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Hugh D. Spitzer

University of Washington School of Law

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BE CAREFUL WHAT YOU WISH FOR: PRIVATE POLITICAL PARTIES, PUBLIC PRIMARIES, AND STATE CONSTITUTIONAL RESTRICTIONS

Hugh D. Spitzer*

Abstract: Political parties always disliked the Progressive Era changes that pulled the entire electorate into nominating candidates. Why, after all, should non-party members participate in the affairs and choices of private organizations? Over the course of a century, Democrats, Republicans, and minor parties repeatedly mounted lawsuits to attack new primary laws, and they eventually prevailed on a key constitutional issue: the First Amendment right of association. But when political actors access the courts for strategic purposes, they can get caught in the vagaries of history and public attitudes, with outcomes they might not like. This Essay focuses on the history of Washington State’s “direct primary” and “blanket primary” systems, the repeated lawsuits challenging them, and the freedom of association doctrine that propelled the blanket primary’s 2004 demise. It then recounts the blowback from Washington voters, who enacted a “top two” primary system that sidelined the political parties by sending the two highest vote-getters to the general election regardless of political affiliation. It asserts that remaining aspects of Washington’s election system might violate the State’s own constitution, and that things could get worse than ever for the parties, perhaps disrupting precinct officer elections and even the state’s presidential primary. How did the political parties wind up at odds with their own voters, with an outcome opposite to what they intended? This Essay suggests that the answer lies in a web of conflicts: between litigation and political strategies; between the federal and state constitutions; and between the First Amendment’s protections of freedom of association, the late nineteenth century populist constitutional ban on public assistance to private entities, and the early twentieth century progressive goal of forcing private political parties to open their processes to the voting public. It concludes that long-term litigation strategies to address political issues can fail to achieve their objectives when those lawsuits overlook historical policy choices and ignore popular sentiments entrenched in the national and state constitutions.

* Professor of Law, University of Washington. The author would like to thank Jeffrey T. Even for his helpful comments on an earlier draft. While in private practice, the author advised Washington State Governor Gary Locke in connection with the veto of legislation discussed in notes 81–83, *infra*.

Carefully designed political and litigation strategies can have unintended consequences. Litigation decisions made for tactical and philosophical reasons can unexpectedly crash into competing legal doctrines, political paradigms, and historical forces, with unexpected outcomes.

This Essay is about the unintended consequences of the American political parties' successful legal attack on the "blanket primary" nominating system. The analysis focuses on Washington State, where for more than a century, Democrats, Republicans, and minor parties mounted lawsuits to dismantle Progressive Era nominations processes on the grounds that parties are private associations protected by the federal Constitution from governmental interference. The Washington political parties were not alone in their efforts, which paralleled developments in other states, most importantly in California. But in Washington, the litigation strategy ultimately led to an outcome that was worse from the parties' standpoint: a wide-open "top two" primary system that further diminished party importance. In addition, it appears that evolving federal court rulings on the constitutionally protected private character of political parties could easily lead to another unforeseen consequence: a conflict with the Washington State Constitution's ban on gifts of public funds to private persons.¹ Simply put, courts hold that in the First Amendment context, political parties are private organizations, so they are shielded from most types of governmental interference in candidate nominations. However, in Washington, this may produce an unintended result: using publicly funded elections to choose party precinct committee officers, and perhaps presidential primary slates, could violate the state constitution.

Political parties never liked Progressive Era changes to the candidate nominating process that reduced party independence. They repeatedly attacked the new primary laws in court over the course of a century, initially without much success. The parties' institutional stance never changed, and as First Amendment freedom-of-association doctrines evolved, the parties eventually prevailed on key constitutional issues. Interestingly, these legal challenges put the political organizations at odds with the voters whose support they sought—voters who doggedly backed primary mechanisms that allowed them to choose whomever they liked, regardless of party. This story highlights the tension between federal constitutional doctrines and state-level policy choices, and additionally, the tension between competing paradigms of political

1. WASH. CONST. art. VIII, §§ 5, 7.

institutions and various major policy choices made by voters over time. In Washington State, there is observable interplay between the First Amendment's protection for freedom of association, the late nineteenth century populist constitutional ban on public assistance to private entities, and the twentieth century progressive goal of forcing private political parties to open their processes to the voting public.

Part I describes the rise and fall of Washington's "direct primary" and "blanket primary" systems, the repeated lawsuits challenging them, and the freedom of association doctrines that propelled the blanket primary's 2004 demise. It describes how Washington voters responded by enacting a "top two" primary system that was eventually approved by the United States Supreme Court. Part II focuses on the Washington State Constitution, reviewing the populist prohibition on spending public money for private purposes. Part III details how Washington statutes provide private political parties with publicly funded processes to select presidential candidates and to select precinct committee officers, the lowest level political party officials. But this public funding for private purposes might run afoul of Washington's state constitution. Finally, Part IV analyzes these phenomena in terms of conflicts between different political philosophies and paradigms over time. These conflicts manifest in evolving legal doctrines. The irony is that when political actors access the courts for strategic purposes, they can get caught in twists and turns of history that they had not foreseen, with results they might not like.

I. DIRECT, BLANKET, AND TOP TWO PRIMARIES, OH MY!

Nominating processes pick candidates, and voters choose elected leaders from among those candidates. In a democracy, nominating systems drive the final choices available to the public. The role of parties in American nominating processes has evolved over time and among the states, but that evolution has always reflected a tension between competing interests of party activists, elected officials, and the general electorate.² Until the early twentieth century, political party nominations in the United States were typically made by party members (and only by

2. MALCOLM E. JEWELL & SARAH M. MOREHOUSE, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* 100–03 (4th ed. 2001).

party members) in local, state, and national conventions.³ In the Jacksonian Era, the use of nominating conventions was seen as a democratic development encouraging broader participation in political parties.⁴ But by the end of the nineteenth century, parties and their nominating processes were widely viewed as undemocratic and under the control of corrupt party bosses.⁵ The University of Chicago political scientist Charles Merriam wrote in 1923 that “abuses of the delegate system had produced widespread dissatisfaction and a general feeling that the nominating conventions did not reasonably reflect the will of the party.”⁶ The progressives “viewed parties . . . as an impediment to democracy.”⁷

Public dissatisfaction with closely held control of candidacies led to political revolution with the widespread adoption of the “direct primary.” In direct primaries, voters (typically voters identifying with a specific party) themselves nominated the candidates who would then stand for office in a general election. By 1923, at least forty-five states had adopted the direct primary system.⁸ In the words of the progressive Republican Senator George W. Norris of Nebraska, the “direct primary is simply a method by which the will of the people can be ascertained in the selection of those who shall make and administer the laws under which all of the people must live.”⁹ The rapid adoption of direct primaries in the early twentieth century reflected the progressive movement’s emphasis on installing an honest and transparent government, strengthening democratic institutions, and reducing the power of both the traditional party leadership and industrial and other special interest groups.¹⁰ For example, in Washington State,

3. Kaori Shoji, *Primaries, State and Local Elections*, in 2 KENNETH F. WARREN, *ENCYCLOPEDIA OF U.S. CAMPAIGNS, ELECTIONS, AND ELECTORAL BEHAVIOR* 671–72 (Kenneth F. Warren ed., 2008).

4. THE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 14 (Michael Kazin et al. eds., 2010).

5. R. Laurence Moore, *Directions of Thought in Progressive America*, in THE PROGRESSIVE ERA 35, 48 (Lewis L. Gould ed., 1974); ERNST CHRISTOPHER MEYER, *NOMINATING SYSTEMS: DIRECT PRIMARIES VERSUS CONVENTIONS IN THE UNITED STATES* 40 (1902).

6. Charles S. Merriam, *Nominating Systems*, in THE ANNALS: THE DIRECT PRIMARY 1 (Clyde L. King ed., 1923).

7. Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 785 (2000).

8. Charles Kettleborough, *Direct Primaries*, in THE ANNALS, *supra* note 6, at 11.

9. George W. Norris, *Why I Believe in the Direct Primary*, in THE ANNALS, *supra* note 6, at 22.

10. WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 74–76 (1st ed. 1970). One study reviews the debate among political scientists on the extent of anti-party sentiment in causing the shift to direct primaries in the early twentieth century.

progressivism also brought the initiative, referendum, and recall—constitutional changes meant to reinforce the democratic power of the people at large.¹¹ Other reforms were brought about by a coalition of Washington State progressives from both major parties.¹² These included nonpartisan judicial elections in 1907–09,¹³ women’s suffrage in 1910,¹⁴ workers’ compensation in 1911,¹⁵ and approval of a federal constitutional amendment establishing popular election of U.S. Senators in 1913.¹⁶

States enacting primaries in the early twentieth century differed in their approaches. Some jurisdictions opted for “open primaries,” in which most voters could participate regardless of formal party membership, while other primaries were “closed,” requiring party registration or even membership in a political party club.¹⁷ For the better

Based on empirical data, that study concludes that Merriam’s contemporary depiction of that phenomenon appears to have been accurate. See Eric Lawrence, Todd Donovan & Shaun Bowler, *The Adoption of Direct Primaries in the United States*, 19 PARTY POL. 3, 15 (2011). Whatever the origins of the direct primary, the impacts were significant, opening up new opportunities for aspiring candidates and groups within the political parties. See V.O. Key, *The Direct Primary and Party Structure: A Study of State Legislative Nominations*, 48 AM. POL. SCI. REV. 1, 2 (1954). General histories and background on America’s progressive movement are included in RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); NANCY COHEN, *THE RECONSTRUCTION OF AMERICAN LIBERALISM, 1865-1914* (2002); and Moore, *supra* note 5.

11. See Claudius Johnson, *The Adoption of the Initiative and Referendum in Washington*, 35 PAC. NW. Q. 296 (1944). In Washington State’s initiative system, a petition signed by 8% of the registered voters may place proposed legislation directly on the ballot, or the proposed legislation may be referred to the legislature either to enact that legislation or send it to the electorate with or without an alternative. WASH. CONST. art. II, § 1(a). With a referendum, the signatures of 4% of the voters can force a statute passed by the legislature to be placed before the electorate. *Id.* § 1(b). The recall permits a petition process to force a special election to oust any nonjudicial elected official out of office mid-term. *Id.* art. I, § 33.

12. Although Washington’s politics was dominated by the Republican Party in the early twentieth century, progressive legislators from both parties collaborated in enacting laws associated with the progressive movement. William T. Kerr, Jr., *The Progressives of Washington, 1910–12*, 55 PAC. NW. Q. 16, 18 (1964).

13. Nomination of Candidates for Public Office, ch. 209, 1907 Wash. Sess. Laws 457. A general discussion of progressive era legislation in Washington State can be found at Hugh Spitzer, *Pivoting to Progressivism: Justice Stephen J. Chadwick, the Washington Supreme Court, and Change in Early 20th Century Judicial Reasoning and Rhetoric*, 104 PAC. NW. Q. 107, 108 (2013).

14. Act of Feb. 25, 1909, ch. 18, 1909 Wash. Sess. Laws 26 (amending WASH. CONST. art. VI).

15. Act of Mar. 9, 1911, ch. 74, 1911 Wash. Sess. Laws 345.

16. H.R.J. Subst. Res. 1, 13th Leg., 1913 Wash. Sess. Laws 678.

17. See Charles Kettleborough, *Digest of Primary Election Laws*, in *THE ANNALS*, *supra* note 6, at 181, 212–21. The open versus closed description is contained at 212–21. According to Kettleborough’s chart comparing early twentieth century primary mechanisms, South Carolina required membership in a political club to participate in that state’s primary election. *Id.* at 220. For

part of two decades after statehood, Washington parties nominated candidates by means of conventions.¹⁸ But in 1907, progressives in the legislature gained passage of a bill establishing a direct primary system for partisan candidates (other than President) and mandating that political parties choose most nominees by public primary.¹⁹ In that new system, separate ballots were printed for each political party, and voters could choose the primary ballot for either party. If challenged, voters could be required to swear or affirm that they intended to affiliate with and support their chosen parties in the general election.²⁰ This requirement that voters affiliate with the party in whose primary they participated put the 1907 approach somewhat in line with a closed primary, restricted to party supporters only,²¹ although voters were not required to pre-register with a specific party as is the case with a true “closed primary.”²² Interestingly, Washington Senator George Cotterill, a strong progressive supporter of the direct primary,²³ protested on the Senate floor that requiring an “open declaration of party affiliation as the price of participation in a direct primary election is absolutely un-American,” “bars the door against the independent voter,” and would allow party machines to “remain supreme.”²⁴ The electorate appears to have been sympathetic to Cotterill’s views. A legislative attempt in 1921

a lively depiction of the historical tension between party regulars and the public, and between party conventions and presidential primaries, see Jill Lepore, *How to Steal an Election: The Crazy History of Nominating Conventions*, NEW YORKER, July 4, 2016, at 20.

18. *History of Washington State Primary Systems*, WASH. SEC’Y ST.: ELECTIONS, <https://www.sos.wa.gov/elections/research/history-of-washington-state-primary-systems.aspx> [https://perma.cc/A5TM-AQB8]. An excellent summary of the history of Washington primary elections from the perspective of a political scientist can be found in Kevin Pirche, *Political Parties in the Evergreen State*, in GOVERNING THE EVERGREEN STATE: POLITICAL LIFE IN WASHINGTON 45, 46–52, (Cornell W. Clayton et al. eds., 2018).

19. *History of Washington State Primary Systems*, *supra* note 18; Nomination of Candidates for Public Office, ch. 209, 1907 Wash. Sess. Laws 457. Section 2 of that law exempted the election of presidential electors from the direct primary process. For a description of the progressive or “insurgent” movement within the 1907 legislature, see DON BRAZIER, HISTORY OF THE WASHINGTON LEGISLATURE, 1854–1963, at 67–69 (2000).

20. Nomination of Candidates for Public Office, ch. 209, 1907 Wash. Sess. Laws 457, 464.

21. Shoji, *supra* note 3, at 671.

22. *Id.*; see also *History of the Blanket Primary in Washington*, WASH. SEC’Y ST.: ELECTIONS, https://www.sos.wa.gov/elections/bp_history.aspx [https://perma.cc/X7KV-FYDR].

23. For Cotterill’s political stance and his own contested election, see DON BRAZIER, HISTORY OF THE WASHINGTON LEGISLATURE, 1854–1963, at 68–69 (2000), and S. Journal, 10th Leg. at 695–96 (Wash. 1907).

24. S. Journal, 10th Leg. at 925–26 (Wash. 1907).

to fully close Washington primaries and require party registration to participate²⁵ was overwhelmingly rejected by a 1922 referendum.²⁶

Immediately after its enactment in 1907, the direct primary was challenged based on several provisions of the state constitution relating to legislative bills, and also on the ground that it interfered with election freedom.²⁷ The Washington State Supreme Court upheld the new primary law.²⁸ Justice Mark Fullerton's opinion noted that the plaintiffs had also objected that the direct primary tended to destroy political parties; he observed that this was "a political, rather than a judicial, question" and that appeal must be made to the people rather than to the courts.²⁹

In any event, the 1907 direct primary system lasted fewer than thirty years. In 1935, in response to an initiative to the legislature championed by labor unions and the state's largest agricultural advocacy group, the Washington State Grange,³⁰ lawmakers enacted a "blanket primary" mechanism.³¹ In the blanket primary, all candidates for a specific office,

25. Act of Mar. 19, 1921, ch. 177, 1921 Wash. Sess. Laws 692.

26. *History of Referendum Measures*, WASH. SEC'Y ST.: ELECTIONS, https://www.sos.wa.gov/elections/initiatives/statistics_referendummeasures.aspx [<https://perma.cc/M5NJ-S2J3>] (Referendum Measure 14B); see also Todd Donovan, *Elections in Washington*, in *GOVERNING THE EVERGREEN STATE: POLITICAL LIFE IN WASHINGTON*, *supra* note 18, at 23, 24.

27. *Zent v. Nichols*, 50 Wash. 508, 523, 97 P. 728, 732 (1908).

28. *Id.*

29. *Id.*

30. The "Granges of the Patrons of Husbandry" began in 1866 in the Midwest and spread throughout the west as a nonpartisan advocacy group for farmers. DOROTHY O. JOHANSEN & CHARLES M. GATES, *EMPIRE OF THE COLUMBIA: A HISTORY OF THE PACIFIC NORTHWEST* 346–48 (Dorothy O. Johansen ed., 2d ed. 1967). The Washington State Grange was organized in 1889. It was a relatively conservative body self-consciously "composed of the very best people in our land," becoming a powerful political force both during the populist 1890s and the progressive era of the early twentieth century. It focused much of its efforts on controlling railroads and large commercial interests, and promoting good government, schools, and public services. The Grange also promoted an income tax initiative that was approved overwhelmingly in the 1932 election, only to be overturned by state supreme court rulings. HARRIET ANN CRAWFORD, *THE WASHINGTON STATE GRANGE, 1889–1924: A ROMANCE OF DEMOCRACY* 14–17, 125–30, 137–43, 159–75 (1940); Harriet Ann Crawford, *Grange Attitudes in Washington, 1889–1896*, 30 PAC. NW. Q. 243, 244–45 (1939); Carlos A. Schwantes, *Farmer-Labor Insurgency in Washington State: William Bouck, the Grange, and the Western Progressive Farmers*, 76 PAC. NW. Q. 2, 2 (1985); Hugh Spitzer, *A Washington State Income Tax—Again?*, 16 U. PUGET SOUND L. REV. 515, 527–28 (1993).

31. Act of Feb. 21, 1935, ch. 26, 1935 Wash. Sess. Laws 60; see also *History of the Blanket Primary in Washington*, *supra* note 22. The measure, labeled Initiative No. 2, was filed with a sufficient number of signatures on August 21, 1934, and enacted voluntarily by the legislature February 21, 1935. *Initiatives to the Legislature*, WASH. SEC'Y ST.: ELECTIONS, https://www.sos.wa.gov/elections/initiatives/statistics_initleg.aspx [<https://perma.cc/TCR4-H3JR>].

other than the President,³² were to be listed together with their party affiliation indicated. The individual voter could mark his or her ballot for any candidate—regardless of party—and the candidate from each party receiving the highest number of votes would proceed to the general election.³³ Under this system, for example, if two Democrats each received more primary votes than any Republican, only the top Democrat would move on to the general election and face the highest vote-getter among the Republicans.³⁴

The blanket primary was progressive reform on steroids, touted as an improvement for voter freedom of choice and allowing electors to “vot[e] for the man.”³⁵ But the “old-line party men and their organizations” were concerned that supporters of one party would cross over and vote in the opposing party’s primary to help select a weak opponent.³⁶ Party regulars challenged the blanket primary, but the Washington State Supreme Court summarily upheld it in *Anderson v. Millikan*.³⁷ The Court ruled that the key issues had been determined by the 1908 ruling sustaining the earlier direct primary law.³⁸ It also declared that political parties were neither mentioned nor favored by the state constitution and that the blanket primary statute made no attempt to

32. The blanket primary statute amended several sections of the 1907 direct primary law, but left in place Section 2 of the Act of Mar. 12, 1907, ch. 209, 1907 Wash. Sess. Laws 457, 457, which exempted the process of choosing presidential electors from the direct primary requirement. Act of Feb. 21, 1935, ch. 26, 1935 Wash. Sess. Laws 60.

33. Ch. 26, 1935 Wash. Sess. Laws 60–64. Section 2 of that legislation established a single primary election ballot with the names of all candidates, regardless of party, listed together. Voters could vote for any of the candidates. The legislation left in place Section 18 of Act of Mar. 18, 1919, ch. 163, 1919 Wash. Sess. Laws 462, 473, and Section 24 of Act of Mar. 15, 1907, ch. 209, 1907 Wash. Sess. Laws 457, 469; the net effect was that electors could vote for any candidate, but only the highest vote-getter among the Republican candidates and the highest vote-getter among the Democrats would proceed to the general election.

34. *Id.* This “hypothetical” is precisely what happened in 1996, when Democrat Gary Locke received 287,762 votes (23.65%) to Democrat Norm Rice’s 212,888 (17.5%). Locke continued to the general election to defeat Republican Ellen Craswell, who had received only 185,680 votes (15.26%) in the primary. *Election Search Results: 1996 Primary*, WASH. SEC’Y ST.: ELECTIONS, https://www.sos.wa.gov/elections/results_report.aspx?e=16&c=&c2=&t=440&t2=2&p=&p2=&y= [<https://perma.cc/8HZ9-LKSJ>].

35. Claudius O. Johnson, *The Washington Blanket Primary*, 33 PAC. NW. Q. 27, 28 (1942); see also John Caldbick, *Washington State Legislature Approves Grange-Sponsored Blanket Primary Initiative on February 21, 1935*, HISTORYLINK (Dec. 2, 2013), <http://www.historylink.org/File/10673> [<https://perma.cc/75YZ-ZTPP>].

36. Johnson, *supra* note 35; see also Claudius O. Johnson, *Washington’s Blanket Primary Reviewed*, 48 PAC. NW. Q. 113, 113 (1957).

37. 186 Wash. 602, 608, 59 P.2d 295, 297–98 (1936).

38. *Id.* at 603, 59 P.2d at 296 (citing *Zent v. Nichols*, 50 Wash. 508, 523, 97 P. 728, 732 (1908)); see *supra* note 27 and accompanying text.

control the power of any political party to adopt its principles or control its membership.³⁹

Over the subsequent years, political life in Washington adjusted to the blanket system. One political scientist reported that crossover voting was modest, and the parties seem to have survived perfectly well.⁴⁰ Nevertheless, party opposition to government interference in their internal nominating processes continued, and the Democratic Party launched a second attack in 1980 on First Amendment freedom-of-association grounds. In *Heavey v. Chapman*,⁴¹ the Washington State Supreme Court again upheld the blanket primary, balancing the party's associational rights with the state's interest in controlling and protecting the integrity of the electoral process.⁴² The *Heavey* Court concluded that the plaintiffs had not shown a substantial burden on their associational rights and that compelling state interests to support a blanket primary included voter interest in keeping party identification secret, encouraging broad participation in the primary process, and giving each voter a free choice among candidates.⁴³

The federal constitutional tide finally turned in favor of the political parties, which adopted a litigation strategy founded on the U.S. Supreme Court's gradual strengthening of First Amendment freedom of association in the election context.⁴⁴ In 1958, the Court relied on freedom of association to strike down an Alabama law that effectively barred the NAACP from operating in that state.⁴⁵ Still earlier decisions in the "White Primary" cases held that internal party regulations could not operate to exclude African-Americans from participation in primary elections.⁴⁶ Later, in 1975, the Court held in *Cousins v. Wigoda*⁴⁷ that

39. *Anderson*, 186 Wash. at 607–08, 59 P.2d at 297.

40. Daniel M. Ogden, Jr., *The Blanket Primary and Party Regularity in Washington*, 39 PAC. NW. Q. 33, 34–35 (1948). Ogden's conclusion is generally consistent with V.O. Key's research, published six years later. *See supra* note 10.

41. 93 Wash. 2d 700, 611 P.2d 1256 (1980).

42. *Id.* at 701–03, 611 P.2d at 1257–58.

43. *Id.* at 704–05, 611 P.2d at 1259.

44. John R. Labbé, *Louisiana's Blanket Primary After California Democratic Party v. Jones*, 96 NW. U. L. REV. 721, 723–26 (2002).

45. *NAACP v. Alabama*, 357 U.S. 449, 462–63 (1958).

46. *Smith v. Allwright*, 321 U.S. 649, 661–64 (1944), held that extensive state involvement in the process meant that political parties partook of a sufficient "public" character to require their primary election candidate selection processes to be open to voters of all races. *Terry v. Adams*, 345 U.S. 461, 469–70 (1953), extended the *Allwright* principles to encompass primary election processes that allowed "private" racially exclusive political clubs to dictate the outcomes of party primary

internal state Democratic Party rules, not a primary election state law, would determine Illinois delegates to the party's national convention.⁴⁸ The Court's opinion, by Justice William J. Brennan, stated that the "National Democratic Party and its adherents enjoy a constitutionally protected right of political association" and that any "interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."⁴⁹ This position was reinforced six years later in an opinion by Justice Potter Stewart that upheld the right of the Wisconsin Democratic Party to insist that only voters affiliated with that party participate in a primary to pick national party convention delegates.⁵⁰

In 1996, California voters copied Washington by adopting an initiative measure that turned the state from a closed partisan primary to the blanket primary method.⁵¹ Four parties challenged the new system: the Democrats, the Republicans, the Libertarians, and the Peace and Freedom Party.⁵² In *California Democratic Party et al. v. Jones*,⁵³ writing for a seven-to-two majority, Justice Antonin Scalia restated the principal that states may require parties to use primaries to select party nominees.⁵⁴ He then added, "in order to assure that intraparty competition is resolved in a democratic fashion," the First Amendment's freedom of association protects the ability of groups to limit membership to those with whom they choose to work.⁵⁵ He emphasized that "a corollary of the right to associate is the right not to associate."⁵⁶ Scalia's opinion concluded that political parties have a right to insist that participation in their primaries be restricted to those who subscribe to their aims.⁵⁷ The Court held that the state's expressed interests—promoting fairness, protecting voter choice, increasing voter

elections. See generally Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55 (2001).

47. 419 U.S. 477 (1975).

48. *Id.* at 487.

49. *Id.* at 487–88 (citations omitted).

50. *Democratic Party of the U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 123–36 (1981).

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

52. *Id.* at 571.

53. *Id.*

54. *Id.* at 572. In discussing the legitimacy of state legislation requiring major parties to nominate candidates through a primary process, Justice Scalia relied principally on *American Party of Texas v. White*, 415 U.S. 767, 781 (1974).

55. *Jones*, 530 U.S. at 571.

56. *Id.* at 574.

57. *Id.*

participation, and protecting voter privacy—were not compelling under the circumstances of that case.⁵⁸ He then observed that even if those state interests were compelling, they were not narrowly tailored because the State of California could protect all of those interests “by resorting to a *nonpartisan* blanket primary,” thereby forecasting the top two approach that Washington eventually adopted.⁵⁹

The U.S. Supreme Court’s reasoning in *Jones* was consistent with earlier decisions on the associational rights of political parties.⁶⁰ Two more decisions have been recently added to the cases described above. First, in *Eu v. San Francisco County Democratic Central Committee*,⁶¹ the Court held that a California statute dictating how political parties were organized and how leaders were selected unconstitutionally burdened their associational rights.⁶² Later, in *Tashjian v. Republican Party of Connecticut*,⁶³ a state Republican Party that chose to allow independents to participate in that party’s primaries successfully challenged a statute restricting primaries to registered party members.⁶⁴ The Court held that the Republican Party’s associational rights under the First Amendment allowed it to decide who could and could not participate in its nominating processes.⁶⁵

Less than a month after the U.S. Supreme Court decided *Jones* in June 2000, Washington’s Democrats, Republicans, and Libertarians resumed their attack on the state’s blanket primary method in federal court.⁶⁶ The Washington Secretary of State, backed by the Grange, defended the blanket primary, emphasizing various differences between Washington’s and California’s statutes.⁶⁷ The district court sided with the state,⁶⁸ but the U.S. Court of Appeals for the Ninth Circuit held that

58. *Id.* at 584.

59. *Id.* at 585.

60. See notes 44–49 and accompanying text.

61. 489 U.S. 214 (1989).

62. *Id.* at 230–31.

63. 479 U.S. 208 (1986).

64. *Id.* at 212.

65. *Id.* at 214.

66. See Complaint for Declaratory Judgment and Injunctive Relief Regarding the Washington State Blanket Primary at 1, Democratic Party of Wash. State v. Reed, No. C00-5419FDB, (W.D. Wash. July 20, 2000), 2000 WL 35599898.

67. Democratic Party of Wash. State v. Reed, 343 F.3d 1198, 1203 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213 (2004) and 541 U.S. 957 (2004).

68. *Democratic Party of Wash. State*, 2002 WL 32925223, at *1.

the differences between California's and Washington's blanket primaries were legally insignificant.⁶⁹ In his opinion, Judge Andrew Kleinfeld wrote that the "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" and further wrote that the blanket primary "prevents those voters who share their affiliation from selecting their party's nominees."⁷⁰

The political parties' long-term litigation strategy appeared to have succeeded when this Ninth Circuit decision overturned Washington's nearly seventy-year blanket primary system. But the wide open, vote-for-anyone primary was an approach to which voters had become accustomed and liked.⁷¹ When legislators were faced with designing a replacement in the 2004 session, they received strong pressure from the general public and media to approve a substitute that retained primary voters' ability to vote for *any* candidates, regardless of those voters' party affiliations.⁷² One political scientist suggests that Washington voters continued to prefer a blanket-type primary "as a mechanism both to reduce the power of the political parties and to encourage more moderate, centrist candidates."⁷³ At the same time, party officials expressed strong dislike for any system that allowed voters to cross party lines in primaries.⁷⁴ In response to voter preferences, some members of the Washington House proposed a "top two" system, also known as the "Louisiana" primary.⁷⁵ In the top two system, now used in just four

69. *Democratic Party of Wash. State*, 343 F.3d at 1206–07.

70. *Id.* at 1204.

71. Background documents on the blanket primary, including historical materials and polling data, are available at *The Blanket Primary*, WASH. SEC'Y OF STATE: ELECTIONS, https://www.sos.wa.gov/elections/blanket_primary.aspx [<https://perma.cc/3RUE-KWR6>].

72. Editorial, *Governor Should Sign New Primary into Law*, EVERETT HERALD (Mar. 11, 2004, 9:00 PM), <https://www.heraldnet.com/opinion/governor-should-sign-new-primary-into-law/> [<https://perma.cc/4QEZ-QRJJ>]; see also Press Release, Wash. Sec'y of State, Polls Favor Modified Blanket Primary (Jan. 28, 2004), <https://www.sos.wa.gov/office/news-releases.aspx#news/231> [<https://perma.cc/3HEF-U67K>].

73. Pirch, *supra* note 18, at 47.

74. *Id.* at 48.

75. The Louisiana blanket primary, first implemented in 1975, allows an elector to vote for any candidate regardless of the voter's party affiliation, with the two candidates receiving the largest number of votes preceding to the general election. The Louisiana system was implemented because, in 1975, an overwhelming percentage of that state's voters were Democrats. The new system provided more choice and offered a simplification of the previous mechanism, which was a three-step election process that itself had its origin in the overwhelmingly Democratic character of Louisiana's politics for many years. Labbé, *supra* note 44, at 742–44.

states,⁷⁶ the two candidates with the most votes proceed to the general election regardless of political affiliation. But when the top two approach was proposed in Washington's legislature, partisan forces threatened to derail it in court.⁷⁷ During the legislative process, after the House adopted a top two bill, Washington's Senate amended the legislation to add a back-up plan to take effect if a political party challenge were successful.⁷⁸ That alternative would install a primary similar to the one adopted back in 1907. Dubbed the "pick-a-party"⁷⁹ or "Montana" primary,⁸⁰ voters could pick the option of voting either in the Democratic or the Republican primary but could not switch back-and-forth on different races.

Washington's Governor at the time, Gary Locke, who like many party activists disliked the top two system, vetoed the sections of the legislation that would have implemented that approach,⁸¹ leaving only the pick-a-party primary.⁸² The Grange responded with its own lawsuit

76. The top two primary system, originating in Louisiana, is now used in California and Washington as well, and in Nebraska only with respect to Nebraska's non-partisan legislature. *State Primary Election Types*, NAT'L CTR. ST. LEGISLATURES (June 26, 2018), <http://www.ncsl.org/research/elections-and-campaigns/primary-types.aspx> [https://perma.cc/Y7AL-LD4R].

77. M. L. Madison, *Area Party Leaders Criticize "Top Two" Primary Bill*, TDN (Mar. 13, 2004), https://tdn.com/business/local/area-party-leaders-criticize-top-two-primary-bill/article_7bdf7625-0c0c-5ef6-bb38-d40b7a8d504b.html [https://perma.cc/G55M-M4AT]; Neil Modie & Angela Galloway, *Locke Vetoes Election Plan: Voters now Face Separate Party Primaries this Fall*, SEATTLE POST-INTELLIGENCER (Apr. 1, 2004, 9:00 PM), <https://www.seattlapi.com/local/article/Locke-vetoes-election-plan-1141277.php> [https://perma.cc/28MY-RKMM].

78. Act of Apr. 1, 2004, ch. 271, 2004 Wash. Sess. Laws 1172. Section 101 of the bill was a transition section that would have substituted the "Montana" primary for the top two approach if a court of competent jurisdiction held the top two version to be unconstitutional. *Id.* at 1202. See *Wash. State Grange v. Locke*, 153 Wash. 2d 475, 479–86, 105 P.3d 9, 12–15 (2005) for a description of the circuitous route the legislation took in the state legislature.

79. For an example of use of the term "pick-a-party," see *A Timeline of Voting and Elections in Washington State*, WASH. SEC'Y OF ST., <https://www.sos.wa.gov/elections/timeline/time5.htm> [https://perma.cc/59JX-8B6X].

80. The "Montana" approach was modeled on a system earlier implemented in that state. *Wash. State Grange*, 153 Wash. 2d at 11–12, 105 P.3d at 478–79.

81. Washington's constitution permits the governor to veto not only entire bills, but also individual sections of legislation, or individual appropriation items in appropriations bills. WASH. CONST. art. III, § 12.

82. Press Release, Office of Governor Gary Locke, Gov. Gary Locke Signs Bill Enacting Montana Primary Election System (Apr. 1, 2004), <https://www.digitalarchives.wa.gov/governorlocke/press/press-view.asp?pressRelease=1575&newsType=1> [https://perma.cc/LG86-M8YQ]. The text of Governor Locke's veto message is available at ch. 271, 2004 Wash. Sess. Laws at 1241–43; see also Modie & Galloway, *supra* note 77.

challenging the Governor's veto, but in *Washington State Grange v. Locke*,⁸³ the Washington State Supreme Court upheld the legislation as it had emerged from the Governor's cutting table.

The pick-a-party primary favored by the political parties was short-lived. It went into effect for the 2004 primary, but that year a solid majority of the electorate indicated their dislike for the system.⁸⁴ The Grange roared back with Initiative No. 872, the "People's Choice Initiative of 2004" ("I-872") which passed with nearly 60% of the vote.⁸⁵ The initiative replaced the pick-a-party system with the top two approach that Governor Locke had earlier vetoed. The political parties promptly challenged the top two primary on familiar grounds, arguing that it was indistinguishable from the blanket primary found in *Jones* to violate their associational and free speech rights under the First Amendment.⁸⁶ The federal district court in 2005,⁸⁷ and then the Ninth Circuit in 2006,⁸⁸ sided with the political parties. The Ninth Circuit opinion held that because I-872 permitted candidates to identify themselves as favoring one party or another, the measure "severely burdens the Washington political parties' associational rights."⁸⁹

Two years later, in *Washington State Grange v. Washington State Republican Party*,⁹⁰ the Supreme Court reversed the Ninth Circuit's decision and upheld the I-872 top two system by a seven-to-two vote. In his opinion for the Court, Justice Clarence Thomas pointed out that unlike the blanket primary, I-872 did not choose party nominees—it simply advanced the top two primary candidates to the general election ballot even if both of them were in the same party.⁹¹ The Court also held that the initiative did not impose a severe burden on the political parties' associational rights and that the parties' arguments rested "on factual assumptions about voter confusion that can be evaluated only in the

83. 153 Wash. 2d 475, 105 P.3d 9 (2005).

84. See *History of the Blanket Primary in Washington*, *supra* note 22.

85. The initiative is entitled the People's Choice Initiative. See *The People's Choice Initiative of 2004*, ch. 2, 2005 Wash. Sess. Laws 9. For a breakdown of the 2004 election results, see OFFICE OF THE SEC'Y OF STATE, OFFICIAL NOVEMBER 2, 2004 GENERAL ELECTION ABSTRACT 9 (2004), https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2004/Documents/2004%20General%20Election/2004Leg-CongDistAbstract.pdf [<https://perma.cc/M5NP-ECWJ>].

86. Plaintiffs' Motion for Summary Judgment at 9, *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005) (No. CV05-0927-TSZ).

87. *Logan*, 377 F. Supp. 2d 907.

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

89. *Id.* at 1124.

90. 552 U.S. 442 (2008).

91. *Id.* at 453.

context of an as-applied challenge.”⁹² The political parties continued to battle away at the top two system, using the same litigation (with shifting case names) to raise issues of voter confusion, associational rights, compelled speech, and trademark claims, among others.⁹³ These arguments were eventually rejected by the Ninth Circuit in 2012,⁹⁴ leaving the political parties precisely where they never wanted to be. After successfully deploying a litigation strategy to gain both federal and state court⁹⁵ recognition of their private status and associational rights, their attempt to eliminate the blanket primary ultimately forced them to live with something worse: a primary election method that would sometimes result in two general election candidates of the same party—perhaps the *other* party.

But the future could hold additional unpleasant surprises for the parties.

II. THE POPULIST ERA AND PROHIBITED GIFTS OF PUBLIC FUNDS

As described above, Washington State’s political parties fought the 1907 direct primary, then the blanket primary three decades later, and, finally, the top two method. Notwithstanding the parties’ attempts to maintain control over the selection of their own candidates, the Progressive Era ideals of open government and direct voter participation were reinforced and augmented with each iteration of Washington’s

92. *Id.* at 444.

93. The winding path of the litigation included, from the beginning, the following decisions: *Wash. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 924–25 (W.D. Wash. 2005) (issuing an initial preliminary injunction against implementation of a top two system on the grounds that it unconstitutionally interfered with the political parties’ associational rights); *Wash. State Republican Party v. Washington*, 460 F.3d 1108 (9th Cir. 2006) (affirming the district court’s preliminary injunction); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008) (reversing the preliminary injunction and rejecting the facial challenge to the top two primary); *Wash. State Republican Party v. Wash.*, 545 F.3d 1125 (9th Cir. 2008) (implementing the U.S. Supreme Court decision); *Wash. State Republican Party v. Grange*, No. C05-0927-JCC, 2011 WL 92032 (W.D. Wash. 2011) (granting summary judgment rejecting an as-applied challenge); *Wash. State Republican Party v. Grange*, 676 F.3d 784 (9th Cir. 2012) (affirming and upholding the top two system from the as-applied challenge).

94. *Wash. State Republican Party v. Wash. State Grange*, 676 F.3d 784 (9th Cir. 2012), *cert. denied*, 568 U.S. 814 (2012).

95. The Washington State Supreme Court underscored the private associational rights of political parties in *Pilloud v. King Cty. Republican Cent. Comm.*, 189 Wash. 2d 599, 404 P.3d 500, 502 (2017), where the court found that a statute requiring parties to elect rather than appoint legislative district chairs violated the Republican Party’s freedom of association.

nominating process. The good news for the parties is that after more than a century of litigation efforts, the U.S. Supreme Court recognizes them as truly private associations with the right to be substantially free from government interference. The bad news for the parties is that voters have remained so keen on “voting for the candidate” rather than voting for a party that, in Washington, primaries have partially transformed into non-partisan affairs.

But things could get still worse for the Washington’s political parties, because of a provision in the state constitution rooted in populism, the movement that immediately preceded and influenced progressivism.

Populist ideas permeate the Washington State Constitution.⁹⁶ A majority of the delegates to the state’s 1889 constitutional convention had a populist outlook, regardless of political party.⁹⁷ They were suspicious of railroads, banks, and commercial interests generally; supportive of farmers and working people; and they strongly favored constitutional restrictions on government handouts to the private sector.⁹⁸ These attitudes were typical of Washington’s predominantly agricultural residents in the late nineteenth century and led to the success of the People’s Party (also known as the “Populist Party”) in Washington’s 1896 election.⁹⁹ In fact, one of the most active organizations in Washington politics during the late nineteenth and early twentieth centuries was the Washington State Grange,¹⁰⁰ the same farmers’ group that spearheaded the blanket primary in 1935.¹⁰¹

Among the key anti-corporate provisions of Washington’s 1889 constitution were three sections banning state and local government gifts, loans, and credit support to the private sector—article VIII, sections 5 and 7, and article XII, section 9.¹⁰² Although worded differently,¹⁰³ all three constitutional sections were propelled by anti-

96. See generally Hugh Spitzer, *Washington: The Past and Present Populist State*, in *THE CONSTITUTIONALISM OF AMERICAN STATES* 771 (George E. Connor & Christopher W. Hammons eds., 2008).

97. *Id.* at 773.

98. *Id.* at 774–76.

99. *Id.* at 774.

100. *Id.*

101. See *supra* notes 27–32 and accompanying text.

102. James M. Dolliver, *Condemnation, Credit, and Corporations in Washington: 100 Years of Judicial Decisions—Have the Framers’ Views Been Followed?*, 12 U. PUGET SOUND L. REV. 163, 168–69, 182–85 (1989).

103. WASH. CONST. art. VIII, § 5 states: “The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.” WASH. CONST. art. VIII, § 7 provides:

No county, city, town or other municipal corporation shall hereafter give any money, or

railroad sentiment¹⁰⁴ and they have been interpreted and applied identically.¹⁰⁵ Of particular relevance here is the flat prohibition on gifts of public funds.

The source of the anti-gift provision was a desire to firmly separate the public and private sectors and to prevent business misuse of taxpayer dollars.¹⁰⁶ But early in the state's history, the Washington State Supreme Court declined to restrict the clause's application to transfers of public funds to for-profit enterprises, holding that a county's cash donation to a private nonprofit fair association to operate a county fair violated the ban on gifts to private organizations, except in aid of the poor and infirm.¹⁰⁷ As a result, the governmental arrangement with fair associations was reconfigured by statute so that counties could "employ persons to assist in the management of such fairs," thus enabling them to contract with the private parties and pay them in exchange for specific services.¹⁰⁸ Over the years, the Washington State Supreme Court elaborated on what characterizes an unconstitutional gift, defining it as a "voluntary transfer of property without consideration,"¹⁰⁹ and then as "a transfer of property without consideration and with donative intent."¹¹⁰ At the same time, "[r]eceipt of valuable consideration assures that a transaction is not a

property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.

WASH. CONST. art. VIII, § 9 states: "The state shall not in any manner loan its credit, nor shall it subscribe to, or be interested in the stock of any company, association or corporation."

104. Dolliver, *supra* note 102, at 184–85.

105. *Citizens for Clean Air v. Spokane*, 114 Wash. 2d 20, 40, 785 P.2d 447, 458 n.8, (1990); *Wash. Health Care Facilities v. Ray*, 93 Wash. 2d 108, 115–116, 605 P.2d 1260, 1264 (1980).

106. See ROBERT F. UTTER & HUGH D. SPITZER, *THE WASHINGTON STATE CONSTITUTION* 162–63 (G. Alan Tar ed., 2d ed. 2013); Dolliver, *supra* note 102, at 190.

107. *Johns v. Wadsworth*, 80 Wash. 352, 354, 141 P. 892, 893 (1914).

108. Act of Jan. 8, 1917, ch. 32, 1917 Wash. Laws 103. Interestingly, House Bill 97, the 1917 legislation permitting counties to employ persons to assist in county fair management, was referred to the House Committee on Agriculture but was then re-referred to the Committee on Judiciary, which later reported it back to the full House "with the recommendation that it is, in our opinion, constitutional." H. Journal, 15th Sess., 180 (Wash. 1917). This suggests some initial uncertainty about the effectiveness of the statutory "fix" for the 1914 ruling in *Johns*.

109. *State ex rel. O'Connell v. Port of Seattle*, 65 Wash. 2d 801, 804, 399 P.2d 623, 625–26 (1965).

110. *Louthan v. King County*, 94 Wash. 2d 422, 428, 617 P.2d 977, 981 (1980).

gift.”¹¹¹ The Washington State Supreme Court has been fairly deferential to elected officials’ determinations of adequacy of consideration.¹¹²

Further, a transaction is not deemed a gift if the transfer of public money, property, or services is an incidental effect of government carrying out one of its fundamental purposes or public functions. For example, in *Johnson v. Johnson*,¹¹³ the Washington State Supreme Court held that spending government funds to collect child support from a delinquent parent carries out the recognized public function of protecting children.¹¹⁴ But that function or purpose must be “fundamental,”¹¹⁵ and it is not deemed adequate consideration simply because a transfer of public assets or credit is seen as generally useful or might have future public benefits.¹¹⁶ The potential problems are accentuated when there is an identifiable private recipient of an expenditure of public funds, as opposed to the public at large.¹¹⁷ Early in the state’s history, the Washington State Supreme Court held that a county’s donation to a private nonprofit association to operate a fair violated the state constitution’s ban on gifts of public funds. In *Johns v. Wadsworth*,¹¹⁸ the Court stated: “[t]hat agricultural fairs serve a good purpose is not questioned, but the Constitution makes no distinction between purposes, but directly and unequivocally prohibits all gifts of money, property, or credit to, or in aid of any corporation,” except to aid the poor and infirm.¹¹⁹ A concurring opinion added: “[t]he grant in question is of obvious public benefit. The terms of the quoted provision of the Constitution are, however, so clear and explicit as to leave no room for construction.”¹²⁰ While the Court has subsequently approved various government transfers to private persons in exchange for sufficient

111. *Id.*

112. *See, e.g.,* *King County v. Taxpayers of King Cty.*, 133 Wash. 2d 584, 597–601, 949 P.2d 1260, 1267–68 (1997) (holding a professional baseball team’s minimal annual rent payment to a public authority did not constitute an unconstitutional gift of the use of a ballpark because those payments were accompanied by a substantial array of other forms of consideration).

113. 96 Wash. 2d 255, 634 P.2d 877 (1981).

114. *Id.* at 267–68, 634 P.2d at 884.

115. *Taxpayers of King Cty.*, 133 Wash. 2d at 624, 949 P.2d at 1280.

116. *Lassila v. Wenatchee*, 89 Wash. 2d 804, 812–13, 576 P.2d 54, 59 (1978).

117. *Compare id.* (city had unconstitutionally provided credit support by purchasing property to re-sell to a specific private developer), *with* *United States v. Town of North Bonneville*, 94 Wash. 2d 827, 830–37, 621 P.2d 127, 129–32 (1980), (municipality purchased a tract of land in order to make it available to its residents, generally, who were being flooded out and displaced by a new reservoir).

118. 80 Wash. 352, 141 P. 892 (1914).

119. *Johns v. Wadsworth*, 80 Wash. 352, 354, 141 P. 892, 893 (1914).

120. *Id.* at 357, 141 P. at 894.

consideration,¹²¹ the basic prohibition on uncompensated transfers of public money and assets remains solidly in place.¹²²

III. ARE PUBLICLY FUNDED ELECTIONS OF PARTY OFFICIALS AND PRESIDENTIAL PRIMARIES UNCONSTITUTIONAL GIFTS IN WASHINGTON STATE?

This Part now applies the Washington State Constitution's ban on public gifts to private persons to two specific uses of public funds and processes: first, to elect political party precinct offers, and second, to select presidential candidates for the major political parties.

In *Jones*,¹²³ the U.S. Supreme Court reiterated that political parties, as private associations, have the right to determine who can and cannot vote in their candidate selection processes; states may not interfere with internal party functions without a compelling state interest.¹²⁴ This was reiterated in the Ninth Circuit's decision to overturn Washington State's blanket primary¹²⁵ and further reinforced by the federal district court's opinion in *Washington State Republican Party v. Washington State Grange*,¹²⁶ which upheld the I-872 top two primary. But *Washington State Grange* separately held that the application of the top two approach

121. See, e.g., *King County v. Taxpayers of King Cty.*, 133 Wash. 2d 584, 949 P.2d 1260 (1997) (finding below-market rent of baseball stadium acceptable because of other sufficient consideration); *Scott Paper Co. v. City of Anacortes*, 90 Wash. 2d 19, 578 P.2d 1292 (1978) (holding provision of water to private manufacturer at below-market rates permitted because of a contractual bargain was adequate consideration); *Ayers v. City of Tacoma*, 6 Wash. 2d 545, 108 P.2d 348 (1940) (finding payment of pension amounts not a gift, but compensation for prior services).

122. For examples of the continued vitality of the prohibition of gifts of public funds, see *Authority of Rural County to Use Special Sales Tax Revenues to Pay for Installation of Fiber Optic Cable for Privately-Owned Electrical Utility*, AGO 2002 No. 1 (Mar. 18, 2002), <https://www.atg.wa.gov/ago-opinions/authority-rural-county-use-special-sales-tax-revenues-pay-installation-fiber-optic> [<https://perma.cc/2638-MMC6>] (concluding that as a private entity nonprofit electrical cooperative cannot receive tax money from government to fund equipment for installation of fiber optic cable); *State ex rel. O'Connell v. Port of Seattle*, 65 Wash. 2d 801, 803-07, 399 P.2d 623, 625-27 (1965) (finding that expenditures of public funds for the entertainment of shippers, business people, and other private individuals constitute unconstitutional gifts).

123. 530 U.S. 567 (2000).

124. See *supra* notes 51-58 and accompanying text.

125. See *supra* notes 66-70 and accompanying text.

126. No. C05-0927-JCC, 2011 WL 92032 (W.D. Wash. 2011), *aff'd*, 676 F.3d 784 (9th Cir. 2012). The political party plaintiffs did not appeal the district court's ruling on the PCO issue.

to party offices such as precinct committee officers (“PCOs”)¹²⁷ violated the right of parties to control their internal affairs. In his opinion, U.S. District Court Judge John C. Coughenour cited the rulings in *Eu* and *Tashjian*, emphasizing that “voters in the partisan ‘party preference’ races are selecting individuals to serve as members of a government office; voters in the PCO races, on the other hand, are selecting individuals to serve as members of the political parties. This distinction is critical.”¹²⁸ Judge Coughenour also relied on *Arizona Libertarian Party, Inc. v. Bayless*,¹²⁹ where the Ninth Circuit held that allowing nonmembers to vote for party precinct committee-people violated the Libertarian Party’s associational rights.¹³⁰

After Judge Coughenour’s ruling barred use of the top two system for precinct committee officers in Washington State, the political parties worked with legislators to redesign the PCO-selection system so it would pass constitutional muster. In 2012, the Washington legislature enacted statutory amendments with the express intent “to remedy the unconstitutional method of selecting precinct committee officers by implementing a provision requiring voters to affirm an affiliation with the appropriate party in order to vote in a race for precinct committee officer in that party.”¹³¹ As the bill worked its way through the legislature, testimony from opponents (including the Grange) observed that political parties are private, that PCOs are not public officers, and that taxpayers should not be required to pay the cost of PCO elections.¹³² The legislation declared that “the office of precinct committee officer itself is both a constitutionally recognized and authorized office with certain duties outlined in state law and the state Constitution.”¹³³ However, this declaration is without foundation in the text of the state constitution. While the Washington State Constitution mentions

127. Precinct committee officers are the lowest official positions within the major parties. In Washington, as in many states, PCOs are responsible for connecting with individual voters on the precinct level, distributing campaign literature, and getting out the vote on election day. PCOs also participate in choosing higher level party officials and convention delegates. *Become a Precinct Committee Officer*, WASH. ST. DEMOCRATS, <https://www.wa-democrats.org/local/pco> [<https://perma.cc/UH8S-M429>]; Lane Covington, *Become a Republican Precinct Committee Officer Today!*, KING COUNTY REPUBLICAN PARTY (May 10, 2018), <https://www.kcgop.org/blog/become-a-republican-precinct-committee-officer-today/> [<https://perma.cc/T8J4-AB39>].

128. *Wash. State Republican Party*, 2011 WL 92032, at *9.

129. 351 F.3d 1277 (9th Cir. 2003).

130. *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003).

131. Act of June 7, 2012, ch. 89, 2012 Wash. Sess. Laws 682.

132. H.B. Rep. E3SHB 1860, 62d Leg., Reg. Sess. at 3 (Wash. 2012); S.B. Rep. E3SHB 1860, 62d Leg., Reg. Sess. at 3 (Wash. 2012).

133. Act of June 7, 2012, ch. 89, 2012 Wash. Sess. Laws 682.

precincts or precinct “officers” in six sections, none of those provisions outline duties, and all but one appear to refer to precinct level public positions such as election officials; the single reference to PCOs clearly distinguishes those party positions from true public offices.¹³⁴ The point is that there is scant constitutional support for the notion that PCOs are public officials of any kind. They are ground-level party officials, and rulings such as Judge Coughenour’s in *Washington State Republican Party v. Washington State Grange* and the Ninth Circuit’s in *Bayless* reinforce the understanding of PCOs as officers of non-governmental private associations.¹³⁵

The independent, non-governmental character of political parties and their officers was underscored by the Washington State Supreme Court’s recent decision in *Pilloud v. King County Republican Central Committee*,¹³⁶ which overturned a statute requiring parties to elect rather than appoint legislative district chairs. *Pilloud* was decided on the grounds that internal operations are a political party’s own business and that the statute violated the Republican Party’s freedom of association.¹³⁷ Chief Justice Mary Fairhurst’s opinion further held that there was no compelling state interest for the government’s interference in internal party governance.¹³⁸ The Washington State Supreme Court’s recognition of the fundamentally private character of political parties might be a victory for the First Amendment associational rights of parties, but it also has state constitutional implications for Washington laws that result in the expenditure of public money on the internal proceedings of those private political groups.

134. WASH. CONST. art. I, § 34 refers to the recall of public officers at the precinct level; WASH. CONST. art. II, § 6 mentions the filling of vacancies in public office at the precinct level; WASH. CONST. art. VI, § 1 refers to voter residency within a precinct; WASH. CONST. art. XI, § 5 mentions county officers at the precinct level; WASH. CONST. art. XXVII, § 14 states that public officials at the precinct level, among others in office upon statehood, are to serve until their successors are qualified. Only WASH. CONST. art. II, § 43(3) expressly refers to precinct committee officers, and that reference is to allow PCOs to serve on the state redistricting commission; in other words, PCOs are expressly distinguished from officials in public office. It should be noted that political parties are mentioned in WASH. CONST. art. II, § 15, which requires that when vacancies occur in partisan elective offices, those offices must be filled by appointment from a three-person list nominated by the relevant county central committee of the departed office holder’s political party.

135. See *supra* notes 124, 127 and accompanying text.

136. 189 Wash. 2d 599, 603–04, 404 P.3d 500, 502 (2017).

137. *Id.* at 604–06, 404 P.3d at 502–03.

138. *Id.* at 606, 404 P.3d at 503.

Notwithstanding the judicial recognition of political parties as private organizations, Washington statutes—particularly the statute passed with party support in 2012¹³⁹—continue to treat parties as quasi-public, and PCOs as some type of government officers. For example, state law mandates that PCOs be registered voters,¹⁴⁰ elected at primary elections in even-number years¹⁴¹ to serve two-year terms.¹⁴² Another statute provides that county central committees of political parties consist of those elected PCOs.¹⁴³ It is hard to imagine that these provisions would survive a challenge along the lines of *Pilloud*. For example, what if the Democratic Party of Washington were to change its bylaws to provide that its county central committees must consist of members elected by precinct-level Democratic clubs, that resident non-citizens were entitled to join those clubs and serve as PCOs, and that PCO terms would last four years? If Washington courts remained consistent with *Pilloud*, it is probable that they would sustain the authority of the Democratic Party to control its internal organization however it pleased—notwithstanding the PCO statutes.

The flipside of the federal and state cases on political party independence is that to the extent that those private organizations continue to make use of biennial public primary elections to choose their officers—without paying for county-level election costs—the counties could readily be viewed as spending public money for private purposes. This is the logical extension of a case like *Johns*,¹⁴⁴ which barred transferring public money to a county fair association without consideration. This potential problem could be remedied by legislation providing that political parties can contract to pay an allocable share of primary election costs in return for access to the ballot. But without such an adjustment, a successful constitutional challenge is still possible.

That raises the issue of the presidential preference primary in Washington State. That primary is a curious beast. Historically, the state's political parties formed their national convention delegations purely through caucus and district convention processes.¹⁴⁵ The 1907 direct primary law exempted presidential primaries,¹⁴⁶ and this was not

139. Act of June 7, 2012, ch. 89, 2012 Wash. Sess. Laws 682.

140. WASH. REV. CODE § 29A.80.041 (2018).

141. *Id.* § 29A.52.171.

142. *Id.* § 29A.80.051.

143. *Id.* § 29A.80.030.

144. *See supra* notes 118–120 and accompanying text.

145. *See Pirche, supra* note 18, at 52–53.

146. *See supra* note 19 and accompanying text.

changed by the 1935 blanket primary initiative.¹⁴⁷ Then, in response to a 1988 initiative to the legislature declaring that the party caucus system was “unnecessarily restrictive of voter participation,”¹⁴⁸ the legislature created a presidential preference primary in 1989. That measure required that the results of a presidential primary determine the allocation of delegate positions among presidential candidates.¹⁴⁹ It also required that all costs of presidential primaries be provided by the state rather than at the local level.¹⁵⁰ In 1995, the legislature made it optional for parties to use the primary results to allocate their delegates,¹⁵¹ attempting to address the conflict between internal party rules and the interest in conducting a presidential primary.¹⁵² But Washington State’s political parties have preferred caucuses and have been reluctant to award many delegates based on presidential primary results.¹⁵³ Because the parties planned to entirely ignore the 2004 presidential primary results, the 2003 legislature cancelled the 2004 preferential primary—a venture that would have cost six million dollars with no appreciable impact.¹⁵⁴ Washington’s current presidential preference primary statute continues to allow the parties to either use, or ignore, preferential primary results.¹⁵⁵ It was suspended again in 2012 to save money after the parties decided to rely on their caucuses to allocate delegates.¹⁵⁶ In 2016, Republicans used it to allocate some of their convention delegates while Democrats ignored it entirely.¹⁵⁷ That proceeding cost Washington State

147. See *supra* note 32 and accompanying text.

148. Act of July 23, 1989, ch. 4, 1989 Wash. Sess. Laws 23. Initiative to the Legislature No. 99 was filed in 1988 with 202,872 signatures. Rather than going to the voters, the Legislature enacted it on March 31, 1989, as ch. 4, 1989 Wash. Sess. Laws 23. See *Initiatives to the Legislature*, *supra* note 31.

149. Act of July 23, 1989, ch. 4, 1989 Wash. Sess. Laws 23.

150. *Id.*

151. Act of Apr. 23, 1995, ch. 20, 1995 Wash. Sess. Laws 2519.

152. S.B. Rep. ESB 5852, 54th Leg., 1st Spec. Sess. at 2–3 (Wash. 1995). The 1995 legislation was also intended to provide flexibility in conforming Washington State’s presidential primary with national party scheduling rules. *Id.*

153. Donovan, *supra* note 26, at 28.

154. H.B. Rep. HB 2297, 58th Leg., 3d Spec. Sess. at 2 (Wash. 2003).

155. WASH. REV. CODE § 29A.56.050 (2018).

156. See Act of May 12, 2011, ch. 319, sec. 1(5), 2011 Wash. Sess. Laws 2064; *Washington State Cancels 2012 Presidential Primary*, SEATTLE TIMES (May 12, 2011, 5:59 PM), <https://www.seattletimes.com/seattle-news/washington-state-cancels-2012-presidential-primary/> [<https://perma.cc/KX5P-U2KE>].

157. Donovan, *supra* note 26, at 28. Donovan points out the interesting fact that Hillary Clinton won a majority of the Democratic preferential primary votes, but activists attending party caucuses

in excess of \$ 8.4 million.¹⁵⁸ For the 2020 presidential nominating process, both parties opted to use the state-sponsored presidential preference primary to choose their respective convention delegates.¹⁵⁹

Does the Washington presidential primary procedure violate the state's constitutional ban on gifts of public funds to benefit private entities? That is a closer question than the PCO issue. Every four years the state seems to sponsor an event and invite "guests" (the major political parties). But those guests are not required to attend the celebration and have exhibited lackluster interest in doing so. Therefore, it is more difficult to establish that the parties truly benefit from the preferential primaries. They are perhaps like the children in the *Johnson* child support case, *i.e.*, indirect beneficiaries of what is a "recognized public function" that they can choose to attend (or not).¹⁶⁰ The counterargument is that under the relevant statute, the political parties play a substantial role in setting the presidential primary date¹⁶¹ and can direct some of the secretary of state's rulemaking for those elections.¹⁶² Moreover, if the parties were to consistently participate in and actively exercise control over the preferential primaries, a successful state constitutional challenge might be mounted, based on the gift-of-public-funds theory.¹⁶³

had already determined that a majority of Washington's Democratic delegation would be pledged to Bernie Sanders.

158. E-mail from Erich R. Ebel, Commc'ns Dir., Office of Wash. Sec'y of State, to Hugh D. Spitzer, Professor of Law, Univ. of Wash. Sch. of Law (June 27, 2018, 8:33 AM) [<https://perma.cc/DT5V-ZPJR>].

159. David Gutman, *Washington Democrats Choose Presidential Primary for 2020, Ditching Precinct Caucuses*, SEATTLE TIMES (Apr. 7, 2019, 11:34 AM), <https://www.seattletimes.com/seattle-news/politics/washington-democrats-choose-presidential-primary-for-2020-ditching-caucuses/> [<https://perma.cc/54HK-2PTJ>].

160. *Johnson v. Johnson*, 96 Wash. 2d 255, 264, 634 P.2d 877, 882 (1981); *see supra* notes 113–114 and accompanying text.

161. WASH. REV. CODE § 29A.56.020 (2018).

162. *Id.* § 29A.56.050.

163. Another challenge might be mounted against the major parties' use of the presidential primary for their private purposes based on article I, section 12 of the Washington State Constitution, which provides that no statute may grant privileges or immunities to any class of citizens or corporations "which upon the same terms shall not equally belong to all citizens, or corporations." WASH. CONST. art. I, § 12. The argument might be that because WASH. REV. CODE §§ 29A.56.010–.060 together with §§ 29A.56.610–.620 provide state-funded access to the "major parties" but not "minor parties," the smaller and new parties are harmed by the privilege and state funding handed to the established private political groups. "Major parties" are those receiving at least 5% of the votes in the prior presidential election. *Id.* § 29A.04.086.

IV. LITIGATING IN A LAND OF CONFLICTING PROVISIONS FROM DIFFERENT HISTORICAL MOVEMENTS

What is to be made of the major parties' stubborn misunderstanding of the voters they had worked so hard to attract, and their use of tactics that backfired so decidedly? Back in 2000, when Washington State's political parties relaunched their legal attack on the blanket primary after *Jones*, they were reacting to a U.S. Supreme Court opinion that was based on America's First Amendment clause protecting speech and association.¹⁶⁴ At first, in 2003, the parties seem to have succeeded, overturning the blanket primary in *Democratic Party v. Reed*.¹⁶⁵

But the political parties might not have taken into sufficient account the political and constitutional resiliency of statutes and constitutional provisions embedded in Washington law by two intervening movements: populism and progressivism. Both of those movements were skeptical of politicians and the established political parties,¹⁶⁶ as well as business interests.¹⁶⁷ The progressives undertook a concerted effort to diminish the importance of parties and to force the parties to open their processes to the public. Those efforts included the 1907 direct primary law, which was popular among voters. In 1922, the electorate rejected closed primaries where they would have to register by party.¹⁶⁸ They similarly embraced the Grange-sponsored blanket primary in 1935.¹⁶⁹

Political scientists have observed that political culture can be "path dependent," meaning that practices remain stable over time "even though the forces that shaped them initially may have dissipated."¹⁷⁰ But

164. See *supra* notes 53–57 and accompanying text.

165. *Democratic Party of Wash. State v. Reed*, 343 F.3d 1198 (9th Cir. 2003); see *supra* notes 66–70 and accompanying text.

166. See *supra* notes 5–7 and accompanying text. An 1894 cartoon asks: "In Which Box Shall the Voter of '96 Put His Ballot?" The three choices presented are: "Republican Party, Builders of Corporate Wealth," "Democratic Party, Builders of Saloons and Jails," and "People's Party, Builders of Churches and Schools." *In Which Box Will the Voter of '96 Put His Ballot?*, *Kingfisher Reformer* (Nov. 29, 1894), <http://courses.missouristate.edu/bobmiller/Populism/scartoon/scartoon33.htm> [<https://perma.cc/6XQD-U2A2>].

167. See *supra* notes 96–100 and accompanying text.

168. See *supra* notes 25–26 and accompanying text.

169. See *supra* note 31 and accompanying text.

170. Nicolas P. Lovrich Jr., John C. Pierce & H. Stuart Elway, *Two Washingtons? Political Culture in the Evergreen State*, in *GOVERNING THE EVERGREEN STATE: POLITICAL LIFE IN WASHINGTON*, *supra* note 18, at 1, 2.

in this instance, Washington voter commitment to wide-open election practices has not dissipated at all. The state's open government attitude can be traced to its populist constitution, later accelerated by progressivism.¹⁷¹ Political customs (including the initiative, referendum, and recall, for example¹⁷²) are often entrenched in constitutions or statutes by an active political movement. Those provisions then play a key role in reinforcing and continuing that movement as an ongoing part of a state's political life. This has been described by Professor Robert A. Schapiro, who has cogently shown how electoral supermajorities enshrine their values in state constitutional provisions and then those provisions themselves help generate ongoing political customs and community.¹⁷³ Professor Nicholas P. Lovrich recently elaborated on how entrenched political values continue from one generation to the next: "An area's political culture tends to be learned by newcomers and sustained by long-time residents, and thereby comes to have an ongoing impact on politics and policy."¹⁷⁴

Washington's open approach to primaries has had remarkable staying power because, decade after decade, voters insist on maintaining an election system that enables them to vote for pretty much whomever they want, whatever they want, whenever they want. This attitude, founded in populism and progressivism, is also reflected in the state's resilient initiative and referendum process,¹⁷⁵ as well as voter insistence on electing judges.¹⁷⁶ In Washington, the open government political culture seems to have only gained strength over the years. When the political parties embarked on a successful legal strategy to eliminate the blanket primary and replace it in 2004 with one that required primary voters to opt for one party or the other,¹⁷⁷ the state's popular political culture recoiled on the parties, throwing out both the baby and the bathwater, putting the top two system in place.¹⁷⁸ The bottom line is that

171. See *supra* notes 6–16 and 94–98 and accompanying text.

172. See *supra* note 11 and accompanying text.

173. Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 393 (1998).

174. Lovrich et al., *supra* note 170, at 2.

175. Shaun Bowler, Todd Donovan, Max Neiman & Johnny Peel, *Institutional Threat and Partisan Outcomes: Legislative Candidates' Attitudes Toward Direct Democracy*, 1 STATE POL. & POL'Y Q. 364, 370 (2001).

176. Shaun Bowler, Todd Donovan & Janine Parry, Public Reasoning About Judicial Selection Methods 20 (paper presented at the Western Political Science Association meeting in Vancouver, B.C., 2009).

177. See *supra* note 84 and accompanying text.

178. See *supra* note 85 and accompanying text.

litigation approaches to solving political problems have limitations.¹⁷⁹ With a strong enough political culture and strong enough tools in the hands of voters, the public can sometimes reverse what initially appears to be a “win” in the courts—even a win based on the First Amendment of the Federal Constitution.

The political parties’ failure to foresee the ultimate political outcome of their litigation strategy for primary elections was in part because the party activists’ worldview was different from that of the voters at large. In a thoughtful analysis, Professors Nathaniel Persily and Bruce E. Cain have observed some contradictions among court decisions on the role of American political parties in the election process—contradictions that reflect a half dozen competing and very different paradigms.¹⁸⁰ These include, among others, a long-dominant “managerial” paradigm in which “states had near plenary authority to regulate political parties” for the preservation of political order,¹⁸¹ a “libertarian” approach that viewed parties as private interest groups to “be accorded maximal rights of association,”¹⁸² and the early twentieth century “progressive paradigm” that viewed parties as impeding democracy and the supremacy of the electorate.¹⁸³ Washington State political party activists probably leaned toward yet another of Persily’s and Cain’s paradigms: a “pluralist” view emphasizing group-based competition built into two major parties that serve as coalitions of interest groups.¹⁸⁴ That approach protects the role of parties as private, but indispensable, mediating institutions in American politics.¹⁸⁵ Yet the party officials driving the litigation strategy hopped on board the “libertarian” trend of the U.S. Supreme Court’s recent freedom-of-association decisions as a tactic to gain freedom from state interference in the nominating processes.

What the party activists missed was that Washington State voters remained ensconced in the Progressive Era. The electorate was

179. For a general discussion of the limitation of litigation strategies in carrying out political and social goals, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

180. Persily & Cain, *supra* note 7, at 779.

181. *Id.* at 779–82.

182. *Id.* at 782–85.

183. *Id.* at 785–87.

184. *Id.* at 793–94. Obviously, the Libertarian Party, which was active in some of the Washington cases discussed above, would have had Persily’s and Cain’s “libertarian” worldview rather than viewing the political world through a lens that focused just on two major parties.

185. *Id.* at 779, 791–96.

overwhelmingly wedded to a progressive paradigm and had no interest in changing. The various lawsuits,¹⁸⁶ the shifting primary election methods,¹⁸⁷ and the ultimate decision by voters to throw the partisan baby out of the primary bathwater,¹⁸⁸ shows that in a democracy a significant disconnect between political leadership and the voters at large will eventually result in what the voters want.

Another important conclusion is that political leaders, including party leadership, must be mindful of *state* constitutions. Just as the late eighteenth century drafters of the Bill of Rights wrote in strong protections for speech and association, the populist drafters of Washington's state constitution—people who took the Bill of Rights for granted but had other immediate concerns—built in very different types of provisions a century later. Those state provisions were meant to protect the public and the public purse from exploitation by business interests. Entrenched provisions can come back and bite. In this instance, it is conceivable that article VIII, sections 5 and 7, which ban spending public money for private sector purposes, could be the legal basis for eliminating the use of taxpayer-funded primaries for electing PCOs, who are private political party officers. It is also conceivable—though less likely—that Washington courts could find the preferential presidential primary violates the state's ban on gifting public funds.

* * *

When political actors access the courts for strategic purposes, they can get caught in unforeseen twists and turns of politics, including different policy choices embraced by society at different points in history and then entrenched into statutes and constitutions. This does not at all mean that citizens and organized groups should avoid using the judicial system to further legitimate goals. However, political insiders in a democracy must plan their tactical moves—including use of litigation—with an eye towards the much broader political context and broad public desires. Otherwise, they risk having things turn out quite different from what they had intended.

186. See notes 66–95 and accompanying text.

187. See notes 72–83 and accompanying text.

188. See notes 84–85 and accompanying text.