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Legal Authority for Top Two Open Primary

After the Supreme Court invalidated California's blanket primary[1], Alaska and Washington State were forced to discard their own versions of the blanket primary.

Washington subsequently introduced a ballot initiative, I-872, to fit within the legal confines articulated in *Jones*. This initiative implemented a top-two open primary, which provides that all candidates for a "partisan office" appear together on the primary ballot which is voted on by all voters, with the two candidates receiving the most votes overall advancing to the general election.[2] The initiative passed in 2004 with over 60% of the vote.[3]

The Washington State Republican Party, joined by the Washington State Democratic Central Committee and Libertarian Party of Washington, filed a facial challenge against I-872[4], claiming that the new system violated its associational rights by depriving the organization of its ability to nominate its own candidates and by forcing it to associate with candidates it did not endorse. The district court granted the parties' motion for summary judgment and enjoined implementation of I-872.[5] The Ninth Circuit affirmed, finding that I-872 was facially invalid because the party-preference designation created the risk that the primary winners would be perceived as the parties' nominees—therefore creating an "impression of associational ties"—even if the party did not want to be associated with the candidate.[6]

In a 7-2 vote, the U.S. Supreme Court rejected the notion that I-872 was similar to California's blanket primary and therefore implicated 1st Amendment associational rights. The Court noted that the ballot initiative did not choose parties' nominees; rather, the primary was a process of cutting down the list of candidates for the general election.[7] Writing for the majority, Justice Thomas upheld the top two primary and emphasized the right of the State and its voters to determine what electoral system they wanted to implement. He also rejected the petitioner's contention that such a primary would confuse voters as to who the parties' nominees were, noting that there was no evidence to support the claim and expressing doubt that an informed electorate could so easily be misled[8].

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[1] *California Democratic Party v. Jones, 530 U.S. 567 (2000).*
[2] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. at 447-48 (2008).
[3] Id. at 447.
[4] Id. at 448
[5] *Was**h**. State Republican Party v. Logan*, 377 F. Supp. 2d 907, 932 (W.D. Wash. 2005).
[6] *Wash. State Republican Party v. Wash*., 460 F.3d 1108, 1119 (9th Cir. 2006).
[7] *Wash. State Grange*, 552 U.S. at 455.
[8] Id.

The decision did not focus on the number of candidates to advance from the primary.

Since then, California passed Proposition 14 and joined Washington in adopting the top-two open primary. The California Supreme Court declined a challenge to block enforcement and the San Francisco Superior Court upheld it.[9]

[9] *Field et al. v. Bowen.*, Case No. CGC-10-502018(Superior Court of California in and for San Francisco County) 2011..