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POLICY BRIEF

A Citizen's Guide to Initiative 872

An Initiative to Change Washington's Primary Election System

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Elections are about determining the philosophy – the ideas – which will organize and govern our society. An electoral system that clarifies choices for Washington's voters will lead to a government more consistently reflecting their priorities. The test voters should apply in evaluating Initiative 872 or any change to Washington's primary election system is whether it leads to more responsive, more accountable government for the people of our state.

I. Introduction

In 2004, Washington joined with 48 other states in nominating candidates by the party primary system, through which adherents of political parties join in primary elections to choose who will be their spokesmen and representatives in the state's general election. The legislature adopted the new system following court decisions which held that the state's previous and long-standing primary election system, the "blanket primary," violated the constitutional rights of members of political parties to determine with whom they would associate and who would be their spokesmen and candidates.[1]

[1] For the history of the litigation battles and the constitutional principles involved see the author's "Beyond the Blanket Primary," Washington Policy Center Policy Brief, December 2000, at http://www.washingtonpolicy.org/ElectionLaws/PBDerhamPrimaryBlanket.html and "After the Blanket Primary: Reforming Washington's Election System," November 2003, at http://www.washingtonpolicy.org/ElectionLaws/PBDerhamAftertheBlanketPrimary2003.html.

The open primary system adopted by the legislature earlier this year is similar to that used in Montana and other states, in which voters join with others sharing their party preference to nominate candidates in the primary. Under this system one candidate from each party automatically advances to the general election. In the general election, of course, citizens can vote for any candidate of their choice, without restriction.

Initiative 872, sponsored by the Washington State Grange, would replace the recently-adopted open primary system with a "top two" or "winnowing" primary, largely based on the "Cajun" system used only in Louisiana. Under this proposal, voters would select among all candidates in a primary, regardless of the party of the voter or the candidates. According to the initiative, "each voter has the right to cast a vote for any candidate for each office without any limitation based on party preference or affiliations, of either the voter or the candidate."[2] Under the system proposed by the initiative, the two candidates appearing on the general election ballot could both be from the same party.

Initiative 872 Ballot Title

Statement of Subject: Initiative Measure No. 872 concerns elections for partisan offices.

Concise Description: This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party.

Should this measure be enacted into law? Yes [ ] No [ ]

II. The Initiative's Provisions: An Overview

Initiative 872 will apply to all partisan elections in Washington State for U. S. Senate, U.S. Representative, and state and county partisan offices.[3] The most significant operative provisions are Sections 5, 6 and 9.

Section 5 changes the definition of a primary or primary election. Under present law, a primary is the statutory procedure for "nominating" a candidate for public office. Under Initiative 872, a primary is defined as a procedure for "winnowing [candidates] to a final list of two..."[4] This change of language recognizes that, if Initiative 872 is adopted, the September election will no longer be the place where political parties

[2] Initiative 872, Section 3 (3). The full text of Initiative 872 is available from the Office of the Secretary of State at http://www.secstate.wa.gov/elections/initiatives/text/i872.aspx.
[3] Initiative 872, Section 4.
[4] Initiative 872, Section 5.

nominate their candidates as it has been since the state's partisan primary law was originally adopted in 1907.

Section 6 provides that the only names that will appear on the general election ballot are the two candidates receiving the most votes in the primary, regardless of party.[5]

Section 9 amends the declaration a candidate signs when filing for office. Under Initiative 872, the candidate, instead of declaring "his or her major or minor party," the candidate would declare "party preference or independent status."[6] While the change may appear merely technical it raises significant constitutional issues that will be discussed later in this Policy Brief.

Finally, almost off-handedly, the initiative repeals several provisions of law, most significantly RCW 29A.28.020, which provides for a procedure by which a political party may name a new candidate for the ballot in the event of death or disqualification of a candidate.[7] While it is relatively rare for a candidate to die during a campaign it is not unknown. In both 2000 and 2002, Democratic Party candidates for the U.S. Senate, in Missouri and Minnesota respectively, died in the final weeks of the campaign. Under Initiative 872, if a candidate were to die after filings closed in July, a replacement candidate could not be named.

III. The Impact of Initiative 872

A. The Effect on Third Parties

Washington State has a long tradition of vigorous minor party participation in our elections. In 2000, for example, 180,000 voters cast their votes for third party candidates, including representatives of philosophies as divergent as the Libertarian Party, the Reform Party, the Green Party, the Natural Law Party, and three other parties.[8]

To some people, third parties merely clutter the ballot, diverting attention from the major party candidates who have a realistic chance of election. To others, they represent alternative voices and philosophies not expressed by the more established parties and, therefore, strengthen democracy.

Under today's law, candidates of minor parties are nominated by convention and petition and appear only on the November ballot.[9] Under Initiative 872, third party candidates would appear on the September ballot, but they would be "winnowed" from the ballot except in those rare cases where only a single candidate of the largest parties has filed for election or when the third party candidate outpolls the candidate of a major

[5] Initiative 872, Section 6.
[6] Initiative 872, Section 9 (3).
[7] Initiative 872, Section 16 (3).
[8] Office of the Secretary of State, at www.secstate.wa.gov/elections/results.
[9] Revised Code of Washington 29A.20.121.

party. The ability of a minor party to graduate to major party status, as the Libertarian Party did in 2000, by garnering 5% of the vote in the general election, would be virtually foreclosed.

B. Initiative 872 Reduces Voter Choice Where It Is Most Important

Each side in the debate over Initiative 872 asserts that its position will best preserve voter choice. Can both be right? It turns out that the debate revolves around whether choice is of greater importance in the primary election when the electorate is smaller or when the final decisions are made in the November general election when most people vote.

In the primary election, under Washington's current party primary law, the purpose of a primary is to allow voters to participate in nominating the candidates of the political party with which the voter feels the greatest affinity. A voter, therefore, will vote for Republican candidates for nomination, or for Democrat candidates or Libertarian candidates, as the voter chooses. Advocates of Initiative 872 claim that this system, the party primary party system used in 48 other states, denies voters the choice of "ticket-splitting" in the primary. Under Initiative 872, a voter could vote for a Republican for one office and a Democrat, Independent or Libertarian for another. Initiative 872, therefore, maximizes choice for those voting in the primary election.

In the general election, however, the reverse is true. Initiative 872 substantially reduces voter choice since only two names will appear on the general election ballot. No minor or third party option will be available. Thus the 180,000 and more voters who voted in 2000 for a candidate other than one of the "top two" would find themselves disenfranchised under Initiative 872.

Further, in some cases, Initiative 872 will eliminate philosophical choice altogether, since the candidates in the general election could represent the same political philosophy. While the proponents state that this would rarely happen (3.3% of the time) in statewide and Congressional races, the times it occurs are far from trivial. In fact, in gubernatorial races in the last quarter century the frequency would be ten times the proponent's figure (or 33.3%). Fully one-third of the time the general election would have been between two candidates of the same political philosophy. Thus, in the 1996 race for governor, voters would have been forced to choose only between two proponents of the Democratic Party philosophy: Gary Locke and Norm Rice. And in 1980, the voters' ultimate choice for governor, John Spellman, who emerged on the top of a crowded Republican primary field, would not have advanced to the general election.

Thus, in the general election, when most voters vote, the choice of candidates would be reduced, in some cases substantially.

To the Grange, these results are perfectly satisfactory. After all, they say, their system results in a runoff between the two most popular candidates. If elections are, in fact, merely popularity contests, like the choice of a Senior Class President, they may

have a point. If, however, elections are designed to provide voters with choices between differing philosophies of government, as democratic theory tells us, the Grange's measure is flawed at its core.

C. How Will Political Parties Nominate Their Candidates?

No political party can easily accept that in the general election it may be denied a place on the ballot for a candidate representing its philosophy of government, simply because a vigorous primary contest between members of its party caused its leading candidate to come in third behind two members of another party, as happened to John Spellman in 1980. Though the major parties have all expressed their preference for a public primary, each has declared that it is prepared to nominate a single candidate for each office by party convention or other internal party procedure, in order to assure that its voice is heard in the November election.[10]

D. Is This a "Cajun" Primary?

Forty-nine states hold primaries in which the top candidate of each party advances as the party's nominee in the general election. Louisiana alone holds a qualifying primary in which the top two candidates advance regardless of party.

On its web page, the Yes on Initiative 872 Committee rejects the comparison between its proposal and the Louisiana "Cajun" primary, noting that two elements in Louisiana are not present in Initiative 872.[11] First, they say, voters in Louisiana register by party, though, as under Initiative 872, they may vote for any candidate regardless of party in the primary. Second, proponents say, in Louisiana a candidate who receives 50% in the primary is immediately elected, rather than still facing a run-off as in Initiative 872. The central provision of Initiative 872, though, that only the top two candidates regardless of party advance to the general election, is identical.

E. Is Initiative 872 Clear of Constitutional Infirmities?

The Yes on Initiative 872 Committee says, "We are convinced that [the Initiative] can be successfully defended by the Attorney General."[12] They apparently base that opinion on a statement by Justice Scalia in *California Democratic Party v. Jones*, decided in 2000, that a qualifying election might be constitutional, because it does not nominate candidates for the political parties.[13] That statement arguably supports claims of the constitutionality of Section 6 of Initiative 872, the "top two" provision.

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[10] For a discussion of the options chosen by the parties see, "After the Blanket Primary: Reforming Washington's Election System," Washington Policy Center Policy Brief, November 2003, at http://www.washingtonpolicy.org/ElectionLaws/PBDerhamAftertheBlanketPrimary2003.html.

[11] Yes on Initiative 872, section on Frequently Asked Questions, at www.i872.org/faq.php.

[12] Ibid.

[13] *California Democratic Party v. Jones*, 530 US 567, 147 L. Ed 2d 502 at 517, decided June 26, 2000.

But the First Amendment freedom of association of political parties that Justice Scalia recognizes in the same paragraph poses grave challenges to Section 9 of Initiative 872, which purports to allow multiple candidates to declare a party preference, notwithstanding actions by that party to nominate a single candidate.

The political parties, supported by a long list of court cases from other states[14] and the Federal courts,[15] assert that their First Amendment right to control who may associate under their name and who may speak with their voice, and that they may prevent the use of their name on the ballot by unauthorized candidates.

Both the U.S. Supreme Court and the Ninth Circuit Court of Appeals, in cases dealing respectively with the California and Washington Blanket Primary emphasize the importance of the issue:

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee…[who is] the party's ambassador to the general electorate in winning it over to the party's views."[16]

Thus, the position of the parties that they would have the right to exclude anyone other than their approved nominee from using their name on the ballot has substantial case support.

The drafters of Initiative 872 directly confront the parties' position by changing the law which now requires that candidates declare their party, and instead provide that candidates will declare their "party preference."[17] By purporting to deny the appearance of party "membership," the Grange attempts to evade the clear court holdings establishing constitutional protection for political parties. If Initiative 872 is adopted, it seems doubtful that Section 9 could withstand the inevitable constitutional challenge.

IV. Is Initiative 872 Good for Washington?

Technical changes in election laws have substantive results. Initiative 872's drafters have declared that their intent is to weaken political parties.[18] The political parties agree that this would be the effect, but disagree whether the result would be beneficial to the people of Washington state.

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[14] Opinion of the Justices to the Governor, 385 Mass. 1201, 434 NE 2d 960 (1982); *Chambers v. I. Ben Greenman Assn*, 58 NYS 2d 637 (App Div 1945), aff'd 58 NYS 2d 3, 269 App Div 938 (1945); *State ex rel Cook v. Houser*, 123 Wis 534, 100 NW 964 (1904).

[15] *LaRouche v. Fowler*, 152 F3d 974 (DC Cir, 1998); *Duke v. Massey*, 87 F3d 1226 (11th Cir, 1996); *Duke v. Smith*, 13 F3d 388 (11th Cir, 1994), Duke v. Cleland 5 F 3d 1399 (11 Cir 1993); see also *Norman v. Reed*, 50 U.S. 279 (1992)(dicta).

[16] *California Democratic Party v. Jones*, 530 US at 574, *Democratic Party of Washington State v. Reed*, 343 F3d 1198, 1204 (9th Cir, 2003).

[17] Initiative 872, Section 9 (3).

[18] "Argument for I-872," Washington State 2004 Voter's Guide.

Washington rightly has eschewed nonpartisan election for county, state and Federal offices, recognizing that the two-party system has functioned well for the state and the nation. Political parties are simply voluntary associations of citizens seeking to advance their philosophy of government. Party labels become a "brand name" and voters, whose busy lives may leave them little time to analyze position papers of all candidates in Washington's long election ballot, can vote with the expectation that a candidate generally agrees with the philosophy of the party that chose him or her as its nominee.

A system which emphasizes the responsibility of a party and its supporters to nominate a candidate whose personal qualifications and philosophy are consistent with the values of that party increases accountability and facilitates clear decisions by the voter.

And a system that achieves that result through a broadly participatory party primary assures that the parties adapt quickly to changing priorities of the electorate and do not become in-bred elitist groups, such as typify some political parties in other countries. A partisan primary, therefore, advances the goal of a truly representative, idea-based, electoral system.

In November voters will decide whether they prefer a system that sees elections merely as personal popularity contests or that focuses choice on alternative visions for the future of the state and nation.

About the Author

Richard Derham is a graduate of Harvard College and Columbia Law School. He practiced law for thirty years in the Seattle office of Davis Wright Tremaine where his practice included election law matters. He also served for three years in the Reagan Administration as Assistant Administrator of the Agency for International Development. Most recently he served four years as President of the Washington Policy Center. Mr. Derham is the author of the studies, "Beyond the Blanket Primary, Washington's Parties Nominate Their Candidates," and "Reforming Washington's Primary Elections, Six Proposals in a Nutshell." He was the chairman of the committee that drafted the Republican Party Nominating Rules.

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