



1-1-2010

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Recommended Citation

Collins, Christine M. (2010) "Primary Elections A Look into Four Primary Election Systems," *California Initiative Review (CIR)*: Vol. 2010, Article 2.

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CALIFORNIA INITIATIVE REVIEW

Primary Elections

A Look into Four Primary Election Systems

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I. INTRODUCTION

One of the founding principles of our nation is the idea that the people should choose who will govern them. However, at our nation's founding, the vehicle for choosing a candidate for office was not political party affiliation. In fact, George Washington, in his farewell address, warned against the dangers of factions.¹ He feared political parties would corrupt and divide the nation. However, absolute unity was hard to maintain in the United States, and the first political parties began to form: the Federalists and Anti-Federalists.

Over two-hundred years later, the United States still maintains a two-party system: Democrats and Republicans. It is estimated that approximately 33.1% of Americans identify as Republicans, 34.6% identify as Democrats, and 32.3% are not affiliated with either major party.² In California, 44.5% of registered voters identify as Democrats, 30.8% identify as Republicans, 4.5% identify with another party, and 20.2% decline to state a party affiliation.³ This identification plays an important role in primary elections. Party affiliation along with the type of primary election system determines whether a voter may participate in a primary election.

First, this report will discuss the four major types of primary election systems: closed, semi-closed, open, and blanket. Next, it will explore each system's supporting and opposing arguments, constitutionality, and effects on the general election. Finally, this report will discuss the influence political party affiliation has on these systems.

II. HISTORY OF PRIMARY ELECTIONS

Primary elections did not exist until the Progressive Era in the late nineteenth and early twentieth centuries - a time when citizens began to develop distrust of their governments and supported moving closer to a direct democracy.⁴ Prior to the Progressive Era, candidates were chosen at party conventions or caucuses in which only a small number of powerful party members and interest groups controlled the nomination process.⁵ Proponents of the primary election system wanted to remove the power from the hands of these high-powered party members and give all registered voters the opportunity to choose the party's candidate for the general election.⁶ Progressive visions soon became reality when individual states began to democratize the process in which candidates were chosen for the general election.⁷ In 1904, Wisconsin became the first

¹ George Washington, President of the United States, Farewell Address (Sept. 17, 1796) (transcript available at http://avalon.law.yale.edu/18th_century/washing.asp).

² *Partisan Trends: For Second Straight Month, Number of Democrats in U.S. Falls to Record Low*, RASMUSSEN REPORTS (Oct. 1, 2010), http://www.rasmussenreports.com/public_content/politics/mood_of_america/partisan_trends.

³ *Historical Voter Registration Statistics*, CALIFORNIA SECRETARY OF STATE (May 24, 2010), <http://www.sos.ca.gov/elections/ror/ror-pages/15day-prim-10/>.

⁴ Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. Cal. L. Rev. 733, 736 (1988).

⁵ Gary D. Allison, *Protecting Party Purity in the Selection of Nominees for Public Office: The Supremes Strike Down California's Blanket Primaries and Endanger the Open Primaries of Many States*, 36 Tulsa L.J. 59, 61 (2000).

⁶ *Id.*

⁷ *Id.*

state to adopt a mandatory primary election law.⁸ By 1910, forty-four of the forty-six states enacted primary election laws.⁹

III. TYPES OF PRIMARY ELECTION SYSTEMS

Primary elections are used to determine which party nominee will advance as the party's candidate in the general election. The type of primary election system determines which voters may participate in a party's primary election: registered party members, unaffiliated voters, and registered party members of another political party.

a. Closed Primary

Under a closed primary election system, only registered party members may vote in the party's primary election.¹⁰ For example, a registered Democrat may only vote in a Democratic primary election. Unaffiliated or Decline-to-State ("DTS") voters may not vote in a closed primary election.

Proponents of the closed primary system believe the chances of crossing-over and "raiding" are practically eliminated. Crossing-over refers to members of one party voting in another party's election, which some believe dilutes the vote of the registered members.¹¹ Raiding involves crossing-over, but the voters of another party intentionally vote for the opposing party's weakest candidate.¹² This results in an advantage in the general election. Lastly, proponents contend that a closed primary encourages loyalty to the party.

Opponents dislike the closed primary system because it prevents DTS voters from voting in the primary. Some take this argument a step further and declare that limiting primary elections to registered party members is a violation of unaffiliated members' right to vote (discussed below).¹³ It may also discourage more moderate voters from participating in elections since they may only vote in the primary of the party in which they are registered.

Numerous courts have held that there is no federal or state constitutional violation where political parties have chosen to limit participation in primary elections to registered party members. The leading case is *Nader v. Schaffer*, which challenged a Connecticut statute providing that no person may vote in a party primary unless he is on the last-completed enrollment list of such party.¹⁴ The court reasoned that when a voter chooses not to affiliate with a party it does not affect their right to vote in the general election; therefore, the fundamental

⁸ Allison, *supra* note 6 at 61.

⁹ Todd J. Zywiki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 Clev. St. L. Rev. 165, 191, (1997).

¹⁰ Todd Cherry & Stephan Kroll, *Crashing the Party: An Experimental Investigation of Strategic Voting in Primary Elections*, 114 Pub. Choice 387, 390 (2003).

¹¹ Robin Miller, Annotation, *Constitutionality of Voter Participation Provisions for Primary Elections*, 120 A.L.R. 5th 125 (2004).

¹² *Clingman v. Beaver*, 544 U.S. 581, 596 (2005).

¹³ *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976).

¹⁴ *Id.* at 840.

right to vote has not been violated.¹⁵ Also see *Ziskis v. Symington* (holding that Arizona's closed primary election law in which unaffiliated voters were denied the opportunity to vote in a party's primary did not violate their right to freedom of association, right to vote, and right to equal protection because there was no indication that the voter was interested in nominating candidates who were most faithful to the policies and philosophies of either party, and the state had legitimate interest in protecting associational rights of party members and preserving integrity of electoral process);¹⁶ *Ferency v. Secretary of State* (holding that a closed primary does not violate the First Amendment right of association because any voter may choose to affiliate himself with a party and participate in that party's primary election by registering as a member).¹⁷

One Washington court did declare a closed primary election system unconstitutional. In *State v. Mitchell*, the court invalidated a Washington state closed primary election law on the grounds of impossible performance.¹⁸ The statute violated the state's voter registration act, which does not allow voters to register with a political party.¹⁹

A few courts have also declared that a state's closed primary election law is unconstitutional where at least one party wants to open its primary election to unaffiliated, or DTS, voters. In *Tashjian v. Republican Party of Connecticut*, the Connecticut statute required that voters be registered members in order to vote in the party's primary election. The Republican Party of Connecticut adopted a rule that allowed unaffiliated voters to vote in the party's primary elections, and as a result brought an action challenging the statute on the grounds that it violated the party's right of association. The Supreme Court in *Tashjian* agreed, and held that Connecticut's closed primary law violated the right of association protected by the First and Fourteenth Amendments because the statute interfered with a party's right to define associational boundaries.²⁰

In sum, closed primaries are constitutional when *all* political parties limit participation to registered members. Closed primaries become unconstitutional when at least one party wishes to open its primary to nonmembers because it violates the associational rights of a political party and its members.²¹ Specifically, the outcome of a case challenging a closed primary election law depends on who is bringing the action: a political party and its members or a non-party, DTS voter. A closed primary violates a political party's right to associate because it restricts the party's ability to determine with whom it associates, while a DTS voter's right to associate is not infringed upon because he may associate by simply registering as a party member.

¹⁵ *Id.*

¹⁶ *Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995).

¹⁷ *Ferency v. Secretary of State*, 476 N.W.2d 417, 424 (1991), *vacated in part on other grounds*, 486 N.W.2d 664 (1992).

¹⁸ *State v. Mitchell*, 55 Wash. 513, 104 P. 791 (1909).

¹⁹ *Id.*

²⁰ *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

²¹ *Ziskis*, 47 F.3d at 1005.

b. Semi-Closed Primary

A semi-closed primary election system is similar to a closed primary. However, it also allows unaffiliated, or DTS, voters to participate in the party's primary election.²² For example, a DTS voter may vote in a Democratic primary election. However, the DTS voter may only request one party's ballot when voting. The DTS voter may select his favored party's primary ballot publicly, privately, in the voting booth, or by registering with the party on Election Day, depending on the state.

Proponents of the semi-closed system argue that since DTS voters are allowed to vote in a party's primary, these voters are more likely to vote in the general election. Since only registered party members and DTS voters may participate, crossing-over and raiding is practically nonexistent. Conversely, opponents argue that allowing DTS voters to participate in a party's primary dilutes the vote of the party.

The Supreme Court in *Clingman v. Beaver* held that the Oklahoma's semi-closed primary election law did not violate the right of association.²³ The plaintiffs, the Libertarian Party of Oklahoma ("LPO") and registered members of two other political parties, argued that the semi-closed primary law burdened their right to freedom of association because it did not allow the party to open its primary to members of other parties, e.g., Democrats and Republicans.²⁴ The Supreme Court found that the law did not violate associational rights because any burden imposed by the law was minor and justified by the state's interest in preserving viable, identifiable interest groups as well as ensuring that the primary results accurately reflected party members' voting.²⁵

However, Rhode Island's semi-closed primary election system violated the right of association in *Cool Moose Party v. Rhode Island*.²⁶ Nonetheless, this case is reconcilable with *Clingman* because the associational rights at issue were not those of a political party which desired to open its primary, but the rights of political parties which desired to restrict participation in its primary. In *Clingman*, Connecticut asserted an interest in protecting the associational rights of political parties wishing to restrict participation in its primaries.²⁷ The burden on these other parties would have been great if the state had allowed LPO an open primary while the burden would be minimal on LPO under the current semi-closed primary law.²⁸ The Court is forced to decide between LPO's right to associate with Democrats and Republicans and the Republican and Democratic parties' right to preserve party loyalty. The Court concluded that there's a greater interest in protecting the latter.

²² Cherry & Kroll, *supra* note 11 at 390.

²³ *Clingman v. Beaver*, 544 U.S. 581, 582 (2005).

²⁴ *Id.* at 581.

²⁵ *Id.* at 585.

²⁶ *Cool Moose Party v. Rhode Island*, 183 F.3d 80 (1st Cir. 1999).

²⁷ Margaret P. Aisenbrey, *Party On: The Right to Voluntary Blanket Primaries*, 105 Mich. L. Rev. 603, 616. (2006).

²⁸ *Id.* at 614.

In *Cool Moose Party*, the litigating political party wanted to open its primary, but Rhode Island asserted an interest in protecting the Cool Moose Party from raiding.²⁹ However, the court found that a state may not assert an interest in protecting the party from itself because it takes away the party's autonomy and associational rights.³⁰ A state may only assert an interest in protecting associational rights when other political parties seek that protection.³¹ If *all* political parties agree to an open primary, it is likely that a semi-closed primary will fail before a court.

c. Open Primary

Under an open primary election system, all registered voters may vote in a party's primary regardless of party affiliation.³² However, voters may only participate in one party's primary election for all offices. For example, a registered Democrat may vote in a Republican primary election, however, he may not vote in a Democratic primary as well. If a voter is not registered with a particular party, it is often referred to as "pick-a-party" because the voter will choose which party's primary to participate.³³

Proponents of the open primary election system believe that open primaries provide voters with more freedom.³⁴ Since voters do not have to commit to only one party's policies and philosophies, a voter can change his mind. An open primary is especially advantageous for moderates, i.e., if a moderate does not agree with the candidates of his registered party, then he may be more likely to participate in the general election. Lastly, proponents contend that open primaries result in a candidate who better represents voters as a whole.³⁵

The opposition believes that open primaries invoke crossing-over and raiding.³⁶ Also, some opponents argue that open primaries lead to less people participating in the nomination process. This is attributed to the fact that voters do not have pledge loyalty to a party. It is believed that more voters will actually pledge loyalty under a closed primary system.

In *State v. Frear*, the court upheld the state's "Primary Election Law," which opened the polls to members of other parties.³⁷ The court concluded that the law did not interfere with the right to assemble.³⁸ Plaintiff also brought up the issue of raiding, however, the court rejected his argument stating that the problem was political, not judicial.³⁹ The open primary was also challenged in *Miller v. Brown*, but the *Miller* court concluded that Virginia's open primary

²⁹ *Cool Moose Party*, 183 F.3d at 84.

³⁰ Aisenbrey, *supra* note 28 at 616.

³¹ *Id.* at 611.

³² Cherry & Kroll, *supra* note 11 at 390.

³³ *Briefing Report: California and the Open Primary - Third Time a Charm?*, CALIFORNIA STATE SENATE REPUBLICAN CAUCUS (Mar. 11, 2009),

<http://cssrc.us/publications.aspx?id=5529&AspxAutoDetectCookieSupport=1>.

³⁴ Allison, *supra* note 6 at 64.

³⁵ Cherry & Kroll, *supra* note 11 at 393.

³⁶ *Id.* at 392.

³⁷ *State v. Frear*, 125 N.W. 961, 962 (Wis. 1910).

³⁸ *Id.*

³⁹ *Id.*

statute did not, on its face, violate a party's First Amendment right to associate.⁴⁰ The court stated that an election law could survive constitutional scrutiny if the state shows a compelling state interest and is narrowly tailored to serve the interest.⁴¹

d. Blanket Primary

The blanket primary election system is similar to an open primary, but goes a step further, i.e., registered voters may vote for any party's candidate for *any* office.⁴² For example, a registered Democrat may vote for a Republican candidate for governor, an Independent candidate for Secretary of State, and a Democrat candidate for Attorney General.

There are two types of blanket primary systems: partisan and nonpartisan. Under a partisan blanket primary system, the candidate who receives the most votes within each party becomes the nominee in the general election for that party, regardless of whether candidates from other parties received more votes.⁴³ However, under a nonpartisan blanket primary system, the two candidates with the most votes are put on the ballot for the general election, regardless of party affiliation.⁴⁴

Proponents of the blanket primary election system believe that voters should not have to commit to one party; voters should have absolute independence when it comes to voting for candidates.⁴⁵ Proponents also suggest that blanket primaries increase voter participation and increase the likelihood of moderates being elected to office.⁴⁶ Opponents, on the other hand, believe that a blanket primary election system would eliminate party loyalty.⁴⁷ Further, the fear of raiding is also present in this system.⁴⁸ Moreover, opponents dislike the fact that two candidates from the same party may appear on general election ballot.⁴⁹

Most courts are reluctant to uphold a partisan blanket primary election system. In 2000, the Supreme Court struck down a blanket primary initiative in *California Democratic Party v. Jones* ("Jones").⁵⁰ In 1996, California voters approved Proposition 198, the "Open Primary Initiative."⁵¹ While Prop 198 was called the "Open Primary Initiative," in actuality it followed a partisan blanket system framework.⁵² The Court expressed concern about raiding. Justice Scalia stated, "having a party's nominee determined by adherents of an opposing party is far from

⁴⁰ *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007).

⁴¹ *Id.* at 364.

⁴² Cherry & Kroll, *supra* note 11 at 388.

⁴³ Aisenbrey, *supra* note 28 at 605.

⁴⁴ *Id.*

⁴⁵ Allison, *supra* note 6 at 64.

⁴⁶ Steven Hill & Roy Ulrich, Op-Ed., *Top-Two Primary is a Horrible Idea*, N. CNTY. TIMES, Apr. 8, 2004, http://www.nctimes.com/news/opinion/article_f2bec888-e555-58f1-8939-63f1fb8f0968.html.

⁴⁷ Allison, *supra* note 6 at 64.

⁴⁸ Aisenbrey, *supra* note 28 at 610.

⁴⁹ Hill & Ulrich, *supra* note 47.

⁵⁰ *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

⁵¹ *Id.* at 568.

⁵² *Id.* at 567.

remote-indeed, it is a clear and present danger.”⁵³ The Court reasoned that the state’s interest in expanding voter participation was not sufficient enough to justify an intrusion on the right to associate.⁵⁴

Similar outcomes followed the Supreme Court decision in *Jones*. For example, the court in *Democratic Party of Washington State v. Reed* found that Washington’s partisan blanket system was materially identical to California’s and struck down the statute for violation of the right of association.⁵⁵ The same was said of Alaska’s attempt at a partisan primary election in *O’Callaghan v. State, Director of Elections*.⁵⁶

Not all hope is lost for states that desire a blanket primary system. The nonpartisan blanket system has had some luck with the Supreme Court. In 2004, Washington voters made another attempt to implement a blanket primary, this time using a nonpartisan framework. Washington’s top-two primary law advances the top-two votegetters for each office to the next general election regardless of party affiliation. For partisan offices such as the United States Senate and House of Representatives candidates may list their party preference, but these designations do not necessarily mean the party endorses the candidate.⁵⁷ In *Washington State Grange v. Washington State Republican Party* (“State Grange”), the Court held that the initiative did not violate the right of association because it did not “provide for the nomination of candidates or compel political parties to associate with or endorse candidates, and there is no basis . . . for presuming that candidates’ party-preference designations will confuse voters.”⁵⁸

However, the fight against Washington’s blanket primary law is not over. In January 2010, the same complaints against the Washington initiative were revived.⁵⁹ Plaintiffs contend that the law falsely led voters to believe that the two candidates on the ballot for the general election would be Democratic and Republican candidates. The Supreme Court in *State Grange*, called this “sheer speculation” because no empirical evidence existed at the time to support their argument.⁶⁰ Two years since the law has passed, the plaintiffs believe that they now have enough evidence of voter behavior to convince a court that the law does confuse voters. A court is expected to hear the case in November.⁶¹

IV. THE PAST AND FUTURE OF CALIFORNIA PRIMARY ELECTIONS

⁵³ *Id.* at 577.

⁵⁴ *Id.* at 568.

⁵⁵ *Democratic Party of Washington State v. Reed*, 343 F.3d 1198, 1203 (9th Cir. 2003).

⁵⁶ *O’Callaghan v. State, Director of Elections*, 6 P.3d 728 (Ak. 2000).

⁵⁷ *Top 2 Primary FAQ*, WASHINGTON SECRETARY OF STATE,

<http://wei.secstate.wa.gov/osos/en/Pages/Top2PrimaryFAQ.aspx> (last visited Oct. 3, 2010)

⁵⁸ *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455 (U.S. 2008).

⁵⁹ Richard Winger, *Washington State Major Parties File Amended Complaint in Case Against “Top-Two Open Primary,”* BALLOT ACCESS NEWS, <http://www.ballot-access.org/2010/01/22/washington-state-major-parties-file-amended-complaint-in-case-against-top-two-open-primary/> (Jan. 22, 2010)

⁶⁰ *Washington State Grange*, 552 U.S. at 443.

⁶¹ Bob Egelko, *Parties Weigh Longshot Challenges to Prop. 14*, S.F. CHRON., June 28, 2010, at A1.

As a part of the Progressive Era previously discussed, California established a closed primary election system in 1909.⁶² In 1913, cross-filing was allowed, which permitted a candidate to appear on more than one party's ballot.⁶³ This practice was ended in 1959 by initiative.⁶⁴ As discussed above, in 1996, California voters approved Proposition 198, the "Open Primary Initiative," and in 2000, the United States Supreme Court struck down the proposition in *Jones*.⁶⁵

In response to the Supreme Court's ruling, the California legislature adopted a modified semi-closed primary in which unaffiliated voters are allowed to vote in a party's primary election if approved by that party.⁶⁶ Both the Democrats and Republicans allowed unaffiliated voters to vote in their primaries until the 2008 Presidential Primary when the Republican Party closed their primary to allow only registered members to participate. California is currently under this modified semi-closed primary election system, but may not be for long.

In June 2010, California voters approved Proposition 14, which again used the name "Open Primary." However, the initiative follows a nonpartisan blanket primary format. Voters will receive one ballot, which will list all candidates. They may vote for any candidate regardless of political party affiliation.⁶⁷ The two candidates with the highest number of votes will advance to the general election.⁶⁸ The change is expected to take effect for elections after January 1, 2011.⁶⁹

In July 2010, a lawsuit was filed challenging the proposition.⁷⁰ The complaint seeks removal of a provision that allows write-in votes to be cast off arguing that this provision violates state and federal rights.⁷¹ The complaint also seeks removal of a provision that only allows candidates to affiliate with parties that have been qualified for the ballot arguing that this provision is discriminatory.⁷² On September 13, 2010, a San Francisco Superior Court judge denied a motion for an injunction against Proposition 14.⁷³

However, the constitutionality of Proposition 14 has not yet been attacked on the ground of violation of the right to associate. If challengers brought such an action, the proposition is likely

⁶² *Briefing Report: California and the Open Primary - Third Time a Charm?*, CALIFORNIA STATE SENATE REPUBLICAN CAUCUS (Mar. 11, 2009),

<http://cssrc.us/publications.aspx?id=5529&AspxAutoDetectCookieSupport=1>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *California Democratic Party*, 530 U.S. at 567.

⁶⁶ *Decline-to-State Information*, CALIFORNIA SECRETARY OF STATE, http://www.sos.ca.gov/elections/elections_decline.htm (last visited Oct. 1, 2010)

⁶⁷ *Proposition 14*, LEGISLATIVE ANALYST'S OFFICE (Feb. 18, 2010), http://www.lao.ca.gov/ballot/2010/14_06_2010.aspx.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Bob Egelko, *Suit Over Prop. 14 Abolishing Party Primaries*, S.F. CHRON., July 30, 2010, at C1.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Torey Oot, *Judge's Tentative Ruling Rejects Blocking "Top Two" Primary*, SAC. BEE, Sept. 13, 2010, <http://blogs.sacbee.com/capitolalertlatest/proposition-14/>

to survive. The California initiative is structurally similar to the nonpartisan blanket primary initiative passed in Washington in 2004, which the Supreme Court held as constitutionally sound. The Court stated that since the law does not require political parties to associate with or endorse candidates the right of association is not violated.

V. CONCLUSION

Each of the four primary election system has faced constitutional challenges; the most frequent challenge being the First Amendment right to freedom of political association. The closed primary is often attacked when at least one political party wishes to include more than only registered members in their primary election. The semi-closed primary is likely to be threatened when all political parties holding primaries wish to include registered members of other parties. The open primary has been challenged by parties wishing to exclude registered members of other parties arguing that it violates the political parties right of association, nonetheless, the open primary has had the most luck surviving constitutional challenges. The blanket primary has only survived in its nonpartisan format, but the current lawsuits concerning Washington and California's nonpartisan blanket primaries may shed more light on its constitutionality. Regardless of challenges each system has faced, all have survived the courts in one form or another, and remain an important part of the nomination process in the United States.