

Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races

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I. INTRODUCTION

In 2010, Alaska's Lisa Murkowski accomplished a remarkable feat that only Senator Strom Thurmond had previously achieved: winning a U.S. Senate

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race via write-in votes.¹ In the Republican primary, Joe Miller had beaten Murkowski by a mere 2000 votes, and the four candidates in the Democratic primary received a combined total of only a third of the number of total number of Republican votes.² The general election was nevertheless between Miller and Democratic candidate Scott McAdams.³ Running as an Independent, Murkowski enjoyed a lead of over 10,000 votes over Miller.⁴

The general election ballot would have prevented a great deal of conflict if Alaska had implemented a system where *all* the primary candidates appeared on a single ballot and the top two vote-getters would advance to the general election, regardless of party affiliation. Under the “top-two” system, Murkowski and Miller would have likely been listed on the general election ballot as the top two vote-getters, rather than Miller and McAdams. The general election ballot would have thus more accurately expressed the collective preferences of Alaskan voters⁵ and Murkowski would not have pursued a third-party candidacy through a write-in campaign (or endured the legal controversy stemming from it).⁶

The Tea Party movement gained momentous ground in 2010,⁷ and the Murkowski/Miller race is a particularly compelling illustration of the pressure points swelling underneath our traditional two-party system and elections process. Today, the Republican Party has essentially been divided into

¹ Huma Khan, *Lisa Murkowski Makes History, Wins Alaska Senate Race but Joe Miller Not Conceding*, ABC NEWS (Nov. 17, 2010), <http://abcnews.go.com/Politics/lisa-murkowski-wins-alaska-senate-race-joe-miller/story?id=12164212#>.

² *State of Alaska 2010 Primary Election, August 24, 2010, Official Results*, STATE OF ALASKA: DIVISION OF ELECTIONS, <http://www.elections.alaska.gov/results/10PRIM/data/results.htm> (last updated Sept. 13, 2010). The two candidates received 55,878 and 53,872 votes, respectively, while Scott McAdams received 18,035 votes in the Democratic primary. *Id.* The four candidates in the Democratic primary received only 36,080 votes altogether. *Id.* There are multiple explanations for how the primary loser was able to beat the Republican candidate to whom she lost just several months previously. See Khan, *supra* note 1.

³ *Election Results 2010: Alaska*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/alaska> (last visited Apr. 10, 2012).

⁴ *Id.* Lisa Murkowski (Independent) won with 39.3% of the vote, while Joe Miller (Republican) received 35.3%, and Scott McAdams (Democrat) received 23.3%. *Id.*

⁵ Edward B. Foley, *Top-10 List and Top-Two Candidates: Some Thoughts on This Election Season*, ELECTION L. @ MORITZ (Sept. 14, 2010), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7615> (explaining that a top-two primary would have resulted in a general ballot with a more precise reflection of voter sentiment).

⁶ Frank James, *Alaska Starts Counting Write-In Votes for Senate Seat*, NPR (Nov. 10, 2010, 9:45 AM), <http://www.npr.org/blogs/itsallpolitics/2010/11/10/131210632/alaska-starts-counting-murkowski-miller-write-in-votes>. Miller filed a federal lawsuit to prevent election officials from counting any ballots where Murkowski’s name was spelled incorrectly, presumably in an attempt to limit the number of votes she would receive. *Id.*

⁷ Lisa Lerer & Alison Fitzgerald, *Tea Party Wins House for Republicans, Wants Rewards in Congress*, BLOOMBERG NEWS (Nov. 4, 2010, 12:00 AM), <http://www.bloomberg.com/news/2010-11-04/tea-party-wins-house-for-republicans-wants-rewards-in-congress.html>.

“establishment” Republicans and so-called Tea Party members, with the latter group receiving increasing support in Congress.⁸ Bipartisanship also continues to be a struggle.⁹ This divisiveness sets up opportunities for close three-way races, where a candidate could win with a mere plurality of the votes.¹⁰

Such scenarios raise important questions about whether our current electoral system is capable of reducing a large field of candidates to one winner who accurately reflects the preferences of the median voter.¹¹ With these values in mind, Louisiana, Washington and California have all adopted the top-two primary, which essentially converts a traditional primary into a general election, and a traditional general election into a runoff election.¹² Multiple candidates from all political parties compete together in the primary and the top two candidates face off in the general election, regardless of party affiliation.¹³ Louisiana first implemented this system in 1975, Washington applied it in

⁸ *Id.* (indicating that in the 2010 elections, Republicans gained sixty seats in the House, twenty-eight of which were backed by the Tea Party).

⁹ See Richard Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 276–77 (2011).

¹⁰ Foley, *supra* note 5. Another example of Tea Party popularity that has led to a three-way race was the 2010 Florida U.S. Senate election. After realizing that he would likely lose to Tea Party-favored Marco Rubio in the Republican primary, Florida Governor Charlie Crist decided to run as an Independent. *Id.* Rubio easily won with 48.9% of the vote (2,645,743 votes cast), while Crist came in second with 29.7% of the vote (1,607,549 votes cast) and Democratic candidate Kendrick Meek came in third with 20.2% of the vote (1,092,936 votes cast). *Election Results 2010: Florida*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/florida> (last visited Apr. 10, 2012); see also *November 2, 2010 General Election Official Results: United States Senator*, FLA. DEP'T OF STATE, DIVISION OF ELECTIONS, <http://enight.dos.state.fl.us/Index.asp?ElectionDate=11/2/2010> (last visited Apr. 10, 2012). Had Florida also adopted a top-two system, Rubio and Crist would have likely advanced to general election. In such a situation, Crist probably would not have had to pursue a third-party candidacy, and the general election ballot would have arguably reflected the collective preferences of the Florida electorate more accurately. Foley, *supra* note 5.

¹¹ Foley, *supra* note 5. (“[I]t is also necessary that the winning candidates represent the electoral preferences of the voters who cast ballots. This essential condition cannot be assumed to occur if, for example, the winning candidate in a three-way race received less than forty percent of the votes. . . . The rise of the Tea Party movement and the ferment within Republican Party primaries show that it is not easy to design a sensible system for moving from many candidates to a single winner.”).

¹² See *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008); DEBRA BOWEN, CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA STATEWIDE DIRECT PRIMARY ELECTION, TUESDAY, JUNE 8, 2010, at 65–66 (2010) [hereinafter *Text of California's Top Two Primaries Act*], available at <http://voterguide.sos.ca.gov/past/2010/primary/pdf/english/complete-vig.pdf>; Christopher Tyson, *Back to the Future: Louisiana's Open Primary Bill*, LA. PROGRESS J., Fall 2010, at 9, 9, available at <http://www.louisianaprogress.org/WordPress/wp-content/uploads/2010/08/2010-10-LPJournal-Final.pdf>.

¹³ *Wash. State Grange*, 552 U.S. at 444. For example, a liberal Democrat could run against a moderate Democrat in a general election instead of a traditional face-off between a Democrat and a Republican.

2004,¹⁴ and California approved it in 2010.¹⁵ Because the primary does not require a general election race between a Democrat and Republican, the resulting candidates on a general election ballot can more accurately reflect preferences of the median voter, especially in situations where one party is clearly dominant over another (e.g., the Alaska Senate race). Partisan loyalists would still be able to vote for their preferred candidates; however, moderates and Independents would not have to choose to vote the ballot of one party or the other, and could even switch “party affiliation” while going down the ballot.¹⁶

Some legislators may recoil from developing novel, open primaries, since the results of such could be extensive and unpredictable.¹⁷ This is understandable—widespread litigation against the top-two primary is continuously budding in the states of California and Washington.¹⁸ Even with the risk that the Court could hold this type of primary unconstitutional in the

¹⁴ Joseph M. Birkenstock, *U.S. Supreme Court Case Preview—Did I-872 Take Washington State’s Voters on an Unconstitutional Detour?: Partisanship in Primaries in Washington v. Washington State Republican Party*, 6 ELECTION L.J. 394, 395 (2007).

¹⁵ Pildes, *supra* note 9, at 301.

¹⁶ Birkenstock, *supra* note 14, at 395.

¹⁷ *Cf.* Pildes, *supra* note 9, at 307 (arguing that open primaries could have “surprisingly powerful ramifications for the kinds of candidates who run, are elected, and then govern in office”).

¹⁸ Litigation surrounding California’s top-two primary came to fruition with *Field v. Bowen*, 131 Cal. Rptr. 3d 721 (Dist. Ct. App. 2011). See Gautam Dutta, *Court Documents & References*, BUS. & ELECTION L. BLOG, <http://businessandelectionlaw.com/sb6/court/> (last visited Apr. 10, 2012). Most recently, the plaintiffs filed a brief with the Ninth Circuit, challenging the constitutionality of California’s top-two primary. Guatam Dutta, *Briefing Begins in Top Two Primary Case*, BUS. & ELECTION L. BLOG (Feb. 4, 2012), <http://businessandelectionlaw.com/2012/02/04/briefing-begins-on-top-two-primary-case/>.

In another lawsuit, a Coffee Party candidate running in the primary for the seat of U.S. Representative Jane Harman (who has since retired) alleged that the top-two primary as it currently stood gave fellow candidate Secretary of State Debra Bowen an unfair advantage: since her label of Democrat is recognized by the state but his political party is not, he would be forced to carry a “no party preference” label in the primary. Jean Merl, ‘No Party,’ ‘Coffee Party’ Candidate Sues over State’s New Top Two Primary Rules, L.A. TIMES: POLITICAL (Feb. 23, 2011, 1:49 PM), <http://latimesblogs.latimes.com/california-politics/2011/02/no-party-coffee-party-candidate-sues-over-states-new-top-two-primary-rules.html>; see also *infra* note 93 and accompanying text (discussing the outcome of this litigation, where Secretary Bowen won summary judgment at the district court level).

Finally, the major political parties in Washington filed an appeal in the Ninth Circuit, after the district court found that the state’s top-two primary was constitutional, even amid new evidence alleged to have established voter confusion with the state’s ballot design. *Primary Ruling Is Appealed*, SEATTLE TIMES (Feb. 17, 2011, 10:17 PM), http://seattletimes.nwsourc.com/html/localnews/2014261509_primaryrulingisappealedhtml. The Ninth Circuit upheld the Washington top-two primary on January 19, 2012. *Wash. State Republican Party v. Wash. State Grange*, Nos. 11-35122, 11-35124, 11-35125, 2012 WL 149475, at *1 (9th Cir. Jan. 19, 2012).

future,¹⁹ there is discussion in other states of implementing the top-two primary.²⁰ As a result, it is important to create provisions that are complementary to the current Supreme Court jurisprudence. Richard Pildes, one of the country's leading election law experts, has said that "it would be a serious mistake for those who support open primaries to shy away from pursuing legislative efforts . . . to adopt [them] out of fears that the Court will hold such primaries unconstitutional."²¹ It is more important than ever in today's vitriolic political climate to find novel ways to improve our electoral system so that it elects candidates who accurately reflect the interests of the median voter and maximizes voter choice. As our laboratories of democracy, allowing states to experiment can help society determine the best electoral structures in the long run.

The law surrounding primaries and political parties is underdeveloped and anything but coherent or consistent.²² This Note does not seek to undertake the daunting task of creating a clear and uniform framework of analysis for primary election law; rather, it presents a three-part framework of the top-two primary for states to adopt, which will (1) fit within the jurisprudence currently established by the Supreme Court and (2) alleviate the legal uncertainties present in current top-two models. Part II of this Note provides background information on primaries in general and traces the development of the top-two primary.²³ Part III discusses the pros and cons of the top-two primary.²⁴ Part IV proposes and analyzes a three-part framework that incorporates a model statute of the top-two primary for states to adopt.²⁵ This statute addresses the current

¹⁹ Pildes, *supra* note 9, at 307 ("[O]ne cannot say there is no risk that the Supreme Court will come to hold open primaries unconstitutional.").

²⁰ See, e.g., Marc Lacey, *In Open Primary Plan for Arizona, A Call for Moderation*, N.Y. TIMES, Aug. 16, 2011, at A15; Frank Pignaneli & LaVarr Webb, *Will Utah Follow California with Top-2 Primary System?*, DESERET NEWS (Salt Lake City), June 20, 2010, at G1 (Utah); *Alaska Bill for a Top-Two Primary*, BALLOT ACCESS NEWS (Jan. 14, 2011), <http://www.ballot-access.org/2011/01/14/alaska-bill-for-a-top-two-primary/> (Alaska); *Arizona Top-Two Primary Initiative Expected to Qualify for Ballot This Year*, BALLOT ACCESS NEWS (Apr. 14, 2012), <http://www.ballot-access.org/2012/04/14/arizona-top-two-primary-initiative-expected-to-qualify-for-ballot-this-year/> (Arizona); DFO, *Idaho Needs Top-Two Primary*, SPOKESMAN-REV. (Spokane) (Feb. 21, 2011, 2:40 PM), <http://www.spokesman.com/blogs/hbo/2011/feb/21/idaho-needs-top-two-primary/> (Idaho); Jeremy Pelzer, *Bill Would Change How Wyoming Handles Primary Elections*, CASPER STAR-TRIB. (Feb. 7, 2012, 7:00 AM), http://trib.com/news/state-and-regional/govt-and-politics/bill-would-change-how-wyoming-handles-primary-elections/article_efeadd185-a8bd-540c-888b-a521ca64d217.html (Wyoming); Jim Weber, *Letter to the Editor, Time to Open Our Primary System*, LAS VEGAS SUN (Jan. 22, 2012, 2:00 AM), <http://www.lasvegas.sun.com/news/2012/jan/22/time-open-our-primary-system/> (Nevada).

²¹ Pildes, *supra* note 9, at 307.

²² See *infra* Part II.A.2.

²³ See *infra* Part II.

²⁴ See *infra* Part III.

²⁵ See *infra* Appendix: Top-Two Primaries Model Act.

legal uncertainties regarding top-two, minimizes the possibility of litigation, and maximizes the interests of both political parties and voters.²⁶

II. BACKGROUND

It is necessary to have background knowledge of the law regarding primaries and the evolution of the top-two primary in order to understand the current model. The following sections provide a brief explanation of the types of primaries that exist today, the current Supreme Court jurisprudence, and four states' experiences with the top-two primary or variations of it.

A. *An Overview of the Law Regarding Primaries*

Primaries exist on a spectrum from closed to open, with the blanket primary being the purest form of an open primary. The top-two primary is a novel variation of the blanket primary. While the Supreme Court's case law regarding primaries and political parties' rights to freedom of association are rather unclear, the Court's recognition of both a political party's autonomy as well as a state's interests in regulating the primary process are certain.

1. *Types of Primaries*

The three main types of primaries are open, closed, and blanket.²⁷ A closed primary is one where only registered members of a political party may vote that party's ballot.²⁸ The rationale behind the closed primary is to promote party unity and prevent nonmembers from "raiding" a party's election, which occurs when a voter votes for the perceived weakest candidate from the opposing party in an attempt to pit that candidate against his or her preferred candidate.²⁹ Some states require that registered Democrats and Republicans vote only in their own party's primaries but will allow unaffiliated voters to choose the party primary

²⁶ See *infra* Part IV.

²⁷ Pildes, *supra* note 9, at 298–99.

²⁸ Kristin Kanthak & Rebecca Morton, *The Effects of Electoral Rules on Congressional Primaries*, in CONGRESSIONAL PRIMARIES AND THE POLITICS OF REPRESENTATION 116, 118–19 (Peter F. Galderisi, Marni Ezra & Michael Lyons eds., 2001) [hereinafter CONGRESSIONAL PRIMARIES]; *Congressional Primaries: Open, Closed, Semi-Closed and "Top Two,"* FAIRVOTE: CENTER FOR VOTING & DEMOCRACY, <http://www.fairvote.org/congressional-primaries-open-closed-semi-closed-and-top-two#.TvNr0VbhqcqM> (last updated Dec. 22, 2011) [hereinafter FAIRVOTE].

²⁹ FAIRVOTE, *supra* note 28; see also Eric McGhee, *At Issue: Open Primaries*, PUB. POL'Y INST. OF CAL., 4 (Feb. 2010), http://www.pplic.org/content/pubs/atissue/AI_210EMAI.pdf.

in which they would like to participate.³⁰ This is known as a semi-closed primary.³¹

In an open primary, a voter need not be registered or affiliated with a political party in order to vote in its primary; in fact, members of opposing political parties may vote in it.³² The voter must nevertheless choose candidates for all offices from only one party.³³ The open primary is more conducive to voter participation by more openly welcoming voters who are independent or not decidedly partisan.³⁴ Conversely, it may encourage political raiding, which is what the closed primary is designed to prevent.³⁵

A blanket primary is the purest form of an open primary. All candidates from all political parties appear on a single ballot, and the most popular candidate from each party becomes the party's nominee.³⁶ The top-two primary is derived from this scheme.³⁷ Traditional blanket primaries and top-two primaries are the most open because they do not require voters to commit to one party's entire ballot.³⁸ Thus voters are free to participate in any party primary on an office-by-office basis³⁹ and may switch "party affiliation" within the ballot.⁴⁰ For example, a voter could concurrently vote for a Democratic candidate for governor and a Republican candidate for attorney general.⁴¹ The top-two primary departs from the blanket primary because the top two vote-getters go on to the general election, *regardless of political party*.⁴² The

³⁰ FAIRVOTE, *supra* note 28 (these states include Idaho, Illinois, Massachusetts, Nebraska, New Hampshire, North Carolina, Rhode Island, and West Virginia).

³¹ Pildes, *supra* note 9, at 299.

³² *Id.*; FAIRVOTE, *supra* note 28.

³³ Lauren Hancock, Note, *The Life of the Party: Analyzing Political Parties' First Amendment Associational Rights When the Primary Election Process Is Construed Along a Continuum*, 88 MINN. L. REV. 159, 162 (2003).

³⁴ Pildes, *supra* note 9, at 299.

³⁵ FAIRVOTE, *supra* note 28; McGhee, *supra* note 29, at 4.

³⁶ FAIRVOTE, *supra* note 28; McGhee, *supra* note 29, at 2.

³⁷ Pildes, *supra* note 9, at 299 n.94.

³⁸ *See id.* at 301 (describing the top-two primary); *see also* Elisabeth R. Gerber, *California's Experience with the Blanket Primary*, in CONGRESSIONAL PRIMARIES, *supra* note 28, at 143, 143; Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 283 (2001).

³⁹ Pildes, *supra* note 9, at 299 n.94.

⁴⁰ Nathaniel Persily, *The Blanket Primary in the Courts: The Precedent and Implications of California Democratic Party v. Jones*, in VOTING AT THE POLITICAL FAULT LINE: CALIFORNIA'S EXPERIMENT WITH THE BLANKET PRIMARY 303, 315 (Bruce E. Cain & Elisabeth R. Gerber eds., 2002) [hereinafter POLITICAL FAULT LINE].

⁴¹ Issacharoff, *supra* note 38, at 283; Pildes, *supra* note 9, at 299, n.94.

⁴² Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 446 (2008). This primary has "all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters [are] not choosing a party's nominee." *Id.* (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 585–86 (2000)).

primary's purpose is therefore not to choose the nominee for each party, but to winnow the list of candidates for the general election.⁴³

Proponents of more open primaries claim that they help produce more moderate candidates, more accurately reflect the median voter's preferences, and encourage more citizen participation.⁴⁴ Opponents claim that they take away from political parties' freedom of association, impose more difficulties for minor party candidates to win elections, and that they in fact limit choice.⁴⁵ All of these arguments will be further explored later in this Note.⁴⁶

2. *Supreme Court Jurisprudence Regarding Political Parties and Primaries*

Although the Supreme Court has a rather inconsistent and incoherent jurisprudence regarding the law of primaries (which partially stems from its legal uncertainty in defining political parties),⁴⁷ the Court has generally been deferential to political parties' First Amendment rights to freedom of association. That is, political parties are generally free to associate with candidates⁴⁸ and with voters⁴⁹ of their choice. The fact that there are several

⁴³ See, e.g., *Complete Text of Initiative Measure No. 872*, SEC'Y OF STATE OF WASH., <http://www.secstate.wa.gov/elections/guide/text/872.pdf> (last visited Apr. 10, 2012) [hereinafter *Text of I-872*].

⁴⁴ Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 OR. L. REV. 1061, 1086 (2008); Pildes, *supra* note 9, at 299; Phil Keisling & Norma Paulus, *Reviving Oregon Elections: Let's Make Primaries Truly Open, Inclusive and Fair*, OREGONIAN, Apr. 13, 2008, at E1; McGhee, *supra* note 29, at 4.

⁴⁵ McGhee, *supra* note 29, at 4.

⁴⁶ See *infra* Part III.

⁴⁷ Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95–96 (“[T]he legal community, in particular 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 . . . Courts are ill equipped to develop and evaluate regulatory strategies affecting political parties.”); Issacharoff, *supra* note 38, at 279 (noting there is “legal uncertainty about what the party actually is”); Hancock, *supra* note 33, at 166.

⁴⁸ See, e.g., *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121–22 (1981) (holding that political parties have a First Amendment right to associate with candidates of their choosing and refrain from associating with candidates they reject).

⁴⁹ Guy Danilowitz, Note, *The Party or the People: Whose Ballot Choice Does the Constitution Protect?*, 41 U.C. DAVIS L. REV. 713, 715 (2007). While the Constitution allows states to prescribe the manner of their elections, the First Amendment prevents states from implementing regulations that significantly impede upon parties' abilities to define their membership. See, e.g., *Clingman v. Beaver*, 544 U.S. 581, 591–94 (2005) (holding that Oklahoma's semi-closed primary did not violate the right to free association, and its minimal burdens on voters' associational rights were justified by state interests such as preserving parties as viable and identifiable entities); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (noting that a state cannot compel political parties to change their requirements for participation in primaries, except in special circumstances).

states with closed primaries indicates that a political party's right to exclude is recognized and accepted.⁵⁰

On the other hand, there is a competing recognition of stronger state regulatory interests that protect "the overall integrity of the historic electoral process."⁵¹ The state also has the "responsibility to observe the limits established by the First Amendment rights of the State's citizens," including freedom of political association.⁵² The Court has asserted that "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls" should be upheld⁵³ and has conceded that "[n]o bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms."⁵⁴

Much of the controversy surrounding top-two primaries relates to the issue of forced association: political parties are not free to exclude who participates in the primary or control candidates' self-designated labels.⁵⁵ The Supreme Court has struck down the partisan blanket primary, where the top candidates from each of the two major political parties become the official nominees of their respective parties.⁵⁶ However, it has validated a "nonpartisan" variation on the blanket primary, where the top two vote-getters can advance to the general

⁵⁰ See FAIRVOTE, *supra* note 28 (listing Arizona, Colorado, Connecticut, Delaware, Florida, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming, as well as the District of Columbia, among the locations with closed primaries). This right to exclude and prevent forced association expands to groups and organizations other than political parties. See also, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (holding that the Boy Scouts were allowed to exclude a homosexual from serving in a leadership position because allowing him to do so would lead to a forced association that the Boy Scouts endorsed homosexuality); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995) (holding that Boston's St. Patrick's Day Parade organizers could exclude a gay rights float because it created an impression that they endorsed the message of the gay rights organization).

⁵¹ Issacharoff, *supra* note 38, at 286 (internal quotation marks omitted); John R. Labbé, Comment, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721, 730 (2002) (describing that states have interests in regulating parties and elections).

⁵² *Eu v. S.F. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (quoting *Tashjian*, 479 U.S. at 217).

⁵³ *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

⁵⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124 (1981) ("Neither the right to associate nor the right to participate in political activities is absolute." (internal quotation marks omitted)); see also Issacharoff, *supra* note 38, at 286 ("The caselaw governing party freedom of association claims proves surprisingly fragile upon examination, certainly too fragile to sustain a first-order claim of a right to autonomy vis-à-vis state regulation.").

⁵⁵ See *infra* Part III.B.1.

⁵⁶ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 567 (2000).

election regardless of the political party to which they belong.⁵⁷ The premise that the two candidates are not official party nominees softens the associational aspect.

B. *The Evolution of the Top-Two Primary*

In order to understand the current model of the top-two primary, it is essential to trace its development throughout the years. The blanket primary has been implemented in some form or another in four states: Alaska, Louisiana, California, and Washington.⁵⁸ Alaska was the first state to adopt it in 1947.⁵⁹ California followed suit in 1996.⁶⁰ These two systems were different than the current top-two primary model because it required the top Republican and top Democrat to go on to the general election⁶¹ rather than the top two vote-getters *regardless* of political party. Louisiana implemented its version of the top-two primary in 1975;⁶² however, it did not possess the “blanket” nature present in California and Alaska.

Washington previously had partisan blanket primaries like California and Alaska for several decades. Taking its cue from the Supreme Court after *Jones*, Washington voters passed Initiative-872 (I-872), which would implement a top-two primary for statewide and congressional elections.⁶³ The primaries would be nonpartisan, since the top-two vote-getters would go on to the general election regardless of political party.⁶⁴ The Supreme Court examined this scheme in *Washington State Grange v. Washington Republican Party* and found the top-two primary to be valid.⁶⁵ Oregon tried to pass its own top-two primary measure in 2008, but failed.⁶⁶ In 2010, California voters, who were still unwilling to go back to closed primaries, passed Proposition 14 and implemented a top-two primary that falls within the legal confines set in *Jones* and *Washington State Grange*.⁶⁷

⁵⁷ *Id.* at 585–86. The Court said in *Washington State Grange*, “In *Jones* we noted that a nonpartisan blanket primary, where the top two votegetters proceed to the general election regardless of their party, was a less restrictive alternative to California’s system because such a primary does not nominate candidates.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452 (2008). In reality, this actually has a more “half-partisan” characteristic, since political parties are not *completely* excluded from the process. Birkenstock, *supra* note 14, at 394.

⁵⁸ *See infra* Part II.B.1–4.

⁵⁹ *Alaska’s Primary Election History*, STATE OF ALASKA, DIVISION OF ELECTIONS, <http://www.elections.alaska.gov/doc/forms/H42.pdf> (last updated Sept. 1, 2009).

⁶⁰ *Jones*, 530 U.S. at 570.

⁶¹ *Id.*

⁶² Labbé, *supra* note 51, at 743.

⁶³ *Text of I-872*, *supra* note 43.

⁶⁴ *Id.*

⁶⁵ 552 U.S. 442, 444 (2008).

⁶⁶ *See infra* Part II.B.5.

⁶⁷ *Text of California’s Top Two Primaries Act*, *supra* note 12, at 65–66.

1. Alaska

Alaska initiated a blanket primary in 1947 by referendum.⁶⁸ Although it went through decades of reverting to closed or semi-closed systems, and then back to blanket primaries, the state finally discarded its blanket primary in the aftermath of *Jones*.⁶⁹ Alaska now operates under a semi-closed system, where voters can choose from three types of ballots: *Republican Candidate and Ballot Measures* for registered Republicans, nonpartisan, and undeclared voters; “(A-D-L)” *Candidate and Ballot Measures* for all registered voters, including Democrats, Libertarians, and Independents; and a *Measures Only* ballot that includes ballot measures only and no candidates.⁷⁰

2. Louisiana

Louisiana has had a top-two primary for congressional, state, and local elections since 1975.⁷¹ Voters of any affiliation are allowed to vote for the slate of any party.⁷² If no candidate receives over 50% of the vote, the top two candidates go into a runoff election thirty days later.⁷³ In 2006, the state reverted back to closed primaries for federal elections, but maintained top-two primaries for state and local elections.⁷⁴ Registered Democrats and Independents were allowed to vote in Democratic primaries, and only registered Republicans could vote in Republican primaries for congressional races.⁷⁵ In 2010, Governor Bobby Jindal again reinstated the top-two primary for both federal and state races.⁷⁶ While there was speculation that Louisiana’s primary would also be invalidated after *Jones*, it remained intact because it carried more

⁶⁸ *Alaska’s Primary Election History*, *supra* note 59.

⁶⁹ ALASKA STAT. § 15.25.060 (2002); *id.* § 15.25.100; *see Alaska’s Primary Election History*, *supra* note 59.

⁷⁰ *Alaska’s Primary Election History*, *supra* note 59. The (A-D-L) ballot combines all the candidates from the Alaska Democratic Party, Alaska Libertarian Party, and Alaskan Independence Party. *Id.*; *see also* ALASKA STAT. § 15.25.060(b) (2010); H.B. 193, 22d Leg. Reg. Sess. (Alaska 2001) (enacted).

⁷¹ Labbé, *supra* note 51, at 743; Tyson, *supra* note 12.

⁷² LA. REV. STAT. ANN. § 18:401 (Supp. 2011) (“All qualified voters of this state may vote on candidates for public office in primary and general elections without regard to the voter’s party affiliation or lack of it, and all candidates for public office who qualify for a primary or general election may be voted on without regard to the candidate’s party affiliation or lack of it.”).

⁷³ *Id.* § 18:511 (regarding the election of candidates in a primary election: “a candidate who receives a majority of the votes cast for an office in a primary election is elected”).

⁷⁴ Tyson, *supra* note 12.

⁷⁵ *Id.*

⁷⁶ *Id.* As a state that is subject to Section 5 of the Voting Rights Act, Louisiana must receive approval from the Department of Justice before making any changes to its electoral system. *Id.* In February 2011, the Department of Justice approved of the change. Bill Barrow, *Justice OKs Open Primaries; Louisiana Returns to Format*, LA. TIMES-PICAYUNE, Feb. 9, 2011, at A2.

of the nonpartisan nature that the Court previously upheld and because voters and parties in the state alike widely accepted the structure and therefore never challenged it.⁷⁷

3. California

Prior to 1996, California operated on a closed primary system.⁷⁸ Evidence showed that the elected representatives in California's legislature were highly ideological and extreme compared to the state's voters and that California's congressional delegation was one of the most extreme in the country.⁷⁹ Voters subsequently adopted Proposition 198—a referendum that converted the electoral system into a partisan blanket primary—with substantial support,⁸⁰ based on the belief that closed primaries motivated candidates to appeal only to a homogenous and exceptionally partisan segment of the population.⁸¹ Proponents argued that it allowed for more choice, increased participation and competition, and decreased influence of parties and special interests in elections.⁸²

The California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party litigated against the blanket primary in 1998.⁸³ Each party had previously excluded nonmembers from voting in their respective primary elections and claimed that the new law violated their First Amendment rights to association.⁸⁴ The Supreme Court agreed that the blanket primary severely burdened the parties' freedom of association by allowing nonmembers to select their nominees.⁸⁵ Furthermore, it found that the primary was not narrowly tailored to further the state's interests, which included promoting fairness, affording voters greater choice, protecting privacy, and increasing participation.⁸⁶ It suggested that a nonpartisan primary would have accomplished each of those interests without burdening parties' associational rights.⁸⁷ In other words, the Court found that open primaries would be constitutional as long as they “are not choosing a

⁷⁷ Labbé, *supra* note 51, at 751–52.

⁷⁸ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

⁷⁹ Gerber, *supra* note 38, at 143–44.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 144–45.

⁸³ *Jones*, 530 U.S. at 571.

⁸⁴ *Id.* at 567.

⁸⁵ *Id.* at 585–86. A party's right to exclude is central to its freedom of association, and this is never “more important than in the process of selecting its nominee.” *Id.* at 575. “There is simply no substitute for a party's selecting its own candidates.” *Id.* at 581.

⁸⁶ *Id.* at 584–85.

⁸⁷ *Id.* at 585.

party's nominee."⁸⁸ This dictum would eventually serve as the basis for Washington's top-two primary.⁸⁹

California joined the ranks of Louisiana and Washington to become the third state to implement the top-two primary, with the passage of Proposition 14 in June 2010.⁹⁰ The new system first went into effect February 15, 2011, in a special election for a state senate seat.⁹¹ Proposition 14 is the latest development of a decades-long evolution of the blanket primary. Although it is modeled after I-872, which the Supreme Court found constitutional, lawsuits remain active in California.⁹² In August 2011, the federal district court, on its own motion, granted summary judgment to reject a challenge to the top-two primary.⁹³ The decision was appealed the next day and is pending at the time of the publication of this Note.⁹⁴ Additionally, in 2011, the California Court of Appeals upheld two provisions of the statute precluding candidates from stating on the ballot a party preference from a nonqualified political party and prohibiting write-in votes in the general election.⁹⁵

4. Washington

The *Jones* decision forced the State of Washington to discard its identical partisan blanket primary that had been in place since 1935.⁹⁶ After the Ninth Circuit invalidated Washington's primary as "materially indistinguishable from the California scheme,"⁹⁷ Washington State Grange introduced I-872⁹⁸ specifically to fit within the legal confines articulated in that case.⁹⁹ This

⁸⁸ *Id.* at 586.

⁸⁹ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 453 (2008); Pildes, *supra* note 9, at 301.

⁹⁰ See CAL. CONST. art. II, §§ 5(a)–(d), 6(a)–(b).

⁹¹ Paul Chavez, *Feb. 15 Set for Special Election to Fill Oropeza's Seat: Candidates Have Until Jan. 3 to File Papers for the 28th District State Senate Race*, REDONDO BEACH PATCH (Dec. 17, 2010), <http://redondobeach.patch.com/articles/feb-15-set-for-special-election-to-fill-oropezas-seat>.

⁹² See *supra* note 18.

⁹³ *Chamness v. Bowen*, No. CV 11-01479 ODW (FFMx), 2011 WL 3715255, at *1 (C.D. Cal. Aug. 23, 2011).

⁹⁴ Gautam Dutta, *Top Two Primary Fight Heads to Federal Appeals Court*, BUS. & ELECTION L. BLOG (Aug. 24, 2011), <http://businessandelectionlaw.com/2011/08/25/top-two-primary-fight-heads-to-federal-appeals-court/>.

⁹⁵ *Field v. Bowen*, 131 Cal. Rptr. 3d 721, 724–25 (Dist. Ct. App., 2011).

⁹⁶ *Blanket Primary Act*, 1935 Wash. Sess. Laws 60, 60–64; *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 445 (2008); Birkenstock, *supra* note 14, at 394.

⁹⁷ *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003).

⁹⁸ *Text of I-872*, *supra* note 43.

⁹⁹ *Id.*; Danilowitz, *supra* note 49, at 725. The Washington State Grange is a nonpartisan, nonprofit grassroots advocacy group that is a subordinate of the National Grange. *About Us*, WASH. ST. GRANGE, <http://www.wa-grange.org/aboutus.html> (last visited Apr. 10, 2012). Primarily directed at rural citizens, it seeks to promote civic engagement at the community level. *Id.*

initiative implemented a top-two primary in Washington.¹⁰⁰ A candidate for office appears on the ballot with a self-designated “party . . . preference.”¹⁰¹ Voters all receive the same ballot, and may vote for any candidate from any party.¹⁰² The scheme was different from California’s in that (1) a candidate self-identifies a party “preference,” and (2) it does not require a Democrat and Republican to face off in the general election.¹⁰³ The initiative passed in 2004 with over 60% of the vote.¹⁰⁴

The Washington State Republican Party, joined by the Washington State Democratic Central Committee and Libertarian Party of Washington, filed a facial challenge against I-872,¹⁰⁵ claiming that the new system violated its associational rights by depriving the organization of its ability to nominate its own candidates and by forcing it to associate with candidates it did not endorse.¹⁰⁶ The district court granted the parties’ motion for summary judgment and enjoined implementation of I-872.¹⁰⁷ The Ninth Circuit affirmed, finding that I-872 was facially invalid because the party-preference designation created the risk that the primary winners would be perceived as the parties’ nominees—therefore creating an “impression of associational ties”—even if the party did not want to be associated with the candidate.¹⁰⁸

Petitioners argued at the Supreme Court that I-872 was valid because it fit within the dictum in *Jones*, in which the Court said that a nonpartisan blanket primary without nominations would be less restrictive.¹⁰⁹ Respondents, on the other hand, argued that I-872 was unconstitutional because it allowed primary voters who were unaffiliated with a party to nevertheless choose a party’s nominee; a candidate proceeding to the general election *became* the nominee of the party he preferred, in the absence of the party’s ability to put forth its preferred candidate. Moreover, the new initiative would cause voter confusion.¹¹⁰

In a 7–2 vote, the Supreme Court rejected the notion that I-872 was similar to California’s blanket primary because it did not choose parties’ nominees; rather, the primary was a process of cutting down the list of candidates for the

¹⁰⁰ *Wash. State Grange*, 552 U.S. at 444.

¹⁰¹ *Text of I-872*, *supra* note 43.

¹⁰² *Id.*

¹⁰³ *Wash. State Grange*, 552 U.S. at 453; Birkenstock, *supra* note 14, at 395.

¹⁰⁴ *Wash. State Grange*, 552 U.S. at 447; Birkenstock, *supra* note 14, at 394.

¹⁰⁵ *Wash. State Grange*, 552 U.S. at 448.

¹⁰⁶ *Id.*

¹⁰⁷ *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005).

¹⁰⁸ *Wash. State Republican Party v. Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006).

¹⁰⁹ *Wash. State Grange*, 552 U.S. at 452; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 585–86 (2000) (“Respondents could protect [their compelling interests] by resorting to a *nonpartisan* blanket primary This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party’s nominee.”).

¹¹⁰ *Wash. State Grange*, 552 U.S. at 455.

general election.¹¹¹ The Court also rejected Respondents' arguments regarding voter confusion because they did not depend on facial requirements, but on possible factual scenarios inappropriate for a facial challenge.¹¹² Chief Justice Roberts concurred on the grounds that there was no right to stop an individual from associating with a party, even if a party does not want that association.¹¹³ However, he agreed with the possibility of this case being litigated again if evidence of voter confusion surfaced as a result of ballot design.¹¹⁴

In 2010, the Washington Democratic and Republican parties filed an amended complaint in their action against I-872.¹¹⁵ It claimed the existence of empirical evidence indicating voter confusion, which the Supreme Court had rejected as "sheer speculation" in *Washington State Grange*.¹¹⁶ On January 11, 2011, the district court denied plaintiffs' motion for summary judgment, and held that Washington's implementation of I-872 remained constitutional because the ballot design actually eliminated the possibility of voter confusion and was "uniformly consistent" with the Supreme Court's conception of a valid ballot.¹¹⁷ The following February, the political party plaintiffs filed an appeal with the Ninth Circuit.¹¹⁸ In August, the State filed its own brief with the Ninth Circuit.¹¹⁹ On January 19, 2012, the Ninth Circuit unanimously upheld the Washington top-two primary, giving strong indication that California's system would likely be upheld as well in its own appeal.¹²⁰

¹¹¹ *Id.* at 453; see also WASH. ADMIN. CODE § 434-262-012 (2005) ("[The] primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." (emphasis added)).

¹¹² *Wash. State Grange*, 552 U.S. at 455. Although voter confusion was possible, the Court said, "[This case involves] a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion." *Id.*; see also *infra* note 115 and accompanying text.

¹¹³ *Wash. State Grange*, 552 U.S. at 461 (Roberts, C.J., concurring).

¹¹⁴ *Id.* at 460-61 ("[B]ecause respondents brought this challenge before the State of Washington had printed ballots for use under the new primary regime, we have no idea what those ballots will look like. . . . [I]f the ballot merely lists the candidates' preferred parties next to the candidates' names, or otherwise fails clearly to convey that the parties and the candidates are not necessarily associated, the I-872 system would not survive a First Amendment challenge." (citation omitted)).

¹¹⁵ *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, 2011 WL 92032, at *3 (W.D. Wash. Jan. 11, 2011).

¹¹⁶ *Id.* at *7.

¹¹⁷ *Id.* at *5.

¹¹⁸ *Primary Ruling Is Appealed*, *supra* note 18.

¹¹⁹ *Washington State Files Brief in 9th Circuit in Top-Two Case*, BALLOT ACCESS NEWS (Aug. 12, 2011), <http://www.ballot-access.org/2011/08/12/washington-state-files-brief-in-9th-circuit-in-top-two-case/>.

¹²⁰ *Wash. State Republican Party v. Wash. State Grange*, No. 11-35122, 2012 WL 149475, at *1 (9th Cir. Jan. 19, 2012).

5. Oregon

Oregon residents voted on Measure 65 in 2008, which sought to implement the state's own top-two primary.¹²¹ This measure differed from Louisiana, California, and Washington because it allowed party endorsements to appear on the ballot.¹²² Supporters argued that the closed primary system currently in use unfairly excluded voters who were unaffiliated with political parties, and that voters should be able to vote for any candidate in a primary, regardless of the affiliation of the voter or candidate.¹²³ Opponents argued that voters should be free to register with the political parties of their choosing, and criticized the possibility of two candidates of the same party facing off in the general election as limiting choice.¹²⁴ Oregon voters overwhelmingly rejected the proposal. There have been no talks of revising it since then.

III. THE PROS AND CONS OF TOP-TWO PRIMARIES

The top-two primary could be beneficial to our current political environment because of its potential to elect more moderate candidates and increase voter turnout. However, problems surrounding the First Amendment issue of association and claims that the general ballot limitation to two candidates per office is undesirable remain. These two concerns should not be magnified, as this Note proposes a modified top-two primary structure that minimizes the chance of litigation over the association issue,¹²⁵ and alleviates concern over the limited-choice issue by showing that this structure places a stronger emphasis on choice than one might initially determine.¹²⁶

¹²¹ Clucas, *supra* note 44, at 1085. The measure only received 34% support. *November 4, 2008, General Election Abstracts of Votes: State Measure No. 65*, OR. SEC'Y OF STATE ELECTIONS DIVISION, <http://www.oregonvotes.org/doc/history/nov42008/results/m65.pdf> (last visited Apr. 10, 2012).

¹²² 1 BILL BRADLEY, VOTER'S PAMPHLET: MEASURES—OREGON GENERAL ELECTION: NOVEMBER 4, 2008, at 134 (2008) [hereinafter *Text of Measure 65*], available at <http://oregonvotes.org/doc/history/nov42008/guide/vol1.pdf> (Section 9(4) reads: "For a voter choice office in a general election, the county clerk shall print on the ballot following the name of the candidate . . . the name of each major or minor political party (if any) that has officially endorsed that candidate for voter choice office, with any such list preceded by the phrase, 'Endorsed by:'.")

¹²³ *See id.* at 137–43.

¹²⁴ *Id.* at 144–49.

¹²⁵ *See infra* Part IV.

¹²⁶ *See infra* Part III.B.2.

A. Pros

Proponents have argued that top-two primaries could bring more moderate candidates to office, increase voter participation, and give benefits to minor party candidates.¹²⁷

1. Moderating Effects

Many scholars assert that open primary systems (such as the top-two primary) tend to elect more moderate candidates,¹²⁸ and that more ideologically extreme voters tend to come out in closed primaries.¹²⁹ There is some credence to this theory. In more open primary structures, political parties and candidates have more motivation to appeal to a broader populace, rather than just each party's base. Through time, the gradual election of less polarizing leaders could result in more moderate legislatures and voters. A more moderate political environment is desirable now because politics is more hyperpolarized than it has been in decades.¹³⁰ This is partially caused by the election of polarizing and divisive political leaders.¹³¹

The moderating effects of primaries may correlate to the type of crossover voting that occurs. There are three types of crossover behavior: (1) sincere, (2)

¹²⁷ They can also increase choice on the ballot and require election winners to have the support of a majority of voters by requiring a majority legal threshold to win office. Clucas, *supra* note 44, at 1086; Pildes, *supra* note 9, at 27; McGhee *supra* note 29, at 4; *see also* Keisling & Paulus, *supra* note 44, at E1; Phil Keisling & Sam Reed, *Taking Back the Vote*, N.Y. TIMES, Oct. 20, 2004, at A27; Jeff Mapes, *Inside the Capitol: Cutting the Party from Partisanship*, OREGONIAN, Apr. 8, 2005, at C1.

¹²⁸ *See, e.g.*, Bruce E. Cain, *Party Autonomy and Two-Party Electoral Competition*, 149 U. PA. L. REV. 793, 799–800 (2001) (arguing that more open systems tend to elect more moderate winners); Clucas, *supra* note 44, at 1087, 1090 (claiming that blanket primaries that do not require party registration can open up the election to many more unaffiliated and independent voters, if there is effective promotion of elections); Pildes, *supra* note 9, at 298 (“The single institutional change most likely to lead to *some* moderation of candidates and officeholders, across all elections, would be to change the design of primary elections. The change would involve replacing closed primaries, in which only registered party members can vote, with various alternative forms of primary elections. As a matter of political economy, this is also a change that is foreseeable; indeed, it is already happening in some states”); McGhee, *supra* note 29, at 1 (explaining that since the top-two primary allows voters to cross over to support candidates from other parties, moderate candidates would have a greater opportunity to gain crossover support and would thus be more likely to run and be supported by those who are not just the most ideologically extreme of either party).

¹²⁹ Pildes, *supra* note 9, at 298. During his presidential campaign, Barack Obama (perceived as more of a centrist) performed better in states with open primaries, whereas Hillary Clinton (perceived as more liberal) performed better in states with closed primaries. *Id.* at 300.

¹³⁰ Pildes, *supra* note 9, at 276.

¹³¹ *Id.*

hedging, and (3) raiding.¹³² A sincere crossover voter selects a candidate from the opposing party that he or she genuinely believes is the best.¹³³ A hedging voter crosses party lines to vote for his or her preferred candidate, but not the overall first choice, usually out of speculation that that candidate could win the general election.¹³⁴ A raiding voter is one who crosses party lines to vote for the candidate in the other party who will be the weakest opponent of the voter's preferred candidate.¹³⁵ While all three are much easier under a blanket primary, moderating effects are likely to persist only when sincere or hedging crossover voting takes place.¹³⁶ The plaintiffs in *Jones* claimed that whenever there is crossover voting, raiders could be instrumental in determining a party's nominee.¹³⁷ To the contrary, sincere and hedging crossover voters dominated raiding voters; this in turn led to the prevalence of more moderate candidates in open primaries.¹³⁸

California's stint with the blanket primary offers the best evidence of its moderating effects,¹³⁹ since the state's legislature became less polarized as a result of its adoption. Moderates were more likely to be elected to the General Assembly, and voting in the assembly became more bipartisan;¹⁴⁰ the U.S. House delegation from California became more moderate as well. More general studies also indicate that U.S. Representatives elected from open, blanket, and nonpartisan primaries were more moderate than similar candidates elected in closed primaries.¹⁴¹

There is currently not enough empirical data to fully determine the top-two primary's moderating effects. However, given its open nature, one can expect for it to follow some of the patterns that have been researched in states that have experimented with blanket primaries and other open primaries. The key distinguishing feature of top-two primaries—that the top-two candidates go on

¹³² Gerber, *supra* note 38, at 147.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 (2000).

¹³⁸ Elisabeth R. Gerber, *Strategic Voting and Candidate Policy Positions*, in *POLITICAL FAULT LINE*, *supra* note 40, at 192, 196–97.

¹³⁹ Gerber, *supra* note 38, at 153; McGhee, *supra* note 29, at 8.

¹⁴⁰ Gerber, *supra* note 38, at 153; McGhee, *supra* note 29, at 8.

¹⁴¹ Gerber, *supra*, note 138, at 196–97. The author cites to seven other studies that also concluded that states with more open primaries tended to have the same moderating effects as a result of sincere and hedging voting. *Id.*; see, e.g., Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304, 318–21 (1998) (finding that U.S. House representatives elected from states with closed primaries held positions that were further from those of the median voters they represented than those from states with semi-closed primaries); see also Kanthak & Morton, *supra* note 28, at 123 (“[I]n states with more open primary systems . . . members of Congress choose more moderate positions relative to the median voters in their districts than do members elected from states with closed primary systems.”).

to the general election regardless of party—should not be dispositive in determining whether the primary structure’s moderating effects remain.¹⁴²

2. Increasing Voter Turnout

In *Jones*, respondents argued that the blanket primary would increase voter participation because it would open up the primary to 2.5 million previously excluded Independents and minor party voters.¹⁴³ Given more choices, voters who would otherwise feel left out would be more inclined to vote in open primaries.¹⁴⁴ Evidence from California shows that voter turnout was indeed higher in the years where the blanket primary was in place: in the 1998 midterm, turnout increased 2.9% from the 1990 and 1994 midterm election.¹⁴⁵ Moreover, there were 6.1% more voters in that year than in 2002 and 2006, when the blanket primary ceased existence.¹⁴⁶ During the presidential years, turnout was 4.6% higher in 2000 than in 1992 and 1996, and 2.2% higher than in 2004 and 2008.¹⁴⁷ Although there is little research on turnout in top-two primary states, there is reason to believe that given its extremely open features, this structure could lead to similar levels of increased voter participation as is found in blanket primaries.

B. Cons

Top-two primaries address desirable objectives that we want to achieve in our electoral process. Although these goals serve as an effective threshold, our examination of top-two primaries should not end here. In addition to maintaining the aspects that help achieve our electoral goals, it is also important to examine and modify the aspects of the top-two primary that are the most legally vulnerable.

Although *Washington State Grange* has validated the current primary model, the majority nevertheless stated that this was analyzed as an as-applied rather than facial challenge, and that the primary could be reexamined again in the future if sufficient evidence of voter confusion and forced association existed.¹⁴⁸ Chief Justice Roberts and Justice Scalia have indicated concern that

¹⁴² See *infra* notes 195–97 and accompanying text (explaining that one-party dominance is rare and that even if it does occur, it could nevertheless lead to moderation).

¹⁴³ Gerber, *supra* note 38, at 149.

¹⁴⁴ McGhee, *supra* note 29, at 10.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ An as-applied challenge was struck down by the district court in 2011, a decision that was unanimously upheld by the Ninth Circuit. *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, 2011 WL 92032, at *12 (W.D. Wash. Jan. 11, 2011), *aff'd*, No. 11-35122, 2012 WL 149475, at *1 (9th Cir. Jan. 19, 2012). The issue of voter confusion has also been the target of scholarly interest. See generally Mathew Manweller, *The Very*

the issue of forced association continues to exist.¹⁴⁹ There is also concern over the limited choice that would be offered in the general election, as only the top two candidates would appear on the ballot for each position. However, this aspect actually offers advantages to both minor party candidates and the major parties that are likely on the general election ballot.

1. *First Amendment Issue of Forced Political Association*

Supreme Court jurisprudence on freedom of association is one of the least-developed concepts of constitutional law.¹⁵⁰ It is neither stable nor coherent.¹⁵¹ Political parties remain important to the electoral process because of their ability to present particular policy platforms and promote candidates.¹⁵² Partisan ties are the most important element in explaining how an average person manages the complexities of politics and helping voters make reasonable political choices.¹⁵³ Moreover, parties remain essential in helping voters compartmentalize important issues and mobilizing voters, and will continue to be relevant for elections for the foreseeable future.¹⁵⁴ Dalton and Wattenberg claim, “[C]ohesive political parties address many of the collective action and responsibility problems that arise in the governing process.”¹⁵⁵ In his dissent in *Washington State Grange*, Justice Scalia focused on party labels as one of the most important considerations for a voter.¹⁵⁶ It is difficult to substitute a political party’s most important role in mobilizing voters and representing their views.¹⁵⁷ Voter turnout tends to be higher when candidates are identified with

Partisan Nonpartisan Top-Two Primary: Understanding What Voters Don’t Understand, 10 ELECTION L.J. 255 (2011) (measuring the extent of voter confusion in Washington caused by the use of the top-two primary through a series of controlled cognitive experiments).

¹⁴⁹ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 462–64 (2008) (Scalia, J., dissenting); *id.* at 459 (Roberts, C.J., concurring); *see infra* Part III.B.1.

¹⁵⁰ Frances R. Hill, *Constitutive Voting and Participatory Association: Contested Constitutional Claims in Primary Elections*, 64 U. MIAMI L. REV. 535, 536 (2010).

¹⁵¹ *Id.* at 588.

¹⁵² Russell J. Dalton & Martin P. Wattenberg, *Partisan Change and the Democratic Process*, in PARTIES WITHOUT PARTISANS: POLITICAL CHANGE IN ADVANCED INDUSTRIAL DEMOCRACIES 261, 273 (Russell J. Dalton & Martin P. Wattenberg eds., 2000) (“While there is strong evidence of dealignment within the electorate, parties as political organizations are adapting to these trends, and the evidence suggests that parties are alive and well within the governing process.”); Manweller, *supra* note 148, at 257.

¹⁵³ Dalton & Wattenberg, *supra* note 152, at 262.

¹⁵⁴ *Id.* at 273.

¹⁵⁵ *Id.* at 272.

¹⁵⁶ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 463–64 (2008) (Scalia, J., dissenting) (“Parties seek principally to promote the election of candidates who will implement [the party’s] views. That is achieved in large part by marking candidates with the party’s seal of approval. . . . [P]arty labels are indeed a central consideration for most voters.” (citations omitted)).

¹⁵⁷ Dalton & Wattenberg, *supra* note 152, at 263, 269.

other social groupings (known as “party-group linkages”).¹⁵⁸ If party differences are more blurry and parties seem less relevant, voters will be less connected to the parties, which could lead to a decline in the polls.¹⁵⁹

Even though the top-two primaries in Washington and Louisiana have been validated, the forced association issue continues to be a legal pressure point. Forced associations occur when the message of the candidate is contrary to the message of his or her designated political party.¹⁶⁰ This scenario creates a problem because, while the right is not absolute,¹⁶¹ political parties are generally able to choose their members, select candidates, and select with whom they will and will not associate.¹⁶² Forced associations with undesirable candidates potentially impede a political party’s important function of helping to inform voters,¹⁶³ during the stage of the election where First Amendment association protections are most critical for the party.¹⁶⁴ The top-two primary does not present the same caliber of forced association as a partisan blanket primary because the primary winners are not assumed to be official nominees of any parties. However, it could still potentially inflict harm on political parties because a candidate influences his or her image by using their name. Parties cannot repudiate a candidate’s First Amendment right to define himself,¹⁶⁵ but they can take steps to disassociate from undesirable candidates.¹⁶⁶

¹⁵⁸ Persily, *supra* note 40, at 317.

¹⁵⁹ *Id.*

¹⁶⁰ *Wash. State Grange*, 552 U.S. at 466 (Scalia, J., dissenting); Erik S. Jaffe, *It’s My Party—Or Is It?: First Amendment Problems Arising from the Mixed Role of Political Parties in Elections*, 2008 CATO SUP. CT. REV. 105, 117.

¹⁶¹ Rights are not absolute for political parties because states have certain regulatory interests in elections that allow them to encroach upon political parties’ rights to free association, to a certain extent. *Democratic Party v. Wisconsin ex rel. La Follette*, 45 U.S. 107, 124 (1981); Labbé, *supra* note 51, at 721.

¹⁶² Labbé, *supra* note 51, at 721; *see also* *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (“[A] political party has a right . . . to select a ‘standard bearer’ who best represents the party’s ideologies and preferences.” (citations omitted)); *La Follette*, 450 U.S. at 122 (“The freedom to associate . . . necessarily presupposes the freedom to identify the people who constitute the association . . .” (citation omitted)).

¹⁶³ *Wash. State Grange*, 552 U.S. at 466 (Scalia, J., dissenting); *see also* Pildes, *supra* note 9, at 302–03. (“[S]ince candidates choose whether to self-identify with a party, and if so, with which one—without ‘the party’ in any form being able to control who uses the party label—it is possible the party’s brand name will come to lose any coherent meaning. . . . If that dilution of the party label happens, voters might end up casting votes that are less well-informed because voters rely on the party label as the most significant cue or heuristic in understanding what a candidate stands for.”).

¹⁶⁴ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000); Hancock, *supra* note 33, at 159.

¹⁶⁵ However, this may be possible in the cases of particularly egregious candidates. For example, the national Democratic Party could stop a known racist and anti-Semite from trying to run for President as a Democrat. *See infra* note 171.

¹⁶⁶ *See infra* Part IV.A.

Partisan “one-sidedness” is a significant deterrent to top-two primaries. Proponents argue that this self-designated party preference by candidates is merely a “signpost” to help voters, and that political parties can still select and promote a standard bearer.¹⁶⁷ However, political parties have historically enjoyed associational interests in choosing the process of naming its nominee,¹⁶⁸ and the top-two primary as it currently stands merely waters down associational interests rather than resolving the issue altogether.¹⁶⁹ There is no way for parties to prevent candidates openly hostile to a party’s platform from claiming affiliation, yet candidates can affiliate with whichever party they choose, even against a party’s objections.¹⁷⁰ This can have potentially harmful effects on political parties.¹⁷¹

The issue of forced association endured much discussion in both Justice Scalia’s dissent in *Washington State Grange*, and the lower court’s decision. Justice Scalia rejected the need for an as-applied challenge, and argued that a

¹⁶⁷ Birkenstock, *supra* note 14, at 396.

¹⁶⁸ In *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), the Court struck down a statute that prevented parties from endorsing or opposing candidates in the primary, on the grounds that it is invalid to prevent parties from conveying candidate preferences to voters and restrict a party’s ability to spread its message. *Id.* at 229; *see also* Hancock, *supra* note 33, at 159; Labbé, *supra* note 51, at 729. *See generally, e.g.*, Clingman v. Beaver, 544 U.S. 581 (2005) (holding that an Oklahoma law under which only registered members and registered Independents may vote in a party’s primary is valid); *Jones*, 530 U.S. at 586 (invalidating California’s blanket primary on the grounds that it violated political parties’ freedom of association with regards to choosing its own nominees); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (affirming the validity of closed primaries but struck down the Connecticut law at issue because it did not allow the Republican Party to open its primary to registered Independents); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (holding that the State of Wisconsin cannot compel the National Party to seat a delegation in a way that violates Party rules).

¹⁶⁹ Birkenstock, *supra* note 14, at 398 (“I-872 attempts to meet the *Jones* test not by eliminating all links between parties and candidates, but by watering those links down in order to diminish—and arguably eliminate—the ‘standard bearer’ character of candidates in the general election.”).

¹⁷⁰ *Id.* at 396.

¹⁷¹ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 462 (2008); Birkenstock, *supra* note 14, at 396 (“[T]he argument here is not principally that I-872 would allow non-members to vote for a given party’s nominees . . . but that I-872 goes further by not allowing parties to prevent even candidates openly hostile to their ideology and politics from claiming affiliation.”); Jaffe, *supra* note 160, at 117 (claiming that allowing candidates to express preferences while preventing the party from using the ballot to reject any undesirable associations on the ballot impedes upon party associational rights). For example, in *LaRouche v. Fowler*, 152 F.3d 974 (D.C. Cir. 1998), Lyndon LaRouche, a known racist and anti-Semite, tried to run in the Democratic Primary for President of the United States. *Id.* at 977. The Democratic National Committee blocked his attempt on the basis that LaRouche was not a bona fide Democrat and was openly hostile to the mission of the Democratic Party. *Id.* at 979. LaRouche contended that the party violated his rights under the Constitution and Voting Rights Act. *Id.* at 980. The court dismissed LaRouche’s claims on the basis of forced association. *Id.* at 975.

statement of party preference was enough to facially invalidate I-872.¹⁷² In Justice Scalia's view, the associational rights of political parties were indeed severely burdened, and Washington's only plausible interest appeared to be reducing the effectiveness of political parties.¹⁷³ The method was not narrowly tailored to support a compelling state interest.¹⁷⁴ Even Chief Justice Roberts, who concurred in *Washington State Grange*, conceded that allowing a candidate to self-identify a party preference could force a party to associate with unwanted candidates.¹⁷⁵

Scalia's dissent was in line with respondents' argument that voters would assume that the candidates on the general election ballot were nominees of the self-designated party.¹⁷⁶ Even if they did not assume this, voters would at least assume that parties associated with, and approved of, the candidates.¹⁷⁷ Thus, parties were nevertheless compelled to associate with candidates they did not endorse. The Ninth Circuit, which struck down I-872, made arguments similar to Scalia's dissent.¹⁷⁸ It claimed that no meaningful distinction between party preference and designation existed.¹⁷⁹

The main function of political parties is to select and support candidates for public office.¹⁸⁰ As such, it is important to effectively encourage their function as a general model for political viewpoints and as a mobilizer. Increasing party visibility on the ballot, and giving parties a more significant role in the elections process,¹⁸¹ minimizes a political party's potential to endure forced association

¹⁷² *Wash. State Grange*, 552 U.S. at 462 (Scalia, J., dissenting) ("The views of the self-identified party supporter color perception of the party's message, and that self-identification on the ballot, with no space for party repudiation or party identification of its own candidate, impairs the party's advocacy of its standard bearer."); Jaffe, *supra* note 160, at 118. *Contra Wash. State Grange*, 552 U.S. at 450 (majority opinion) ("The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions."). Note that Justice Scalia's assertion is contrary to the current trend of the Supreme Court to increasingly reject facial challenges; based on the lack of evidence of a burden on a constitutional right, the Court employs a much higher standard of scrutiny. See Manweller, *supra* note 148, at 259 (internal citations omitted).

¹⁷³ *Wash. State Grange*, 552 U.S. at 462 (Scalia, J., dissenting).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 459 (Roberts, C.J., concurring).

¹⁷⁶ *Id.* at 453 (majority opinion).

¹⁷⁷ *Id.* at 455.

¹⁷⁸ *Wash. State Republican Party v. Washington*, 460 F.3d 1108, 1119 (9th Cir. 2006).

¹⁷⁹ *Id.* "Party designation is a powerful, partisan message that voters may rely upon in casting a vote—in the primary and in the general election." *Id.* at 1118. "Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing." *Id.* at 1118–19.

¹⁸⁰ Labbé, *supra* note 51, at 721.

¹⁸¹ See *infra* Part IV.

with candidates with whom they do not agree or support.¹⁸² A material difference between this model statute and other statutes is that this one actually increases official party visibility on the ballot.

2. Limited Choice on the General Election Ballot

A concern with top-two primaries is that they will limit choice in three ways: minor party candidates are more likely to be excluded in the general election,¹⁸³ there will always be only two candidates on the general election ballot for each office, and there is a possibility that two candidates from the same party could face off in the general election.¹⁸⁴ However, the premise for these concerns may be misguided, and actually result in helpful advantages unique to the top-two primary.

First, minor parties could receive much more exposure because the range of choices is much more extensive. Since candidates from all parties appear on the same ballot, voters are not pigeonholed into one party primary or another and are exposed to a larger slate of candidates, including those of minor parties. Inherent in this feature is the opportunity for minor party candidates to reach out to a wider expanse of voters that would not be available in normal open primaries or closed primaries.

Second, minor party candidates seldom win general elections, and serve more as a means of pushing certain policy agendas and affecting the outcome between the two major candidates.¹⁸⁵ The ability for minor parties to promote

¹⁸² There have been suggestions of holding completely nonpartisan primaries, where political party labels have no place on the ballot, whatsoever. The top-two primary is not precisely as nonpartisan as it purports to be, but only “half-partisan,” because candidates can still list their self-designated party preferences on the ballot. Birkenstock, *supra* note 14, at 396. Justice Scalia has suggested that, in order to have a completely nonpartisan primary, party labels must have *no place* on the ballot whatsoever. *Wash. State Grange*, 552 U.S. at 464 (Scalia, J., dissenting). While this completely nonpartisan approach alleviates the problem of forced association on the ballot, it still may not be a desirable remedy. First, it even further diminishes the role of political parties in primary elections. Second, it may lead to even more voter confusion. Voters would have no “signpost” or indicators that signify a candidate’s political persuasions, and would have to fully educate themselves on candidates beforehand. Third, it is difficult and unrealistic to get rid of political parties’ influence on the ballot because they are so ingrained in our democracy. If voters had wanted a purely nonpartisan primary, they would have voted for one in Washington and California. Birkenstock, *supra* note 14, at 397.

¹⁸³ Jesse McKinley, *California Puts Vote Overhaul on the Ballot*, N.Y. TIMES, May 27, 2010, at B12 (“It’s the biggest threat to independent and third parties in the last 50 years,” said Christina Tobin, who is running for secretary of state as a Libertarian while also campaigning against Proposition 14. “It would make it far more difficult for minor parties to qualify.”).

¹⁸⁴ McGhee, *supra* note 29, at 4.

¹⁸⁵ *Id.*; see also Gerber, *supra* note 38, at 154–55.

their agendas is not debilitated in a top-two primary.¹⁸⁶ With visibility early in the primary season, minor party candidates can promote their issues and put major party candidates on the defensive.¹⁸⁷ This is in contrast to a closed system, where minor party candidates tend to be ignored until after the primaries.¹⁸⁸ The more open aspect of top-two primaries should motivate minor party candidates to run “early and often” to be heard, and to campaign more aggressively to the general electorate.¹⁸⁹ In the 1998 California blanket primaries, minor party candidates actually received up to thirty times greater support in the blanket primaries than they did in the previously closed primaries.¹⁹⁰

Third, the exclusion of a third candidate in a general election would guarantee that a candidate would always win with a majority of votes. Several states currently have “sore loser” laws, where the loser of a party’s primary is not allowed to compete in the general election as the nominee of another party or as an Independent.¹⁹¹ The presence and discussion of “sore loser” laws, which seek to prevent primary losers from getting on the ballot in the general election, demonstrates that this issue is a real concern.¹⁹² This indicates that winnowing the list of candidates, one of the goals of a top-two primary,¹⁹³ is indeed an important goal in the design of an effective primary process. In the

¹⁸⁶If a state adopts a top-two primary structure like the one in Louisiana, where the “primary” actually takes place on the traditional election day in November and the runoff takes place four weeks later in December, third party candidates would still have the ability to campaign to the fullest extent during the prime of election season. *See* LA. REV. STAT. ANN. § 18:402(B)(1) (Supp. 2011) (“Primary elections for members of congress and officers elected at the same time as members of congress shall be held on the first Tuesday after the first Monday in November of an election year.”); *id.* § 18:402(B)(2) (“General elections for members of congress and officers elected at the same time as members of congress shall be held on the first Saturday in December of an election year.”). There are several pros and cons stemming from a November primary. The issue of timing has also been the subject of Supreme Court scrutiny. *See generally* Foster v. Love, 522 U.S. 67 (1997) (striking down Louisiana’s October primary because it conflicted with federal law). Since the subject of timing requires its own rather extensive inquiry, it has been omitted from the scope of this Note.

¹⁸⁷Christian Collet, *Openness Begets Opportunity: Minor Parties and California’s Blanket Primary*, in POLITICAL FAULT LINE, *supra* note 40, at 214, 225.

¹⁸⁸*Id.*

¹⁸⁹*Id.*

¹⁹⁰Gerber, *supra* note 38, at 155.

¹⁹¹Sean Lengell, *Florida Eyes ‘Sore Loser’ Election Law*, WASH. TIMES, Oct. 24, 2010, at C1. Other states that have sore loser laws include California and Colorado. *Id.*

¹⁹²*Id.*

¹⁹³*Text of I-872, supra* note 43 (“‘Primary’ or ‘primary election’ means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate.”); Foley, *supra* note 5 (“The rise of the Tea Party movement and the ferment within Republican Party primaries show that it is not easy to design a sensible system for moving from many candidates to a single winner.”).

states that do not have such laws (which is the majority of states), there appears to be a trend for primary “losers” to reappear on the general election ballot.¹⁹⁴ The top-two primary eliminates the issue of primary losers attempting to reappear on the general election ballot, either through a write-in or running as an Independent. While this would come at the expense of minor parties being more likely to be absent on the general election ballot, the expense is not very high.

Finally, concern over two candidates of the same party facing off in the general election should not be magnified quite yet. Since 1991 in Louisiana, only 17% of the state’s house primaries, 17% of the state’s senate primaries, and 9% of the U.S. House primaries produced same-party runoffs.¹⁹⁵ Since Washington has had the top-two primary, only 6% of its state house, 7% of its state senate races, and none of the U.S. House races have resulted in same-party runoffs.¹⁹⁶ Same-party runoffs tend to take place in districts that are already dominated by one party.¹⁹⁷ Even in this situation, the top-two primary could result in a moderating effect. For example, the top two candidates in a district dominated by Democrats are likely to both be from that party. Any Republicans, moderates, or Independents in that district who do not prefer the more liberal candidate would likely vote for the more moderate Democrat, therefore affecting the outcome in a general election. Under a normal open or closed primary, the general election would likely be between a Democrat and a Republican, with the Democrat consistently winning, even if he or she may not be moderate. While it is true that minor parties have lesser chances to participate in the general election, there are nevertheless potential beneficial tradeoffs.

IV. PROPOSED SOLUTION

The following Part describes a three-stage process for conducting elections pursuant to a proposed statute¹⁹⁸ modeled after the language of the laws in Louisiana,¹⁹⁹ California,²⁰⁰ and Washington,²⁰¹ as well as Oregon’s failed Measure 65.²⁰² The proposal seeks to balance the interests of political parties

¹⁹⁴ Foley, *supra* note 5. After losing to Marco Rubio in the Florida U.S. Senate primary in 2010, Charlie Crist ran as an Independent. Other high-profile “switching and leaving” occurrences in recent years include Lisa Murkowski running as an Independent after losing to Joe Miller in the Alaskan Republican primary for U.S. Senate in 2010, and Joe Lieberman running as an Independent after losing to Ned Lamont in the 2006 Connecticut Democratic primary for U.S. Senate. *Id.*

¹⁹⁵ McGhee, *supra* note 29, at 4.

¹⁹⁶ *Id.*

¹⁹⁷ Pildes, *supra* note 9, at 302.

¹⁹⁸ For the entire statute, see *infra* Appendix: Top-Two Primaries Model Act.

¹⁹⁹ LA. REV. STAT. ANN. § 18:402(B)(1) (Supp. 2011); *id.* § 18:402(B)(2).

²⁰⁰ *Text of California’s Top Two Primaries Act*, *supra* note 12, at 65–66.

²⁰¹ *Text of I-872*, *supra* note 43.

²⁰² *Text of Measure 65*, *supra* note 122, at 133–35.

and individual candidates. Political parties still play an important role in our electoral system by helping voters compartmentalize candidates and issues, make informed decisions at the polls,²⁰³ organize citizens, and bring more competition to the political marketplace.²⁰⁴ This statute has been modified to enhance the role of political parties, which includes giving them a more visible presence on the ballot and an increased ability to associate with candidates of their choice. Concurrently, the open and “nonpartisan” nature of the top-two primary is maintained in this model;²⁰⁵ unlike closed or semi-closed primaries, voters would not have to disclose a party preference in order to vote for congressional or state offices.

It is also important to point out that there are three types of elections to which the top-two primary would not apply, including presidential elections, party leadership elections, and nonpartisan elections.²⁰⁶ Regarding presidential elections, national parties generally choose delegates to represent candidates at each party’s respective nominating conventions; the Supreme Court has respected a party’s autonomy in closing this process to registered partisans.²⁰⁷ There is also a special constitutional scheme that the Framers adopted in choosing a presidential nominee,²⁰⁸ given its national impact, and thus warrants a more uniform scheme. The election of party leadership is closed because it is exclusively within the interest of the political party and not the public at large.²⁰⁹ Similarly, candidates in nonpartisan races may not designate a party preference or be endorsed by a party, in order to maintain their nonpartisan status.

²⁰³ Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 464–65 (2008) (Scalia, J., dissenting); Dalton & Wattenberg, *supra* note 152, at 262. For more discussion about the importance of political parties to the electoral process, see *supra* Part III.B.1.

²⁰⁴ Issacharoff, *supra* note 38, at 299. He adds that it is important to help improve the viability of political parties to the top-two primary. *Id.* at 312.

²⁰⁵ See *infra* Appendix: Top-Two Primaries Model Act §§ 1, 3, 7. The language of this section is similar to that of section (c) in California’s Top Two Primaries Act and § 5 of Washington’s I-872. *Text of California’s Top Two Primaries Act, supra* note 12, at 65 (“At the time they register, all voters shall have the freedom to choose whether or not to disclose their party preference. No voter shall be denied the right to vote for the candidate of his or her choice in either a primary or a general election for statewide constitutional office, the State Legislature, or the Congress of the United States based upon his or her disclosure or nondisclosure of party preference.”); *Text of I-872, supra* note 43.

²⁰⁶ See *infra* Appendix: Top-Two Primaries Model Act § 7(a)–(c).

²⁰⁷ See, e.g., *supra* note 50.

²⁰⁸ See U.S. CONST. art. II, § 1, cl. 2–5.

²⁰⁹ On remand, the district court held that Washington’s method of electing political party leaders was unconstitutional because it allowed the votes of non-party members to vote for nonpublic officials. Wash. State Republican Party v. Wash. State Grange, No. C05-0927-JCC, 2011 WL 92032, at *1, *9 (W.D. Wash. Jan. 11, 2011). Political parties have a strong interest in selecting their own leadership, which in turn plays an important role in molding the message of the party. *Id.* at *10 (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 230 (1989)).

A. Three-Stage Process

The model statute proposed in this Note divides the election into three unique stages: the pre-election stage, the primary stage, and the general election stage. Preparations take place in the pre-election stage. Here, candidates should have complete autonomy in selecting their party preference and political parties should similarly have complete autonomy in choosing which candidates to officially endorse through the use of state conventions. The primary stage focuses on a clear ballot design with three layers of protection so as to prevent any unwanted association or a perceived risk thereof. Finally, the general election ballot includes the names of the top-two candidates for each office. The protections afforded to the ballot in the primary carry over to this stage.

1. Pre-Election Preparations²¹⁰

There are two aspects to the pre-elections stage: candidate preference selection and party endorsement. At this stage, candidates should have free rein in choosing their party preferences. They may elect to identify with traditional party labels such as “Democrat,” “Republican,” and “Independent.” However, unlike California—where only officially recognized party names are allowed on the ballot²¹¹—a candidate may choose a more descriptive label or party that may or may not officially exist. For example, “Tea Party Republican” or “Anti-War Democrat” could be valid preferences. These descriptive labels are beneficial because they help candidates define themselves to the voters more clearly and indicate a slight departure from a traditional party’s image by focusing on unique issues of concern.²¹²

In order to convert the elections process into more of a state-party effort that allows the interests of both to be recognized, political parties should be given more opportunities to exert influence. The Supreme Court has held that

²¹⁰ See *infra* Appendix: Top-Two Primaries Model Act §§ 4, 6.

²¹¹ *Contra* Chamness v. Bowen, No. CV 11-01479 ODW (FFMx), 2011 WL 3715255, at *8 (C.D. Cal. Aug. 23, 2011) (finding that a state’s important regulatory interests in distinguishing between “qualified” and “nonqualified” parties are sufficiently important to justify its restrictions); Field v. Bowen, 131 Cal. Rptr. 3d 721 (Dist. Ct. App. 2011) (holding that the provision in California’s law prohibiting candidates from being listed as a nonqualified party on the ballot does not discriminate against nonqualified political parties). These opinions do not suggest, however, that a provision *allowing* descriptive party terms would be unconstitutional.

²¹² Parts 4 and 5 in particular relate to the aspects of the top-two primary that the Court has indicated would be left open for litigation if empirical information about ballot design resulting in voter confusion emerges. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 467 (2008) (Scalia, J., dissenting); Pildes *supra* note 9, at 302–03. Section 4 emphasizes the uniqueness of candidates self-designating a party. Top-two primaries are especially distinct in that candidates do not have to file with the party, or can choose to not have any party preference at all. See, e.g., *Text of California’s Top Two Primaries Act, supra* note 12, at 65–66; *Text of I-872, supra* note 43.

political party endorsements must be authorized because preventing parties from conveying any candidate preferences to voters restricts the party's ability to spread its message.²¹³ Allowing formal endorsements helps political parties remain involved in the election.²¹⁴ Oregon's Measure 65 explicitly permitted such endorsements to appear on the ballot.²¹⁵ California's statute also explicitly allows party endorsements, but they do not appear on the ballot.²¹⁶ Although Washington's I-872 does not explicitly acknowledge party endorsements, *Washington State Grange* has specified that it would be allowed; however, like California, they do not appear on the ballot.²¹⁷ The top-two primary in Louisiana does not allow party endorsements whatsoever.²¹⁸ After a candidate has petitioned to run for office and made his or her party preference, the State could thereafter make the complete list of candidates available to political parties, which may then endorse candidates through a mechanism of their own choosing.

State political conventions are often an event for selecting and nominating candidates for state and federal office as well as political party leadership.²¹⁹ Therefore, a political party convention would be the perfect medium for officially endorsing candidates. Like candidates receiving free rein in creating their label, political parties should enjoy free rein in whom to endorse, the process for endorsing, and the number of candidates to endorse.²²⁰ For example, a Tea Party Republican may receive the endorsement of the Republican Party alongside a plain Republican. An Independent candidate could feasibly receive the endorsement of both the Republican and Democratic parties. Voters use political parties as a means of compartmentalizing issues; the juxtaposition of both a candidate's own self-descriptive label and official endorsement may help clarify the type of candidate much more than any of the current top-two systems

²¹³ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

²¹⁴ Clucas, *supra* note 44, at 1092.

²¹⁵ *Text of Measure 65*, *supra* note 122, at 133 (section 9(2)(d) provides that the ballot would include the name of any party that has officially endorsed the candidate).

²¹⁶ *Text of California's Top Two Primaries Act*, *supra* note 12, at 65 ("Nothing in this measure shall restrict the parties' right to contribute to, endorse, or otherwise support a candidate for state elective or congressional office.").

²¹⁷ *Wash. State Grange*, 552 U.S. at 453.

²¹⁸ Clucas, *supra* note 44, at 1092.

²¹⁹ For an example of a statute describing the functions of a state political party convention, see OHIO REV. CODE ANN. § 3513.11 (West 2011). Delegates to state conventions include party members apportioned by counties, candidates running for state and federal office, and candidates running for state party leadership. *Id.* The creation of the state party platform and nomination of the state's presidential electors to the Electoral College are also voted upon at the convention. *Id.*

²²⁰ Although it is possible for a party to endorse a candidate who does not want its endorsement, the risk of this happening is small because (1) party endorsements bring support and exposure that a candidate would not otherwise receive and would thus usually be welcomed and (2) parties would not likely endorse candidates who do not reflect their views. Therefore, the candidate would more likely than not support the party endorsing.

allow. After official endorsements of candidates have been made, the political party could then send the list of candidates endorsed to the secretary of state or similar state election official, who would then begin the process of noting this on the ballot.

2. Primary²²¹

In the primary stage, the focus should turn to clearer ballot design that minimizes the risk of unwanted association. The model statute asserts that a top-two primary does not nominate candidates to political parties but is actually a means of winnowing.²²² By emphasizing the goal of winnowing, the language highlights the importance of limiting access to the general election ballot, a point of concern that sore loser laws in various states seek to address.²²³

The primary ballot should comprise of three layers of clarification. First, the ballot should include a statement at the top that says, "Candidates are not officially endorsed by their self-designated party preference, *unless otherwise indicated*." This would help clarify any disassociation between the candidate and its self-designated party. Second, each candidate's label would be prefaced by the word "prefers." This minimizes confusion where these candidates were actually endorsed or nominated by the party without creating associational problems.²²⁴ Third, the ballot would also display any official endorsements next to the names of any candidates who received them. The language here mirrors that of section (d) in the California Top Two Primaries Act and section 7(3) of I-872.²²⁵ It is also parallel to the factors that the district court lists in

²²¹ See *infra* Appendix: Top-Two Primaries Model Act § 5(a).

²²² Compare *infra* Appendix: Top-Two Primaries Model Act § 2(b) ("Primary: a procedure for winnowing the list of candidates for a public office from multiple to a final list of two."), with *Text of I-872, supra* note 43 ("'Primary' or 'primary election' means a procedure for winnowing candidates for public office to a final list of two as part of a special or general election. Each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliation, of either the voter or the candidate."). It is also worth noting that, like in any other type of primary election, write-in votes should be allowed at this stage.

²²³ Lengell, *supra* note 191.

²²⁴ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 461 (2008) (Roberts, C.J., concurring); Jaffe, *supra* note 160, at 116. Chief Justice Roberts has claimed that highlighting preference would not necessarily lead to association: "Assuming the ballot is so designed, voters would not regard the listed candidates as 'party' candidates, any more than someone saying 'I like Campbell's Soup' would be understood to be associated with Campbell's [Without this,] I-872 [could not] survive a First Amendment challenge." *Wash. State Grange*, 552 U.S. at 461 (Roberts, C.J., concurring).

²²⁵ *Text of California's Top Two Primaries Act, supra* note 12, at 65 ("[A]ll candidates shall have the choice to declare a party preference. The preference chosen shall accompany the candidate's name on both the primary and general election ballots. The names of candidates who choose not to declare a party preference shall be accompanied by the designation 'No Party Preference' Selection of a party preference by a candidate . . . shall not constitute or imply endorsement of the candidate"); *Text of I-*

Washington State Grange on remand, which made the state's top-two primary scheme constitutional.²²⁶

These three layers of protection would lessen the probability that a voter would associate a candidate with his or her self-designated party affiliation. It allows parties to engage in more association with candidates than the other statutes currently enacted and reduces the risk of parties being associated with hostile candidates.

3. General Election²²⁷

Once the results from the primaries have been tallied, the top two vote-getters for each party will then appear on the general election ballot for each contested office.²²⁸ The top vote-getter should be listed first, with the runner-up candidate listed second. The three layers of protection remain intact here: the disclaimer remains at the top of the ballot, party preference is prefaced by the word "prefers," and any official party endorsements on the primary can be carried over to the general election ballot. With these levels of elucidation in place and with the limit of two candidate choices per position, voters receive maximum clarification regarding association and each office is guaranteed a majority vote winner.

While write-in candidates would be allowed at the primary stage (just like in any other primary), such an option should not be available during the general election stage.²²⁹ A California district court has already held that such a

872, *supra* note 43 ("[I]f a candidate has expressed a party or independent preference on the declaration of candidacy, then that preference will be shown after the name of the candidate on the primary and general election ballots A candidate may express no party or independent preference.").

²²⁶ These factors include: (1) a "prominent, unambiguous, explicit statement" that the candidate's party preference does not signal any type of association with the party; (2) the repeated use of "prefer"; (3) ballot inserts and brochures explaining the new system; and (4) a widespread media campaign explaining the new system. *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, 2011 WL 92032, at *4 (W.D. Wash. Jan. 11, 2011). *But see* Manweller, *supra* note 148, at 265 (finding an overwhelming occurrence of voters in a controlled study inferring association between candidates and their preferred parties). Nevertheless, a question remains whether or not misperceiving association and not necessarily *nomination* is enough to meet the Supreme Court standard. *Id.* The compelling nature of these studies, however, remains to be debated. *See, e.g., Wash. State Grange*, 2011 WL 92032, at *8 ("Social science experiments and studies are exceptional tools for improved understanding of society, and the Court does not intend to diminish their general value. But their applicability to the nuances of constitutional review in a case such as this do not, as of yet, appear particularly practical.").

²²⁷ *See infra* Appendix: Top-Two Primaries Model Act § 5(b).

²²⁸ *See id.*

²²⁹ This is parallel to California's scheme. *See* CAL. ELEC. CODE § 8606 (West Supp. 2012) ("A person whose name has been written on the ballot as a write-in candidate at the general election for a voter-nominated office shall not be counted."); *Chamness v. Bowen*, No. CV 11-01479 ODW (FFMx), 2011 WL 3715255, at *3 (C.D. Cal. Aug. 23, 2011)

restriction places only a minimal burden on a voter's First Amendment rights, and that such rights are justified by state interests in implementing the goal of the top-two primary, which is "identifying the two candidates who will compete in the general election."²³⁰ Moreover, this write-in provision is less restrictive than one that the Supreme Court has already upheld in *Burdick v. Takushi*, where the State of Hawaii's *complete* ban on write-in voting was considered to be "a very limited one."²³¹

B. *The Three-Stage Model and the Judiciary*

The Supreme Court has not always possessed the extensive background in political and social theory necessary to assess politically-based election law decisions.²³² Scholars have thus questioned the ability of the Court to adequately resolve cases that involve and require a grasp of normative political theory.²³³ As a result, the Justices seem to favor focusing on the more practical consequences that stem from their decisions rather than on developing a consistent or coherent approach or framework for election law cases.²³⁴ The Justices are also much more likely in election law cases than other types of cases to rely on their personal views to determine the best means of developing structures of democracy.²³⁵ A risk that stems from this trend is that one view of democracy would be constitutionalized at the detriment of other theories that could also embody a reasonable view of democracy and be supported by a majority.²³⁶ Some scholars believe that the blanket primary was a victim to the Court's detour to normative political analysis.²³⁷

Two practical points stem from this construction: first, legislators and policymakers must consider the means by which these laws are passed; second,

("[W]hen a candidate runs for a voter-nominated office . . . he may run as a write-in candidate only in a primary election."); *Field v. Bowen*, 131 Cal. Rptr. 3d 721, 738 (Dist. Ct. App. 2011) ("A ban on write-in votes in general elections for voter-nominated offices is implicit . . .").

²³⁰ *Chamness*, 2011 WL 3715255, at *9.

²³¹ *Burdick v. Takushi*, 504 U.S. 428, 436–37 (1992).

²³² Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 96 ("Courts are ill equipped to develop and evaluate regulatory strategies affecting political parties.").

²³³ *Id.* at 95; see also Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 675 (2009); Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 535 (2008); Issacharoff, *supra* note 38, at 311 ("The absence of text or established doctrine then raises the separate problem of the institutional competence of the judiciary to resolve deeply contested claims resting largely on normative political theory.").

²³⁴ Douglas, *supra* note 233, at 675; Elmendorf & Foley, *supra* note 233, at 535.

²³⁵ Garrett, *supra* note 232, at 131.

²³⁶ *Id.*

²³⁷ See generally Garrett, *supra* note 232 (claiming the Court was misguided in its analysis of California's blanket primary in *Jones*); Issacharoff, *supra* note 38 (same).

they must be able to strike the delicate balance between developing innovative changes while taking care to keep within current confines of Supreme Court precedent. Since the Court is more concerned about the practical implications of its holding rather than about developing a consistent doctrine, it is possible that it would look more favorably upon a voter-passed initiative than one that is passed by a legislative body. In fact, the Court in *Washington State Grange* hinted that the likelihood of voter confusion developing over the ballot was inhibited to an extent by the fact that the scheme was passed by voters.²³⁸ A possible reason why Louisiana's blanket primary remained intact when the Court struck down California's blanket primary was that it had been in place for a long time and was generally accepted by voters and political parties alike.²³⁹ While the Court has never formally drawn a constitutional distinction based on the source of a restriction on First Amendment rights (i.e., popular vote or legislative action),²⁴⁰ it is nevertheless a factor for legislators to take into consideration.

Second, because the Court is not looking to establish a consistent framework of analysis for these types of cases, legislators should also take care to keep within the precedents of the most recent cases while also finding opportunities to improve the status quo. The model statute presented here, accompanied by its three-stage framework, is different from the statutes currently enacted in California, Washington, and Louisiana; while it maintains the spirit of the top-two primary, it includes features that lessen the chances of voter confusion, give political parties more leeway and influence in the elections process, and turns the primary into more of a joint state-party effort. The new designs, such as pre-election free-rein candidate preference and official political party endorsements, help enhance both candidates' and political parties' abilities to define their messages. The added layers of protection on the primary and general election ballot lessen both the risk of forced association and voter confusion. If this model were to be litigated in the

²³⁸ *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008). Compare *id.*, with *Wash. State Republican Party v. Wash. State Grange*, No. C05-0927-JCC, 2011 WL 92032, at *1 (W.D. Wash. Jan. 11, 2011) (holding that I-872, as applied, is constitutional because the ballot language and design eliminates the possibility for voter confusion), and *Manweller*, *supra* note 148, at 267 (finding 80% to 90% of its participants expressed a belief that candidates on a ballot were associated with a political party despite a clear disclaimer disavowing such associations). See also *Expert Witness Publishes His Findings on Voter Confusion in Top-Two Systems*, BALLOT ACCESS NEWS (Oct. 18, 2011) <http://www.ballot-access.org/2011/10/18/expert-witness-publishes-his-findings-on-voter-confusion-in-top-two-systems/>. The Ninth Circuit affirmed the decision in January 2012. *Wash. State Republican Party v. Wash. State Grange*, No. 11-35122, 2012 WL 149475, at *1 (9th Cir. Jan. 19, 2012).

²³⁹ *Labbé*, *supra* note 51, at 746–47 (“Of crucial importance . . . is the fact that the political parties in Louisiana acquiesce to the state’s blanket primary.”).

²⁴⁰ *Persily*, *supra* note 40, at 316.

High Court, it would likely be upheld because of its ability to address the deficiencies that were at issue in *Washington State Grange*.²⁴¹

V. CONCLUSION

The top-two primary is a model that is worthy of consideration given our current vitriolic political environment. It could help produce election results that more accurately reflect the preferences of the median voter, produce a moderating effect, increase participation, and guarantee that candidates will always be elected with a majority of the vote. While legal issues surrounding political parties' First Amendment rights remain, they can be addressed with a tailored solution. Increasing party visibility on the ballot and allowing political parties to play a more proactive role in the elections process can alleviate some of the problems surrounding forced association. Lawmakers should adopt the three-part, top-two primary model proposed in this Note to achieve the electoral interests that the model addresses and minimize the potential for future litigation. Since there is still relatively little empirical data about the effects of top-two primaries, it is possible that continued constitutional challenges could arise over it.²⁴² However, this should not deter legislators from addressing very real concerns that the prevailing primary system poses in our elections process. Richard Pildes has said, "Small changes in institutional design for elections often do have surprisingly powerful ramifications for the kind of candidates who run, get elected, and then govern in office."²⁴³ In fact, there is discussion in other states of implementing top-two primaries.²⁴⁴ The best way to alleviate the discontents with our electoral process and discover the best structures that help us reach our democratic goals is to experiment with novel ideas. The proposed top-two primary model in this Note allows this opportunity while staying within the confines of established law.

²⁴¹ See *supra* Part III.A.1.

²⁴² Pildes, *supra* note 9, at 307.

²⁴³ *Id.* at 307.

²⁴⁴ See *supra* note 20.

APPENDIX: TOP-TWO PRIMARIES MODEL ACT

1. SUMMARY: this Act will serve to implement a uniform and unrestricted system for electing congressional and statewide offices; it shall preserve and maximize the ability for each voter to vote for the candidate of his or her choice. Under this system, each congressional and state-elective office in the State shall be listed on a single primary ballot. A voter may vote in the primary election for any candidate, without regard to the political party preference of either the candidate or the voter. The two candidates with the most votes shall be the only two names to appear on the general ballot for each public office, regardless of party affiliation.
2. DEFINITIONS:
 - (a) *Partisan Office*: an office for which a candidate may list a political party preference on his or her declaration of candidacy, which shall subsequently appear on the primary and general election ballot next to his or her name. Such offices include: (1) United States Senator and United States Representative; (2) all state offices, including executive and legislative, except ___*; and (3) all county offices, except ___*.
 - (b) *Primary*: a procedure for winnowing the list of candidates for a public office from multiple to a final list of two.
 - (c) *General Election*: a runoff election succeeding the primary, which shall include the names of the top two vote-getters of the primary election.
3. OPEN VOTER REGISTRATION: at the time of voter registration, the voter shall have the option to disclose a party preference; no voter shall be denied a right to vote for a particular candidate for Congressional or statewide office on the basis of his preference (or lack thereof) for a political party.
4. OPEN CANDIDATE DISCLOSURE: when a candidate files to run for public office, he or she shall be able to, but is not required to, declare a political party preference. The preferred party shall not be limited to established political parties within the state. Once declared, this preference shall accompany the candidate's name on the primary and general election ballots, and cannot be changed. Unless otherwise permitted through an official endorsement pursuant to §§ 5 and 6, candidates who want to declare an established political party must preface the name of the party with "Prefers" (e.g., "Prefers Democratic Party" or "Prefers Republican Party"). "No Party Preference," shall also be an option, if a candidate chooses not to include any preference.
5. THE BALLOT:
 - (a) *Primary Ballot*: each candidate who successfully files to run for public office shall have his or her name listed on the ballot for his or her preferred office with his or her party preference or lack thereof, as indicated in § 4. The ballot must include a disclaimer at the beginning, explicitly stating that the candidates are not officially endorsed by their self-designated party, unless otherwise indicated. A political party has the option to explicitly state on the ballot that it endorses a candidate as

its official nomination, although it is not required to do so. Parties are not limited to endorsing only candidates who mention the party's name in its preference. At this stage, write-in candidates may be allowed.

- (b) *General Election Ballot*: The two candidates with the greatest number of votes in the primary shall advance to the ballot for the general election. Candidates who either (i) were not one of the top two vote-getters at the primary stage or (ii) did not appear on the primary ballot at all, may not appear on the general election ballot. The name of the candidate with the most number of votes shall appear first, and the name of the candidate with the second-most number of votes shall appear second. The ballot must include a disclaimer at the very beginning explicitly stating that the candidates are not officially endorsed by their self-designated party, unless otherwise indicated. Like in the primary stage, a political party has the option to explicitly state on the ballot that it endorses a candidate as its official nomination, although it is not required to do so. At this stage, write-in candidates will not be allowed.
6. POLITICAL PARTY RIGHTS: nothing in this statute shall restrict the ability of political parties to contribute to, endorse, or otherwise support a candidate for office. If they so choose, they may (i) invite any candidate to speak, and/or (ii) officially endorse a candidate whose name shall appear on the primary and general election ballots, at a state party convention. Nothing in this statute shall restrict the ability of political parties to adopt rules for the selection of presidential candidates or party officials leaders, as indicated in § 7.
7. EXCEPTIONS:
- (a) *Presidential Primaries*: this statute will not make any changes in the law regarding presidential primaries, whereby the candidates on the ballot are those who are running throughout the nation for Office of the President of the United States. Political parties retain the right to close their presidential primaries to those who disclose their party preference for that primary or open it to those who have not disclosed a party preference or are Independent.
- (b) *Central Political Party Committees*: as stipulated in § 6, such elections may be closed to those who are officially registered with the party.
- (c) *Nonpartisan Elections*: political parties may not nominate or endorse a candidate for nonpartisan office, which include ___*; candidates for such offices may not designate a party preference.

*Each state will vary in terms of what offices are considered partisan and nonpartisan. For example, some states hold partisan judicial elections and elections for state superintendent of education, while other states hold these as nonpartisan public offices.