COMMENTS

Partisanship Redefined:
Why Blanket Primaries are Constitutional

Deidra A. Foster†

I. INTRODUCTION

In 2003, the Ninth Circuit Court of Appeals rendered a decision that would pave the way for drastic changes in Washington State’s election process. In Democratic Party of Washington v. Reed, the court held that Washington’s nearly seventy-year-old blanket primary was unconstitutional, and the Supreme Court declined to review the case.¹ The Ninth Circuit professed to be bound by California Democratic Party v. Jones, the Supreme Court case that ruled California’s blanket primary unconstitutional just three years earlier, ignoring the argument that Washington’s blanket primary differed materially from California’s.² What followed was a mêlée of voter disapproval and disappointment. The Washington State Legislature reacted with damage control efforts but was conflicted. Legislators were pressured by voters who yearned for a primary system that would closely replicate the invalidated blanket primary voters had come to love. They also faced pressure from Washington’s political parties to close the primary so that voters would be forced to select candidates for all offices from only one party. Indicative of the turmoil the loss of the blanket primary caused, the Washington State Legislature enacted a nonpartisan primary; Washington’s governor vetoed that provision,

† J.D. Candidate, Seattle University School of Law, 2006; B.A., University of Washington, 2003. The author thanks her family, especially Thuan, for being so supportive and encouraging.

¹ 343 F.3d 1198 (9th Cir. 2003), cert. denied, 540 U.S. 1213 (2004).
resulting in the enactment of a Montana-style primary; Washingtonians voted for an initiative to enact the nonpartisan primary as a means of preserving as many of the virtues of the constitutionally-flawed blanket primary as possible; and, at the time of this publication, the state of the primary remains up in the air as Washington voters await the Ninth Circuit's ruling on the appeal of a decision holding the nonpartisan primary unconstitutional.

This Comment argues that Reed should be overturned because it fails to appreciate the material distinction between the Washington and California primaries, and that Jones did not render all blanket primaries unconstitutional. In doing so, this Comment examines blanket primaries more generally and argues against the typical perception of political primaries as merely a component of party machinery. Part II explores the historical background of candidate nomination in political parties. Part III details the blanket primary today by exploring the California and Washington systems and the cases invalidating them. Part IV contends that blanket primaries may be deemed constitutional when they are carefully analyzed on a state by state basis, in their state specific context. This section also debunks the notion that political parties have the same rights as purely private organizations and posits that blanket primaries do not violate the freedom of association. In addition, Part IV analyzes a unique form of disenfranchisement that only blanket primaries can prevent and casts the oft-argued distinction between primary and general elections as illusory. This section concludes by tackling the issue of party raiding, arguing that although theoretically possible, it is unlikely, ultimately irrelevant, and not the concern of states.

II. THE HISTORY OF THE TWO-PARTY SYSTEM AND THE PRIMARY

Understanding the primary's various permutations requires an understanding of its relation to the two-party system and how the primary system evolved from other, more party-centered forms of candidate nomination.

A. The Two-Party System

The Constitution does not mention political parties, not because they were inconceivable to the Framers but because they were viewed

3. The Montana-style primary is an open primary in which voters privately choose one party's ballot. See Andrew Garber, House Approves Louisiana-Style Primary, SEATTLE TIMES, Mar. 9, 2004, at B2.
negatively.\(^4\) Thomas Jefferson’s distaste for parties exemplifies the view of the Founders: Party affiliation “is the last degradation of a free and moral agent. If I could not go to heaven but with a party, I would not go there at all.”\(^5\)

American party politics nevertheless emerged soon after ratification.\(^6\) George Washington’s departure from the Presidency marked the emergence of American partisanship, with a debate brewing between notions of strong, centralized government advocated by Alexander Hamilton and state-dominated, decentralized government advocated by Thomas Jefferson and James Madison.\(^7\) In the mid 1850s, both the Democratic and Republican parties established national committees with one representative from each state,\(^8\) and it is within the context of political parties that the primary election evolved as a way to nominate party candidates.

### B. Evolution of the Primary

Relatively speaking, the political primary is a new phenomenon. The oldest form of candidate nomination was the legislative caucus whereby a party’s elected officials chose party candidates for the primary ballot in an informal meeting.\(^9\) Due to concerns that the caucus system was too unrepresentative and too cumbersome to accommodate the growth of cities, the convention system arose as a replacement.\(^10\) In the convention system, party members chose delegates to send to formal nomination meetings.\(^11\) Critics condemned the convention system for being corrupt, fostering intimidation and bribery, and being class- and boss-ridden.\(^12\) As a result of these criticisms, the direct primary system emerged as an attempt to “return nominations ‘to the people’” by taking control from the party and giving it to the state.\(^13\)

---

6. See NEUBORNE & EISENBERG, supra note 4, at 166.
8. Id. at 33.
10. ADRIAN & FINE, supra note 9, at 152; HANCOCK, supra note 9, at 164–165.
11. ADRIAN & FINE, supra note 9, at 152; HANCOCK, supra note 9, at 164–165.
12. ADRIAN & FINE, supra note 9, at 152; HANCOCK, supra note 9, at 164–165.
13. ADRIAN & FINE, supra note 9, at 152; HANCOCK, supra note 9, at 164–165.
Political parties were not initially adverse to the adoption of primaries as nomination devices. As America became more populous, urbanized, and heterogeneous, informal nomination procedures became inadequate. In fact, parties advocated for primaries as a response to changing demographics. The primary system was embodied first in party rule and then in state laws. The primary was first used in Pennsylvania in the mid-1800s, and Wisconsin first adopted the direct primary as a compulsory statewide nomination method in 1903. Wisconsin adopted the direct primary due to the Republican Party’s domination of the state for nearly fifty years, which had led to concerns that the state was overly hostile to progressive legislation and candidates. Nonetheless, the primary was first put to “general use” in the South, with the West, Midwest, and East following suit. Today, use of the primary system in the United States is widespread, with some states employing it as a hybrid with the convention system. The primary is an interesting political beast; while it serves a governmental purpose, its history reveals that it is a function of the parties themselves.

However, the primary system did not meet the parties’ expectations. Arguably, returning candidate nomination to the people merely led to the nomination of people with recognizable political names. The adoption of the primary is also seen to have undermined the strength and organization of the parties. It has facilitated ticket-splitting, whereby voters vote for candidates from more than one party in the same election. In the 1880s, a highly partisan period, ticket-splitting was widespread, accounting for at least twenty-five percent of apparent party members in some regions. Today, ticket-splitting still has a strong presence in American politics, and there are some indications that American voters

15. Id.; “In a ‘face-to-face’ society, most citizens knew most other citizens, or at least knew who they were. Consequently, politics could largely be organized on an informal basis—that is, without formal, or legally binding, rules.” Id. at 34.
16. Id. at 21.
18. ADRIAN & FINE, supra note 9, at 153.
20. ADRIAN & FINE, supra note 9, at 153. In the early 1900s, the majority of states chose the closed primary. WARE, supra note 14, at 127–128.
21. ADRIAN & FINE, supra note 9, at 152.
22. Id.
23. See WARE, supra note 14, at 36.
view ticket-splitting as a sign of intelligence. The primary system arguably has further undermined the power of party politics, by creating competition within, rather than among, the party structure.

Several other drawbacks of the primary system as a means of selecting party candidates stem from the fact that the primary system necessitates an additional election. It has been argued that the primary negatively affects voter turnout because voters are generally less likely to vote in the primary than in the general election. Thus the voters who do turn out to vote in primaries may be unrepresentative of the party. This added election also means that candidates have to do more campaigning, and parties are unlikely to fund candidates' campaigns in contested primaries. The added expense of campaigning for the primary election may mean that the candidate is less equipped to succeed in the general election. In sum, political parties first sought primaries but, as they felt the practical effects, the political parties reversed their position and subsequently opposed the primary system.

C. Types of Primaries

Primaries can generally be classified into two categories: nonpartisan and partisan. In nonpartisan primaries, the names of all candidates running for office are listed on the ballot without a party designation. Twice the number of candidates needed to proceed to the general election to face off, regardless of whether the top vote-getters are from the same party. This runoff style of election has the benefit of ensuring that the winner receives a majority, rather than a mere plurality, of the vote. In some non-partisan primaries, the candidate receiving a simple majority is elected without having to face the runner up in the general election. Some states employ this method for nonpartisan offices, such as

24. SABATO & LARSON, supra note 7, at 121–123. "[I]n a 1996 Media Studies Center/Roper Center survey, a sizable majority of reported typically splitting their tickets in elections . . . . These high percentages . . . may reflect split-ticket voting below the national level."

25. JEWELL & MOREHOUSE, supra note 17, at 140; SABATO & LARSON, supra note 7, at 4; WARE, supra note 14.

26. ADRIAN & FINE, supra note 9, at 156; but see JEWELL & MOREHOUSE, supra note 17, at 123.

27. JEWELL & MOREHOUSE, supra note 17, at 140.

28. ADRIAN & FINE, supra note 7, at 156 ("[A] candidate's ability to raise enough funds to pay for commercials becomes even more important in primary campaigns than it is in general elections."); JEWELL & MOREHOUSE, supra note 17, at 128.

29. JEWELL & MOREHOUSE, supra note 17, at 140.

30. ADRIAN & FINE, supra note 9, at 154.

31. Id.

32. Id.

33. Id.

34. Id.
judgeships, and others utilize the runoff method in tandem with their partisan primaries. This is particularly true in the South, where the Democratic primary was historically so influential and drew so many candidates that none was likely to get a majority of the vote. For example, Louisiana uses a purely nonpartisan primary election for statewide and congressional offices. The system emerged in 1972 when Democratic gubernatorial candidate Edwin W. Edwards was elected after having to compete in and win three elections: the Democratic primary, the Democratic runoff, and the general election. Edwards’s frustration with the system led him to push the legislature to make changes. The new system, implemented after Edwards’s election, effectively balanced the power between Democratic and Republican parties. Prior to Edwards’s changes, the Democratic Party had such strong roots in Louisiana that the Democratic primary was viewed as determinative. Today, under Louisiana’s nonpartisan system, Republicans are better equipped to provide real competition for Democratic candidates. Unlike Louisiana, the vast majority of primaries are partisan.

There are four types of partisan primaries: closed, semi-closed, open, and blanket. The different types fall along a continuum, with closed primaries being the most restrictive of voter choice and blanket primaries being the most permissive. In closed primaries, voters are required to register their party affiliation by a certain date before the election, and the state maintains a record of the registration. On Election Day, voters may only choose candidates from their party. Voters who define themselves as independents may not vote in these types of primaries. Voters wishing to change their party registration must do so by a specified deadline. Closed primaries are prevalent in Northeastern states and illustrate the strong party presence and control in the region.

35. JEWELL & MOREHOUSE, supra note 17, at 104–105.
36. Id. at 105.
37. Id. at 104.
38. Id.
40. Id.
41. See id.
42. ADRIAN & FINE, supra note 9, at 154. Laws known as durational affiliation provisions require voters to declare party affiliation in advance of primary elections. NEUBORNE & EISENBERG, supra note 4, at 173–174; JEWELL & MOREHOUSE, supra note 17, at 103.
43. ADRIAN & FINE, supra note 9, at 154.
45. JEWELL & MOREHOUSE, supra note 17, at 103.
46. Id. at 105. Another indicator of party strength is the use of pre-primary endorsements. Id. at 122; 106–118.
States with semi-closed primaries permit voters to register or change their party preference on the day of the election, and some permit independents to vote.\textsuperscript{47} States record voters' party preferences in semi-closed primaries.\textsuperscript{48} The state does not record the voter preference in an open primary.\textsuperscript{49} This type of primary is common in Northeastern and Midwestern states.\textsuperscript{50}

Open primaries require voters to choose a party's ballot on Election Day, either by publicly requesting a certain ballot before entering the voting booth or by making their choice privately in the voting booth.\textsuperscript{51} Voters are required to vote only for the candidates within their party.\textsuperscript{52}

The blanket primary is considered the most permissive type of primary. In a blanket primary, voters choose one candidate for each available seat, irrespective of the voters' or the candidates' political affiliation.\textsuperscript{53} Voters are free to cross party lines for different offices and are completely unrestrained by party labels.\textsuperscript{54} Only when the votes are tabulated do party labels become relevant.\textsuperscript{55} The top vote-getter from each party advances to the general election to face off, which makes the blanket primary a partisan primary.\textsuperscript{56} In the 2000 election, three states used blanket primaries: California, Washington, and Alaska.\textsuperscript{57}

III. THE BLANKET PRIMARY TODAY

For almost seventy years, Washington's blanket primary enjoyed a peaceful existence. The blanket primary did not come under fire until California passed Proposition 198, an initiative that replaced California's closed primary with a blanket primary.\textsuperscript{58} Challengers to California's adoption of a blanket primary succeeded not only in invalidating blanket primaries with Jones, but also in closing Alaska's primary and persuading the Ninth Circuit to find Washington's blanket primary unconstitutional in Reed.\textsuperscript{59} Because the Court in Reed relied so heavily on the rea-

\textsuperscript{47} ADRIAN & FINE, supra note 9, at 154.
\textsuperscript{48} JEWELL & MOREHOUSE, supra note 17, at 104.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 103.
\textsuperscript{51} ADRIAN & FINE, supra note 9, at 154.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Proposition 198 provided that "[a]ll 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." Cal. Democratic Party v. Jones, 530 U.S. 567, 570 (2000).
\textsuperscript{59} The Alaska legislature passed a bill enacting a blanket primary in 1966. Although the primary had withstood attack in 1996, it was ultimately deemed unconstitutional as a result of the Jones
soning in Jones, understanding the demise of Washington’s primary requires an examination of the rise and fall of California’s blanket primary.

A. Jones: The Death Knell for the Blanket Primary

In California Democratic Party v. Jones, the Supreme Court disagreed with the Ninth Circuit and invalidated California’s blanket primary, a decision that would prove lethal to the blanket primary system. Four political parties with rules prohibiting voters not registered with the party from voting in the parties’ primaries brought suit against the California Secretary of State for injunctive and declaratory relief, alleging that Proposition 198 was a facially unconstitutional violation of their right to free association, and the Supreme Court ultimately agreed. The district court found for the Secretary of State; and its reasoning offers a compelling analysis of the extent to which political parties can fairly be viewed as private organizations, the extent to which the blanket primary facilitates crossover voting, and the way in which the blanket primary cures voter disenfranchisement.

The district court first acknowledged that that political parties’ freedom to associate is constitutionally protected. Generally, freedom of association stems from the First Amendment’s guarantee of free speech because association advances ideas and beliefs. This freedom encompasses association with partisan political organizations and affords party members the right to associate only with those who share their political views. The district court in Jones recognized that an important corollary of this freedom of association is the freedom not to associate, that is, to exclude.

Thus, political parties, much like private organizations, have the power to define their membership and to nominate candidates. However, the district court in Jones refused to hold that this right was limitless. To do so, the district court noted, would lead to the absurd result

---

decision because the Alaska primary was indistinguishable from the California primary. O’Callaghan v. Director of Elections, 6 P.3d 728, 730 (Alaska 2000).

60. While California referred to the new primary as an open primary, the Supreme Court in Jones correctly identified the new system as a blanket primary because it allowed all eligible voters to vote for any candidate, regardless of party affiliation. See Jones, 530 U.S. at 570.


63. Id. at 1293.


65. Id.

66. Jones, 530 U.S. at 574.

67. Id.

of barring the state from requiring that all eligible voters be permitted to vote in primary elections. Rather, the district court held that the analogy between political parties and private organizations is "imperfect at best" because political parties do not embody the unity of most organizations; they cannot compel voters to take oaths, pay dues, or to attend meetings in order to vote in primary elections. Instead, the court stated that parties are more analogous to government because they exert influence over government and perform governmental functions. Parties' First Amendment freedom of association right, then, is not dispositive of the constitutionality of the blanket primary because the primary is more of a governmental function than a purely private process. On this basis the district court refused to hold rule Proposition 198 unconstitutional on its face as a violation of the First Amendment's freedom to associate.

The Jones district court also addressed whether blanket primaries violated the freedom to associate in practice. It asked whether the burden of the blanket primary law was severe, and if so, it asked whether the blanket primary supported important government objectives. First to decide what level of scrutiny to apply, the district court was required to determine how burdensome Proposition 198 was on the parties' association right. The court rejected the parties' arguments that the blanket primary severely burdens parties' First Amendment association right merely because it encourages crossover voting, a phenomenon where a person not associated with a party votes in that party's primary. It explained that blanket primary laws are not severe because blanket primaries do not increase the prevalence of party raiding, the most egregious type of crossover voting. In reaching this conclusion, the court distinguished between three different motivations behind crossover voting: sincerity, strategy, and raiding.

Sincere voting occurs when a voter not affiliated with a party nevertheless votes for a candidate from that party because she genuinely wants that candidate to win the election. Strategic voting occurs when a voter not affiliated with a party nevertheless votes for a candidate from that party because she believes the candidate she genuinely wants to win will

69. Id.
70. Id. at 1296.
71. Id.
72. Id.
73. Id.
74. Id. at 1297.
75. Id.
76. Id.
77. Id. at 1297–98.
78. Id. at 1297.
79. Id.
not be successful and therefore chooses the candidate as a backup to her first choice. Finally, raiding occurs when a voter not affiliated with the party nevertheless votes for a candidate from that party because she believes that candidate will be too weak to win in the general election against her preferred candidate from another party. Raiding was the only crossover voting of concern in this context.

In assessing the threat of party raiding, the court was persuaded by the "almost unanimity" among experts, who agree that party raiding is not a realistic threat under blanket primaries. To the extent that "benevolent" crossover voting occurs, it affects not the outcome of an election but the margin of victory. Even accepting that crossover voting might one day determine the outcome of an election and that the burden to parties' association right was more than negligible, the court held that the burden was not severe. At most, the opinion suggests, the burdens imposed by a blanket primary are no more severe than those characteristic of an open primary.

Next, finding that the burden on parties' right to associate was not severe, the court required that the state prove that the blanket primary advance important governmental objectives. The state's sundry justifications for the law were all premised upon the belief that a blanket primary system leads to the election of candidates who are more representative of the electorate because it enfranchises "two types of arguably 'disenfranchised' voters—Independents and minority party voters in safe districts." The court accepted the argument that representativeness and democracy are both served by the blanket primary system because it forces candidates to cater to a wider cross section of the electorate and because it increases voter participation. Ultimately the court held that blanket primaries were not facially constitutional, and that the burden of blanket primary laws was not a severe burden to political parties; even if

80. Id.
81. Id.
82. Id. at 1297.
83. Id. at 1298.
84. Id. at 1299–1300.
85. Id. at 1300.
86. Id. at 1301.
87. The court also noted that the defendants argued that blanket primaries afford voters more privacy, a justification the court admitted does not square perfectly with the representativeness argument. Id. at 1303; Minority party voters in safe districts are those voters who are in an area where a party with which they are not affiliated is dominant to such a degree that the primary election determines the outcome of the general election as a practical matter. Id. at 1301.
88. See id. at 1301–1302.
severe, the law supported important governmental objectives. The Ninth Circuit agreed.

Jones was eventually appealed to the United States Supreme Court, which reversed both the district and circuit court decisions. Unlike the district court, the Supreme Court found that the blanket primary law must withstand strict scrutiny because it characterized the burden on parties' association right as severe. The Supreme Court began with a discussion of the importance of political parties' First Amendment right to exclude, holding that Proposition 198 contravenes this right because it "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." As support, the Supreme Court referred to the fact that in some primary races, votes totaled more than twice the number of registered party members. The Court concluded that the effect of these non-party votes would ultimately change the message and direction of the party and was thus severe. Because the Court "[could] think of no heavier burden on a political party’s associational freedom," it required that the blanket primary survive strict scrutiny. Proposition 198 failed strict scrutiny because none of the seven articulated objectives of the law advanced were sufficiently compelling.

89. Id.
92. Id. at 582.
93. Id. at 574, 577.
94. Id. at 578.
95. Id. at 579.
96. Id. at 582.
97. According to the Court, the first two interests, producing more representative candidates and freeing political debates from partisan constraints, amounted to nothing more than a desire to facilitate election of candidates that the party would not otherwise choose for itself. The third interest, enfranchising voters, was dismissed, in part, as a matter of semantics. The Court rebuffed the notion that terming voters who ascribe to minority parties or no party at all as "disenfranchised" could refute the legal principle that a party's interest in defining its own members trumps the interests of nonmembers who wish to participate in party functions. The solution to this perceived disenfranchisement, the Court said, is simply to join the party. The Court implied that the remaining state interests in fairness, voter choice, voter participation, and voter privacy might be compelling in another context, but not under the circumstances of this case. Even accepting the argument that denying "disenfranchised" voters the opportunity to participate is unfair, the Court held that it would be "less unfair than permitting non-party members to hijack the party." Increasing voter choice was not served by the adoption of a blanket primary because the system encourages candidates to become more centrist, thereby decreasing voters' choices. The blanket system only provides more choices for those among the majority. Finally, the Court deemed that interests in retaining private voters' party affiliations is not compelling, as evidenced by the fact that appointment to certain offices requires disclosure of party affiliation. See id. at 582-85.
Even having found no compelling state interest, the Court considered whether the blanket primary laws were narrowly tailored to the state interest and concluded that they were not. The Court concluded that a nonpartisan primary would serve the state’s interests without imposing severe burdens on political parties’ freedom of association right. The Jones decision left little hope that Washington’s primary could survive because Washington’s primary was technically considered a blanket primary rather than a nonpartisan primary.

B. Washington’s Blanket Primary

Washington’s blanket primary is a legislative enactment, but there are indications that voters overwhelmingly approved of the method for selecting party candidates. In 1907, the Washington State legislature replaced the state’s convention system for nominating candidates with an open primary. The system required voters to publicly declare their party affiliation to receive a ballot. Washington had been a heavily Republican state until the adoption of the blanket primary, with Democrats occupying only ten percent of the legislature’s seats between 1914 and 1930. In 1921, the state legislature moved to close the state’s primary, adopting a law requiring voters to declare their party affiliation at the time of registration. Voters overwhelmingly defeated this measure. In 1934, organizations including the Washington State Grange proposed an initiative to change the state’s nomination process from an open primary to a blanket primary. The legislature adopted the proposal, and the blanket primary became law in 1935. The proposal was never subject to a vote, but the fervor with which the party registration requirement was rejected suggests that voters would have given their approval to a blanket primary. Washington State Grange signature gatherers garnered more than the requisite number of signatures in sup-

98. Id.
99. Id. at 585–86; see supra Part II.C.
101. Id.
103. Washington Secretary of State, supra note 100.
104. 60,593 people voted in favor, and 164,004 voted against. Id.
106. Washington Secretary of State, supra note 100.
107. Id.
port of the proposal in just one day, demonstrating the extent to which Washington voters supported the adoption of the blanket primary. 108

C. Precursors to Democratic Party of Washington State v. Reed

In spite of this indication that voters favored the blanket primary whereby voters choose among all available candidates without regard for party affiliation, the law was immediately challenged, but upheld, in Anderson v. Millikin. 109 The Washington Supreme Court emphasized the absence of the notion of political parties in the Constitution:

The people in adopting the Constitutions, both state and federal, wisely considered that political parties are evanescent things, born of political emotions and of uncertain—sometimes precarious—tenure of life, and went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another . . . . Political parties being neither mentioned, protected, nor favored in the Constitution, a law will not be held to be unconstitutional, although in its workings it may destroy these organizations. 110

Conceding that parties do have some inherent rights, the court nevertheless upheld the blanket primary law, holding that it did not violate any of these inherent rights. 111 The state’s first blanket primary occurred just months after the Anderson decision. 112

After this early defeat, foes of the blanket primary remained vigilant. In 1964 and 1966, the Republican and Democratic Parties, respectively, proposed overhauling the blanket primary in favor of an open primary. 113 In 1979, the Senate conducted hearings on alternatives to the blanket primary. 114

The biggest attack to blanket primaries in Washington came in 1980 with Heavey v. Chapman. 115 The earlier case of Anderson was not dispositive of the constitutional issues in Heavey because the Supreme Court of Washington had since articulated a constitutional right to free-

---


110. Id. at 606, 59 P.2d at 297 (citing State ex rel. Shepard v. Superior Court, 60 Wash. 370, 380, 111 P. 233, 238 (1910)).

111. These include the right to adopt principles, the right to require members to adhere to those principles, and the right to expel officials who contravene those principles. Id.

112. HODDE, supra note 108.

113. Id.

114. Id.

115. 93 Wash. 2d 700, 611 P.2d 1256 (1980).
dom of association. In *Heavey*, the political party-plaintiffs were first required to prove that the law was a substantial burden to their right of association, and the state-defendant would be required to prove that the blanket primary was narrowly tailored to advance compelling state interests.\(^{117}\)

The plaintiffs were unable to meet this burden because of the secret nature of state ballots.\(^{118}\) While acknowledging that the plaintiffs' burden was difficult to meet, the court chastised the plaintiffs for refusing to even attempt to show that they had suffered some injury.\(^{119}\) However, the court indicated that the plaintiffs might not have prevailed even if they had been able to prove that the blanket primary permitted crossover voting:

A state may legislate to prevent the perceived evils of crossover voting, but several states permit crossover voting in their primaries. Others have provision[s] for primaries which allow participation by independents and members of other parties. There is no suggestion that such a clause makes the election laws unconstitutional, nor is it a mandatory prerequisite to constitutionality that independent, non-member electors be permitted to vote in a party’s primary.\(^{120}\)

Moreover, the court suggested that the right of association is not limitless and would only be recognized insofar as it could be used to invalidate a law that was either racially discriminatory or impeded voter participation, neither of which was alleged by the plaintiffs.\(^{121}\) Thus, the issue was put to rest in Washington, but *Jones* reinvigorated the issue for those opposed to the Washington primary.

**D. Democratic Party of Washington State v. Reed**

After the Supreme Court’s decision in *Jones*, the Democratic Party of Washington State filed suit in federal district court against Washington Secretary of State Sam Reed.\(^{122}\) The Democratic Party sought a declaratory judgment that Washington’s blanket primary was unconstitutional because it does not advance a compelling state interest, or even if the blanket primary does assert a compelling state interest, there are less

\(^{116}\) *Id.* at 702, 611 P.2d at 1257.

\(^{117}\) See *id*.

\(^{118}\) *Id.* at 703, 611 P.2d at 1258.

\(^{119}\) See *id*.

\(^{120}\) *Id.* (citing Nader v. Schaffer, 417 F. Supp. 837, 850 (D. Conn. 1976)) (internal citations omitted).

\(^{121}\) *Id*.

restrictive means of doing so.\textsuperscript{123} The party also sought an injunction allowing it to restrict participation in partisan primaries.\textsuperscript{124} The Republican and Libertarian Parties intervened as plaintiffs.\textsuperscript{125} The Washington State Grange, a key player in the adoption of the blanket primary in 1935, intervened as a defendant.\textsuperscript{126} The parties filed cross-motions for summary judgment.\textsuperscript{127}

The district court granted the Secretary of State’s motion to dismiss the claim, finding that Washington’s blanket primary was constitutional.\textsuperscript{128} The court held that Jones was inapplicable because there were material differences between the California and Washington blanket primaries and because the parties could not prove that their association right was substantially burdened by Washington’s blanket primary.\textsuperscript{129}

The district court distinguished the California and Washington systems on five different grounds. First, the systems were distinguishable because California required that voters register their party affiliation, while Washington did not.\textsuperscript{130} Second, the California primary placed more emphasis on party affiliation, requiring that candidates demonstrate three months of continuous registration for the party whose nomination they were seeking.\textsuperscript{131} Washington, on the other hand, freely allowed candidates to indicate party affiliation, if applicable.\textsuperscript{132} Third, the court characterized Washington’s primary as akin to a nonpartisan primary.\textsuperscript{133} Rather than sending the top two vote-getters to the general election, candidates receiving at least one percent of the vote for that office and a plurality of the votes for their parties proceed to the general election.\textsuperscript{134} Washington’s primary thus prevented a general election runoff between two members of the same party. Fourth, the adoption of the blanket primary in Washington differed from the adoption of Proposition 198 in California.\textsuperscript{135} Washington’s blanket primary was adopted by the legislature, whereas California’s blanket primary was enacted through a voter initia-
tive. Thus, the Washington primary is authorized by the Elections Clause, which vests powers over elections in state legislatures.\textsuperscript{137}

Finally, the court distinguished the purposes behind the California and Washington laws. The purpose of the California primary was to "'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers.'"\textsuperscript{138} In contrast, Washington's blanket primary was enacted "to allow [a]ll properly registered voters [to] vote for their choice at any primary election, for any candidate for each office regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter."\textsuperscript{139}

As in \textit{Heavey}, the district court found that the political party-plaintiffs could not provide evidence of a substantial burden on their association right.\textsuperscript{140} The court came to this conclusion by exploring the extent to which non-party-members participate in party primaries.\textsuperscript{141} In other words, the court looked for evidence of crossover voting.

The court was not persuaded by the plaintiffs' evidence of injury.\textsuperscript{142} The court deemed the evidence provided as a "mere assertion" that did not show actual injury.\textsuperscript{143} Elected candidates remained committed to party goals, voter loyalty to parties in Washington mimicked national patterns, parties were still able to set their own agendas, parties were cohesive and maintained their own leadership hierarchies, and there was no evidence of party raiding.\textsuperscript{144} Thus, finding no evidence of a substantial burden on the parties' associational right, the court granted the Secretary of State's motion to dismiss.\textsuperscript{145}

The political parties appealed to the Ninth Circuit, which acknowledged the precedent set by \textit{Jones} and concluded that resolution of the case required only that the court determine whether the Washington State

\begin{itemize}
  \item \textsuperscript{136} Id. at 12.
  \item \textsuperscript{138} Reed, No. C005419FDB at 13.
  \item \textsuperscript{139} Id. (citing \textit{Heavey v. Chapman}, 93 Wash. 2d 700, 705, 611 P.2d 1256, 1259 (1980)).
  \item \textsuperscript{140} The court's discussion of certain evidentiary issues is excluded from this summary. See \textit{Reed}, No. C005419FDB at 14–23; \textit{Heavey}, 93 Wash. 2d at 702, 611 P.2d at 1258.
  \item \textsuperscript{141} Reed, No. C005419FDB at 24.
  \item \textsuperscript{142} The Republican Party claimed to have been injured by Republican candidate Jennifer Dunn's 1992 congressional campaign because of the way in which "she sought broad support" from primary voters. Having no evidence from which to conclude that Republican voters in Dunn's district did not truly want her to win, the court disregarded this evidence. Similarly, the Democratic Party argued that the nomination of gubernatorial candidate Dixy Lee Ray resulted from crossover voting. Id. at 27–28.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id. at 24–26.
  \item \textsuperscript{145} Id. at 29.
\end{itemize}
blanket primary was distinguishable from the California primary, which was invalidated in Jones.\footnote{146} The Secretary of State argued that the California primary was distinguishable in two respects.\footnote{147} First, California registers voter affiliation, but Washington does not.\footnote{148} The court dismissed this argument by noting that the fact that Washington voters are not required to formally proclaim party affiliation does not mean that they lack party affiliation.\footnote{149} Thus, the court permitted parties to exclude voters not explicitly affiliated with the party even though Washington does not require voters to declare their affiliations.\footnote{150}

The State also lost its argument that Washington’s primary is nonpartisan because Washington State lacks a party registration scheme\footnote{151} and Washington voters do not elect party nominees.\footnote{152} The court dismissed this argument as “the problem with the system, not a defense of it.”\footnote{153} In the court’s view, Washington’s primary impermissibly prevented parties from selecting their nominees.\footnote{154} It stated that the First Amendment’s freedom of association guarantee applies to parties and ensures them the freedom not to associate with nonparty members.\footnote{155}

Having found the Washington primary “materially indistinguishable” from California’s blanket primary, the court proceeded to strictly scrutinize the law.\footnote{156} The court ultimately found no compelling state interest to support the primary law’s facial constitutional burden on parties’ First Amendment rights.\footnote{157} Stating that Jones was dispositive of all of Washington’s interests, it struck down Washington’s blanket primary by analogizing each of the State’s arguments to Jones and summarily dismissing them.\footnote{158}

\footnote{146} Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003). The inability to demonstrate a substantial burden that proved to be fatal for the plaintiffs in Heavey and Reed was of no concern to the court because, as was the case in Jones, the burden could be inferred from the face of the blanket primary law. In other words, the court did not require evidence that the parties’ rights had actually been burdened. Id.

\footnote{147} Id.

\footnote{148} Id.

\footnote{149} Id. at 1203–04.

\footnote{150} Id. at 1204.

\footnote{151} Id. at 1203.

\footnote{152} Id.

\footnote{153} Id. at 1204.

\footnote{154} See id.

\footnote{155} Id.

\footnote{156} Id.

\footnote{157} Id.

\footnote{158} The State first argued that the law promoted fairness by empowering all voters to participate in all stages of candidate selection. Employing the language from Jones, the court held that “a nonmember’s desire to participate in the party’s affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications.” The State’s second argument, that the primary maximizes voter choice, was also rejected because, as was said in Jones,
The district court decision in favor of Washington State was reversed. The defendants appealed, and the Supreme Court denied certiorari twice. Thus, Reed successfully invalidated blanket primaries in Washington State.

E. The Aftermath of Reed

In response to the invalidation of the blanket primary, the Washington State Legislature debated whether to replace the old system with a ballot modeled after either Montana or Louisiana. The Montana-style primary is an open primary in which voters privately choose one party’s ballot. The Louisiana-style primary is nonpartisan and would allow voters to vote for any candidate, much like they had in the blanket primary, except that the top two vote-getters would advance to the general election, regardless of party affiliation. It was billed as the “modified blanket primary” because, from voters’ perspectives, it would mimic the blanket primary. Washington Secretary of State Sam Reed supported such an interest “is hardly a compelling state interest, if indeed it is even a legitimate one.” The third state interest, protecting voter privacy, was not considered compelling in Jones, and was particularly worthy of rejection here because the state broadly protects voter privacy only in general elections, which are distinguishable from primaries. The fourth interest, increasing voter participation, was essentially rejected because the increased participation results only from producing candidates that cater to majoritarian, rather than partisan, concerns. Later in the opinion, the court also addressed the Grange’s arguments that the blanket primary affords voters a scheme for voting on the basis of issues that do not fall along party lines. The court rejected this argument as an attempt to force parties to nominate more majoritarian candidates who appeal to the entire electorate but not to party members. The remedy for such voters, according to the court, is to vote for a different candidate rather than to participate in determining who will carry the party’s message. The court rejected the State’s fifth interest, preserving state sovereignty in determining how state elections are held, as being insufficiently specific to warrant designation as compelling. While recognizing that states have the power to determine time, place, and manner requirements, the court rejected the notion that those restrictions could be employed to impede fundamental rights. Id. at 1205–1207 (citing Jones, 530 U.S. at 583, 584).

159. Id. at 1207.
161. See Garber, supra, note 3.
162. Id.
163. Id.
this proposal.\textsuperscript{165} The Secretary of State’s website also published polls indicating a clear voter preference for the nonpartisan primary.\textsuperscript{166}

 Nonetheless, Washington politicians sharply criticized the nonpartisan primary on several bases. They argued that a nonpartisan primary deprives voters of some choice because they may be forced to pick between candidates from the same party in the general election.\textsuperscript{167} Governor Gary Locke, one of the nonpartisan primary’s vocal critics, claimed that Washington voters would have been forced to choose between two Democratic gubernatorial candidates in the general elections of 1980 and 1996.\textsuperscript{168} Of 627 races between 1993 and 2003, the Secretary of State’s office found twenty-five races in which two candidates of the same party would have faced off in the general election if the nonpartisan primary had been in effect at the time.\textsuperscript{169} It also argued that voters may also be deprived of choices because the nonpartisan primary effectively excludes minor parties.\textsuperscript{170}

 Another criticism leveled against the nonpartisan primary was that it places more emphasis on the primary election, where voter participation is much lower.\textsuperscript{171} Under the nonpartisan system, the primary can take on more importance because it might decisively exclude one party.\textsuperscript{172} In Washington, voter turnout in the primaries of 2000 and 2002 was about half of the turnout in the general elections.\textsuperscript{173} This is problematic if low voter turnout results in skewed voter representation.\textsuperscript{174}

 The second alternative considered, the nonpartisan model in Louisiana, has reportedly contributed to some unusual results. It encourages candidates to enter races solely to draw votes away from disliked candi-


\textsuperscript{166} \textit{Washington Secretary of State, Voters Support a Qualifying (Modified Blanket) Primary} (Feb. 2004), \url{http://www.secstate.wa.gov/office/news_docs/Voters%20support%20a%20modified%20blanket%20primary.pdf}.


\textsuperscript{168} \textit{Id}.

\textsuperscript{169} \textit{Id}.


\textsuperscript{171} \textit{Id}.

\textsuperscript{172} \textit{Gary Locke, Editorial, Voter Choice the Primary Consideration, Seattle Times}, Apr. 18, 2004, at D1.

\textsuperscript{173} See \textit{id.} "[V]oter turnout tends to be depressed for the runoffs." Jacobson, \textit{supra} note 38, at 2894.

\textsuperscript{174} \textit{Id}.
dates. Some argue that this has facilitated the election of extremists, such as the election of white supremacist David Duke. Washington’s Democratic and Republican Parties bitterly opposed adoption of the nonpartisan primary. They argued that, like the blanket primary, the nonpartisan ballot would deprive them of the power to choose their own candidates. If the nonpartisan primary were adopted, the two major parties pledged to revert back to the convention model of candidate nomination, a system that had not been used in the state since 1907. The Democratic and Republican Party chairs supported the veto and the Montana-style open primary.

The nonpartisan system had some success in Washington. On March 2, 2004, the Washington State Senate passed a bill replacing the blanket primary with a nonpartisan primary in a twenty-eight to twenty vote. In a move that would prove to be significant, the House passed a modified version. The house added a fallback provision, requiring the adoption of the Montana-style primary in the event that the nonpartisan primary was invalidated by the courts. This version passed the Senate and reached Governor Locke’s desk.

Governor Locke voiced disapproval of the nonpartisan system. The modified House version gave him the perfect opportunity to show his disapproval; rather than veto the entire bill, the Governor was able to veto parts establishing the nonpartisan primary. The parts establishing the Montana-style system, the provision that was intended to operate as a backup measure, remained unchanged. In Governor Locke’s view, the way the bill was written implied that the legislature desired this type of veto. According to Governor Locke, “In the last days of the session there were many legislators who came up and said, ‘Do you know how we wrote this?’ They indicated that while they voted for the bill, they would not be at all displeased if I vetoed out [the Louisiana system].”

175. Jacobson, supra note 39, at 2894.
176. Experts believe that white supremacist David Duke was able to secure a seat in Louisiana’s House of Representatives because of the nonpartisan structure of Louisiana’s elections. Id.
177. Garber, supra note 167.
178. Id.; HODDE, supra note 108.
179. Garber, supra note 167.
180. HODDE, supra note 108.
181. Garber, supra note 167.
182. Id.
184. Garber, supra note 167.
185. Id.
186. Id.
187. Id.
His decision was also guided by the belief that the parties would have inevitably challenged the nonpartisan system.188 The resulting ballot, used in the 2003 primary, was an open primary allowing voters to declare their party affiliation secretly. Under the new system, not only were voters required to vote for the candidates of a single party, but they also had to declare their party preference in order for their votes to count.189 To appear on the primary ballot, parties must have received more than five percent of the vote.190 To advance to the general election, candidates must have received at least one percent of the vote in the primary.191

Voter response to the new primary was robust. In one twenty-four hour period, the Secretary of State’s office received 2000 phone calls and one email every two minutes.192 Secretary of State Sam Reed estimated that only about five percent of phone calls from voters were positive and that his office had received 2000 angry emails.193

While the Montana-style primary appeared to be a clear win for Washington’s political parties, it is not entirely clear that political parties agreed.194 While the Democratic Party clearly approved of the veto, they preferred that Washington voters also be required to register their party affiliation publicly.195 The Washington State Grange, the organization that helped to spearhead the enactment of the blanket primary in Washington and defend its constitutionality, was also disappointed by the adoption of the new system.196 In response, the Grange launched a two-front attack. First, the Grange filed an ultimately unsuccessful lawsuit against Governor Locke, challenging the constitutionality of his creative

188. Id.
189. Ammons, supra note 183.
191. Id.
193. Id.
194. "'We think it was a very positive step for him to veto (the Top Two),' said Paul Berendt, chairman of the state Democratic Party." Garber, supra note 166.
195. Ammons, supra note 183.
196. Chad Johnson, Grange Fights Locke’s Primary Veto, SEATTLE TIMES, Apr. 23, 2004, at B3.
veto.\textsuperscript{197} Second, it worked, via Initiative 872, to reinstate the blanket primary in a modified form.\textsuperscript{198}

If voter support for the initiative can be viewed as any indication of voter response to the Reed decision, the results clearly indicate voter disapproval of Reed.\textsuperscript{199} The measure was decisively victorious, garnering 59.84\% of the vote.\textsuperscript{200} The measure gained voter approval both statewide and in each of Washington’s thirty-nine counties.\textsuperscript{201} Not to be outdone by the will of the people, the major political parties successfully challenged the constitutionality of the nonpartisan primary in federal district court;\textsuperscript{202} the decision has been appealed to the Ninth Circuit.\textsuperscript{203}

\textbf{IV. BLANKET PRIMARIES ARE CONSTITUTIONAL AND ARE SUPPORTED BY PUBLIC POLICY}

The Ninth Circuit in Reed erroneously assumed that Jones mandated the invalidation of all blank primaries.\textsuperscript{204} Washington had adhered to the blanket primary system for decades, so some voter resentment was to be expected. At a deeper level, the invalidation of Washington’s blanket primary is open to criticism because it was premised on a fundamental disregard for Washington’s unique political landscape, the place of the primary in that landscape, and a method for selecting party candidates that, through a blanket primary, was constitutional.

Beyond Reed and the Washington context, there are many features inherent in the blanket primary system that suggest that the Supreme Court in Jones erred in ruling it unconstitutional. The blanket primary affords a maximum amount of voter choice, allowing voters of all affiliations equal levels of participation, regardless of whether “their” party is offering a competitive slate of candidates.\textsuperscript{205} The blanket primary recognizes that political parties are not entitled to all of the protections

\textsuperscript{197} Wash. State Grange v. Locke, 153 Wash. 2d 475, 105 P.3d 9 (2005). The court upheld the veto because it applied to entire sections, because Governor Locke’s expression of his understanding of the meaning of one of the sections he decided not to veto did not amount to an attempt to rewrite it, because the title of the bill passed muster under Article II, \textsection 19 of the Washington State Constitution, and because the veto need not be subjected to an Article II, \textsection 83 analysis, which applies only to amendments.

\textsuperscript{198} Gilmore, supra note 170.


\textsuperscript{200} Id.

\textsuperscript{201} Id.


\textsuperscript{204} \textit{Infra} Part IV.A.

\textsuperscript{205} \textit{Infra} Part IV.C–D.
that the First Amendment affords private organizations. Furthermore, it assigns great importance to the primary stage, deviating from acceptance that primaries are less important to voters than general elections. Moreover, while the level of openness of blanket primaries may expose the parties to a greater risk of party raiding than other primary systems, no system can truly stop party raiding; in fact, the threat of party raiding is more imagined than real. The following sections detail why the Reed court was wrong and why blanket primaries in Washington are constitutional and supported by public policy.

A. Jones did not Invalidate All Blanket Primaries

The premise of the Reed court’s invalidation of Washington’s blanket primary was that Jones was dispositive. However, the court failed to appreciate the material distinction between California and Washington primary elections. That both states employed primaries properly characterized as “blanket primaries” does not necessitate identical conclusions of non-constitutionality; a blanket primary may still pass constitutional muster. The district court properly recognized five points of distinction between the two states’ primaries, but the state argued only one of the two most important distinctions to the Ninth Circuit. The interplay between these two distinctions most clearly illustrates how Washington’s primary elections were unique and distinguishable from California’s, and thus shows why Jones did not apply in the Washington context.

The State argued in Reed that the systems differ because California voters register their party affiliation, but Washington voters do not. The result of this nonpartisan registration, according to the State, is that the election itself is nonpartisan. In other words, the election serves to elect nominees who represent the electorate at large rather than a party. Even if voters do not register their party affiliation, according to the court, they still have some party affiliation and presumably vote in accordance with it.

This aspect of the court’s opinion directly conflicts with the language in Jones. The Jones Court delineated a primary system that would constitutionally preserve the openness of the blanket system: a nonpartisan primary. The crucial feature of this type of primary, according to the Jones Court, is that voters are not choosing the party’s nominee be-

206. Infra Part IV.D.
207. Infra Part IV.E.
208. See Democratic Party of Wash. v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003).
209. Id.
210. Id.
211. Id. at 1203–04.
cause that would violate the right to freedom of association.213 This is precisely the argument the court rejected in Reed.214 If the State had also argued the second key feature of Washington's primary system that makes it critically different from California's, that candidates are not required to demonstrate strict party adherence, the Court might not have concluded that Washingtonian voting patterns are likely to be partisan.

Although the court may have been correct in concluding that merely because Washington voters do not register party affiliation does not mean that their votes are nonpartisan, this conclusion fails to consider that candidates running for office in Washington are not required to meet strict registration requirements.215 In California, candidates are required to continuously register for their party for three months in order to qualify to be placed on their party's ballot.216 In Washington, candidates self-declare their party affiliation;217 there is no requirement that candidates in Washington be true party adherents. In a sense, the Washington declaration of party affiliation is more an informational tool for voters than it is a sign of commitment to the party.

Thus, candidates in Washington do not need to demonstrate any level of commitment to "their" party, and the state's argument that Washington primary winners are nominees of the electorate rather than of "their" party is an accurate description of Washington's blanket primary. Granted, this may be a rather unorthodox approach to primary elections, but that alone does not justify invalidating it. It may be that seventy years ago Washington's legislators figured out something that the courts and the rest of the states are still loathe to admit: Primary elections are too important to be treated like party pageants dominated by party rules. As the district court in Reed recognized, that an election involves party labels does not mean that the election itself is partisan or that primary winners can fairly be characterized as representing only their declared parties.218 Only by engaging in a state-specific inquiry into the meaning of partisanship can the constitutionality of a state's blanket primary system be accurately evaluated.

B. Political Parties are not Purely Private Organizations

The premise of any political party's attack of a state's primary system is the notion that the political party's right to free association entitles

213. Id. at 586.
214. Reed, 343 F.3d at 1204.
216. Id.
217. Id. at 9.
218. See id. at 9, 11.
it to determine which voters can associate with the party. However, political parties are not purely private organizations, so their associational right to exclude should not be viewed as absolute. Many political party functions are private in nature, and therefore parties’ First Amendment right to associate would apply. Some examples of a party’s private practices are the decision to endorse particular candidates and how to communicate the party’s endorsements of those candidates. When performing these functions, the party acts as a private organization and is entitled to all of the First Amendment protections that come with that status. These are mostly internal party functions.

However, the primary is entirely different from these “internal” party functions; the primary is a public, state function. It is unlike any other form of candidate nomination because it is actually an election. In these respects, the primary is more like a government function deserving of less First Amendment protection. In his Jones dissent, Justice Stevens offered an extreme illustration of why parties’ right not to associate applies to internal party affairs but is not absolute in the primary process:

A political party could, if a majority of its members chose to do so, adopt a platform advocating white supremacy and opposing the election of any non-Caucasians. Indeed, it could decide to use its funds and oratorical skills to support only those candidates who were loyal to its racist views. Moreover, if a State permitted its political parties to select their candidates through conventions or caucuses, a racist party would also be free to select only candidates who would adhere to the party line . . . . It is because the primary is state action that an organization—whether it calls itself a political party or just a “Jaybird” association—may not deny non-Caucasians the right to participate in the selection of its nominees.

In a primary, a party cannot compel voters to take oaths, pay dues, or attend meetings before being permitted to vote in primary elections, effectively rendering parties powerless to control who votes. Nonetheless, because primaries are elections, they have a high degree of state involvement. This state involvement, including the financing of the

220. See supra, Part III.A.
221. See Jones, 530 U.S. at 592.
222. See id.
223. Id. at 594.
224. Id. at 594.
225. Id. at 592–594.
226. Id. at 596
227. Id. at 594.
actual election, implicates state interests and demands that party interests not be viewed as absolute.\textsuperscript{228} When viewed in this light, the concern that the blanket primary system may infringe upon parties’ right to associate is an insufficient justification for deeming the blanket primary unconstitutional.

\textit{C. The Forgotten Voter}

Beyond the First Amendment, there are other public policy reasons for supporting Washington’s blanket primary model. Forgotten in any discussion of the balance between state and party interests are minority party,\textsuperscript{229} third party,\textsuperscript{230} and independent voters.\textsuperscript{231} Only under a blanket primary scheme are these voters afforded a meaningful voice. Under other primary systems, these voters have no stake in the outcome of major parties’ political primaries because they are not formal members of the parties.

Minority voters should be heard at the primary for four reasons. First, the primary election may be determinative of the general election. If two candidates of the same party are unopposed by candidates from other parties, voters who are not members of the only party to offer candidates for the general election would be excluded unfairly from the election that will ultimately determine the candidate who will represent them. Although not all primary elections rise to this level of importance, the risk that whole segments of the voting population could be disenfranchised in this way demands that the courts err on the side of inclusion rather than exclusion.

Second, even if a primary technically offers candidates from at least two parties, voters may perceive themselves as realistically having only one clear choice. Such is the case when one party so clearly dominates a region that candidates from other parties are considered nothing more than token opposition.\textsuperscript{232} For example, in a voting district that is historically overwhelmingly Democratic; the Republican, independent, and third party voters would be denied the opportunity to participate in what is, pragmatically speaking, the only primary that matters.

\textsuperscript{228} See \textit{id.} at 595.
\textsuperscript{229} “Minority party” refers to those voters who adhere to a party that is so marginalized in their voting district so as to have no viable chance of winning the election.
\textsuperscript{230} “Third party” refers to any party other than the Republican and Democratic parties.
\textsuperscript{231} “Independent voters” refers not to voters who tout themselves as being independent but instead to those voters who do not adhere to one party.
\textsuperscript{232} “Voters who identify with the minority party may be less motivated to vote in the primary if they assume that the eventual nominee has little chance of being elected because the majority party dominates the elections.” JEWELL & MOREHOUSE, note 17, at 126.
Third, in a race between strong candidates from two opposing parties, independents and third party voters should still be afforded a voice in one of the major parties' primaries. Even if the primary offers independent and third party candidates, it is realistic for potential voters to view a vote for these candidates as a throwaway vote and to want to participate in a primary that they perceive as actually affecting the general election. Third party candidates can and do rob major candidates of important votes. In 1912, Theodore Roosevelt ran for President as a Progressive Party candidate, capturing twenty-seven percent of the votes and securing Democrat Woodrow Wilson's election.\(^{233}\) In 2000, Ralph Nader ran for President as a Green Party candidate, siphoning critical votes from Al Gore.\(^{234}\) To avoid this, third party adherents may choose to cast their votes for a candidate from one of the major parties, and they should be allowed to do so.

Finally, forcing voters to join the party of the primary in which they want to participate is not the answer.\(^{235}\) This proposed solution ignores the possibility that in any given election, there may be a mixture of races in which voters feel compelled to vote for major party candidates and races in which minor party candidates are viable options. Also, even if voters do vote for major party candidates in all races, they should still be allowed to express their affiliation with a different party.\(^{236}\)

**D. The Nonpartisan Primary Still Disenfranchises Voters**

At first glance, a nonpartisan primary, which Washington voters selected to replace the Montana-style primary that Governor Locke signed into law, appears to cure voter disenfranchisement. This was the view of the Supreme Court in *Jones*. In a situation in which the only candidates running are from the same party, the nonpartisan primary is no worse than the Montana primary.\(^{237}\) In a sense, it is better because it allows non-party members to participate. For example, suppose two Democrats are running for governor. Under the Montana primary, Republican voters would be barred from voting in the gubernatorial race unless they were willing to vote for Democrats in all primary races because they would be limited to the Democratic ballot.\(^{238}\) Under the nonpartisan primary, how-

---

233. SABATO & LARSON, supra note 7, at 29.
234. Id.
235. This was the Supreme Court’s response to the argument in *Jones* that the blanket primary disfranchised voters in a way that other primaries cannot. *Jones*, 530 U.S. at 584.
236. See supra Part IV.C.
237. The Montana-style primary is an open primary, which is described supra, Part II.C.
238. In fact, Republicans would also be required to check a box declaring Democratic affiliation.
ever, Republican voters could vote in the gubernatorial race without sacrific- ing votes for Republican candidates in other races.

However, in a nonpartisan primary race where there are candidates representing both major parties, there is still the potential for voter disenfranchisement. For example, in an overwhelmingly Republican district, Democratic, independent, and third party voters will want to participate in the Republican primary because they know it will ultimately determine the outcome of the general election; their non-Republican candidates may be nothing more than token opposition. Under both the blanket primary and the nonpartisan primary, voters of all parties would be allowed to vote for one of the Republican candidates. The difference between the two primary systems is the impact that this openness at the primary stage has on the general election. Under the blanket primary, the Republican who received the most primary votes would advance to the general election to compete against the highest vote-getter from the other parties. Under the nonpartisan primary, though, the top two vote-getters would advance, irrespective of their party affiliation. In other words, there is no guarantee that unaffiliated voters and voters affiliated with the minority party or a third party will have a candidate to represent them at the general election. Under the nonpartisan primary, the price to pay for having a voice in the race that will ultimately decide the winner is surrendering the chance to vote for a candidate representing your party in the general election.

One may argue that the right surrendered under the nonpartisan primary is inconsequential. The motivation behind non-Republicans’ desire to participate in the Republican primary is that the district is so dominated by Republicans that no other candidates stand a chance. Why, then, should it matter whether other candidates are represented in the general election? The reason is twofold.

First, minority party candidates may stand a better chance of winning when the vote is no longer shared with another candidate from the majority party. For example, imagine that the two Republican candidates competing in the nonpartisan primary have vastly different political agendas. Candidates running in the Republican-dominated district will be encouraged to affiliate with the Republican Party to increase their chances of winning. Candidates running on the Republican platform will want to cater their message to attract non-Republican voters who have no viable candidates to represent them. If both Republican candidates advance to the general election, they will compete for the remaining votes that went to non-Republicans.

239. See supra Part II.C.
240. See supra Part II.C.
A different outcome is likely under a blanket primary system. Obviously, only one of the two Republicans will advance to the general election. But what happens to all the primary votes that went to the losing Republican candidate? It is too simplistic to suggest that they merely transfer to the winning Republican candidate, ensuring her victory in the general election. Some, or many, of those votes could go to non-Republican candidates. What this means is that while non-majority candidates may be mere token opposition in the primary, they may serve as viable opponents in the general election. The nonpartisan primary deprives non-majority voters of the opportunity to vote for their candidate in the general election while also participating in the majority party’s primary. Ensuring that voters have the choice to exercise both options gives them a voice in determining which candidate will ultimately represent them.

The second reason why these voters deserve to have their party affiliations represented in the general election is that it affords them an avenue for political change. An election is about more than selecting a candidate. It also sends a message from voters to majority party candidates about how strong or weak the minority party is, and it forces them to be accountable to not just their own party members, but their constituents as a whole. It tells parties whether they are succeeding at getting their message out and reaching voters. Even if minority party voters know that their candidate is going to lose at the general election, they should have the chance to cast a vote for their candidate as a means of expressing their values.

E. Party Raiding

One of the major concerns in Jones and Reed is that blanket primaries allow raiders from other parties to crossover and change the values and messages the party espouses. As the Supreme Court’s jurisprudence clearly indicates, one surefire way for state primary election laws to pass muster is if they claim to prevent party raiding.241 Because the argument that party raiding interferes with parties’ association right is so universally accepted, it bears investigation.242

241. Cal. Democratic Party v. Jones, 530 U.S. 567, 580 (2000). For example, the Supreme Court in Jones was not persuaded by evidence that party raiding is unlikely and that even benevolent crossover votes are unlikely to affect an election’s results.

242. See, e.g., Rosario v. Rockefeller, 410 U.S. 752, 760–762 (1973) (upholding New York’s registration scheme requiring voters to register party affiliation eight months before presidential primaries and eleven months before non-presidential primaries because the requirement made party raiding almost impossible).
1. True Raiding is Unlikely

Party raiding does not justify abolishing blanket primaries because raiding is unlikely to occur. While characterizing the motivations behind crossover votes is admittedly difficult, studies suggest that party raiding simply does not occur.244 There was near unanimity among experts called to testify about this issue on behalf of both parties.245 Moreover, some conclude that crossover voters "are rarely trying to pick a weak candidate but usually support the candidate whose views or record and personality are appealing to them."246 Even the evidence that persuaded the Supreme Court in Jones does not clearly demonstrate the presence of actual raiding.247 Merely because more voters voted in primary races than were actually registered as party members does not necessarily mean that people were voting for the opposition.

Additionally, because raiding is so difficult and risky to accomplish, the excess votes are probably attributable to voters finally being free to cast sincere crossover votes for their preferred candidates irrespective of party designations. When voters cross over to the other party's race, they sacrifice votes for their own party's candidate. Thus, people who cross over are more likely to vote for a candidate they would actually like to see in office, even if only as their second choice. In other words, these crossover votes are probably sincere.

Also, raiding is only worth the risk for devout party loyalists.248 Voters must be quite committed to their party's success in order to have the foresight and strategizing raiding requires. This is an unrealistic expectation for a country that is reluctant to vote, much less participate in party politics and strategizing.249 Indeed, raiding requires a certain

243. Voters may cross over because they sincerely want the other party's candidate to succeed, they believe the other party's candidate is more likely to win, or they believe the other party's candidate will not be able to defeat their party's candidate in the general election. See supra Part III.A.

244. "Overall, the prevalence of sincere voting confirms the findings of many studies of primary systems and voting behavior, and tends not to support early fears about mischievous voting under open and blanket primaries." See Jonathan Cohen, Thad Kousser, & John Sides, Sincere Voting, Hedging, and Raiding: Testing a Formal Model of Crossover Voting in Blanket Primaries 23 (Sept. 2, 1999) (internal citations omitted) (unpublished manuscript, on file with the Political Science Department, University of California, Berkeley); "Studies also conclude that crossover voting with malicious intent simply does not occur." Reed, No. C005419FDB at 25. See also discussion infra Part IV.E.3.

246. JEWELL & MOREHOUSE, supra note 17, at 106.
247. See Jones, 530 U.S. at 578.
248. JEWELL & MOREHOUSE, supra note 17, at 128.
249. "After the 1982 election voters in Michigan—an open primary state—were asked in a survey whether they always voted in the same party's primary or shifted from time to time...[A]lmost half said they shifted back and forth between party primaries." Id. at 127.
amount of skill. In order for voters to be willing to risk that their candidate of choice will not be nominated, they have to be informed as to the likelihood that their party's candidate will advance to the primary without their vote, they have to know which candidate from the opposing party is considered weaker than their party's candidate, and they have to know the likelihood of that candidate advancing to the general election with their vote. Raiding requires some level of party organization to educate party loyalists about races where party raiding is likely to succeed. This presupposes a level of voter sophistication that is simply not realistic in modern American politics.

2. Raiding is Theoretically Possible in All Primary Systems

Even if party raiding was a real threat, the existence of raiding should not have been used to invalidate the Washington primary because, assuming it took place, it is not unique to the blanket primary. The Jones district court correctly recognized that raiding is no more likely under a blanket primary than under an open primary. Even in a closed primary in which voters are required to state party affiliation well in advance of the primary election, raiding is still possible. Voters wishing to raid the other party's primary are simply required to plan farther in advance and to register for the opposing party. Admittedly, this feature of closed primaries "deters raiding in one way that the blanket primary does not [because] [a] partisan voter who switches party allegiances just before the election in order to cast a raiding vote must give up the right to vote for candidates of his or her choice in races in which he has no desire to raid." This is especially true in states requiring party registration months before the primary election. Therefore, eliminating blanket primaries will, at most, increase the amount of raiding that occurs in closed primaries. Voters willing to sacrifice a vote for their own party's candidate in order to raid the other party's primary will find themselves forced into raiding the other races as well.

250. Id.
251. See Jones, 984 F. Supp. at 1298.
252. "[I]n order to be effective, 'raiding' by voters requires organized and elaborate complicity among many persons." NEUBORNE & EISENBERG, supra note 4, at 177.
253. See id.
255. Id. at 1298.
256. Id.
3. Raiding is a Party Problem, Not a Government Problem

If party raiding and ticket-splitting should be discouraged, it is not the responsibility of states to do so. Party raiding and ticket-splitting are motivated not by the structure of the primary but by intra- and inter-party politics.\(^{259}\) It is irresponsible for parties to rely on state governments to solve their raiding and ticket-splitting woes. Voters’ intent to crossover stems from a poor offering of candidates rather than from the structure of the primary system, so the onus is on the parties to discourage such behavior.\(^{260}\)

It is impossible to conclude whether crossover voting actually occurs in Washington because there is no party registration.\(^{261}\) There are characteristics of elections that make certain types of crossover voting more or less likely, however, which makes distinguishing the types of crossover voting possible without the use of voter polls and surveys.\(^{262}\)

The presence of an incumbent is associated with sincere crossover voting by members of the opposing party.\(^{263}\) The presence of a disparity between the competitiveness of the parties’ primaries increases strategic crossover voting by members of the party with the uncompetitive primary into the party with the competitive primary unless one of the candidates in the uncompetitive primary is an incumbent.\(^{264}\) Data show that crossover voting still occurs in elections where one party is overwhelmingly expected to win the general election, suggesting that the motivation behind this admittedly strategic crossover voting is hedging rather than raiding.\(^{265}\) Put simply, parties lose votes when facing strong competition, whether from an incumbent or a newcomer. The answer to raiding and other types of crossover voting, then, is for parties to offer stronger candidates. Parties should not be permitted to manipulate the candidate nomination process to shirk their responsibility for offering a strong oppositional voice.

Ticket-splitting, a related trend whereby a voter votes for candidates from more than one party in the same election, is not a new phenomenon. It has been around almost as long as the primary itself.\(^ {266}\) Possible explanations for ticket-splitting include the rise of issue-centered politics, the increased emphasis on candidates and their personalities, the growing value of incumbency, and the widening disconnect between par-

\(^{259}\) See Jones, 984 F. Supp. at 1298.
\(^{260}\) Id.
\(^{262}\) See Cohen et al. supra note 244.
\(^{263}\) See id. at 17.
\(^{264}\) Id. at 18, 22.
\(^{265}\) See id. at 15.
\(^{266}\) See supra Part II.B.
ties and voters.\textsuperscript{267} Those voters who are frustrated with both the Democratic and Republican Parties may find little recourse in the existence of third party and independent candidates because most Americans view voting for these candidates as a waste of their vote.\textsuperscript{268}

Again, the answer to this party problem lies within the parties themselves. The major political parties must organize and play a more prominent role in the voting patterns of American citizens. A change in election protocol is no substitute for some focused party politicking to bridge the disconnect between parties and their constituents. If parties long for the historic days of party loyalists, they should make strides to earn the trust of voters and demonstrate their continued relevance. Granted, the solution may not be quite so simple for third party and independent candidates, but that does not alter the simple truth that enticing voters is the responsibility of candidates and parties, not state legislators.

4. Misplaced Emphasis on Voter Intent

It is useful to note the role the courts play when they permit states to adopt legislation aimed to curb party raiding. When recognizing the associational right of voters, the courts ordinarily do not assess the subjective intent behind voters in voting for candidates of a particular party.\textsuperscript{269} The courts are not concerned about whether this type of association stems from a lifelong adherence to party principles or a coin toss. Only if the association can fairly be termed “raiding” are the courts concerned with subjective intent.

The reason for the sudden concern with party intent is that raiders are viewed as harmful to party interests, meaning that their associational right is deserving of less protection. In a sense, the argument seems to be that party raiders’ associational interests, because they are strategic, are somehow less sincere or genuine than those of voters who vote within their party.\textsuperscript{270} Such is not necessarily the case, however. A raider’s desire to associate with a party may actually be far more genuine and spirited than that of a disinterested voter who pays little attention to party politics and votes for candidates from one party by chance or circumstance. Party raiders are no less members of a party than are straight-ticket party voters. The key difference is that party raiders choose to associate with the

\begin{footnotes}
\footnotetext{267} SABATO & LARSON, supra note 7, at 123–124.
\footnotetext{268} See id. at 126–127.
\footnotetext{269} Party affiliation, whether registered or merely professed, is a proxy for subjective intent. See, e.g., Jones, 530 U.S. at 578–79.
\footnotetext{270} In fact, this is the basis for distinguishing raiders from hedgers, who vote for the opposing party’s candidate that they would most like to see win if their party’s candidate does not, and from sincere crossovers, who vote for the opposing party’s candidate as their first choice. See supra Part III.A.
\end{footnotes}
party to advance a different interest (election of a candidate from a different party) than do other party adherents. This may also translate into a desire to associate with the party for a more limited time period than is true for typical party members. These voters should not be denied the right to associate with the parties of their choice merely because they employ a calculated and ends-based rationale to voting.

5. A Blanket System is Worth It

Even if more closed primaries are effective at preventing party raiding, blanket primaries are still a better system of candidate nomination. This is because closed primaries, to the extent that they prevent party raiding, also prevent more desirable forms of crossover voting. Surely a party would not mind having members of another party vote for its candidates if the voters did so because the party’s candidate was preferred over all alternatives or because the voters’ preferred candidates were considered unlikely to succeed in the general election. These types of crossover voting, sincere voting and hedging, pose none of the associational concerns typical of party raiders but would be equally deterred by a non-blanket primary. Embracing the blanket primary could ultimately strengthen parties by enticing voters to be more active in party affairs and ensuring the election of more popular and representative candidates.

V. CONCLUSION

Primary elections occupy a particularly important role in modern American politics. One wonders whether the party leaders of the early 1900s fully grasped the significance of the decision to forfeit control over candidate nomination to states. They would probably be quite shocked to see how candidate nomination, previously considered an internal party affair, has become almost completely integrated into the political machinery of state government.

Perhaps the major political parties have launched an attack on state political primary election processes in an effort to reclaim control over candidate nomination and to undo what they perceive to be a grave mistake. Jones and Reed, which together constitute the party-driven abolition of the blanket primary in American politics, mark their dramatic success in so doing. What these cases fail to recognize is that the era of candidate nomination by primary has come and gone. Today’s political primary is not merely a means of selecting the candidate to bear the party label; it is often about selecting the candidate who will hold office and represent the entire electorate.

Precisely because primary elections are just that, elections, it is nonsensical and undemocratic to allow parties to exclude certain types of
voters from participating on the grounds that parties are akin to private organizations. Moreover, studies suggest that voters who crossover to another party’s primary do so in order to vote for someone they perceive as being a better candidate or having a better chance of winning the general election. When viewed this way, the concern that people of other political affiliations will participate in a party’s primary seems less damming of the blanket primary system and more commendable as one of its potential virtues.