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# Vying to be King of the Jungle: Where Top-Two Primaries Fall Short

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VYING TO BE KING OF THE JUNGLE: WHERE OPEN PRIMARIES FALL SHORT

*Taylor Larson* \* & *Joshua A. Duden* \*\*

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INTRODUCTION

Since their indoctrination into American politics during the Progressive Era,<sup>1</sup> primary elections have served as a filter for candidates to enter the general election.<sup>2</sup> Primaries are predominantly party functions:

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<sup>1</sup> Steven Levitsky & Daniel Ziblatt, *How a Democracy Dies*, NEW REPUBLIC (Dec. 7, 2017), <https://newrepublic.com/article/145916/democracy-dies-donald-trump-contempt-for-american-political-institutions>.

<sup>2</sup> See Seth Masket, *What's the Point of Primaries?*, PAC. STANDARD (May 4, 2015), <https://psmag.com/news/whats-the-point-of-primaries>. This, however, is not to say general elections do not serve a similar purpose: elections, in general:

although the process varies from state to state and is regulated by individual state legislatures,<sup>3</sup> primary elections allow voters of a particular party to nominate the candidate they think best represents them against other parties in the general election.<sup>4</sup> As the United States (U.S.) population has made hard “left” and “right” turns in political ideology, from the creation of democratic

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[F]unction as safety valves. . . . Herbert Hoover and the Republicans failed to respond to the crushing weight of the Great Depression, so the electorate brought a new president and a new party to power. Ronald Reagan was propelled to office to restore America’s standing in the world. Small-scale adjustments happen in most elections, and occasionally so-called realignments dramatically change the policy agenda for a generation.

Daniel M. Shea, *Our Addiction to Elections is Killing American Democracy*, NATION (Apr. 12, 2017), <https://www.thenation.com/article/our-addiction-to-elections-is-killing-our-democracy/>.

<sup>3</sup> *State Primary Election Types*, NAT’L CONF. ST. LEGISLATURES (June 26, 2018), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx>; *but see generally* John R. Labbe, *Louisiana’s Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721 (Winter 2002). Standard primary elections come in three categories: open, closed, and blanket. *Id.* at 734. The National Conference of State Legislatures (NCSL) discusses each type in depth, including hybrids and combinations of types and lists which states participate in each. *See State Primary Election Types, supra*. For example, Iowa is considered to participate in a “partially open” primary: “Iowa asks voters to choose a party on the state voter registration form, yet it allows a primary voter to publicly change party affiliation for purposes of voting on primary Election Day.” *Id.* John Labbe mentions, however, limits “on a state’s ability to regulate a political party’s nomination process.” Labbe, *supra* at 722. Namely, he discusses the freedom of association in the First Amendment, applied to the states through the Fourteenth Amendment. *Id.* This Article also discusses blanket primaries, particularly with concern to primary systems in place in California and Washington prior to the enactment of their most recent top-two systems. *See generally id.*

In a blanket primary system, voters are not required to affiliate with a political party and may vote for any candidate on the ballot. The candidate from each political party who receives the most votes in the primary advances to the general election. A blanket primary is sometimes confused with an open primary in which voters may pick candidates regardless of their own party registration, but may only choose among candidates from a single party of the voter’s choice.

*Blanket Primary*, TAEGAN GODDARD’S POL. DICTIONARY, <https://politicaldictionary.com/words/blanket-primary/> (last visited, Feb. 9, 2019). It is the authors’ opinion that while blanket (similar to top two) and open primaries differ, all are the wrong options for national primary reform based on factors discussed later in this Article. Labbe, *supra* at 753. “Open” throughout this Article can be assumed to refer to any system that is not traditionally closed.

<sup>4</sup> Labbe, *supra* note 3 (“The chief function of political parties in the United States is the selection of nominees for public office. Through the nomination process, political parties select candidates the party will support in general elections.”).

socialists<sup>5</sup> to the modern Tea Party voters,<sup>6</sup> American political scientists question “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*.”<sup>7</sup>

To combat partisan politics, Washington and California grappled with election reform, especially reform to their own primary systems.<sup>8</sup> They did so in the early 2000s,<sup>9</sup> following the argument “that all voters should be able to participate in primary elections. . . . everyone should be able to participate in the nomination of candidates, even for parties to which they hold no allegiance.”<sup>10</sup> These states moved to a top-two version of an open primary, later donned the “Jungle Primary,” in which all candidates would face off in one primary election.<sup>11</sup> The first and second place primary winners, Republican and Democrat (two Republicans or two Democrats),<sup>12</sup> would move on to the general election, regardless if there was party balance.<sup>13</sup>

Today, as frustration with polarization reaches lawmakers, some politicians even advocate for an overhaul of states’ primary systems similar

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<sup>5</sup> See Meagan Day, *Democratic Socialism, Explained by a Democratic Socialist*, VOX (Aug. 1, 2018, 12:50 PM), <https://www.vox.com/first-person/2018/8/1/17637028/bernie-sanders-alexandria-ocasio-cortez-cynthia-nixon-democratic-socialism-jacobin-dsa>.

<sup>6</sup> See *About Us*, TEA PARTY (last visited Feb. 9, 2019), <https://www.teaparty.org/about-us/>.

<sup>7</sup> Chenwei Zhang, Note, *Towards a More Perfect Election: Improving the Top-Two Primary for Congressional and State Races*, 73 OHIO ST. L.J. 615, 617 (2012) (emphasis added). Eugene Stearns, a Miami attorney, expressed a similar opinion in January 2018 in a *Sun Sentinel* opinion piece advocating for a top-two primary system in Florida based on its supposed results in California: “A friend in California told me the most significant difference is how elected officials behave. In Florida, it would make it much harder for the NRA to pass the utterly extreme laws the Republicans are forced to stomach while pretending they agree.” Sun Sentinel Editorial Board, *‘Top Two’ Election Choices Better than None*, SUN SENTINEL (Jan. 31, 2018, 5:45 PM), <https://www.sun-sentinel.com/opinion/editorials/fl-op-editorial-top-two-primary-election-20180131-story.html>. There is proof, however, discussed later in this Article, that a change to open primary elections would not produce the median result for which they were intended. *Id.*

<sup>8</sup> Zhang, *supra* note 7.

<sup>9</sup> *Id.*

<sup>10</sup> Masket, *supra* note 2.

<sup>11</sup> Adam Nagourney, *Here’s How California’s ‘Jungle Primary’ System Works*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/us/california-primary-election-rules-system.html>.

<sup>12</sup> Libertarian, Green, no-party, or third-party candidates are also eligible to win in a top-two primary, though it is more unlikely based on system constraints. As such, Republican and Democratic candidates are simply mentioned as the most likely to succeed under this system.

<sup>13</sup> Nagourney, *supra* note 11.

to the change in California.<sup>14</sup> Senator Chuck Schumer, a Democrat from New York and current Minority Leader of the United States Senate, explained his support of jungle primaries in a 2014 *New York Times* op-ed, which stated:

From 10,000 feet, the structure of our electorate looks to be healthy, with perhaps a third of the potential voters who are left-leaning Democrats, a third who are right-leaning Republicans and a third who are independents in the middle. But primaries poison the health of that system and warp its natural balance, because the vast majority of Americans don't typically vote in primaries. Instead, it is the "third of the third" most to the right or most to the left who come out to vote — the 10 percent at each of the two extremes of the political spectrum. Making things worse, in most states, laws prohibit independents — who are not registered with either party and who make up a growing proportion of the electorate — from voting in primaries at all.<sup>15</sup>

Schumer specifically advocated for an open, top-two primary system nationwide.<sup>16</sup> He wrote that "[w]e need a national movement to adopt the 'top-two' primary . . . in which all voters, regardless of party registration, can vote and the top two vote-getters, regardless of party, then enter a runoff."<sup>17</sup> He goes on to say that "[t]his would prevent a hard-right or hard-left candidate from gaining office with the support of just a sliver of the voters of the vastly diminished primary electorate; to finish in the top two, candidates from either party would have to reach out to the broad middle."<sup>18</sup>

There are several issues, however, that arise with usage of open primaries, and questions that beg to be answered from the implementation of top-two systems in a few liberal leaning states. After analyzing top-two systems as they exist in Washington and California, this Article addresses open primary systems legally, summarizes cases that challenge them, and

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<sup>14</sup> See, e.g., *Some Lawmakers Want to Open Primaries to Independent Voters*, AP (May 22, 2018), <https://www.apnews.com/0f790a17f46d43fab11137e73503691c> (citing state lawmakers in Pennsylvania); Jeff Stein, *Bernie Sanders Says Democrats Should Get Rid of Closed Primaries. Is He Right?*, VOX (Apr. 28, 2016, 9:50 AM), <https://www.vox.com/2016/4/28/11469468/open-primaries-closed-primaries-sanders>.

<sup>15</sup> Charles E. Schumer, Opinion, *End Partisan Primaries, Save America*, N.Y. TIMES (July 21, 2014), <https://www.nytimes.com/2014/07/22/opinion/charles-schumer-adopt-the-open-primary.html>.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

applies their analyses along with the First Amendment's freedom of association to open systems that have yet to be challenged. Further, this Article compares current top-two primary implementation and its successes, pitfalls, and overall goals. Then, to the possible performance of an open primary in states, like Iowa, where the standard closed primary is working as intended.

Overall, this article advocates against a national open or top-two primary system, both from a practical and legal standpoint. Not only do open primary systems fail to create the moderacy for which they were intended, but such systems run afoul of a primary's predominant purpose as a party function and also impede on state parties' First Amendment right of association. While the open primary system may be, albeit arguably, working in politically homogeneous states like California, a primary election overhaul in states like Iowa or Colorado may mean sacrificing an already successful closed system at the hands of more gridlock.

#### I. THE TOP-TWO SYSTEM IN THE UNITED STATES

While open primary systems have support from some in Congress,<sup>19</sup> only two states (Washington and California) use a true top-two system for partisan elected positions at the federal level.<sup>20</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *State Primary Election Types*, *supra* note 3. Louisiana and Nebraska are also listed as using top-two primaries but with variations. *Id.* Nebraska, according to the NCSL, uses top-two for nonpartisan legislative races only. *Id.* Louisiana's system, after further research, wholly replaces a primary system with a general election: "all candidates appear on a single ballot. All registered voters may participate. If a candidate does not receive 50% of the vote there is a runoff election between the top two vote getters." *Primary Elections State by State*, OPEN PRIMARIES, [https://www.openprimaries.org/states\\_louisiana](https://www.openprimaries.org/states_louisiana) (last visited Feb. 9, 2019). The NCSL also provides a list of a host of other states that use a traditional open primary: Alabama, Arkansas, Georgia, Hawaii, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, South Carolina, Texas, Vermont, Virginia, and Wisconsin. *State Primary Election Types*, *supra* note 3.

In an open primary, voters may choose privately in which primary to vote. In other words, voters may choose which party's ballot to vote, but this decision is private and does not register the voter with that party. This permits a voter to cast a vote across party lines for the primary election.

*Id.* Nebraska is not listed among the federal top-two primary election systems, which utilizes a top-two system for its nonpartisan state legislative races but subscribes to a closed primary system for its federal and remaining statewide elections. *Primary Elections State by State*, *supra*.

### A. *Washington*

After an adverse ruling from the United States Court of Appeals for the Ninth Circuit on the state's use of a blanket primary system,<sup>21</sup> Washington implemented a top-two system in 2004.<sup>22</sup> Known as Initiative 872, the top-two primary system passed as an "initiative to the people,"<sup>23</sup> or a ballot measure proposed directly by Washington citizens, rather than the legislature.<sup>24</sup> Initiative 872 was sponsored by Washington State Grange, a "non-profit, non-partisan organization dedicated to improving the quality of life of Washington's residents through the spirit of community service and legislative action."<sup>25</sup> Washington State Grange is favored by nearly 60% of voters in the state.<sup>26</sup> Initiative 872 was later reviewed by the Supreme Court of the United States and upheld in 2008.<sup>27</sup>

### B. *California*

In 1996, California voters adopted Proposition 198 to create the aforementioned blanket primary system.<sup>28</sup> After it was declared

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<sup>21</sup> See generally, *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198 (9th Cir. 2003).

<sup>22</sup> See Li Zhou, *Washington Has a Top-Two Primary. Here's How it Works.*, VOX (Aug. 7, 2018, 7:30 AM), <https://www.vox.com/2018/8/7/17649564/washington-primary-results>. According to an opinion piece, the move was fueled by independent Washington state voters who were "miffed" and the judicial branch's dismissal of the blanket primary. *Washington State Beat California to Top-Two Primary*, HERALDNET (June 12, 2018, 1:30 AM), <https://www.heraldnet.com/opinion/washington-state-beat-california-to-top-two-primary/>. "They enjoyed being able to vote for candidates of either party if they felt they were best for the individual offices." *Id.*

<sup>23</sup> See *Index to Initiative and Referendum History and Statistics*, SEC'Y ST., <https://www.sos.wa.gov/elections/initiatives/statistics.aspx> (last visited Feb. 9, 2019).

<sup>24</sup> *Frequently Asked Questions About Circulating Initiative and Referendum Petitions*, SEC'Y ST., <https://www.sos.wa.gov/elections/initiatives/faq.aspx> (last visited Feb. 9, 2019). The top of the website reads:

The Washington State Constitution reserves to the people the right to approve or reject certain state laws through the process of initiative or referendum. A registered voter, or group of voters, desiring to qualify an initiative or referendum for the ballot must gather signatures on petitions in order to do so.

<sup>25</sup> WASH. ST. GRANGE, <http://www.wa-grange.com/> (last visited Feb. 9, 2019).

<sup>26</sup> See *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 447 (2008).

<sup>27</sup> See *The Top Two Primary*, Initiative 872, WASH. SEC'Y STA. (last accessed Mar. 28, 2019), <https://perma.cc/7W4F-5WVG/>.

<sup>28</sup> *Id.*

unconstitutional by the U.S. Supreme Court in 2000,<sup>29</sup> Californians again attempted reform in 2010 with Proposition 14—the ballot measure which created the jungle primary.<sup>30</sup> Supporters of Proposition 14 cited polarization and a lack of appeal to moderation, which created a backlog in the California legislature.<sup>31</sup> This backlog delayed the vote on the state’s budget by nearly 100 days.<sup>32</sup> Proponents sent lawmakers a clear message: this was an effort to create more moderate candidates, pass more moderate legislation, and get more work done.<sup>33</sup>

## II. TOP-TWO CONSTITUTIONALITY: EXAMINING THE FREEDOM OF ASSOCIATION

On the outskirts of election reform, especially any reform to state primaries, lies the Constitution—particularly the First and Fourteenth Amendments. To protect the sanctity of the closed primary, different kinds of open primaries and registration systems have been challenged in court by the major political parties in the U.S. using these Amendments.<sup>34</sup> Both plaintiffs and political parties rely on the judicial branch to: balance their rights to nominate party candidates, protect the rights of voters to participate in their democracy, and preserve the rights of states to regulate the electoral process altogether:

The rationale generally employed by courts evaluating the constitutionality of restrictions imposed by state statutes on party autonomy has involved a balancing of the state’s interest in imposing the restriction against the party’s interest in being free from the restriction. The state certainly has an interest in

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<sup>29</sup> Petition for Writ of Certiorari, *California Democratic Party v. Jones*, 1999 WL 33611417 (U.S.); see Sinclair, J. Andrew, *Winning from the Center: Frank Bigelow and California’s Nonpartisan Primary*, 7 CAL. J. OF POL. & POL’Y 1 (2015).

<sup>30</sup> Sinclair, *supra* note 29.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; Nagourney, *supra* note 11 (“But critics-- including Arnold Schwarzenegger, who was the Republican governor at the time-- argued that the system was producing ideologically extreme candidates who were forced to appeal to the most fervent wings of their party, and that was leading to gridlock instead of governance.”).

<sup>33</sup> Jesse McKinley, *Calif. Voting Change Could Signal Big Political Shift*, N.Y. TIMES (June 9, 2010), <https://www.nytimes.com/2010/06/10/us/politics/10prop.html>. (“That no one actually knows the real effect of Proposition 14 will be seems almost beside the point to frustrated voters. What mattered, supporters said, is that something fundamental about politics-- anything fundamental-- had changed.”).

<sup>34</sup> See, e.g., *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 446 (2008); *California Democratic Party v. Jones*, 530 U.S. 567 (2000).



promoting the welfare of its citizens by preserving the integrity of its electoral process. . . . At the same time, the political party has an interest in seeing that its members are free to associate and nominate political candidates without interference . . . .<sup>35</sup>

What remains central to these cases, no matter their outcome, is the discussion of the First Amendment right of association, especially in relation to political parties and individual voters:

[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. And, though freedom of belief is central, [t]he First Amendment protects political association as well as political expression. There can no longer be any doubt that freedom to association with others for the common advancement of political beliefs and ideas is a form of “orderly group activity” protected by the First and Fourteenth Amendments. The right to associate with the political party of one’s choice is an integral part of this basic constitutional freedom.<sup>36</sup>

The following cases and their discussion of the First Amendment, along with their holdings, are integral to the way modern courts would view any national primary reform, including reform to a more open system.<sup>37</sup>

A. *Tashjian v. Republican Party*

In *Tashjian v. Republican Party*, Connecticut Republicans adopted a party rule that allowed independent voters to vote in their primaries.<sup>38</sup> Unlike later precedent, the party supported allowing independent voters the opportunity to help choose their candidate.<sup>39</sup> “Motivated in part by the

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<sup>35</sup> Charles G. Geyh, Note, “*It’s My Party and I’ll Cry if I Want To*”: *State Intrusions Upon the Associational Freedoms of Political Parties—Democratic Party of the United States v. Wisconsin Ex Rel. La Follette*, 1983 WIS. L. REV. 211, 219–20 (1983) (“On those occasions when a dispute arises from a state’s attempt to regulate its elections in a manner alleged to interfere with a political party’s candidate selection process, the question for the courts becomes one of how the respective interests of party and state are to be balanced.”).

<sup>36</sup> *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>37</sup> See also *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).

<sup>38</sup> *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 210 (1986).

<sup>39</sup> *Id.* at 212.

demographic importance of independent voters in Connecticut politics,” the party adopted the rule, which provided, “any elector not enrolled as a member of a party shall be eligible to vote in primaries for nomination of [statewide and federal] candidates.”<sup>40</sup> The party and its officers later sued Julia Tashjian, Connecticut’s Secretary of State, for administration of a statute that went against their new adoption and required registration before participation in any of the state’s primaries.<sup>41</sup>

The Republican Party contended that disallowing non-registered voters to participate specifically in their primary “impermissibly burden[ed] the right of its members to determine for themselves with whom they [would] associate, and whose support they [would] seek . . . .”<sup>42</sup> The state argued, however, that the law was narrowly tailored to advance “the State’s compelling interests by ensuring the administrability of the primary system, preventing raiding, avoiding voter confusion, and protecting the responsibility of party government,” and thus should survive any burden imposed by the U.S. Constitution.<sup>43</sup> Secretary Tashjian cited “the purchase of additional voting machines, the training of additional poll workers, and potentially the printing of additional ballot materials . . . .” as evidence that the new rule would cost Connecticut too much money.<sup>44</sup>

Justice Marshall, writing for the majority, was not compelled by the state prioritizing cost savings over the party’s First Amendment freedoms:

While the State is of course entitled to take administrative and financial considerations into account in choosing whether or not to have a primary system at all, it can no more restrain the Republican Party’s freedom of association for reasons of its own administrative convenience than it could on the same ground limit the ballot access of a new major party.<sup>45</sup>

Marshall was equally unimpressed with the state’s need to prevent raiding, a crossover voting theory that speculates members of one party would vote in the opposition’s primary in order to choose their least viable candidate.<sup>46</sup> Marshall reasoned that forcing registration, which was allowed as late as the

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 210 (citing Conn. Gen. Stat. § 9-431 (1985)).

<sup>42</sup> *Id.* at 214.

<sup>43</sup> *Id.* at 217.

<sup>44</sup> *Id.* at 218.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

business day before the election, “actually *assist[ed]* a ‘raid’ by independents, which could be organized and implemented at the 11th hour.”<sup>47</sup>

Lastly, Justice Marshall addressed the state’s final interest in “protecting the integrity of the two-party system and the responsibility of party government.” According to Marshall, the state “argue[d] vigorously and at length that the closed primary system chosen by the state legislature promote[d] responsiveness by elected officials and strengthen[ed] the effectiveness of the political parties.”<sup>48</sup> Justice Marshall, however, declined to be so baited:

The relative merits of closed and open primaries have been the subject of substantial debate since the beginning of this century, and no consensus has as yet emerged. Appellant invokes a long and distinguished line of political scientists and public officials who have been supporters of the closed primary. But our role is not to decide whether the state legislature was acting wisely in enacting the closed primary system in 1955, or whether the Republican Party makes a mistake in seeking to depart from the practice of the past 30 years.<sup>49</sup>

Instead, Marshall concluded that the party should be allowed to determine “the boundaries of its own association, and of the structure which best allows it to pursue its political goals . . . .”<sup>50</sup> When reviewing the party’s protections, citing *U.S. v. Wisconsin*, Justice Marshall stated “courts may not interfere on the ground that they view a particular expression as unwise or irrational.”<sup>51</sup> In essence, courts should not interfere to protect “the integrity of the Party against the Party itself.”<sup>52</sup> After discussion, the Court concluded the administrative statute violated the party’s rights under the First and Fourteenth amendments.<sup>53</sup>

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<sup>47</sup> *Id.* at 219.

<sup>48</sup> *Id.* at 222.

<sup>49</sup> *Id.* at 222–23.

<sup>50</sup> *Id.* at 224.

<sup>51</sup> *Id.* (quoting *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 122 (1981)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 237 (“Our holding today does not establish that state regulation of primary voting qualifications may never withstand challenge by a political party or its membership. A party seeking, for example, to open its primary to all voters, including members of other parties, would raise a different combination of considerations.”).

Dissenting, Justice Scalia argued that the majority was using the First Amendment freedom of association too loosely:

It seems to me fanciful to refer to this as an interest in freedom of association between the members of the Republican Party and the putative independent voters. The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful “association” with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster. If the concept of freedom of association is extended to such casual contacts, it ceases to be of any analytic use.<sup>54</sup>

B. *California Democratic Party v. Jones*

In *California Democratic Party v. Jones*, the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party all joined to bring suit against the California Secretary of State, alleging the state’s nonpartisan blanket primary system<sup>55</sup> violated their First Amendment right to freedom of association.<sup>56</sup> The aforementioned primary system at issue, Initiative Proposition 198, provided voters’ ballots that “lists every candidate regardless of party affiliation and allows the voter to choose freely among them.”<sup>57</sup> Respondents, the California Secretary of State and Californians for an Open Primary, “rest[ed] their defense of the blanket primary upon the proposition that primaries play an integral role in citizens’ selection of public officials.”<sup>58</sup> They contended that “primaries are public rather than private proceedings, and the States may and must play a role in ensuring that they serve the public interest.”<sup>59</sup> Accordingly, respondents asserted, “Proposition 198 . . . [was] simply a rather pedestrian example of a State’s regulating its system of elections,”<sup>60</sup> which

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<sup>54</sup> *Id.* at 235 (Scalia, dissenting); see *Wisconsin*, 450 U.S. at 122 (1981).

<sup>55</sup> See *Democratic Party v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003) (“*Jones* also distinguishes the ‘nonpartisan blanket primary’ in which voters can vote for anyone on the primary ballot, and then the top vote-getters regardless of party run against each other in the general election.”); *California Democratic Party v. Jones*, 530 U.S. 567, 571 (2000).

<sup>56</sup> *Jones*, 530 U.S. at 571.

<sup>57</sup> *Id.* at 570.

<sup>58</sup> *Id.* at 572.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

California should be allowed to do, unfettered from judicial or federal scrutiny.

Justice Scalia, however, was not swayed by such an argument.<sup>61</sup> After determining that Proposition 198 was a “clear and present danger” to the right of political parties to associate because of the increased potential for sabotage and crossover voting in the opposing party’s nomination,<sup>62</sup> he held that primaries must be preserved as private party functions:

Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. Consistent with this tradition, the Court has recognized that the First Amendment protects “the freedom to join together in furtherance of common political beliefs,” which “necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only.” That is to say, a corollary of the right to associate is the right not to associate. “Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association’s being.”<sup>63</sup>

Citing *Timmons v. Twin Cities Area New Party*, Scalia reasoned that as a regulation on the freedom of association, reform to closed primaries must be viewed with strict scrutiny.<sup>64</sup> Respondents thus offered several state interests, the first two included “producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns.”<sup>65</sup> Scalia, however, quickly dismissed these interests as a

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 578. In this section, Scalia discussed “crossover voting,” where faithful members of one party would vote in the opposite primary in order to nominate a candidate they thought their nominee would beat. *Id.* at 579. For support, he cited statistics from the trial record: “[I]n one 1997 survey of California voters 37 percent of Republicans said that they planned to vote in the 1998 Democratic gubernatorial primary, and 20 percent of Democrats said they planned to vote in the 1998 Republican United States Senate primary.” *Id.* at 578.

<sup>63</sup> *Id.* at 572 (citing *Tashjian*, 479 U.S. at 214–15 (1986); *Wisconsin*, 450 U.S. at 122 (1981)).

<sup>64</sup> *Id.* at 582 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (“Regulations imposing severe burdens [on parties’ rights] must be narrowly tailored and advance a compelling state interest.”)).

<sup>65</sup> *Id.*

“stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.”<sup>66</sup>

Respondents also asserted the right to vote as their third compelling interest.<sup>67</sup> They claimed that independents and members of the minority party in certain districts “are disenfranchised [by closed primary systems] . . . because . . . they are unable to participate in what amounts to be the determinative election—the majority party’s primary . . . .”<sup>68</sup> Respondents argued “the only way to ensure [independents and members of a minority party] have an ‘effective’ vote is to force the party to open its primary to them.”<sup>69</sup> Justice Scalia explained, however, that disenfranchisement “also appear[ed] to be nothing more than reformulation of an asserted state interest,” which he had already rejected.<sup>70</sup> He wrote:

The voter’s desire to participate does not become more weighty simply because the State supports it . . . . The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon *his* freedom of association, whereas compelling party members to accept his selection of their nominee *is* a state-imposed restriction upon theirs.<sup>71</sup>

In sum, Justice Scalia stated that each interest proffered by the state was not compelling, nor was Proposition 198 narrowly tailored.<sup>72</sup> To conclude, Scalia noted, “The burden Proposition 198 places on petitioners’ rights of political association is both severe and unnecessary.”<sup>73</sup> He further wrote:

When the State seeks to regulate a political party’s nomination process as a means to shape and control political doctrine and the scope of political choice, the First Amendment gives substantial protection to the party from the manipulation. In a

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 583.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 583–84.

<sup>72</sup> *Id.* at 585.

<sup>73</sup> *Id.*

free society the State is directed by political doctrine, not the other way around.<sup>74</sup>

C. *Democratic Party of Washington v. Reed*

Consistent with *Jones*, the Ninth Circuit affirmed the right of political parties to control the administration of their primary elections in 2003.<sup>75</sup> In *Reed*, Washington's blanket primary system was deemed an unconstitutional infringement on the rights of state parties.<sup>76</sup> The challenged system was similar to that found as unconstitutional in California in 2000, but also allowed candidates to be listed with their respective party affiliations.<sup>77</sup> The Democratic Party of Washington, along with the Republican and Libertarian parties of the state, sued based on an infringement to their constitutional rights to freedom of association.<sup>78</sup>

While the State of Washington argued that implementation of a blanket primary imposed a rational burden on the parties,<sup>79</sup> the Ninth Circuit found the burden irrelevant; instead, the statute could be determined unconstitutional on its face, consistent with precedent in *Jones*.<sup>80</sup> The state argued their system was distinguishable from California's because Washington did not register voters by party, and thus "as the State's brief puts it, because of its non-partisan registration, the winners of the primary '[were] the "nominees" not of the parties but of the electorate.'"<sup>81</sup> Washington reasoned that because its registration system was nonpartisan, a blanket primary did not violate any political party's associational rights.<sup>82</sup> The court concluded, however, that Washington's system was indistinguishable from that challenged in *Jones*:

These are distinctions without a difference. That the voters do not reveal their party preferences at a government registration desk does not mean that they do not have them. The

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<sup>74</sup> *Id.* at 590 (Kennedy, concurring).

<sup>75</sup> *See* *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198, 1198 (9th Cir. 2003).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1201–02.

<sup>78</sup> *Id.* at 1201.

<sup>79</sup> *Id.* at 1203.

<sup>80</sup> *Id.* ("The Supreme Court does not set out an analytic scheme whereby the political parties submitted evidence establishing that they were burdened. Instead, *Jones* infers the burden from the face of the blanket primary statutes. We accordingly follow the same analytic approach as *Jones*.").

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

Washington scheme denies party adherents the opportunity to nominate their party's candidate free of the risk of being swamped by voters whose preference is for the other party.<sup>83</sup>

Relying on the same rationale as California in *Jones*, Washington further argued that the change to the primary system increased voter participation and reduced political corruption, which were sufficiently compelling state interests to withstand strict scrutiny. However, this argument remained unpersuasive to the court, as it was still relying on *Jones*.<sup>84</sup> The Ninth Circuit instead found the remedy to corruption and lack of moderacy was not to impose a blanket primary on the state, but to simply let voters vote for someone else.<sup>85</sup>

D. *Washington State Grant v. Washington State Republican Party*

The Supreme Court departed from its most recent precedent in *Jones* and *Reed*, however, in deciding *Washington State Grange v. Washington State Republican Party* in 2008.<sup>86</sup> Following passage of the aforementioned Initiative 872, creating the state's top-two primary, the Republican Party of Washington filed suit against county and state officials to bar its implementation—arguing that it unconstitutionally infringed on the rights of political parties to control who they endorsed and with whom they associated.<sup>87</sup> Showcasing a specific issue with Initiative 872, the Republican Party, joined again by the Democratic and Libertarian parties of the state, also argued the law interfered with the rights of the parties to choose who could utilize the party designation on the ballot, as it allowed for self-designation.<sup>88</sup>

Determining the legitimacy of Initiative 872, the Court's majority, in an opinion written by Justice Thomas, declined to consider the hypothetical impact of the Initiative on future Washington elections.<sup>89</sup> Thomas's approach

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<sup>83</sup> *Id.* at 1204.

<sup>84</sup> *Id.* at 1205–06.

<sup>85</sup> *Id.* at 1207 (“The remedy available to the Grangers and the people of the State of Washington for a party that nominates candidates carrying a message adverse to their interests is to vote for someone else, not to control whom the party's adherents select to carry their message.”).

<sup>86</sup> *See generally*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

<sup>87</sup> *Id.* at 444.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 449–50 (noting “a plaintiff can only succeed in a facial challenge by “establish[ing] that no set of circumstances exists under which the Act would be valid,” *i.e.*, that the law is



required the plaintiffs to demonstrate the law would *never* be constitutional—an impossible burden given the law had not yet taken effect.<sup>90</sup>

Ultimately, Thomas wrote of the broad power of the states to regulate the election process for state offices, and explained that this broad authority is only invalid when it violates the “specific provisions of the Constitution.”<sup>91</sup> Respondents relied heavily on *Jones* and asked the Court to reaffirm “the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party ‘select[s] a standard bearer who best represents the party’s ideologies and preferences.’”<sup>92</sup>

The parties’ flaw in comparing Washington’s Initiative 872 to California’s Proposition 14 in *Jones*, however, was that the language of the Initiative did not mention the choice of a party nominee;<sup>93</sup> instead, the Initiative sought to eliminate the importance of party affiliation altogether. According to the Court, “The essence of nomination—the choice of a party representative—does not occur under I-872. The law never refers to the candidates as nominees of any party, nor does it treat them as such.”<sup>94</sup> In fact, Justice Thomas opined that the Initiative did the opposite: “[T]he election regulations specifically provide that 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.’”<sup>95</sup> Thomas reasoned that parties could still nominate candidates outside of the state-administered primary.<sup>96</sup>

To counter, Respondents claimed that “even if the I-872 primary does not actually choose parties’ nominees, it nevertheless burdens their associational rights because voters will assume that candidates on the general

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unconstitutional in all of its applications”) (citing and implementing the rationale of *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

<sup>90</sup> *Id.* at 450 (“In determining whether a law is facially invalid, we must be careful not to go beyond the statute’s facial requirements and speculate about “hypothetical” or “imaginary” cases.”) (citing *United States v. Raines*, 372 U.S. 17 (1960) (stating “the delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined”).

<sup>91</sup> *Id.* at 451 (citing *Williams v. Rhodes*, 393 U.S. 23, 29 (1968)).

<sup>92</sup> *Id.* at 453 (citing *Jones*, 530 U.S. at 567) (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

election ballot are the nominees of their preferred parties.”<sup>97</sup> The Court again refused, however, to strike down Initiative 872 based solely on speculation.<sup>98</sup>

Agreeing with Respondents, Justices Scalia and Kennedy strongly dissented.<sup>99</sup> They wrote:

The electorate's perception of a political party's beliefs is colored by its perception of those who support the party; and a party's defining act is the selection of a candidate and advocacy of that candidate's election by conferring upon him the party's endorsement. When the state-printed ballot for the general election causes a party to be associated with candidates who may not fully (if at all) represent its views, it undermines both these vital aspects of political association.<sup>100</sup>

Scalia and Kennedy bluntly concluded that the state's intention in enacting Initiative 872 was not to convey the will of the people, but to reduce the effectiveness of the state's political parties.<sup>101</sup> They stated:

Washington seeks to reduce the effectiveness of that endorsement by allowing *any* candidate to use the ballot for drawing upon the goodwill that a party has developed, while preventing the party from using the ballot to reject the claimed association or to identify the genuine candidate of its choice. This does not merely place the ballot off limits for party building; it makes the ballot an instrument by which party building is impeded, permitting unrebutted associations that the party itself does not approve.<sup>102</sup>

Justices Scalia and Kennedy essentially argued that the law fails facially, similar to *Jones*, even without speculative outcomes from either side, as the stated purpose deviates from the actual purpose of the law—to undercut the rights of political parties, distort their message, and hijack the goodwill political parties have cultivated.<sup>103</sup>

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<sup>97</sup> *Id.* at 454.

<sup>98</sup> *Id.* at 454–55 (“There is simply no basis to presume that a well-informed electorate will interpret a candidate's party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate.”) (citing *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 13–14 (1988)).

<sup>99</sup> *Id.* at 462 (Scalia, dissenting).

<sup>100</sup> *Id.* (Scalia, dissenting).

<sup>101</sup> *Id.* (Scalia, dissenting).

<sup>102</sup> *Id.* at 464–65.

<sup>103</sup> *Id.* at 466.

### III. WHY THE U.S. DOESN'T NEED NATIONAL PRIMARY REFORM

The biggest ideological factor in favor of the creation of a nationwide jungle primary system is moderation, a phenomenon akin to Bigfoot in 2018 as polarization is on the rise.<sup>104</sup> Today, in California specifically, “top-two backers argue that a large boost in voters’ approval of the California state legislature is a direct result of lawmakers’ increased productivity, which they say is rooted in the top-two system . . . .”<sup>105</sup> They assert that the closed primary “was producing ideologically extreme candidates who were forced to appeal to the most fervent wings of their party, and that was leading to gridlock instead of governance.”<sup>106</sup> Like Washington, to combat said gridlock, Californians introduced the top-two primary in order to ensure “candidates would be forced to moderate their appeals to win a broader section of the electorate.”<sup>107</sup>

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<sup>104</sup> *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>. The unfavorable views between political parties are discussed further in the article:

For the first time in surveys dating to 1992, majorities in both parties express not just unfavorable but *very* unfavorable views of the other party. And today, sizeable shares of both Democrats and Republicans say the other parties stirs feelings of not just frustration, but fear and anger. . . . Across a number of realms, negative feelings about the opposing party are as powerful—and in many cases more powerful—as are positive feelings about one’s own party. . . . These sentiments are not just limited to views of the parties and their policy proposals; they have a personal element as well.

Eric McGhee & Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 PERSPECTIVES ON POLITICS 1053, 1054 (2017). As stated in McGhee and Shor’s article:

If primaries are an important cause of polarization, the most commonly proposed reform has been to open primaries to participation by voters outside the party faithful. With open primaries, the median of the primary electorate moves closer to the median of the general electorate, making it less likely that the preferences of each party’s base voters will determine the final outcome.

*Id.*

<sup>105</sup> Russell Berman, *This is Not a Reform. It is Terrible.*, ATLANTIC (June 1, 2018), <https://www.theatlantic.com/politics/archive/2018/06/california-top-two-jungle-primary-democrats-republicans/561689/>.

<sup>106</sup> Nagourney, *supra* note 11.

<sup>107</sup> *Id.*

Political advocates of open primaries concur; many argue moderate candidates cannot find success in closed primaries because they risk being ousted just for compromising:

Today, few elected officials value moderation, because the electorate they are responsible to is not itself moderate. They don't worry about the next general election, but they do fret mightily about offending their base and triggering a challenge in the ever-looming primary contest. To their base, any whiff of compromise becomes sedition, and legislators are, above all, rational actors, clued in to their own self-interest.<sup>108</sup>

Accordingly, because an open primary does not require a two-party race in the general election, “the resulting candidates . . . can more accurately reflect preferences of the median voter, especially in situations where one party is clearly dominant over another.”<sup>109</sup> Enthusiasts proffer that as a result, “[p]artisan 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.”<sup>110</sup> Theoretically, this premise makes sense, as the voters that turn out for primary elections are not your general election voters; instead, primary voters are “a small proportion of highly energized, ideologically driven” part of the electorate.<sup>111</sup>

Data evidence from these states, however, cannot conclusively pinpoint a reason for polarization, nor can it suggest a return to moderation.<sup>112</sup> In fact, “evidence that changing the rules can change the underlying dysfunctional dynamic of Congress is relatively weak.”<sup>113</sup> Eric McGhee,

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<sup>108</sup> Shea, *supra* note 2.

<sup>109</sup> Zhang, *supra* note 7; *see also* Zhou, *supra* note 22. As stated in Zhou’s article:

Proponents for this kind of primary argue that it more closely reflects the will of the broader electorate—unlike primaries that are limited to party membership, which tend to trend toward more extreme candidates and policy positions. Because voters have the option to evaluate candidates from both parties, more moderate options may have a better chance of advancing.

*Id.*

<sup>110</sup> Zhang, *supra* note 7.

<sup>111</sup> Schumer, *supra* note 15.

<sup>112</sup> *See generally* McGhee & Schor, *supra* note 104.

<sup>113</sup> Richard L. Hasen, *Political Dysfunction and Constitutional Change*, 61 *DRAKE L. REV.* 989, 1012 (2013). Hasen states:

research fellow at the Public Policy Institute of California, and Boris Shor, visiting assistant professor at Georgetown University, used roll call vote data to identify changes in California and Washington legislators' ideological dispositions.<sup>114</sup> The pair found that “the lion’s share of polarization” does not come from closed primaries:

The broadest studies to date of the effect of primaries on representation have been consistent with the null effects from election research: neither the competitiveness of the primary election, the extremeness of the primary electorate, nor most critically, the type of primary system, seems to have much effect on the ideology of those who are ultimately elected.<sup>115</sup>

Thus, “tinkering with . . . external rules of election [is] likely to make only modest inroads at best in the polarization and dysfunction currently afflicting our national politics.”<sup>116</sup>

While California has shown slow, moderate progress since the institution of the top-two framework according to McGhee and Shor,<sup>117</sup> after three election cycles, the jungle primary has frustrated both voters and politicians on every side of the aisle. Specifically, Democratic House Minority Leader Nancy Pelosi and Republican House Majority Leader Kevin McCarthy, renowned politicians from California’s own Congressional delegation, both “despise” the system.<sup>118</sup> Political scientists have found “[t]he electorate is still voting tribally,” treating the state as if it were part of a closed

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While some blame internal rules (as opposed to constitutional structure) for the disfunction [in Congress], others blame outside election rules such as closed primaries and partisan gerrymandering. The theory is that closed primaries and gerrymandering lead to more extreme candidates who are unwilling to compromise in Congress. . . . Eric McGhee, Seth Masket, Boris Shor, Steven Rogers, and Nolan McCarty studied variations in state primary systems over two decades and found little evidence that more open primaries produced moderation by legislators.

*Id.*

<sup>114</sup> See generally McGhee & Schor, *supra* note 104.

<sup>115</sup> *Id.* at 1056.

<sup>116</sup> Hasen, *supra* note 113.

<sup>117</sup> McGhee & Schor, *supra* note 104, at 1063.

<sup>118</sup> Berman, *supra* note 105.

primary system: “Republicans for Republicans, Democrats for Democrats.”<sup>119</sup>

Most recently, the closed system in Iowa prohibited 36% of Iowa’s voters who register as independent or no party, from being able to show up on primary day,<sup>120</sup> arguably leaving them disenfranchised. The primary disenfranchisement argument, however, begs the response; what is a primary’s central purpose? Primaries were not created to serve voters in general, as they serve, first and foremost, parties and their registered members: “If I’m not part of that party, I have no more right to decide its nominees than a Seahawks fan has to determine whether Peyton Manning plays for the Broncos next season or a Coca-Cola drinker has to decide on a new Pepsi formula.”<sup>121</sup> As a party function, many consider the inability to vote in a primary without party registration a fact of life, rather than disenfranchisement. A closed primary system ultimately “gives [voters] an incentive to register for the party, and it rewards those who commit to becoming team players.”<sup>122</sup>

Top-two systems, furthermore, pose a substantial threat to legitimate political diversity on the ballot. Politically homogenous districts and states in general that are dark red or dark blue run the risk of dividing majority party votes in so many directions during primary season that they are left with only two options from the minority party in the general election. For example, in California the top-two system could become a liability where “a trio of GOP-held districts that Hillary Clinton carried in 2016, several viable Democrats are running, raising the possibility of a splintered vote that could allow two Republicans to narrowly capture the general-election slots.”<sup>123</sup> The result of such splintering when the House of Representatives is at stake could be catastrophic for the Democratic Party, potentially allowing two Republican candidates to become the only individuals on the ballot without any showing from the dominant party in the dark blue state. A crowded campaign field in

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<sup>119</sup> George Skelton, *Give California’s Top-Two Primary Some More Time, and if It Doesn’t Get Better, Junk It*, L.A. TIMES (June 11, 2018, 12:05 AM), <http://www.latimes.com/politics/la-pol-ca-skelton-top-two-views-20180611-story.html>.

<sup>120</sup> *Editorial: Law Prohibits All Iowans from Voting in Primaries*, KCCI DES MOINES (June 2, 2018 6:14 PM), <https://www.kcci.com/article/editorial-law-prohibits-all-iowans-from-voting-in-primaries/21059522>.

<sup>121</sup> Masket, *supra* note 2.

<sup>122</sup> Stein, *supra* note 14.

<sup>123</sup> Berman, *supra* note 105.

the primary has proven disastrous for the major parties, resulting in “intraparty warfare and pleading with candidates to drop out of congressional races for the sake of the party.”<sup>124</sup>

Held constitutional for now, top-two systems call into question whether other voting systems, such as federal protections by statute or amendment, could be superior. Though enticing, in the name of protecting political association, a federalized, mandated open primary system is contrary to the standards and protections already granted by the Constitution; it is not a new law that is needed, it is a consistent interpretation of the rights of political parties to the First Amendment freedom of association.

#### CONCLUSION

National, federal, mandated open primary reform is not the answer to Congress’ polarization problem. Not only do top-two primaries pose significant constitutional issues for political parties, but like Senator Schumer and House Minority Leader Pelosi note, they do not create the moderacy for which they were intended. New legal challenges are needed in order to achieve judicial unity beyond facial challenges, all in an effort to return to the successful, clearly constitutional closed primary systems that adequately represent the two-party democratic republic of the United States. Relying on the freedom of association, political parties, under our national republic, have the right to choose their candidates. In sum, “it is of paramount importance to allow political parties to freely associate by choosing who may participate in their nomination process. . . . This means both preserving the right to include and to exclude.”<sup>125</sup>

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<sup>124</sup> *Id.*

<sup>125</sup> Jamie Gregorian, *How Primary Election Laws Adversely Affect the Associational Rights of Political Parties in the Commonwealth of Virginia and How to Fix Them*, 18 GEO. MASON. U. CIV. RTS. L.J. 135, 164 (2007).