STEALING THE COVERS: THE SUPREME COURT'S BAN ON BLANKET PRIMARY ELECTIONS AND ITS EFFECT ON A CITIZEN'S FIRST AMENDMENT RIGHT "TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES"

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When James Madison wrote The Federalist No. 10, he expressed strong discontent with political parties. Madison often referred to political parties as factions. He recognized that if a political party with sinister views consisted of less than a majority, relief would be supplied by the republican principle that enables the majority to defeat such a view by regular vote. In 1996, California voters shared Madison's view when they enacted Proposition 198. Proposition 198 changed California's partisan primary election from a closed primary to a blanket primary. In a closed primary system, a voter must identify with a political party affiliation when registering to vote and can vote only for candidates of that party. Under California's new blanket primary system, "all persons entitled to vote, including those not affiliated with any political party shall have the right to vote... for any candidate regardless of the candidate's political affiliation."

Under Proposition 198, the candidate of each party who wins the most votes is that party's nominee for the general election. After California voters passed Proposition 198, several of California's political parties brought suit alleging that Proposition 198 was contrary to their First Amendment rights because it:

permits voters who are not members of a particular party, who may indeed be hostile to that party's electoral interests to vote in that party's primary and thus to participate in the process by which the party defines its positions on a variety of issues and by which it chooses its [standard-bearers].

The Federal District Court for the Eastern District of California, in California Democratic Party v. Jones, reviewed Proposition 198 and found that it was within the rights embodied in the Constitution. When the Supreme Court reviewed Proposition 198, it reversed the lower court's holding, and held that California's use of a blanket primary to determine a political party's nominee for the general election placed a "severe and unnecessary burden" on petitioner's rights of political association and therefore violated the First Amendment of the United States Constitution.

Supporters of Proposition 198 argued "that the closed primary favors the election of party hardliners, contributes to legislative gridlock, and stacks the deck against more modern problem solvers." In addition, California voters adopted Proposition 198 by a "convincing margin of those..."

1 The Federalist No. 10 (Alexander Hamilton). Complaints are everywhere heard from our most considerate and virtuous citizens that... the public good is disregarded in the conflicts of rival parties and that measures are too often decided, not according to the rules of justice and the rights of a minor party, but by the superior force of an interesting and overbearing majority. Id.
2 Id.
6 Jones, 984 F. Supp. at 1289 (citing a legislative analysis explaining the blanket primary instituted by Proposition 198).
7 Cal. Democratic Party v. Jones, 169 F.3d. 646, 653 (9th Cir. 1999).
8 984 F. Supp. 1288.
9 Jones, 984 F. Supp. at 1289.
10 Cal. Democratic Party v. Jones, 120 S. Ct. 2402, 2414 (2000). The text of the First Amendment of the United States Constitution provides in part, "Congress shall make no law... abridging the freedom of speech or the right of the people... to petition the Government for a redress of grievances." U.S. Const. amend. I.
11 Jones, 169 F.3d at 649.
voting, [59.51% to 40.49%]."12 While the Supreme Court traditionally recognizes that the freedom of association protected by the First Amendment includes partisan political organization,13 it should not ignore the message of the California voting electorate’s First Amendment freedom to initiate change.14

This note analyzes the Supreme Court’s ban on California’s blanket primary law and its effect on the initiative process. Part I of this note outlines the general development of the freedom of association. Part II recounts the facts and holding of Jones. Part III discusses the development of the Supreme Court’s precedent regarding the freedom of association in the context of election law challenges. Part IV applies this precedent to argue that Jones was wrongly decided, and Proposition 198 was indeed constitutional. Finally, Part V concludes that citizens have a First Amendment freedom when they seek change at the ballot box, and this right should not be restricted through arbitrary judicial activism.

I. DEFINING THE FREEDOM OF ASSOCIATION

To understand fully the constitutional issues presented by Jones and Proposition 198, it is necessary to review the freedom of association. The First Amendment does not explicitly provide a freedom of association. However, in numerous cases, the Supreme Court has held that freedom to associate derives by implication from the explicit rights of speech, press, assembly and petition.15 The Court does not broadly construe the freedom of association. What the Court has recognized in the context of a freedom of association is a right to join with others to pursue ends having special First Amendment freedom.16 Laurence Tribe argues that Supreme Court case law suggests that government can abridge this implied freedom of association in four ways.17 These abridgments are: (1) directly punishing the mere fact of membership in a group or association; (2) compelling unnecessary disclosure of a group’s membership list or of an individual’s associational affiliations through a focused investigation or a general disclosure rule; (3) withholding a privilege or benefit from the members of a group or association; and (4) intruding on an organization’s right to exclude or not associate with those whom it does not wish to be members.18 One other way the government might intrude on the constitutional freedom of association is to interfere with an organization’s internal structure.19 For example impermissible interference on an organization’s internal structure might include attempts to control a political party’s delegate seating procedures at political conventions.20

A. “Guilt by Association” Is Usually Unconstitutional

The government infringes on the freedom of association when it arbitrarily outlaws an association or punishes individuals associated with it.21 In these cases constitutional review is twofold.22 First, an association or organization cannot be made illegal in the absence of a clear showing that the group is actively engaged in prohibited conduct.23 Second, an individual cannot be punished for joining, associating with, or attending meetings of an association or organization unless the association meets the first requirement.24 The individual, by engaging in prohibited conduct with an association, must be shown to have affiliated (a) with knowledge of its illegality and (b) with the specific intent of furthering its illegal aims by

Bisexual Group of Boston, 515 U.S. 557, 581 (1995) (holding that the right to not associate allows private parties who conduct a parade to exclude unwanted members).

12 Id.
14 U.S. Const. amend. I (providing in part that “Congress shall make no law . . . abridging the freedom of speech or the right of the people . . . to petition the Government for a redress of grievances”).
16 Tribe, supra note 15, at 1015.
17 Id.
18 Id; see, e.g., Hurley v. Irish-American Gay, Lesbian, and
such individual affiliation.\textsuperscript{25}

B. Compulsory Disclosure of Membership Lists May Violate the Freedom of Association

The government can also violate the freedom of association if, without a compelling interest, it inquires into the membership of an organization.\textsuperscript{26} Additionally, the government infringes on the freedom of association when it inquires about what specific organizations an individual has joined without a compelling reason to inquire.\textsuperscript{27} For instance, the Supreme Court has recognized that "compelled disclosure may constitute a restraint on freedom of association."\textsuperscript{28} The Supreme Court in \textit{Brown v. Socialist Workers Party}\textsuperscript{29} went further to discourage compelled disclosure of membership lists by holding a statute unconstitutional that applied specifically to force disclosure of membership lists belonging to the Socialist Worker's Party. The statute challenged in Brown required disclosure of campaign contributors and recipients of campaign disbursements. This statute would have been constitutional if it were applied in a more neutral manner and to all political parties.\textsuperscript{30}

C. Government Abridges the Freedom of Association if It Withholds Benefits or Privileges From Individuals Because They Are a Member of a Group or Association

A third situation where the government might violate the freedom of association is when it denies government benefits or privileges because an individual holds membership in a certain organization.\textsuperscript{31} For example, the Court has held that membership in the Communist Party alone does not justify denying an individual the opportunity to practice law,\textsuperscript{32} to work in the merchant marine,\textsuperscript{33} to travel abroad with the protection of a United States passport,\textsuperscript{34} to serve as an officer or employee of a labor union,\textsuperscript{35} or to work in a defense facility.\textsuperscript{36} Courts have justified denial of a governmental benefit for membership in otherwise protected organizations in very limited situations.\textsuperscript{37} For instance, persons who hate children or speak ill of them—something that the First Amendment protects—have no right to work for a public day care.\textsuperscript{38} The Court also has held that partisan political activities by federal employees must be limited if the government is to operate effectively and fairly.\textsuperscript{39}

D. The Right Not to Associate Is Also Protected by the First Amendment

The Supreme Court also recognizes a right not to associate under the First Amendment.\textsuperscript{40} In other words, individuals and associations have a constitutional right not to be compelled to support (financially or otherwise) expressive activities by organizations of which they do not approve.\textsuperscript{41} The "right not to associate" also implies that an association has a First Amendment interest in not being forced to accept unwanted members.\textsuperscript{42}

\textsuperscript{25} Id. at 1015 n.28 (citing Elfrmanj v. Russell, 384 U.S. 11 (1966)).
\textsuperscript{26} Id. at 1019.
\textsuperscript{27} Id.
\textsuperscript{28} NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463 (1958) (reversing civil contempt judgment against NAACP for refusing to disclose its membership list).
\textsuperscript{29} 459 U.S. 87 (1982).
\textsuperscript{30} Time, supra note 15, at 1019 n.61 (citing Brown v. Socialist Workers, 459 U.S. 87, 95 (1982)).
\textsuperscript{31} Id. at 1017.
\textsuperscript{32} Id. at 1017 n.44 (citing Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957)).
\textsuperscript{33} Id. at 1017 n.45 (citing Schneider v. Smith, 390 U.S. 17 (1968) (construing a federal statute narrowly so that Congress could not delegate executive officials the authority to condition employment on American merchant vessels upon nonmembership in the Communist Party)).
\textsuperscript{34} Id. at 1017 n.47 (citing Aptheker v. Sec'y of State, 378 U.S. 500 (1964)).
\textsuperscript{35} Id. at 1018 n.48 (citing United States v. Brown, 381 U.S. 437 (1965)).
\textsuperscript{36} Id. at 1018 n.49 (citing United States v. Robel, 389 U.S. 258 (1967)).
\textsuperscript{37} Id. at 1018.
\textsuperscript{38} Id. at 1018 n.54 (citing Hollon v. Pierce, 64 Cal. Rptr. 808 (Cal. Ct. App. 3d Dist. 1967) (holding that a city may discharge school bus driver who believes in the religious sacrifice of children)).
\textsuperscript{39} Id. (citing United States Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 (1973) (upholding a prohibition on federal employees taking an active part in political management or political campaigns)).
\textsuperscript{40} N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988) (holding that the forced inclusion of an unwanted person in a group infringes the groups freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints).
\textsuperscript{41} Abood v. Detroit Bd. of Educ., 431 U.S. 209, 241 (1977) (holding that nonunion employees have a constitutional right not to have their service fees used for support of ideological causes of which they disapproved).
\textsuperscript{42} Hurley, 515 U.S. at 580 (holding that the right not to associate allows private parties who conduct a parade to exclude unwanted members from the parade).
example, applying a public accommodation anti-discrimination law to a private group for the purpose of forcing that private group to reinstate a member whose views were contrary to that of the private group violates the First Amendment.\(^{43}\)

E. When Government Significantly Interferes With an Association's Internal Structure or Organization, It Violates the Freedom of Association

When the government interferes significantly with an organization's internal structure without a compelling interest, it violates the First Amendment freedom of association.\(^{44}\) For example, the Supreme Court held that when a state attempts to control defrocking procedures in a religious organization, it violates the First Amendment.\(^{45}\) The Court also has invalidated state attempts to deny a campus organization the opportunity to use state college facilities to disseminate its views.\(^{46}\) Additionally, the imposition of tort damages against boycotters who may cause injury to a business that engages in discriminatory practices violates the freedom of expression.\(^{47}\)

State interference with the internal structure of a political organization or procedures at a national political convention implicates the freedom of association.\(^{48}\) For instance, the Supreme Court has held that when a state attempts to control the procedures of a national political convention, it violates the freedom of association held by the national political party or its state equivalent.\(^{49}\) Other instances when state interference with a political organization’s internal structure violates the First Amendment occur when the state tries to prevent a political party from seeking to broaden its appeal by including nonmembers in its primary election.\(^{50}\)

II. **CALIFORNIA DEMOCRATIC PARTY v. JONES**

Until 1996, California held what is known as a “closed” partisan primary in which only persons who are members of the political party (or those who have declared affiliation with that party) may vote for that party's nominee.\(^{51}\) In 1996, California voters adopted Proposition 198,\(^{52}\) which changed California’s partisan primary from a closed primary to a blanket primary.\(^{53}\) Four political parties (the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party) brought suit challenging Proposition 198 in the United States District Court for the Eastern District of California.\(^{54}\) Each of the plaintiffs had a rule prohibiting nonmembers from voting in the party's California primary.\(^{55}\) Therefore, these four political parties argued that Proposition 198 violated their First Amendment right of association and sought injunctive relief against California.\(^{56}\) The district court, following recent Supreme Court precedent, applied a two-step analysis to determine if Proposition 198 violated the First Amendment.\(^{57}\) In applying the first step of the analysis, which was to determine the character and magnitude of the burdens that the blanket primary imposed on the political parties’ associational right, the district court concluded the burden imposed on the plaintiffs’ right of association by Proposition 198 was not severe.\(^{58}\) They further recognized that Proposition 198 might place a burden on a political party by causing it to select a...

\(^{43}\) Boy Scouts of Am. v. Dale, 120 S. Ct. 2446, 2457 (2000) (holding that application of a state public accommodation law to a private organization for the purpose of forcing inclusion of a homosexual when the organization does not agree with homosexuality violates the First Amendment and freedom of association).

\(^{44}\) *Id., supra* note 15, at 1016.

\(^{45}\) *Id.* at 1016 n.32 (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (invalidating attempted state control of the procedures of the Serbian Orthodox Church)).

\(^{46}\) *Id.* at 1016 n.33 (citing Healy v. James, 408 U.S. 169, 194 (1972) (invalidating a state college’s refusal to permit a Students for a Democratic Society chapter from holding meetings on campus)).

\(^{47}\) *Id.* at 1016 n.35 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 931–32 (1982)).
nominee different from the one that party members would select (or perhaps cause the same nominee to commit himself to positions that differ from the party position), but nonetheless concluded that this burden did not greatly interfere with the political parties’ freedom of association.59

The district court then applied the second part of its constitutional analysis, which requires a court to consider the state’s interests and weigh the strength of those interests against the particular burdens placed on the political parties’ associative right.60 The court found that California’s asserted state interests in increasing the “representativeness” of elected officials chosen by the open primary process, giving voters greater choice, and increasing voter turnout and participation in the primary, were substantial and compelling.61 Because California’s asserted state interests were compelling and Proposition 198 imposed a minimal burden on plaintiff’s right of association, the district court held that it was constitutional.62 The district court also recognized that a clear majority of voters, with a convincing margin from both major parties, supported the proposition.63 The Ninth Circuit Court of Appeals affirmed, adopting the district court’s opinion as its own.64 The Supreme Court granted certiorari and reversed.65

The Supreme Court majority, applying strict scrutiny, concluded that the single blanket primary system enacted by Proposition 198 was unconstitutional.66 The Court held that respondents’ state interests of “ensuring that disenfranchised citizens have an effective vote, producing elected officials who better represent the electorate, and expanding political debate beyond partisan concerns”67 were insufficient to justify the burden imposed by Proposition 198 on petitioners’ freedom of association. The Court concluded that state interests could not justify a “substantial intrusion into the associational freedom of members of a national political party.”68

The majority then illustrated that states have a compelling interest to ensure that the election ballot is not burdened with frivolous candidacies.69 Therefore, a state may require parties to demonstrate “a significant modicum of support” among a majority of voters, while not violating the First Amendment freedom of association.70 The majority also argued that a state has a compelling interest in preventing party raiding.71 In doing so, “a state may require party registration in a reasonable period of time before the actual primary election.”72 The Court reasoned, however, that any regulation that attempts to further a compelling state interest must be narrowly tailored so as not to offend a political party’s First Amendment rights.73

Justice Scalia, writing for the majority in Jones, specifically recognized a political party’s First Amendment right “to join together in furtherance of common political beliefs.”74 Implicit in this right is the freedom to identify people who “constitute the association and to limit the association only to those people.”75 Therefore, the majority asserted that a political party has a right not to associate with those outside the party.76 The majority also found that a political party’s right to exclude is especially important during the process of selecting party nominees.77 According to the majority, the nomination selection process “often determines the party’s positions on significant public policy issues of the day[,] and even when those positions are predetermined[,] it is the nominee who becomes the ambassador to the general electorate in winning it over to the party’s view.”78 As a result, the majority reasoned that Proposition 198 interfered with a party’s right not to associate because it forces a political party to associate with a nominee with differing positions from that of the party.79

59 Id. at 1299–1300.
60 Id. at 1301.
61 Id. at 1301–03.
62 Id. at 1303.
63 Id.
64 Jones, 169 F.3d at 647–48.
65 Jones, 120 S. Ct. at 2413.
66 Id. at 2412–14.
67 Id. at 2412–13.
68 Id. at 2409 (quoting Wisconsin, 450 U.S. at 126).
69 Id. at 2407.
70 Id. (quoting Jenness v. Fortson, 403 U.S. 431, 442 (1971)).
71 Id. (defining party raiding as "a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary").
72 Id.
73 Id. at 2412.
74 Id. at 2408 (quoting Tashjian, 479 U.S. at 214–15).
75 Id. (quoting Wisconsin, 450 U.S. at 122).
76 Id.
77 Id.
78 Id.
79 Id. at 2409.
The majority of the Court also argued that Proposition 198 violated the First Amendment freedom not to associate because "it force[d] political parties to have their nominees and hence their positions determined by those who have refused to affiliate with the party and may have expressly affiliated with a rival political party."

To bolster this conclusion, Justice Scalia cited a survey showing that having a party's nominee determined by persons of an opposing party under a blanket primary was clearly a problem. The survey of California voters found that 37% of Republicans indicated that they planned to vote in the 1998 Democratic gubernatorial primary, and 20% of Democrats stated that they planned to vote in the 1998 Republican and United States Senate primary. Finally, Justice Scalia concluded that the burden Proposition 198 placed on petitioner's right of political association was "both severe and unnecessary" because it forced political parties to associate with those who did not share their political beliefs.

Justice Kennedy, concurring, argued that respondents' justification for Proposition 198 was "doubtful." Justice Kennedy attacked respondents' assertion that a political party has alternative means to protect its freedom of association using its funds and resources to support the candidate of its choice. Kennedy argued that recent Supreme Court decisions placed strict limitations on a political party's ability to use its own funds and resources to support the candidate of its choice, and therefore seriously impeded a political party's First Amendment right of association.

Because of this impediment, Kennedy believed that the problem would be further compounded if the Court upheld Proposition 198.

Justice Stevens, joined by Justice Ginsburg, dissented and argued that Proposition 198 was constitutional. Stevens first argued that the principles of federalism required the Court to respect the policy choice made by California voters when they approved Proposition 198. Stevens then asserted that Proposition 198 did not abridge a political organization's freedom of association because it furthered the compelling state interests of expanding an individual's ability to participate in the democratic process and increasing voter participation. The dissent also argued, siding with District Court Judge Levi, that Proposition 198 was narrowly tailored because it did not limit a political party from engaging in other traditional party behavior, such as ensuring orderly internal party governance and maintaining party discipline. The dissent then asserted that the right not to associate is "simply inapplicable to participation in a state election." They argued that a state election, unlike a convention or caucus, is a public affair that involved government regulation through public activities aimed at opening up the political process (as Proposition 198 tried to do in California). The dissent also pointed out that although a party's First Amendment protection extended to a party's right to invite independents to participate in its primaries, it did not impose a limit on a state's power to open up its primary elections to eligible voters.

In addition to its First Amendment analysis, the dissent addressed the application of Proposition 198 to elections for U.S. Senators and Representatives. The dissent specifically addressed the difficulty that could arise under the Election Clause of...
the United States Constitution. The dissent asserted that Proposition 198 might be unconstitutional under the Elections Clause of the Constitution because initiative systems are unreviewable by independent legislative action. However, because neither party raised this point nor did the courts below discuss it, Justice Stevens reserved judgment on this question.

III. THE SUPREME COURT'S FREEDOM OF ASSOCIATION PRECEDENT IN REVIEWING STATE ELECTION LAWS

A. The Supreme Court’s Test for Election Laws Affecting the Right to Associate

In Anderson v. Celebrezze, the Supreme Court articulated a two-part test used in constitutional challenges to state election laws. A court must first compare the “character and magnitude of the asserted injury to rights protected by the First Amendment” that the plaintiff seeks to vindicate. It must then “identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule” on a political party’s associational freedom. When the court passes judgment on state election laws, it “must not only determine the legitimacy and strength of each of the asserted state interests, [but also] it must consider the extent to which those state interests make it necessary to burden the plaintiff’s rights.” In short, this test requires a court to weigh the asserted state interests against the alleged constitutional injury, and then consider the fit between the asserted interests and the challenged state regulation.

The petitioner in Anderson was an independent candidate for president. The petitioner and three other voters brought an action challenging the constitutionality of an Ohio statute that required independent candidates to file in March of an election year in order to appear on the general election ballot in November. Applying the two-part test first developed in Williams v. Rhodes, the Court first assessed the burden that the state statute imposed on independent candidates. The Court found that setting a deadline simultaneously precluded independent candidates from entering the presidential race after March and limited the effectiveness of independent candidates who attempted to meet the March deadline. Therefore, the Court found that the law burdened the associational voting right of Anderson’s supporters and other “independent-minded voters.”

After the Court determined that Ohio’s March deadline violated Anderson’s First Amendment right of association, it then assessed the legitimacy of Ohio’s asserted state interests in voter education, equal treatment for all candidates and political stability, as well as the extent to which the challenged law served these interests. The Court found the first interest “important and legitimate” but concluded that the state’s interest in voter education did not justify the specific restriction on participation in a presidential election. Similarly, the Court concluded that the state’s interest in equal treatment of partisan and independent candidates “simply is not achieved by imposing the March filing deadline on both.” Finally, the Court rejected the state’s interest in political stability because it was “not precisely drawn to protect the parties from ‘intraparty’ feuding, whatever legitimacy that state goal may have in a presidential election.” The Court ultimately invalidated Ohio’s filing deadline because the burden on a candidate’s freedom of association “unequivocally outweigh[ed] the State’s minimal interest in imposing a March deadline.”

In Tashjian v. Republican Party of Connecticut, the Court applied the Anderson two-part test and
invalidated Connecticut’s closed primary statute, which required voters in a political primary to be registered members of that party.\footnote{117} The Connecticut Republican Party, seeking to allow unaffiliated voters to participate in the Republican primary, challenged the constitutional validity of Connecticut’s closed primary statute.\footnote{118} Because the Connecticut law required voters in any party primary to be registered members of a political party, it precluded unaffiliated voters from voting in the Republican primary. The Republican Party, which had previously adopted a party rule permitting unaffiliated or “independent” voters to vote in its primary, argued that Connecticut’s closed primary statute violated its First and Fourteenth Amendment right of association.\footnote{119} The district court,\footnote{120} the Court of Appeals for the Second Circuit\footnote{121} and the Supreme Court\footnote{122} all concurred and held that the statute impermissibly interfered with the Republican Party’s freedom of association right.

In applying the \textit{Anderson} test, the Court found that the challenged statutes burdened the right of the political party and its members to freely associate. The Court noted that “the freedom to join together in furtherance of common political beliefs ‘necessarily presupposes the freedom to identify the people who constitute the association.’”\footnote{123} The Court found that Connecticut’s closed primary statute limited the Republican Party’s “associational opportunities at the crucial juncture [in which the appeal to common principles may be translated into concerted action, and hence to political power in the community].”\footnote{124} Apparently this burden was sufficient to trigger strict scrutiny review because the Court subsequently applied it when it invalidated the Connecticut statute.\footnote{125}

Connecticut asserted four compelling interests in \textit{Tashjian} to justify the challenged state law.\footnote{126} These interests were “minimizing the administrative burden of the party system,” “preventing raiding, avoiding voter confusion, and protecting the responsibility of party government.”\footnote{127} The Court found that Connecticut’s first asserted interest—the administrative burden posed by opening up the primary election—was “not a sufficient basis . . . for infringing appellees’ First Amendment rights.”\footnote{128} In response to the state’s asserted compelling interest in preventing party raiding,\footnote{129} the Court stated that while a legitimate interest, it “was not implicated here.”\footnote{130} The Court held that the statute actually assisted party raiders because the statute permitted an independent to affiliate with a political party as late as noon on the business day preceding the primary.\footnote{131} The Court classified the state’s interest in preventing voter confusion and providing for educated and responsible voter decisions as legitimate.\footnote{132} Because the Court classified this interest as legitimate, it concluded that it in no respect made it necessary to burden the Connecticut Republican Party’s right.\footnote{133} The Court subsequently concluded that none of these interests were substantial and held that the statute, as applied to the party in this case, was unconstitutional.\footnote{134}

Finally, the Court addressed Connecticut’s fourth compelling interest “in protecting the integrity of the [two-party] system and the responsibility of party government.”\footnote{135} While the Court found this interest compelling, it nonetheless concluded that neither a state nor a court may “substitute its own judgment for that of the party.”\footnote{136} After \textit{Tashjian}, it is clear that the Court had expanded the role of unaffiliated voters by allowing them to participate in partisan political primaries.

\footnotesize{\textsuperscript{117} Id. at 213–14.} \\
\footnotesize{\textsuperscript{118} Id. at 213.} \\
\footnotesize{\textsuperscript{119} Id.} \\
\footnotesize{\textsuperscript{120} Tashjian v. Republican Party of Conn., 599 F. Supp 1228, 1241 (D. Conn. 1984).} \\
\footnotesize{\textsuperscript{121} Tashjian v. Republican Party of Conn., 770 F.2d. 265, 283 (2d Cir. 1985).} \\
\footnotesize{\textsuperscript{122} Tashjian, 479 U.S. at 228.} \\
\footnotesize{\textsuperscript{123} Id. at 214 (quoting \textit{Wisconsin}, 450 U.S. at 107).} \\
\footnotesize{\textsuperscript{124} Id. at 216.} \\
\footnotesize{\textsuperscript{125} Id. at 217 (addressing whether Connecticut’s statute was “narrowly tailored . . . [to address] the state’s compelling interests”).} \\
\footnotesize{\textsuperscript{126} Id. at 216–24.} \\
\footnotesize{\textsuperscript{127} Id. at 220.} \\
\footnotesize{\textsuperscript{128} Id. at 218.} \\
\footnotesize{\textsuperscript{129} Id. at 219 (quoting Rosario v. Rockefeller, 410 U.S. 752, 760 (1973) (defining party raiding as a practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary").) } \\
\footnotesize{\textsuperscript{130} Id. at 219.} \\
\footnotesize{\textsuperscript{131} Id.} \\
\footnotesize{\textsuperscript{132} Id.} \\
\footnotesize{\textsuperscript{133} Id. (quoting \textit{Anderson}, 460 U.S. at 796).} \\
\footnotesize{\textsuperscript{134} Id. at 225.} \\
\footnotesize{\textsuperscript{135} Id. at 222.} \\
\footnotesize{\textsuperscript{136} Id. at 224 (citing \textit{Wisconsin}, 450 U.S. at 123–24).}
B. The Supreme Court Will Apply Strict Scrutiny When Using the Anderson Analysis if the Regulation Severely Burdens a Party’s Assocational Right

In *Eu v. San Francisco Democratic Central Committee*, the Supreme Court applied strict scrutiny when it used the Anderson analysis for assessing the constitutionality of provisions of California’s state election laws, which regulated the internal structure and organization of political parties. The Court specifically addressed whether provisions of the California Election Code banning political parties’ governing bodies from endorsing primary candidates violated those political parties’ speech and association rights under the First Amendment. The Court, citing Anderson, assessed whether the challenged law burdened “rights protected by the First and Fourteenth Amendments.” The Court then outlined its next step of the inquiry: “If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and is narrowly tailored to serve that interest.”

Petitioners in *Eu* challenged provisions of the California Election Code, which prohibited the official governing bodies of political parties from endorsing candidates in primaries and imposed various restrictions on the internal governance of political parties. Specifically, the restrictions on internal governance included “the size and composition of the state central committees; set forth rules governing the selection and removal of committee members; fix[ed] the maximum term of office for the chair of the state central committee; [and] requir[ed] that the chair rotate between residents of northern and southern California.”

Applying strict scrutiny in its use of the Anderson test to the endorsement ban challenged in *Eu*, the Court found first that the state election code provisions barring party endorsements during party primaries and heavily regulating their internal organization, burdened the parties’ First and Fourteenth Amendment rights (namely their freedom of association). Then the Court moved to the second step of the Anderson standard and applied strict scrutiny to the challenged state law. The Court held that the law was not narrowly tailored to serve a compelling governmental interest.

In an attempt to justify the ban on party endorsements and the heavy regulation of the parties’ internal organization, California offered two compelling interests: “stable government and protecting voters from confusion and undue influence.” The Court rejected the two asserted governmental interests as insufficient to pass constitutional muster. As for the state of California’s argument that the ban promoted stable government, the Court concluded that California had never explained how “banning parties from endorsing or opposing primary candidates advanced that interest.” When rejecting this argument, the Court quoted *Tashjian* and stated that “a state may enact laws to ‘prevent the disruption of the political parties from without,’ but not, as in this case, laws ‘to prevent the parties from taking internal steps affecting their own process for the selection of candidates.’” The Court then turned to the state’s second asserted governmental interest and noted that “the State has a legitimate interest in fostering an informed electorate.” It, however, concluded that this interest was not served by a ban on party endorsements because such a rule actually restricts the flow of information to voters.

C. The Court Uses Heightened Scrutiny in Its Two-Part Constitutional Analysis of Election Laws if the Laws Do Not Severely Burden a Party’s Constitutional Rights

In 1997, the Supreme Court decided *Timmons v. Twin Cities Area New Party*. In *Timmons*, the Court used heightened scrutiny when it applied the Anderson analysis to a Minnesota election law, which prohibited an individual from appearing on the ballot as the candidate for more than one

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138 *Id.* at 222.
139 *Id.* at 216, 221–22.
140 *Id.* at 222.
141 *Id.*
142 *Id.* at 218.
143 *Id.* at 219.
144 *Id.* at 222–25.
145 *Id.* at 233.
146 *Id.* at 226.
147 *Id.*
148 *Id.* at 227 (quoting *Tashjian*, 479 U.S. at 224).
149 *Id.* at 228.
150 *Id.* at 228–29.
political party.152 This practice of “nomination by more than one political party of the same candidate for the same office in the same general election” is called “fusion.”153 The Court concluded that Minnesota’s statute banning fusion candidates was constitutional.154 Applying the first part of the Anderson test, the Court determined that the fusion ban did “not severely burden that party’s associational [right].”155 Because the fusion ban did not severely burden the Twin Cities Area New Party’s First and Fourteenth Amendment rights, it survived constitutional challenge on heightened scrutiny grounds.156

The Timmons’ Court distinguished between the burden imposed by a fusion ban and the burden of state laws governing the internal affairs of a political party.157 The Court compared Timmons with Eu and reasserted its analytical point that “regulation of political parties’ internal affairs and core associational activities impose too great a burden to withstand constitutional scrutiny.”158 The Court contrasted those regulations with ones that merely precluded a candidate already on the ballot from being nominated by a second political party.159 The Court noted that the fusion ban simply limits a candidate for political office to a single party nomination. It does not prohibit any one party from nominating a candidate. Because the fusion ban only minimally burdened the political parties’ First and Fourteenth Amendment right of association, Minnesota’s asserted interests in “promoting candidate competition . . . preventing electoral distortions and ballot manipulations, and discouraging party splintering”160 were “correspondingly weighty.”161 Therefore, Minnesota’s fusion ban did not constitutionally burden petitioners’ freedom of association.162 As a result, the Timmons’ Court concluded that Minnesota’s interests were sufficient to withstand this heightened scrutiny review and upheld the fusion ban as constitutional.163

It is clear from Tashjian and Timmons that the two-part balancing test first articulated in Anderson is the appropriate standard to assess the validity of state laws that allegedly infringe on the freedom of association although the Court uses it in varying degrees depending on the circumstances of each case.

IV. THE SUPREME COURT ERRED WHEN IT BANNED BLANKET PRIMARIES IN CALIFORNIA DEMOCRATIC PARTY V. JONES

A. The Majority Opinion in Jones

Before discussing the errors of the Scalia majority in Jones, it is useful to note that its reasoning for striking down Proposition 198 was that it offended political parties’ freedom of association. The majority first outlined the background of the litigation and then turned to the standard of review that it would apply in evaluating the constitutional challenge posed by this case. The majority, using strict scrutiny, applied the first part of the Anderson test and concluded that Proposition 198 severely burdened petitioners’ First Amendment right to associate because it forced state political parties to affiliate with candidates and voters who refused to participate with the party and have expressly associated with a rival political party.164

After determining that Proposition 198 severely burdened petitioners’ right of association, the Court applied the second part of Anderson and considered California’s seven interests offered as justifications for Proposition 198, and whether Proposition 198 was a narrowly tailored means of furthering them.165 The interests that California offered the Court were: (1) “producing elected officials who better represented the electorate”; (2) “expanding candidate debate beyond narrow partisan political concerns”; (3) ensuring that a disenfranchised person had an effective vote”; (4) “promoting fairness”; (5) “affording voters greater choice”; (6) “increasing voter participa-

152 Id. at 354.
153 Id. (quoting Twin Cities Area New Party v. McKenna, 73 F.3d 196, 197–98 (8th Cir. 1996)).
154 Id. at 359–54.
155 Id. at 359 (citing Burdick v. Takushi, 504 U.S. 428, 440 n.10 (1992)).
156 Id. at 363–64.
157 Id. at 362.
158 Id. at 360 (comparing Timmons with Tashjian and Eu and noting that the statutes at issue in Tashjian and Eu in-
tion”; (7) and “protecting privacy.” The Court held that the seven interests that the state offered were compelling. The majority then concluded that Proposition 198 was not a narrowly tailored means of furthering California’s seven proffered state interests and that the burden Proposition 198 placed on petitioners’ right of political association was both severe and unnecessary, and therefore unconstitutional.

B. The Majority Erred in Applying the Anderson Test to Jones

The Anderson test should be applied to any state regulation that infringes on the right of free association. The Court previously utilized this test to assess the constitutionality of challenged state election statutes in Anderson, Tashjian, Eu and Timmons. The test, as articulated in these cases, requires a court to first assess the constitutional burden that the challenged law imposes on state political parties’ associational freedom. Then a court must analyze the state interests offered as a justification for the challenged regulation while considering the necessity of the regulation in protecting those interests.

1. Proposition 198 Does Not Severely Burden the Parties’ First Amendment Right of Association

A court’s first step under Anderson is to determine what constitutional burden the law imposes on the parties asserted constitutional rights. The majority opinion, authored by Scalia, held that Proposition 198 “severely” burdened the petitioners’ rights. The Jones majority believed that “evidence demonstrates that under California’s blanket primary system, the prospect of having a political party’s nominee determined by adherents of an opposing party is far from remote, indeed, it is a clear and present danger[,]” and as a result violates a political party’s freedom of association. Additionally, the majority used respondents’ own expert’s opinion and contended that blanket primaries placed a significant burden on the parties’ freedom of association. The Court specifically highlighted the expert’s conclusion that “the policy positions of Members of Congress elected from blanket primary states are . . . more reflective of the preferences of the mass of voters at the center of the ideological spectrum.”

Contrary to the majority opinion in Jones, Proposition 198 does not severely burden the major political parties’ First Amendment freedom of association. Party rules and other portions of the California Election Code provide alternatives for parties who are unsatisfied with the results of a blanket primary. Additionally, a political party also could preserve its constitutional right to select a standard-bearer with views that best re-

166 Id. at 2412–13.
167 Id. at 2414.
168 Id.
169 Anderson, 460 U.S. at 789.
170 Id.
171 Jones, 120 S. Ct. at 2414.
172 Id. at 2410.
173 See id. at 2411.
174 Id.
175 Jones, 169 F.3d at 659 (holding that the magnitude of the burdens Proposition 198 imposes on the political parties are not characterized as either “severe” or as “negligible”); cf. Brian M. Castro, Note, Smothering Freedom of Association: The Alaska Supreme Court Errs in Upholding The State’s Blanket Primary Statute, 14 ALASKA L. REV. 523, 524. (2000) [hereinafter Castro]. Castro argues that the Alaska State Supreme Court erred in upholding Alaska’s blanket primary statute when it decided O’Callaghan v. Alaska, 914 P.2d 1250 (1996), because it failed to subject Alaska’s blanket primary statute to strict scrutiny when it applied the Anderson test. The strict scrutiny test should have been used because the primary statute severely burdened the associational right of the Alaskan Republican Party and its members by requiring them to include members of other political parties in the Republican primary. See Castro, this note.
176 Id. at 2410 (discussing and citing CAL. ELEC. CODE § 15375(c).) Section 15375(c) requires that the results of the primary election “to be reported according to the number of
present its rights and ideologies by selectively distributing party funds to a candidate with views that are with the political party's views.\textsuperscript{178} Finally, the majority's contention in \textit{Jones} that Proposition 198 severely burdens a political party's right to association because it forces political candidates to move toward the center of the political spectrum in order to appeal to most voters, is misplaced. Political parties alter their traditional party positions during each election cycle in order to achieve victory. Because each political party has rules and other internal mechanisms available to offset primary results that contradict party beliefs, Proposition 198 did not severely burden petitioners' First Amendment right of association. Therefore, the \textit{Jones} majority should have analyzed Proposition 198 under an \textit{Anderson}-type heightened scrutiny standard of review instead of applying strict scrutiny and invalidating a citizen initiative like Proposition 198.

2. \textit{The Majority Erred in Applying Strict Scrutiny to California's Interests Because Proposition 198 Did Not Severely Impact the Political Parties' First Amendment Rights}

Because Proposition 198 did not interfere with the internal organization of either party and both political parties had mechanisms in place to ensure that candidates who best represented their views were selected in the primary elections, it did not severely impact the political parties' association right. \textit{Anderson} and its progeny, therefore, require the application of heightened scrutiny. Consequently, when the majority in \textit{Jones} applied strict scrutiny to Proposition 198, it erred.\textsuperscript{179} The Court in \textit{Jones} should have required that California justify Proposition 198 by showing that it served an important state objective, and that a reasonable relationship existed between Proposition 198 and California's state objectives. These objectives included ensuring that all persons enjoy the right to an effective vote. Had the majority utilized heightened scrutiny review, it would have upheld California's blanket primary law as constitutional.

California argued that Proposition 198 served seven legitimate interests.\textsuperscript{180} California first asserted that it had a compelling interest in producing elected officials who better represent the electorate by expanding political debate beyond purely partisan concerns.\textsuperscript{181} In opening up California's state primary system to independent voters, Proposition 198 would likely force elected officials to address the needs of a wider electorate. With Proposition 198 in place, an elected official would be forced to expand his or her message beyond the narrow interests of the party stalwart.

California then argued to the Court in \textit{Jones} that it had a legitimate interest in ensuring that disenfranchised voters (i.e., independent and members of the minority party in politically "safe" districts dominated by one political party) would have an effective vote.\textsuperscript{182} Just as it is a rational means for opening up political debate beyond a partisan audience at the state party convention, Proposition 198 also ensures that every citizen who votes in a primary will have a significant say in who will be the standard-bearer in the general election. The majority is inaccurate when they suggest that the only way for a citizen to not "disenfranchise himself"\textsuperscript{183} is to join a political party.

\textsuperscript{178} 18 Month FEC Release, \textit{supra} note 86. The release reported that both political parties continue to raise record amounts of nonfederal or "soft money" funds outside the limits and prohibitions of the Federal Election Campaign Act: Republicans raised $130.2 million, an 81\% increase over the same period in 1997-98 and 65\% over 1995-96; Democrats collected $124.2 million, an 134\% increase over 1997-98 and 77\% more than 1995-96. Because the FEC cannot regulate soft money, both political parties are able to freely control how much and to which candidate they allocate their money, in effect, preserving the freedom of association embodied in the First Amendment. \textit{Id.}

\textsuperscript{179} See, e.g., \textit{Timmons}, 520 U.S. at 365-64. \textit{Timmons} held that state regulatory interests need only be "sufficiently weighty" to justify limitations placed on a political party's right of association when state election laws that do not restrict the ability of political parties to endorse, support or vote for anyone they like, or impose on a party's internal structure or governance. \textit{Id.} Arguably when the Court describes a state interest as "sufficiently weighty," it subjects the state interest and the state regulation (in this case it would be an election regulation) advancing the sufficiently weighty interest to heightened constitutional review, instead of strict scrutiny.

\textsuperscript{180} \textit{Jones}, 120 S. Ct. at 2412.

\textsuperscript{181} \textit{Id.} \textit{But see} Castro, \textit{supra} note 175, at 547 (arguing that the general election, not the primary, is the time for making candidates more representative to voters).

\textsuperscript{182} \textit{Jones}, 120 S. Ct. at 2413.

\textsuperscript{183} \textit{Id.}
Merely joining a political party does not solve the problem of effective voter disenfranchisement in safe political districts. A voter may join a political party in hopes that the party will choose candidates who support the voter’s position, only to become disenfranchised again when the party nominates a candidate whom the voter finds inadequate. The state certainly has an interest in promoting fairness in elections as the Court in *Jones* recognized. Proposition 198 aids this state interest by assuring that nonparty members in “safe districts” have more input in deciding who will be their nominee in the general election.

California also argued in *Jones* that it had a legitimate state interest in increasing voter participation in primary elections because government becomes more representative as more people vote. One effective way to increase voter turnout is to offer them a wider choice of candidates. Proposition 198 would allow any registered voter, including those who are unaffiliated with any political party, to vote for any candidate regardless of the candidate’s political affiliation. This would encourage voters to cross party lines and vote for candidates who had wide political appeal. Additionally, California’s asserted state interest fares well when considered in the light of the minimal burden imposed by the challenged statute in *Jones* on the associational right held by political parties and their members. For instance, Proposition 198 does not interfere with either party’s internal governance or organization, and each party has rules or other means to invalidate a primary that is contrary to their positions. It is also important to note that California voters from both parties overwhelmingly voted in favor of Proposition 198. Therefore, in striking down this statute, the majority largely ignored the voice of the citizens of California and their desire to have a more fair and open election, as well as principles of federalism.

C. The Majority Disregarded Precedent

Protecting a Citizen’s Right “to petition the Government for a redress of grievances” Through the Initiative Process

In addition to incorrectly applying the *Anderson* test, the *Jones* majority ignored controlling precedent that protects a citizen’s right to make laws directly through initiatives placed on election ballots. For instance, the Court in *Buckley v. American Constitutional Law Foundation*, afforded the citizen initiative process First Amendment protection. At issue in *American Constitutional Law Foundation* was whether certain requirements for petition circulators (those who disseminate and gather voter signatures in order for an initiative to be placed on the ballot) was constitutional. Specifically, the Colorado law challenged in *American Constitutional Law Foundation* mandated that petition circulators be registered voters at least 18 years old. The state law also mandated that the petition circulation period be only six months, and that petition circulators wear identification badges stating their name and their status as “VOLUNTEER” or “PAID.” If the petition circulators were paid, they had to identify the name and telephone number of their employer. Additionally, the Colorado law required petition circulators to attach to each petition section an affidavit containing the circulator’s name, address, and a statement that the voter signing the petition has read and understands the laws governing the circulation of petitions.

Relying on prior case law, the Court in *American Constitutional Law Foundation* ruled that Proposition 198 aids this state interest in increasing voter participation. The state law also mandated that the petition circulation period be only six months, and that petition circulators wear identification badges stating their name and their status as “VOLUNTEER” or “PAID.” If the petition circulators were paid, they had to identify the name and telephone number of their employer. Additionally, the Colorado law required petition circulators to attach to each petition section an affidavit containing the circulator’s name, address, and a statement that the voter signing the petition has read and understands the laws governing the circulation of petitions.
can Constitutional Law Foundation first assessed the burden that Colorado's petition circulation regulations placed on the petition circulators' First Amendment rights. The American Constitutional Law Foundation Court determined that the disclosure requirements for petition circulators discouraged participation in the petition process and therefore severely burdened free speech. Because the badge requirement severely burdened the petitioners' First Amendment rights, the Court subjected Colorado's asserted interests to strict scrutiny review. Subsequently, the Court held that the badge requirements failed the test of constitutionality of strict scrutiny analysis. The Court held that the badge requirements were not sufficiently related to the substantial state interest of protecting the integrity of the initiative process (specifically to deter fraud and diminish corruption). Therefore, the Colorado statute was unconstitutional. Because the Court used its two-step Anderson analysis in reviewing the constitutional challenge posed in American Constitutional Law Foundation, one might argue that the Court recognized that the citizen's ability to initiate change through the ballot box is a protected First Amendment right that cannot be infringed through arbitrary measures.

Unfortunately, the majority in Jones largely ignored the freedom of the collective majority to "petition the government for a redress of grievances," as set out in American Constitutional Law Foundation. In his reasoning, Justice Scalia seemed to ignore the collective citizenry's First Amendment right in striking down Proposition 198. When he dissented in Romer v. Evans, Scalia strongly disagreed with the Court for striking down a citizen initiative that amended the Colorado state constitution, Amendment 2, which Colorado citizens adopted in a 1992 statewide referendum prohibited:

\begin{itemize}
  \item [200] Id. at 198–99.
  \item [201] Id. at 199.
  \item [202] Id. at 204.
  \item [203] Id.
  \item [204] Id.
  \item [205] Id.
  \item [206] U.S. Const. amend. I (providing in part that "Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances")
  \item [207] Compare American Constitutional Law Foundation, 525 U.S. at 198–200 (recognizing that citizen initiative measures deserve the utmost First Amendment protection), with Jones, 120 S. Ct. 2402 (invalidating a citizen passed open primary law on the grounds it violated partisan political parties' First Amendment freedom to associate).
  \item [209] Id. (Scalia, J., dissenting).
  \item [210] Id. at 623–25 (Scalia, J., dissenting).
  \item [211] Id. at 636 (Scalia, J., dissenting).
  \item [212] Compare Jones, 120 S. Ct. 2402, 2410 (holding that statewide initiative that implements a blanket primary election is minimal when compared with protecting the freedom of association of partisan political organizations), with Romer, 517 U.S. at 635 (Scalia, J., dissenting) (asserting that the Court trumped "[a] rather . . . modest attempt by seemingly tolerant Coloradans to preserve traditional mores against the efforts of a politically powerful minority to revise those mores through the use of the laws")
\end{itemize}
First Amendment protection given through the citizen initiative process. As a result, the *Jones* Court significantly eroded a fundamental First Amendment right for citizens to redress their grievances against government.