

POINT / COUNTERPOINT

PARTY AUTONOMY AND TWO-PARTY ELECTORAL COMPETITION

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There is widespread sympathy these days for giving U.S. voters much more freedom and choice in making their selections. Some see choosing between only two parties as the political equivalent of not having cable television—excusable in the fifties, but not in the modern era. Even the increasingly prevalent use of the term “duopoly” for a two-party system has a pejorative implication of unnatural constraint.¹ The term “competition” in U.S. politics has traditionally meant only that the voter has more than just one viable candidate, party, or option to choose from.² Now, however, there are new claims to be assessed: that two parties are not sufficient given the complexities of modern society,³ and, more to the point of this Article,

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¹ Consider, for example, the use of the term “duopoly” in the titles of two recent law journal articles that are critical of the power that major parties have to entrench themselves: Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331, and Daniel R. Ortiz, *Duopoly Versus Autonomy: How the Two-Party System Harms the Major Parties*, 100 COLUM. L. REV. 753 (2000).

² I concur with Richard Hasen’s comments on the partisan lockup model: “Although two parties are better than one, it is not so clear that three are better than two, or even that two parties being influenced by third parties are better than two parties not so influenced.” Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 726 (1998). There is no theoretical framework that allows one to assert with confidence that proportional representation is more competitive than winner-take-all systems. A review of the political science literature on congressional elections illustrates that the central issue of competition is the problem of uncontested and incumbent-dominated seats, and not the lack of third-party threats. See GARY C. JACOBSON, *THE POLITICS OF CONGRESSIONAL ELECTIONS* 45-46 (2d ed. 1987) (noting that the incumbency factor can discharge opposition since “[m]any incumbents win easily by wide margins because they face inexperienced, sometimes reluctant challengers who lack the financial and organizational backing to mount a serious campaign for Congress”).

³ For an example of the strong advocacy of multipartyism, see DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: THE CASE FOR PROPORTIONAL REPRESENTATION*

that voters should be free to participate in several party primaries simultaneously.⁴ The desire to have more choices has been amplified, and perhaps distorted, in recent years by the popularity of economic modes of analysis that suggest many parallels between markets and elections.⁵ As highly competitive markets with numerous small firms tend to spur product innovation and lower prices, then perhaps giving voters more choices will result in better representation. But is it always true that offering voters more choices is necessarily better?

For those who would answer yes to the previous question, the Supreme Court's recent decisions in *California Democratic Party v. Jones*,⁶ striking down California's blanket primary system, and in *Timmons v. Twin Cities Area New Party*,⁷ defending a ban on fusion candidates in support of a two-party system, erect new judicial barriers to a better democracy. Instead of promoting more choice, these decisions seem to some to restrict voter choices and weaken the prospect of minor party challenges. I argue against the prevailing assumption that more choices necessarily result in better democracy. Democratic theory recognizes numerous forms of legitimate party systems and electoral rules, and gives us no basis to conclude that multiparty systems are more democratic than two-party systems, or that closed party nomination rules are less democratic than open or blanket systems that offer voters more choices. All conform to the basic requirements of a democracy as laid out by Joseph Shumpeter, Robert Dahl, Anthony Downs, and other modern theorists.⁸ Looking

ELECTIONS IN THE UNITED STATES (1993). Amy even goes so far as to call the two-party system a "monopoly." *Id.* at 7.

⁴ So far this position has found support with such political scientists as Elizabeth Gerber and Jonathon Nagler who testified at the *Jones* trial, and from legal scholars such as Richard L. Hasen, *Do the Parties or the People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 817 (2001), Daniel R. Ortíz, *supra* note 1, at 766-74, and Samuel Issacharoff, *Private Parties With Public Purposes: Political Parties, Associational Freedoms and Partisan Competition*, 101 COLUM. L. REV. (forthcoming 2001).

⁵ The strongest statement in favor of this approach is in Samuel Issacharoff & Richard H. Pildes's article, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 647-48 (1998) (arguing for a shift in public law thought similar to the shift in corporate law scholarship—towards markets for partisan control).

⁶ 120 S. Ct. 2402 (2000) (holding that California's blanket primary violated political parties' associational rights).

⁷ 520 U.S. 351 (1997) (holding that Minnesota's fusion ban does not violate the First and Fourteenth Amendments).

⁸ See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 3 (1956) (arguing that "democratic theory is concerned with processes by which ordinary citizens exert a relatively high degree of control over leaders"); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 20 (1957) (using economic models to show that "democratic

at the effects of implementing a blanket system, there is no compelling state reason for forcing parties to adopt such rules when they would quite understandably prefer not to. Moreover, I argue that letting the parties decide how to bestow their party labels with only minimal constitutional constraint serves important functional purposes in a two-party democracy. It also saves the Court from being a party to yet another, unnecessary lock-in of one particular representational theory (i.e., hypercentrism).

There are two basic questions raised in *California Democratic Party v. Jones*. The first, largely a political science question, concerns the relative merits of different nomination systems and whether it can be said indisputably that a blanket primary is better than a closed primary. I will argue that it cannot. The second question is whether the state should be allowed to impose a nomination system upon the parties. Based on a principle of functional party autonomy, I will argue that the answer is no.⁹ While V.O. Key's work usefully reminds us that party ties can also be found between elected representatives and the general electorate,¹⁰ the central question in *Jones* concerns the party organization's right to establish the process and criteria by which it officially confers its party label upon candidates on the November ballot. Whether a significant number of party registrants and some elected officials might have favored the state's action is not relevant since the question at issue concerns the official party organization.

In the sections that follow, I will first set out evidence concerning the relative merits of different primary nomination systems. Much of this is derived from recent political science work in this area, especially a recent study of California's only election under the blanket primary system.¹¹ Secondly, I will consider the case for the Court's intervention based on a functional theory of party autonomy.¹²

governments act rationally to maximize political support"); JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (3d ed. 1950) (describing democracy in economic terms and as a "competition for political leadership").

⁹ The term "party" in this discussion refers to the official party organization.

¹⁰ See V.O. KEY, JR., *POLITICS, PARTIES AND PRESSURE GROUPS* 163-65 (5th ed. 1964) (contending that party affiliation within the body of voters as a whole has a "social reality").

¹¹ See *VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY* (Bruce E. Cain & Elisabeth R. Gerber eds., forthcoming 2001) [hereinafter *VOTING AT THE POLITICAL FAULT LINE*] (exploring the impact and outcome of California's blanket primary election on political parties and the election process).

¹² Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A*

Unlike the position taken by the Brennan Center for Justice in the *Jones* litigation and by Rick Hasen in this volume, this theory does not distinguish between major and minor parties and does not hold that minority parties deserve different or greater protections than major parties themselves. I argue that the function and value of protecting minority voices (such as activists and party supporters with noncentrist positions) within the major parties is as valuable as protecting the minor parties. Finally, I will consider the question of how to reconcile the Court's intervention with my general aversion to judicial interference with the political sector. I argue that in *Jones*, the Court acted to prevent the state from the unnecessary lock-in by initiative of a particular theory of competition (i.e., hypercentrism). In other areas, such as redistricting, I have opposed the Court's attempt to define criteria of fairness that would lock in rigid and highly disputable theories of representation.

I. THE BLANKET PRIMARY CONSIDERED

The basic political science question at the core of the *Jones* case is whether the blanket primary system enacted by Proposition 198 imparts any important, let alone compelling, state interest on California's electoral system. This divides into an empirical assessment—what are the actual effects of implementing a blanket system?—and a normative/legal assessment—to what degree are the measurable effects important for a democratic state and how do they fit into a sensible scheme of legal regulation? At the *Jones* trial and in subsequent studies of the blanket primary's impact in the one California election before the Court overturned Proposition 198, political scientists examined many different possible effects, such as the blanket primary's impact on campaign spending levels and incumbency reelection rates. Some of these causal relationships are valuable in assessing the pure policy problem of predicting what might happen when blanket rules are put in place, but do not address core state interests. The primary goal of imposing the blanket system was not to lower campaign costs or incumbency reelection rates. Indeed, there is evidence that some of these effects went the other direction; for example, incumbents were rewarded with even more

support under the blanket system.¹³ In general, the ancillary empirical findings serve to remind us that any set of rules has both good and bad unintended effects.

The two potential state interests I want to focus on are higher participation and ideological moderation.¹⁴ With respect to the former, it is clearly important for a democracy to have extensive participation by its citizens for several reasons. First, it prevents skewed or biased outcomes that may occur when key segments of the electorate are not active participants. Unless the portion of those who actually vote is representative of the entire population as a whole, election outcomes can get skewed.¹⁵ In that case, a process that yields biased decisions can lose legitimacy in the eyes of citizens who feel shut out. Finally, since participation is partly educative—i.e., people inform themselves in order to make their choices—getting people to participate raises awareness and knowledge of the pertinent election issues. So if there is a strong and narrowly tailored link between the blanket system and wider participation, the state might plausibly have an important reason for imposing the blanket system upon the parties.

But is it true? A blanket primary system is defined as one that allows voters the freedom to vote in any party election he or she chooses for each race. Thus, a voter can vote in the Republican primary for the president, the Democratic primary for state senator,

¹³ See Anthony M. Salvanto & Martin P. Wattenberg, *Peeking Under the Blanket: A Direct Look at Crossover Voting in the 1998 Primary*, in VOTING AT THE POLITICAL FAULT LINE, *supra* note 11 (manuscript at 184, 200-01) (hypothesizing why incumbents have more support under blanket primary systems).

¹⁴ The majority opinion in *Jones* reviewed seven alleged state interests and found that many of them were restatements of one another or were otherwise not compelling. My judgment that participation and moderation are plausible candidates is based on the real empirical effects of rule changes on voter behavior rather than the vague, largely rhetorical claims of the defendants.

¹⁵ The argument for adverse effects on the poorest segments of the population is made in FRANCES FOX PIVEN & RICHARD A. CLOWARD, WHY AMERICANS DON'T VOTE 103-12 (1988) (noting the historical trend that the majority of those not registered to vote have low incomes, which has historically skewed politics away from poorer constituencies). The dissenting view can be found in RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 13-36 (1980) (examining the effects of socioeconomic status on voter turnout while concluding that income does not have a strong, independent effect on turnout). An even more skeptical viewpoint argues that U.S. voting does not differentially suppress turnout among people with low and high levels of education. See Jonathan Nagler, *The Effect of Registration Laws and Education on U.S. Voter Turnout*, 85 AM. POL. SCI. REV. 1393, 1393 (1991) (concluding "that restrictive registration laws do not dissuade individuals with lower levels of education any more than individuals with higher levels of education").

and so forth. Since there is no restriction by party affiliation, independents and party registrants can freely enter any party's race. In a closed primary, only those who are registered with the party (typically some specified number of days in advance of the election) can vote in that party's primary. Independents and other party registrants are not allowed to participate unless they affiliate with that party prior to the election. In an open primary system, there is no prior party registration requirement, but the voter is allowed to take only one party ballot and may not cross party lines for different races. Finally, in the semi-open systems, independents are allowed to cross party lines, but no other party registrants are allowed to do so.

The expectation that the blanket primary system might increase participation is based on the understanding that, at a minimum, independents would be able to vote in contests from which they were previously excluded, as well as the belief that some party registrants might become more energized by the opportunity to participate in another party's primary. The 1998 California primary provided a natural experiment for these predictions. With the blanket rules in effect, the turnout proved to be 29.8% of the eligible vote. Comparing this with the three previous non-presidential California primaries beginning with 1986, the 1998 figure represents an increase of 2.4% over the closed primary average of 27.4%. As Wendy K. Tam Cho and Brian Gaines demonstrate, assuming a constant turnout rate among partisans and nonpartisans, the surge can be completely explained by the addition of the nonpartisan registrants.¹⁶ They conclude that there is no obvious sign in the aggregate data that the blanket primary energized party registrants or that the surge carried over into the general election in November.

In sum, the effect of the blanket primary system is very modest in size and restricted to the primary election only. Furthermore, the effect comes about mainly for the purely mechanical reason that independents were given the right to vote in partisan primaries without having to bother to register with a party. The significance of this last point is that the state could have essentially achieved the same modest increase in a less-burdensome manner by simply allowing independents to vote in partisan primaries. Allowing Democrats to vote in Republican contests and vice versa contributed little to the

¹⁶ See Wendy K. Tam Cho & Brian J. Gaines, *Candidates, Donors, and Voters in California's First Blanket Primary Elections*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 249, 255-57) (arguing that the blanket primary system did not significantly increase crossover participation between the parties).

participation goal. But even more importantly, there are more narrowly tailored ways to dramatically increase participation—such as Sunday voting, compulsory voting, combining automatic voter registration with the application for a motor vehicle license—that California and other states have not seen fit to implement.¹⁷ How compelling can this interest in participation be if states choose to ignore the measures that would clearly improve general turnout dramatically in favor of a measure which modestly affects the primary election only? Moreover, the assumption that primary turnout needs to be increased only makes sense if one assumes that we are trying to set up a two-step general election process. But this is precisely the question at issue: should the primary be thought of as another general election or as a way for the parties to nominate their candidates? If one takes the latter view, then turnout is an internal issue for the parties to resolve, not a state interest.¹⁸

The second possible interest that a state might have in imposing a blanket system upon the political parties is to strengthen their incentives to nominate more moderate candidates. Although no one at the *Jones* trial or in subsequent studies has produced evidence that candidate extremism has become a major problem in California, the story of how Proposition 198 got onto the ballots suggests what its authors might have had in mind. In 1992, a moderate Republican candidate, Tom Campbell, lost to a conservative Republican candidate, Bruce Herschenson, who then went on to lose to a liberal Democrat, Barbara Boxer, in the general election. Campbell and other moderates believed that he would have beaten Boxer in the November contest had the closed nature of the Republican primary process not precluded a moderate winning the nomination. Fearing that the party would remain captured by the conservative and Christian right elements as long as they were protected by closed party rules, Campbell, with Silicon Valley support, set out to rescue the Republican Party by changing its rules to allow independents and

¹⁷ See G. Bingham Powell, Jr., *American Voter Turnout in Comparative Perspective*, 80 AM. POL. SCI. REV. 17 (1986) (providing an empirical comparison of U.S. voter turnout and the turnout rates of other democratic nations).

¹⁸ See Nathaniel Persily, *The Legal Regulation of Party Nomination Methods: California Democratic Party v. Jones*, John McCain, and Beyond, Paper Delivered at the American Political Science Meetings (Aug. 31-Sept. 3, 2000) (arguing for more judicial protection for party organizational autonomy by contending that voter turnout should be a party preoccupation and not a state concern), available at <http://pro.harvard.edu/papers/034/034013PersilyNat.pdf>.

crossover Democrats to vote in the Republican primary.¹⁹ In short, it would be fair to characterize Proposition 198 as an attempt by one faction of the Republican Party to use state law to gain advantage over another faction.

The assumption that crossover voters would help moderate candidates is supported by several academic studies. Comparing the ADA scores of members of Congress elected under different primary systems, Elisabeth Gerber and Rebecca Morton show that candidates elected under open, blanket, and nonpartisan primaries are more moderate than otherwise similar candidates elected from closed primaries.²⁰ Other studies show that open primary states produce a higher proportion of mixed-party Senate and House delegations.²¹ Looking at the experience in California, Gerber finds that moderates won fifty percent of all state assembly primary contests in 1998 under the blanket primary rules as compared to thirty-seven percent in 1996 under closed primary rules.²²

Given that the empirical relationship seems to be measurable, the question is whether it is in a state's interest to have more centrist candidates. Leaving aside for the moment the associational harm inflicted on the parties by having nominations determined by nonparty members, there is no obvious need to produce more centrism at the pre-general-election phase of the process. Two-party systems with single-member, winner-take-all rules already have very strong median voter incentives.²³ Parties correct themselves from being too extreme by learning over time that moving to the center is a dominant strategy. Bill Clinton's new Democratic policies in 1992

¹⁹ See Brian J. Gaines & Wendy K. Tam Cho, *Crossover Voting Before the Blanket: Primaries versus Parties in California History*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 14, 41-43); see also, e.g., Dave Leshner, *State's Radical Shift to an Open Primary Upheld*, L.A. TIMES, Nov. 18, 1997, at A1.

²⁰ See Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 318-22 (1998) (concluding that participation by more of the electorate in open voting systems leads to the election of more moderate candidates).

²¹ See Bernard Grofman & Thomas L. Brunell, *Explaining the Ideological Differences Between Two Senators Elected From the Same State: An Institutional Effects Model*, in *CONGRESSIONAL PRIMARIES IN THE POLITICS OF REPRESENTATION* (Peter F. Galderisi ed. forthcoming 2001).

²² See Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 291, 309-12) (analyzing the moderation effect of blanket primaries).

²³ See DOWNS, *supra* note 8, at 115-17 (borrowing from spatial competition theory in economics to demonstrate the pull of the median voter).

were built on correcting the errors of earlier, more liberal candidates. Anticipating the need to field winnable candidates in November, candidates will moderate their positions in the primary, and if the party base values winning enough, activists will compromise their principles. The tension between electoral and ideological considerations is commonplace in political parties in all democracies, but it does not prevent many parties from moving to median positions when they so choose. Ironically, it could even be argued that if blanket primary systems were perfectly successful, voters would have less choice. Median voter logic would drive the candidates to nearly identical spots in the center, reducing the selection to a difference in labels, not policies.

In sum, there is no evidence that median voter incentives are weak in the U.S. two-party system, nor that U.S. democracy is flawed because one or both parties sometimes choose to offer noncentrist candidates. There are cycles of polarization and moderation in U.S. history, but there is no evidence that this is destructive to a democracy. Arguably, we might even be better off with more distinct ideological choices. The value of moderation is disputable, however, and certainly cannot be equated with other broad democratic principles such as equality, nondiscrimination, and protecting the integrity and viability of the electoral system. At best, hypercentrism gives normative value to an extreme version of Downsian theory, which is no more democratic than many competing doctrines such as the responsible party theory that Professor Hasen so harshly criticizes in his counterpoint piece.²¹

II. ASSOCIATIONAL HARMS AND PARTY AUTONOMY

Militating against the alleged state interests in furthering turnout and the prospects of centrist candidates is the harm that was inflicted upon California's parties and its two-party system when the blanket primary rules were imposed by a majority vote in favor of Proposition 198 in 1996. I want to break this discussion into two parts: the specific harms inflicted upon the parties by the blanket system and the general harm against party autonomy and a two-party system.

Both the major and minor parties in California perceived the blanket system as a threat to their capacity to carry out fundamental party functions, including fielding support and giving their party label

²¹ See Hasen, *supra* note 4, at 820-26 (criticizing responsible party government scholars).

to candidates running for elective offices. By definition, political parties are teams of individuals who come together to coordinate resources and efforts to elect individuals who will work on behalf of common ideas and policies.²⁵ What distinguishes political parties from interest groups is that the former officially nominate candidates under their name (i.e., party label) while the latter do not. Additionally, in certain situations, the parties may receive state money to run campaigns and hold conventions. Otherwise, parties and interest groups can be very similar, especially in an era of independent spending. It is widely acknowledged that interest groups and other private political associations should have the unfettered right to determine the governance of their internal affairs and the beneficiaries of their support. Therefore, another way to frame the party rights issue is to ask how much of the freedom normally accorded to interest groups should be forfeited when a group places its label next to a candidate's name on a ballot, and why. Arguing for party autonomy, I would advocate only taking away what is necessary to prevent racial discrimination and maintain the orderly management of the ballot.

In *Jones*, the state would have required the parties to allow independents (who had chosen not to affiliate with any party) and other party registrants (who had chosen to affiliate with another party) to participate in the selection of the parties' official nominees.²⁶ The evidence at the trial and in subsequent studies is quite clear: independents and registrants of other parties will take the opportunity to cross over in greater numbers than in the closed primary system that existed prior to Proposition 198.²⁷ The reason for this is simple. Although theoretically under a closed system, voters could re-register in order to participate in another party's primary, the opportunity and transaction costs of doing so are considerably higher. The voter

²⁵ See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 364-66 (Barbara North & Robert North trans., Methuen & Co. Ltd. 1969) (1951) (discussing external sources of party development as based on the need of the organization to develop electoral support and nominate candidates).

²⁶ See *Cal. Democratic Party v. Jones*, 120 S. Ct. 2402, 2409-10 (2000).

²⁷ See R. Michael Alvarez & Jonathan Nagler, *Should I Stay or Should I Go? Sincere and Strategic Crossover Voting in California Assembly Races*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 161) (examining Assembly district crossover voting); Thad Kousser, *Crossing Over When It Counts: How the Motives of Voters in Blanket Primaries Are Revealed in Their Actions in General Elections*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 213) (analyzing general election voting behavior of primary crossover voters).

would actually have to go through the trouble of re-registering and would forego the opportunity to participate in his own party's primary. In most cases, voters would not care so much about one race to pay such a high price.

There are several implications of the higher crossover vote for the parties. First, under certain conditions, nonparty members can cast the decisive vote and the party can be forced to give its official label to a candidate that is not preferred by even a plurality of party registrants.²⁸ Second, a significant number of the crossover voters will be strategic, meaning they will not vote for their first preference but for a candidate who serves other motives.

Studies of the 1998 California primary revealed two main types of strategic voters: hedgers who had no competitive race in their own primary and therefore voted for the most preferred candidate in another party's primary (thereby ensuring that they at least get their second favorite candidate in November), and raiders/saboteurs who voted for the weakest candidate in order to help their own party's candidate in the fall.²⁹ While the number of raiders/saboteurs is small and the total number of strategic voters will normally be less than the total number of sincere crossover voters, it is clear that a party's nomination in the spring may be determined by a significant number of voters who will not support the nominee in November.³⁰ This raises serious questions about the authenticity and legitimacy of party nominees made under a blanket system and about the system's vulnerability to strategic manipulation.

The 2000 Michigan Republican primary illustrates the turmoil that such problems can cause.³¹ The Republicans adopted an open

²⁸ Several California counties kept count of crossover votes, and on that basis three Republican candidates in the 2000 primary in Assembly districts 61, 62, and 72 alleged that they would have won had crossover been prohibited. One of them brought suit to have the outcome reversed in light of the decision in *Jones*. The Court ruled against the candidate. *Righeimer v. Jones*, No. CIV. S-00-1522DFLPAN, 2000 WL 1346808 at *1 (Sept. 14, 2000) (rejecting the claims under the First Amendment and the California Elections Code).

²⁹ These terms are discussed in Bruce E. Cain & Elisabeth R. Gerber, *California's Blanket Primary Experiment*, in *VOTING AT THE POLITICAL FAULT LINE*, *supra* note 11 (manuscript at 1, 6-7). A summary of the findings can be found in the conclusion of the book.

³⁰ See Kousser, *supra* note 27, at 232-34 (summarizing findings of the effects of crossover voting).

³¹ See Bruce E. Cain & Megan Mullin, *Strategies and Rules: Lessons from the 2000 Presidential Primary*, in CAIN & GERBER, *supra* note 11 (manuscript at 488, 500-06) (examining the 2000 Michigan primary contest).

primary rule while the Michigan Democrats opted for a caucus procedure that took place on a different date. These conditions were similar to a blanket primary in the sense that Democrats paid no opportunity costs for voting in the Republican primary. As a result, urged on by certain Democratic leaders, a significant number of Democrats voted for John McCain in order to upset the Bush nomination and to avenge Governor Engler's actions against the Detroit schools.³² The ensuing uproar raised serious questions about the meaning and legitimacy of the election outcome.

Although Proposition 198 proponents often characterized the conflict over the blanket rules as one between the party bosses and the people, I think it should be apparent from the discussion to this point that it is more accurate to say that it was a conflict between the interests of the party as a nominating organization and the interests of legislative or initiative majorities who wanted to dictate the processes by which those organizations confer their party labels on candidates. I reject Professor Hasen's position that control over the party label can be easily separated from party endorsement and that therefore state control over the nomination process is not forced association.³³ As decades of political science research amply demonstrates, the party label has enormous informational value—indeed since a majority of the electorate tends to vote predictably along the lines of party label, it is the most important resource that the party possesses.³⁴ Giving up control of that label is a significant blow to the party's capacity to determine its nominees even if, as Professor Hasen notes, the party can refuse to support those who eventually receive it.³⁵

But perhaps the most important question raised in the *Jones* litigation is why parties should retain the right to confer party labels on candidates. If the state can determine the time, manner, and place of elections, then why should it not also dictate the process by which party labels are assigned to candidates? My argument, which was first

³² See *id.* at 502-03 (noting that some Democrats voted for McCain to get even with Governor Engler).

³³ See Hasen, *supra* note 4, at 826-37 (discussing the effect of party labels).

³⁴ Recent studies cast doubt on the thesis that voter partisanship is declining in America. One shows that independents act more like party leaners. See BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992). Another scholar has shown that partisan voting has rebounded in the nineties after a low in the seventies. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952-1996*, 44 AM. J. POL. SCI. 35, 35-50 (2000) (analyzing the relationship between partisanship and voting behavior).

³⁵ See Hasen, *supra* note 4, at 826-37 (noting that the party is not forced to associate with, work for, or endorse the nominee).

developed in work with my colleague Nate Persily, is that it is functionally important in a free, democratic system for groups undertaking party-like functions (that is, those that officially support candidates under their party labels) to have the greatest possible degree of self-determination and autonomy.³⁶ We reject, at one extreme, the notion that the political parties should be mere instruments of the state and, at the opposite extreme, that parties are entirely private organizations. Rather, they should be quasi-autonomous and, for the sake of a well-functioning two-party system, the degree of state intrusion into party matters should be kept to a minimum. Given the special history of racial discrimination, the existence of constitutional amendments that protect against intentional voting discrimination, and statutory protections against institutions that effectively deny protected groups an equal opportunity to participate, it is appropriate that the Court should limit the parties' right to exclude voters from participation based on race.

It is also appropriate for the state to set out a rational process by which a reasonable number of candidates appear on the November ballot. A primary system that restricts November ballot access to primary ballot winners and write-ins limits the ballot to a manageable number of candidates supported by groups that have received some modicum of support in the past and to candidates who have garnered more support than others from their own party. The majority in *Jones* "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion."³⁷ I would add that expecting the parties to participate in a primary while allowing the parties to require affiliation if they so desire seems a reasonable compromise, given the large participatory gain that comes from having an election (as compared to the very slight gain that comes from adopting the blanket system) and the degree of autonomy the parties get from choosing the type of primary system. But dictating the form of the primary rules goes beyond the need to conduct an orderly and fair selection process. The closed, blanket, open, and semi-open systems all serve that

³⁶ See Persily & Cain, *supra* note 12, at 800 (stressing the centrality within our system of the "[p]rinciple of [p]arty [a]utonomy," which "serves as a filter for interest group activity and under certain conditions can counteract the majoritarian bias of the American plurality-based electoral system").

³⁷ Cal. Democratic Party v. Jones, 120 S. Ct. 2404, 2407 (2000).

function equally well. As I have argued at length already, the choice of these procedures also affects the ideological content of the parties' nominees and labels—for instance, the evidence that the blanket rules might well have the effect of pushing candidates to the center—and there is no compelling state interest in promoting certain ideologies over others.³⁸

Aside from the requirements of nondiscrimination by race and of a rationally winnowed ballot, the political parties should be allowed a wide area of self-determination and autonomy. As I am not a legal scholar, I will not presume to enter into a discussion of whether the majority's decision in *Jones* is faithful to the precedents in *Tashjian v. Republican Party of Connecticut*³⁹ and *Eu v. San Francisco County Democratic Central Committee*.⁴⁰ What I can add, however, is a theoretical justification for the position that the Court has taken on party rights. Nate Persily and I have called this a "functional" theory of party rights.

The theory starts from the premise that even though parties are not mentioned in the federal Constitution, their existence is logically implied in the electoral rules established by the states. Congressional elections, for example, are fought under single-member, simple plurality rules. That means that there can be only one winner per district, and the largest vote-getter gets the seat. Under these conditions, there is a tendency for the system to consolidate into two main teams or parties and for most potential supporters of minor parties to cast their votes for major party candidates in order to avoid wasting those votes.⁴¹

As mentioned earlier, there are also strong centripetal forces operating on those parties, driving them towards the median voter.⁴² Political parties are part of the informal constitution—institutions that fill in the implied functions that arise out of the formal electoral structure. Political parties are no accident. They derive from the

³⁸ See *supra* text accompanying note 20.

³⁹ 479 U.S. 208 (1986).

⁴⁰ 489 U.S. 214 (1989).

⁴¹ For evidence of sophisticated voting in national elections, see Paul R. Abramson et al., *Sophisticated Voting in the 1988 Presidential Primaries*, 86 AM. POL. SCI. REV. 55 (1992), describing the 1988 presidential election as "an excellent opportunity to test for the presence of sophisticated voting." The most extensive analysis of the role of strategic voting and the number of parties can be found in GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* (1997).

⁴² See DOWNS, *supra* note 8, at 36-50 (exploring the causes and rationales of voting behavior).

need to organize efforts to solicit voter support for candidates and to coordinate legislative action around a common program. They exist in a no-man's land between the public and private sectors: the party as government (for example, elected officials) in the former and the party as organization (such as activists and party officials) in the latter. Leaving aside a rights-based argument that the party as organization deserves autonomy because citizen participation is protected by the First Amendment and freedom of association, I want to suggest that giving the party as organization the broadest degree of autonomy is functionally important for several reasons.

First, it protects against dominant party abuse. Dominant party abuse commonly occurs when one party controls the governorship and state legislature and uses that legislative control to pass measures that confer on it political advantage. The best example of this is, of course, the partisan gerrymandering that occurs when the party controlling the redistricting process draws the lines so as to get a better chance to win extra seats in the next election. Dominant party abuse can also take other forms, such as when one party tries to prevent another party from adopting the nomination process most beneficial to the other party. This is arguably what the *Tashjian* case was about: the dominant party trying to prevent the other party from opening its nomination process to independents to gain electoral advantage. There are those who would try to define fairness formally and have the Court rule against decisions such as redistricting plans that smack of partisan bias.³³ Others believe that it is impossible to develop unbiased standards of political fairness and have opted for bipartisan procedural approaches to remedy the situations where partisan abuse seems most likely.⁴¹

In the case of party rules, since there is no compelling reason for state action in the heightened participation and centrism arguments, or even for the parties to have the same rules, the best check against partisan abuse as I have defined it is to let each party determine its own partisan rules. By comparison, in the case of redistricting, since

³³ See, e.g., Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 88-93 (1985) (reflecting on formal districting criteria). For an approach based more on compactness, see Richard Niemi et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155, 1157 (1990) (presenting "the first comprehensive study of compactness measures").

⁴¹ See BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 159-66 (1984) (discussing some of the advantages of bipartisan gerrymandering and rules by which it might be implemented).

one cannot draw separate lines for each of the political parties for the obvious practical reason, and since there are no coherent, indisputable standards for determining fair lines, I have argued for political reforms that establish supermajority rules for legislative redistricting decisions. Since the greatest dangers in a two-party system are the possible collapse into a one-party system (e.g., Southern politics from 1948 to 1964) and the general loss of a second viable choice across the board (e.g., strong incumbency effects), autonomy from other party control assures that rules and procedures are set in the best interests of party members, and not in the interests of their opposition.

A second argument for party autonomy, which I would call protection from majority abuse, is more relevant to the facts in *Jones* than in *Tashjian*. My first reason related to the abuse of power along party lines; this second discusses abuse that transcends party lines. It should be assumed in any discussion that people all along the ideological spectrum would prefer to have their views predominate. If the two parties drift in a more polarized direction, those in the middle will be unhappy with what we in political science quaintly call the “summed Euclidian loss of utility”—the distance of the party actions from the median voter ideal.⁴⁵ If the parties drift toward the center, voters on the ends become alienated, threatening to abstain or vote for a minor party because of their “Euclidian loss.” The history of party nomination processes is that the parties tinker with rules in response to their varying inclinations either to please the base or to entice more independent and crossover voters into their ranks. In this framework, we can recharacterize the facts in *Jones* as a centrist majority (independents and moderate partisans) fixing the rules to give themselves an advantage over a much smaller minority of ideologues in the selection of candidates.⁴⁶ Even the minor parties

⁴⁵ This spatial model theory is described in William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 34 (1968) (offering “a theory about the individual calculus of voting which is . . . consistent with some known facts about the decision to vote”), and in Richard D. McKelvey & Peter C. Ordeshook, *A General Theory of the Calculus of Voting*, in MATHEMATICAL APPLICATIONS IN POLITICAL SCIENCE VI, at 32 (James F. Herndon & Joseph L. Bernd eds., 1972) (applying the calculus of voting “to permit inferences about participation in multicandidate elections”).

⁴⁶ It should be noted that that according to a comprehensive poll of the California electorate released on August 10, 2000, by the Public Policy Institute of California, only 11% of likely voters describe themselves as very liberal and 10% as very conservative, the rest saying they are moderate or only somewhat liberal or conservative. In short, true ideologues probably account for no more than 1/5 of the California population.

were swept into adopting the centrist majority's favored procedures, which Professor Hasen concedes is particularly threatening to their role as innovators and spokespersons for conscience and principle.⁴⁷ Even though the U.S. two-party system already has strong centripetal forces and fields relatively non-ideological and centrist candidates as compared to European democracies, the blanket primary supporters sought to eliminate the last element of "Euclidian loss" with a procedural coup d'état. This is no less an abuse of power than the partisan case.

Aside from these two protective functions, party autonomy has other roles. One is that it facilitates the coalition-building process for broadly based parties. Since the logic of winner-take-all election systems works against factions striking out on their own and fielding a separate slate of candidates, groups have incentives to make compromises in order to build alliances. The product of those compromises can move the party away from the median voter ideal, but the extent of this movement constantly varies with the political context and recent electoral experiences. The flexibility to move away from an electorally dominant position is important to keeping coalition partners under the big tent. It may be necessary for a party to go through a cycle of loss until new terms of compromise are offered by the groups that feel most intensely about a given issue position.

Hence, for example, it took the Democrats several disappointing elections in the eighties to abandon their unpopular position on the death penalty. Liberals made the conscious choice in the nineties to support Clinton and Gore. Had the rules been rigged in the eighties by Proposition 198 supporters, the base would have been spared the experience of learning the painful electoral lesson, but the basis for compromise and willing alliance would have been undercut as well. Since this is a counterfactual argument, I can only speculate as to the consequences, but it at least seems plausible that noncentrists could be alienated in larger numbers if they do not feel that their views are at least occasionally represented and tested by the parties' candidates. Having autonomy in these matters gives parties the freedom to compromise between ideological purity and electoral opportunity in whatever ways they think best. Imposing rules that tilt the nomination

and the rest think of themselves as moderate or somewhat liberal or conservative. MARK BALDASSARE, *PPIC STATEWIDE SURVEY: CALIFORNIANS AND THEIR GOVERNMENT* 36 (2000).

⁴⁷ See Hasen, *supra* note 4, at 837-41.

towards the median voter undercuts the need for negotiation and compromise.

Finally, there is the ultimate irony of two-party systems with enhanced median voter incentives; namely, that in equilibrium, they converge to the same point. The reason is quite simple: the median voter position is dominant and no position to the left or right can defeat it. It therefore produces a virtual version of the noncompetitive danger I referred to earlier. A two-party system becomes noncompetitive when it produces only one viable choice for extended periods of time and at various levels of the system. A virtually noncompetitive system is one in which both choices are effectively the same choice; in which technically there is a choice between two labels, but substantively there is little or no difference between them. For those at or near the median position, this describes a political nirvana, with little risk of the dreaded "Euclidian loss." But for all others, the already limited representational coverage of the two-party system becomes more limited. Giving parties autonomy saves the two-party system from becoming a meaningless exercise in labeling, and further prevents a descent into personality and character assassination politics (because that is all that is left to argue about). It is extremely ironic that many of the scholars who most strongly advocate that the Court should intervene to promote competition and choice now argue that the Court should stand back and allow a centrist electoral majority to cripple the two parties' ability to offer even two choices.⁴⁸

III. TO INTERVENE OR NOT?

So far, I have argued that the state had no compelling reason to impose blanket nomination rules upon California's political parties. Moreover, political parties should be given the greatest degree of self-determination in these matters, because it is functionally important for four reasons: protection against majority party abuse, protection against majority abuse, flexibility to create coalitions, and the

⁴⁸ See Issacharoff, *supra* note 4 (acknowledging that party positions are a product of median voter and activist pressure, but seeming to place less value than I do on the role that activists play in preventing near or complete party convergence to the median). Issacharoff explains that the core of his anti-lockup theory is that "there should be legal intervention when self-serving incumbent behavior threatens the competitiveness of the process." *Id.* (manuscript at 8). Apparently, when self-serving factions combine to lock up the field for centrist candidates and weaken the ability of the parties to incorporate the minority opinions of those on the ends of the ideological continuum, his theory has nothing to say.

prevention of convergence. Given the positions that I have taken in the past about the value of political self-correction, the losses associated with the abandonment of the political question doctrine, and the drawbacks of court-imposed institutional values,⁴⁹ how do I reconcile my support for the Court's decision in this matter with my preference for political self-correction?

A neglected aspect of *Jones* is that the blanket primary reform became a state action through the popular initiative. Encouraged by the failure of state courts to enforce the distinction between fundamental revision and mere amendment, and seeing the advantages of bypassing elected officials, the initiative is no longer the tool of last resort—direct democracy has become the preferred method of political reform in states like California with few subject matter restrictions, a highly professional initiative industry, and relatively easy requirements for placing measures on the ballot. The constituency that controls the outcome of votes on initiative measures is the set of statewide registered voters. The success and failure of these measures reflect the median voter preferences of that group. The state legislature, on the other hand, elects representatives who compete in districts based on population and not voters. Moreover, the districts are not likely to be perfectly random samples of the statewide electorate. Add in the effects of interest group lobbying, party leadership, and other nonelectoral factors, and it is not hard to see how the same measures might be treated differently in the legislature than in the initiative process. For the purposes of political debate, this tends to get subsumed under the generalization that politicians are sometimes insulated from the popular will (i.e., statewide median preference). The important point is that for all of the above reasons, we can expect political reform to continue to emanate from the initiative process.

Leaving aside the merits of this development, majorities will sometimes make institutional choices that truly address undemocratic features, such as the need for full disclosure, the prevention of corruption, and the need for weaker incumbency effects. In other instances, however, the majority may try to strengthen its control, weaken the rights of those in the minority, or override procedural justice. This leaves the court system as the sole guardian against majority tyranny and injustice. As the number of initiatives has grown,

⁴⁹ See Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L. REV. 1105, 1111 (1999) (discussing the value of judicial intervention in political issues).

so have the number of instances in which the courts have had to invalidate all or parts of measures that violate constitutional rights.⁵⁰ While there are a number of checks and balances in addition to the courts for the normal legislative process in the United States, there is nothing other than the courts in the case of initiatives. While I worry about the difficult position this puts the courts in—especially the state courts—I see no alternative. We may want to re-think the wisdom of allowing direct election of justices in states where direct democracy mechanisms thrive, or attempt to reform the initiative process to make it a more deliberative process. In the short run, the courts cannot retreat from the challenge of reviewing initiative measures with even more scrutiny than they give legislative measures.⁵¹

In the case of the blanket primary, the interests of minor parties and of ideological minorities within the major parties rightfully deserved consideration.⁵² It is safe to assume that voting majorities will sometimes be tempted to trample on the rights and interests of others. Balancing the interests of the minority against the will of the majority is the unpopular part, quite literally, of the Madisonian equation. Hence, it is no surprise that a recent poll of Californians revealed that a majority of them did not like the Court's ruling in *Jones*.⁵³ However, as I have argued before, this case is about more than

⁵⁰ See Kenneth P. Miller, *The Role of the Courts in the Initiative Process: A Search For Standards*, Paper Delivered at the American Political Science Association (1999).

⁵¹ See Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1752 (1998) ("Majorities in the representative legislature have considered, shaped, and approved referred measures; [in an initiative,] the voters' only role is to give or withhold their consent.").

⁵² Again, it is curious to political scientists that legal scholars who are willing to give special protections to minor parties will not extend the same protection to minor voices within the major parties. The problem may be that they assume the parties to be monolithic rather than aggregations of different groups and factions. When the parties are conceived as aggregations, it is then possible to see how factions of the parties, along with the independents, might combine in an initiative vote to put in place rules that favor their interests. In this sense, the minor voices within the majority parties are vulnerable to majority attempts to fix the rules to favor centrist candidates.

⁵³ See BALDASSARE, *supra* note 46, at 12 ("Most Californians are not pleased that the Supreme Court has ruled unconstitutional California's blanket/open primary..."). The poll by the Public Policy Institute of California informed respondents that the U.S. Supreme Court ruled against the blanket primary on the grounds that it violated the political parties' right of association, and then explained that this meant voters would only be able to vote in the primary of their registered party. When asked their opinion, 64% had an unfavorable opinion of the Supreme Court's decision and 28% had a favorable view. At the same time, when asked to look back on the effect of the blanket primary in 1998 on California elections, 45% said that the blanket primary had no effect, 22% said that it was a good thing, and another 22%

the rights of the parties generally, minor parties specifically, or noncentrists per se. It is also about using the state to predispose election outcomes to fall into a certain segment of the ideological spectrum and undermining the operation of the two-party system. This goes to the question of the neutrality of state action with respect to the content of political speech and representation.

Many of the most important institutional decisions have political implications. The decision to use winner-take-all rules as opposed to proportional or semiproportional rules gives advantages to some groups and not others. Unless the rules arrive from heaven on a stone tablet in the offices of some wise political science professor, their selection can be viewed as arbitrarily favoring some over others. If the state is to run an orderly election, however, it has to have some procedure. As long as the eventual winner receives majority or at least plurality support from a free electorate, the process will be democratic. There are well-known trade-offs implicit in choosing one system over another, and all systems, including proportional ones, have to cut off representation somewhere. The argument over which system is best is a non-terminating disagreement. Still, a choice has to be made for the state to function.

In the case of the blanket primary, the state had no overriding reason to impose a choice. To the contrary, there were at least four good reasons why they should have left the matter to the parties. My strongest objections to past court intervention in political reform disputes have been reserved for cases in which I felt the court locked in a particular theory of representation or institutional design, leaving the political system without the flexibility to adapt to different needs and circumstances. Hence, the extension of the rigid one person-one vote mandate beyond Congress to all elected local governments has made it difficult to create new cooperative regional arrangements by ruling out mechanisms that alleviate the fears of uncooperative smaller jurisdictions that they will be swallowed up by larger ones.⁵⁴ In *Jones*, the state was attempting to implement an initiative measure that would have locked in a theory of representational hypercentrism rather than allowing the parties to go through the natural cycles of

said that it was a bad thing. *Id.* In short, the public does not regard this issue as making a critical difference to them.

⁵⁴ *See* Cain, *supra* note 49, at 1110 ("Since . . . smaller cities were unwilling to join into any arrangement that would allow their suburban votes to be swamped by the more numerous votes of the larger, urban cities, the governance problem proved to be insurmountable.").

moderation and polarization. The neutral action was to keep control of the decision in the hands of the parties.

Most states have not opted for the closed primary system. In the 2000 Presidential primaries, for instance, only fourteen states used the closed primary system and twenty-seven Republican and twenty-two Democratic state parties adopted either open or semi-open systems.⁵⁵ The trend has been towards fully open rules, but based on the experiences of the Republican Michigan primary, we may see more movement towards semi-open systems in the next election cycle. The critical point is that letting the parties choose does not lock in any particular method as did Proposition 198.

CONCLUSION

Professor Hasen poses the question as “who controls the electoral process, major party organizations or the people[?]”⁵⁶ He proclaims his vote is with the people, although he wavers on the question of the minor parties. It should be clear from my discussion that I see this issue in entirely different terms. First, the term “the people” is his euphemism for electoral majority. Second, he provides no compelling explanation for why the majority needs to add to the already strong centripetal features of the U.S. political system, nor why independents so anxious to participate cannot register in the party they want to affect. There are no barriers to their participation other than their own decisions to declare themselves unaffiliated. Is there a compelling interest in helping them have their cake and eat it too?

Professor Hasen’s concern for minor parties and alternative voices, for some reason, does not extend to minorities within parties such as hard-core liberals and conservatives. Using the initiative, the majority will increasingly shape the rules to consolidate its power. Forgotten are the Madisonian lessons of balancing the rights of the minority and the majority. Apparently, some would have the Court lock in a preference for plebiscitary democracy. I do not wish to be counted among them.

⁵⁵ A curious feature is that open systems are not necessarily more fair in their allocation of delegates. A lot depends on whether the state uses proportional representation or nonproportional representation rules. Even odder is the fact that on some measures, such as estimated responsiveness, caucuses fare better than primaries. See Stephen Ansolabehere & Gary King, *Measuring the Consequences of Delegate Selection Rules in Presidential Nominations*, 52 J. POL. 609, 616 (1990) (describing the effect of voting rules on electoral responsiveness in primaries and caucuses).

⁵⁶ See Hasen, *supra* note 4, at 817.