

Fixing Top Two in California:

The 2012 Elections and a Prescription for Further Reform

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June 18, 2013

SUMMARY

In 2010, California voters approved a ballot measure establishing a Top Two primary system. Top Two replaced a system in which partisan primaries were followed by a general election among nominees of each party and independents. Under Top Two, all candidates compete against each other in the first preliminary election irrespective of party preferences. Voters have one vote, and the two candidates receiving the most votes advance to the general election, again irrespective of party preferences.

California's new system was used for all state and congressional elections for the first time in 2012. This report examines the impact of the system on voter choice, representation and competition and explores the potential impact of a revised model of the system: advancing more than two candidates with ranked choice voting in the general election.

We find that Top Two has made little difference in most races, yet has created new problems. It improves competition and inclusion only at a troubling cost. Fortunately, a simple change would make Top Two more likely to accomplish the goals of Top Two supporters while avoiding its pitfalls. We demonstrate the value of a simple change: advancing four candidate to the general election and using ranked choice voting to accommodate increased voter choice.

OVERVIEW

In 2010, California voters approved a ballot measure establishing a Top Two primary system. Top Two replaced a system in which partisan primaries were followed by a general election among nominees of each party and independents. Under Top Two, all candidates compete against each other in the first preliminary election irrespective of party preferences. Voters have one vote, and the two candidates receiving the most votes advance to the general election, again irrespective of party preferences.

California's new system was used for all state and congressional elections for the first time in 2012. This report examines the impact of the system on voter choice, representation and competition and explores the potential impact of a revised model of the system: advancing more than two candidates with ranked choice voting in the general election. Among our findings:

- ***Incumbent and Major Parties:*** Major parties and incumbents continue to dominate California elections. Every single congressional and state legislative incumbent advanced to the general election, and the overwhelming percentage of them won easily in November. Only one independent reached the November ballot in a district where both a Democrat and a Republican candidate participated; on average, it took more than 25% of the vote to advance to the November election when more than two candidates ran.
- ***Vote-Splitting Unfairness:*** Vote-splitting in the preliminary election undermines the goals of Top Two. Out of 154 Top Two races in 2012, more than half (92) included potential split votes in the primary in which the most popular candidate may not have even made it to the general election.
- ***Voter Turnout Distortion:*** The two-round system distorts turnout. Even though most candidates were eliminated in June, well over twice as many voters participated in the November election. A comparison of candidate performances in the two rounds of voting show that June voters were disproportionately older and more traditional, and more likely to vote for Republicans and against racial minority candidates.
- ***Lack of Competition Still the Norm:*** California elections remain largely uncompetitive. The majority of races, including those featuring two candidates from the same party, were won by landslide margins. To the extent these intraparty races promote competition, they do so at the expense of voters' ability to express a preference for a minority party.
- ***The Value of Top Four:*** An otherwise identical system could advance four candidates instead of two and then conducts the general election with ranked choice voting. This change would address all of the concerns identified in this report and promote the stated goals of Top Two better than Top Two itself because nearly every general election race would include both an intraparty contest within the majority party and a contest with other parties and independents.
- ***Association Rights:*** The lack of party endorsements on the ballot undermines important First Amendment rights and is easily addressed within the system. Other changes should uphold association rights and reasonable ballot access.

INTRODUCTION

Many current social issues concerning government and representation stem from how we conduct elections. We face a crisis of polarization among elected officials, coupled with elections that are plagued with both lack of choice for voters and lack of competition among those choices, diluting the value of the vote. These issues are not inevitable; they are the result of how we choose to conduct elections. Lately, many reformers who acknowledge that fact have placed the blame on the partisan primary election system, and so they have pushed for a reform that eliminates that system. In Washington and California, partisan primaries have been replaced with a new system, called “the Top Two primary.”

Under Top Two, a blanket preliminary election replaces partisan primaries. Every candidate seeking office must run in the preliminary irrespective of party preference or endorsement. Voters have one vote, and the two candidates receiving the most votes advance to the general election, again irrespective of party preference or endorsement. The general election then always features exactly two candidates, even if they both identify with the same political party.

FairVote has been at the forefront of analysis of the Top Two system, providing a point of view for how the system could be improved. Our analysis has demonstrated that the use of a blanket preliminary election that allows broad choices and accommodates unaffiliated voters is worthy of serious consideration, but that the limitation to two candidates in the general election severely undermines its goals and creates new problems. That limitation: (1) eliminates most candidates in a lower-profile preliminary election with a smaller and less representative electorate; (2) fails to substantially alter the typical dynamic of traditionally uncompetitive general elections between candidates from each of the two major parties; (3) only succeeds in marginally altering that traditional dynamic at the cost of denying all members outside one political party the opportunity to vote for a preferred candidate.

The best way to correct these issues while retaining the advantages of a blanket preliminary election is to simply advance more than two candidates and then conduct the general election using a ranked choice voting system designed to accommodate more candidates. In California, we propose advancing four candidates from the preliminary round of voting, using ranked choice voting in the general election, and improving protection of First Amendment association rights.

TOP TWO IN PRACTICE: CALIFORNIA'S 2012 ELECTIONS

Top Two has generated substantial controversy, both in popular debate and among academics. Many important criticisms derive from one central aspect of Top Two: the fact that it advances only two candidates to the general election. FairVote has raised several concerns with Top Two related to this fact, each of which is described below.

Incumbents and Party-Backed Candidates Dominate

Every incumbent Member of Congress and state legislator who sought re-election advanced to the general election round. Out of the 100 races with an incumbent, eight races led to a non-incumbent unseating an incumbent, with two congressional incumbents losing to another incumbent. Some of these incumbent defeats are likely traceable to California's 2011 redistricting, as incumbents are more vulnerable when running in new districts. Four incumbent defeats had no link to the Top Two system itself, as they occurred in a general election between a Republican and a Democrat, effectively replicating the likely results from a traditional partisan primary and general election. Two incumbent defeats featured only one of the two major parties' candidates in both the preliminary and general election, with the incumbent loss potentially – but not necessarily – tied to the different November electorate essentially deciding an intra-party contest that ordinarily would be resolved in the primary.

Two races did see an incumbent defeated who more definitively would have prevailed under the old partisan primary system, in state assembly districts 10 and 50. In these races, a Democratic challenger defeated an incumbent Democrat. In both cases, a Republican ran in the preliminary, and the incumbent Democrat had the plurality of votes in the preliminary, suggesting that had a partisan primary taken place, the incumbent would have faced the Republican in the general election after eliminating the ultimately successful challenger Democrat in the primary. In those races, Top Two apparently performed as its promoters thought it would.

Eliminating partisan primaries does not undo the benefits of being preferred by party leadership. According to research by Eric McGhee of the Public Policy Institute of California, even controlling for incumbency status and the district's partisan registration, the estimated effect of a party endorsement is 40 percentage points. In the preliminary election, candidates who won the endorsement of the Democratic Party captured an average of 86% of the party's vote, compared with an average of 32% for candidates who did not win the endorsement. Looking forward to the 2014 elections, Democratic contenders are already locked in a struggle to gain the endorsement of the Democratic Party – with *Roll Call* in June 2013 reporting on District 31 candidates seeking to avoid splitting votes among themselves in the preliminary as they did in 2012.

Major Parties Dominate

Top Two has had a devastating effect on the ability of minority party and independent candidates to have their voices heard in the general election period, when most voters participate. Out of California's 154 total races in 2012 (including for Senate, Congress, and both houses of the state legislature), only eight featured general elections with candidates who identified as something other than a Republican or Democrat. In 2010, that number was 77. Of those eight non-major party candidates, only one survived a preliminary election that had at least one Democrat and at least one Republican.

By limiting voter choice in the general election to only two candidates, Top Two virtually guarantees that when at least one Democrat and at least one Republican run in the preliminary, voters will have no option in the general election other than a major party candidate. This is especially problematic because Top Two in California does not allow write-in votes in the general election, leaving those who prefer not to vote for a major party candidate with no voice.

Distorted Turnout between Rounds and Voting Rights Concerns

Well over twice as many voters participated in the general election in November as in the preliminary election in June, with 72% of registered voters participating in November compared with only 31% in June. But when only two candidates can advance to the general election, these preliminary elections had a decisive impact for most candidates, with 264 candidates eliminated in June compared to only 148 candidates eliminated in November.

Turnout in the preliminary election was also less representative than the general election. Democratic candidates on average ran about five percentage points better in the general election in California congressional races than in the preliminary election. In those critical congressional districts decided by fewer than 10 percentage points, Democrats ran about seven points better than in the preliminary election – meaning an impact in margin between candidates of some 14%. There were five congressional districts where Republicans won an outright majority in the preliminary election, but a Democrat was elected in November.

The data suggests that the lower turnout had a particular impact on Latino voters. Heavily Latino districts saw larger swings in favor of Democrats in the general election, suggesting lower Latino turnout in the preliminary. For example, the districts with at least 40% Latino voting age population saw a median change of about 6.6% (over 13% margin between candidates). Majority-Latino district 38 saw one of the largest swings, with the Democrat (Linda Sánchez) going from 33,243 votes in the preliminary election to 145,280 votes in the general election, gaining a margin of over 22% against her Republican opponents between rounds.

These disparities underscore how certain kinds of voters – generally older, white and more traditional – have a measurable advantage in the June election as compared with the November election. By making the preliminary election much more important, Top Two therefore represents a system biased against younger and more populist voters, as well as those who prefer Democrats and candidates of color.

A clear example of this occurred in congressional district 31. In this district, President Obama in November won 58.5% of the vote, over 6.5 percentage points higher than his national average. Using FairVote's partisan index, the district has a Democratic partisanship of 56.5%, making it more Democratic than over 60% of congressional districts nationwide. Democrats in 2012 won every single other district with a partisanship higher than 54%. Being based entirely in Los Angeles, district 31 has a voting age population that is only 44% white, with a substantial Latino population. However, the preliminary round, in which only 62,667 voters voted for House candidates (compared with 207,095 who cast a ballot in the general election in the same district), the Democrats collectively received only 48.5% of the vote. That fact, coupled with the Democratic vote being split among four Democratic candidates, resulted in two white Republicans advancing to the general election. A Latino Democrat trailed in third, about a thousand votes behind the second-place Republican.

Consequently, the majority Democratic, majority-minority voters in November had to choose between two conservative white Republicans, with no option for a write-in. It should not be surprising that over 22% of voters in that district cast a ballot for President but chose not to vote in the House race. District 31 highlights the voting rights concerns that arise when a disproportionately white population is able to decide who the entire district will be able to vote for in November.

Yet another example may be found in congressional district 52, where Latina Democrat Lori Saldaña just missed advancing to the general election, trailing Republican incumbent Brian Bilbray by about 19% and white Democrat Scott Peters by only half a percent. Peters won the general election in a district where Barack Obama won with 52.1% of the vote to Mitt Romney's 45.7%, meaning that the Latina Democrat likely would have been elected if advancing to the general election.

Vote-Splitting in the Preliminary Round

When at least four candidates participate in the preliminary round, it becomes possible for the candidate who would have won the general election to come in third due to vote-splitting. This can only have occurred in races where the combined vote total of all candidates placing third or later is greater than the number of votes received by the second-place candidate.

Out of 154 Top Two races in 2012, far more than half – 92 in all – had a potential split vote outcome in which at least four candidates ran and the eliminated candidates collectively won more votes than the advancing candidate in second. That they occur so often under Top Two is no surprise: they are much more likely the more candidates compete and the more candidates are eliminated, and Top Two lumps all candidates of all parties together into a single election that then eliminates all but two.

In congressional district eight, for example, the top two candidates, Gregg Imus and Paul Cook, received 15.6% and 15.3% respectively, while the third-place candidate, Phil Libatore, received 15.0%. With the top two candidates collectively receiving just under 31% and the votes being split that closely with the third place candidate, it cannot be confidently said that the most popular candidate advanced to the general election round.

Similarly, in the congressional district two preliminary, the Democratic candidates collectively received about 75% of the vote, while the two Republicans collectively garnered 20.9%, yet only one Democrat advanced along with one Republican. Again, the second-place candidate, Republican Daniel W. Roberts, received 15.0%, while the third-place candidate, Democrat Norman Solomon, received 14.9%, splitting his vote with other Democratic candidates. Unsurprisingly, the general election became one of the least competitive in California, with Roberts losing by a margin of over 40%.

Impact of Top Two on Competition

The near ubiquity of safe, uncompetitive districts remains an enduring feature of elections in California after the use of an independent redistricting commission and a switch to Top Two. In 2012, 85 districts or 56% of contested races overall were won in the general election by a margin of greater than 20%. Another 39 districts or 25% were won by safe margins of more than 10%, while 13 districts or about 8.5% were won by safe margins of more than 5%. That leaves only 15

truly competitive races where every vote clearly mattered in the general election: three out of 53 races for Congress, one out of 20 for State Senate, and 11 out of 80 for State Assembly.

The possibility of intraparty races rarely resulted in more competitive races. Of the eight intraparty congressional races, only one was decided by a close margin of less than 5%. The other seven were all decided by 10% or more, with three of those being landslides decided by more than 20% margins.

Intraparty races also carry their own costs relevant to competition: they may simply alienate voters from other political parties who will skip the race entirely. Congressional races featuring two candidates from the same political party had over 25% fewer votes in the general election than those featuring both a Republican and a Democrat. This number matches the conclusions drawn by an analysis by Richard Winger that showed that in races featuring candidates from only one political party, one in four voters left the race blank. This trend undermines the benefits of having intraparty races, and undermines the majoritarian goal of Top Two altogether.

THE FIX: FROM “TOP TWO” TO “TOP FOUR”

In spite of the concerns raised above, the use of an effectively nonpartisan blanket primary remains promising. More incumbents can be held accountable, and more voters can be part of meaningful elections. But in the vast majority of cases, Top Two fails to have any meaningful impact on the race, retaining uncompetitive races dominated by incumbents and major party insiders – yet it comes at the expense of near complete elimination of minor parties and independents from a general election voice.

Fortunately, there is a simple solution that significantly mitigates all of these identified downsides experienced by Top Two in California in 2012: simply allow more than two candidates to advance to the general election. For example, under a “Top Four” system, in which four candidates advance to the general election, significant challengers to incumbents and establishment candidates would nearly always make it into the general election. In districts where one party dominates, a more diverse group of candidates from that party would advance to the general election *along with* members of at least one other minority party in most cases.

With more than two candidates in November, elections should be decided with ranked choice voting, the method of voting already used to accommodate voter choice in elections in four Bay Area cities. With four candidates on the November ballot, voters would be given the opportunity rank up to three candidates in order of choice. Those rankings would simulate two runoff rounds – first eliminating the candidate in fourth place and then eliminating the candidate in third place – to ensure that the winner has majority support when matched against his or her top opponent.

California’s Congressional Elections Under Top Four

Using the election results from California in 2012, we can directly examine how a top four system would change the electoral landscape from the Top Two system actually used that year. The following numbers refer only to federal congressional elections.

	Top Two (53 districts)		Top Four (53 districts)	
Both major parties in general election	41	77.4%	45*	84.9%
Intraparty race in general election	8	15.1%	43*	81.1%
Independent candidates in general election	4	7.5%	22	41.5%

* If both major parties ran in the preliminary, they were both always represented in the general election, and if at least one major party ran more than one candidate, then at least two candidates from the same party advanced to the general election every time. Note that in 21 of 53 races, fewer than four candidates ran in the preliminary.

As the table demonstrates, simply changing the number of advancing candidates from two to four allows the election to have the benefits of an intraparty race in every election where more than one candidate from either major party participates while *simultaneously* allowing both Republicans and Democrats to participate *and* allowing alternative party and no party preference candidates to participate at five times the rate they can under Top Two.

In 21 congressional races, three or fewer candidates ran at all. Top Four would encourage more candidates to run in those races, expanding inclusion, competition, and voter choice.

To earn a place in the general election in November in the Top Two races, the median percentage of the vote gained by a second-place candidate in a race with at least three candidates was 25.1%. – a high bar for alternative parties and also for other major party candidates who could have proven viable with more time and a larger November electorate. In contrast, the median percent of the vote gained by the fourth-place candidate in a race with at least five contenders was 5.8% (with four or fewer candidates, any number of votes will result in advancement). Under top four, it can be confidently said that the best candidates who can be viable in November always advance, and that the district will have a diversity of viewpoints in the general election debates.

Looking at individual races, we can see how top four advances the goals of Top Two proponents much better than Top Two itself. For example, in congressional district 11, Democrats received just shy of 70% of the vote in the preliminary election, but vote-splitting resulted in a Republican advancing rather than two Democrats, with the November election resulting in one of the least competitive races in California. Under top four, the general election would have been between three Democrats and one Republican, generating real competition while including a greater diversity of voices.

In district 12, Democrats received over 80% of the two-party vote in the preliminary election, but again Top Two advanced a Republican who went on to only receive about 15% of the vote in the general election. Under top four, the district 12 general election would have included the Republican along with two Democrats and a Green Party candidate.

This pattern recurred a number of times. In the following districts, the majority party received over two-thirds of the two-party vote in the preliminary election, yet Top Two advanced only one candidate from that majority party: districts 2, 11, 12, 14, 18, 20, 25, 33, and 42. In every one of these districts, top four would have advanced at least two candidates from the majority party along with at least one candidate from the minority party. That is nine races that were ultimately decided by a median margin of over 40%, utterly devoid of competition, in which a top four system would have allowed real competition without excluding minority voices.

Under top four, the infamous election in district 31, in which two conservative, white Republicans advanced in a majority-minority Democratic district, would have instead featured both of the two Republicans along with two Democrats (one Asian American and one Latino), which would have been a much fairer slate for representing the diversity of the district in debates and ultimately identifying a real majoritarian candidate. Certainly a lot fewer than one in five presidential voters would have skipped voting in their own House race.

California’s State Legislative Elections Under Top Four

A similar analysis may be conducted for California’s state legislative races:

	Top Two (100 races)		Top Four (100 races)	
Both major parties in general election	74	74%	86*	86%
Intraparty race in general election	20	20%	59*	59%
Independent candidates in general election	4	4%	14	14%

* If both major parties ran in the preliminary, they were both always represented in the general election, and if at least one major party ran more than one candidate, then at least two candidates from the same party advanced to the general election every time. In 63 of 100 state legislative races, fewer than four candidates ran in the preliminary.

State legislative races, being lower profile, attract a smaller field of candidates in many cases. Of the 100 state legislative races, 42 had two or fewer candidates on the preliminary ballot, which means they would come out exactly the same under either top two or top four – although more candidates may have incentives to run under top four, where they would be more likely to advance to the general election. Nonetheless, it remained true under state legislative races that, using Top Four, any time a candidate from each major party ran, both major parties were represented in the general election; and any time more than one candidate from the majority political party ran, more than one such candidate would advance to the general election. This accomplishes the goals of Top Two of promoting inclusion and competition while also retaining – indeed, expanding – voter in choice in the general election.

In state legislative races, we continue to see the pattern of Top Two failing to advance two candidates from the same political party where that party has over two-thirds of the two-party vote in the preliminary where Top Four would. That was the case in 19 races: state senate districts 1 and 35 and state assembly districts 3, 24, 25, 29, 33, 36, 38, 46, 53, 54, 58, 60, 63, 69, 71, 74, and 77. It cannot be considered an uncommon occurrence.

In 63 state legislative races, three or fewer candidates ran at all. Top Four would encourage more candidates to run in those races, expanding inclusion, competition, and voter choice.

The use of ranked choice voting in the general election would also give more members of the non-dominant party in the districts the opportunity to influence which dominant candidate actually gets elected. Under Top Two currently, if a district is heavily Democrat and advances two Democrats, theoretically the Democrat who appeals more to the Republican minority will win, promoting inclusion. This does not seem to have borne out in practice, with many partisans from the other party just skipping the race entirely. Using ranked choice voting with four candidates advancing in a Democratic district, Republicans would be able to rank the Republican

candidate or candidates first and then rank the Democrats in order of their preference. In such a district, the Republicans would likely be defeated in an early round of tabulation, allowing Republican preferences to influence which Democrat will win. The same is true of Democrats in Republican districts and members of smaller minority parties everywhere.

Of course, we cannot say what the results actually would have been under top four. Parties and candidates behave differently in response to different electoral rules. However, this data does demonstrate that top four allows for greater access, widens the diversity of voices, and enhances competition compared to a limit of two in the general election.

Top four is an example of how a “Top X” approach could supplant the rigid limit of two candidates in the general election. Jurisdictions may vary in debating how to fix Top Two, and a limit of four is not the only option. For example, an alternative might be “top three,” which would not guarantee as much choice in November, but would be good in jurisdictions that have voting machines only able to handle giving voters a second choice. Other variations could include “top five”, which would require voting machines able to allow voters to rank four candidates, or a floating number of general election candidates based on vote percentage – for example “top three plus any who receive at least 5%.” Top four is an excellent model, but we may see adopting jurisdictions explore other variations.

FREEDOM OF ASSOCIATION RIGHTS

This analysis is not designed to be a comprehensive review of how we might improve California’s Top Two primary system. For example, we believe the right to support a write-in candidate is an important right, and we believe California should hold its two-round voting as closely together as administratively possible in order for the election season to be more focused. Although unrelated to the number of candidates advanced, we do see value in addressing the related issue of how candidates secure a place on the ballot and how they are identified on the ballot.

FairVote shares concerns raised by many opponents of Top Two regarding the First Amendment rights of association. Political parties exist to promote certain ideas in governance through elections. When a person appears as a “Democrat,” voters assume that the candidate generally promotes the goals of the Democratic Party, and likewise for Republicans, Libertarians, Greens, and others. When, however, a candidate can be listed as a “Democrat” on the ballot without any vetting by the Democratic Party, the very purpose of the Democratic Party’s existence as an association is undermined. In a Democratic-leaning district, a candidate absolutely opposed by a political party may run under that party’s label in a way that on the ballot is indistinguishable from a candidate actively promoted by that political party.

This right of association is grounded in the First Amendment to the U.S. Constitution. These same concerns led to the U.S. Supreme Court holding that partisan blanket primaries violate the First Amendment. Top Two, as currently administered, avoids constitutional issues by simply asserting that the candidates are not actually representatives from the parties whose labels they adopt, but merely that they prefer those parties. However, all data suggest that voters treat candidates with party labels as partisan candidates.

At the same time, a central goal of Top Two is to allow candidates access to the ballot without having to go through party leadership. In some cases, a particular candidate may be the favorite of most Democrats without being able to acquire the Democratic Party endorsement due to conflicts with party leadership or something similar. Accordingly, candidates should still be able to appear on the ballot with a preferred political party even if they lack that party's endorsement.

The solution is simple: allow each candidate to state a political party preference of any recognized party in the United States, similar to what is done in Washington. Each candidate should also be able to indicate official endorsements from recognized California political parties. The candidates would thus be listed first by name, then by political party preference, and finally with a list of all political parties that extended their official endorsement to the candidate. Typically, this might be just be one political party endorsement or none, but in the American tradition of fusion voting, a candidate should be able to list more than one political party endorsement if that candidate can get more than one.

Allowing more than two candidates to advance also helps promote association rights by easing ballot access requirements for alternative political parties, which may be tied to vote totals in the general election. We would support changes that make it easier for parties to keep and sustain being recognized political parties and that ensured ballot access hurdles were not too extreme.

CONCLUSION

Whether stemming from Top Two's artificial limit of two candidates in the general election or its undermining of political party association rights, the most problematic aspects of Top Two can be fixed with surprising ease. A "Top Four" system, in which four candidates advance from the primary, each listing both a political party preference and any political party endorsements, would allow the beneficial aspects of Top Two to shine through in nearly every election, while simultaneously protecting voter choice, competition and First Amendment values.

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