

A red silhouette of the state of California with a black outline of a ballot box and a ballot being inserted into it, positioned in the lower right portion of the state.

BALLOT BARRIER:

**Will
Proposition 62
Limit Voter
Choice in
California?**

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Executive Summary

In November 2004, California will vote on Proposition 62: “The Voter-Choice Open Primary Act.” Currently, voters may vote for the nominees of only one political party. Proposition 62 would replace this “modified-closed” system of party primaries with one in which all candidates for state or federal offices (except for presidential electors) run in a single primary election and only the top-two vote recipients are allowed to run in the general election.

This study of Proposition 62 questions how well it is likely to achieve its stated aims. After a careful analysis of relevant court opinions, California’s blanket primary and Louisiana’s “top-two” primary, it concludes that Proposition 62 would be less effective at increasing voter participation, choice, privacy, fairness, or the moderation of candidates, than other electoral reforms, while risking significant reductions in voter choice and participation in general elections.

Election systems like Proposition 62 have several drawbacks:

They do not halt declining turnout: California’s old “blanket primary” may have raised primary turnout slightly, but failed to halt the decline in general election turnout.

They rely on lower-turnout primary elections: A third fewer Californians voted in the last three primary elections than voted in the subsequent general elections.

They limit minor parties: Minor parties have rarely made it to the general election for congress in Louisiana since it adopted the top-two primary in 1975.

They favor extremists as often as moderates: Louisiana’s primary frequently resulted in more extreme candidates, such as former Ku Klux Klan grand wizard David Duke, winning one—and sometimes both—spots in the runoff.

They weaken the accountability of political parties: Top-two primaries force political parties to nominate candidates using methods with less public accountability than public elections.

They erect informational barriers for voters: Like nonpartisan elections, top-two primaries require voters to learn about a large number of candidates with less aid from partisan labels, often lowering turnout.

Proposition 62 seems a poor method for fixing California’s electoral system. Instead, reforms like Election Day Registration and Instant Runoff Voting should be considered as alternatives for increasing turnout and choice without Proposition 62’s drawbacks.

Introduction

After capturing the world's attention with their frenzied, free-for-all 2003 recall election, Californians will consider a new ballot initiative to dramatically change their electoral system: Proposition 62, "The Voter-Choice Open Primary Act." Similar to the system used by Louisiana, the new system would force all candidates for state and federal offices (except the presidency) to run in a single primary election to nominate two candidates, without regard to their political party, to stand in the general election.

Proposition 62 is heralded by its proponents as a court-approved replacement for the "blanket primary" passed by California voters in 1996 and struck down by the U.S. Supreme Court in 2000. The measure receives support from centrist Democrats and Republicans and business groups, who say it will result in the election of more moderates. It is being opposed by seven of California's political parties, Common Cause, and a number of other civic groups.

Proponents argue that Proposition 62 achieves similar ends to California's blanket primary (without violating the political parties' right of free association in choosing their nominees). They claim it allows for "more choice, greater participation, increased privacy, and a sense of fairness." Observing that most of California's congressional and legislative districts are tilted heavily toward one political party or the other, supporters of Proposition 62 say it will allow for more meaningful participation for members of a district's minority parties. Opponents, however, argue that Proposition 62 limits voters' choices in general election and decreases the participation of those who rely on partisan cues in decisive elections. They claim that Proposition 62 will hinder efforts of minor parties and often force voters to choose between two members of the same party or two candidates representing only the extremes of the political spectrum.

So far, Proposition 62 has been marketed as an expansion to "voter choice" and consequently received approval from most of those expressing a preference in public opinion polls. Although Proposition 62 increases the options available to a small number of primary voters, it does so at the cost of limiting choice for a much greater number of voters in general elections. Understanding this tradeoff is crucial for properly evaluating Proposition 62. Proposition 62's opponents in the state legislature muddied the debate by attempting to bundle their competing measure (which mostly reaffirms the present primary system) with a popular proposal to sell surplus state assets to reduce the state's debt.¹ Before voters go to the polls this November, they deserve to hear an honest explanation and debate of Proposition 62, a measure that would radically alter their state's democracy.

¹ The measure has since been split into two separate ballot questions (60 and 60A) by a court ruling. If Proposition 60 receives more "Yes" votes than Proposition 62, the present system, with minor modifications to ease access for write-in candidates, will remain in place.

Proposition 62 “Top-Two” Primary Summary

Secretary of State’s Summary:

SA03RF0031, Amdt. #1-S. Elections. Primaries. Initiative Constitutional Amendment and Statute.

Proponents: Nick Tobey, Susan Riegel Harding, and George David Kieffer c/o Peter A. Bagatelos (415) 242-8830 and c/o Barry Fadem (925) 283-0581

Requires primary elections in which voters may vote for any state or federal candidate regardless of party registration. Exempts presidential nominations and elections of party central committees, in which only registered party members may vote unless party otherwise permits. Only the two primary-election candidates with most votes for an office, whether or not members of the same party, would be listed on general election ballot; however, candidate receiving majority vote in special primary election is elected. Requires party's consent to allow identification of candidates' party registration on ballot and other official election publications. Summary of estimate by Legislative Analyst and Director of Finance of fiscal impact on state and local governments: Measure would result in no significant net fiscal effect on state or local governments.²

Summary Bullet Points:

- Applies to: U.S. Senate, U.S. House, State Assembly, State Senate, and all Statewide partisan offices
- Exempts: Presidential electors, nonpartisan county and city offices, political party committee elections
- Primary (first-round) would still be held in March, and the run-off would be held in November. This is unlike Louisiana, which holds its first-round election in November, with a December runoff if necessary.
- Political parties can choose whether they are mentioned next to one or more candidates’ names in each round of voting. (This is in response to the Supreme Court’s rationale for voiding the previous “blanket primary” described below.)
- In special elections, candidates who receive a majority of the vote do not face a runoff election. In normal elections, they still must appear on the ballot in November because Congress has set that election date nationally.

² http://www.ss.ca.gov/elections/elections_j.htm#2004General

History

1975 Louisiana Adopts “Top-Two” Primary

After facing stiff Democratic primary competition (and a primary runoff) at a time when Louisiana was a virtual one-party state, Gubernatorial candidate Edwin Edwards emerged to face, and narrowly beat, a well-financed Republican opponent who had not had to face a primary challenge. In order to make elections more difficult for Republicans and increase his incumbent advantage, he advocated and passed (as part of the new, 1975 State Constitution) a “Top-Two” Primary system that forced Republicans to compete in the first round of the election as well. Ironically, this change of system helped revive the weakened Republican Party in Louisiana as it often split the Democratic vote.

1996 Passage of California’s Proposition 198 “Blanket Primary”

In 1996, California voters approved Proposition 198 (59%-41%), thereby placing all parties’ primary races on a single ballot and allowing any voter, regardless of party, to vote in any party’s primary to nominate a candidate for each office. For example, a voter registered as a Green could vote to select a Democratic nominee for Governor and to choose a Republican nominee for Secretary of State on the same ballot. This “Blanket Primary” system continued until 2000, when the U.S. Supreme Court struck it down as unconstitutional.

1997 Supreme Court Forces Louisiana to Change Primary System

In *Foster v. Love*, the U.S. Supreme Court rules that Louisiana’s Top-two primaries violated Congress’s selection of the first Tuesday after November 1 as the national date for federal elections. From 1976-1997, Louisiana had elected 80% of its members of the U.S. House of Representatives in the October primary because they received the majority of the vote. In response, Louisiana moved its first-round primary back to November and any necessary runoff to December.

2000 Supreme Court Throws Out California’s “Blanket Primary”

The U.S. Supreme Court, in *California Democratic Party v. Jones*, found that California’s Proposition 198 violated political parties’ right to free association (i.e. not to associate with non-members when choosing party candidates and platforms). The legal status of other “open primaries,” in which voters may choose any party ballot, but may not vote in multiple parties’ primaries in the same election, were for the moment left intact. California (along with Washington and Alaska, which employ similar “blanket primary” systems) subsequently reverted to a closed-primary system. In California, the closed-primary was modified so that, with a political party’s permission, voters who chose to “decline to state” a party affiliation could still participate in that party’s primary.

Legal Issues Surrounding Proposition 62

Relating to *Foster v. Love*

Proposition 62 successfully conforms to federal law establishing the date of federal elections because, unlike Louisiana, the top two candidates in direct primary elections are both placed on the November general election ballot, even if one wins a majority in the primary.³ This method differs from Louisiana's choice to reschedule its first, and often decisive, round of voting for November, making it the official "election." Unlike Louisiana, California's November runoff constitutes the official "election." It therefore may be subject to U.S. Supreme Court rulings affirming a right to general election ballot access for minor political parties if they can demonstrate a "modicum of support," through ballot signatures or a greater than 5% proportion of the primary vote.⁴

Relating to *California Democratic Party v. Jones*

Proposition 62 carefully maintains the ability of parties to decide who may appear on the ballot under their banner. Since the primary chooses two "voter-nominated" candidates, who may be of the same party or registered with no party, it appears not to infringe on political parties' rights. Under Proposition 62, political parties may still choose which candidate to support in the primary. Although they will no longer have government-sponsored elections for party nominees, there is no obvious constitutional obligation of states to provide such public elections.⁵ Proposition 62 is also careful to bar candidates from using a political party's label without its permission. For these reasons, it is unlikely that Proposition 62 could be overturned on similar grounds to Proposition 198.

Relating to the Election Clause of the U.S. Constitution

Article I, Section 4, Clause 1 provides that the "Times, and Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." As Justice Stevens, with Justice Ginsburg joining, observed in dicta in his *California Democratic Party v. Jones* dissent, this clause provides grounds for overturning any changes to the system for electing U.S. Senators and Representatives enacted by a ballot initiative, rather than by the legislature itself. Although the *California Democratic Party v. Jones* did not decide this question, the provisions of Proposition 62 that apply to U.S. Senators and Representatives would appear amenable to legal challenge on these grounds.⁶

³ Although winning the majority in *special* primary elections would be sufficient for election under Proposition 62, special elections are obviously not governed by the same congressionally-specified date.

⁴ *Munro v Socialist Workers Party*, 479 US 189 (1986), *Williams v. Rhodes*, 393 U.S. 23 (1968), *Anderson v. Celebrezze*, 460 U.S. 780 (1983)

⁵ The U.S. Supreme Court has found that the state has certain obligations to ensure the fairness of primary elections if they are run by the state, or if the political parties are given privileges by the state, but has not established an obligation to hold public primary elections.

⁶ Proposition 62's system for filling state offices, however, would probably survive such a challenge.

Likely Consequences of Proposition 62

On Voter Turnout

Proponents of Proposition 62 have cited increased voter turnout as one of its principal benefits. For support, they point to the higher turnout in primaries during the two elections when Proposition 198, the blanket primary, was in effect. Table 1 shows that there was an increase in voting rates of 4-7% when comparing those two primary elections with other recent primary elections in California. Some might argue that this change was caused solely by the new participation of the 14% of California voters who declined to state their political party who had been barred by party rules from voting in “closed primaries” prior to 1998. This analysis, however, would also predict that primary turnout would remain elevated after the U.S. Supreme Court ruling caused California to revert to a “modified closed-primary” system, in which party rules were amended to allow “decline to state” registrants to vote in a party primary of their choice. Since turnout returned to just below its pre-proposition 198 levels in 2002 and 2004, it is unlikely that the change in access rules fully explains the increase in primary turnout.

| California Primary Turnout | | California General Turnout | |
|---|---|-----------------------------------|---|
| Election Year | Percent of Eligible Voters Who Voted in Primary | Election Year | Percent of Eligible Voters Who Voted in Primary |
| Presidential | | Presidential | |
| 1992 | 33.58% | 1992 | 54.52% |
| 1996 | 31.47% | 1996 | 52.56% |
| 2000* | 37.15% | 2000* | 51.92% |
| 2004 | 30.54% | | |
| Midterm | | Midterm | |
| 1994 | 26.22% | 1994 | 46.98% |
| 1998* | 30.05% | 1998* | 41.43% |
| 2002 | 24.58% | 2002 | 36.05% |
| *Proposition 198 “Blanket Primary” in effect | | | |

Although the available data are consistent with the argument that Proposition 198 raised turnout in primaries, the change in turnout is small enough that it could also be explained by other factors (such as the number of contested elections or the competitiveness of those elections). Since the General Election turnout declined in each year (in a pattern similar to national averages), there is no support for the contention that

⁷ Data from California’s Secretary of State.

blanket primaries result in candidates who generate higher turnout in the general election because of their “moderate appeal.”

Because the provisions of Proposition 62 are actually closer to Louisiana’s primary system than the system established in California by Proposition 198, Louisiana’s turnout may provide a better case study in the likely effect of Proposition 62 on California’s turnout. According to the Center for Voting and Democracy, “throughout the 1990’s, Louisiana often ranked last in the nation in voter turnout in U.S. House election[s]. In 1998, only 2 out of 7 races were contested. The turnout in these races was typical of House races, but more problematically, voters in most districts didn’t even have their representatives appear⁸ on the ballot.”⁹

In 1998, Louisiana changed its election schedule to conform to federal law regulating the date of federal elections. One effect of this change has increased the number of votes cast in Louisiana’s decisive first-round elections, because those elections now occur during the November general election. Between the 1975 adoption of the runoff system and the 1997 U.S. Supreme Court ruling, Louisiana held its primaries in lower turnout elections in October. During this time, 80% of races were decided without the need for a November runoff. In response to the Court’s ruling, Louisiana shifted its first round of voting to November and now holds a runoff, when necessary, in December. Since the shift, voting in the first, and often decisive, round of voting has often been higher and there has not been a dramatic drop-off in voting for runoff elections. In the 2002 Senate election, turnout dropped from 38.4% of the voting age population in November to 37.4% in the December runoff. In the 2003 gubernatorial elections, turnout actually rose from 40.6% to 42.6%. In other states, runoff elections have sometimes resulted in turnout falling by as much as half.¹⁰

Proposition 62 would continue to hold the first round of elections in California in March and allow for runoffs in November. Although Proposition 62 avoids running aground on the same constitutional reefs that afflicted Louisiana’s pre-1998 schedule by holding a runoff even when one candidate receives more than 50% of the vote¹¹ in the first election, it allows the general election ballot choices to be limited by the relatively few primary voters who turnout for off-peak season elections. Even if Proposition 62 raises the turnout in these elections slightly relative to current primary elections, it is still likely to be much lower than the current general elections. This pattern is typical of primary elections, but is more problematic in a system that allows primary elections to shape the choices available in the subsequent general elections so dramatically.

⁸ Unopposed candidates for U.S. House of Representatives do not appear on the ballot in Louisiana.

⁹ <http://www.fairvote.org/irv/louisiana.htm>

¹⁰ Georgia’s 1992 Senate election is one such example.

¹¹ Louisiana’s original pre-1998 system considered candidates who won a majority in the first round of voting “elected” and did not hold a subsequent round of voting on the November date mandated by Congress. Where Louisiana chose to comply with Congress by moving its primary election date, Proposition 62 complies by guaranteeing that the primary election never fully “elects” a candidate because it requires a runoff even when one candidate receives the majority of the primary vote.

In summary, it is possible that Proposition 62 would raise turnout slightly in some primary elections, but the evidence is not sufficient to know for sure. The possibility that primary elections might draw slightly more voters under Proposition 62 should not be applauded without attention to the far more significant drawback associated with it. The delegation of decision-making power to a small and unrepresentative group of primary voters requires taking that authority away from the much larger and more representative group of citizens who vote in general elections. Slightly better attended primaries would still be a vastly inferior mechanism to general elections when it comes to casting ballots that may often prove decisive. Other reforms, like Election Day registration, have proven much more effective at increasing voter turnout without these detrimental effects. Proposition 62 is hurt, rather than helped, by careful consideration of its effects on voter participation in key electoral decisions.

On “Moderation” of Candidates

In statewide elections, Louisiana has recently succeeded in electing moderate Democrats, such as Senators John Breaux and Mary Landrieu and Governor Kathleen Blanco. Races for the U.S. House of Representatives have nearly always favored incumbents since the adoption of the “Top-Two Primary,” perhaps because of the increased importance of name recognition, base support, and other incumbent advantages in making it to the runoff election.

In the 1990s, however, Louisiana’s system frequently led to the nomination of more extreme candidates, such as the 1990 runoff involving David Duke. (Since Duke’s opponent, former Governor Edwin Edwards had a history of suspected corruption, the race prompted a bumper sticker with the slogan, “Vote for the Crook: It’s Important.”) When a large number of candidates run in the first-round election, such as the sixteen candidates running in the 1995 governor’s race, a relatively small number of votes are needed to proceed to the runoff. In that race, Mike Foster and Cleo Fields, who were generally viewed as the furthest right and left (respectively) of the leading candidates, advanced to the runoff even though the majority of votes were cast for other candidates.

Whether California would tend to more closely resemble pre-1997 or post-1997 Louisiana in the candidates it nominated is difficult to predict. Given that Proposition 62 would establish low-turnout March elections as the first-round of voting and given California’s heterogeneity, the former result seems more likely. Proposition 62 may result in limiting the choices to two extreme candidates in statewide elections. Gerrymandered U.S. House and state legislative districts with a strong partisan tilt, on the other hand, would frequently have two members of the dominant party as the only options allowed in runoff elections.¹² Either result has disadvantages and imposes limits on the choices of voters in general elections.

¹² The standard political “left-to-right-spectrum” model suggests that the ability of members of the minority party to vote for the more moderate member of the district’s majority party would result in the election of more moderates in such districts. Even if this model is accurate, this moderating effect may not overcome the importance of the base to winning the first-round elections described above.

On Privacy

Proponents of Proposition 62 point out that it protects the privacy of voters who do not wish to publicly identify as members of a political party—either by registering in that party or by publicly choosing which political party’s primary ballot to cast. Protecting voters’ privacy can also be done through less obtrusive reforms to California’s primary election system. Several states hold “open primaries” that allow all voters, even those who decline to register with a party, to choose one party primary in which to participate while in the privacy of the voting booth. This is an alternative to Proposition 62 that increases voter choice and privacy without Proposition 62’s other consequences.

On Political Party Nominations

Proposition 62 preserves the right of political parties to control their own procedures for nominating candidates, but replaces the current state-sponsored partisan primary elections with non-partisan “voter-nominating” elections. As a result, parties will have to adopt new procedures for choosing candidates. In order to avoid splitting their vote and to maximize their candidate’s chances of becoming “voter nominated” by winning the first-round elections, parties are likely to nominate candidates before either round of public voting. Party leaders have already alluded to the need for caucuses or party conventions to replace statewide partisan-primary elections if Proposition 62 is passed. The result may be a return to the “closed doors” style of nominating that public primary elections were originally proposed to solve.

On Partisan Voting Behavior

By increasing the importance of elections involving multiple members of the same party, Proposition 62 decreases the ability of voters to use partisan labels as shorthand cues when evaluating electoral choices. For this reason, Proposition 62 would be likely to have similar effects, though perhaps less dramatically, as a shift to fully nonpartisan elections. Over time, nonpartisan elections tend to have lower turnout and favor those with significant personal notoriety or resources.¹³ This is because voters have to spend more time identifying the relative merits of different electoral outcomes without the aid of party labels to stand in for specific platforms on a range of issues. Decreased turnout also results from the difficulty of creating campaigns or other organizations on a temporary basis that can target, educate, and mobilize voters as effectively as parties that exist over the course of many electoral cycles. Similar to nonpartisan elections, a fractured, multi-candidate race for “voter nominations” requires more information literacy and access to voting information than many eligible voters have. As a result, voters with less formal education have a difficult time forming preferences among

¹³ http://www.brennancenter.org/programs/downloads/Statement_NYC_Nonpartisan_Elections_072403.pdf

candidates with the same party label or without party labels.¹⁴ This effect is particularly pronounced among poor communities of color.¹⁵

Proposition 62 is also likely to make elections more difficult for minor parties. The relatively few minor party candidates who have been elected have generally succeeded in garnering the plurality of the vote in three-way races with two major party candidates. Although minor party candidates might be able to avoid being defined as “spoilers” under a top-two system, even those that win a plurality of the vote would then be forced to face a major party candidate in a two-way race, in which members of the major parties often combine to defeat the minor party. Since Louisiana adopted the top-two primary in 1975, minor parties have rarely made it on the general election ballot for congressional races.¹⁶

Recommendation

Taken as a whole, Proposition 62 does not fully provide many of its advertised benefits and may have significant and negative, if unintended, consequences. Proposition 62 may raise turnout slightly in primaries, but not sufficiently to compensate for the increased importance that these primaries would have on limiting choices for the higher-turnout general elections. Proposition 62 may contribute to electing moderate candidates, but it is at least as likely to result in the nomination of extreme candidates who can appeal strongly to their base in multi-candidate elections. By weakening the transparency and salience of parties, Proposition 62 is also likely to reduce the influence of those with the least political power and education. The goals of Proposition 62 could be far better accomplished by a set of reforms including Election Day registration, instant runoff voting, and multi-member legislative districts. In the absence of these reforms, Proposition 62 is negative and insufficient. With them, its stated aims would already be achieved.

¹⁴ “The Partisan Heuristic in Low-Information Elections.” Schaffner, Brian and Streb, Matthew. *Public Opinion Quarterly*, 2002; 66: 559-581.

¹⁵ William P. Collins, *Race as a Salient Factor in Nonpartisan Elections*, 33 *Western Political Quarterly* 3:330 (1980); Hamilton, *The Municipal Voter*, *supra* n.3, at 1138-39.

¹⁶ <http://www.fairvote.org/irv/louisiana.htm>



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