



# POLICY BRIEF

## **Elections By Plurality** *A Multi-Party System and the Grange Initiative*

By  
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#### Executive Summary

Should voters replace the state's unconstitutional blanket primary with a multi party general election scheme in which elections by a mere plurality would become the norm?

That is the proposal advanced by the Washington State Grange in Initiative 751 filed in January 2001. The initiative would, alternatively, establish a multi-party election in which, potentially, two Republicans and two Democrats would advance to the general election ballot. Or, if the courts invalidate the multi-party scheme, it would transform Washington State's partisan elections into contests in which the general election would become a contest between the three candidates getting the most votes on a primary election ballot regardless of party affiliation.

This Policy Brief reviews the Grange Initiative and will:

- Describe the provisions of both multi-party and multi-candidate elections as proposed.
- Analyze the impact of the initiative on elections in Washington State, including an examination of how it might have changed the results in recent elections.
- Review the assertions by the Grange that Washington's constitution has a provision regarding "ballot secrecy" that conflicts with the constitutional claims of political parties to know which voters choose to affiliate with their primaries.

The Grange Initiative is a flawed measure that, far from preserving the blanket primary as its advocates claim, would fundamentally alter the election system of the State of Washington, undermining popular will and enhancing the role of special interest groups such as the Grange.

#### Introduction

In a frontal assault on the two-party system, the Washington State Grange has introduced Initiative 751 that would in effect transform Washington's election system into an election by plurality along either the European style multi-party electoral scheme or, alternatively, a three-candidate election system.

Although billed as an initiative to "preserve the blanket primary,"<sup>1</sup> the Grange Initiative in fact works a radical change in the way general elections will be conducted for most partisan offices in Washington State.

The purpose of a primary is to narrow the field of candidates so that one, and only one, representative of each political philosophy appears on the general election ballot. By providing a process through which a single champion

<sup>1</sup> Washington State Grange Press Release, Jan 8, 2001

of each party advances to the general election, the traditional two-party system provides voters with two choices and a majority selects the winning candidate and philosophy.<sup>2</sup>

Under the Grange Initiative multiple candidates will advance to the general election, including, potentially, two candidates claiming to represent the viewpoints of each of the major parties. Had this been the case in the 2000 election, both Maria Cantwell and Deborah Senn would have appeared on the general election ballot as Democratic candidates alongside Senator Gorton and, presumably, enough Democrats would have voted for Ms. Senn to assure Senator Gorton's re-election.

In effect, the Initiative creates two "Republican" parties and two "Democratic" parties, an "official" Republican and Democratic Party and an "affiliate" Republican and Democratic Party.<sup>3</sup> The same would apply to the Libertarian Party, which, since the 2000 election, has major party status under Washington law,<sup>4</sup> and will also hold primaries to nominate candidates under the current law.

As a "fail-safe" provision anticipating the likely unconstitutionality of the principle thrust of the initiative, the Grange Initiative transforms Washington's partisan elections to multi-candidate elections.

## Background

In 1934, the Washington State Labor Council and the Washington State Grange joined to sponsor Initiative 2, which replaced Washington's open primary system with a blanket primary, a system for many years unique to Washington State and which survived until the end of 2000.

In 1996, California adopted a blanket primary based on Washington's law, which was promptly challenged by the Democratic, Republican, Libertarian, and Peace and Freedom Parties. In June 2000 the U.S. Supreme Court declared that the blanket primary is an unconstitutional infringement of fundamental First Amendment freedoms of speech and association when imposed over the objections of political parties.<sup>5</sup>

Subsequent to the Supreme Court decision, the U.S. District Court in Western Washington entered a Preliminary Injunction consented to by the Secretary of State and the two major parties that declared that Washington's

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<sup>2</sup> Third party candidates, of course exist and in close elections, where sufficient votes are cast for third party candidates, the winning candidate may receive only a plurality of the votes. Thus, Senator Maria Cantwell was elected in 2000 with a plurality of the votes (48.73%) rather than an outright majority because 64,734 votes were cast for the Libertarian candidate. <http://www.vote.wa.gov/vote2000/results/federal.tpl?race=1111&district=0> While such exceptions do occur, it remains generally true that under our current system, winning candidates receive a majority of the votes.

<sup>3</sup> The Grange description of its Initiative makes this explicit: "You can basically look at the 'affiliate' candidates and the 'official' candidates as two different parties ..." Grange Legislative Update dated Jan 17, 2001 at <http://216,55,18,46/Washington/walegisl.htm>

<sup>4</sup> Traditionally Washington has had two "major parties" governed by the primary law. All minor parties nominate their candidates solely by the convention method. As a result of achieving 5% of the vote in the race for three separate statewide races in the 2000 General Election, the Libertarian Party has now achieved "major party" status for purpose of the state's election laws. See RCW 29.01.090. They remain a small party and, for purposes of this Policy Brief, we will continue to discuss the "two-party system" since it is likely that in most future elections, voters' decisions will still come down to advocates of the two major political philosophies.

<sup>5</sup> California Democratic Party v. Jones, 530 U.S. \_\_\_, 147 L Ed 2d 502 (2000)

blanket primary was unconstitutional and provided for a partisan primary beginning in 2001.<sup>6</sup>

The history of the blanket primary in Washington, together with a detailed analysis of the rationale of the U.S. Supreme Court decision in *California Democratic Party v. Jones* and the subsequent Washington State litigation can be found in “Beyond the Blanket Primary: Washington’s Parties Nominate Their Candidates,” a Policy Brief published by the Washington Institute Foundation in December 2000.

## **Description of the Grange Initiative**

### **A. Declaration of Policy**

The Initiative begins with a declaration of policy asserting that it is the constitutional “right” of the voters to vote in a primary election to select candidates for the general election ballot “who have the most substantial support.” Further, the Initiative asserts a constitutional right to vote “for any candidate for every office without being forced to make a declaration of political faith or membership in a political party.”<sup>7</sup> No source of these purported rights is identified and such claims conflict directly with the holding of the U.S. Supreme Court in *California Democratic Party v. Jones*.

### **B. The Multi-Party Primary**

#### **1. Scope: Legislative Exemption**

The Grange Initiative applies to all congressional and senatorial elections, all statewide offices, all legislative offices, and all county offices, except for nonpartisan offices.<sup>8</sup> Local offices (city and local districts) are nonpartisan elections and will not be affected by the “multi-party” portion of the Grange Initiative.

#### **2. Party Rules to Define “Official” Candidate**

The substantive portion of the Initiative begins by defining two key terms. The distinction between “official candidate” and “party affiliate” becomes crucial to an understanding of the remainder of the Initiative.

An “official candidate” of a major party is “a candidate recognized as the representative” of that party. A party may provide for recognition of more than one candidate.<sup>9</sup> A “party affiliate” is “a self-identification of party interest of allegiance made by any candidate” at the time the candidate files for office.<sup>10</sup>

The procedure for designation of one or more “official” candidates shall be provided by a party rule adopted either at a state convention or at a meeting of the party’s “central committee.”<sup>11</sup> Party rules may provide that the designation

<sup>6</sup> Order on Motion of Democratic Party for Preliminary Injunction, July 20, 2000 in *Washington State Democratic Party v. The State of Washington*, Case No C00-5419, U.S.D.C., (W. Wa).

<sup>7</sup> The Grange Initiative, Sec. 1.

<sup>8</sup> *Id.*, Sec. 6.

<sup>9</sup> *Id.*, Sec. 2.

<sup>10</sup> *Id.*, Sec. 3.

<sup>11</sup> *Id.*, Sec. 6. The statutory term for the state body governing major political parties is “state committee” not “central committee”, RCW 29.42.020. The term “central committee” applies to the county governing body, RCW 29.42.030. Apparently the Grange intends that rules governing statewide candidates must be adopted by convention, and not by the party’s governing committee, but rules governing county level candidates must be adopted by the county central committee, but not by the county convention. Whether the courts would uphold that distinction is questionable.

“official candidate” shall appear on election ballots and in the Voters Pamphlet.<sup>12</sup> Party rules are required to be filed with the Secretary of State within thirty days following adoption and shall be in effect until sixty days following the filing of subsequently adopted or amended rules. The rules will be published in the Secretary of State’s Voters Pamphlet.<sup>13</sup>

### 3. The Primary Nomination Ballot

A candidate filing for partisan office who meets the test established by his party for designation as an “official” candidate may choose to file either as an “official” or an “affiliate” member of the party.<sup>14</sup> The status of a candidate as “official” or “affiliate” shall appear on the “primary and election ballot.”[Sic: the insertion of the word “and” in the quoted phrase is confusing and may be a drafting error.]<sup>15</sup> The Voters Pamphlet shall also indicate the “official” or “affiliate” status of each candidate.<sup>16</sup>

### 4. General Election Ballot

The revolutionary nature of the Grange Initiative appears in Section 16, which describes how candidates advance to the general election ballot. It provides:

The name of a candidate for any office for which a primary was conducted shall not be printed on the general election ballot for that office at the subsequent general election unless the candidate receives a number of votes equal to at least one percent of the total number cast for all candidates for that position and a plurality of the votes cast for the “official candidates” of the party for that office at the primary or a plurality of the votes cast for affiliates of a party.<sup>17</sup>

### C. The Multi-Candidate Fallback

Clearly recognizing constitutional difficulties with their proposal, the drafters have provided a fall back position. Sections 2 through 13 of the Initiative, those described above, are declared to be non-severable, that is if any portion of the initiative is determined to be invalid, then all those sections will be invalidated.<sup>18</sup>

In the event the new multi-party primary is invalidated, all Washington partisan primaries will change in nature so that the top three candidates, irrespective of party affiliation, will advance to the general election.<sup>19</sup>

## Analysis

### A. The Grange Initiative Distorts the Purposes of Nomination Primaries

If general elections are the way democracies select the philosophies that will govern their political life, primaries advance that purpose to the extent, but only to the extent, that they winnow the field and channel the voters’ final selections to the leading proponents of differing philosophies.

A two-party system has proven to be the most efficient mechanism for promoting effective alternative choices. The experience of nations with multi-party

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<sup>12</sup> Id., Sec. 7(3).

<sup>13</sup> Id., Sec. 8.

<sup>14</sup> Id., Sec.9.

<sup>15</sup> Id., Sec. 14.

<sup>16</sup> Id., Sec. 15

<sup>17</sup> Id., Sec.16.

<sup>18</sup> Id., Sec. 20.

<sup>19</sup> Id., Sec. 19.

elections illustrates the challenges of trying to build a stable government with multi-party elections.<sup>20</sup>

Given what some experts describe as the “facial unconstitutionality” of the Grange Initiative under a long series of U.S. Supreme Court cases, discussed in some detail in “Beyond the Blanket Primary: Washington’s Parties Nominate Their Candidates,”<sup>21</sup> it may be that the real purpose of the Grange is to arrive, by stealth, at the three-candidate run-off scheme it establishes as its “fail-safe” provision.

## **B. Multi-Party Elections**

It is a common place that changing the procedure for elections will change the results.

The Grange Initiative intentionally establishes two parallel primaries for each party. Two candidates identified as “Republican” and two identified as “Democrat” as well as two identified as “Libertarian” may advance to the general election ballot, together with one each for qualifying minor parties.

The “official” Republican candidate receiving the most votes in the primary advances to the general election ballot, providing that he received at least 1% of the total votes cast for the position. In addition, the “affiliated” Republican candidate receiving the most votes among affiliated Republicans also advances to the general election, again provided that he received at least 1% of the total votes cast for that office. The same applies to the two other parties currently qualifying for major party status.

Thus it is possible, even likely, that on the general election ballot for many offices there will be two Republican and two Democrats. In such a situation, a candidate may well be elected to a major office with, say, 30% of the total vote. What may be even more pernicious is the possibility that there may be two Democrats, for example, on the general election ballot and only a single Republican. In that situation, even a strong Democrat majority might not be sufficient to elect a Democrat. A Republican could easily be elected with only 40% of the vote, against 60% divided between the two Democrats.

To see how this system could work, assume it had been in effect for the 2000 elections. Senator Slade Gorton, running for re-election, faced only token opposition in the Republican primary, while the Democrats had a vigorous primary contest between Deborah Senn and Maria Cantwell. Had all candidates been eligible to file as “official” candidates of their respective parties, the final two-party choices would have remained Senator Gorton and Maria Cantwell. But the Democratic Party might well have chosen Maria Cantwell as their only official nominee or Deborah Senn might have chosen for tactical reasons to declare her as a “party affiliate.” Senator Gorton’s challengers likewise might have chosen to declare themselves as “affiliates.” Had they done so, the general election ballot would have provided voters a choice between Cantwell, Gorton, and Senn, along with Warren Hanson, a Republican who received 1% of the primary vote. Jeff Jared, the Libertarian Party candidate, would also have appeared on the ballot.<sup>22</sup> In the extremely close race that resulted, it is quite probable that sufficient votes would have been cast for Ms. Senn to shift the election victory from Ms. Cantwell to Senator Gorton.

<sup>20</sup> Thus, Chile’s multi-party democracy resulted in a Communist being elected to its Presidency in 1970 by 35% of the vote, with consequences that affected Chile’s political life for decades.

<sup>21</sup> See, e.g., *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), *Opinion of the Justices to the Governor*, 385 Mass. 1201, 434 N.E. 2d 960 (1092).

<sup>22</sup> <http://www.vote.wa.gov/primary/vote2000/results/federal.tpl?race=1111>

By setting up a process through which the support for the philosophy of one -- or both -- parties is divided, elections that run contrary to the popular will are not only possible, but also likely.

### **C. The Default: Multi-Candidate Run-off Elections**

Recognizing that the core provisions of the Grange Initiative raise serious constitutional questions, the drafters have provided a default provision. If the Grange Initiative is enacted it will certainly be challenged by the political parties,<sup>23</sup> and perhaps by others. In the likely event that its core provisions are invalidated in any respect, the result will be that all elections will become nonpartisan.

Washington voters are familiar with nonpartisan elections in which the top two vote getters advance to the general election. Under the Grange Initiative, however, the top three candidates will advance. This will radically change the nature of elections.

No minor party candidates are likely to advance to the general election except in very rare circumstances thus removing whatever benefit or detriment there may be to having the voices of the Libertarian, Green and Reform parties on the general election ballot.

Again, let us examine the effect of the Grange Initiative's "fail-safe" rules upon a recent election: the 1996 Gubernatorial race. In that election, eight Republicans and six Democrats squared off in the primary. The top two vote getters were then King County Executive Gary Locke and Seattle Mayor Norm Rice. Coming in third overall, but first among Republican candidates, was Republican Ellen Craswell.<sup>24</sup> In the general election, Gary Locke defeated Ellen Craswell by a margin of 58% to 42%.<sup>25</sup>

But under the Grange Initiative, three names would have advanced to the general election: Locke, Craswell and Rice. Had Rice held on to even half of the votes he received in the primary, Ellen Craswell would have been elected with 42% of the vote.

Inevitably, it will the stronger party in any given electoral district that is likely to see two of its candidates advance into the general election, dividing their vote and frequently allowing the minority candidate to be elected. By so doing, the Grange Initiative eliminates the vital role the parties serve in providing the voters with a choice between two candidates espousing opposing philosophies for the state. If one assumes that philosophy is irrelevant to government and that personal qualities and competence should control, that's one thing. But if one recognizes that elections are choices between opposing philosophies regarding the extent to which government should command the resources of its citizens (through taxes) and govern the activities of its citizens (through regulations), then offering candidates of alternative philosophies is a critical role played by the parties and establishing a process which actually favors the minority philosophy is indeed incomprehensible.

<sup>23</sup> This Policy Brief is not the place for an analysis of potential constitutional challenges, which range from the technical (whether the Initiative includes more than one subject, the basis upon which Initiative 695 was struck down, the whether it includes repealers not set forth in the act, also a basis for the invalidation of Initiative 695) to more substantive grounds. The Libertarian Party of Washington has already taken a formal position as proposed interveners in Washington State Democratic Party v. The State of Washington that they have a constitutional right to nominate solely by convention and, therefore, would challenge the inclusion of a "party affiliate" Libertarian on the ballot. Other challenges are likely from the other major parties.

<sup>24</sup> <http://www.secstate.wa.gov/elections/pri96sum.htm>

<sup>25</sup> <http://www.secstate.wa.gov/elections/gen96sum.htm>

## Conclusion

In the Declaration of Purposes, the Initiative asserts that there is a “right to absolute secrecy of the ballot” as provided by Article VI of the Washington Constitution. The Initiative itself does not specifically address this issue, though it appears prominently in the discussions of the Initiative by the Grange.<sup>26</sup>

The Initiative drafters thus appear to suggest that there is a conflict between the constitutional rights of the voters under the State Constitution, and the constitutional rights of political parties, as recognized by numerous Supreme Court cases, to determine the rules by which voters may participate in partisan primaries.<sup>27</sup> If there were any such conflict, state constitutional protections must yield to U.S. Constitutional protections.

But no such conflict exists. Article VI, Section 6 of the State Constitution provides as follows:

All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

No one is suggesting that ballot secrecy be changed. Voters will still, under every proposal advanced to date, fill out ballots in secrecy and deposit them without their ballot being disclosed to anyone.

In an effort to create a constitutional claim where none exists, the Grange confuses secrecy of the ballot with whether someone may assert a right to be a “secret” participant in a group process, contrary to the determination by the group that its processes shall be public. By so doing, the Grange Initiative invests individuals with the power to dictate to the rest of the group how the group conducts its affairs.

What is required under the primary system established by the Preliminary Injunction now in effect is that a voter must decide whether to participate in the primary process of the Democratic or the Republican Party and that the party has a right to know who has chosen to affiliate with it for purposes of selecting its candidate. But that is a voluntary act as a condition, imposed by the political parties, upon participating in the primary process of the party. Parties clearly have the constitutional right to exclude nonparty adherents from their primaries,<sup>28</sup> and it follows that they have a constitutional right to require some form of identification.

Supporters of the Grange Initiative have the burden of persuading voters that we should move away from a system which generally requires a candidate to gain a majority of the vote in order to be elected, to one in which a mere plurality is sufficient for victory, and that this will improve the democratic process in Washington State. Supporters of Senator Gorton and Mrs. Craswell might be cheered by the idea that their candidate would have won under the Grange Initiative, but can they -- or anyone -- truly advocate such a system when next time they are as likely to be on the losing side as on the winning side?

The Grange Initiative is a flawed measure that, far from preserving the blanket primary as its advocates claim, would fundamentally alter the election system of the State of Washington, undermining popular will and enhancing the role of special interest groups such as the Grange.

<sup>26</sup> See news release, January 5, 2001; <http://www.grange.org/washington/news/010501.htm> News Release Jan 8, 2001, <http://www.grange.org/washington/news/010701.htm>.

<sup>27</sup> See cases cited in *Beyond the Blanket Primary*

<sup>28</sup> *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981).