democratic values. The issue posed by this case is whether the Constitution takes that choice out of the hands of the people.

Petitioners argue that the undoubted First Amendment right of a political party to a degree of autonomy from government regulation forbids a state from requiring a political party to permit participation by independents and members of other political parties in its nominating process pursuant to a blanket primary, even when the majority of the state's voters believe that democracy would be enhanced by a system that opens the nominating process to the entire electorate without onerous transaction costs. *See California Democratic Party v. Jones*, 169 F.3d 646, 653-54 (9th Cir. 1999). Taken to its logical end, petitioners' assertion of a robust right of party autonomy that trumps the people's efforts to democratize the nominating process might call into question the decision of every state that requires some form of party primary as an integral part of the electoral process. If, as petitioners argue, party autonomy shields a political party's nondiscriminatory nominating processes from state regulation, it is unclear why states may require primaries at all when the "autonomous" party wishes to nominate by leadership selection, caucus, or convention. *See*

9. Proposition 198, opening the primary process to the entire electorate, was adopted by 59% of the electorate, including clear majorities of the members of both major parties. *See California Democratic Party v. Jones*, 169 F.3d 646, 649 (9th Cir. 1999).

California Democratic Party, 169 F.3d at 654 (citing *Lightfoot v. Eu*, 964 F.2d 865, 872 (9th Cir. 1992) (upholding state mandated primary election)).

Whatever the impact of petitioners' party autonomy argument on obligatory primaries generally, petitioners' view of a robust First Amendment right of party autonomy, which insulates party nominating processes from "outsiders," challenges the ability of states to provide for anything other than a closed primary. *See California Democratic Party*, 169 F.3d at 654-55. In all the other variants of primaries currently in use, including the closed primary, voters may move with varying degrees of ease from one party primary to another after the identities of the candidates are known. In a closed primary, the move, typically, must be made at least one month before the primary. In an open or blanket primary, the move need not be formalized, and may be carried out on election day. If petitioners are correct in arguing that the Constitution prevents the state from allowing "outsiders" to participate in an unreceptive political party's nominating process, their argument would call into question not only the blanket primary, but the open primary and the independent voter option primary, as well. *Id.*

Petitioners argue that blanket primaries are constitutionally distinguishable from open primaries and from other forms of outsider access primaries because the absence of transaction costs in blanket primaries increases the likelihood that large numbers of outsiders will crash the party's primary. *Id.* at 655-56. An empirically debatable assumption about the relative number of likely crossover voters in an open primary, as opposed to a blanket primary, is, however, a thin reed on which to base a First Amendment distinction. If blanket primaries violate the Constitution, it is difficult to imagine the continued constitutional viability of the open primaries that govern elections in nearly half the states.

Amicus believes that states should be permitted to broaden citizen participation in the election of governing officials by

eliminating the transaction costs associated with participation in the nominating processes of major parties. While a major political party's First Amendment interest in autonomy from government regulation is a real one, it is balanced by the state's countervailing First Amendment interest in involving the entire electorate in the process of selecting those who will serve as government officials. Where, as here, important but conflicting First Amendment interests in democratic governance are in rough equipoise, the Constitution does not compel the adoption of a particular conception of democracy. Ultimately, only the people can choose between the benefits of major party autonomy and the benefits of enhanced participation in the process by which governing officials are chosen.

Where, however, a state seeks to force a minor political party, which has virtually none of the benefits and governmental responsibilities of the major parties, to open its primary elections to outsiders, the weighty First Amendment state interest in involving the entire electorate in the choice of future government officials is not present. The lack of a compelling interest in opening the nomination process of minor parties to outsiders, coupled with the enhanced interest in autonomy enjoyed by ideologically defined minor parties, renders the involuntary application of open or blanket primaries to such parties unconstitutional.

ARGUMENT

I.

MAJOR POLITICAL PARTIES MAY BE REQUIRED TO PERMIT NONMEMBERS TO PARTICIPATE IN THEIR PRIMARY ELECTIONS, WHICH ARE AN INTEGRAL PART OF THE DEMOCRATIC PROCESS BY WHICH GOVERNING OFFICIALS ARE CHOSEN.

A. The State Has a Compelling Interest in Requiring Major Parties to Hold Primary Elections Open to the Entire Electorate.

Major parties in the American political system owe their dominant status to the regulatory structure in which they operate. A representational system based on single-member districts combined with an electoral system where the "winner takes all" inevitably generates two dominant parties with weak ideological underpinnings. *See* Maurice Duverger, *Political Parties* 206-28 (Barbara & Robert North trans., 1964). In the context of such a system, the process by which the major parties choose their respective candidates is, therefore, an integral exercise of the power to govern because that process will organize a choice between only two candidates who have a realistic chance of winning the general election. It is a highly selective conception of autonomy that embraces regulatory judgments that reinforce major party dominance, but rejects regulations designed to increase participation in the exercise of that dominance. Moreover, in a single-member-district system like ours, where one party is often dominant in a particular jurisdiction because of partisan gerrymandering and other incumbency advantages, the selection of a nominee by the dominant party is often the only point in the electoral process where there is an opportunity to cast a meaningful vote.

In the *White Primary Cases*, this Court recognized that, under our system, the primary elections of major parties, including the informal pre-primary elections leading up to the

primary, are integral parts of the election process by which those who are to govern are selected by the people. *See United States v. Classic*, 313 U.S. 299, 318 (1941) (Major party nominating processes can be "an integral part of the procedure of choice" in selecting governing officials.); *Smith v. Allwright*, 321 U.S. 649, 659-60 (1944); *Terry v. Adams*, 345 U.S. 461, 469 (1953) (the *White Primary Cases*). Accordingly, even in the absence of traditional state action, this Court recognized that primary and pre-primary elections by major parties are integral aspects of the election process and must, therefore, be subject to the self-executing provisions of Section 1 of the Fourteenth Amendment.[10]

In the years after the *White Primary Cases*, a spirited debate has arisen concerning the most desirable way to structure the primary elections of major political parties that function as integral aspects of the electoral process. Major party leaders, supported by thoughtful political scientists, have often argued that our system of democracy will be enhanced by limiting participation in the primary elections of major parties to persons who espouse the party's general philosophy. (Indeed, the current Republican presidential nomination contest has presented the question squarely for a national audience. *See* Keith Bradsher, *Loss by Bush Forces Debate on Open Primaries*, N.Y. Times, Feb. 27, 2000, at A33.) Autonomous, self-governing parties, it is argued, are essential to the vigorous operation of a winner-take-all, single-member-district system of democracy. Limiting participation to party loyalists, it is further argued, leads to the selection of candidates that provide the electorate with a clear

10. In the years after the *White Primary Cases*, state legislation governing the right to participate in primary elections has been subjected to constitutional scrutiny that appears indistinguishable from the scrutiny applied to general elections. *See, e.g., Bullock v. Carter*, 405 U.S. 134, 140 (1972) (invalidating substantial filing fees for running in primary election); *Gray v. Sanders*, 372 U.S. 368, 374 (1963); *Molinari v. Powers*, 2000 WL 154163 (E.D.N.Y. 2000) (invalidating unduly burdensome rules governing access to primary ballot); *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y.) (same), *aff'd*, 78 F.3d 44 (2d Cir.), *cert. denied*, 517 U.S. 1203 (1996).

choice on the issues, preserves the major parties from sabotage or strategic voting, and strengthens the ability of party activists to function at the grassroots level.

Not surprisingly, because they often control both the party organization and the "party in the government,"[11] major party leaders have been successful in persuading many state legislatures to adopt precisely such a closed conception of a major party primary. State imposed party loyalty oaths for candidates, as opposed to primary voters, have been upheld by this Court, as have "sore loser" statutes (barring a participant in a party primary from running as an independent in the general election), and bans on cross-endorsements (barring more than one party from nominating a particular candidate). *See Ray v. Blair*, 343 U.S. 214, 231 (1952) (upholding party loyalty oaths for candidates for presidential electors); *Storer v. Brown*, 415 U.S. 724, 733 (1974) (upholding "sore loser" ban on independent candidacy if participated in party primary, or was registered member of party within past year); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (upholding ban on cross-endorsements). The Court has also upheld significant state-imposed limits on the ability of nonmembers to vote in a party primary. *Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (upholding state law requiring that voter affiliate with major party eight months before presidential primary, and eleven months before nonpresidential primary); *Nader v. Schaffer*, 417 F. Supp. 837, 849 (D. Conn.) (upholding state law barring independents from voting in party primary), *summarily aff'd*, 429 U.S. 989 (1976). *But see Kusper v. Pontikes*, 414 U.S. 51, 61 (1973) (invalidating state law requiring that voter affiliate with party twenty-three months before primary); *Tashjian v. Republican Party*, 479 U.S. 208, 225 (1986)

11. *See generally* V.O. Key, *Politics, Parties & Pressure Groups* 163-65 (5th ed. 1964) (describing parties as consisting of three components: a party in the electorate, a party in the government, and professional party workers).

(invalidating state law forbidding political party from allowing nonmembers to vote in party primary).

But party leaders have not always succeeded or desired to succeed in persuading states to adopt a closed conception of a party primary election. Moved by a desire to open the processes by which governing officials are actually chosen in our democracy, many states have opted for a more open conception of the primary process that permits, even encourages, all eligible voters, regardless of party affiliation, to participate in a major party primary of choice. A state might choose an open conception of the primary process for several reasons. First, in a system of winner-take-all, single-member districts, the act of drawing district lines will often create a de facto one-party monopoly, essentially disenfranchising adherents of the hopelessly outnumbered party. *See Davis v. Bandemer*, 478 U.S. 109, 125 (1986) (recognizing cause of action for gross partisan gerrymandering). Instead of relying on the demonstrably inadequate cause of action recognized in *Davis v. Bandemer*,[12] voters and representatives, through either popular initiative or legislation, could choose to expand the franchise to the nominating stage in an effort to permit the entire electorate to participate in the selection of the almost certain winner.

Second, in an era of dramatically declining voter participation, states may seek to open the nominating process to all in an effort to stimulate participation in the electoral process by encouraging voters to participate in any election that draws their interest. Such a state interest is particularly important in areas where reciprocal partisan gerrymandering has left many

12. It has proven virtually impossible to satisfy the demanding standards imposed in *Davis v. Bandemer*. *See Badham v. Eu*, 694 F. Supp. 664 (N.D. Cal. 1988), *aff'd*, 488 U.S. 1024 (1989). The only reported case to have made out a partisan gerrymandering claim is *Republican Party v. Martin*, 980 F. 2d 943, 961 (4th Cir. 1992), and that case appears to have been wrong. *Republican Party v. Hunt*, 77 F.3d 470 (4th Cir. 1996) (unpublished opinion) (vacating and remanding in light of 1994 elections).

voters with little or no incentive to vote in the general election because the outcome is a foregone conclusion. Even in elections untouched by partisan gerrymandering, states may have adopted open or blanket primaries in the hope of stimulating voter interest in elections with shockingly low, declining patterns of voter turnout.

Finally, states may adopt open primaries in recognition of the fact that extremely low patterns of voter participation in closed party primaries tend to overvalue the power of party leaders and extreme partisans. In an effort to prevent both major party primaries from selecting candidates that are unappealing to the broad electorate, states might experiment with opening the primary to precisely that general electorate.

B. The Major Parties' Interest in Preventing Nonmembers from Participating in Their Nominating Processes Does Not Outweigh the State's Interest in Promoting Participation in Critical Stages of the Election of Government Officials.

Choosing either an open or closed conception of a primary election carries costs. Closed primaries freeze interested voters out of participating in crucial aspects of the process of selecting government officials, risk overvaluing the power of strong partisans, and reinforce a sense of alienation that depresses voter turnout. Despite the obvious costs, however, since reasonable persons can believe that closed primaries are essential means of assuring strong political parties, this Court has rejected efforts to use the Constitution to force the adoption of an open conception of the primary process. Indeed, the Court has overturned state efforts to require closed primaries only when the affiliation period was unreasonably long, or where the political parties themselves did not wish such "protection." *See Kusper*, 414 U.S. at 61; *Tashjian*, 479 U.S. at 225.

Selecting an open primary also carries costs. It weakens the ideological coherence of a major party by permitting persons who do not share the party's philosophy to exercise a role in

selecting its nominees. While such a cost is significantly lessened by the fact that the party may insist that any candidate be a party member, there is no doubt that open primaries risk blurring the already hazy ideological lines between the major parties. Open primaries also carry the risk that nonmembers will maliciously invade an opposing party's primary in order to select a weak nominee. Other voters may cross over to another party in an open primary, not because they wish to harm the party, but because they wish to hedge their electoral bets by selecting a second-best candidate in case their first choice loses in the general election. Such "strategic" voting is particularly likely in one-party settings where the primary election is the only chance to influence the identity of the winner of the general election.

In short, the central issue in deciding whether to adopt a blanket or an open primary, on the one hand, or whether to operate a closed primary, on the other hand, is whether the real benefits that flow from increasing the ability to participate in the actual selection of governing officials are outweighed by the real costs to party autonomy. The First Amendment simply does not answer that question.

C. Neither Empirical Data nor Constitutional Analysis Preclude a State from Determining That the Benefit to Democracy from a Major Party Blanket Primary Outweighs the Cost.

1. Empirical Data Do Not Support a Ban on Blanket Primaries for Major Parties.

Although California has operated only one blanket primary thus far, the data analysis that followed in its wake aids in assessing the nature and extent of the asserted injury to

California's dominant political parties.[13] How to interpret these findings remains a point of vigorous argument, and the findings vary somewhat depending on the particular race discussed. The data do not, however, resolve the policy question (much less, the constitutional issue) of whether the blanket primary is so destructive to major party autonomy so as to require judges to intervene.

- Voter turnout increased 2.4% over the previous midterm election largely because the blanket primary initiative enfranchised California's 1.8 million independent voters.[14]
- Although 15% to 20% of voters, on average, crossed over to vote in a primary of the party of which they were not a member, there is no evidence that any group in any race organized to "raid" the opposing party's elections (*i.e.*, to try deliberately to help nominate the weaker candidate of the opposition party).[15]

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13. The data analysis presented here comes chiefly from *California's Open/Blanket Primary: A Natural Experiment in Electoral Dynamics* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2000) and is available from the Institute of Governmental Studies at the University of California at Berkeley. Similar conclusions, which also use data from Washington State, appear in Jonathan Cohen, Thad Kousser & John Sides, *Sincere Voting, Hedging, and Raiding: Testing a Formal Model of Crossover Voting in Blanket Primaries*, Presented at the Annual Meeting of the American Political Science Association, Atlanta, Ga., September 2-5, 1999 (available at <http://pro.harvard.edu/abstracts/036/036006SidesJohn0.html>).

14. *See* Wendy K. Tam Cho & Brian J. Gaines, *Candidates, Donors, and Voters in California's First Blanket Primary Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 9 (draft available at <http://cho.pol.uiuc.edu/~wendy/>).

15. *See* R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting in California Assembly Races*, *in* Cain & Gerber, *supra* note 13, at ch. 6.

- Most voters who crossed over into the opposing party for the primary appear to have continued to support that party's nominee in the general election. In the gubernatorial race, for example, approximately 63% of Republican voters who crossed over into the Democratic primary ended up voting for the Democratic nominee, Gray Davis. Moreover, approximately 75% of Republicans who crossed over and voted specifically for Davis in the primary also voted for him in the general election. A similar trend was observed in the race for U.S. Senate, but scholars disagree on the extent of loyal crossover voting in elections to the state legislature.[16]
- Voters were more likely to cross over into another party's primary if that primary was more competitive than their own, if the incumbent running for reelection was from the other party, and if the partisan balance in a district was highly skewed in favor of the other party.[17]

The evidence from this single election, while hardly determinative of the issue of the desirability of the blanket primary, suggests at least that the constitutionally permissible vision of democracy that motivated voters' to pass the Open Primary Initiative has borne its intended fruits. Voters did

16. *See* John M. Sides, Jonathan Cohen & Jack Citrin, *The Causes and Consequences of Crossover Voting in the 1998 California Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 5 (analyzing gubernatorial and senate races); R. Michael Alvarez & Jonathan Nagler, *supra* note 15 (finding little strategic crossover voting in state assembly races); Thad Kousser, *Crossing Over When It Counts: How the Motives of Voters in Blanket Primaries Are Revealed by Their Actions in General Elections*, *in* Cain & Gerber, *supra* note 13, at ch. 8 (also available at <http:\\socrates.berkeley.edu\~tkousser>) (finding extensive crossover voting in some state legislative primaries that did not replicate itself in the general election).

17. *See* Cohen, *et al.*, *supra* note 13, at 28; Kousser, *supra* note 16.

not raid the opposing primary in order to force the nomination of a weak candidate. As a general rule, those voters who crossed over did so in order to help narrow the choices down to their two most-preferred candidates. As intended, the primary election became the first stage in an integrated process of democratic selection through which all voters could have the most say in who would eventually win elected office. The blanket primary enfranchised independent voters, increased participation in the primary as a whole, and gave voters an additional opportunity to express themselves when they felt their vote could make a difference.

2. Constitutional Analysis Does Not Support a Ban on Open Primaries.

Petitioners argue that the choice between an open and a closed primary is mandated by the First Amendment; the people have no latitude to assess for themselves the relative empirical costs and benefits to democracy of the two competing methods of organizing the nominating processes of the major parties. *California Democratic Party*, 169 F.3d at 653-54. Citing *Tashjian* and *Eu v. S.F. County Democratic Cent. Committee*, 489 U.S. 214 (1989), petitioners argue that this Court has recognized a constitutional right to party autonomy rooted in the First Amendment's protection of political association. Since open primaries clearly diminish a party's autonomy, therefore, they must be unconstitutional.

Petitioners' constitutional syllogism is, however, deeply flawed. Petitioners' argument focuses exclusively on the tension that exists between democracy and the First Amendment. First Amendment rights to speech, press, and association, they maintain, are designed exclusively to place limits on the majority's power to limit autonomous behavior by individuals or groups, regardless of whether the challenged regulation is designed to enhance participation in the democratic process. In short, according to petitioners, when government impinges on the autonomous behavior of some, government always wears

the black hat, even when it is seeking to enhance the ability of others to participate more fully in the democratic process. But such a myopic vision of the First Amendment that views it as unremittingly hostile to democracy fails to grasp the complex, symbiotic relationship between the two bedrock principles of our constitutional order.

Read as the Framers understood it, the First Amendment is neither exogenous to, nor hostile to, democracy. Vigorous judicial protection of speech, press, and association reinforces democracy by preserving the freedom to engage in forms of autonomous behavior that are essential to democracy's success. However, just as the First Amendment *disables* government from interfering with autonomous behavior that is crucial to democracy, it also *empowers* government to act to preserve and expand full participation in the democratic process, even when such an expansion results in a modest decrease in autonomy for some. Thus, in *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a ban on electioneering at the polls because the limitation on autonomous behavior was more than offset by the increase in the ability of voters to participate more thoughtfully in the democratic process. *Id.* at 211. Where, as here, government acts, not to limit democratic participation, but to expand the ability of individuals to participate in the democratic process, government does not act as a foe of the First Amendment, but as its implementing arm. *See South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding Section 5 of the Voting Rights Act); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding congressional abolition of English language literacy tests for voting); *Morse v. Republican Party*, 517 U.S. 186, 210 (1996) (upholding application of section 5 of the Voting Rights Act to changes in party nomination rules). Accordingly, when government acts to expand or to protect participation in the democratic process, First Amendment values are present on both sides of the constitutional equation. In such a setting, unless the democracy-enhancing interest asserted by the state is illusory or illegitimate,

First Amendment interests are in equipoise, leaving the ultimate choice to the people as a matter of policy.

This Court has repeatedly recognized that when government seeks to enhance First Amendment values by increasing the ability of individuals to participate effectively in First Amendment activities, it may impose modest restrictions on autonomous behavior that would otherwise be protected by the First Amendment. The *White Primary Cases*, for example, imposed a limitation on associational autonomy in order to enhance the ability of members of racial minorities to participate in the democratic process. Moreover, in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), this Court upheld a state-imposed limit on the First Amendment autonomy of individuals to contribute unlimited sums to political campaigns because the restrictions were reasonably related to efforts to foster public confidence in the democratic process by removing the appearance of corruption. *Id.* at 907; *see also id.* at 912 (Breyer, J., concurring) ("The Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many."); *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). Similarly, in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*Turner I*), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), this Court upheld regulations requiring the owners of cable television stations to broadcast the signals of over-the-air broadcasters because, although the content-neutral "must carry" regulations undoubtedly impinged on the autonomy of the cable broadcasters, they were reasonably related to enhancing the First Amendment interests of other participants in the cable broadcast process. *Turner* I, 512 U.S. at 663; *Turner II*, 520 U.S. at 224; *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 675 (1998) (upholding modest intrusion into autonomy of public television broadcaster designed to enhance the ability of unpopular candidates to participate in debates); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990) (upholding independent expenditure limits on corporations

designed to protect against the "distortion" of state and local elections caused by massive wealth disparity).

When due weight is given to California's First Amendment interest in enhancing the capacity of large numbers of individuals to participate in the democratic selection of governing officials, petitioners' First Amendment argument collapses. The bulk of the Court's cases in this area do not involve an effort to expand the ability of individuals to participate in the democratic process. Thus, the *White Primary Cases* involved an effort by a political party acting without formal state assistance to *prevent* members of racial minorities from voting in its primary. *Rosario*, *Kusper*, *Nader*, and *Bullock* all involved efforts by the state to *limit* participation in a primary. Whatever the outcomes of such cases, they do not involve a state seeking to expand the right to vote. Similarly, *Eu* and *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), involved government efforts to *silence* political parties. Once again, whatever the outcome of such cases, they do not involve a state seeking to *enhance* First Amendment participation in democracy. And while *Eu* is phrased in terms of protecting party autonomy against government regulation, it is the autonomy to speak, not to exclude individuals from voting.

When this Court has been confronted with legislative efforts to expand the ability to participate in democracy, it has recognized the formidable nature of such an interest. Thus, in *Morse v. Republican Party*, 517 U.S. 186 (1996), the Court applied Section 5 of the Voting Rights Act to a major party's decision to alter its internal party rules governing nomination, despite the dramatic incursion on party autonomy caused by requiring a political party to pre-clear its internal rules. *Id.* at 186-87. *Morse* merely continued the Court's tradition of deference to legislative efforts to enhance participation in the democratic process that initially emerged in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Not surprisingly, when the Democratic-controlled state legislature attempted to prevent the Republican Party of Connecticut from broadening the ability of nonmembers to vote in its primary, the Court struck down the state's effort to prevent such an expansion of the franchise. *Tashjian*, 479 U.S. at 229. To be sure, the *Tashjian* opinion is phrased in terms of party autonomy, but, as in *Eu*, it is the autonomy to enhance participation in the democratic process, not to restrict it.

The only case in which this Court has questioned the constitutionality of a legislative effort to expand the franchise is *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), where the Court declined to enforce Wisconsin's effort to bind delegates to the Democratic National Convention to vote in accordance with the results of the state's open presidential primary despite Democratic National Convention rules forbidding the selection of presidential delegates by open primary. *Id.* at 126; *see also Cousins v. Wigoda*, 419 U.S. 477 (1975) (holding that the Illinois state courts had no power to force the National Democratic Party to seat an Illinois delegation that violated the party's delegate selection rules). *LaFollette* is, however, a federalism case, not a general license to political parties to ignore legislative judgments in favor of open primaries. The Court stressed the extraterritorial nature of Wisconsin's attempted regulation of the Democratic National Convention, and noted that a single state lacked power to purport to engage in extraterritorial regulation of a presidential election that is uniquely national in scope. *Cf. Saenz v. Roe*, 119 S. Ct. 1518, 1526 (1999) (recognizing that the Privileges and Immunities Clause of the 14th Amendment limits state efforts to regulate certain uniquely national interests). Indeed, the *LaFollette* opinion is careful to avoid casting doubt on the use of the open primary in state and local elections.[18] 450 U.S.

18. California has avoided any collision with *LaFollette* by providing for presidential primary ballots coded by the party affiliation of the voter so that parties could calculate votes for delegates based solely on the votes of party members. *See* Cal. Elec. Code §§ 15151(3), 15375(C); 15500 (West 1999).

at 121. *LaFollette* is, therefore, the federalism analogue of *Oregon v. Mitchell*, 400 U.S. 112 (1970), where this Court ruled that Congress lacked the power to lower the voting age to 18 in state and local elections, but possessed the power to do so in federal elections. *Id.* at 130. Similarly, while California may not seek to engage in extraterritorial regulation of the presidential election, it possesses the constitutional power to expand the franchise in major party primary elections that take place entirely within the State of California.

II.

MINOR POLITICAL PARTIES MAY NOT BE COMPELLED TO PERMIT NONMEMBERS TO PARTICIPATE IN THEIR NOMINATING PROCESSES.

A. The State Has No Interest in Requiring Minor Parties to Permit Nonmembers to Vote in Their Primaries.

Because of their past and future control of nearly all elected bodies in California, the preferential treatment and benefits state and federal law accords them,[19] and the general bias in favor of the two established parties fostered by the winner-take-all electoral system used throughout the state, the Democrats and Republicans cannot use the First Amendment to shield themselves from a voter-initiated measure seeking to expand participation in the selection of their candidates. The state has a compelling interest in fostering participation by the governed (*i.e.*, adding to rather than subtracting from the totality of First Amendment activity in California politics) in elections that determine who will be their governors.

19. *See, e.g.*, 26 U.S.C. §§ 9003, 9004, & 9008 (1994) (establishing different rules for public funding of minor and major party presidential primary campaigns and conventions).

The same logic does not hold, however, for minor party primaries.[20] Minor parties in our democratic system do not deal in power; they deal in ideology and ideas. *See* Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, *Third Parties in America* 8-9 (1984). Thus, to the extent the government's power to regulate the primary elections of major parties flows from the fact that major party primaries are crucial way-stations on the road to power, that justification cannot be deployed in support of efforts to regulate the nominating processes of minor parties.

In its ballot access cases, this Court has described the distinct and "significant role that third parties have played in the political development of the Nation." *Illinois v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). "Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining office." *Id.*; *see also Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of the challenges to the status quo have in time made their way into the mainstream."); *Munro v. Socialist Workers Party*, 479 U.S. 189, 200 (1986) (Marshall, J., dissenting); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (Douglas, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957). As the premier text on the subject of minor parties explains:

> [T]he power of third parties lies in their capacity to affect the content and range of political discourse, and ultimately public policy, by raising issues and options that the two major parties have

20. California has recognized five minor parties that have the right to place candidates on the primary ballot: the Green Party, American Independence Party, Libertarian Party, Natural Law Party, and Reform Party. *See* Cal. Elec. Law § 5100 (West 1999) (establishing rules for qualifying as a political party).

> ignored. In so doing, they not only promote their cause but affect the very character of the two party system. When a third party compels a major party to adopt policies it otherwise may not have, it stimulates a redrawing of the political battle lines and a reshuffling of the major party coalitions.

Rosenstone, *et al.*, *supra*, at 8-9.

California's minor parties are thus nearly pure First Amendment creations. They exist as banners of protest against the two major parties or as interest groups using the ballot box to promote a particular ideology, rather than as electoral institutions used principally to select governmental leaders. The state's interest in fostering electoral participation, which is dependent on a theory of democratic legitimacy holding that representatives in government ought to enjoy as much electoral support as possible, therefore cannot possibly apply.

B. States May Not Interfere with Minor Party Autonomy in the Absence of a Significant Government Interest.

Stripped of its participation-enhancing justification for regulation, California's effort to force minor parties to open their nominating processes to outsiders must fail, especially since the ideological complexion of most minor parties gives rise to an intense associational interest rooted in common commitment to a narrow ideology that cannot be matched by major "big tent" parties. *Cf. Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (emphasizing the size, selectivity, and seclusion of an organization in assessing its freedom of association).

Although this Court declined in *Buckley v. Valeo* to grant minor parties a blanket exemption from campaign finance regulation because they were unlikely to be in a position to exercise power, the Court recognized that the special status of minor parties in our system of democracy required a tailoring of the constitutional rules. 424 U.S. 1, 70-75 (1976). Thus, under *Buckley*, minor parties are permitted to exempt themselves from

contribution disclosure rules upon a showing that their controversial nature would pose a risk of retribution to financial supporters. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-102 (1982) (applying *Buckley*'s differential standard for contributions to minor parties to law regulating campaign disbursements). Similarly, the *Buckley* Court recognized that the unique status of minor parties might render aspects of the campaign financing law unconstitutional as applied to them in subsequent litigation. *Buckley*, 424 U.S. at 74. This case poses a classic example of a statute that is constitutional on its face, and as applied to major parties, but that cannot constitutionally be applied to minor parties because the state lacks a credible interest in doing so. *See Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971) (explaining that "sometimes the grossest discrimination can lie in treating [parties] that are different as though they were exactly alike").

In *Tashjian*, this Court invalidated a Connecticut statute that forbade the state's Republican Party from permitting nonmembers to vote in its primary. Connecticut sought to justify the restriction by arguing that it was designed to protect the Republican Party against its ill-considered decision to permit outsiders to vote in its primaries. In fact, the prohibition was a thinly veiled attempt by the governing Democratic Party to prevent the Republican Party from seeking to expand its electoral base. Taking Connecticut's justification at face value, however, the prohibition would still be unconstitutional because the state simply may not purport to restrict the First Amendment activities of groups and individuals for their own good. Such an exercise in restrictive paternalism is not a legitimate reason to impinge on First Amendment behavior. Lacking a legitimate justification, the prohibition in *Tashjian* was clearly unconstitutional.

In this case, California has articulated a powerful justification for regulating major party primaries, not to protect major parties against themselves, but to open up crucial aspects of the electoral process to otherwise excluded voters. But that justification is absent as applied to primaries that are not integral

aspects of the choice of a governing official. As in *Tashjian*, therefore, California lacks a legitimate democracy-enhancing justification for its effort to regulate who can vote in a minor party primary. Accordingly, as in *Tashjian*, the statute is clearly unconstitutional as an intrusion on First Amendment behavior that cannot be justified by a correlative increase in the ability of others to participate more fully in the selection of governing officials.

C. California's Blanket Primary Severely Intrudes on Minor Parties' Protected Sphere of Autonomy.

Whereas average crossover voting into major party primaries approximated 15% to 20% of the total major party primary vote in the 1998 California primary, the story is quite different for the minor party primaries. Although contested races in minor party primaries are rare, the evidence from the 1998 primary demonstrates that the magnitude of the crossover vote can often make the participation by minor party members irrelevant.

Tables 1 and 2 describe the overwhelming impact of the blanket primary on minor party members' ability to nominate a candidate of their choice. Depending on the office, turnout in the 1998 primary dwarfed previous average levels by a factor between 3 and 20. In effect, the minor party primaries became fora in which major party members could determine in a systematic way who would "speak" for the party in the general election.

Table 1: Average Number of Votes Cast in Contested Minor Party Primaries in 1968-1996 versus those cast in 1998[21]

	1968-1996 average	1998	Increase
Governor N =	11,695 8	37,077 1	3:1
Lieutenant Governor N =	12,865 5	141,128 1	11:1
Secretary of State N =	6,357 2	127,609 1	20:1
Attorney General N =	(n/a) 0	137,946 1	(n/a)
Insurance Commissioner N =	5,400 1	159,307 1	30:1
U.S. Congress N =	536 16	4,343 1	8:1
State Assembly N =	314 33	3,469 1	11:1

21. The source for Tables 1 and 2 is Christian Collet, *Openness Begets Opportunity: Minor Parties and the First Blanket Primary in California*, *in* Cain & Gerber, *supra* note 13, at ch. 11. N refers to the number of contested minor party primaries used in computing the average turnout for a race for that office. Only the Peace and Freedom Party and the Libertarian Party had contested primaries in 1998.

Table 2. Share of Total Primary Vote Received by Minor Party Primary Candidates in California, 1994 and 1998

	1994	1998
Governor	0.2%	0.7%
U.S. Senate	0.2	0.8
U.S. House	0.3	2.2
California Senate	0.3	3.4
California Assembly	0.4	3.0

If the legal and political differences between major an minor parties are insufficient to warrant a distinct method of constitutional analysis, surely the differential impact both in kind and degree of the blanket primary cautions against applying a one-size-fits-all-parties approach. Of course, outsiders may also have cast decisive votes in major party primaries so as to alter who speaks for that party in the general election. However, the blanket primary for them does not systematically swamp any competitive primary race nor does it threaten the major parties' very reason for being. For the major parties, the blanket primary merely frontloads into the primary election the preferences of the entire electorate in their selection of who should win the office.

For minor parties though, their "voice" in the general election is really all they have. To allow members of the establishment parties to change its pitch and tone contracts, rather than expands, the totality of First Amendment activity occurring in California elections.

CONCLUSION

For the above-stated reasons, Proposition 198 should be upheld as applied to major party primary elections, but should be declared unconstitutional as applied to the primary elections of minor parties.

Respectfully submitted,

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