

## Reforms to Improve California's Top Two Primary System

By Rob Richie and Cameron Ferrante

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### Summary of Recommendations

- **Statutory Change: Use ranked choice voting in the primary when reducing the field to two candidates.** Doing so would: 1) eliminate concerns about vote-splitting that might allow one party to advance two candidates to the general election even when the other major party has more votes; 2) allow voters to vote their true preferences even if they have a preference among the more favored candidates and their first choice is a long shot; and 3) would create incentives for candidates to reach out to more voters in order to earn the second and third choice rankings of backers of others candidates.
- **Statutory Change: Use ranked choice voting in the general election and allow write-in candidates.** Doing so would: 1) eliminate concerns that allowing write-ins would split votes and result in unrepresentative outcomes; and 2) give voters the opportunity to write-in candidates when unhappy with the two candidates on the ballot or when a leading candidate has died or been forced to withdraw.
- **State Constitutional Change: Eliminate the primary, adopt ranked choice voting and hold a runoff election in December under certain conditions.** Doing so would avoid the problem of denying general election voters choices among candidates they would like to support, empower the larger general election electorate, uphold the values of majority rule, and provide greater voter engagement through ranked choice voting. Absent a constitutional change, it also is not realistic to shorten the election period by advancing the primary past its current June date.

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## Discussion

This report examines potential reforms to California’s Top Two primary system that can be accomplished through statutory changes. It explains the potential benefits of four specific reforms: (1) incorporating ranked choice voting (“RCV”) into the primary; (2) reincorporating write-in voting in the general election in conjunction with RCV; and (3) moving the date of the Top Two primary closer to the general election date.

What might be the ideal solution—adapting Louisiana’s model of holding the first round of the election in November, with ranked choice voting used in the November election and a contingent runoff election in December—would require a state constitutional amendment revising the definition of the Top Two primary.

As background, the California Constitution provides the basic framework for the Top Two primary system. Under Article 2, Section 5 of the California Constitution (“Section 5”), candidates for all congressional and state elective offices must be selected through a nonpartisan primary in which the “top two vote-getters” are nominated and compete in the general election in November.<sup>1</sup> Section 5 provides only a basic description of the Top Two system and does not prescribe any specific election methods, dates or other requirements. As a result, the Top Two primary system is relatively open to statutory modification.

### I. RECOMMENDED STATUTORY CHANGE: USING RANKED CHOICE VOTING IN THE TOP TWO PRIMARY

Incorporating ranked choice voting into the Top Two primary is possible through statute and would improve the representativeness of candidates advancing to the general election. Under California’s Top Two system, the primary ballot lists all candidates for office irrespective of political party. The top two candidates in the primary advance to the November general election, no matter how low their share of the vote. As a result, primaries with large fields have advanced candidates receiving less than 20% of the vote while those with fractured voter groups have advanced unrepresentative candidates to the general election.<sup>2</sup>

In 2012, California’s Congressional District 31 advanced two white Republican candidates to the general election, even though District 31 is majority Latino and majority Democratic.<sup>3</sup> In 2014, District 31 had nearly the same result, and two Republicans nearly advanced that year in the statewide race for California Controller. These results incentivize political parties to limit the size and diversity of the field of candidates during the primary. This trend has already become pronounced in Washington, where the Top Two primary has been used since 2008. Due in part to the power of party interests to rally around frontrunners, a majority of primary races in 2014

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<sup>1</sup> CAL. CONST. art. II, § 5(a).

<sup>2</sup> See *Certified List of Candidates for the November 6, 2012 General Election* at 13 CAL. SEC’Y OF STATE (Nov. 2012), <http://elections.cdn.sos.ca.gov/sov/2012-primary/pdf/2012-complete-sov.pdf> (advancing candidates for U.S. Representative in the 8<sup>th</sup> District with 15.3% and 15.6% of the vote in the primary election).

<sup>3</sup> See *California’s 31<sup>st</sup> Congressional District Elections, 2012*, BALLOTPEdia.ORG (Apr. 7, 2015), [http://ballotpedia.org/California%27s\\_31st\\_Congressional\\_District\\_elections,\\_2012](http://ballotpedia.org/California%27s_31st_Congressional_District_elections,_2012).

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featured no more than two candidates, of more than 50 statewide and congressional races with the Top two system, nearly all have involved one-sided primary contests that advanced one “consensus” Democrat to face one “consensus” Republican.<sup>4</sup>

To address these problems, the California legislature should adopt RCV in the primary election. As long as the top two candidates still advance from the primary election, RCV may be incorporated by statute.<sup>5</sup> Using RCV, voters would be able to rank at least three preferences. Their ballots would initially count as one vote for their top choice. The last-place candidate would be eliminated after each round, and their ballots added the totals of the next ranked candidate until two candidates remain. Those two candidates would advance to the general election. Concerns would vanish about vote-splitting that might allow one party to advance two candidates to the general election even when the other major party has more votes. Furthermore, voters could vote their true preferences in the primary even if their first choice is a longshot and even if they have a preference among the more favored candidates. Finally, candidates would have new incentives to reach out to more voters in order to earn the second and third choice rankings of backers of others candidates.

## II. RECOMMENDED STATUTORY CHANGE: RE-INCORPORATING WRITE-IN CANDIDATES AND USING RANKED CHOICE VOTING IN THE GENERAL ELECTION

Currently, California voters have no ability to cast write-in ballots in November. This is problematic for several reasons: First, candidate scandals, withdrawals, or deaths may occur between the first and second election that necessitate the intervention of a new candidate. Second, the ability of Top Two to advance two candidates from the same party has led to decreased participation by voters supportive of other parties and can be especially problematic if due to a split vote among the other party (see Part I above). Third, a large number of voters only participate in the general election, and the primary winners may not reflect their views. Without the ability to write-in for a different candidate during the general election, voters are effectively required to either vote for a candidate they may not support or not vote at all.

A write-in option in the general election would provide a convenient and effective outlet for voters to express any changes in candidate preference after the Top Two primary. While the California constitution is clear that only two candidates may advance from the primary to the general election, it contains no provision stating that those two candidates must be voters' only options. However, the California legislature acted to bar write-in candidates from participating in general elections when it implemented the Top Two system.<sup>6</sup> This limitation was motivated by a desire to avoid unrepresentative outcomes in the general election. For example, a strong write-in candidate could split the majority vote and allow a less representative candidate to win or an unrepresentative write-in candidate could exploit a split vote and win by a plurality, as almost happened in San Diego's mayoral election in 2004. Finding a way to re-incorporate write-in

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<sup>4</sup> See generally *August 5, 2014 Primary Results*, Wa. Sec'y of State (Apr. 7, 2015), <http://results.vote.wa.gov/results/20140805/default.htm>.

<sup>5</sup> In the course of drafting statutory language, we suggest that the Elections Code be amended in its provisions governing winning candidates and the format of ballots used in elections. See CAL. ELEC. CODE §§ 13100-13121.

<sup>6</sup> CAL. ELEC. CODE § 8606.

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candidacies in general elections would benefit all voters and could be accomplished through statutory changes to California's Elections Code.<sup>7</sup>

Using ranked choice voting in the general election—with voters able to indicate a second choice—would address any concerns that write-ins might lead to unrepresentative winners. Under this system, voters would have the ability to rank the two candidates advancing from the Top Two primary, as well as any write-in candidate, in order of preference. For example, where two candidates of the same party advanced, voters backing another party would have the option to rank a write-in candidate first, and then rank as their second choice their preferred ballot-qualified candidate. This implementation of RCV would allow voters to express their candidate preferences even in the case of a same-party general election while avoiding the concerns over additional candidates splitting the vote. It also could create a clear incentive for candidates to reach out to more voters. Reincorporating write-in voting with an RCV system could be accomplished through statutory amendments similar to those necessary to incorporate RCV into the Top Two primary.<sup>8</sup>

### III. POTENTIAL CONSTITUTIONAL CHANGE: ALTERING THE TIMING OF CALIFORNIA'S TOP TWO PRIMARY

California's Top Two primary currently takes place in June, five months before the November general election. However, eighteen other states, including Washington—the only state with an identical top two system—hold their primary elections in August or later.<sup>9</sup> Holding California's Top Two primary closer to the general election would have several potential benefits. Candidates would have more time to appeal to voters before facing elimination in the primary, thereby increasing the breadth of discussion on issues important to voters.<sup>10</sup> Further, holding the primary closer to the general election would shorten the campaign season, reducing voter fatigue and campaign spending.<sup>11</sup>

The best alteration in timing for California would be to adjust the election dates so that they mimic the Louisiana system. In Louisiana, the first round of election is held on the federal Election Day in November. If a candidate wins a majority in November, they are seated. If no candidate receives a majority, a runoff election takes place between the top two candidates in December.<sup>12</sup> This system has two principle benefits. First, by holding the first round on the

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<sup>7</sup> See Eric McGhee, *Voter Turnout in Primary Elections*, at 2, PUB. POL'Y INST. OF CAL. (May 2014), [http://www.ppic.org/content/pubs/report/R\\_514EMR.pdf](http://www.ppic.org/content/pubs/report/R_514EMR.pdf) (identifying write-in and independent petitions as a potential reform already available in presidential elections); California Election Code § 8606 (barring write-in candidates in general elections for voter-nominated offices) and § 15340 (referencing the prohibition on write-in candidates for voter-nominated offices) would be the principle statutes in need of amendment, in addition to various ballot formatting provisions contained in §§ 13100-121.

<sup>8</sup> See Section I, *supra*.

<sup>9</sup> See 2014 Congressional Primary Election Dates & Candidate Filing Deadlines for Ballot Access, FEC, <http://www.fec.gov/pubrec/fe2014/2014pdates.pdf> (AK (Aug); AZ (Aug); CT (Aug); DE (Sept.); FL (Aug); HI (Aug); KS (Aug); MA (Sept); MI (Aug); MN (Aug); MO (Aug); NH (Sept); RI (Sept); TN (Aug); VT (Aug); WA (Aug); WI (Aug); WY (Aug)).

<sup>10</sup> See Rob Richie & Patrick Withers, *California's Proposition 14: Weaknesses & Remedies*, FAIRVOTE (Aug. 2010), <http://www.fairvote.org/assets/Uploads/OpenPrimariesAnalysisAugust2010.pdf>.

<sup>11</sup> *Id.*

<sup>12</sup> Although the Louisiana election system refers to the first round as a "primary" and the second as a "general" election, the system is better understood not as a Top Two primary, but as having no primary

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general election date, Louisiana capitalizes on the higher voter turnout experienced during general elections.<sup>13</sup> Second, by having a potential winnowing election (in the case of a runoff) on the general election date, Louisiana ensures that the decision of which candidates advance is given to more voters than it would be in a low-turnout primary election.<sup>14</sup> The Louisiana system would be even better if voters used a ranked choice voting in November. For instance, a candidate might be immediately elected if winning the RCV election with more than a certain share of first choices, say 40 percent. Where no candidate receives that minimum share of first choices, RCV would be used to reduce the field to two runoff candidates for the December election.

Despite its potential benefits, the California constitution and federal law effectively prevent California from mimicking Louisiana's system. The California constitution prohibits the legislature from making the second election contingent on failure to achieve a majority in the first. Article 2 Section 5(a) of the California constitution describes the Top Two system and requires the top two candidates for congressional and statewide offices "shall" advance to an "ensuing" general election.<sup>15</sup> This provision simultaneously limits the function of California's primary to that of a winnowing election and requires holding a second round election no matter the outcome of the first. As a result, candidates for state and federal offices may only be elected at the second round of election.

Although the California constitution affords the legislature the authority to modify the dates of California's primary and general elections,<sup>16</sup> federal law limits the dates on which California may hold its general election for federal office. Pursuant to federal law, candidates for federal offices must be elected on the federal Election Day.<sup>17</sup> Louisiana complies with this requirement by making its December election a contingent runoff, meaning that even though the November election is the first round, candidates can be—and often are—elected on Election Day.<sup>18</sup> However, because the California constitution limits the function of the Top Two primary to a winnowing election at which no candidates can be actually seated, the legislature cannot hold the first round on the federal Election Day. As a result, California is effectively required to hold

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election whatsoever and as holding a runoff election if no candidate wins a majority in the November general election. See LA. REV. STAT. §§ 18:402; 18:481; 18:482.

<sup>13</sup> FairVote analysis indicates that Louisiana's winnowing election had an average turnout of 54.6% from 2010 through 2014 while California's average turnout in its Top Two primary was only 33% during the same period.

<sup>14</sup> See Note 13, *supra*.

<sup>15</sup> CAL. CONST. art. 2 § 5(a) ("The candidates who are the top two vote-getters at a voter-nominated primary election for a congressional or state elective office shall... compete in the ensuing general election.").

<sup>16</sup> See CAL. CONST. art. 4 § 2(b) (giving the legislature authority to alter the general election date); CAL. ELEC. CODE §§ 1000-1001, 1201 (setting the primary election date).

<sup>17</sup> See *generally* Foster et al. v. Love, 522 U.S. 67 (1997) (finding that federal elections must be held on the November general election day unless a runoff is necessitated).

<sup>18</sup> See 2 U.S.C. § 8 (permitting federal elections on dates other than November election date when necessitated by a failure to elect at the time prescribed by law."); Love et al. v. Foster et al., 147 F.3d 383 (5th Cir. 1998) (finding Louisiana's November "primary" elections constitutional).

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its second round elections in conjunction with the November Election Day and its first round elections prior to the November Election Day.<sup>19</sup>

The requirement that California hold its general election on the federal Election Day limits the dates on which California may hold its Top Two primary. Pursuant to federal law, states must mail ballots to overseas and absentee voters no less than 45 days prior to an election.<sup>20</sup> Louisiana is able to hold its elections less than 45 days apart by mailing overseas and absentee voters a primary ballot as well as a separate “special ballot.”<sup>21</sup> The special ballot uses RCV to allow voters to rank candidates in order of preference.<sup>22</sup> In the event of a runoff election, the special ballots are counted for the voters’ highest-ranked remaining candidate.<sup>23</sup> Thus, there is no need for Louisiana to mail new ballots to overseas or absentee voters before its contingent general election. This system is beneficial because it facilitates greater overseas and absentee voter participation in Louisiana’s general election. While such a system could be adopted in California,<sup>24</sup> it would not have the same added benefits.

The beneficial effects of Louisiana’s use of RCV ballots for overseas voters and out-of state military voters arise from the fact that Louisiana’s first election functions as a general election, with the associated increase in voter turnout. Thus, the RCV ballots carry-over the participation of voters in a high-turnout general election to a typically low-turnout runoff election.<sup>25</sup> In California, the function would be the opposite. California’s Top Two primary functions as an early winnowing election, with the associated low-turnout of primary elections.<sup>26</sup> Holding the Top Two primary election less than 45 days prior to the general election would effectively require overseas and absentee voters to participate in a traditionally low-turnout election to have their votes count in the traditionally high-turnout general election. While holding the primary closer to the general election is likely to increase turnout overall, the relative increase in primary turnout would fall well short of offsetting the difference in turnout between the primary and general election. This, coupled with California’s often slow primary canvassing process, indicates that California would not benefit from holding its elections less than 45 days prior to the general election.

The California legislature has the authority to alter the dates of California’s Top Two primary and its general election. However, the California constitution and federal law limit the types of reform which are possible through statutory amendment. Although California voters would likely benefit

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<sup>19</sup> While it would be possible for California to statutorily split its elections, adopting a pure Louisiana system for state offices and holding a separate primary and general election for federal candidates in accordance with federal law, such a system would be both expensive and unwieldy.

<sup>20</sup> See 42 U.S.C. § 1973ff-1(a)(8) (2013).

<sup>21</sup> LA. REV. STAT. § 18:1308(A)(2)(a).

<sup>22</sup> LA. REV. STAT. § 18:1306(A)(4).

<sup>23</sup> *Id.*

<sup>24</sup> The California Constitution makes no reference to overseas ballots or their format, implementing ranked choice voting for overseas voters would only require specific amendments to Chapter 2 of Division 3 of the Elections Code.

<sup>25</sup> See *Federal Primary Election Runoffs & Voter Turnout Decline, 1994-2014* at 4, FAIRVOTE (Nov. 2014) <http://www.fairvote.org/assets/Primaries/Federal-Primary-Election-Runoff-Turnout-2014-updated-11.17.14.pdf> (finding a decline in turnout of over 30% between primary elections and runoffs).

<sup>26</sup> See Eric McGhee, *Voter Turnout in Primary Elections*, at 2, PUBLIC POL’Y INST. OF CAL. (May 2014), [http://www.ppic.org/content/pubs/report/R\\_514EMR.pdf](http://www.ppic.org/content/pubs/report/R_514EMR.pdf) (noting California’s primary election turnout).

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from holding the Top Two primary closer in time to the general election, the combination of existing laws -- the fixed date of the general election, the 45 day ballot mailing deadline, and the rate at which election results are canvassed -- mean California realistically is not able to hold its Top Two primary any later than August of a given election year. Even an August date would leave little time for recounts that might affect which two candidates advance to the general election, and holding primary elections in the middle of summer (July and August) might reduce California's low primary election turnout even more.

## Conclusion

This report has described a variety of potential reforms to the California Top Two Primary system, each of which may be accomplished via statutory amendment. California's election system would benefit greatly from the implementation of ranked choice voting in both the Top Two Primary and the general election, as well as the re-incorporation of write-in candidates in the general election. While there would be one-time costs with upgrading voting equipment, these reforms would require only minor modification to California's Elections Code, yet would have a broad impact on voter participation and fair representation within California.

However, an amendment to California's constitution may have an even broader impact than these proposed statutory changes. An amendment that permits California to adopt Louisiana's election method, with a first round election in November and a contingent Top Two runoff in December, would not only increase voter participation and minority representation, it would also avoid voter and candidate fatigue, reduce election administration costs, avoid single-party general elections, and facilitate overseas and military voter participation.

Each of the proposed statutory modifications and the constitutional amendment would provide California voters with a more responsive and representative government.



FairVote  
6930 Carroll Avenue  
Suite 610  
Takoma Park, MD 20912

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