NOTE

The Party or the People: Whose Ballot Choice Does the Constitution Protect?

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INTRODUCTION

The Constitution empowers states to prescribe the manner of holding elections.[1] However, the First Amendment limits that power by preventing a state from implementing regulations that significantly affect parties' rights to define their membership.[2] For example, the Supreme Court has held that a state must allow independent voters to vote in a party's primary if the party so wishes.[3] This conflict between states' powers and parties' First Amendment rights surfaced in the context of primary elections in the State of Washington.[4]

In 1935, Washington implemented a unique and popular blanket primary election system.[5] The primary system allowed voters to cast votes for any candidate for a particular office, regardless of the candidate's or the voter's political party affiliation.[6] From the moment that the Blanket Primary Act passed in 1935, the Washington Democratic and Republican Parties sponsored legislation to replace

[1] U.S. CONST. art. I, § 4, cl. 1; *see also* Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (finding Constitution grants states broad power to prescribe times, places, and manner of holding elections).

[2] *Tashjian*, 479 U.S. at 217 (finding that First Amendment limits Constitution's broad grant of power to regulate elections); *see* 16A AM. JUR. 2D *Constitutional Law* § 539 (2006) (discussing origin and nature of right of freedom of association). *See generally* Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (describing two types of freedom of association: freedom of intimate association and freedom of expressive association); NAACP v. State of Alaska *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (finding that freedom of association is inextricable part of freedom of speech which Fourteenth Amendment's due process clause guarantees).

[3] *Tashjian*, 479 U.S. at 210-11.

[4] Wash. State Republican Party v. Washington, 460 F.3d 1108, 1112 (9th Cir. 2006) (holding that Washington's new blanket primary was unconstitutional); Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1202-04 (9th Cir. 2003) (holding that Washington's original blanket primary was unconstitutional); *see also* Susan Gilmore, *Court Unravels Elections in Two States*, SEATTLE TIMES, Sept. 16, 2003, at A1 (reporting decision in *Democratic Party of Washington State*).

[5] Blanket Primary Act, 1935 Wash. Sess. Laws 60-64; *see* Louise Overacker, *Direct Primary Legislation in 1934-35*, 30 AM. POL. SCI. REV. 279, 280-81 (1936) (summarizing direct primary legislation enacted in 1934-35); Sam Reed, Sec. of State, Washington, Elections: History of the Blanket Primary in Washington, http://www.secstate.wa.gov/elections/bp_history.aspx (last visited Oct. 25, 2007) (describing history of Washington's blanket primary); *see also* V.O. KEY, JR., POLITICS, PARTIES, & PRESSURE GROUPS 391 (5th ed. 1964) (describing Washington primary).

[6] Blanket Primary Act, 1935 Wash. Sess. Laws at 64; *see also* PAUL ALLEN BECK & FRANK J. SORAUF, PARTY POLITICS IN AMERICA 247 (6th ed. 1988) (describing blanket primary); KEY, *supra* note 5, at 391 (describing Washington primary); Reed, *supra* note 5 (describing history of Washington's blanket primary).

the blanket primary, but these attempts failed.[7] Washington's political parties also challenged the constitutionality of the blanket primary on the grounds that it violated their First Amendment right to freedom of association.[8] The Washington Supreme Court, however, upheld the validity of the blanket primary on two separate occasions.[9] In short, the Washington blanket primary was infallible until a 2000 U.S. Supreme Court case.[10]

In 2000, in *California Democratic Party v. Jones*, the Supreme Court ruled that California's blanket primary was unconstitutional.[11] In 2003, in *Democratic Party of Washington State v. Reed*, the Ninth Circuit Court of Appeals invalidated Washington's blanket primary based on the rationale of *California Democratic Party*.[12] Keen to maintain their popular and long-standing blanket primary, the Washington electorate implemented a new blanket primary in 2004.[13] The new blanket primary's authors designed it to conform to the Supreme Court's standards in *California Democratic Party*.[14]

[7] Reed, *supra* note 5.

[8] *See* Heavey v. Chapman, 611 P.2d 1256, 1257 (Wash. 1980) (holding that Washington's blanket primary election laws did not unconstitutionally restrict voters' right of association under Washington and Federal Constitutions); Anderson v. Milliken, 59 P.2d 295, 297-98 (Wash. 1936) (holding that Washington's Blanket Primary Act was not unconstitutional); Reed, *supra* note 5.

[9] *Heavey*, 611 P.2d at 1257; *Anderson*, 59 P.2d at 297-98; *see also* Reed, *supra* note 5 (describing history of Washington's blanket primary).

[10] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (holding California's blanket primary unconstitutional); *see also* Linda Greenhouse, *The Supreme Court: Freedom of Association Court Strikes Down California Primary Placing All Parties on a Single Ballot*, N.Y. TIMES, June 27, 2000, at A1 (reporting decision in *California Democratic Party*).

[11] 530 U.S. at 586; *see* Greenhouse, *supra* note 10.

[12] Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1202-04 (9th Cir. 2003) (holding that Washington's blanket primary was materially indistinguishable from California's blanket primary, and therefore unconstitutional).

[13] *See* Wash. State Republican Party v. Washington, 460 F.3d. 1108, 1114 (9th Cir. 2006); Susan Gilmore, *Initiative on Primary Elections Winning Approval from Voters; Initiative 872*, SEATTLE TIMES, Nov. 3, 2004, at B11 (reporting passage of Washington ballot initiative implementing new blanket primary election); *see also* Wash. Research Council, The Primary Objective of I-872: More Choices in September; Fewer in November, Washington Research Council Policy Brief (Oct. 5, 2004) (unpublished policy brief, on file with author) [hereinafter Primary Objective] (describing Washington's new blanket primary); Initiative 872 — Preserve the Blanket Primary, Initiative 872 Frequently Asked Questions, http://www.blanketprimary.org/faq.php (last visited Oct. 14, 2007) (responding to questions about Washington's new blanket primary).

[14] *See Wash. State Republican Party*, 460 F.3d. at 1114-15; Gilmore, *supra* note 13 (reporting popularity of I-872); *see also* Initiative 872, *supra* note 13 (discussing

Unfortunately for the Washington electorate, however, the Ninth Circuit invalidated Washington's new blanket primary in *Washington State Republican Party v. Washington*.[15] This Ninth Circuit decision ended the attempts of Washington voters to preserve the primary system they had used for nearly seventy years.[16]

This Note argues that the Ninth Circuit incorrectly decided *Washington State Republican Party*.[17] In order to preserve Washington's ability to increase the competitiveness of its elections, the court should permit voters to vote for whomever they choose.[18] Conversely, the Ninth Circuit's decision limits the candidates for whom voters can vote in a primary by abolishing the blanket primary.[19] Therefore, the Supreme Court should reverse the Ninth Circuit's decision and set a strong precedent explaining which blanket primary systems are constitutionally permissible.[20]

Part I of this Note discusses the American primary election system, associational rights jurisprudence, and two primary election cases preceding *Washington State Republican Party*.[21] Part II reports the facts, procedure, holding, and rationale of *Washington State Republican Party*.[22] Part III argues that the Ninth Circuit incorrectly decided *Washington State Republican Party*.[23] First, the Ninth Circuit's holding relied on part of the Supreme Court's flawed rationale in *California Democratic Party*.[24] Second, the Ninth Circuit incorrectly analyzed

approval of Washington's new blanket primary); Primary Objective, *supra* note 13 (discussing history of I-872).

[15] *Wash. State Republican Party*, 460 F.3d at 1111 (holding that Washington's new blanket primary was unconstitutional under *California Democratic Party*); *see* Susan Gilmore, *Primary Possibility: Don't Mention Party*, SEATTLE TIMES, Aug. 23, 2006, at B1 (reporting implications of holding in *Washington State Republican Party*).

[16] *Wash. State Republican Party*, 460 F.3d at 1112 (affirming district court's permanent injunction against implementation of blanket primary); *see* Kathie Durbin, *Local Election Officials to Miss "Voter-friendly" System*, THE COLUMBIAN, Aug. 23, 2006, at C2 (reporting on popularity of Washington's blanket primary); Gilmore, *supra* note 15.

[17] *See* discussion *infra* Part III (arguing that Ninth Circuit incorrectly decided *Washington State Republican Party*).

[18] *See* discussion *infra* Part III.C (arguing that holding in *Washington State Republican Party* violated federalism principles).

[19] *See* discussion *infra* Part II (discussing holding in *Washington State Republican Party*).

[20] *See* discussion *infra* Part III (arguing that Ninth Circuit incorrectly decided *Washington State Republican Party*).

[21] *Infra* Part I.A-B.

[22] *Infra* Part II.A-B.

[23] *Infra* Part III.A-C.

[24] *Infra* Part III.A.

Supreme Court precedent to conclude that the Washington primary election was unconstitutional.[25] Third, by striking down the primary law, the Ninth Circuit improperly prevented Washington voters from implementing pro-competition electoral reforms.[26]

I. BACKGROUND

The First Amendment protects the freedom to associate, allowing individuals to form groups such as political parties to achieve political goals.[27] The freedom to associate includes the right of political parties to determine who may and who may not belong to their groups.[28] When a state enforces a regulation that burdens a party's right to determine its membership boundaries, the regulation infringes on the party's freedom of association.[29]

If the regulation severely burdens a party's associational rights, courts analyze the statute under strict scrutiny.[30] To satisfy strict scrutiny, the state must narrowly tailor the regulation to achieve a compelling state interest.[31] If the regulation only minimally burdens a party's associational rights, courts analyze the law under a rational basis review.[32] To satisfy rational basis review, the state need only

[25] *Infra* Part III.B.

[26] *Infra* Part III.C.

[27] *See* Clingman v. Beaver, 544 U.S. 581, 586 (2005) (discussing First Amendment's protection of citizens' right to join together for political purposes); Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000) (asserting importance of citizens' ability to join together to elect representatives who will advocate for their interests); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (discussing First Amendment's protection of forming groups to further political goals and ideas); NAACP v. State of Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) (finding that freedom to associate for political purposes is inextricable part of Fourteenth Amendment Due Process Clause).

[28] Tashjian v. Republican Party of Conn., 479 U.S. 208, 214 (1986) (finding that freedom of association includes partisan political organization); Buckley v. Valeo, 424 U.S. 1, 15 (1976) (finding that First Amendment protects political association and political expression); McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1220 (4th Cir. 1995) (finding that state laws restricting party ballot access implicate First Amendment associational rights); *see* 16A AM. JUR. 2D, *supra* note 2, § 539 (discussing origin and nature of right of freedom of association).

[29] *Timmons*, 520 U.S. at 358 (discussing balancing benefits and burdens of state regulation of elections); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (describing balancing test that Court must perform to determine whether election laws are constitutionally permissible).

[30] *Timmons*, 520 U.S. at 358; *Anderson*, 460 U.S. at 789.

[31] *Timmons*, 520 U.S. at 358; *Anderson*, 460 U.S. at 789.

[32] *Timmons*, 520 U.S. at 358; *Anderson*, 460 U.S. at 789; Bullock v. Carter, 405 U.S. 134, 142-44 (1972) (finding that Texas filing fee system deserved close scrutiny to

assert important interests justifying the regulation.[33] This is an easier standard to satisfy than strict scrutiny.[34] A state's important regulatory interests are usually enough to justify reasonable, nondiscriminatory restrictions.[35]

A. Primary Elections

All fifty states exercise their power to regulate elections by requiring parties to use primary elections to nominate candidates for political office.[36] A primary is an election to determine which candidates will run in the general election for a particular office.[37] Before 1902, political parties used caucuses and conventions to select and nominate candidates to run in the general election.[38] In 1902, however, Wisconsin enacted the country's first statewide primary law, and within fifteen years, forty-six states had adopted some sort of primary election.[39] Proponents of the primary saw it as a means to transfer the nominating process from the party elites to the general electorate.[40]

Primary election systems fall generally into three categories: closed, open, and blanket.[41] Twenty-six states hold closed primaries in which

determine whether it was reasonably necessary to accomplish legitimate state objectives).

[33] *Timmons*, 520 U.S. at 358; *Anderson*, 460 U.S. at 789; *Bullock*, 405 U.S. at 142-44.

[34] Sources cited *supra* note 33.

[35] Sources cited *supra* note 33.

[36] *See* Fair Vote — Voting and Democracy Research Center, Primaries: Open and Closed, http://www.fairvote.org/?page=1801 (last visited November 10, 2007) [hereinafter Primaries] (summarizing primary elections of fifty states); *see also* BECK & SORAUF, *supra* note 6, at 243-45 (discussing advent of direct primary); ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 91-93 (1990) (describing history of ballot access in United States and noting that Idaho in 1919, and New York in 1921, returned to nominations by convention system); Bruce E. Cain & Elisabeth R. Gerber, *California's Blanket Primary Experiment*, *in* VOTING AT THE POLITICAL FAULT LINE 3, 5 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) (providing background information to analysis of California's blanket primary election). *See generally* ALAN WARE, THE AMERICAN DIRECT PRIMARY 227-54 (2002) (discussing evolution of direct primaries since 1915).

[37] *See* BECK & SORAUF, *supra* note 6, at 243-45; BOTT, *supra* note 36, at 91-93 (discussing evolution of primary elections); WARE, *supra* note 36, at 227-54; Cain & Gerber, *supra* note 36, at 5.

[38] *See* CHARLES R. ADRIAN & MICHAEL R. FINE, STATE AND LOCAL POLITICS 152 (1991) (discussing evolution of primary elections); BECK & SORAUF, *supra* note 6, at 243-44.

[39] *See* BECK & SORAUF, *supra* note 6, at 243-44.

[40] *See* ADRIAN & FINE, *supra* note 38, at 152; BECK & SORAUF, *supra* note 6, at 243-44 (discussing progressive's philosophy that cure for ills of democracy was more democracy).

[41] *See* Primaries, *supra* note 36 (describing three types of primaries and explaining

voters must declare a party affiliation and may only vote in their own party's primary.[42] Some states require voters to declare party affiliation well in advance of voting in a closed primary.[43] Others, however, allow voters to declare their affiliation as late as the day of the election.[44] In such systems, voters do not form any sort of affiliation with a political party until they enter the polling place.[45] Twenty-four states hold a form of open primary in which voters may vote in any single party's primary.[46] In an open primary, a voter forms no party affiliation until receiving a ballot.[47]

Although three states have used blanket primaries in the past, no state currently uses a blanket primary.[48] In a blanket primary, voters

which states use each type); *see also* 26 AM. JUR. 2D *Elections* § 226 (2006) (describing difference between open, closed, and blanket primaries); BECK & SORAUF, *supra* note 6, at 245-49 (describing different categories of direct primaries); BOTT, *supra* note 36, at 19-25 (1990) (discussing party affiliation in primary elections).

[42] *See* Primaries, *supra* note 36; *see also* WARE, *supra* note 36, at 246-48 (discussing changes in direct primary since 1920s). *See generally* 26 AM. JUR. 2D, *supra* note 41 (describing difference between open, closed, and blanket primaries); BECK & SORAUF, *supra* note 6, at 246 (describing closed primary).

[43] Rosario v. Rockefeller, 410 U.S. 752, 762 (1973) (upholding New York closed primary law that required voters to register 11 months in advance of primary election). *But cf.* Kusper v. Pontikes, 414 U.S. 51, 61 (1973) (invalidating Illinois law that prevented voter from voting in closed party primary if that voter had voted in another party's primary within past 23 months).

[44] WYO. STAT. ANN. § 22-3-104 (2005) (providing that Wyoming voters may change party affiliation at polling place on election day); *see* Penn. Election Reform Task Force, *Task (d)—Post-March 17, 2005 Meeting Research*, at d-21 (Mar. 17, 2005) http://www.dos.state.pa.us/election_reform/lib/election_reform/Task_D_Post_March_17_Research_Materials.pdf [hereinafter Election Reform Task Force] (describing Wyoming's primary as closed system that allows voters to change affiliation on day of primary).

[45] *See* § 22-3-104; Election Reform Task Force, *supra* note 44, at d-21.

[46] *See* BECK & SORAUF, *supra* note 6, at 246; Primaries, *supra* note 36; *see also* 26 AM. JUR. 2D, *supra* note 41, § 226 (describing difference between open, closed, and blanket primaries).

[47] *See supra* note 46.

[48] BECK & SORAUF, *supra* note 6, at 247 (noting that Alaska, Louisiana, and Washington hold blanket primaries); Primaries, *supra* note 36. Following *California Democratic Party*, the Alaska and Louisiana legislatures replaced their primary elections with a version of the open primary. Blanket Primary, http://en.wikipedia.org/wiki/Blanket_primary (last visited November 10, 2007) (noting that Alaska has recently replaced its blanket primary); Nonpartisan Blanket Primary, http://en.wikipedia.org/wiki/Cajun_primary (last visited October 26, 2007) (noting that Louisiana has recently replaced its quasi-blanket primary election for federal offices). Since *California Democratic Party*, the Ninth Circuit has invalidated two Washington blanket primary systems. Wash. State Republican Party v. Washington, 460 F.3d 1108, 1112 (9th Cir. 2006) (invalidating Washington's new

may vote for candidates of different parties for different offices on the same ballot.[49] For example, a registered Libertarian may vote for a Democratic candidate for governor and a Republican candidate for attorney general.[50] In a blanket primary, a voter does not form any sort of party affiliation until casting a vote.[51]

The Supreme Court has upheld the constitutionality of a closed primary, finding that a state may prevent a party from opening its primary to registered members of other parties.[52] The Court has also upheld the constitutionality of an open primary, holding that a state must allow a party to open its primary to independent voters if the party so wishes.[53] The Supreme Court, however, has not upheld any blanket primaries.[54] In 2000, the Court addressed the constitutionality of a blanket primary for the first time.[55]

B. California Democratic Party v. Jones

In 1996, the California electorate implemented a blanket primary that was similar to Washington's original blanket primary.[56] In *California Democratic Party v. Jones*, various political parties challenged California's blanket primary on the grounds that it violated their rights to freely associate.[57] Each party had a rule prohibiting nonmembers from voting in its primary because the parties wanted to

blanket primary that was implemented in 2004); Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1201 (9th Cir. 2003) (invalidating Washington's original blanket primary that was implemented in 1935).

[49] *See supra* note 46.

[50] Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 107 (2005) (discussing Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)).

[51] *See supra* note 46.

[52] Clingman v. Beaver, 544 U.S. 581, 598 (2005) (holding that Constitution did not require Oklahoma to permit Libertarian party to open its primary election to members of other parties).

[53] Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11 (1986) (holding that state must allow independent voters to vote in party's primary if party so wishes).

[54] Cal. Democratic Party v. Jones, 530 U.S. 567, 586 (2000) (invalidating California's blanket primary).

[55] *Id.*

[56] *See id.* at 569-71; *see also* Robert B. Gunnison, *Open Primary Law Headed for Court*, S.F. CHRON., Mar. 28, 1996, at A17 (reporting passage of California's blanket primary and parties' threats to challenge law in court).

[57] *Cal. Democratic Party*, 530 U.S. at 569-71; *see* Dave Lesher, *State's Radical Shift to an Open Primary Upheld*, L.A. TIMES, Nov. 18, 1997, at A1 (reporting that California Democratic and Republican parties had joined forces to challenge blanket primary).

prevent nonmembers from determining the party's nominee.[58] In direct contradiction, the California blanket primary allowed any voter to vote in a party's primary.[59] California's primary forced all parties to open the selection of their nominees to all voters.[60] The parties felt that this forced association violated their First Amendment right to determine who may belong to their groups.[61] Therefore, the parties challenged the California blanket primary's constitutionality in court, claiming the blanket primary violated their associational rights.[62]

The district court ruled that the California blanket primary was constitutional.[63] The court recognized that the primary would allow a substantial number of voters unaffiliated with a party to vote in that party's primary.[64] Nevertheless, the court held that the law did not severely burden the parties' associational rights.[65] The district court found that state interests in the democratic nature of the election process justified the state's experiment with a new primary election.[66] The political parties appealed, and the Ninth Circuit Court of Appeals affirmed the district court's decision.[67] The parties then appealed to the U.S. Supreme Court, which reversed the Ninth Circuit's ruling.[68] The Supreme Court concluded that California's blanket primary impermissibly burdened the political parties' First Amendment rights to freely associate.[69]

The *California Democratic Party* court expanded the notion of a political party's right to associate and recognized for the first time a corollary right not to associate.[70] The Court held that California's

[58] *Cal. Democratic Party*, 530 U.S. at 569-71.

[59] *Id.* at 571; *see* Lesher, *supra* note 57 (reporting that California primary allowed voters to vote for candidates of any party, regardless of voters' own party registration).

[60] *Cal. Democratic Party*, 530 U.S. at 569-71.

[61] *Id.* at 571; *see* Petition for Writ of Certiorari at 7-11, *Cal. Democratic Party*, 530 U.S. 567 (No. 99-401) (arguing that Ninth Circuit decision conflicted with Supreme Court and Ninth Circuit precedent regarding associational rights of political parties). *See generally* Lesher, *supra* note 57 (reporting reactions of party leaders to Supreme Court decision in *California Democratic Party*).

[62] *Cal. Democratic Party*, 530 U.S. at 569-71; *see* Lesher, *supra* note 57.

[63] *See supra* note 62.

[64] *Cal. Democratic Party*, 530 U.S. at 571.

[65] *Id.*

[66] *Id.*; *see* Lesher, *supra* note 57.

[67] *Cal. Democratic Party*, 530 U.S. at 569-71. *See generally*, Greenhouse, *supra* note 10 (reporting decision in *California Democratic Party*).

[68] *Cal. Democratic Party*, 530 U.S. at 571.

[69] *Id.* at 586 (holding that Proposition 198 placed severe and unnecessary burden on parties' rights of political association); *see also* Greenhouse, supra note 10.

[70] *Cal. Democratic Party*, 530 U.S. at 576 & n.7 (citing *Democratic Party of U.S. v.*

blanket primary violated this right not to associate.[71] The Court justified a party's right not to associate using a hostile voter rationale.[72] That is, the Court found that the California blanket primary permitted potentially hostile voters to determine a party's nominees for the general election.[73] This hostile voter threat constituted a severe burden on the party's associational rights because the party risked losing control of its positions on various issues.[74]

Because the *California Democratic Party* court concluded that the primary severely burdened the parties' associational rights, it applied strict scrutiny.[75] Applying strict scrutiny, the Court analyzed whether the drafters narrowly tailored the primary to serve a compelling state interest.[76] It found none of the State's seven asserted interests compelling enough to justify the burden on the parties' associational rights.[77] Consequently, the Court held that the law was unconstitutional.[78]

However, the Supreme Court's decision in *California Democratic Party* was not so broad as to preclude any blanket primary election.[79]

Wisconsin ex rel. *La Follette*, 450 U.S. 107, 122 & n.22 (1981), to support assertion that political party's right not to associate is corollary of right to associate).

[71] *Id.* at 577-82 (reasoning that California's blanket primary severely burdens political parties' rights not to associate because of danger of voters unaffiliated with party determining parties' policies).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 581-82 (finding that allowing potentially hostile voters to vote in party's primary severely burdens party's associational freedom because it changes party's message).

[75] *Id.* at 582 (concluding that blanket primary was unconstitutional unless narrowly tailored to serve compelling state interest).

[76] *Id.*

[77] *Id.* at 582-86 (holding that proffered state interests were not compelling). *But see* Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 797 n.14 (2001) (arguing that, based on empirical data, two of the seven interests — moderation and participation — may be compelling).

[78] *Cal. Democratic Party*, 530 U.S. at 586.

[79] *Id.* at 585-86 (discussing hypothetical constitutionally permissible nonpartisan blanket primary); Wash. State Republican Party v. Washington, 460 F.3d 1108, 1117-18 (9th Cir. 2006) (discussing hypothetical nonpartisan blanket primary in *California Democratic Party*); *see also* Cain, *supra* note 77, at 797 (arguing that *California Democratic Party*'s nonpartisan primary test "allows voters to vote with maximum freedom but with the constitutional virtue of 'not choosing a party's nominee'" (quoting *Cal. Democratic Party*, 530 U.S. at 586)); *The Supreme Court 1999 Term: Leading Cases*, 114 HARV. L. REV. 259, 278 (2000) (arguing that after *California Democratic Party*, states may still institute open or nonpartisan primaries that allow independents and registered members of all parties to participate).

The Court reserved to the states the right to conduct a "nonpartisan blanket primary."[80] The Court prescribed a constitutionally permissible blanket primary in which the "top two vote getters," regardless of their party affiliation, advanced to the general election.[81] According to the Court, the crucial characteristic of a nonpartisan blanket primary is that it is separate from the nomination process of any political party.[82] The Court found that such a primary would allow a state to achieve its asserted interests without severely burdening a political party's associational rights.[83]

C. Democratic Party of Washington State v. Reed

Washington's popular, long-standing blanket primary was similar to California's blanket primary.[84] After the Supreme Court invalidated the California blanket primary in *California Democratic Party*, Washington's political parties challenged Washington's blanket primary.[85] In *Democratic Party of Washington State*, the Democratic, Republican, and Libertarian parties claimed that Washington's primary unconstitutionally burdened the parties' associational rights.[86]

The three political parties sued the State of Washington in an effort to invalidate Washington's blanket primary.[87] The district court granted the State's motion for summary judgment.[88] The court held that the political parties failed to meet their burden of proof.[89] The political parties appealed, and the Ninth Circuit Court of Appeals reversed the district court's ruling.[90] The Ninth Circuit held that

[80] *Cal. Democratic Party*, 530 U.S. at 585-86 (describing nonpartisan blanket primary that is constitutionally permissible); *see also* Greenhouse, *supra* note 10.

[81] *Cal. Democratic Party*, 530 U.S. at 585-86.

[82] *Id.*

[83] *Id.*

[84] *See* Neil Modie, *Blanket Primary Is Struck Down*, SEATTLE POST-INTELLIGENCER, Sept. 16, 2003, at B1 (reporting that after *California Democratic Party*, Washington legislature contemplated changes to blanket primary); John Wildermuth, *Search Starts Over for Voter-Friendly Primary*, S.F. CHRON., June 27, 2000, at A17 (reporting holding of *California Democratic Party* and commentary of parties and public figures).

[85] Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1201-02 (9th Cir. 2003).

[86] *Id.* at 1201-02; *see also* Gilmore, *supra* note 4.

[87] *Democratic Party of Wash. State*, 343 F.3d at 1201-02; *see also* Gilmore, *supra* note 4 (reporting facts of *Democratic Party of Washington State*).

[88] *Democratic Party of Wash. State*, 343 F.3d at 1201-02.

[89] *Id.*

[90] *Id.*

Washington's blanket primary was unconstitutional.[91] The Ninth Circuit found that Washington's primary was materially indistinguishable from California's primary and thus applied strict scrutiny as the Supreme Court had in *California Democratic Party*.[92] The Ninth Circuit held that none of the State's five asserted interests was compelling enough to justify the burden on the parties' associational rights.[93] Consequently, the court held that Washington's seventy-year-old primary law was unconstitutional.[94]

D. I-872: Washington's New Blanket Primary

Following *Democratic Party of Washington*, the Washington State Grange ("Grange"), the state affiliate of the national agricultural advocacy group, sponsored a new blanket primary, Initiative 872 ("I-872").[95] The Grange expressly crafted I-872 to comply with the requirements of a nonpartisan blanket primary that the Supreme Court set forth in *California Democratic Party*.[96] With the support of almost sixty percent of Washington voters, I-872 became law in December 2004.[97]

Like Washington's older blanket primary, I-872 allowed voters to vote for any candidate regardless of the voter's party affiliation.[98] I-872 was different from Washington's original blanket primary,

[91] *Id.* at 1202, 1207 (discussing standard of review and holding); *see* Gilmore, *supra* note 4 (reporting holding of case and commentary of parties and public figures).

[92] *Democratic Party of Wash. State*, 343 F.3d at 1202-03 (discussing standard of review); *see* Cal. Democratic Party v. Jones, 530 U.S. 567, 582 (1999) ("Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.").

[93] 343 F.3d at 1205-07 (discussing appellee's assertion of compelling state interests).

[94] *Id.* at 1207 (holding that Washington blanket primary was unconstitutional burden on associational rights of political parties).

[95] *See* Initiative 872, *supra* note 13 (summarizing history of I-872); Primary Objective, *supra* note 13 (describing history of I-872).

[96] *See* Primary Objective, *supra* note 13.

[97] *See* Wash. State Republican Party v. Washington, 460 F.3d. 1108, 1114-15 (9th Cir. 2006). *See generally* Gilmore, *supra* note 13 (reporting passage of I-872); Initiative 872, *supra* note 13; Primary Objective, *supra* note 13.

[98] *Wash. State Republican Party*, 460 F.3d at 1112-13 (discussing Washington's original primary and California's recently invalidated primary); *see also* Blanket Primary Act, 1935 Wash. Sess. Laws 60-64 (providing that voters may vote for any candidate); People's Choice Initiative of 2004 (Dec. 2, 2004), http://apps.leg.wa.gov/billinfo/initiatives.aspx?year=2003 (scroll down to link to "Initiative 872") [hereinafter People's Choice Initiative] (providing that voter may vote for any candidate regardless of voter's or candidate's party registration).

however, because of the outcome it produced.[99] Under Washington's original blanket primary, the top candidate from each party advanced to the general election.[100] Election officials and other elected representatives referred to Washington's old blanket primary as a "nominating" primary because political parties used it to select their nominees.[101] Under I-872, the two candidates that received the most votes advanced to the general election, regardless of those candidates' party affiliations.[102] For this reason, courts and scholars refer to I-872 as a "top-two" primary.[103] Although I-872 allowed candidates to choose a party label to appear beside their names on the ballot, candidates were not competing for a party's nomination.[104]

II. *WASHINGTON STATE REPUBLICAN PARTY V. WASHINGTON*

In *Washington State Republican Party v. Washington*, the Ninth Circuit Court of Appeals struck down I-872, which the Grange had designed to survive constitutional scrutiny.[105] The Ninth Circuit held

[99] *See Wash. State Republican Party*, 460 F.3d at 1114 (describing "top two" feature of Washington's new primary).

[100] Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1201 (9th Cir. 2006).

[101] *See* Press Release, Sam Reed et al., Wash. Sec'y of State, Elected Officials Urge Governor Locke to Adopt Modified Blanket Primary (Mar. 16, 2004) (on file on Washington Secretary of State's website) (describing Washington's old blanket primary as "nominating" primary and contrasting old primary with new primary); Initiative 872, *supra* note 13 (explaining difference between Washington's old and new blanket primaries).

[102] *Wash. State Republican Party*, 460 F.3d at 1114.

[103] *See, e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567, 585-86 (2000) (describing nonpartisan blanket primary where "top two vote getters" advance to general election, regardless of their party affiliation); *Wash. State Republican Party*, 460 F.3d at 1114 (discussing I-872's "top two" feature); Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1116-17 (2005) (discussing 2004 campaign to implement top two primary in California); Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 283 (2001) (describing Louisiana's top two blanket primary). Some scholars distinguish the "top two" blanket primary as a fourth type of primary. *See* John C. Kuzenski, *The Four-Yes, Four-Types of State Primaries*, 30 PS: POLI. SCI. & POLITICS 207, 207-08 (1997) (arguing that Louisiana's primary was different enough from open, closed, and blanket systems to constitute a fourth type of primary system).

[104] *See* Reply Brief of Appellants at 2-10, *Wash. State Republican Party*, 460 F.3d 1108 (No. 05-35780 & No. 05-35774) (explaining that I-872 primary is not used to select party nominees); *see also* People's Choice Initiative, *supra* note 98 (providing text of I-872).

[105] *Wash. State Republican Party*, 460 F.3d at 1112 (affirming district court's permanent injunction against implementation of blanket primary); *see also* Gilmore, *supra* note 15 (reporting holding of *Washington State Republican Party* and

that I-872 was unconstitutional for two reasons.[106] First, the court found that I-872 failed the test for a nonpartisan blanket primary under *California Democratic Party*.[107] Second, the court held that I-872 impermissibly burdened political parties' First Amendment rights of freedom of association.[108]

A. Factual and Procedural Background

The Washington State Republican Party challenged I-872 shortly after it became law in 2004.[109] The party sought a declaratory judgment and injunctive relief under 42 U.S.C. § 1983 to prevent county auditors from enforcing I-872.[110] The Washington State Democratic Central Committee and the Libertarian Party of Washington State intervened as plaintiffs.[111] The State of Washington and the Grange intervened as defendants and substituted for the county auditors who dropped out of the litigation.[112]

The district court granted the political parties' motions for summary judgment and enjoined enforcement of I-872 in July 2005.[113] The court found that, on its face, I-872 impermissibly forced a political party to associate with voters unaffiliated with the party when selecting its nominees.[114] In August 2006, after both the State and the Grange filed timely notices of appeal, the Ninth Circuit affirmed the district court's permanent injunction.[115]

commentary from parties and public figures).

[106] *Wash. State Republican Party*, 460 F.3d at 1117-23.

[107] *Id.* at 1117 ("[T]he primary under Initiative 872 is not the kind of nonpartisan election [*California Democratic Party*] contemplated."); *see infra* Part II.B (discussing Ninth Circuit's holding and rationale).

[108] *Wash. State Republican Party*, 460 F.3d at 1117-23 (discussing severe burden on associational rights); *see infra* Part II.B.

[109] *Wash. State Republican Party*, 460 F.3d at 1114-15; *see* Susan Gilmore, *Judge Tosses State's New Primary Top-Two System Ruled Unconstitutional Unpopular Version Restored State to Appeal*, SEATTLE TIMES, July 16, 2005, at A1 (reporting that Washington's political parties filed lawsuit challenging I-872 six months after it became law).

[110] *Wash. State Republican Party*, 460 F.3d at 1114-15.

[111] *Id.*

[112] *Id.*

[113] Wash. State Republican Party v. Logan, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005); *see* Gilmore, *supra* note 109 (reporting holding in *Logan*).

[114] *Logan*, 377 F. Supp. 2d at 919-28.

[115] *Wash. State Republican Party*, 460 F.3d at 1112.

B. Holding and Rationale

The Ninth Circuit based its holding squarely on the *California Democratic Party* Court's recognition of a political party's right not to associate.[116] The Ninth Circuit conceded that I-872 complied with the *California Democratic Party* requirements for a nonpartisan blanket primary in some respects.[117] However, it held that the initiative did not fully cure the constitutional defects that the Supreme Court identified in *California Democratic Party* in the California blanket primary.[118]

The Ninth Circuit's decision focused its analysis of I-872's party preference identification provision.[119] The provision allowed a candidate to specify a party preference to appear on the ballot next to his or her name.[120] The court found that the party preference identification provision rendered the initiative unconstitutional for two reasons.[121]

First, the provision made the I-872 primary partisan and therefore unconstitutional under *California Democratic Party*.[122] The court recognized that the *California Democratic Party* Court contemplated a primary that was separate from the nominating process of any political party.[123] However, the Ninth Circuit did not base its holding on this finding.[124] Instead, the court cited secondary authority to support its conclusion that "nonpartisan" meant that candidates could not list party names on the ballot.[125] Thus, the court held that the party

[116] *Id.* at 1118-19 (finding that I-872 severely burdened political parties' associational rights by perpetuating flaw that *California Democratic Party* Court found in California's blanket primary).

[117] *Id.* at 1117 (finding that I-872 resembled *California Democratic Party* hypothetical nonpartisan blanket primary in some respects but noting that party preference identification provision was crucial difference).

[118] *Id.*

[119] *Id.* at 1118-19 (finding that party preference identification provision made I-872 partisan and imposed severe burden on political parties' associational rights); *see also id.* at 1117 ("[T]he crucial point of divergence between Initiative 872 and *California Democratic Party* lies in the concept of partisanship.").

[120] *Id.* at 1111, 1114 (discussing I-872 provision allowing candidates to indicate party preference for appearance next to name on ballot).

[121] *Id.* at 1117-23 (explaining how party preference identification provision renders I-872 partisan and burdens parties' associational rights).

[122] *Id.* at 1117-19 (finding I-872 was partisan under *California Democratic Party* test).

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1118.

preference identification provision made I-872 unconstitutionally partisan under *California Democratic Party*.[126]

Second, the Ninth Circuit held that the party preference identification provision severely burdened a political party's right not to associate.[127] The court used the following hypothetical scenario to illustrate the burden on a party's associational rights.[128] The Republican Party holds a nominating convention and selects candidate *C*, a conservative, over candidate *M*, a moderate, as its candidate in the primary.[129] Despite losing the nomination, *M* decides to enter the primary as a Republican, as does candidate *W*, a wild-eyed radical.[130] Under I-872, these three candidates would all appear on the primary ballot as Republicans.[131] The ballot would not show which candidate was the party's official nominee.[132]

According to the Ninth Circuit, this hypothetical illustrated that under I-872, parties do not choose which candidates associate with them.[133] Rather, the court found that the party preference identification provision could result in a forced association between a party and a candidate.[134] Therefore, the court held that I-872 constituted a severe burden on a party's right to associate with the candidate of its choice.[135]

The Ninth Circuit found that the State failed to identify a compelling interest that would justify this burden.[136] In addition, I-872 was not narrowly tailored to meet any compelling state interests that might exist.[137] Washington could have tailored I-872 more narrowly by requiring a candidate's name to appear on the ballot without any party designation.[138] Finally, the court held that it could

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[126] *Id.* at 1117-19 (finding that party preference identification provision made I-872 partisan).

[127] *Id.* at 1118-19.

[128] *Id.* at 1120-21 (describing hypothetical situation in which party preference identification provision confuses voters).

[129] *Id.*

[130] *Id.*

[131] *Id.*; *cf.* Initiative 872, *supra* note 13 (discussing differences between I-872 and Washington's original blanket primary).

[132] *Wash. State Republican Party*, 460 F.3d at 1120-21; *cf.* Initiative 872, *supra* note 13 (describing I-872).

[133] *Wash. State Republican Party*, 460 F.3d at 1121.

[134] *Id.*

[135] *Id.* at 1117-23.

[136] *Id.* at 1123.

[137] *Id.*

[138] *Id.*

not sever the unconstitutional provisions from the rest of I-872. Thus, the entire initiative was unconstitutional.[139]

III. ANALYSIS

The Ninth Circuit incorrectly decided *Washington State Republican Party* for three reasons.[140] First, the Ninth Circuit relied on a flawed rationale from *California Democratic Party*.[141] Second, the court incorrectly concluded that the Washington blanket primary election was an unconstitutional partisan primary under the rationale in *California Democratic Party*.[142] Third, by striking down I-872, the Ninth Circuit prevented Washington voters from implementing pro-competition electoral reforms.[143]

A. The Ninth Circuit Court of Appeals Relied on a Flawed Rationale

The Ninth Circuit based its holding in *Washington State Republican Party* squarely on the *California Democratic Party* Court's recognition of a political party's right not to associate.[144] In *California Democratic Party*, the Supreme Court justified this right using a hostile voter rationale.[145] That is, California's blanket primary was unconstitutional because it permitted hostile voters to determine the parties' nominees.[146] This rationale distinguishes the blanket primary from other primaries as being vulnerable to the threat of hostile voters.[147]

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[139] *See id.* at 1124.

[140] *See infra* Part III.A-C (arguing that Ninth Circuit decided *Washington State Republican Party* incorrectly).

[141] *See* discussion *infra* Part III.A.

[142] *See* discussion *infra* Part III.B (arguing that I-872 was constitutionally permissible under *California Democratic Party*).

[143] *See* discussion *infra* Part III.C (arguing that principles of federalism dictate that Ninth Circuit should have respected policy choices of Washington electorate).

[144] *Wash. State Republican Party*, 460 F.3d. at 1117-23 (finding that I-872 constitutes severe burden on parties' associational rights.)

[145] Cal. Democratic Party v. Jones, 530 U.S. 567, 577-82 (1999) (reasoning that California's blanket primary severely burdens political parties' rights not to associate because of danger of voters unaffiliated with party determining policies of party); *see* discussion *supra* Part I.B (discussing Supreme Court's hostile voter rationale in *California Democratic Party*).

[146] *Cal. Democratic Party*, 530 U.S. at 577-82; *see* discussion *supra* Part I.B.

[147] *Cal. Democratic Party*, 530 U.S. at 577-82; *id.* at 596-98 (Stevens, J., dissenting) (criticizing majority's rule as turning on state's requirements for membership in political party).

This distinction is improper.[148] Most primary election systems are effectively as vulnerable as a blanket primary to a hostile voter threat such as the one described by the *California Democratic Party* court.[149] In an open primary, and in some closed primaries, voters do not form any sort of affiliation with a party until entering the polling place.[150] In these primaries, voters can choose which party's primary to vote in when they decide which ballot to take into the voting booth.[151] In a blanket primary, party affiliation occurs when the voter votes for a particular candidate, only moments after entering the voting booth.[152] Because this difference in timing is negligible, parties have no more control over a voter's motives in other primaries than they have in blanket primaries.[153] In short, most primaries are equally susceptible

[148] *See id.* at 598 (contending that holding potentially invalidates primary elections in 32 states). *See generally* Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 TULSA L.J. 59 (2000) (arguing that *California Democratic Party* left many states' open primaries vulnerable to constitutional challenges); Issacharoff, *supra* note 103, at 282-85 (discussing *California Democratic Party* Court's failure to distinguish blanket primary from extensive regulatory framework surrounding all elections); Nathaniel Persily, *Toward a Functional Defense of Political Party Autonomy*, 76 N.Y.U. L. REV. 750, 784 (2001) (discussing Justice Stevens' warning that *California Democratic Party* Court's rationale leaves Court with no principled basis for distinguishing between different primary systems); *id.* at 787 (describing rule that allows state to require open primaries but not blanket ones as arbitrary).

[149] *See Cal. Democratic Party*, 530 U.S. at 598 (Stevens, J., dissenting); Issacharoff, *supra* note 103, at 282-85 (arguing that *California Democratic Party* rationale does not distinguish blanket primary from other election regulations). *See generally* Allison, *supra* note 148 (arguing that *California Democratic Party* endangered many states' open primaries).

[150] *See* discussion *supra* Part I.A (describing open and closed primaries); *see also Cal. Democratic Party*, 530 U.S. at 597 (Stevens, J., dissenting) (arguing that majority's rule would still allow registered Democrat to vote in Republican primary simply by asking for ballot). Wyoming's closed primary allows voters to change affiliation at the polling place on the day of the primary. WYO. STAT. ANN. § 22-3-104 (2006); *see* Election Reform Task Force, *supra* note 44, at d-21 (describing Wyoming's primary as closed system that allows voters to change affiliation on day of primary).

[151] *See* § 22-3-104; discussion *supra* Part I.A.

[152] *See* discussion *supra* Part I.A (describing blanket primary).

[153] *See Cal. Democratic Party*, 530 U.S. at 596 (Stevens, J., dissenting) (describing majority's rule as turning on "nothing more than the state-defined timing of the new associate's application for membership"); Allison, *supra* note 148, at 114-15 (arguing that *California Democratic Party* rationale invites reconsideration of whether states can force political parties to nominate candidates using primary elections); Issacharoff, *supra* note 103, at 284-85 (discussing *California Democratic Party* Court's inability to sustain distinction between various primary systems on basis of moment at which voter forms affiliation with party); Persily, *supra* note 148, at 784-87 (discussing

to the hostile voter problem. Thus, under this rationale, it is improper to invalidate blanket primaries and not invalidate others.[154]

Moreover, because most primaries are equally susceptible to the hostile voter problem, consistent application of the hostile voter rationale would invalidate almost all primaries.[155] Thus, the hostile voter rationale is flawed because it would undermine states' constitutional power to regulate elections.[156] Therefore, the Ninth Circuit erred by relying on the flawed hostile voter rationale to reach its holding in *Washington State Republican Party*.

Opponents might contest the notion that the potential for courts to invalidate many state primaries demonstrates a flaw in the hostile voter rationale.[157] These opponents would argue that successful challenges to existing primary systems would be consistent with Supreme Court precedent reflecting a strong concern for party autonomy in the primary election context.[158] In other words, such

impact of *California Democratic Party* on open and closed primaries); s*ee also* Democratic Party of U.S. v. Wis. *ex rel.* La Follette, 450 U.S. 107, 133 (1981) (arguing that difference between open and closed primaries loses meaning as party affiliation becomes easier to change).

[154] *See Cal. Democratic Party*, 530 U.S. at 597 (Stevens, J., dissenting) (arguing that majority's rule implies improper distinction between blanket primaries and other primary elections); Issacharoff, *supra* note 103, at 282-85 (discussing problems with *California Democratic Party* Court's broad right not to associate); Persily, *supra* note 148, at 784-87 (discussing constitutional implications of *California Democratic Party* for open and closed primaries).

[155] *See Cal. Democratic Party*, 530 U.S. at 596 (Stevens, J., dissenting) (describing majority's distinction as meaningless); Issacharoff, *supra* note 103, at 282-85; Persily, *supra* note 148, at 784-87. *See generally* Allison, *supra* note 148, at 114-15 (arguing that *California Democratic Party* rationale is flawed because it left many states' open primaries vulnerable to constitutional challenges); Primaries, *supra* note 36 (describing primaries in United States).

[156] *See Cal. Democratic Party*, 530 U.S. at 598 n.8 (Stevens, J., dissenting); Issacharoff, *supra* note 103, at 282-85.

[157] *Cf.* Cain, *supra* note 77, at 795 (arguing that courts should prevent states from imposing nominating system on political parties); Persily, *supra* note 148, at 794-96 (advocating judicial protection of party autonomy and associational rights).

[158] *See, e.g.*, *Cal. Democratic Party*, 530 U.S. at 586 (invalidating California's blanket primary); Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 216 (1989) (striking down state law that prohibited party organization from endorsing candidate in primary election); Tashjian v. Republican Party of Conn., 479 U.S. 208, 210-11 (1986) (holding that state must allow independent voters to vote in party's primary if party so wishes); *La Follette*, 450 U.S. at 126 (holding that Democratic Party could exclude Wisconsin delegates because of open primary law); Cousins v. Widgoda, 419 U.S. 477, 491 (1975) (holding that state's interest in protecting integrity of electoral process was not compelling in context of national party's delegate selection); O'Brien v. Brown, 409 U.S. 1, 2-4 (1972) (per curiam) (staying court of

successful challenges would shift control over primary elections from the states to political parties.[159] Thus, opponents would conclude that the Ninth Circuit correctly relied on the hostile voter rationale in its holding.[160]

Ultimately, however, the case law does not support such opponents' assertion that the Supreme Court's precedent is deferential to party autonomy in the primary election context.[161] The case law preceding *California Democratic Party* does not recognize a political party's right not to associate.[162] Thus, Supreme Court precedent addressing the associational rights of political parties in the primary election context is not consistently deferential to party autonomy.[163] Instead,

appeals' judgment that would have prevented National Democratic Party from unseating delegates to 1972 Democratic National Convention); *see also* Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1741-42 (1993) (discussing interpretations of primary election case law as establishing associational rights for political parties); Persily, *supra* note 148, at 771 (suggesting that right of association recognized by *La Follette* Court included right not to associate).

[159] *See* Persily, *supra* note 148, at 805 (framing case for party autonomy as question of whether legislative majority may make electoral rules over objections of political parties).

[160] *Cf. Eu*, 489 U.S. at 216 (striking down state law that regulated parties' internal affairs). *See generally* Cain, *supra* note 77 (advocating for judicial deference to party autonomy); Persily, *supra* note 148, at 793-815 (articulating functional defense of party autonomy).

[161] *See* Clingman v. Beaver, 544 U.S. 581, 598 (2005) (holding that Constitution did not require Oklahoma to permit Libertarian party to open its primary election to members of other parties); *La Follette*, 450 U.S. at 126 (holding that Wisconsin could conduct open primary but could not force delegates to vote in accordance with primary results if it would violate Democratic Party rules); Nader v. Schaffer, 417 F. Supp. 837, 849-50 (1976), *aff'd*, 429 U.S. 989 (1976) (holding that state could require voter to be registered party member to vote in that party's primary); Issacharoff, *supra* note 103, at 278-79 (asserting that political parties have weak claims of formal institutional autonomy); Lowenstein, *supra* note 158, at 1741-42 (arguing that *Tashjian* and *Eu* represent unwelcome step beyond Supreme Court's earlier recognition of political parties' associational rights).

[162] *See* Issacharoff, *supra* note 103, at 278-79 (asserting that political parties have weak rights claims). *See generally* Lowenstein, *supra* note 158, at 1741-42 (arguing that case law does not support political parties' associational rights claims).

[163] *See, e.g.*, *Clingman*, 544 U.S. at 598 (finding that state primary law trumped party rule opening primary to members of other parties); *Eu*, 489 U.S. at 214 (citing interference with internal party affairs, as opposed to party autonomy, as grounds to strike down state law); *La Follette*, 450 U.S. at 126 (holding that Wisconsin could conduct open primary even though it would violate Democratic Party rules); *Nader*, 417 F. Supp. at 849-50 (holding that state could require voter to be registered party member to vote in that party's primary); Issacharoff, *supra* note 103, at 278-79 (arguing that case law indicates political parties have weak rights claims). *See*

California Democratic Party is the outlier because it is the only case to grant parties power over primary elections.[164] The argument that Supreme Court precedent supports invalidating most existing primary elections therefore ultimately fails.[165]

B. I-872 Was Constitutionally Permissible Under California Democratic Party

In *Washington State Republican Party*, the Ninth Circuit overlooked the fact that the "top two" result of the I-872 primary was nonpartisan.[166] In *California Democratic Party*, the Supreme Court made it clear that a nonpartisan blanket primary meant an election that would produce a result that was independent of the nominating process of any party.[167] I-872's "top two" result provided such a result because, under I-872, the "top two" candidates may have the same party preference.[168] An election whose outcome is the selection of two candidates from the same party cannot be said to be part of a party's "nominating process." Instead, the I-872 primary served to narrow the field of candidates for the general election.[169] I-872 removed the nominating process from Washington's primary election and thereby complied with the requirements for a nonpartisan blanket primary.[170]

generally Lowenstein, *supra* note 158, at 1741-42 (arguing that Supreme Court has not recognized robust associational rights for political parties).

[164] *See* Allison, *supra* note 148, at 61 (asserting that *California Democratic Party* altered balance of associational rights of political parties and states' constitutional power to regulate elections); Issacharoff, *supra* note 103, at 278-79; Lowenstein, *supra* note 158, at 1741-42.

[165] *See supra* notes 161-64 and accompanying text (arguing that Supreme Court precedent is not deferential to concerns for party autonomy).

[166] *See* Wash. State Republican Party v. Washington, 460 F.3d. 1108, 1117-23 (9th Cir. 2006) (describing party preference identification as severe burden on parties' associational rights).

[167] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 585-86 (2000).

[168] *See* discussion *supra* Part II.B (discussing Ninth Circuit's hypothetical in which three candidates, only one of whom is party's nominee, self-identify as Republican on blanket primary ballot).

[169] *See* discussion *supra* Part I.D.

[170] *See* discussion *supra* Part I.D (discussing separation of primary from nominating process under I-872). As evidence that I-872 extricated party nomination from primary elections, in the wake of I-872's passage, Washington's political parties held nominating conventions to select candidates. *Cf.* Gilmore, *supra* note 109 (reporting that selections at nominating conventions will not be needed in light of district court ruling enjoining implementation of I-872).

Therefore, I-872 was constitutionally permissible under the rationale of *California Democratic Party*.[171]

Opponents might argue that I-872 constitutes a severe burden on a party's freedom of association because it impedes a party's right to endorse candidates.[172] Control of the party label is vital to a party's constitutionally protected rights to nominate and endorse candidates for elective offices.[173] I-872's party preference identification provision takes control of the party label away from a political party.[174] The initiative therefore impedes a party's ability to endorse candidates because it prevents the party from communicating the identity of its nominee to voters.[175] That is, under I-872, any candidate can identify with any party.[176] Voters may get confused about which candidates are the parties' nominees and which candidates have merely labeled themselves as representing that party.[177]

Although party labels are important, opponents' argument fails for two reasons.[178] First, because parties control the political process, if parties do not like a state's primary system, they can alter the system through the legislative process.[179] If parties did not like I-872's party preference identification provision, they could have changed the primary by lobbying for a new law.[180] It is improper to conclude that

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[171] *See Cal. Democratic Party*, 530 U.S. at 585-86; People's Choice Initiative, *supra* note 98, §§ 5-6 (providing that top two candidates from primary advance to general election under I-872).

[172] *See* Cain, *supra* note 77, at 795, 804-05 (discussing importance of party labels to fundamental party functions).

[173] Clingman v. Beaver, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring) (discussing constitutional protection of associational rights of candidates and parties); *see Wash. State Republican Party*, 460 F.3d at 1119-20 (discussing party label); Cain, *supra* note 77, at 795, 804-05.

[174] *Cf.* Wash. State Republican Party v. Washington, 460 F.3d 1108, 1119-20 (9th Cir. 2006) (discussing importance of party label).

[175] *See Wash. State Republican Party*, 460 F.3d at 1119-22.

[176] *See* discussion *supra* Part I.D (describing I-872).

[177] *See* discussion *supra* Part II.B (discussing Ninth Circuit's hypothetical in which three candidates, only one of whom is party's nominee, self-identify as Republican on primary ballot).

[178] *Infra* notes 179, 182 and accompanying text.

[179] *See* Richard L. Hasen, *Do the Parties or The People Own the Electoral Process?*, 149 U. PA. L. REV. 815, 835-36 (2001) (arguing that depriving parties of party label does not burden their ability to influence political process); Lowenstein, *supra* note 158, at 1790 (arguing that political parties are not powerless against state election regulations because they have power to change laws governing elections).

[180] *See* Hasen, *supra* note 179, at 835-36.

the primary is a severe burden if the parties have the power to change the primary.[181]

Second, placing the party label on a primary election ballot is not essential to political parties' associational rights. This is because political parties strengthen the association between the party label and candidates and issues through their extensive use of the media.[182] Parties purchase television and radio airtime to advertise in support of their nominees.[183] Because parties have extensive access to mass media advertising, they can identify their official nominees even if other candidates self-identify with the party on the ballot.[184] Also, because party nominees generally have larger advertising budgets than non-party candidates, they can communicate their party affiliation more easily than non-party candidates.[185]

In sum, political parties dominate the political process. They have many avenues through which to influence the process indirectly, thereby mitigating any potential negative effects of blanket primaries such as I-872.[186] Lack of control over the party label on election day, therefore, does not constitute a severe burden on a political party's First Amendment rights.[187] Thus, the Ninth Circuit erred in holding

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[181] *Id.*; Lowenstein, *supra* note 158, at 1790.

[182] *See, e.g.*, Phil Rosenthal, *Election Dollars Pouring into TV Local Ad Spending in $40 Million Range*, CHI. TRIB., Nov. 7, 2006, at C16 (reporting spending by political parties and other groups on television advertising in Illinois); *News Channel 9 at 5pm* (ABC television broadcast Nov. 3, 2006) [hereinafter ABC News] (reporting spending on negative television campaign ads used to point out differences between candidates); *see also* CRAIG B. HOLMAN & LUKE P. MCLOUGHLIN, BUYING TIME 2000, at 60-69 (2001) (analyzing political parties' campaign spending); Cain, *supra* note 77, at 802 (arguing that parties are distinct from interest groups because they receive state money to perform democratic functions). *See generally* Caleb P. Burns & Rebecca H. Gordon, *Contributions to Parties, 527S and 501(c)s*, 1624 PLI/CORP. 379 (2007) (describing ways in which parties spend campaign contributions, including making direct campaign contributions to candidates, placing advertising supporting candidates, and funding get out the vote operations).

[183] *See* Rosenthal, *supra* note 182; ABC News, *supra* note 182.

[184] *See* BECK & SORAUF, *supra* note 6, at 361-90 (discussing campaign financing); HOLMAN & MCLOUGHLIN, *supra* note 182, at 60-69 (discussing spending by political parties). *See generally* KEY, *supra* note 5, at 486-515 (discussing party finance).

[185] *See* HOLMAN & MCLOUGHLIN, *supra* note 182, at 60-69 (discussing political party spending on political advertising).

[186] *See* HOLMAN & MCLOUGHLIN, *supra* note 182, at 60-69; Hasen, *supra* note 179, at 835-36 (discussing parties' ability to act legislatively).

[187] *See* Hasen, *supra* note 179, at 835-36; Lowenstein, *supra* note 158, at 1790 (arguing that parties do not have constitutional claims unless facially neutral regulation disproportionately favors one party at expense of another).

that the party preference identification provision made I-872 unconstitutionally partisan under *California Democratic Party*.[188]

C. The Ninth Circuit Should Have Respected Washington Voters' Policy Choice

One principle of federalism is that states function as laboratories of democracy.[189] This principle dictates that courts should permit states to experiment with reforms designed to improve the democratic process.[190] The Grange implemented I-872 to improve the democratic process by making elections more competitive.[191] The Ninth Circuit should have respected the policy choice made by Washington voters in enacting I-872.[192] Because the court did not respect this policy choice, the court incorrectly decided *Washington State Republican Party*.

Competitive elections are vital to representative democracy in the United States.[193] For a representative government to be democratic, elected politicians must be accountable to voters.[194] Citizens in a representative democracy use elections to hold politicians accountable.[195] However, if elections are not competitive, politicians

[188] *See supra* notes 166-71 and accompanying text.

[189] *See* Cal. Democratic Party v. Jones, 530 U.S. 567, 591 (2000) (Stevens, J., dissenting) (arguing that majority's holding violated principles of federalism). *See generally* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838-39 (1995) (Kennedy, J., concurring) (discussing origins of federalism).

[190] *See Cal. Democratic Party*, 530 U.S. at 601 (Stevens, J., dissenting) (advocating judicial restraint in light of principles of federalism); Williams. v. Rhodes, 393 U.S. 23, 60-61 (1968) (Stewart, J., dissenting) (criticizing majority's insensitivity to constitutional principles of federalism).

[191] *See* Initiative 872, *supra* note 13 (citing competition as one reason why qualifying primary is better than nominating primary).

[192] *Cf. Cal. Democratic Party*, 530 U.S. at 601 (Stevens, J., dissenting) (arguing that Supreme Court should have respected policy choice of California's voters).

[193] *See* League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2640 n.10 (2006) (Stevens, J., concurring in part, dissenting in part) (discussing importance of competition to democratic governance); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 574 (2004) (arguing that uncompetitive elections endanger democratic governance in United States). *See generally* PATRICK BASHAM & DENNIS POLHILL, CATO INST., UNCOMPETITIVE ELECTIONS AND THE AMERICAN POLITICAL SYSTEM (2005), *available at* http://www.cato.org/pubs/pas/pa547.pdf (discussing importance of competitive elections in representative democracy).

[194] *See* ROBERT A. DAHL, ON DEMOCRACY 83-85, 93-96 (1998).

[195] *See* ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 125 (1956) (commenting on importance of elections in ensuring that elected officials will be responsive to electorate); DAHL, *supra* note 194, at 83-85, 93-96; Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L.

will lack incentive to respond to voters' concerns.[196] Consequently, noncompetitive elections will not work to hold politicians accountable to the electorate, and representative government will be less democratic.[197] A more competitive electoral system therefore produces a more democratic government.[198]

I-872 creates elections that are more competitive because candidates from the same party must compete for votes from voters of all parties in the primary election.[199] Candidates who advance to the general election will have demonstrated support from among the entire electorate in the primary election.[200] In this way, I-872 guarantees a competitive general election.[201] Federalism dictates that courts should allow states to make reforms that improve the democratic process.[202] The Ninth Circuit's decision was improper because it prevented Washington from implementing pro-competition electoral reforms.[203]

REV. 1280, 1292 (2005) (discussing problem of agency costs in theory of constitutional, democratic governance); Oliver Hall, *Death by a Thousand Signatures: The Rise of Restrictive Ballot Access Laws and the Decline of Electoral Competition in the United States*, 29 SEATTLE U. L. REV. 407, 409-11 (2005) (discussing role of elections in democracy); Samuel Issacharoff & Daniel Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1648 (1999) (describing elections as vital mechanism for voters to regulate elected officials' behavior).

[196] *See generally* DAHL, *supra* note 194, at 83-85, 93-96 (discussing requirements for large scale democracy); BeVier, *supra* note 195, at 1292 (discussing agency costs); Hall, *supra* note 195, at 409-11 (discussing function of elections); Issacharoff & Ortiz, *supra* note 195, at 1648 (asserting that voters regulate behavior of elected officials through elections); Gary C. Jacobsen, *Campaign Finance and Democratic Control: Comments on Gottlieb and Lowenstein's Papers*, 18 HOFSTRA L. REV. 369, 370 (1989) (discussing principal-agent problems in context of competitive elections).

[197] *See generally* DAHL, *supra* note 194, at 83-85, 93-96 (discussing elected representatives and "free, fair, and frequent elections" as requirements for large scale democracy); BeVier, *supra* note 195, at 1292 (discussing agency costs); Hall, *supra* note 195, at 409-11 (2005) (discussing function of elections); Jacobsen, *supra* note 196, at 370 (discussing relationship between voter and politician).

[198] Hall, *supra* note 195, at 411-13 (discussing decline of electoral competition in United States). *See generally* Jacobsen, *supra* note 196, at 370 (asserting that competitive elections reduce the incidence of shirking).

[199] *See infra* Part I.D.

[200] *See infra* Part I.D.

[201] *See infra* Part I.D.

[202] *See supra* note 190 and accompanying text (arguing that courts should exercise restraint when reviewing states' attempts to improve democratic process).

[203] *See supra* notes 189-201and accompanying text (arguing that Ninth Circuit should have respected Washington electorate's policy choice).

CONCLUSION

In *Washington State Republican Party*, the Ninth Circuit held that political parties have a robust constitutional right to exclude voters from their primaries.[204] The court, however, incorrectly decided the case.[205] First, the Ninth Circuit relied on a flawed hostile voter rationale from *California Democratic Party*.[206] Second, the Ninth Circuit mischaracterized I-872 as a partisan primary system.[207] Third, the court's errors constrained Washington's ability to implement pro-competition reforms to its primary election.[208] Competitive elections are the lifeblood of American democracy. Courts should empower the citizenry to implement pro-competition measures such as I-872.[209] Therefore, the Supreme Court should reverse the Ninth Circuit and create a principled rule to clarify which blanket primaries are and are not constitutionally permissible.[210]

[204] *See* discussion *supra* Part II.B (discussing holding in Washington State Republican Party).

[205] *See* discussion *supra* Part III (arguing that Ninth Circuit incorrectly decided *Washington State Republican Party*).

[206] *See* discussion *supra* Part III.A (arguing that Ninth Circuit improperly decided *Washington State Republican Party* based on flawed rationale from California Democratic Party).

[207] *See* discussion *supra* Part III.B (arguing that I-872 was constitutionally permissible under *California Democratic Party*).

[208] *See* discussion *supra* Part III.C (arguing that I-872 improves democracy).

[209] *See* discussion *supra* Part III.C (arguing that Ninth Circuit should have respected Washington electorate's policy choice).

[210] *See* discussion *supra* Part III (arguing that Ninth Circuit improperly invalidated Washington's blanket primary).