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The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights when the Primary Election Process Is Construed Along a Continuum

Lauren Hancock*

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.¹

More than fifty years after Justice Roberts delivered these words in the dissent to a famous election law case, elections are still "marked by doubt and confusion," and the public continues to rely upon courts for resolutions.² Some people might wonder in particular what Justice Roberts would make of the decision delivered by the Supreme Court in California Democratic Party v. Jones.³ In Jones, the Supreme Court declared that California's blanket primary unconstitutionally infringed upon political parties' First Amendment rights of free association.⁴ The primaries utilized by Alaska and Washington were of the same type as California, and thus also invalidated, but the decision

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* J.D. Candidate 2004, University of Minnesota Law School; B.S. 1998, magna cum laude, Loyola University of Chicago. For encouragement and advice throughout the writing process I am tremendously grateful to Professor Guy-Uriel E. Charles, Hansem Dawn Kim, Shannon Garrett, and Emily Pruisner. I also thank the Board and Staff of the Minnesota Law Review for their technical editorial assistance. Finally, this Note is dedicated to Matt Brown, a beloved and constant reminder of all of life's balancing tests.

4. Id. at 586.
suggested that the unique and much-troubled format of the "nonpartisan" blanket primary in Louisiana would survive constitutional scrutiny. The Court in *Jones* did not, however, specifically consider how its decision affected the open primary election, a system significantly more prevalent than the blanket primary in the United States. While many legal scholars agree with the dissent's claim that the reasoning employed in *Jones* implies that open primaries are unconstitutional, this Note suggests that the open primary survives constitutional scrutiny if one takes seriously the Court's distinction between political party membership and affiliation. Further, this Note suggests that the Court's seemingly inconsistent primary election law jurisprudence can be made consistent by employing a tripartite model of political parties and understanding the primary electoral process as a series of events along a continuum. Along this continuum, each stage requires a balancing and shifting of the First Amendment rights of each component of the political party.

Part I of this Note discusses the different types of primary systems and explains how the evolution of the direct primary itself led to the development of these distinct systems. Part II of this Note explains the components of a political party in a way that can be useful in evaluating the legal analyses employed by

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5. *Id.* at 585. Louisiana conducts its own variation of the blanket primary, the nonpartisan blanket primary, in which voters may choose candidates from either party, regardless of affiliation. John R. Labbe, Comment, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721, 742 (2002). The two candidates who receive the highest number of votes are then nominated for the general election. *Id.* This nonpartisan primary format was the system advocated by the majority in *Jones* as a means of avoiding the constitutional infractions presented by blanket primaries. *See id.* (discussing Louisiana's unique brand of the blanket primary and its questionable constitutional status under the *Jones* analysis).

6. *Jones*, 530 U.S. at 578 n.8 ("This case does not require us to determine the constitutionality of open primaries.").

7. *See infra* note 18.

8. Justice Stevens, joined in this part of the dissent by Justice Ginsburg, stated that under the majority's analysis "there is surely a danger that open primaries will fare no better against a First Amendment challenge than blanket primaries have." *Jones*, 530 U.S. at 598 (Stevens, J., dissenting); see also Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 787 (2001) (calling the Court's distinction between open and blanket primaries "arbitrary," and suggesting that even closed and semi-closed primaries would be invalidated under the *Jones* analysis); Labbe, *supra* note 5, at 740 (suggesting that "distinguishing the effect of the open primary on a party's associational rights from the effect of California's blanket primary appears extremely difficult").
the courts in election law cases. Part III presents a critical line of cases leading up to the Jones decision and focuses on the First Amendment associational rights in question at each stage of the election process. Finally, Part IV proffers the author's model for squaring the seemingly incongruous decisions in primary election law cases. This model suggests that the weighing and balancing of the associational rights at issue in election law cases must be conducted along an "electoral process continuum," using a tripartite definition of political parties, with the rights of each component of the party given different weight at each stage of the continuum.

I. PRIMARY SYSTEMS AND THE EFFORTS OF EVOLUTION

Primaries can be categorized generally as closed, open, or blanket systems, with some of the distinctions among the systems subtle but instrumental. The following sections detail each type of primary and describe how the direct primary evolved into the system it is today.

A. THE CLOSED AND SEMI-CLOSED PRIMARIES

A strictly closed primary system allows only voters formally affiliated in advance with the political party to participate in that party's primary. In closed primary states, affiliation...
tion is equated with party membership. Some states employ a slight variation on the closed primary called the "semi-closed primary." In the semi-closed primary, formally affiliated party members can only vote in the primary of the party with which they are registered, but independent and unaffiliated voters can vote in either party's primary. It is critical to note that in most states with semi-closed primaries, some act of party affiliation is required on voting day. For example, at the polls in some states, unaffiliated voters must publicly choose one party's ballot or declare affiliation in another way, thereby enrolling them with that party.

B. THE OPEN PRIMARY

In an open primary, any person, regardless of party membership or affiliation prior to voting, may vote for the candidate of his choosing, but the voter must choose candidates for all offices from one party. Thus, if the voter selects a Republican candidate for governor, the voter must select a Republican candidate for all other offices on the ballot as well. Open primaries effectively allow all voters to participate in a party's primary, whether they are registered with the party, registered with another party, or not registered with any party, as long as

12. See V.O. Key, Politics, Parties, & Pressure Groups 390 (5th ed. 1964) (stating that enrolling with a party when registering to vote is the "most common mode of determination of party membership," and that this enrollment serves as a recorded "assertion of affiliation").

13. According to the most recent data available, nine states' primaries could be considered a form of semi-closed primary. Party Affiliation and Primary Voting, supra note 9.


15. In Colorado, independent voters must declare affiliation at the polls, which enrolls them with a particular party. Colo. Rev. Stat. § 1-7-201 (2002) (stating that "[i]f unaffiliated, the eligible elector shall openly declare to the election judges the name of the major political party with which the elector wishes to affiliate," after which the election judge "shall deliver the appropriate party ballot to the eligible voter"); see also Kan. Stat. Ann. § 25-3301 (2000) (stating that voters must declare a party affiliation in order to vote in the primary, which can be done at the polls on election day, but that "such a statement of party affiliation shall constitute a declaration of party affiliation" that will be preserved for five years); Tex. Elec. Code Ann. § 162.003 (Vernon 1986) (stating that "a person becomes affiliated with a political party when the person is accepted to vote in the party's primary election").


18. See id. According to the most recent data available, twenty states conduct "open primaries." Party Affiliation and Primary Voting, supra note 9.
they select only one party's candidates for all offices. Unlike
the semi-closed primary, this participation does not generally
enroll the voter with the party for whose candidates he voted,
though in most states the parties have access to the voter
lists. Thus, in open primary states, the act of voting for one
party's candidates for all offices essentially constitutes an act of
affiliation with that party, rather than an act of membership.
The open primary system most clearly adheres to a distinction
between "political membership" and "political affiliation," a dis-
tinction that proves crucial when interpreting Jones and apply-
ing it to the context of open primaries.

C. THE BLANKET PRIMARY

Finally, a blanket primary can be considered an extension
of the open primary. In a blanket primary, any person, regard-
less of party membership or affiliation, may vote for a party's
nominee. Unlike the open primary, however, the voter may
switch between parties when voting for each office on the bal-

19. See id.
20. See id.
21. See Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107, 130 n.2 (1981) ([T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party.).
22. See Cal. Democratic Party v. Jones, 530 U.S. 567, 577 n.8 (2000) (suggesting that because voters in open primaries affiliate themselves with one party through the act of voting in that party's primary, open primaries are likely constitutional). The dissent in Jones questioned this distinction. See id. at 597-98 (Stevens, J., dissenting) (suggesting that the majority drew an "unprincipled distinction among various primary configurations" and "cast serious doubt on" the constitutionality of open and semi-closed primaries).
24. BOTT, supra note 10, at 139.
lot. So, for example, a voter may choose a Republican candidate for governor, a Democratic candidate for secretary of state, and a Green candidate for state representative. In a blanket primary, no formal act of party affiliation is required prior to voting, and no party affiliation is produced as a result of voting. In states with blanket primaries, a major goal of the system is to get as many people as possible out to vote for the candidates, regardless of the voter's party affiliation and regardless of the candidate's party affiliation.

D. THE EVOLUTION OF THE DIRECT PRIMARY

The history of the direct primary and its evolution into each of these distinct formats is significant. The direct primary was born as a tool to take the nominating process out of the hands of the party elites and place it into the hands of the general electorate. Originally, legislative caucuses were used to nominate candidates for state office. At legislative caucuses, groups of elected officials from each party chose the party candidates for the primary ballot. By 1800, the legislative caucus was the prevailing mode of nomination in the states. The legislative caucus nomination system quickly buckled under criticism, however, because it placed the power to nominate in the hands of the controlling party in Congress. This system left no room for the minority party in the legislature to have a voice in the nominating process.

In an attempt to make the process more democratic, the caucus system over time was replaced with the convention sys-

25. Id.
26. See id.
27. See id. at 21.
29. See PAUL ALLEN BECK & FRANK J. SORAUF, PARTY POLITICS IN AMERICA 232–34 (7th ed. 1992) (stating that "the primary was designed to reform the nominating processes by 'democratization'").
30. KEY, supra note 12, at 371.
31. Id.
32. Id.
33. Id. at 372.
34. Id.
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35. Id. at 373 (stating that "[t]he convention was a means for the expression of the 'popular will' of the party").

36. Id.

37. Id.

38. Id. at 374.

39. Id. During this period the party was still an entirely private association that was not subject to any federal or state regulation. Id. at 375. This seldom-referenced fact undoubtedly contributed to the corruption of the conventions. In 1886, legal restrictions were placed on conventions and caucuses, but "[b]y the time that regulation became fairly general, the convention system was on the way out." Id.

40. BECK & SORAUF, supra note 29, at 233.

41. Id.; see also KEY, supra note 12, at 375 ("To [the Progressives] the direct primary constituted a means by which an enlightened people might cut through the mesh of organized and privileged power and grasp control of the government.").

42. See KEY, supra note 12, at 375–77. In the states where the direct primary is not used as a nomination system, it is used to settle challenges among candidates selected through the caucus or convention system. Id. at 377.
direct primaries also failed to entirely eliminate the factional struggle for control. While the direct primary did allow for broader and easier mass participation in candidate nominations, this new power wielded by the electorate necessarily influenced candidate approaches to winning a place on the primary ballot. The direct primary system encouraged candidates to make concerted appeals to voters, instead of tailoring their messages to the party elites who had controlled the caucuses and conventions. Shifting the bulk of nominating power to the electorate also forced the parties to change their approaches to winning. In a direct primary the party leaders could not effectively dominate the nominating process, and they were under increased pressure to prevent the party from splitting into factions, each in support of its own candidate. Having weakened control over their nominee, the party elites tried to thwart maverick candidates that might appeal to primary voters but lose in the general election. In effect, the shift to the direct primary as the most prevalent nominating method in state elections represented a shift from one extreme—a concentration of power in the hands of party elites—to the other—a concentration of power in the hands of the electorate.

II. THE TRIPARTITE MODEL OF POLITICAL PARTIES

The problem with presenting this power struggle to the courts for resolution is that in most election law jurisprudence, the courts have failed to develop a coherent and functional understanding of political parties. As one critic noted, "[t]he present Court—lacking even a single member with significant

43. See id. at 378.
44. Id.
45. Id. at 378–79.
46. Id. at 386.
47. See id. It is important to note, though, that the party-organization still has avenues to exert its influence, for example, in preprimary conventions or through preprimary endorsement procedures. See MALCOLM E. JEWELL & DAVID M. OLSON, POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES 94 (3d ed. 1988); see also infra Part III.A.
48. See Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 COLUM. L. REV. 274, 279 (2001) (stating that throughout the caselaw there is persistent "legal uncertainty about what the party actually is"); see also Elizabeth Garrett, Is the Party Over? Courts and the Political Process, 2002 SUP. CT. REV. 95, 95 (2002) (suggesting that the judiciary "has failed to develop sophisticated positive and normative views of political parties, resulting in a jurisprudence of the political process that is inconsistent and unsatisfying").
electoral experience—simply does not understand elections and political parties. Its decisions on the political process are muddled, ungrounded, and poorly reasoned.  

Functional models, however, familiar to lawyers and legal scholars, do exist. For example, one widely accepted definition of a political party, the tripartite model, suggests that the political party consists of three components: the party-organization, the party-in-government, and the party-in-the-electorate. Each of these components can be defined in terms of membership, function, and goals, which may overlap at some points and conflict at other points throughout the electoral process.

The party-organization is composed of party activists—the individuals working on the campaigns, attending conventions, and recruiting other party members. The party-organization can be described as “a system of layers of organization” that must collaborate to reach the major objective of winning the election. In practical terms, “the party-organization is the formal apparatus of the precincts, wards, cities, counties, congressional districts, and state that results from the legislation of the state itself.” The goal of the party-organization is to nominate candidates for office that will win in the general election. To reach this goal, the party-organization is responsible for jobs such as grooming candidates for the ballot, running campaigns, organizing conventions, and fund-raising. Additionally, the party-organization is responsible for mobilizing electoral support, serving as a link between the electorate, candidates, people, and government.

50. See Garrett, supra note 48, at 95 (employing Key’s tripartite model at length in a legal analysis of courts and the political process); Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 89 GEO. L.J. 2181, 2185 (2001) (stating that “V.O. Key’s tripartite classification scheme is now familiar to lawyers”).
51. This tripartite model was developed by political scientist V.O. Key. See supra note 12; see also Nathaniel Persily & Bruce E. Cain, The Legal Status of Political Parties: A Reassessment of Competing Paradigms, 100 COLUM. L. REV. 775, 778 (2000) (calling Key’s model “a foundational work of political science”).
52. See BECK & SORAUF, supra note 29, at 132–33.
53. KEY, supra note 12, at 316.
54. BECK & SORAUF, supra note 29, at 63.
55. KEY, supra note 12, at 315–16.
56. Id. at 316; BECK & SORAUF, supra note 29, at 18.
57. KEY, supra note 12, at 314.
The party-in-government (party-government) is composed of the party's elected officials, who form groups in solidarity with their party in the legislature and take responsibility for government action. The members of the party-government must function as public officials while maintaining a party role, because one of the major goals of the party-government is to be the party in the majority. The role of the party-government in the minority is to "assail governmental ineptitude, serve as a point for the coalescence of discontent, propose alternative governmental policies, and influence the behavior of the majority as well as lay plans to throw it out of power."

The party-in-the-electorate (party-electorate) is "within the body of voters as a whole, groups ... formed of persons who regard themselves as party members." Significantly, the party-electorate is not defined as the whole body of voters itself. The party-electorate is instead a group within the whole body of voters that affiliates itself with the party in some way, either through formal party membership or by voting for the party's candidates in the primaries and general elections. The function of the party-electorate is to choose the party-government, and the goal of the party-electorate is to carry the best candidates for office to victory.

III. THE COURT'S ANALYSIS OF PARTY RIGHTS UNDER THE FIRST AMENDMENT

While the Court has not overtly employed either this tripartite framework or any particular model of political parties in its analyses, it is helpful to bear the tripartite model in mind when reviewing election law jurisprudence, because at times the Court implicitly suggests a familiarity with this model or even inadvertently conducts its analysis in such a way that

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58. Id. at 206–07.
59. See id. at 206.
60. Id. at 207.
61. Id. at 164.
62. Id.
63. See id. The party-electorate can be formal members of a party or the people who affiliate with the party in another way and typically "react in characteristic ways to public issues." Id. The party-electorate is an "amorphous group," but one with a "social reality." Id. The electorate only has a voice in the process at the final stage, via the act of voting in the primary, and "[t]he nature of [the electorate's] role is fixed by the choices presented to [it] by the party[organization]." Id. at 520.
64. See BECK & SORAUF, supra note 29, at 143.
conforms to this model. The cases discussed below present an overview of the Court’s analysis of the electoral process in the context of parties’ First Amendment rights. In these cases, the precise party rights at issue are rights of freedom of association and expression, as derived from the First Amendment. Under contemporary interpretations of the First Amendment as applied to political parties, the Court’s “primary concern [is] with identifying and protecting private expression against governmental regulatory excesses.” Thus, a First Amendment inquiry into party activity requires a balancing of private rights of association and expression with the degree and necessity of government regulation applied to associative and expressive activities.

Through a review of the Court’s recent First Amendment case law, the following sections analyze the Court’s treatment of the electoral process in the critical stages leading to the general election: ballot access, endorsement procedures, party conventions, and finally the primary itself.

A. THE PREPRIMARY CASES

The preprimary cases involve the first three stages of the electoral process: ballot access, endorsement procedures, and party conventions. At each stage leading to the primary the Court must consider the degree to which the state’s interest in regulating the electoral process can burden the parties’ associational rights.

1. Ballot Access

The first stage of the electoral process is the preprimary ballot access stage, during which the names that will go on the ballot are selected. Ballot access was at issue in Timmons v. Twin Cities Area New Party, where the Court noted that al-

65. See infra Part IV.B.1 and Part IV.B.2 (discussing such instances).
66. U.S. CONST. amend. I.
67. Gregory P. Magarian, Regulating Political Parties Under a “Public Rights” First Amendment, 44 WM. & MARY L. REV. 1939, 1951 (2003) (describing this as the “private rights theory,” as opposed to the “public rights theory,” where the Court is primarily concerned with the rights of the public to disseminate and receive information).
68. Id. at 1952.
69. See BOTT, supra note 10, at 93, 96–107 (discussing the history and development of ballot access laws and detailing the ballot access laws of each state).
70. 520 U.S. 351 (1997).
though a party had a “right to select its own candidate,” it did not follow “that a party is absolutely entitled to have its nominee appear on the ballot as that party’s candidate.”71 The specific laws in question were Minnesota’s antifusion statutes, which prohibited candidates from appearing on the ballot as candidates of more than one political party.72 While recognizing the party’s associational rights, the Court asserted that, in balancing the party’s rights and the state’s interest, the party does not suffer a severe burden on its associational rights when the state prevents it from running as its candidate someone who is on the ballot as another party’s candidate.73 The Court acknowledged that the state regulations do impose some burden on the party,74 but that the state’s interest in protecting ballot integrity and political stability outweighs this burden on the party’s associational rights.75 In addition, the Court maintained that, despite being prevented from getting its candidate on the ballot under its party label, the “party retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party’s candidate.”76

2. Endorsement Process

This “great latitude” was acknowledged in a case addressing another preprimary stage, the endorsement process. In Eu

71. Id. at 359.
72. Id. at 354. In Timmons, a state representative running as the Democrat-Farmer-Labor Party candidate was nominated by the New Party (a minor party under Minnesota law) to run as its candidate as well. Id. Minnesota state law prohibits such “fusion” candidacies. See MINN. STAT. § 204B.04 subd. 1 (2002) (stating that “[n]o individual shall be named on any ballot as the candidate of more than one major political party”); MINN. STAT. § 204B.04 subd. 2 (2002) (stating that “[n]o individual who seeks nomination for any partisan or nonpartisan office at a primary shall be nominated for the same office by nomination petition”). In Timmons, the New Party had attempted to nominate its candidate by petition, and in accordance with the statutes, local election officials refused to accept it. See Timmons, 520 U.S. at 354.
73. Timmons, 520 U.S. at 358–59.
74. Id. at 363 (“We conclude that the burdens Minnesota imposes on the party’s First and Fourteenth Amendment associational rights—though not trivial—are not severe.”).
75. Id. at 369–70.
76. Id. at 363.
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v. San Francisco County Democratic Central Committee, the Court held that state bans on candidate endorsements by party committees constitute an infringement on rights of political speech and association. The advantages of endorsements can include a top position on the ballot and party resources such as financing, organization, and personnel. Further, endorsements frequently serve as a cue to loyal party voters, effectively garnering those votes. In Eu, the Secretary of State and other party officials brought suit challenging sections of the California Elections Code that prevented governing bodies of political parties from endorsing or opposing candidates in the primary election. The State argued that the endorsement ban served its compelling interests in preserving a stable government and protecting voters from confusion and undue influence. While the Court acknowledged these were compelling state interests, it held that preventing political parties from endorsing and opposing candidates infringes on party associational rights because those rights include the right to identify and promote candidates within the association. The Court declared that the primary election was "the crucial juncture" for the party, and that allowing individuals to endorse candidates but preventing individuals joined together in a party from endorsing candidates was "clearly a restraint on the right of association.

78. Id. at 229.
79. JEWELL & OLSON, supra note 47, at 95.
80. Id. at 99.
81. BECK & SORAUF, supra note 29, at 250.
83. Eu, 489 U.S. at 217.
84. Id. at 226. The State attempted to argue that the endorsement ban served its interest in protecting election stability by minimizing the risk of intraparty friction that the endorsement process may cause. Id. Additionally, the State argued that the ban protected primary voters from confusion and undue influence by reducing the possibility for a candidate to claim that a party endorsed him when it did not. Id. at 228. The Court handily dismissed both of these arguments. See id. at 227–28.
85. Id. at 224.
86. Id. (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 216 (1986)).
87. Id. at 224–25 (quoting Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 296 (1981)).
3. Party Conventions

Another stage in the preprimary electoral process that requires the balancing of state interests and party interests is the party convention. The party uses the convention to select candidates for the primary, to choose candidates to run in the general election (foregoing the primary altogether), or to endorse a candidate running in the primary. The convention serves as a place for party members to gather together and engage in collective action, because "[w]ithout conventions people may rely on a party label or selection at a primary, but not on the benefits gained from a decisionmaking body that meets, discusses, and hammers out a common plan." In Democratic Party of United States v. Wisconsin ex rel. La Follette, the Court held that members of the National Democratic Party had the right to "define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention." In La Follette, the National Democratic Party rules regarding delegate selection to the convention were at odds with state election laws governing the primary and convention. The State argued that its law, which allowed greater participation among the electorate in the selection of delegates to the convention, imposed only a minor burden on the national party, while advancing state interests in "preserving the overall integrity of the electoral process, provid-

88. The convention structure is discussed in Part I, supra. While the party-organization still runs the conventions, since the convention in most states is no longer the single nomination method, conventions are less prone to the excessive influence from party elites than they were two hundred years ago. See Bott, supra note 10, at 172–75. Many states hold a convention either before or after the primary. Id. The cases discussed herein pertain to the more familiar party conventions held for candidates for national office.
89. Id. at 173.
92. Id. at 122.
93. See id. at 123. The national party rules restricted the selection of delegates to the convention to Democratic voters. Id. at 109. However, in Wisconsin, the process of choosing a presidential candidate consisted of an open primary election, in which anyone could vote (including members of other parties and independents), followed by a caucus where the actual delegates were selected, and which only party members could attend. Id. at 110–12. The conflict arose in that the national party required the delegates to vote in accordance with the results of the open primary election, so in essence while the delegates themselves were all Democrats, they were bound to vote in accordance with results from an election open to nonmembers. Id. at 112.
ing secrecy of the ballot, increasing voter participation in primaries, and preventing harassment of voters." The Court, however, held that even if the burden placed on the party by the state is minor, "[a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention" is a protected First Amendment right of association.

The Court made its protection of the party's rights at the convention stage even more explicit in Cousins v. Wigoda, another case in which the Court struck down state laws regulating delegate selection, because the state laws violated the national party's rules governing the party convention. As stated in Cousins, "[t]he right of members of a political party to gather in a national political convention in order to formulate proposed programs and nominate candidates for political office is at the very heart of the freedom of assembly and association.

B. THE PRIMARY STAGE CASES LEADING TO CALIFORNIA DEMOCRATIC PARTY V. JONES

The ballot access, endorsement, and convention stages of the electoral process are steps along the way to the final stage of the nomination process, the primary election. The primary stage not only requires the balancing of state interests and party interests, but demands a thorough examination of the rights of the electorate as well, because the primary is ultimately the means by which the electorate can express its candidate preferences. The primary was at issue in Nader v. Schaffer, where the Court held that "[t]he party's selection of its candidates... is an ultimate and crucial element of the party members' political activities," and thus, in the context of a closed primary election, "[t]he rights of party members may

94. Id. at 123–25. The State was suggesting that its rules advanced these interests because open primaries increase voter participation, and, in Wisconsin, allow voters to choose which party they will vote for from within the confines of the polling booth. See id. at 125 n.29 (citing the Wisconsin Supreme Court's identification of state interests).

95. Id. at 123–24.


97. Id. at 490–91.

98. Id. at 491 (Rehnquist, J., concurring).

99. See KEY, supra note 12, at 520–21.


101. Id. at 844.
to some extent offset the importance of claimed conflicting rights asserted by [nonmembers] challenging some aspect of the candidate selection process.\textsuperscript{102} In \textit{Nader}, two registered voters not affiliated with any party brought suit arguing that Connecticut’s closed primary law violated their associational rights by preventing them from participating in the state’s closed primary election.\textsuperscript{103} In its balancing test, the Court determined that the associational rights of the party to keep nonmembers from participating in the closed party primary outweigh the voters’ asserted rights to associate with that party by voting in its primary.\textsuperscript{104} Significantly, the Court noted that the voters in this case made no effort to affiliate in any way with the party, such as by participating in party caucuses or conventions, before attempting to vote in the party’s primary.\textsuperscript{105}

The Court examined Connecticut’s primary process again in \textit{Tashjian v. Republican Party of Connecticut}.\textsuperscript{106} In \textit{Tashjian}, the Connecticut Republican Party brought suit challenging the state’s statute that mandated closed primaries, thus preventing independents from voting in the primary election.\textsuperscript{107} Here the Court stated that the party’s attempt to include independent voters in its closed primary was a valid exercise of its associational rights.\textsuperscript{108} Citing precedent, the Court likened the party’s attempt to open its elections to independents with the freedom to identify the people who constitute the association.\textsuperscript{109} Additionally, the Court distinguished this case from \textit{Nader} and other cases in which nonmembers of a party seek to vote in that party’s primary, because in those cases “the nonmember’s de-

\textsuperscript{102} Id. at 845.
\textsuperscript{103} Id. at 840.
\textsuperscript{104} See id. at 847.
\textsuperscript{105} Id. at 848.
\textsuperscript{106} 479 U.S. 208 (1986). After \textit{Nader}, the Connecticut Republican Party realized the importance of independent voters and adopted its own rule allowing independent voters to vote in its primaries. Id. at 212. The Democrats dominated the legislature at the time, and they feared that independent voters in the primaries could shift control to Republicans; thus, the Democrats wanted to maintain the state’s closed primary system, and they made no effort to revise state statutes. See id. at 212–13.
\textsuperscript{107} Id. at 210–11.
\textsuperscript{108} Id. at 214.
\textsuperscript{109} Id. at 224 (citing Democratic Party of United States v. Wisconsin \textit{ex rel.} La Follette, 450 U.S. 107, 123–24 (1981), though failing to note that \textit{La Follette} considered associational rights in the context of conventions, not primaries).
sire to participate in the party’s affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications.” Ultimately Tashjian stood for the proposition that states could not force parties to close their primaries off from nonmembers; this holding paved the way for the Court to consider whether or not a state can force a party to open its primary to nonmembers, the issue presented in Jones.

C. THE PRIMARY STAGE: CALIFORNIA DEMOCRATIC PARTY v. JONES

In Jones, the conflict again involved struggle for power between the political parties and the state in the primary electoral process. In 1996, California voters enacted a blanket primary by referendum, thereby opening all primaries to all voters regardless of affiliation and allowing voters to choose candidates from any party for any office. In Jones, the state Democratic and Republican parties brought suit arguing that the blanket primary violated their rights of free association under the First Amendment. All the plaintiff parties had rules prohibiting nonmembers from voting in their primaries. Thus, the parties argued that being forced to allow nonmembers to vote in their primary elections, thereby giving nonmembers a role in the crucial process of selecting party nominees to proceed to the general election, was a fundamental impairment of a party’s associational rights.

The political parties asserted that “the single most important way that a party defines and advances the interests of its members is through the choice of its nominees,” which is “the central function of a political party.” The State argued that while political parties may

110. Id. at 215 n.6.
112. Id. at 570. The Court failed to find any significance in the fact that the voters themselves had elected to institute the blanket primary system. See id.
113. See supra notes 23–28 and accompanying text for a review of blanket primaries.
114. Two minor parties, the Libertarian Party of California and the Peace and Freedom Party, were also plaintiffs in the suit. Jones, 530 U.S. at 571.
115. Id.
116. Id.
118. Id. at 20.
119. Id. at 17.
have associational rights under the First Amendment, those rights are "not absolute," but rather are subordinate to the states' rights to regulate elections, as granted by Article I of the Constitution. 120

The Jones Court dedicated the bulk of its analysis to weighing the state's interests in regulating electoral processes against the party's interests in preserving its rights to free association. The Court began the analysis by first asserting, unequivocally, "States have a major role to play in structuring and monitoring the election process, including primaries." 121 In support of this argument the Court cited several cases that have addressed this issue, though in each case the issue was raised in a context quite different from that of Jones. 122 While specifying some instances in which state regulation of the electoral process is legal and necessary, the Court carefully pointed out that approval of some state regulatory procedures did not mean that "the processes by which political parties select their nominees are . . . wholly public affairs that States may regulate freely." 123

After acknowledging the necessary role states play in regulating the electoral process, the Court noted that political parties have been critical throughout history to the advancement of democracy, 124 and further that "[t]he moment of choosing the party's nominee . . . is 'the crucial juncture'" for the party. 125 Thus, with both states and parties critical to the primary election process, consideration of the rights of these two players re-

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121. Jones, 530 U.S. at 572.

122. For example, the Court cited a case in which it held that states can require parties to select their candidates through primaries, id. (citing Am. Party of Tex. v. White, 415 U.S. 767 (1974)); a case in which it held states can require parties to regulate ballot access to prevent frivolous candidacies, id. (citing Jenness v. Fortson, 403 U.S. 431 (1971)); and a case which upheld the right of the states to require party registration before a primary election, id. (citing Rosario v. Rockefeller, 410 U.S. 752 (1973)). It is worth noting that each of these cases analyzes a stage of the electoral process much earlier than the primary election itself.

123. Id. at 572–73.

124. Id. at 574 ("The formation of national political parties was almost concurrent with the formation of the Republic itself.").

125. Id. at 575 (quoting Tashjian, 479 U.S. at 216).
quired the Court to engage in a delicate balancing act. Drawing heavily from precedent, the Court stated that individuals have associational rights to affiliate with the political party they choose, but that political parties also have distinct freedom of association rights, and 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." Additionally in Jones, the Court relied on La Follette in particular for the premise that political parties have the right to limit the people with whom they choose to associate: "That is to say, a corollary of the right to associate is the right not to associate." The Court held that this "right to exclude" is most critical for a party during its nominee selection process, and any state regulation forcing the parties to allow nonparty members' participation is likely to be considered a "substantial intrusion."

Having established that states have a role in the electoral process, but that political parties have played a critical role in representative democracy and thereby deserve special constitutional consideration, the Court declared that the First Amendment associational protections granted to political parties are most critically preserved during the nomination process. The Court asserted that the nomination process is granted "special protection" because of how significant the process is to the party: "[T]he moment of choosing the party's nominee . . . is 'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power.' The Jones Court equated the nomination process with the process of determining the party's positions through the selection of a "standard bearer who best represents the party's ideologies and preferences." In furtherance of this argument, the Court relied on precedent that also heavily protected the associational rights of parties, though,

126. The Court in Jones relied particularly on Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981), and Tashjian, 479 U.S. 208.
127. Jones, 530 U.S. at 583 (citing Tashjian, 479 U.S. at 215 n.6).
128. Id. at 574.
129. Id. at 576 (quoting La Follette, 450 U.S. at 126).
130. Id. at 574.
131. Id. at 575.
132. Id. (quoting Tashjian, 479 U.S. at 216).
133. Id. (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 224 (1989)).
notably, at different stages of the electoral process.\textsuperscript{134}

Noting the sanctity of the nomination process, the Court asserted that any state regulation mandating that parties allow nonmembers to participate in a party primary is likely to be considered a substantial intrusion on the party.\textsuperscript{135} Having determined that the blanket primary constituted a severe burden on parties' associational rights, the Court required that the state interests in conducting a blanket primary be narrowly tailored to serve a compelling state interest.\textsuperscript{136} Of the seven interests offered by the state, the Court outright declared three of them to be illegitimate: the state's interest in producing more representative candidates, in expanding the scope of debate, and in providing a forum in which independents and minority party members in safe districts can vote.\textsuperscript{137} The Court dismissed the state's remaining four asserted interests in "promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy" by declaring that they were not compelling interests in light of the specific circumstances of the case.\textsuperscript{138} Further, the Court asserted that even if any of the interests were compelling, the institution of a blanket primary is not a narrowly tailored method of achieving them.\textsuperscript{139} The Court ultimately held that because the interests were not compelling and the means were not narrowly tailored, and because the burden on the parties' associational rights was significant, California's blanket primary was unconstitutional.\textsuperscript{140}

The Court only briefly addressed open primaries in its decision, explicitly stating that the case did not require it to consider the constitutionality of open primaries.\textsuperscript{141} The Court first

\begin{itemize}
\item \textsuperscript{135} Jones, 530 U.S. at 576 (quoting La Follette, 450 U.S. at 126). The Court suggested that the number of cross-over (and independent) voters in primaries is significant because these voters not only influence the candidate that gets selected, but also force the selected candidate to moderate his position in order to win the general election. \textit{Id.} at 579–80. The rationale is that unaffiliated voters prefer more moderate positions and candidates, thus candidates in open elections must appeal to a broader base. \textit{Id.} at 580.
\item \textsuperscript{136} \textit{Id.} at 582 (citing Timmons, 520 U.S. at 358).
\item \textsuperscript{137} \textit{Id.} at 582–83.
\item \textsuperscript{138} \textit{Id.}
\item \textsuperscript{139} \textit{Id.} at 585.
\item \textsuperscript{140} \textit{Id.}
\item \textsuperscript{141} \textit{Id.} at 577 n.8.
\end{itemize}
distinguished closed primaries from blanket primaries by pointing out that in closed primaries, "even when it is made quite easy for a voter to change his party affiliation the day of the primary . . . at least he must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party." The Court then carefully, albeit briefly, distinguished open primaries from both closed and blanket primaries by noting that "[i]n this sense, the blanket primary also may be constitutionally distinct from the open primary . . . in which the voter is limited to one party's ballot." It ended this analysis by quoting the dissent in *La Follette* to assert that "the act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party."

IV. THE TRIPARTITE MODEL AND THE ELECTORAL PROCESS CONTINUUM: BALANCING THE PARTY'S ASSOCIATIONAL RIGHTS AT EACH STAGE OF THE PROCESS

A coherent understanding of party membership and function will greatly influence any assessment of a party's associational rights. The *Jones* case can be viewed as the last stop in a line of cases that has strengthened the rights of the party-organization ("organization") at the expense of the party-electorate ("electorate"). Still, it is often difficult to reconcile the holdings of the cases involving political parties, because at different times the Court seemed to be emphasizing different aspects of the party's associational rights.

Implementing a functional model of political parties in election law analysis, such as the tripartite model discussed in Part II, would advantage the Court in several ways. It would

142. *Id.* at 577.
143. *Id.* at 577 n.8.
144. *Id.* (quoting Democratic Party of United States v. Wisconsin ex rel. *La Follette*, 450 U.S. 107, 130 n.2 (Powell, J., dissenting)).
145. For purposes of fluidity, the components of the party—the party-government, consisting of the parties' elected officials; the party-organization, consisting of the party activists; and the party-electorate, consisting of groups of voters who identify themselves with the party in some way—will in the following sections be referred to by less cumbersome terms: government, organization, and electorate, respectively. For a review of the role of each component, see *supra* Part II.
146. See Garrett, *supra* note 48, at 99 (stating that "there are elements of political parties on both sides of every case concerning parties that comes to the courts").
require the Court to acknowledge that the issues in election law cases are derived from an electoral process during which different components of the party have different degrees of power and different rights at stake.\textsuperscript{147} Up to now, the Court has strictly protected the organization's associational rights, often to the detriment of the rights of the electorate, but presented the analysis as a protection of rights of the party as a whole.\textsuperscript{148} Implementation of the tripartite party model would enable the court to more closely consider the rights of each component of the party and examine where along the continuum of the election process those rights should be most strictly preserved. This analysis would provide the Court with a more balanced and consistent approach to future cases.

This Note suggests that the weighing and balancing of associational rights must be conducted along an "electoral process continuum," with the rights of each component of the party given different weight at each stage of the continuum. At the earliest stage of the process, the ballot access stage, the party-government's ("government") interests are best preserved, at minimal cost to the organization and electorate. At the next stages, the convention and endorsement stages, the organization's associational interests are most implicated and thus best preserved, at less significant cost to the government and electorate. Finally, at the last stage of the primary process, the direct primary stage, the rights of the electorate should be recognized as premiere. This analysis will be developed in the context of the cases discussed in Part III.

A. THE PREPRIMARY CASES

1. Ballot Access Is the Province of the Party-Government

Ballot access rules determine which candidates are afforded positions on the primary ballot.\textsuperscript{149} At issue in \textit{Timmons}\textsuperscript{150} was a state statute preventing candidates from running on the ballot under the banner of more than one party.\textsuperscript{151} In upholding the statute as constitutional, the Court enforced a government regulation of the organization in the

\begin{footnotesize}
\begin{enumerate}
\item[147.] \textit{See supra} Part III.
\item[148.] \textit{See supra} Part III.
\item[149.] \textit{See supra} note 69 and accompanying text.
\item[151.] \textit{See supra} note 72 and accompanying text.
\end{enumerate}
\end{footnotesize}
interest of political stability.\textsuperscript{152}

The ability to get onto a primary ballot might properly be viewed as the first step in the primary electoral process. At this stage, it could be argued that the rights at stake minimally involve the electorate because the majority of the electorate likely does not even know who the possible candidates are.\textsuperscript{153} Viewed as such, the ban on fusion candidates (the specific issue in Timmons) more obviously becomes a balancing test between the rights of the organization to run the candidate of its choosing and the rights of the government to preserve a stable electoral process. In conducting this balancing test in Timmons, the Court was correct to hold that the rights of the government, and thus the statutory ban on fusion candidacies, should be upheld.\textsuperscript{154} The associational burden on the organization is minimal: It can still run any other candidate of its choice, and members are not restricted from throwing their support behind a candidate running under the banner of another party.\textsuperscript{155} As the Court indicated, if the organization's main goal is to help elect a certain candidate, party members still have all of the same resources at their disposal to do this, short of having their party's name on the ballot next to the candidate.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{152} See supra notes 73–76 and accompanying text.
\item \textsuperscript{153} It is important to note that some scholars view the ballot access stage not as a balancing of rights between the state and the party-organization, but instead as a balancing of rights between the state or party-organization and the electorate. See Bott, supra note 10, at 93 (discussing how parties in control can use the lawmaking process to reduce the threat of challenges on the ballot from other parties); see also Nathaniel Persily, Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws, 89 Geo. L.J. 2181, 2186 (2001) (“In the context of a primary ballot access lawsuit, the court must determine the constitutional limits on the power of the party organization and the party-in-the-[government] to limit the choices available to the party-in-the-electorate.”). Scholars such as Persily argue that because primary ballot access laws can have serious implications on the party-electorate's First Amendment rights of association (in that ballot access laws restrict the electorate's associational rights at the earliest possible stage), ballot access laws should come under strict constitutional scrutiny. See id. Still, the Court has demonstrated that it is willing to strike down unreasonably restrictive ballot access laws, such as those requiring filing fees. See, e.g., Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972). Additionally, as the Timmons Court pointed out, in cases of fusion candidacies, the candidate will appear on the ballot under the label of one party, and so the electorate does have the opportunity to vote for that candidate. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 352 (1997).
\item \textsuperscript{154} See supra notes 73–75 and accompanying text.
\item \textsuperscript{155} See supra note 76 and accompanying text.
\item \textsuperscript{156} See Timmons, 520 U.S. at 369.
\end{itemize}
Further, it makes sense to favor the government's rights at the ballot access stage because the government is charged with running the election and thus maintaining ballot integrity and avoiding frivolous candidacies.157 The government is in a better position than the organization to govern ballot access because the government is better positioned to implement impartial requirements. Allowing the government to mandate specific rules for getting a candidate's name on a ballot restricts the parties' ability to tailor access rules to their own ends.158 If the government is allowed to dictate ballot access rules, then all the parties are on notice regarding ballot access requirements, and all major parties can be held to the same standards. While the organizations may, and have, argued that giving government the latitude to determine candidate ballot requirements unfairly infringes upon party rights,159 the burden must be viewed in context. The organization has the opportunity to fully exercise its associational rights at the convention and through the endorsement system.160

2. Endorsements and Conventions Are the Province of the Party-Organization

In Eu,161 the Court struck down a statute that prevented parties from endorsing or opposing candidates in the primary election.162 It is important to note that in this case the Court appeared to equate the party's endorsement of a candidate with the party's identification of the political association and selection of the standard bearer.163 It is also important to note that in the endorsement process, candidate selection through voting is never at issue, thereby minimizing the role of the electorate. Preserving the organization's right to endorse over the government's endorsement prohibition makes sense if the endorsement stage is viewed as the province of the organization. In its discussion, the Court noted that the endorsement ban pre-
vented party-governing bodies from conveying their candidate preferences to voters, effectively restricting the party's ability to spread its message.\textsuperscript{164} With this language the Court implicitly acknowledged that the endorsement process is a tool for the organization to use in communicating with the electorate. The endorsement process is a powerful means by which the organization retains influence over primary candidate selection.\textsuperscript{165} The government's stake in this process is minimal (in fact the Court questioned how limiting endorsement furthered\textit{ any} state interest),\textsuperscript{166} and few if any of the electorate's rights are at issue. Thus, preferring the rights of the organization over the interests of the other two party components at this stage is a sensible approach that does not unduly burden interests of any component of the party.

The party convention is another stage in the electoral process that should properly be considered the province of the organization. The preprimary convention is a place where party members alone can meet to discuss the most effective means of furthering the organization's goals.\textsuperscript{167} In\textit{ La Follette}, the Court strictly protected the organization's choice to determine the makeup of its delegates to the national convention.\textsuperscript{168}

It is reasonable to strictly favor the associational rights of the organization in the context of convention regulations. At a convention, the boundaries of participation and association are much clearer than they are at other stages of the electoral process. The convention provides an opportunity for the organization to meet in one place and deliver speeches, formulate party platforms, and nominate candidates.\textsuperscript{169} In effect, "[t]he party convention represents the purest expression of the 'party as organization'. . . . For the week [delegates] convene, they engage in pure acts of speech and association."\textsuperscript{170} In a sense, there is no role for the electorate at a convention; further, at what can rightly be viewed as a "private affair," there is no role for government regulation.

\begin{itemize}
  \item \textsuperscript{164} Eu, 489 U.S. at 223.
  \item \textsuperscript{165} See\textit{ supra} notes 80–81 and accompanying text.
  \item \textsuperscript{166} Eu, 489 U.S. at 226 n.16 (noting the Court's skepticism about the State's claim that the endorsement ban served compelling state interests by pointing out that the State admitted it has never even enforced the challenged law).
  \item \textsuperscript{167} See\textit{ supra} notes 89–90 and accompanying text.
  \item \textsuperscript{168} See\textit{ supra} notes 92–95 and accompanying text.
  \item \textsuperscript{169} Persily,\textit{ supra} note 153, at 2218.
  \item \textsuperscript{170} Id.
\end{itemize}
3. Summary of the Preprimary Cases

The Court's lack of concern for the rights of the electorate in the preprimary cases illustrates a weighing of rights that comports with the tripartite definition of a party. When power encompasses ballot access, the government's concerns are paramount to those of the organization. When power relates to endorsement, the organization's concerns in "selecting its standard bearer" via the endorsement process are valued over the government's asserted interest in maintaining a stable government and protecting voters from confusion and undue influence. Finally, when power encompasses roles at the party's convention, the Court is most clear that the processes of conducting the convention and determining selection of delegates are the province of the organization.

Again, it is critical to note that each phase of this process—ballot access, endorsement, and convention—is a linear step in the electoral process leading to the primary election. The culmination of the process, the primary election, is directly at issue in the next section's analysis.

B. THE PRIMARY STAGE CASES

A review of the primary stage cases reveals that while states can conduct closed primaries and thereby allow parties to limit participation in their primaries to party members, states cannot force a party to exclude independent and unaffiliated voters from a primary if the party chooses to include these voters. Additionally, a state cannot force parties to include "wholly unaffiliated" voters in their elections by virtue of blanket primaries. Initially, these cases seem difficult to reconcile. However, this Note suggests that the cases can be reconciled by

171. See Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); see also supra note 71 and accompanying text.
173. Democratic Party of United States v. Wisconsin ex rel. La Follette, 450 U.S. 107 (1981); see also supra note 95 and accompanying text.
175. Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986); see also supra note 108 and accompanying text.
an employment of the tripartite definition of parties, a conception of the electoral process as a series of stages leading to the primary election, and an appreciation of the Court's distinction between political party membership and affiliation.

1. The Government Cannot Prevent the Organization from Conducting Closed Primaries

In Nader, the district court upheld the right of the state to conduct closed primary elections that prevented nonmembers from voting. Significantly, the plaintiff voters had no connection, either by membership or affiliation, to the party in whose primary they wanted to participate. This case is especially interesting when examined with the tripartite party model in mind, as it is one of the few cases in which the court observed that the primary election is a single component of a larger process. The court in Nader pointed out that the primary in Connecticut was the last step of the nominating process, and that at conventions prior to the primary major parties "choose a candidate for nomination to each of the state or district offices." If the candidate chosen at the convention is not opposed, she proceeds to the general election. A non-endorsed candidate may "force a primary" after receiving a certain percentage of delegate votes at the convention, paying a fee, and collecting petition signatures. With this analysis of the process, the court implicitly acknowledged that different party components have different rights at stake during each stage. The court, however, failed to draw the logical conclusion: that the organization chose its candidate for nomination at the con-

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177. See supra Part II.
178. See supra Part III.
179. This is the distinction the Court relied on to rescue open primaries from being declared unconstitutional under Jones. See infra Part IV.B.3.
181. See supra note 102 and accompanying text.
182. The voters in the case did not even qualify as members of the electorate, and are more properly viewed as members of the public at large because members of the electorate are either registered or affiliated in some way with the party. See supra note 63 and accompanying text.
183. See supra Part II for a review of the tripartite model.
184. Nader, 417 F. Supp. at 841 (quoting CONN. GEN. STAT. § 9-382 (1963)).
185. Id. (citing CONN. GEN. STAT. §§ 9-408 and 9-409 (1963) (repealed 2003)).
186. Id. (citing CONN. GEN. STAT. § 9-400 (1963) (amended 2003)).
vention, and thus anything that follows, namely a "forced primary," cannot properly be defined as a place where the organization is choosing its candidate. A primary is forced when a candidate not chosen by the party at the convention decides to appeal directly to the electorate for nomination through the petition process.\textsuperscript{187}

2. The Government Cannot Prevent the Organization from Opening a Closed Election to Independent Voters

The \textit{Tashjian} Court upheld the organization's rule that permitted unaffiliated voters to vote in Connecticut's closed primary election, a party rule that overrode the state's closed primary statute.\textsuperscript{188} In this case the Court again took into account the significance of the fact that the primary follows a party convention.\textsuperscript{189} The Court pointed out that to obtain a place on the primary ballot, the candidate "must have obtained at least 20\% of the vote at a Party convention, which only Party members may attend."\textsuperscript{190} This statement suggests the Court understood the significance of the power the organization has at the convention stage and implies that the Court recognized the importance of balancing the interests of the organization with the interests of the electorate at different stages of the process.

3. The Government Cannot Conduct Blanket Primaries that Force Organizations to Allow Entirely Unaffiliated Voters to Participate in Party Primaries

The Court in \textit{Jones} struck down blanket primary elections, which force parties to include independent and unaffiliated voters in their primaries.\textsuperscript{191} Many critics saw this holding as the death knell not only for blanket primaries but also for open primaries.\textsuperscript{192} These critics, however, have overlooked the crucial distinction the Court in \textit{Jones} made between party membership and party affiliation. Although the Court failed to fully develop

\begin{footnotesize}
\item[187.] \textit{Id.} The petition must include signatures equal to one percent of the votes cast for the same office at the last preceding election. \textit{Id.} (citing CONN. GEN. STAT. § 9-453d (1971)).
\item[188.] \textit{See Tashjian v. Republican Party of Conn.}, 479 U.S. 208, 224 (1986); \textit{see also supra} notes 108–09 and accompanying text.
\item[189.] \textit{Tashjian}, 479 U.S. at 220–21.
\item[190.] \textit{Id.}
\item[191.] \textit{See supra} note 140 and accompanying text.
\item[192.] \textit{See supra} note 8 and accompanying text.
\end{footnotesize}
this distinction, it is crucial to understanding the significance of the differences among the primary systems. More directly, it is a critical component to understanding why the Jones decision did not invalidate open primaries.

Membership in a political party requires some act of formal enrollment, through registration or by virtue of voting in a party’s closed primary. Membership characterizes the government and organization, and the associational rights of members are strictly preserved at early stages of the candidate selection process. Though the distinction between affiliation and membership may initially seem a thin one, it is a significant one in a legal analysis involving political parties. In the political party context, membership and affiliation carry different meanings than they do when applied to other, more traditional organizations. Thus, when analyzing membership and affiliation with political parties, the familiar yardsticks do not apply. Becoming a member of a political party does not mandate that dues be paid, meetings be attended, or even certain votes be cast. More typically, membership is generally characterized as a “housekeeping” tool that allows the parties to better coordinate campaigns, solicit donations, and keep track of voters. Further, the distinction between membership and affiliation is employed in a significant way in non-election-law cases involving political party considerations. For example, in cases where political affiliation is considered a necessary characteristic for the performance of a particular job, the Court’s traditional understanding is that “political affiliation refers to commonality of political purpose and support, not political party membership.”

193. The discussion is confined to footnote 8 of the opinion. See supra notes 6, 141-42.
194. See supra notes 10-12 and accompanying text.
195. See supra Part IV.A.
196. Some scholars have characterized the distinction by drawing an analogy with sports teams. The distinction between being a member of a sports team and being affiliated with a sports team is quite apparent, and team affiliates conduct much of the same behavior as party affiliates do, such as engaging in supportive behavior, tracking successes and failures, and recruiting converts. See Garrett, supra note 48, at 103.
197. See Beck & Sorauf, supra note 29, at 7-12; Key, supra note 12, at 163-65.
198. See Key, supra note 12, at 163-65.
199. See Williams v. City of River Rouge, 909 F.2d 151, 153 n.4 (6th Cir. 1990) (acknowledging this as the reasoning the Supreme Court has used in cases such as Balogh v. Charron, 855 F.2d 356 (6th Cir. 1988)).
This distinction comports with the tripartite understanding of political parties and the Court's analysis of the different stages of the electoral process, as well as the different primary systems discussed in Jones. Membership best characterizes the government and organization, and the constitutional rights of these party members are firmly protected by the Court throughout the preprimary stages of the electoral process. Affiliation, on the other hand, characterizes the electorate, and the electorate exercises this affiliation in its most significant way through voting in the primary. As the Court repeatedly emphasized, the party's primary plays a crucial function for the party, as it produces the nominee that will continue to the general election. Because the government and organization have their associational rights emphasized and protected during the earlier steps in the process, such as the ballot access, endorsement, and convention stages, the primary should be considered the province of the electorate. Essentially, the primary is the only step in the process where the voters of the electorate can fully exercise their roles as party affiliates. In fact, the act of voting in a party's primary can fairly be seen as one of the most significant acts of affiliation the electorate can accomplish. Arguably an unregistered, independent voter who voted for a party's candidates in an open election has affiliated herself with the party in a more significant way than an enrolled party member who did not vote at all in that primary.

Additionally, focusing on the rights of the electorate during the primary stage comports with the seminal reason parties moved to implement direct primaries: "[T]he purpose of nominating by primary elections is to enable voters, rather than a party organization or leaders, to choose the nominee." Protecting the rights of the organization over the rights of the electorate at the primary stage suggests a failure of the primary system.

200. See supra Part IV.A.
201. See supra Part II.
202. See supra notes 125, 132–33 and accompanying text.
203. See supra Part II.
204. JEWELL & OLSON, supra note 47, at 104; see also BECK & SORAUF, supra note 29, at 250 ("The direct primary perhaps can best be thought of as creating a veto body that passes on the work of party nominators . . . .").
205. See BECK & SORAUF, supra note 29, at 249 ("If one purpose of the primary was to replace the caucuses and conventions of the party organizations as nominators, the primary fails when it falls under the sway of those organizations.").
This analysis culminates with *Jones*, in which the Court suggested that as long as a voter has some connection to the party, through membership or affiliation, that voter should be allowed to vote in a party's primaries.\textsuperscript{206} It is this connection to the party, via membership or affiliation, that serves as the subtle but crucial distinction among the primary systems, and that rendered the blanket primary in *Jones* unconstitutional while protecting open and closed primaries.\textsuperscript{207} For example, in states with closed primaries, where only enrolled party members can vote,\textsuperscript{208} the organization leaders and the government are emphasizing, through the implementation of the closed primary system, that the nomination process should not be influenced in any way by voters who have made no effort to formally affiliate with the party.\textsuperscript{209} In states with semi-closed primaries, those enrolled as party members before the election can only vote in their party's primary.\textsuperscript{210} The semi-closed primary, however, allows for those who have not declared formal prior party affiliation to participate in choosing the party's leaders on primary election day.\textsuperscript{211} Thus, in semi-closed primary states, political affiliation is equated with voting for a single party's candidates in the primary election, in contrast to the closed primary, where political affiliation only occurs if a voter is registered with a party in advance of the primary election.\textsuperscript{212} States with semi-closed primaries view the act of selecting a party's leaders as an act that is privileged in the sense that, by participating, voters are affiliating themselves with a party, but that participation should not be limited only to those who have affiliated with a party in advance of the election.\textsuperscript{213}

On the other hand, in an open primary, a registered member of one party may vote in another party's primary but is required to choose candidates from *that* party for *each* office on the ballot.\textsuperscript{214} By virtue of the act of voting for a single party's

\begin{itemize}
\item \textsuperscript{206} See supra note 142 and accompanying text.
\item \textsuperscript{207} See supra note 143 and accompanying text.
\item \textsuperscript{208} See supra notes 11–12 and accompanying text (discussing closed primaries).
\item \textsuperscript{209} See supra notes 11–12 and accompanying text.
\item \textsuperscript{210} See supra notes 13–14 and accompanying text (discussing semi-closed primaries).
\item \textsuperscript{211} See supra notes 13–14 and accompanying text.
\item \textsuperscript{212} See supra Part I.A.
\item \textsuperscript{213} See supra notes 14–16 and accompanying text.
\item \textsuperscript{214} See supra notes 17–18 and accompanying text (discussing open primaries).
\end{itemize}
candidates, the voter has not enrolled with that party, but has affiliated himself with it at the least for the time spent in the polling booth. In states with open primaries, the organization and government are less concerned with keeping out previously unaffiliated voters or automatically enrolling voters in their party after they vote than they are with ensuring that an act of affiliation occurs at the voting booth through the selection of candidates from a single party for all offices, even if this act appears to demand minimal commitment to the party. In open primary states, the act of voting for candidates from a single party becomes an act of affiliation with that party.

It is the absence of this act of affiliation in blanket primaries that rendered blanket primaries unconstitutional in Jones. In a blanket primary, because any voter may switch between parties when voting (for example, by voting for a Democratic candidate for governor and a Republican candidate for senator), the voter never actually affiliates with a single party. The voter is not required in any way to demonstrate identity with a party, and the Court in Jones concluded that a voter unwilling to affiliate in even the most minimal way with a single party should not be allowed to vote in a direct primary.

C. POLITICAL PARTIES AND THE PROCESS IN THE WAKE OF JONES

While the Jones majority suggested that the open primary is safe from future constitutional attacks because of the distinction between membership and affiliation, this Note advances an additional structure by which to understand the distinctions among the many factors at play in the electoral process. Specifically, the framework proposed in this Note, that of a tripartite model of political parties combined with an understanding of the electoral process as a series of stages leading to the primary, might serve as a useful tool for examining how to correct flaws in the electoral process without challenging the constitutionality of state primary systems. For example,

215. See supra notes 19–22 and accompanying text.
216. See supra Part I.B.
217. See supra notes 142–43 and accompanying text.
218. See supra Part I.C.
219. In a sense, the more appropriate forum for these voters is the general election, where all voters are allowed to switch between parties when selecting candidates.
conceptualizing the primary itself as the province of the electorate might shift the focus of the deterioration of political parties back where it belongs, on the organizations themselves. The electorate is in the unique position of comprising the bulk of the party yet having little control over its direction, save for its role in voting in elections. 220 Both before and after this vote is cast, however, it is the organization and the government that must claim responsibility for the direction and success or failure of the party. Thus, while the party's concerns with its associational rights are valid, and the Court has made every concession to these concerns in its line of decisions, 221 perhaps the organizations' emphasis on determining who votes in their primary elections is misplaced. The organization and government, when challenging blanket primary elections, have asserted that opening primaries to either nonmembers or non-affiliates threatens to change the party's message by allowing nonmembers and non-affiliates to determine the party's position through selection of its nominee, and the Court has not disagreed with these assertions. 222

In reality, however, defining the party's message is the responsibility of the organization to a large degree, and the government to a smaller degree. If the goal of the party as a whole is to succeed in the general election, then the primary nominee is not likely to get far without relying on the organization's direction and support in defining the party's message, determining positions, and winning over the general electorate. In some sense, it is the organization's responsibility, through endorsement and caucuses and conventions, to present a strong slate of candidates to voters in the primary so that the threat posed by "cross-over" voters is minimal because any candidate the voters chose would hold promise for the party. Relying on the courts to protect against the threat of cross-over voters seemingly shifts the focus away from the organization's responsibility to groom compelling and loyal candidates who will appeal to a broad spectrum of voters to a misplaced blame on the primary structure that allows independents or the unaffiliated to vote for a candidate.

220. See supra notes 63-64 and accompanying text.
221. See supra Part III.
222. See Cal. Democratic Party v. Jones, 530 U.S. 567, 575 (2000) ("In no area is the political association's right to exclude more important than in the process of selecting a nominee.").
CONCLUSION

In summary, the entire candidate selection process can, and should, be viewed on a linear temporal model that requires a constant balancing and shifting of different party components’ associational rights and different degrees of power over the candidate selection process. At the earliest stage, the courts have held that the party-government’s constitutional rights are most deserving of protection, through its regulation of ballot access measures. The party-government gets to determine what candidates must do to even appear on the ballot, the initial and most fundamental step to being elected. The party-organization has a similarly crucial role early in the electoral process in its capacity to conduct a caucus or convention before the primary, where it can select its candidate at an entirely private affair free from associational burdens. If the party-government requires that any caucus or convention be followed by a primary, the party-organization still has the unrestricted ability to endorse a candidate in the primary. These processes are powerful and free from intrusive regulation and should be considered the means by which the party-organization can select its standard bearer.

In the last stage of the process, the primary itself, the party-electorate has the opportunity to select its standard bearer. The candidate chosen by the party-electorate may or may not coincide with the candidate endorsed by the party-organization, but if the party-organization has done its job, it will have convinced the party-electorate to choose its preferred candidate. The primary election phase of the electoral process is where the party-electorate’s rights should be favored, which include the right of the independent and unaffiliated voters to affiliate with the party by voting in its primary.

By construing the electoral process along a continuum in this way and considering the political party in light of its three components, the Court’s primary election law jurisprudence can be sufficiently reconciled and appropriately stabilized to the benefit everyone interested in the electoral process.