Political Parties Before the Bar: The Controversy Over Associational Rights

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The Washington State Democratic Party recently filed suit against the state of Washington alleging that the state's blanket primary system[1] was unconstitutional because it was considered repugnant to the party's first and fourteenth amendment associational rights. The blanket primary system permits voters to decide from among all candidates for each office, regardless of party affiliation.[2] Because the Washington blanket primary permits interparty crossover voting during the primary election, the party argued that it was effectively denied the right to associate for the purpose of choosing its own party candidates for elective office. In a unanimous decision,[3] the Washington Supreme Court dismissed the suit on the grounds that the Democratic Party had failed to show a substantial burden on its associational rights,[4] and further, that there is a compelling state interest supportive of the blanket primary system.[5] The question the Democratic Party raised, however, continues to be of both legal and political interest. At issue is the scope and nature of constitutional protection to be afforded party autonomy by the first and fourteenth amendments. The purpose of the present discussion is to review both legal and political sides of this question. Once

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1. The Washington statute provides: "All properly registered voters may vote for their choice at any primary election, for any candidate for each office, regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter." WASH. REV. CODE § 29.18.200 (1979).

2. The blanket primary differs from open and closed primaries. The open primary system allows voters to vote for candidates of any party. But, unlike the blanket primary system, the open primary system requires voters to choose only among candidates from one party. The closed primary system allows voters to vote only for candidates from their previously chosen party.

3. 93 Wash. 2d 700, 611 P.2d 1256 (1980).

4. *Id.* at 703, 611 P.2d at 1258.

5. *Id.* at 705, 611 P.2d at 1259.

this is done it will become clear that a party right to protected autonomy during the candidate selection process is not only founded upon solid constitutional ground but is also in keeping with sound political wisdom.

I. Political Parties and the Constitution

A. *Associational Rights in Historical Perspective*

The right to free association is not explicitly mentioned in the Constitution. Its constitutional status, derived from the spirit of the first amendment, is a "by-product of many constitutional guarantees, such as the rights of petition and assembly, the rights of free speech and free press, and the right to vote."[6] Because it is regarded as a first amendment guarantee, the right of association enjoys the status of a fundamental right protected against state impairment by the fourteenth amendment. By the time the Supreme Court decided *NAACP v. Alabama*[7] in 1958, the Court thought it "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the due process clause of the Fourteenth Amendment."[8] While the right of association comprehends a variety of private associational activities, it is first and foremost a political right protecting the freedom of individuals to join efforts in pursuit of political goals and objectives.[9] As a political right, the right of free association constitutes an important and fundamental feature of the democratic process. Recognizing this fact, the Supreme Court has declared emphatically that "the National Democratic Party and its adherents enjoy a constitutionally protected right of political association."[10] Further, the right is indistinguishable between the individual and the group or association itself. "Once the organization is formed, the Constitution protects the self-perpetuation of the group as an institution as well as the right of individuals to seek realization of their aims through the group."[11]

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6. D. Fellman, The Constitutional Right of Association 38 (1963).

7. 357 U.S. 449 (1958). *See also* Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Palko v. Connecticut, 302 U.S. 319, 324 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925).

8. 357 U.S. at 460.

9. NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960).

10. Cousins v. Wigoda, 419 U.S. 477, 487 (1975).

11. Note, *Primary Elections: The Real Party in Interest*, 27 Rutgers L. Rev. 298, 303 (1974). *See also* NAACP v. Alabama, 357 U.S. 449 (1958). An association, the Court declared, "[i]s but the medium through which its individual members seek to make more

Political scientists are reluctant to classify political parties as *associations* in the traditional sense. As one noted party scholar put it, a party "does not accept the application; it does not vote the applicant into the association; it may not reject the application; and, finally there is usually no recognized and authoritative procedure by which the party may expel a member."[12] Nevertheless, political parties consist of individuals who associate to advance their own political objectives and ideas. Historically, party activity, including the candidate selection process, was the purely private affair of party activists. But efforts to "democratize" the parties, by making the candidate selection process more open and accessible to all party identifiers, have thrown a shadow of uncertainty over the question of party privacy. The party caucus, long the private sanctuary of the party boss, initially gave way to the party convention—still a private party affair. But the convention system has in turn given way to the direct primary system as a means of combating the evils of the party machine.[13] At present, all fifty states have some version of the direct primary for choosing party candidates for statewide office.[14] The states, called upon to create primary systems, thus found themselves involved in what previously had been the purely internal affair of the party, and the courts, called upon to measure the constitutionality of state primary legislation, found themselves involved in what has become the associational rights controversy.

While the Supreme Court has made it clear that the right of free association protects party autonomy, it has never examined the extent and limitations of this protection. The most that can be inferred from Supreme Court decisions is that the right of free association protects party efforts to pursue its goals in a reasonable and orderly fashion.[15] The salient question thus becomes whether the blanket primary system poses a realistic threat to the ability of political parties to pursue their goals and objectives. To resolve this question, it is necessary to undertake a more specific inquiry into the nature and scope of party associa-

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effective the expression of their own views." *Id.* at 459.

12. E. SCHATTSCHNEIDER, PARTY GOVERNMENT 56 (1942). *See also* C. RICE, FREEDOM OF ASSOCIATION 105-08 (1962).

13. A. RANNEY, CURING THE MISCHIEFS OF FACTION 12-20 (1975).

14. R. SMOLKA, *Election Legislation*, in THE BOOK OF THE STATES 52-75 (1980-81).

15. Kusper v. Pontikes, 414 U.S. 51 (1973); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

tional rights than the Supreme Court has thus far offered.

The Washington Supreme Court's decision in *Heavey v. Chapman*[16] provides an excellent vehicle for analysis of the unique constitutional question raised in the associational rights controversy. The court, however, apparently failed to appreciate this unique character.[17] Instead, it quite naturally made an effort to find a niche for *Heavey* under existing constitutional law. Thus, the Washington court considered itself bound by the precedent of *Smith v. Allwright*.[18] In *Smith*, the United States Supreme Court struck down the Texas "white primary" declaring that the Texas Party took on the character of a "state agency" by virtue of certain duties imposed upon it by state statute.[19] These "duties do not become matters of private law because they are performed by a political party."[20] Because political parties were thought to have a public character, the Court reasoned that the Texas Party could not establish itself as a private organization with the right to restrict or limit party membership as a means of excluding some from participation in important party activities. Because the Washington Democratic Party's claim to protected party autonomy asked the state to restrict participation in the Democratic primary to party identifiers only, the Washington court equated it with the claim to the right to control party membership advanced in *Smith*.[21]

The problem in *Heavey* is substantively different from the issue the Supreme Court decided in *Smith*, however, and it is important to see that the latter does not control the former. Even the narrowest reading of *Smith* makes it clear that an associational rights claim cannot be invoked to close party doors to any judicially recognized "suspect classes."[22] An associational rights claim cannot be advanced to avoid basic standards of American democracy. A somewhat broader reading of *Smith* suggests that an associational rights claim cannot be advanced

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16. 93 Wash. 2d 700, 611 P.2d 1256 (1980).

17. *Id.* at 704, 611 P.2d at 1259. Responsibility must be shared with the Democratic Party itself which also apparently failed to perceive the unique constitutional character of its own claim.

18. 321 U.S. 649 (1944).

19. *Id.* at 663.

20. *Id.*

21. *Heavey*, 93 Wash. 2d at 704, 611 P.2d at 1259. *See generally* Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1974).

22. *See* Comment, *The Right to Vote and Restrictions on Crossover Primaries*, 40 U. CHI. L. REV. 636, 640 (1973).

to enable the party to rule upon or limit party membership. According to this reading of *Smith*, political parties should be open to all who choose to affiliate with the party, and those who do should be entitled to participate in all party activities, including the candidate selection process. Fortunately, it is not necessary to referee these two readings of *Smith* since neither is relevant to the associational rights challenge to the blanket primary system. This challenge does not claim that parties are entitled to control their membership or to prohibit party identifiers from participating in party activities. It involves only the claim that participation in party activities should be *restricted* to party identifiers. For example, only those individuals choosing to affiliate with the Democratic Party should be permitted to participate in the candidate selection process. The associational rights challenge, in effect, claims parties to be *autonomous* associations and not *private* associations. Since the *Smith* decision sheds light only on the question of privacy, and not the question of autonomy, it is not relevant to the associational rights challenge to blanket primary systems.

Other cases seem to provide precedent more relevant to this challenge. In *Rosario v. Rockefeller*,[23] for example, the Supreme Court sustained a New York statute requiring a voter to register with a political party at least thirty days before the November general election to be eligible to vote in that party's primary the following year. The New York legislation was intended to discourage party raiding by requiring a voter to register with the party of his choice well before that party's upcoming primary. The statute permitted only those members registered with a party to participate in that party's primary election; that is, the statute closed New York primaries in roughly the way the Washington Democratic Party wanted to see them closed in Washington. Rosario, who had been living in New York and could have met the statute's requirements, failed to change party affiliation in time to qualify for his new party's upcoming primary.[24] He challenged the statute, claiming that it abridged his first and fourteenth amendment rights to vote and associate with the party of his choice.[25] The Court, however, dismissed both enfranchisement and associational rights issues on the grounds

23. 410 U.S. 752 (1973).
24. *Id.* at 755.
25. *Id.* at 756.

that Rosario could have met the statutory requirements if he had acted more swiftly in changing parties.[26]

The *Rosario* decision at first appears relevant to the associational rights challenge for two reasons. First, the decision elaborates on the nature of Rosario's associational rights. Second, the decision makes clear that statutes closing party primaries to guard against party raiding can pass constitutional muster. But first appearances are deceiving. While *Rosario* begins to explicate the associational rights of *individuals* — *i.e.,* the right to join political parties — it does not elaborate on the associational rights of *parties* themselves. Further, it is one thing to say that state legislatures can provide against the evils of party raiding or crossover voting if they so desire; but it is another to say that political parties have the right to require the state to make certain that primary systems do not pose such threats to party autonomy. *Rosario* establishes only the former point and consequently is of little use in demonstrating the constitutional necessity of the latter.

Interestingly, the Supreme Court reached a different conclusion just a few months after *Rosario* in *Kusper v. Pontikes.*[27] In *Kusper,* the Court invalidated an Illinois statute prohibiting citizens from voting in a party primary if they had voted in the primary of any other party within twenty-three months of their new party's primary. The Court again emphasized the right of individuals to associate freely for the advancement of political beliefs and ideas. The Illinois statute compromised this right, according to the Court, because it substantially restricted the right of a voter to change party affiliation.[28]

Kusper, like *Rosario,* is not directly relevant to the associational rights challenge. *Kusper* focuses on the associational rights of individuals rather than parties. But *Kusper* does suggest that there is a limit to the extent state legislation can lock a voter into a particular party affiliation by penalizing the voter with a loss of his primary vote if he changes party affiliation. While in *Rosario* the Court found the restraining period tolerable because the plaintiff could have met the standard, in *Kusper* the Court considered the twenty-three month restraint unnecessarily burdensome.

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26. *Id.* at 759.
27. 414 U.S. 51 (1973).
28. *Id.* at 58.

The Supreme Court's decision in *Cousins v. Wigoda*[29] is more promising than either *Rosario* or *Kusper*. In *Cousins*, the Court was called upon to settle a controversy arising out of the Democratic National Convention of 1972. Under Illinois law, a delegation headed by Paul T. Wigoda had the right to be seated at the convention. However, a group of delegates supporting William Cousins also arrived at the convention and challenged the seating of the Wigoda delegation on the grounds that "the slate-making procedures under which the Wigoda delegates were selected violated Party guidelines incorporated in the call of the convention."[30] The party's credentials committee supported the Cousins claim and recommended that the Cousins delegation be seated in favor of the Wigoda delegation, a recommendation later adopted by the convention as a whole. Cousins later pressed his claim before the Supreme Court after Wigoda asked for and was granted injunctive relief from the convention decision by the Illinois state courts.[31]

In reversing the decision of the Illinois court, the Supreme Court emphasized that the Democratic Party does enjoy a right of free association for the furtherance of political purposes. The Court found the candidate selection process of the national party to be a private affair of that party in which states have no legitimate interest.[32] Thus, at the national level the Court has declared that parties enjoy a constitutionally protected autonomy which permits them to govern their candidate selection process according to their own rules. A direct analogy to the states would suggest that state party autonomy requires that the party candidate selection process be considered the private affair of the party. However, no such direct analogy can be drawn. State adoption of the direct primary system in place of the party convention makes any such analogy impossible. The convention system has an aura of privacy about it which apparently made it easier for the Court to characterize the proceedings of the national convention as the private affair of the party. State primaries, however, are elections structured and governed by state statute, and this, of course, makes them a decidedly public activity. The claim of constitutionally protected autonomy for the purpose of selecting candidates for elective office at the state

29. 419 U.S. 477 (1975).
30. *Id.* at 479.
31. Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973).
32. 419 U.S. at 489-90 (1973).

level is thus a good deal more complicated than a similar claim pressed at the national level. *Cousins* loses its vitality as a precedent for *Heavey* for just this reason.

The Supreme Court's most recent associational rights decision, *Democratic Party v. State ex.rel. La Follette*,[33] while still not conclusive, offers further encouragement for state party associational rights claims. In *La Follette*, the national Democratic Party, in accordance with party rules requiring public declaration of party affiliation by those wishing to participate in the delegate selection process, indicated they would not seat Wisconsin delegates selected through the state's open primary system.[34] The state sued the national Democratic Party. The Wisconsin Supreme Court stated that Wisconsin's primary system was constitutional and required the party to seat the delegation elected under the state system.[35] The United States Supreme Court narrowed the issue to whether a state may compel seating of delegates chosen in a manner contrary to national party rules.[36] The Court ruled a state may not compel the party to seat such delegates.[37]

La Follette not only reaffirms *Cousins*, it heartily reasserts the Court's commitment to the view that political parties may protect themselves from the interference of those unaffiliated with the party.[38] Though the Court cited no evidence to substantiate the claim, it stipulated that the contamination of party affairs by individuals not affiliated with the party "may seriously distort its collective decisions—thus impairing the party's essential functions . . . ."[39] If the Court is correct in this claim (and we shall argue below that it is) it not only substantially establishes that the inability to control their candidate selection process burdens political parties, but also suggests that the challenge to party autonomy threatens the health of the democratic process itself. As in *Cousins*, the litigating party in *La Follette* was the National Democratic Party rather than a state party. Therefore, as with *Cousins*, it is uncertain whether state parties have similar constitutional protection. Yet the importance the

33. 450 U.S. 107 (1981).
34. *Id.* at 109-13.
35. *Id.* at 113-14.
36. *Id.* at 120.
37. *Id.* at 126.
38. *See* Ray v. Blair, 343 U.S. 214 (1951).
39. 450 U.S. at 122.

Court attached to party privacy in *La Follette,* along with the Court's inclination to speak of parties in general and avoid distinguishing state and national parties,[40] suggests the Court might be willing to extend the logic of *La Follette* and *Cousins* to include state parties.

B. Associational Rights: Standards for Review

The failure to find an appropriate constitutional jacket for *Heavey v. Chapman* forces an independent inquiry into the scope and limits of party associational rights. To undertake the inquiry, however, it is necessary to establish the standards for review the Supreme Court has adopted for associational rights controversies. The Supreme Court consistently has held that the fourteenth amendment protects constitutional rights against state intrusion only if the rights in question are "fundamental" or "essential to a scheme of ordered liberty."[41] But even fundamental rights have never been considered absolute.[42] The mere demonstration that state action compromises a fundamental right is not sufficient to strike down state action on constitutional grounds.[43] The Court has recognized that the right of free association is fundamental and basically established a two step analysis to determine whether the state action violates political parties' associational rights. The Court evaluates the facts of each associational rights case to determine: (1) whether the state's action substantially burdens the party's right of free association; and (2) whether the state has a compelling interest in the legislation.[44] By adopting this two part test, the Court has

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40. The Court in *La Follette,* again emphasized the dictum of *Cousins* that associational rights protection covers not only the national parties but also their adherents. *Id.* at 122; *Cousins,* 419 U.S. at 487. *See also* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

41. Palko v. Connecticut, 302 U.S. 319, 325 (1937); Gitlow v. New York, 268 U.S. 652, 666 (1925).

42. For example, the Court stated in *La Follette:* " 'Neither the right to associate nor the right to participate in political activities is absolute.' " 450 U.S. at 124.

43. Roth v. United States, 354 U.S. 476, 483 (1956); Beauharnais v. Illinois, 343 U.S. 250, 266 (1951); Kovacs v. Cooper, 336 U.S. 77, 85 (1948); Schenck v. United States, 249 U.S. 47, 52 (1919); J. CASPER, THE POLITICS OF CIVIL LIBERTIES 28-30 (1972).

44. *E.g., La Follette,* 450 U.S. at 128 (Powell, J., dissenting). At least one commentator maintains that the state must also show that state action is necessary to achieve the state's interest. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-22, at 786 (1978). In some associational rights situations the court requires not only that the state action be necessary to achieve the state's interest but that the state employ the least drastic restriction upon freedom of association. *See, e.g.,* Shelton v. Tucker, 364 U.S. 479, 488

refused to set rigid guidelines which might clarify the boundary between public and private functions of the political parties but might also "constitutionalize"[45] state primary systems. The test, in effect, welcomes further associational rights litigation.

II. Associational Rights and Intraparty Politics

The argument supporting the associational rights challenge to the blanket primary system is straightforward enough. Party autonomy is threatened because the blanket primary opens party candidate selection to all statewide registered voters. With the primary this open, the party loses the ability to be certain that it controls the selection of its own candidates for elective office. And this, it is argued, undermines the ability of party identifiers to associate for the pursuit of political objectives. Thus, the blanket primary seems to compromise the recognized right of political parties to associate for the pursuit of political objectives.

The strength of this argument must be measured not only in terms of constitutional law but also in terms of political wisdom. The appropriate litmus test here must determine the nature and degree to which the blanket primary actually threatens party autonomy. This, of course, is an empirical matter and forces us into the literature of political science. In the remainder of this section we shall discuss the nature of the threat the blanket primary raises for party autonomy. In the following section we shall discuss whether this threat is real and damaging to party autonomy.

Political parties are not debating societies; people do not join political parties to share thoughts on matters of political philosophy. Political parties are the vehicles through which people seek political power and the purpose of associating with a party is to gain a measure of that power.[46] A party gains political power only when successful in getting candidates elected to public office. In turn, the success of the party identifiers in gaining power is tied to the electoral success of the party. From a practical point of view, the preservation of party autonomy entails preservation of the political efficacy of those individuals who

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(1960).

45. *See* Elrod v. Burns, 427 U.S. 347, 388-89 (1976) (Powell, J., dissenting).

46. V.O. Key, Jr., Politics, Parties, and Pressure Groups 204-05 (1964); E. Schattschneider, *supra* note 12, at 20-25.

associate with the party. State action compromising party autonomy also compromises the ability of the individual to pursue political objectives.[47]

More importantly, political parties give form to American politics. Because viable candidates for elective office generally represent one of the two major parties, diverse political interests are encouraged to join one of these parties to effectively pursue their political objectives. For this reason, political scientists characterize political parties as loose coalitions of groups that associate for the advancement of their political interests.[48] This view of political parties suggests the extent intraparty politics is important for the group or individual seeking political power. Political parties are composed of varied and eclectic interests. These political interests find it necessary to compete with one another for power or standing within the party structure. From the standpoint of individual political interests, intraparty struggles are as important as interparty political struggles. Party reforms leading to the adoption of the direct primary system were intended simply to make these intraparty struggles more democratic.[49] With the increased "democratization" of intraparty conflict, intraparty politics becomes an even more significant aspect of party operations.

Political scientists have long noted the importance of vital intraparty politics for the American two party system.[50] This system militates against the fragmentation of political issues and thus impedes the rise of factions.[51] It expands political debate to reach more members of society by placing specific political

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47. *See* V.O. KEY, JR., *supra* note 46. Key notes the threat posed to party efficacy by the open primary system, saying:

> [T]he open primary at times makes difficult the maintenance of orientations differentiating the two parties and probably handicaps the lesser party in those jurisdictions in which one party holds a substantial advantage. The voters of the lesser party may find it more attractive to exercise a balance of power in the primary of the major party than to engage in the troublesome task of building up their own party.

Id. at 392. The blanket primary system, as Key correctly notes, is a more drastic version of the open primary.

48. *See* E. SCHATTSCHNEIDER, *supra* note 12, at 17-63.

49. *See* A. RANNEY, *supra* note 13, at 121-34.

50. For a comprehensive discussion of the importance of political parties for the American democratic process, see W. CHAMBERS, *Parties and Nation Building*, in POLITICAL PARTIES AND POLITICAL DEVELOPMENT 79-106 (J. LaPalombra & M. Weiner eds. 1966).

51. The classic statement of this argument is to be found in THE FEDERALIST No. 10 (J. Madison). *See also* G. SARTORI, PARTIES AND PARTY SYSTEMS 22-29 (1976).

issues within the context of general party discussion.[52] It lends cohesiveness to political struggle that mitigates the basically divisive nature of political conflict.[53] And it provides political efficacy for political interests which might otherwise fail to receive a fair hearing.

The intraparty struggle, in short, is an important, albeit informal, aspect of American democracy. Like interparty politics, intraparty politics is representative in character, with representatives of the dominant party interests chosen through the primary process. Thus, the primary election provides insight into the policy objectives of the party as a whole. Party candidates for elective office are presumed to represent the wishes of the majority of the party on a wide range of political issues. These candidates, in other words, are not just candidates for elective office in the general election; from the standpoint of intraparty politics, they represent the party position on issues that concern party identifiers. This is important not only because it tells the candidates about the wishes of his party constituents, but also because it gives the party identifiers the opportunity to gauge their political efficacy within the party.[54]

Like other elections, party primaries are likely to be close and hotly contested affairs. A small bloc of votes could well determine the outcome of the election. By opening the primary to nonparty voters, a small group of nonpartisans is capable of affecting the outcome of the election and poisoning the democratic character of intraparty politics. This may involve an organized intrusion into intraparty politics as in the case of an interparty "raid" or simply a crossover of nonpartisans. In either case, the potential results are equally destructive of the democratic personality of intraparty politics.

The blanket primary system permits just this evil. By opening the ultimate expression of intraparty politics to nonparty voters, the democratic character of intraparty politics is threatened just as the democratic character of Washington state politics would be threatened by permitting Oregonians to vote in

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52. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE, 76-94 (1975).

53. N. POLSBY & A. WILDAVSKY, PRESIDENTIAL ELECTIONS 7-17, 125-26 (1968). *See also* Elrod v. Burns, 427 U.S. 347, 376-89 (1976) (Powell, J., dissenting).

54. This information is crucial to party partisans since without it they are unable to organize themselves for greater political effectiveness *within* the party. In the absence of this information, intraparty coalition building is severely impeded which could easily result in party partisan alienation from the party, weakening the party system.

the Washington general election. This is contrary to the spirit of party reform which brought the primary system into being in the first place since, rather than making intraparty politics more democratic, it actually detracts from the democratic character of the process. Preservation of party autonomy involves nothing more than the preservation of the democratic character of intraparty politics.

The blanket primary threatens the integrity of intraparty politics, and consequently, it jeopardizes party autonomy. Intraparty politics is the private affair of those groups of individuals who choose to associate with a party to seek political clout. Since associating in this fashion enjoys the protection of the first amendment this protection must also extend to the internal politics of the parties *if this process meets the basic democratic standards fundamental to American democracy.* State action that pollutes the internal politics of the party must then violate this first amendment guarantee. This should not be taken to mean, of course, that the internal functions of the parties are completely beyond the scope of state regulation. As noted above, the Supreme Court has steadfastly rejected this point of view. But it does mean, as one commentator put it, "that the impact on the autonomy of the political party is a factor that must be considered in deciding the constitutionality of statutes relating to political parties."[55]

III. Proof of Burden

We now examine the extent of the threat posed to party autonomy by the blanket primary system. Before a political party can successfully challenge the constitutionality of state action violating the party's right to free association, the party must demonstrate an actual burden upon the exercise of the right.[56] Proving that a statute burdens a party's right to associate is difficult and complicates challenges to the blanket primary system. Arguably, proof of actual burden is impossible because of the secret ballot. This argument is not without appeal because it is the act of voting itself, as well as the intention of the voter, that burdens party autonomy.

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55. Comment, *supra* note 22, at 649.

56. *See* Democratic Party v. Wisconsin ex. rel. La Follette, 450 U.S. 107, 121-22 (1981) (Powell, J., dissenting).

A. Crossover Voting and Raiding

The dilemma created by the demand for proof can be resolved by distinguishing between "crossover voting" and "raiding." It is difficult to prove the occurrence of party raiding but the assertion that the difficulty arises from the secrecy of the ballot is only partially correct. The far greater problem arises from the need to show intent. The Supreme Court has defined raiding as the practice "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."[57] Clearly then, raiding occurs only when the *intent* to distort a party's primary is present and just as clearly it is impossible to prove intent from election results. If raiding was the only act burdening a party's associational rights, then the assertion that proof of burden is impossible would be correct.

There is, however, an easier solution to the problem of proof. All voting which cuts across party lines is called "crossover voting."[58] The unprovable evil of raiding need not be discussed here since the eminently provable evil of crossover voting is, in itself, enough to constitute a clear burden on a party's associatonal rights. Unlike raiding, the proof of crossover voting does not depend upon intent; it can be shown statistically and the burden on a party's associatonal rights can be implied directly.[59]

B. Crossover Voting as Burden

Crossover voting burdens a party's associational rights by rendering it impossible for a party to be certain it has chosen its own candidates in a primary election. Ironically, the primary election held in Washington immediately after the *Heavey* decision provides us with just such a worst case scenario. Two contests in the September 1980 primary merit special attention. In the Republican Party primary for the United States Senate, a substantial crossover vote may have dictated the result. In fact, the size of the crossover vote was 176 percent of the margin of

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57. Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

58. For a recent discussion of crossover voting and its effects, see Adamany, *Communication: Crossover Voting and the Democratic Party's Reform Rules*, 70 AM. POL. SCI. REV. 536 (1976).

59. *Id.* at 537-39.

victory between the two leading candidates.[60] In at least this one very important race it is likely that Democratic and other crossover voters affected the election of the Republican candidate. The Republican Party was thus not in complete control of its own candidate selection process. This particular race provided a classic situation because it was hotly contested while the Democratic incumbent had only token opposition[61] leaving Democrats free to vote in the Republican race.

Another important though smaller crossover vote occurred in the Democratic gubernatorial primary. In that race the incumbent Democrat was defeated as a result of an extremely large voter turnout coupled with a significant crossover vote. Both the Democratic winner and the runner-up incumbent polled a significantly larger number of votes than the winning Republican.[62] Therefore, significant numbers of voters must have crossed over to vote in the Democratic gubernatorial race, leaving the Democratic party unable to control its own candidate selection process. This single election then, burdened *both*

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60. The usual method for calculating crossover votes is to compare the vote for one party's combined candidates for a single race with the mean vote cast for that same party's candidates in all statewide races. *See, e.g.*, D. OGDEN & H. BONE, WASHINGTON POLITICS 38-40 (1960); Adamany, *supra* note 58, at 537. Calculated by this method, the crossover vote in the Republican senatorial race was 224% of the margin of victory between the two leading candidates! This method considers all votes beyond the mean vote for a party to be crossovers. It does not consider the phenomenon known as "undervote" wherein fewer people vote in many of the races than voted in the total election. By comparing votes in large turnout races (like the race for United States Senate) with the average vote in all other races, the calculation considers all "extra" voters to be crossover voters. This consideration ignores the probability that the "extra" voters are distributed over the political spectrum in much the same way that all other voters are distributed. In order to account for this "normal" distribution of voters, we have calculated the crossover vote in a statistically more conservative way that allows for a percentage of the "extra" votes to be counted as party identifiers and not crossovers. Our method is to compare the votes cast for one party's combined candidates in a single race (*observed vote* or V_o) with the (*expected vote* V_e) for that party's candidates in the same race. The difference ($V_o - V_e$) is the crossover vote. The *expected vote* is calculated by dividing a party's total vote in all races (N_p) by the total votes cast (N) in all partisan races, or $\frac{N_p}{N}$. The resulting percentage is the percent of the vote that a party can expect to receive in any single race and is not affected by "extra" votes. The expected vote percentage (still expressed as $\frac{N_p}{N}$) is then multiplied by the total vote cast for all parties in any single race (N_{sr}) to obtain the total *expected vote* for that party in that single race, or $V_e = (\frac{N_p}{N}) N_{sr}$.

61. The vote totals in the Democratic race show: the incumbent, 348,471; the other two candidates, 18,348, and 10,157 respectively. WASH. SECRETARY OF STATE, ABSTRACT OF VOTES PRIMARY ELECTION (1980).

62. The Republican winner polled only 50.5% as many votes as the winning Democrat and only 69.3% as many votes as the runner-up Democrat incumbent. *Id.*

major parties by depriving them of the right to exercise control over their own candidate selection process in at least two major statewide races.

It should be clear from the preceding discussion that the existence of crossover voting impairs the effectiveness of both individual and party associational rights. Because blanket primary elections are structured for the express purpose of allowing crossover voting, they impose significant burdens on party associational rights. Moreover, the question of the magnitude of the practice is not relevant to the constitutional question. As the Supreme Court characterized the practice of patronage: "It is the practice itself, not the magnitude of its occurrence, the constitutionality of which must be determined."[63] So, too, it is the practice of crossover voting, or even its availability, that threatens the democratic nature of intraparty politics and consequently burdens a party's associational rights.

IV. Compelling State Interest v. Associational Rights

Even if it can be shown that a party's associational rights are abridged by the blanket primary, that abridgement can be legitimized by a state demonstration of a compelling interest in favor of the blanket primary.[64] When considering compelling state interest arguments, the Supreme Court has asked whether the state's interests are correctly identified and whether the legislation is accurately designed to achieve those interests.[65]

Most arguments asserted in favor of a state's compelling interest in blanket primaries may be grouped under the single category: "preservation of the democratic process."[66] Certainly the preservation of the democratic process is an extremely compelling interest for all, including the state. We must examine, however, whether the blanket primary system actually preserves the democratic process.

Most of these arguments suggest that increasing voter

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63. Elrod v. Burns, 427 U.S. 347, 354 (1976).

64. *See* Heavey v. Chapman, 93 Wash. 2d 700, 702, 611 P.2d 1256, 1257 (1980).

65. *See, e.g.*, Elrod v. Burns, 427 U.S. 347 (1976); Buckley v. Valeo, 424 U.S. 1 (1976); Kusper v. Pontikes, 414 U.S. 51 (1973).

66. Comment, *The Constitutionality of Non-Member Voting in Political Party Primary Elections*, 14 Willamette L.J. 259 (1978). See also Elrod v. Burns, 427 U.S. 347, 368 (1976), for the United States Supreme Court's recognition of the "preservation of the democratic process" as a compelling state interest.

choice increases voter participation.[67] They assert that primary elections that force a voter to choose from one or the other party's slate unnecessarily restrict a voter's choice and therefore discourage participation.[68] Furthermore, it is argued, this process precludes participation of the independent voter in the primary election process.[69]

The initial half of this argument, that expanded voter participation results from expanded voter choice, rests on two assumptions not supported by the relevant facts. The first assumption is that many independent voters are eager to vote if not constrained by the necessity to choose a party or state a party preference. The second assumption is that the average voter, even a party identifier, would more likely vote if he could vote for the individual and not the party.

Though there have been recent reassessments concerning the independent voter, evidence still suggests that "independents" are less likely to vote than party identifiers.[70] In fact, strength of party identity appears to correlate directly with participation. According to Flanigan and Zingale: "Strong partisans are more likely to vote in *all kinds of elections* than either weak partisans or independents."[71] A comparison of two geographically contiguous states, Washington and Oregon, both with long standing populist traditions, goes far in substantiating this claim. Washington's blanket primary elections have consistently shown much lower turnouts than Oregon's closed primary elections.[72] This is true in spite of the fact that turnout in the general elections in both states is nearly the same.[73] It would appear

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67. Heavey v. Chapman, 93 Wash. 2d 700, 703, 611 P.2d 1256, 1258 (1980); Comment, *supra* note 66, at 275-81.

68. *See, e.g.*, Comment, *supra* note 66, at 276-78.

69. *Id.* at 278.

70. *See, e.g.*, J. CLOTFELTER & C. PRYSBY, POLITICAL CHOICES 40-41 (1980); W. CROTTY & G. JACOBSON, AMERICAN PARTIES IN DECLINE 36-37 (1980); W. FLANIGAN & N. ZINGALE, POLITICAL BEHAVIOR OF THE AMERICAN ELECTORATE 58-64 (3d ed. 1975); A. RANNEY, *supra* note 13, at 52.

71. W. FLANIGAN & N. ZINGALE, *supra* note 70, at 57 (emphasis added).

72. In the two decades since 1960, Oregon has averaged 65.5% voter turnout. ORE. SECRETARY OF STATE, OFFICIAL ABSTRACT OF VOTES PRIMARY ELECTION at X (1980). Washington for the period averaged only 48.95%. WASH. SECRETARY OF STATE, ABSTRACT OF VOTES PRIMARY ELECTION 1 (1960); *Id.* (1964); *Id.* (1968); *Id.* (1972); WASH. SECRETARY OF STATE, ABSTRACT OF VOTES PRIMARY AND GENERAL ELECTIONS 1 (1976); *Id.* (1980).

73. For general elections held in 1964, 1968, 1972, and 1976, Oregon had 80.75% voter turnout. ORE. SECRETARY OF STATE, OFFICIAL ABSTRACT OF VOTES PRIMARY ELECTION at X (1980). For the same period, Washington had a voter turnout of 78.49%. WASH. SECRETARY OF STATE, ABSTRACT OF VOTES PRIMARY ELECTION (1964); *Id.* (1968) (inside

then, that the argument asserting that the blanket primary allows and encourages the broadest possible participation in the primary election,[74] is simply false.

What factors account for low voter turnout in the Washington blanket primary? We believe that low voter turnout is caused in large part by the continued decline of party efficacy in Washington as a direct result of the blanket primary, where parties are not free to associate effectively to choose their own candidates for office. Without party efficacy there can be no strong party identity and it is clear that less party identity means less participation. As Austin Ranney, a noted party scholar, suggests, "the more partisan they are, the more likely they are to vote."[75] According to Ranney, one of the major reasons people vote less in primary elections than in general elections is the absence of *interparty* competition.[76] By the same reasoning, a major reason for low voter turnout in *blanket* primaries, as compared with other primary forms, is the absence of genuine *intraparty* competition.

If every voter has the opportunity to vote in the primary elections of both Republican and Democratic parties, then the concept of party membership is meaningless.[77] If the concept of party membership, however loosely defined becomes meaningless, so too, must the meaningfulness of parties themselves be cast in serious doubt. This would seem to militate against efforts to preserve the democratic process.

The viability of parties is crucial to the proper functioning of our political processes. Our democratic system depends on the electoral process as its cornerstone. Political parties are the best vehicles in any democratic society for the aggregation of interests, promotion of voter turnout, clarification of political issues, and enhancement of candidate identification.[78] Even so, the blanket primary might be acceptable if "voter freedom" was able to substitute parallel functions or take over existing party functions, without which our democratic system would be in

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front cover); *Id.* (1972) (inside front cover); WASH. SECRETARY OF STATE, ABSTRACT OF VOTES PRIMARY AND GENERAL ELECTION 11 (1976).

74. Heavey v. Chapman, 93 Wash. 2d 700, 705, 611 P.2d 1256, 1259 (1980).

75. A. RANNEY, *supra* note 13, at 52.

76. *Id.* at 128.

77. *Id.* at 164.

78. For a discussion of the role played by parties see generally E. SCHATTSCHNEIDER, *supra* note 12.

jeopardy. Given the nature of the so-called independent voter in America, we cannot expect to find such functions carried out by anyone but parties. It is ironic that no democratic country in the world gives as much importance to the independent voter and yet almost no democratic country surpasses us in low voter turnout.[79]

The blanket primary system then, discourages rather than encourages voter participation; it is detrimental to party efficacy but creates no substitute for party functions. It should thus be judged to destroy rather than preserve the democratic process. The compelling state interest in preserving the democratic process is best served by allowing for efficacious party association.

Another argument suggests the state has a compelling interest in blanket primaries because closed primaries exclude independent voters. Technically, of course, this is true. If one registers as an independent, in closed primary states one may not vote in a party's primary. But this technical exclusion need not be thought of as a disenfranchisement of a class of voters.

The Supreme Court has distinguished between the abridgement of the right to vote, *disenfranchisement,* and a mere imposition of certain contingency requirements on the right to vote.[80] In *Rosario,* the Court described the New York laws concerning enrollment deadlines as merely *conditioning* the right to vote rather than disenfranchising any particular class.[81] The Court went on to say: "[I]f their plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment."[82] The question concerning the independent voter in closed primary states is whether technical exclusion of a certain class of voters equates with disenfranchisement. The condition or status of being independent is assumed by the voter by his own free choice. It does not, therefore, unconstitutionally discriminate against or disenfranchise any person. If the law relating to party primary elections prescribes beforehand the exclusion of anyone *choosing* to register as an independent, then each voter who so chooses does so with full knowledge that the choice includes not voting in the primary election. Independents are excluded from

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79. "It is claimed that American voting turnout exceeds that of only one other democracy—Botswana." W. CROTTY & G. JACOBSON, *supra* note 70, at 5.

80. 410 U.S. 752 (1973).

81. *Id.* at 758, 762.

82. *Id.* at 758.

voting just as anyone will be if he should choose not to register at all. Since party primary elections are for the sole purpose of selecting party nominees this does not seem a burdensome condition on the individual. Yet it certainly preserves party rights, efficacy, and autonomy.

Arguments stressing the rights of the individual to have an effective vote in the primary election simply fail to accurately account for the nature of the American political process.[83] In our system, the voter is effective only when he associates with others for the purpose of pooling votes, a fact which led to the formation of political parties in the United States. Additionally, in our system where parties are the cornerstone of the electoral process, the individual's effectiveness is contingent on the effectiveness of his party.[84] The blanket primary, allowing crossover voting, erodes party effectiveness. This, in turn, weakens the effectiveness of the individual voter. Stressing the individual voter's free choice among all candidates is viable only in an electoral process where individuals do not pool votes to win elections. Since this is not the case in the United States, these arguments favoring the blanket primary lack relevance to political reality.

A final argument favoring the blanket primary system is that it allows each voter to keep his party identification, if any, secret.[85] Proponents of this argument state that maintaining the secrecy of party identification is merely an extension of the secret ballot, and is necessary to prevent employers or others from pressuring the individual.[86]

Though we believe that pressures concerning party identification may be more imagined than real in the present day, there is, nonetheless, the possibility of negative consequences. Even conceding that the state has an interest in protecting the secrecy of party identification, there are ways of accomplishing this that do not permit crossover voting. Public disclosure of party identification does not necessarily follow from closed primary systems. Certainly whatever difficulties a state may experience in trying to incorporate party identification secrecy into closed primary election laws pales in comparison to the considerable burden the

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83. *See,* Brief of Amicus Curiae at 6, (Aronson) Heavey v. Chapman, 93 Wash. 2d 700, 611 P.2d 1256 (1980); Comment, *supra* note 66, at 276-77.

84. *See supra* text accompanying notes 46-55.

85. Heavey v. Chapman, 93 Wash. 2d 700, 705, 611 P.2d 1256, 1259 (1980).

86. Comment, *supra* note 66, at 279.

blanket primary system places on parties' associational rights. Since there are other means available for its attainment, the secrecy argument alone cannot support the argument that the state has a compelling interest in the blanket primary.

The compelling state interest arguments advanced in favor of the blanket primary system have been shown to rely on a misunderstanding of the actual workings of our democratic process. The blanket primary both discourages voter participation and burdens the associational rights of individuals and parties. As such it is destructive of, rather than preservative of, the democratic process.

V. Conclusion

In the final analysis, the issue raised by *Heavey v. Chapman* is whether preservation of the integrity of intraparty politics promotes or hinders the democratic process. While the law dictates the form such controversies must take in a legal forum, political wisdom must be the controlling factor in their final disposition. Political parties are vital elements of the democratic process, but political scientists have noted their slow decay. State action contributing to this decay is certainly contrary to the best interests of the parties and consequently to the best interest of the democratic process. The right to associate for political purposes provides the parties with a strong constitutional instrument to fight well-meaning but misguided state action that furthers party decay. But the parties can be successful with their associational rights claims only if courts are aware of the importance of party autonomy for American democracy. We have argued that the blanket primary system is destructive of party autonomy; the blanket primary not only leads to the breakdown of intraparty politics, it also indirectly inhibits participation in the electoral process. Thus it would be in keeping with the integrity of the democratic process for the courts to uphold party constitutional challenges to state blanket primary systems.