

**Recapturing Voter Intent:
The Nonpartisan Primary in California**

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Preface

This report was prepared as part of the Capstone Policy Seminar experience at the Pepperdine School of Public Policy. The Seminar, one of the integral parts of the preparation for students receiving the Master of Public Policy degree, provides students with the opportunity to explore a public policy program in depth and to prepare a set of specific recommendations to policy makers to solve the problem. These reports are prepared by a team of 6-8 students over the course of only twelve weeks, providing for an intensive and challenging experience.

The results of the team's analysis is then presented to a panel of experts in a public workshop setting where the student panelists are given the opportunity to interact directly with the policy professionals, not only presenting their findings but engaging in an exchange of ideas and views regarding the specifics of those recommendations. The policy expert panel for this report included Arnold Steinberg, a widely respected campaign strategist, Joseph R. Cerrell, CEO of Cerrell Associates, Inc. and political consultant, and Walter Karabian, former majority leader of the California Assembly and attorney.

The School of Public Policy would like to thank our students for their hard work and commitment in preparing this policy analysis. We are proud of your achievement.

Executive Summary

One of the most controversial political topics in California is the State's primary election system. The argument centers on the primary format best suited for the voters of the State. California began with a closed primary system that restricted voters to vote only in the primary of the party with whom they are affiliated and disallowed non-affiliated voters from voting in the primary election of any party. In 1996, Californians passed Proposition 198, a citizen-generated initiative to replace the closed primary system with a blanket primary system. The blanket system ratified by the Proposition allowed all registered voters, regardless of party affiliation, to vote for any candidate for each office.

Following the successful implementation of Proposition 198, opponents of the open primary system, led by California's political parties, directed the Proposition through a bitter court battle that ultimately concluded in the United States Supreme Court. Despite decisions by the Eastern California Federal District Court and the 9th U.S. Circuit Court of Appeals supporting the legality of the Proposition, the Supreme Court judged the Proposition unconstitutional. The Supreme Court declared that Proposition 198 infringed on the First Amendment freedom of the right of association guaranteed by the United States Constitution. The Court ruled that political parties, like any political organization, have the constitutional freedom to prohibit non-members from selecting leaders and representatives of the organization. Despite the legal enactment of Proposition 198 by 60 percent of the voters of California, the open primary toppled, along with the desires of the millions of Californians that supported the system.

In 2000, California replaced the open primary with a modified closed primary system, which permits each party choose to allow or disallow non-affiliated voters to vote in that party's primary election. In practice, however, just one of California's six political parties allows non-affiliated voters to participate in their primary elections. In effect, this modified closed primary system disenfranchises Decline to State (DTS) voters just as the closed primary system did for decades. With historic low voter turnouts in the 2000 and 2002 elections, Californians indicated their disappointment with the overthrow of the primary system created by Proposition 198, the replacement of that system with the restrictive modified closed system, and the frequently unappealing candidates available to voters under the modified closed primary.

This article provides insight into this political phenomenon of primary election systems in California. Within the work, the authors examine the advantages and disadvantages of

primary formats options based on the view that a primary election must encourage larger and wider voter participation, represent the will of the people, abide by the Constitution, and allow freedom of association while remaining cost-effective and comprehensible to voters. That extensive criterion in mind, the authors propose to replace the current primary system with a nonpartisan primary system, which allows voters to choose one candidate from a group of candidates chosen by individual parties or placed on the ballot by the signatures of California's voters. These candidates then appear on the ballot without party affiliation.

The nonpartisan primary recommendation addresses the problems of low voter turnout, disenfranchisement of DTS voters, and limited voter choice without breaching the parties' right of association. Voter interest and turnout stand to improve. Under a nonpartisan primary system, all registered voters, regardless of party affiliation, may cast a vote for the candidate of their choice for all elected offices, regardless of party affiliation. Since parties gain direct control of the candidate they choose to place on the ballot, the nonpartisan primary does not violate the parties' right of association.

The implementation of nonpartisan primary is not without difficulty. Employing a nonpartisan primary system in California requires alterations to the State Constitution. Such alteration come only following the success of a costly, time-intensive initiative campaign. The implementation of the rare primary system requires voter education to prepare Californians to cast their votes capably.

Despite these impediments, the nonpartisan primary offers Californians the best method to correct and improve the State's primary system. In order to generate the successful creation and implementation of the nonpartisan primary system, the authors present a series of recommendations. Included among these recommendations is the initiation of a citizen-driven proposition to create a nonpartisan primary, as well as methods for fundraising and coalition building to encourage the success of such a proposition. The article recommends small alterations to the Election Code, easily transforming the modified closed primary into a promising nonpartisan election. The authors also address concerns of practical execution and voter education that accompany the institution of a new primary election system in America's most populous state.

The nonpartisan primary provides California voters the opportunity to gain choice and influence in the electoral process without infringing upon the constitutional rights of parties and other political actors. Through a series of stages herein recommended, the nonpartisan primary is a realistic aim for California voters. With the nonpartisan primary, Californians have the opportunity to change the course and quality of political representation with a system that embodies the will and the desires of the people of California.

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1. Failures of the Closed Primary: The Need for Improvement

The issue of voting is one of unmatched importance in the United States. In no action, save for voting, do individuals within society have direct influence over a matter as important as governmental representation. The electoral process is central to a functioning democracy. The system must allow voters to convey their will through the simple act of voting and encourage the expression of that will in the actions of their elected officials.

Perhaps in no state in America is the expression of the will of the voters as necessarily important as in California. California harbors over thirty five million residents inhabiting one of Earth's most amazingly diverse topographical regions spread over nearly 165,000 square miles. Among these residents are the largest population of Asians outside of Asia, the greatest collection of Latinos in the English-speaking world and the one of the largest African-American population of any state in the Union. The diversity of California and its residents, and the varied array of opinions, passions, and interests maintained by Californians, create an environment in which the importance of opportunity for political expression is unmatched.

Despite the importance of political participation in California, the State's unpopular primary system confounds the critical right of voting. The system, described in the technical parlance of politics as a modified closed system, effectively restricts voters who wish not to affiliate with one specific political party from voting in partisan primary elections. The modified closed primary scheme permits each party to choose to allow or disallow voters not affiliated with that party to vote in that party's primary election.

Problems riddle the modified closed primary system. Principal among these problems is the exclusion of over 15 percent of California's voters from the primary election system. These voters, DTS voters, choose to remain independent from party affiliation. The rules of the primary system prevent these millions of Californians from voting in any party's primary system. Further, voters registered with a party are generally unable to cross party lines to demonstrate their predilections.

In 1996, Californians faced the opportunity to increase their power of the candidate selection process in the State's primaries. Voters responded to the opportunity by passing Proposition 198 by a 60-40 margin. Proposition 198 offered voters the ability to replace the state's closed primary system with a blanket primary system allowing all eligible primary voters, including those not affiliated with a political party, to vote for any primary candidate eligible for each office.

Proposition 198—Californians Call for Change

Proposition 198, a citizen-driven initiative gained entrance on the ballot through the collection of the signatures of nearly a million Californians. The Proposition became law on March 26, 1996, following a commanding election day victory. As the map below indicates, a majority of the voters in every county in California supported the Proposition. Proposition 198 proved the only citizen proposed proposition to pass in the 1996 primary.

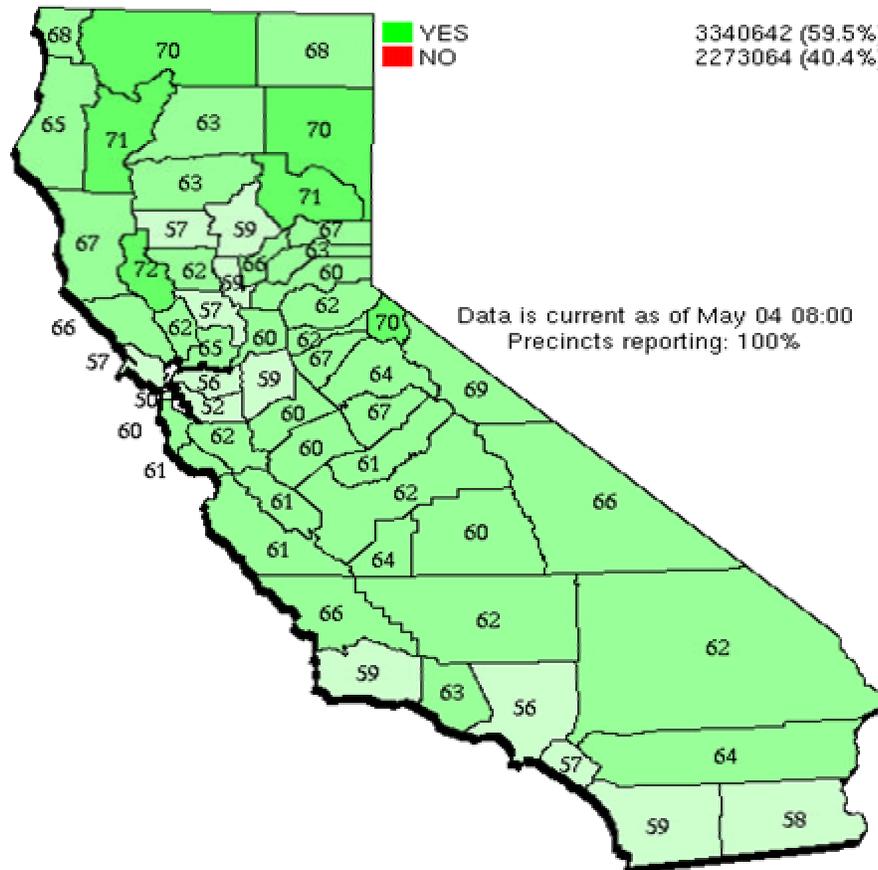


Figure 1.1—Percent Voting in Favor of Proposition 198 by County¹

Political parties, outraged by the loss of influence over the candidate selection process, joined to strike down the popular law through a series of court challenges. Claiming an infringement on the parties' right to associate and fearing a loss of control in the candidate selection process, the parties guided their opposition to Proposition 198 through Federal District Court, the 9th U.S. Circuit Court of Appeals, and eventually, to the United States Supreme Court. Despite Court precedent of supporting the right to

¹ www.primary96.ss.ca.gov/e/returns/prop/prop-198.960504080000.html 11 February 2003.

expand participation in primary elections and the existence of similar primary systems in 29 other states, the justices of the Supreme Court believed there was a constitutional basis to overturn Proposition 198. The Supreme Court ruling rejecting the constitutionality of the proposition proved a devastating blow to the will of the majority of California's voters.

Following the Supreme Court decision to overturn the democratically adopted Proposition 198, polls illustrated Californian's displeasure with the Court's decision. According to an August 2000 survey prepared by the Public Policy Institute of California, 64 percent of Californians had an unfavorable opinion of the Court's decision concerning Proposition 198. Fully 70 percent of independent voters polled disliked the outcome of the court battle and 65 percent of Democrats, the party filing the initial lawsuit against the State of California seeking to reverse the ratification of Proposition 198, disagreed with the Supreme Court decision. The same poll indicated that 71 percent of Californians supported legislation allowing DTS voters the option of voting for party candidates in state primaries.²

California reverted to a modified closed primary system subsequent to the overturn of the open system created by Proposition 198. The results of Proposition 198, as well as the historically exceptional voter turnout in 1998, the one election under which Californian voters enjoyed the blanket primary system, demonstrate that Californians desire a more open, less disenfranchising method of candidate selection. Californians currently reside under a system of political representation that does not respect, much less embody, the will of the people. For this crucial reason, given the availability of legal and effective means of altering the primary system, California's voters must enact an electoral system reflective of their desires.

Benefits of the Open Primary

States with more open primary systems customarily enjoy higher rates of voter turnout than states employing closed systems.³ In the general election of 2000, for example, states whose citizens enjoyed the open and blanket primary systems were more likely to vote in the general election as well.⁴

The tendency of higher voter turnout in states offering the most open forms of primary elections held true in California as voter participation soared in 1998 under the blanket primary system created by Proposition 198. Since 1940, when California first combined the August federal, state, and local primaries with the May presidential primary, only four

² www.ppic.org/content/pubs/S_800MBS.pdf. 6 April 2003

³ www.fec.gov/pages/2000turnout/reg&to00.htm. 1 February 2003.

⁴ For complete list of the states using each primary system, see Appendix C.

times has the voter turnout been greater in non-presidential election years than in the preceding presidential primary. This oddity occurred only once since 1962—in 1998, the year of the open primary in California. In 1998, 42.5 percent of registered voters voted in the primary elections, compared to 35.1 percent in 1994, the previous “off-year” election. In absolute numbers, Californians had not turned out in such numbers since 1978. The first off-year primary following the demise of the open primary, the primary of 2002, resulted in the lowest voter turnout since the compilation of California primary participation in 1910. Over 900,000 fewer voters voted under the modified closed primary system of 2002 than the open primary effective in 1998.⁵

The increase in voter participation under the open primary system spread throughout California counties as well. In Los Angeles County, the turnout of registered voters increased by over 100,000 voters from 1996 to 1998, an unprecedented occurrence in the County’s election history. In 2002, the next non-presidential election year, and the first since the discontinuation of the open primary, the primary election turnout of registered voters in Los Angeles County was a paltry 25.9 percent. This represents a one-third reduction in the number of Angelenos casting votes --nearly 400,000 voters--from the 1998 turnout numbers.⁶

⁵ Figures derived from www.ss.ca.gov/elections/sov/2002_primary/contents.htm. 1 February 2003.

⁶ Figures derived from www.losangelesalmanac.com/topics/Election/el02.htm. 17 February 2003.

2. Considering the Role of Parties and the California Primary System

The system of primary elections in California results from an uncommon political history. Parties, historically weakened by potent railroad interests and candidate cross-filing, created a primary election system ensuring themselves almost exclusive influence in the outcome. Thus, highly restrictive and exclusionary regulations manage the candidate selection process in California

Parties and Elections in California—A Unique Experience

California attained statehood in 1850, a time of national Democratic prominence. In California's early years, the California Democratic Party controlled the State Senate, Assembly, the majority of the delegation to the House of Representatives, one United States Senate seat, and the Governorship.⁷ Despite the early success of the Democratic Party in California, the Party soon fell into turmoil after a series of internal conflicts weakened the Party and allowed a series of defeats by the Know-Nothing Party. Following the Kansas -Nebraska Act, much of California's antislavery majority gravitated towards the newly created and abolition-minded Republican Party.

In 1860, following the failed presidencies of Democrats Franklin Pierce and James Buchanan, the Republican Party swept into national power. Californians followed, electing railroad operator Leland Stanford Governor. After the Civil War, railroad interests controlled California politics. Party influence gave way to the "machine" politics of the powerful railroad companies of the Gilded Age.⁸ The political machine weakened party allegiance and party influence in political affairs as the influence of railroads penetrated deeply into all of California's political parties.

During the first decade of the Twentieth Century, voters opposed to the influence of the railroad companies and the associated governmental corruption turned away from both the Democrats and the Republicans and formed the Progressive Party. The power of the Progressives peaked in 1910 as Californians elected Progressive leader Hiram Johnson Governor. Johnson's administration saw a number of political reforms including the

⁷ www.demcco.org/demcco_history.htm. 20 January 2003.

⁸ www.questia.com/PM.qst?action=openPageViewer&docId=35454019. 11 February 2003.

direct primary, the initiative and referendum, nonpartisan local elections, regulatory agencies, the recall, women's suffrage, and candidate cross-filing on the primary ballots of more than one political party.⁹ Cross-filing, which allowed candidates to run on all parties' primary ballots, served to de-emphasized role of political parties in California.¹⁰ These reforms attempted to eliminate governmental corruption by weakening the power of political parties, at the time perceive as puppets of the railroad's political machine. Many of these reforms increased the influence of voters in California's political, electoral, and policymaking systems.

Following WWI, the Progressive's power declined rapidly, and the Republican Party recaptured the governorship in 1922. During this period, the Democratic Party suffered a three-to-one voter registration disadvantage to the Republican Party. However, by the heyday of the New Deal, the California Democratic Party gained a three-to-two voter registration advantage, fueled in significant part by an influx of Democratically-inclined Dust Bowl escapees in the 1930s.¹¹ The Democratic Party maintained that advantage in voter affiliation throughout the rest of the twentieth century and, as of February 2002, held an edge of 1.6 million voters over the Republican Party.¹² Despite the Democratic advantage in voter registration, the governorship of California frequently oscillated between Republicans and Democrats throughout the second half of the Twentieth Century

In 1959, soon after gubernatorial candidate Pat Brown successfully captured the nomination of both parties, the California legislature adopted a law to prohibit candidate cross-filing. Thus began the modern era of the California primary. Party affiliations increased as voters sought a means by which to exact greater influence on primary elections. As a result, party importance in California increased, but only marginally.¹³ Low voter turnout frequently plagues California's party-focused closed primary system. In fact, never since the prohibition of cross-filing has turnout of eligible voters surpassed 50 percent in a primary election, likely due in part to the effective disenfranchisement of many voters.¹⁴

⁹ www.demcco.org/demcco_history.htm. 20 January 2003.

¹⁰ www.questia.com/PM.qst?action=openPageViewer&docId=35454019. 11 February 2003.

¹¹ www.demcco.org/demcco_history.htm. 20 January 2003.

¹² Figures derived from www.ss.ca.gov/elections/sov/2002_primary/contents.htm. 1 February 2003.

¹³ The recent campaign finance reforms that render the parties as the only unlimited resource conduits for campaigns also extended the role and significance of parties in California.

¹⁴ Figures derived from www.ss.ca.gov/elections/sov/2002_primary/contents.htm. 1 February 2003.

The Voters Respond with Proposition 198

Section 2151 of the California Elections Code states that “no person shall be entitled to vote the ballot of any political party at any primary election unless he or she has stated the name of the party with which he or she intends to affiliate.” Consequently, following the prohibition of candidate cross-filing, the members of each political party maintained exclusive control of candidate selection in primary elections. Voters cannot legally vote on another party’s ballot without re-registering and changing party affiliation.

Unaffiliated, or DTS, voters may not vote in the primary elections for any partisan political office including, among others, state assembly, state senate, congressional representative, senator, governor, and president. This closed system of primary elections often results in the nomination of radical candidates that prove representative of only the extreme ideologies of each party. These candidates advance to the general elections presenting California voters with limited and often unappealing voting options.

More troubling than the unappealing slate of candidates available to voters on the first Tuesday of every other November remains the issue of the effective disenfranchisement of a large number of Californians. As of February 2003, 15 percent of California’s voters registered as DTS.¹⁵ Thus, over 2.25 million voters have no voice in California’s political process until the general election.¹⁶ From this problematic process sprouted the citizen initiative that became Proposition 198.

A group of Californians, led by U.S. Representative Tom Campbell, attempted to address the undemocratic and unrepresentative aspects of California’s election system.¹⁷ This group drafted the initial plans for the initiative that became Proposition 198. Proposition 198 endeavored to open California’s primary system.¹⁸ By allowing voters to vote for the candidate of their choice, regardless of party affiliation, for each elected position, authors of Proposition 198 sought to enhance the opportunity for moderate candidates and attract voters to the primary election process eager to influence the political system. The initiative required county election officials to prepare one uniform ballot listing candidates randomly, not grouped by party affiliation. The candidate of each political party receiving the most votes for each state elective office became the nominee of that party in the subsequent general election.¹⁹

¹⁵ www.ss.ca.gov/elections/sov/2002_primary/contents.htm. 1 February 2003.

¹⁶ Further, the 5.22 percent of Californians registered as an affiliate of a minor party, along with members of a minority party in a safe district, are also effectively disenfranchised, as they are unable to participate in the election of candidates with general election viability if they so desire.

¹⁷ www.prospect.org/print-friendly/print/v11/8/schrag-p.html 11 February 2003.

¹⁸ For actual text of Proposition 198, see Appendix A.

¹⁹ www.primary96.ca.gov/e/ballot/198analysis.html. 11 February 2003.

A relatively low profile campaign backed Proposition 198. Supporters of Proposition 198 exhausted only \$955,649 for voter education and awareness operations.²⁰ Opponents of Proposition 198, injured by the statewide popularity of the initiative, mustered only \$98,847 to combat the passage of Proposition 198 with billionaire Rupert Murdoch providing \$50,000 and the California Republican Party providing the remainder.²¹

Proposition 198 reached the California ballot in March 1996. The result was a sweeping affirmation of the open primary in California. The Proposition secured 59.9 percent of the vote and voters approved Proposition 198 by a majority in each of California's 58 counties²². Statewide, Proposition 198 passed by over a million votes.

The Parties Respond: *California Democratic Party v. Jones and Proposition 3*

Fearful of reduced influence in controlling the outcome of the primary elections, the California Democratic Party filed a lawsuit against the State of California. The suit, filed in November 1996, attempted to overturn Proposition 198 on the grounds that it infringed on the Democratic Party's First Amendment rights of freedom of association. The Democratic Party contended that Proposition 198 interfered with the ability of the members of a private organization from choosing the representative nominees of their choice. Democrats also raised the concern that the open primary system created by Proposition 198 produced opportunities for abuse through "sabotage" votes arising when voters select a weaker candidate on an opposing ticket to advantage the voters' party in the general election.²³ By early 1997, the Republican, Libertarian, and Peace and Freedom Parties also joined the lawsuit as petitioners.

While awaiting their day in court, opponents of the open primary developed the language of Proposition 3. Proposition 3 intended to return to a closed presidential nominating process in California. Under Proposition 3, unaffiliated voters could not vote for presidential delegates. Proposition 3 affected only presidential primaries and did not alter the Proposition 198 system allowing primary election voters to cross party lines when voting for state offices, U.S. senators and congressional representatives.²⁴ In 1998, Californians defeated Proposition 3 by over half a million votes. Only 39.7 percent of

²⁰ www.ss.ca.gov/prd/bmc96/prop198.htm. 1 February 2003.

²¹ *Ibid.*

²² www.primary96.ss.ca.gov/e/returns/prop/prop-198.960504080000.html. 11 February 2003.

²³ www.csmweb2.emcweb.com/durable/1997/08/05/us/us.5.htm. 17 February 2003.

²⁴ www.ca.lwv.org/lwvc.files/nov98/pc/prop3.html. 11 February 2003.

voters supported the Proposition compared to the 59.5 percent voting for Proposition 198.²⁵

With the hopes of reinstating closed presidential primaries dashed by the failure of Proposition 3, the adversaries of Proposition 198, led by California's political parties, shifted focus to the courts.

The Courts Speak

In December 1998, *California Democratic Party v. Bill Jones, Secretary of State of California* came before the U.S. District Court for the Eastern District of California. District Judge David Levis ruled in favor of the State of California, upholding the constitutionality of Proposition 198. The Democratic Party appealed the District Court ruling, leading *California Democratic Party v. Jones* to a three-judge panel of the 9th U.S. Circuit Court of Appeals. In March 1999, the Circuit Court affirmed the lower court ruling by again upholding the constitutionality of Proposition 198. In September 1999, the Republican, Libertarian, and Peace and Freedom parties petitioned the U.S. Supreme Court to review the lower court decisions.²⁶

The Supreme Court, in a 7-2 decision, overturned the Court of Appeals judgment upholding the ratification of Proposition 198. The Court agreed with the California Democratic Party *et. al.*, that Proposition 198 infringed on the First Amendment rights of the political parties. The June 2000 decision proved the first in the history of America to restrict the power of a state and its voters from altering the method of candidate selection in a popular election.

Justices Stevens, writing in the dissent, contended that states have the authority to define the obligation of organizations performing public functions. This includes political parties. While the First Amendment protects endorsements, internal business, and core associational activities of a political party, no precedent exists that extends to a party the same rights enjoyed by a wholly private organization. Further, primary elections are no less forms of necessary state action than are general elections, and therefore states may constitutionally make decisions affecting the manner and process of a primary election as well as a general election.

²⁵See Appendix B.

²⁶ www.freedomforum.org/fac/99-2000/calif_time.htm. 23 February 2003.

Current Electoral Structure

Following the overturn of Proposition 198, the California Legislature attempted to pacify the supporters of Proposition 198 and DTS voters by creating what appeared to be a less disenfranchising primary system, the modified closed primary. The modified closed system, effective on 1 January 2001, allows DTS voters the opportunity to vote in a partisan primary if authorized by an individual party's rules.²⁷ Despite this allowance, only one party, the American Independent Party, presently permits DTS voters to vote in its primary contests.²⁸

Under current California law, a voter may change his party affiliation by re-registering to vote at least 15 days prior to the election.²⁹ Voters may affiliate with any one of California's six qualified political parties or decline to state a party affiliation. The qualified political parties presently include the American Independent, Democratic, Green, Libertarian, Natural Law, and Republican Parties. Once affiliated with a party, a voter retains that affiliation indefinitely unless the voter re-registers with another party or as an unaffiliated (DTS) voter.

The modified closed primary system scarcely differs from the former closed system. The system prohibits voters from crossing party lines to vote for the candidate of their choice. Since only one of California's six political parties appear willing to accept the influence of DTS voters in the primary elections, unaffiliated voters remain effectively excluded from the State's primary elections.

²⁷ www.ss.ca.gov/elections/elections_decline.htm#history. 1 February 2003.

²⁸ Shearer, William. American Independent Party. Interviewed by Karen Speicher. 5 March 2003.

²⁹ www.sonoma-county.org/regvoter/party.htm. 20 January 2003.

3. Improving California's Electoral Process: How to Mend the Flaws.

With this history and context of the California primary system recognized, the problems identified in the first chapter appear deeply entrenched. However, California maintains a tradition of responding to challenges through systemic reform. What options exist for Californians to reform their electoral process in ways that address the problems and concerns associated with the system? Before examining the alternatives available to Californians to improve opportunities for voters, it is important to establish goals in reforming the electoral process.

Structuring the Conversation—Format Versus Timing

There are two distinct set of issues to address when seeking to alter the primary system in California—format concerns and timing factors. The first, format concerns, relate to the structural form of the overall primary process in California. These include such features as Constitutional wording, ballot eligibility rules regulating candidates, and party affiliation regulations. Conversely, timing centers on the more precise matter of voter eligibility. Examples of timing issues include the time limits on voter registration and change of party affiliation. To examine the options available to alter the primary system, it is crucial to explore both format and timing, the options available within both of the two stages, and the difficulties and consequences associated with each of the options. .

Goals of Electoral Process Reform

In order to address the problem of how to provide California voters the influence sought in the primary system, a successful recommendation must address a set of five criteria. This criteria includes 1) embracing the will of the people, 2) maintaining politically and legally feasibility, 3) remaining economically viable, 4) favoring no one party explicitly, and 5) encouraging larger and broader voter participation.

Proposition 198 proved an extremely popular initiative that obtained the overwhelming support of Californian voters. Opposition by the political parties and, ultimately, the United States Supreme Court's decision interfered with the people's will to obtain an open primary system in California. Therefore, it is imperative that a recommendation to improve the primary election system embrace and reflect the will of the people. In due

course, the modification must reflect the desires Californians demonstrated through initially altering the primary system by ratifying Proposition 198.

Political and legal feasibility is necessary to any recommendation. In the case of any recommendation to alter the primary election system in California, political and legal feasibility are interrelated and almost solely reliant on the acceptance of the parties. In order to consider a recommendation politically feasible, a proposal must generate political support. To receive this support, any alteration to California's primary system must protect the ability of political parties to maintain control over whom they choose to place on the primary ballot.

It is also imperative that a recommendation withstand legal challenges, by complying with the California and United States Constitutions. In *California Democratic Party v. Jones*, the Supreme Court found that the State of California, through Proposition 198, restricted the associational capability of parties by directing changes in a party's ideology through affecting candidate selection. Thus, it is necessary that any alternative primary approach maintain constitutional free association and withstand charges of unconstitutionality.

Another essential element to any recommendation is economical viability. A successfully recommendation must minimize additional cost to the State of California and the State's taxpayers. If possible, a recommendation should attempt to reduce the costs currently associated with performing the primary election..

An alternative primary approach must guard against charges of political party favoritism. Therefore, our recommendation must not provide unfair advantages to one party over another. If one party perceives itself disadvantaged, a lawsuit or even a legislative overthrow of the new system is likely.

Lastly, it is imperative that all recommendations encourage larger and broader voter participation. The new system must seek to engage voters disenfranchised by the current primary system including the DTS voters that comprise 15 percent of the registered voting population in California.³⁰ Any system considered confusing or inconvenient by voters may reduce interest in politics and voting, regardless of the intent or quality of the system. Therefore, a recommendation must consider the ease of transition and education necessary to realize the new method.

The five criteria are the measure against which to judge recommendations for primary election system. The capacity of an option to satisfy the criteria determines the viability and potential success of each option. Thus, as the authors explore options available for

³⁰ www.ss.ca.gov/elections/sov/2002_primay/contents.htm. 1 February 2003.

improving the primary election system in California, these criteria reemerge, and the merit of each option judged.

What Reforms Are Possible?

Four separate options appear available to Californians aspiring to improve the electoral system. These four options, an improved modified closed system, a modified open system, an instant runoff scheme, and a nonpartisan primary each offer a series of benefits, as well as challenging drawbacks. The options vary in their “openness”—from the exclusive modified closed, to the almost completely open nonpartisan system—and are, therefore, divergent in their ability to address the problems plaguing the California primary system.

The Status Quo: A Proven Failure

The first option available is to remain with the *status quo*. As mentioned in the first chapter, California currently employs a modified closed primary system. The only party that presently permits DTS voters to vote in its primary contests is the American Independent Party. Under current California law, a voter may change his party affiliation by re-registering to vote at least 15 days prior to the election.³¹ Once affiliated with a party, a voter retains that affiliation indefinitely unless the voter re-registers with another party or as an unaffiliated (DTS) voter. However, for reasons stated in Chapter Two, we obviously must reject this as a viable solution to the problem facing California Primary system.

Status Quo with Revisions (Modified Closed Primary)

Improving the modified closed primary system necessarily requires offering an incentive to the parties to allow DTS voters the freedom to vote in the primary election of their choice. If parties receive sufficient notice of the DTS voters’ choice of ballots, they can then inform and persuade the DTS voters of candidate options and platform stances. The incentive would thus come in the form of advanced notification to parties. If a DTS voter chooses to vote in a party’s primary, he must do so no less than 30 days prior to the election. This 30 day period allows parties the opportunity to contact voters and influence their candidate selection. Throughout this process, nonaffiliated voters remain registered as DTS, having no lasting affiliation to the party in whose primary they choose to vote.

³¹ www.sonoma-county.org/regvoter/party.htm. 20 January 2003.

However, this option offers parties an opportunity to create party loyalty in DTS voters, thereby strengthening their support base.

California's political parties favor closed primary systems that permit only those eligible voters registered within a party to vote for that party's representative, or candidate, for each elected state or federal office. In order to satisfy employees, donors, and supporters of California's political parties, it is necessary to ensure that any "opening" of the primary system will not result in a noteworthy loss of party control over candidate choice. Therefore, any effort to improve the primary system must not promote the victory of candidates not satisfactorily representative of the parties' ideologies and policies, nor may it promote the "sabotage" vote arising when a voter votes for a weaker candidate on an opposing ticket to advantage the voter's interests in the general election.

Maintaining the *status quo* is advantageous for a number of reasons. The first advantage of this format is that it requires no alteration to the State Constitution. Slight modifications to the current primary system in California may require no more than legislative action or an executive order. Additionally, this format option has encountered no challenges on either California or United States Constitutional grounds. This format option meets the criterion of economic viability since it assumes no new costs for the State. Lastly, maintaining the *status quo* while making the slight modifications mentioned above, enables voters to continue with a familiar voting process.

The principal disadvantage of this format option lies in the fact that it does not satisfy the major criterion of embracing and reflecting the will of the people. As discussed earlier, the modification of the primary system in California through Proposition 198 resulted in greater voter turnout, participation, and interest in the primary process. The nullification of this system and, consequently, public dissatisfaction over the decision resulted in a marked decrease in voter turnout.³² Furthermore, it is unlikely that this format option is politically feasible. Since the defeat of Proposition 198, only one political party, American Independent Party, ever allowed DTS voters to vote in their primary. This refusal of other political parties has demonstrates that they will continue to oppose any non-party member making a choice in their primary.

Modified Open Primary System

A third option available to alter the primary system is the modified open primary. By definition, this format option allows all registered voters to vote in the primary, regardless of party affiliation. The voter must ask for any one party specific ballot, by

³² See Chapter Two – "The Benefits of the Open Primary."

guidelines discussed later in the Timing Stage. Voters may vote only on the ballot of one party.

This format option embodies the will of the people, allowing all registered voters to vote in the primary, regardless of party affiliation. There is likelihood that the State can enjoy increased voter turnout under a modified open system.³³ The modified open requires little to no voter education due to its simplicity. Furthermore, there is a precedent of a modified open primary in the United States. Thirteen states currently employ such a primary system.³⁴

Enacting a modified open primary system requires a change in the California Constitution. There exists the possibility that this system may face legal challenges brought about by the political parties arguing that the system weakens parties and breaches parties' right of association.

Instant Runoff

Another format option is the instant runoff voting (IRV) system, which asks the voter to rank the candidates in order of preference. As in a traditional delayed runoff, the system generates runoff finalists according to the preferences marked on the ballots. In this format, if no candidate receives a winning majority of first place rankings, the system eliminates the candidates with the fewest first place votes.³⁵ Computers and election officials then recalculate the votes, according to preference rankings, to determine the winning candidate. This process continues until one candidate receives a majority of votes. Unlike a traditional delayed runoff, no new election is required. This format option requires the elimination of primaries. Thus, a political party chooses candidates to place on the ballot, likely via convention or caucus.

Many consider establishing a system of instant runoff voting instead of a primary system beneficial due to its simplicity. As the above description explains, instant runoff voting is a relatively straightforward system allowing voters to realize the value of their votes in directly influence the outcome. In addition, there is no need to require a second election, chancing the possibility of poor voter turnout. In terms of economic efficiency, such a system eliminates the cost of a primary, thereby saving the State of California money. Due to the elimination of the primary, this format option more directly addresses the will of the people established in Proposition 198 and has the likelihood of encouraging a higher voter turnout.

³³ See Figure 2.2.

³⁴ See Appendix C

³⁵ www.chrisgates.net/irv/ 17 February 2003.

One concern associated with instant runoff voting that there is no long-term precedent in the United States and is, as yet, relatively untried and untested . Thus far, only Vermont and the City of San Francisco employ a runoff system. Changing the current primary system in California to an instant runoff voting system requires a proposition or legislative constitutional amendment to change the California Constitution.

Nonpartisan Primary System

The nonpartisan primary format option permits all registered voters to vote in the primary. Voters may select one candidate from a list of candidates on the ballot. The Secretary of State or the California Constitution establishes the number of candidates who advance from the primary to the general election. There are no party affiliations noted on the ballot. Eligibility for inclusion as a candidate on the ballot is determined through party selection or the collection of a pre-determined number of signatures. The State may wish to uphold the ability of candidates to campaign under party affiliations, thus allowing party involvement in fundraising and campaigning..

The benefits to the nonpartisan primary format option are significant. First, it captures the will of the people by extending the right to participate in the primary to all registered voters. A chief measure of the value of a proposed primary system is larger and broader voter participation. Through executing the intent of Proposition 198, the nonpartisan primary does just that.

Secondly, the nonpartisan primary system increases the power of the political parties to choose the candidates they desire to appear on the ballot, while allowing others the opportunity of candidacy through signature collection. Permitting all registered voters to vote and including independent candidates on the ballot encourages increased voter turnout. A similar concept, Louisiana's nonpartisan election system, demonstrates enhanced voter interest and turnout.

In addition to the above-mentioned benefits, is the precedent for federal legality of this format option. Justice Antonin Scalia discusses the nonpartisan primary in the United States Supreme Court decision *California Democratic Party, et al v. Jones, Secretary of State of California, et al* as a practical and legal way to avoid impinging on First Amendment rights. Scalia states,

“Finally, we may observe that even if all these state interests were compelling ones, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a *nonpartisan* blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot--which may include nomination by established parties and voter-petition requirements for independent candidates. Each voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State

prescribes) then move on to the general election. This system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness"--all without severely burdening a political party's First Amendment right of association."³⁶

An alternative primary approach must withstand all charges of political party favoritism. Therefore, the implementation must guard against providing any unfair advantages to one party over another. This primary option does much to level the playing field for not only between parties but also between parties and independents by presenting all candidates on the ballot without party affiliation.

There are challenges to the nonpartisan primary format option. A proposition is necessary to address the changes to the California Constitution required by a change in primary election systems. Thus, voters are the most crucial agents to consider in any alteration of the voting system. Any revisions made to the California primary system, must achieve majority approval from the voters of California. While their history with Proposition 198 is encouraging, support from voters for any proposition is never completely predictable.

In addition, this format goes against tradition as only one state, Louisiana, employs a similar system. Even Louisiana's practice is different since they do not hold primaries for their federal offices. Further challenges are the increased responsibility of parties to determine their candidates via conventions, caucuses or other means, and an increased need for voter education due to the new, unfamiliar format.

What Timing Approach Best Serves California?

Two approaches to primary elections, the nonpartisan and the instant runoff systems, appear viable to improve California's primary elections. It is important to consider options available to the timing of the electoral process to develop clearer course of action. What dimensions of timing are available and which one best serves the interest of improving the election process? Same day, 15-day prior and 30-day prior are all possible affiliation periods for determining when a DTS voter may register to vote in a primary election.

³⁶ California Democratic Party, et al. v. Jones, Secretary of State of California, et al., Opinion of the Court Delivered by Justice Scalia.

Same Day Affiliation

The same day affiliation option allows all other registered voters to change party affiliation on the day of the election. It is possible incorporate all voters into this system or to limit this option to DTS voters, while forcing registered party members to vote in the primary of the party with which they are already registered. This approach allows the most freedom for the voter. A distinct disadvantage is the limited knowledge to parties of whom and how many voters will be participating in their primary. This lack of knowledge limits the party's ability to freely associate among its members and would create several legal complications. An additional drawback to this timing option is the cost to the State for over printing of ballots.

15 Days Prior To Election

This system allows voters 15 days prior to the primary to alter the ballot on which they wish to vote. The voter informs the State which ballot they choose, and the State is to, in turn, inform the Parties of the voters choice. A distinct advantage of this timing option is that it grants parties time to realize who will vote in their primary and allow time to influence and educate the voter. However, this timing option is administratively impossible, due to the lack of time granted to the State for printing to ballots, and the influx of information into an already beleaguered Secretary of State office to disseminate the information to the correct party.

30 Days Prior To Election

Under the 30 Days Prior Election timing option, DTS voters are to inform the State 30 days prior to the primary election which ballot they wish to vote on. The State then informs the parties of the voters choosing to vote in their primary. The major advantage to this timing option is that it is administratively possible, giving enough time to the Secretary of State to inform the parties and print the estimated amount of ballots. This timing option also grants enough time to the parties to inform and educate the voters on the candidates representing their party. A disadvantage to this timing option is that restricts the voters' freedom of choice.

Since this timing option grants the most amount of time to the parties and the Secretary of State it is the preferred timing option to match with the Modified Open Primary system. This timing option still allows the voter to take part in the primary election while also granting the political parties the information needed to inform the voter about the parties' candidate. These two options coupled would constitute a compromise between the political parties and Proposition 198.

The nonpartisan primary system has no timing issues regarding the DTS voter since all registered voters may vote under this system. However, Format Option C, the Modified Open primary system, can include any of the three timing options.

Table 3.1
Modified Open Primary Systems: Date of Ballot Acquisition from Election Day

Modified Open Primary System (Days when ballot is picked)		
Advantages		Disadvantages
Same Day	Allows voters most freedom A true Modified-Open Primary	Does not give Parties enough time to know who will vote in primary Costs of over printed ballots
15 Day	Gives Parties time to inform voters	Administratively impossible Restricts voters
*30 Day	Administratively possible Give Parties enough time to inform voters on candidates	Restricts voters the most

The Nonpartisan Primary Serves Californians the Best

In the Supreme Court decision *California Democratic Party, et al v. Jones, Secretary of State of California, et al*, Justice Scalia offered the nonpartisan primary system as a viable alternative to the system proposed in Proposition 198. The nonpartisan primary allows parties the opportunity to select candidates of their choice for the ballot, while allowing all registered voters regardless of party affiliation the opportunity to vote in primary elections. Thus, the nonpartisan primary presents a system securely legal under the federal Constitution while offering Californians the option to vote freely in primaries.

The implementation of a nonpartisan primary system in California requires a slight modification to the provisions of Article II, Section 8 of the California Constitution. One procedure available to alter the Constitution is the introduction of a proposition through the collection of signatures to gain entry on the ballot, the method used by proponents of Proposition 198. Given the sweeping success of Proposition 198, and the similarity of the intention of the nonpartisan primary to that created by Proposition 198, there is little question about the popular support available for a proposition introducing the nonpartisan primary to California.

The nonpartisan primary has a number of distinct advantages. One benefit of nonpartisan primaries is the increase of voter turnout due to the inclusion of all registered voters.

Although this new style may require a modest amount of voter education, the voters of California demonstrated their capacity for such an adjustment through their turnout and comfort with the blanket primary style that followed the enactment of Proposition 198. A nonpartisan system is also advantageous to political parties because they maintain direct control over whom they chose to appear on the primary ballot. This added party control outweighs any possible drawback that the parties would face from the additional internal responsibilities of deciding how they choose their candidates, such as the creation of a convention or the like to select candidates.

The State of Louisiana, the only state with nonpartisan federal elections, offers ample evidence of the success available through the nonpartisan primary system. However, any implementation of the nonpartisan primary system in California would differ from the Louisiana system. Louisiana does not utilize a primary system at all for its elections of federal offices. Instead, the State allows voters to select their federal officers from a list of candidates that appear without party affiliation on the ballot on the date of the general election. If any candidate secures a majority of the vote, that individual automatically wins the election. If no candidate secures a majority of votes, however, the two topmost vote earners, regardless of party, advance to a run-off election. The winner of the run-off election, which takes place in early December, then becomes the senator or representative. The nonpartisan primary system would eliminate the need for a run-off election by effectively transforming the general election into a run-off. The two to three top vote getters in the nonpartisan primary, depending on statutory phrasing, would advance to the general election.

As any option to rectify the faults intrinsic in the California modified closed primary system, the nonpartisan primary is fallible. In cases of overwhelming party advantage, it is possible that both advancing candidates will represent the same party. In California 44.4 percent of voters registered as Democrats, compared to the 35.2 percent-registered Republican.³⁷ This difference represents over 1.5 million voters. Therefore, critics of the nonpartisan primary contend that in the case of unpopular Republican candidates, low Republican turnout, and an appealing set of Democratic candidates, it is possible that Democrats comprise both general election candidates.

The occurrence of two candidates from the same party is exceptionally unlikely due to the strong primary turnout of Republican voters in the primary election. In the 2002 primaries, only 73,000 more registered Democrats turned out than Republican voters.³⁸ Thus, in order for both general election candidates to come from the same party affiliation, there must be exceptionally low Republican turnout combined with two or

³⁷ www.ss.ca.gov/elections/votereg1.html. 1 February 2003.

³⁸ *Ibid.*

more Republican candidates that attain a very similar number of votes as well as high Democratic turnout and two very competitive Democratic candidates. In the unlikely event that both candidates for the general election are members of the same party, then the argument exists that it is the fruition of the will of the voters.

If the success of the nonpartisan election system in Louisiana proves any indication, the addition of a more straightforward and viable nonpartisan primary method to the California election system would result in greater voter interest and turnout, as well as more exciting elections. In short, the nonpartisan primary system offers the solution to California's problems of effective disenfranchisement of DTS and minority party voters without the thorny First Amendment issues raised by Proposition 198.

4. How Do We Make A Nonpartisan Primary Happen in California?

Making a nonpartisan primary happen in California is no small task. The supporters of the nonpartisan primary must address several issues and concerns associated with developing and passing an initiative of this magnitude. These factors include: choosing the correct means by which to alter the State Constitution, properly structuring the language of the proposed amendment, raising the funds necessary to ensure a strong campaign, building the network necessary to generate voter support, operating a viable and successful campaign that produces victory, educating voters concerning this new method of primary elections, and preparing for possible legal challenges to the proposition. If the advocates of electoral reform in California successfully tackle these issues, a nonpartisan primary in California is possible.

Appropriate Form of Revision

The legal construction of a nonpartisan-type primary system in California requires alterations to the California Constitution. Since executive orders and legislative statutes are powerless to alter the Constitution, it is necessary to employ a legislative constitutional amendment or, preferably, a ballot proposition. The partisan nature and the penchant against change common in the State Legislature makes the successful passage of a nonpartisan primary through the means of a legislative constitutional amendment unlikely. The considerable success of Proposition 198 demonstrates the strong likelihood of the passage of a similar citizen initiative intended create a more open primary system. Therefore, from this point forward, the implementation strategy must focus on the creation and ratification of a proposition

Structuring the Language of the Proposed Amendment

To create a nonpartisan primary system in California, it is necessary to alter a section of the California Constitution known as the "Election Codes." The Election Codes set forth a rigid system of compulsory party affiliation in order to vote for partisan offices in the primary election. Since the nonpartisan primary eliminates the denotation of party affiliation on the ballot and lists all candidates on one ballot, it is necessary to replace all language in the Election Codes referring to the necessity of party affiliation to vote in the

primary and the requirement of printing different ballots and sample ballots for the voters associate with each party.

The principal task of the language of the proposed amendment, as illustrated in Appendix D, is to develop one ballot for all voters within common counties and districts. The proposed amendment contains no evidence of part affiliation on the ballot and allows voters to choose any one candidate from the list of randomly ordered eligible candidates for all state and federal offices. Further alterations made by the proposed proposition to the current Elections Code includes the elimination of demarcation between partisan and nonpartisan offices on the ballot, the mailing of the same sample ballot to all registered voters in identical counties and districts, regardless of party affiliation, and the exemption of presidential primaries from laws governing offices utilizing the nonpartisan primary system.

Raising the Funds

Of course, any citizen-driven initiative needs substantial funds in order to take the idea from the drawing board to the ballot. Money is required to secure the signatures necessary to get the proposition on the ballot. Once on the ballot, funds are necessary to operate a campaign that successfully generates voter interest and knowledge about the proposition that ultimately translates into votes and an election day victory. Fortunately, the financial supporters of Proposition 198 are very likely to back any proposition creating a nonpartisan primary system, since such a system ultimately creates a very similar outcome to Proposition 198.

A dozen people donated over \$10,000 and hundreds of Californians donated smaller amounts to support Proposition 198. It is possible to attain the names and addresses of the contributors to Proposition 198 through the California Secretary of State's Political Reform division. It is important that the advocates of the nonpartisan primary meet with the people who gave large donations to the fight for Proposition 198 to secure similar donations for the nonpartisan primary proposition. Smaller contributors to Proposition 198 should receive mailers outlining the benefits of the nonpartisan primary and asking for their financial support. Through this process, it is plausible that a campaign to support the nonpartisan primary could benefit from the same comfortable financial base enjoyed by the supporters of Proposition 198.

Building the Network

In order to build a network for the purpose of implementing a nonpartisan primary in California, it will be helpful to turn to the supporters of Proposition 198 who were successful in securing the passage of the Proposition. First, it is crucial to enlist the aid of the moderate politicians that stand to benefit from a nonpartisan primary, as well as politicians and contenders who disagree with aspects of their party's platform. From these public voices will come much of the front-line media presence for the nonpartisan primary system. Additionally, the private citizens who donate to the proposition have a stake in seeing the nonpartisan primary develop to fruition. These Californians are vital in the success of the proposition in their own communities. If these citizens can expose their support for the nonpartisan primary at civil meetings, community functions, and with phone calls, letters to the editor, and newspaper op-eds, the nonpartisan primary can win voter support one community at a time.

Finally, it is important to consider every voter that supported Proposition 198 as a crucial piece of the network. If each of these voters will vote in favor of the proposition for the nonpartisan primary, it will almost surely pass. It is therefore crucial to perform intensive research on California's voter rolls contained within each county to determine who voted for Proposition 198. From there, it is important to generate interest in these citizens by encouraging them to sign the petition to ensure that the initiative reaches the ballot. Doing so will generate a feeling of direct involvement with the cause and increase the likelihood of election day support. Further, it is valuable to use direct mailing on these people to remind them of the importance of their support, and ultimately, of their vote to secure a fairer and more representative primary in California.

Winning the Election

The fundraising successes of the supporters of Proposition 198, and the virtually nonexistent campaign by opponents of the Proposition demonstrate the likelihood of a decisive media advantage held by supporters of a nonpartisan primary proposition. It is crucial that the message put forth concerning the nonpartisan primary remain clear and concise, demonstrating the advantages of the system to voters who can, upon passage of the proposition, vote in the primary election even if they are unaffiliated, and can vote for the candidate of their choice, regardless of party affiliation. Reminding voters of the history of Proposition 198, in which a citizen-led proposition passed by a substantial margin just to be overturned by actions the self-interested parties bent on imposing their will on California elections at the expense of the will of the people, is useful to inspire support for the proposition. In short, given similar popular and financial support shown Proposition 198, the nonpartisan primary should enjoy similar success.

Voter Education

Much of the success of this new primary system will rely on educating voters about the nonpartisan primary. Voters will need to be informed about why this type of primary will best serve their interests, the efforts involved to implement such a system, and, most importantly, how this primary system functions. A number of methods are available to educate voters, such as using the informative tools of the newspaper and the mailing of printed materials.

Following the ratification of the nonpartisan primary, Californians that register to vote will receive a pamphlet explaining the details of the nonpartisan primary system. Additionally, the sample ballots mailed to registered voters within the state before the primary election will include a section outlining the new options available to voters under the updated system. Poll workers, employees at the Secretary of State of California, and county election officials must receive training in the workings of the nonpartisan primary and offer assistance to voters with needs or questions about the system. Effective voter education must occur to ensure that California voters understand this new system and feel compelled to turnout on election day.

Surviving Legal Challenges

While court challenges to a nonpartisan primary are less likely than they were following the ratification of Proposition 198, since the influence of parties in selecting candidates actually increases under the nonpartisan primary, they are still possible. Parties can again make the claim that the nonpartisan primary restricts the right of association granted under the first amendment. However, since under the nonpartisan primary system the voters are not choosing the nominee of a political party, there is no legal basis on which to claim that the system unconstitutionally burdens the political parties' First Amendment rights of free association. This claim is evidenced in the Opinion of the Court penned by Justice Scalia following *California Democratic Party v. Jones*. The seven Justices agreeing in the majority opinion, through supporting the Opinion of the Court, agreed that there is no Constitutional concern with a nonpartisan primary system. Thus, any possible court challenges against the nonpartisan primary system appear unfounded and unlikely to gain support.

Concluding Remarks

In a representative democracy, nothing is as crucial as an effective and expressive electoral system. Californians demonstrated through the ballot that they believe that the primary election system in California is neither effective nor expressive. After their voices were silenced and their will overturned, Californians responded by demonstrating once again their displeasure with the voting system, this time by refusing to vote, and in record numbers no less. California's government and citizens must address the failures of the closed primary and implement a system that represents the will of the people and offers the effective and expressive electoral system vital to the United States.

The closed primary system has disenfranchised California voters for decades. Unrepresentative parties, unappealing candidates, unpopular elected officials, dejected voters, and dwindling voter turnout plague the state. The nonpartisan primary system offers Californians a legal, cost-efficient, and uncomplicated method by which to address these problems.

Through a simple proposition, Californians can enjoy a system of voting that allows voters the option to cast a ballot for any candidates, regardless of party, without the constitutional predicaments faced by other types of open primary structures. Under the nonpartisan primary system, parties would generate greater control over candidate choice without limiting the choices of voters. The millions of unaffiliated voters would gain power and political validity in the state without silencing the voices of the party faithful. Minority party voters could regain political influence in choosing the person to represent them in Washington, D.C. or Sacramento.

Most importantly, a nonpartisan primary system allows the ratification of the will of the voters of California. No longer would parties and courts deny the 60 percent of Californians that desire the right to vote for the candidate of their choice that privilege. No longer would the system provide a disincentive for voters to vote by limited options or downright exclusion from the system. The nonpartisan primary system offers Californians the opportunity to have, at long last, the effective and expressive electoral system vital to a good government.

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Appendix A. Proposition 198: Text of Proposed Law

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution. This initiative measure amends and adds sections to the Elections Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

SECTION 1. This act shall be known and may be cited as the "Open Primary Act."

SEC. 2. Section 2001 is added to the Elections Code, to read:

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

SEC. 3. Section 2151 of the Elections Code is amended to read:

2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index. The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, ~~but no person shall be entitled to vote the ballot of any political party~~ ***and that all properly registered voters may vote for their choice*** at any primary election ~~unless he or she has stated the name of the party with which he or she intends to affiliate~~ ***for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance***. The voter registration card shall include a listing of all qualified political parties.

~~No~~

Notwithstanding any provision to the contrary, no person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party for any elective political party central or district committee member other than the party designated in his or her registration, except as provided by Section 2152.

SEC. 4. Section 13102 of the Elections Code is amended to read:

13102. (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, ~~but one form of ballot for all~~

candidates for public office, ~~except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot listing all candidates for public office,~~ in accordance with subdivision (b). (b) At ~~partisan~~ *such* primary elections, each voter ~~not registered as intending to affiliate with any one of the political parties participating in the election shall be furnished only a nonpartisan~~ *an official primary* ballot. The ~~nonpartisan~~ *official primary* ballot shall contain ~~only~~ the names of all candidates for nonpartisan *and partisan* offices and measures to be voted for at the primary election. ~~Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.~~

SEC. 5. Section 13203 of the Elections Code is amended to read:

13203. Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of a ~~partisan~~ *an official* primary election, shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or the words "NONPARTISAN-"~~ *OFFICIAL PRIMARY* BALLOT" as applicable. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district, the name of the county in which the ballot is to be voted, and the date of the election. SEC. 6. Section 13206 of the Elections Code is amended to read:

13206. (a) On the ~~partisan~~ ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box one-half inch high enclosed by a heavy-ruled line the same as the borderline. This box shall be as long as there are columns for the ~~partisan~~ ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldfaced gothic capital type the words "Partisan Offices."

(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Nonpartisan Offices."

(c) This section shall not apply to ballots for elective political party central or district committee members prepared in accordance with Section 13300.

SEC. 7. Section 13230 of the Elections Code is amended to read:

13230. (a) If the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a ~~nonpartisan~~ ballot *for nonpartisan offices and measures* shall be given to each ~~partisan~~ voter, together with his or her ~~partisan~~ *official primary* ballot, ~~and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the~~

heading itself, shall be omitted from the partisan ballots.

(b) ~~If the~~ **Notwithstanding Section 13300, the** county elections official ~~so provides,~~ **shall provide that** the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots numbers higher than those assigned to the ballots ~~containing partisan offices~~ **for nonpartisan offices and measures** . SEC. 8.

Section 13300 of the Elections Code is amended to read:

13300. (a) By at least 29 days before the primary **election** , each county elections official shall prepare ~~separate~~ **identical** sample ballots for each ~~political party and a separate sample nonpartisan ballot, placing voter,~~ **provided however, that in the case of ballots involving elective political party central or district committee members, each county elections official shall prepare separate ballots for the sole use of persons registered with that party, as provided for in Section 2151. On the official identical primary ballots, each county elections official shall place** thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names **and party affiliations** of all candidates **organized randomly as provided in Section 13112 and not grouped by political party,** for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ~~ballot~~ **ballots** shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) ~~One~~ **Except as provided in Section 13230, one** sample **official primary** ballot ~~of the party to which the voter belongs, as evidenced by his or her registration,~~ shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election. ~~A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election.~~

SEC. 9. Section 13301 of the Elections Code is amended to read:

13301. (a) At the time the county elections official prepares sample ballots for ~~each political party~~ at the presidential primary, he or she shall also prepare a list **with the name** of candidates for delegates for each political party. The names of the candidates for delegates of any political party shall be arranged upon the list of candidates for delegates of that party in parallel columns under their preference for President. The order of groups on the list shall be alphabetically according to the names of the persons they prefer appear upon the ballot. Each column shall be headed in boldface 10-point, gothic type as follows: "The following delegates are pledged to _____ ." (The blank being filled in with the name of that candidate for presidential nominee for whom the members of the group have expressed a preference.) The names of the candidates for delegates shall be

printed in eight-point, roman capital type.

(b) Copies of the list of candidates for delegates of each party shall be submitted by the county elections official to the chairman of the county central committee of that party, and the county elections official shall post a copy of each list in a conspicuous place in his or her office.

SEC. 10. Section 13302 of the Elections Code is amended to read:

13302. The county elections official shall forthwith submit the sample *official primary* ballot ~~of each political party~~ to the chairperson of the county central committee of ~~that~~ *each political* party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of ~~each~~ *the* sample ballot in a conspicuous place in his or her office.

SEC. 11. (a) No provision of this act may be changed except by a vote of the people.

(b) The Legislature shall amend or delete other provisions of law not encompassed by this act which conflict with the provisions herein in order to bring them into conformity with this act.

SEC. 12. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Appendix B. The Financing in Support of and in Opposition to Proposition 198

The following table from the California Secretary of State's office provides detail of the campaign funding in support and opposition of Proposition 198.³⁹

Contributions Received in Opposition to Proposition 198

Californians Against 198 ID# 960413- Contributions Received	
Under \$10,000	\$ 0
\$10,000 or more	98,847
Itemized contributions of \$10,000 or more	
California Republican Party	\$ 48,847
Murdoch, Rupert	50,000
TOTAL CONTRIBUTIONS RECEIVED	\$ 98,847
TOTAL EXPENDITURES AND ACCRUED EXPENSES	\$ 50,225
In-Kind contributions/payments	0
TOTAL COSTS	\$ 50,225

³⁹ www.ss.ca.gov/prd/bmc96/finprop198.htm. 1 February 2003.

Contributions Received in Support of Proposition 198

Californians for an Open Primary/Yes on Proposition 198 ID# 940774 – Contributions Received	
Under \$10,000	\$ 152,574
\$10,000 or more	824,979
Itemized contributions of \$10,000 or more	
Allgauer, Harry	\$ 26,000
Campbell for State Senate, ID# 930919	97,787
Ford, Susan B.	25,000
Ford, Thomas W.	35,000
Harding, Susan Riegel	12,866
Hewlett Packard	45,000
Hewlett, William R.	75,000
Lane, Melvin B.	20,000
Morgan for Senate, Becky	146,326
Packard, David	302,000
Robertson, Sanford R.	10,000
Walton, John	30,000
TOTAL CONTRIBUTIONS RECEIVED	\$ 977,553
TOTAL EXPENDITURES AND ACCRUED EXPENSES	\$ 879,201
In-Kind contributions/payments	76,448
TOTAL COSTS	\$ 955,649

Appendix C. Primary Election Systems by State

Primary Format	States With Specified Format
Closed Primary	Connecticut Delaware Kentucky Maine Nebraska Nevada New Jersey New Mexico New York Oklahoma Pennsylvania South Dakota Wyoming
Modified Closed Primary	Arizona California Colorado Florida Iowa Kansas Maryland Massachusetts New Hampshire Oregon Rhode Island Utah West Virginia

Primary Format	States With Specified Format
Modified Open Primary	Alabama Alaska Arkansas Georgia Illinois Indiana Mississippi North Carolina Ohio South Carolina Tennessee Texas Virginia
Open Primary	Hawaii Idaho Michigan Minnesota Missouri Montana North Dakota Vermont Wisconsin
Blanket Primary	Washington
Nonpartisan Primary	Louisiana

Appendix D. Text of Proposed Recommendation

Text of Proposed Recommendation

SEC. 3. Section 2151 of the Elections Code is amended to read:

2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate ~~at the ensuing primary election~~. The name of that political party shall be stated in the affidavit of registration and the index. The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, ~~but no person shall be entitled to vote the ballot of any political party at any primary election unless he or she has stated the name of the party with which he or she intends to affiliate~~. The voter registration card shall include a listing of all qualified political parties.

No person shall be permitted to vote the ballot of any party or for any delegates to the convention of any party other than the party designated in his or her registration, except as provided by Section 2152.

SEC. 4. Section 13102 of the Elections Code is amended to read:

13102. (a) All voting shall be by ballot. There shall be provided, at each polling place, at each election at which public officers are to be voted for, but one form of ballot for all candidates for public office, ~~except that, for partisan primary elections, one form of ballot shall be provided for each qualified political party as well as one form of nonpartisan ballot listing all candidates for public office~~, in accordance with subdivision (b). (b) At ~~partisan~~ *such* primary elections, each voter ~~not registered as intending to affiliate with any one of the political parties participating in the election~~ shall be furnished ~~only a nonpartisan~~ *an official primary* ballot. The ~~nonpartisan~~ *official primary* ballot shall contain ~~only~~ the names of all candidates for ~~nonpartisan~~ *all* offices and measures to be voted for at the primary election. ~~Each voter registered as intending to affiliate with a political party participating in the election shall be furnished only a ballot of the political party with which he or she is registered and the nonpartisan ballot, both of which shall be printed together as one ballot in the form prescribed by Section 13207.~~

SEC. 5. Section 13203 of the Elections Code is amended to read:

13203. Across the top of the ballot shall be printed in heavy-faced gothic capital type not smaller than 30-point, the words "OFFICIAL BALLOT." However, if the ballot is no wider than a single column, the words "OFFICIAL BALLOT" may be as small as 24-point. Beneath this heading, in the case of a ~~partisan~~ *an official* primary election, shall be printed in 18-point boldfaced gothic capital type ~~the official party designation or the~~ words "~~NONPARTISAN~~ **OFFICIAL PRIMARY** BALLOT" as applicable. Beneath the heading line or lines, there shall be printed, in boldface type as large as the width of the ballot makes possible, the number of the congressional, Senate, and Assembly district, the name of the county in which the ballot is to be voted, and the date of the election.

SEC. 6. Section 13206 of the Elections Code is amended to read:

13206. ~~(a) On the partisan ballot used in a direct primary election, immediately below the instructions to voters, there shall be a box one-half inch high enclosed by a heavy ruled line the same as the borderline. This box shall be as long as there are columns for the partisan ballot and shall be set directly above these columns. Within the box shall be printed in 24-point boldfaced gothic capital type the words "Partisan Offices."~~

~~(b) The same style of box described in subdivision (a) shall also appear over the columns of the nonpartisan part of the ballot and within the box in the same style and point size of type shall be printed "Nonpartisan Offices."~~

(a) No official primary ballot shall print any party names nor indicate the party affiliation of any candidate.

(b) Presidential primary elections are exempt from rules provided in Section 13206 (a).

SEC. 7. 13230 of the Election Code is amended to read:

13230. ~~(a) If the county elections official determines that, due to the number of candidates and measures that must be printed on the ballot, the ballot will be larger than may be conveniently handled, the county elections official may provide that a nonpartisan ballot shall be given to each partisan voter, together with his or her partisan ballot, and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots.~~

~~(b) If the county elections official so provides, the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters. The county elections official may, in this case, order the second ballot to be printed on paper of a different tint, and assign to those ballots~~

numbers higher than those assigned to the ballots containing ~~partisan~~ **city, county, and other local offices and measures.**

SEC. 8. Section 13300 of the Election Code is amended to read:

13230. (a) By at least 29 days before the primary **election**, each county elections official shall prepare ~~separate~~ sample ballots for each political party and a separate sample ~~nonpartisan~~ ballot, placing thereon in each case in the order provided in Chapter 2 (commencing with Section 13100), and under the appropriate title of each office, the names of all candidates for whom nomination papers have been duly filed with him or her or have been certified to him or her by the Secretary of State to be voted for in his or her county at the primary election.

(b) The sample ballot shall be identical to the official ballots, except as otherwise provided by law. The sample ballots shall be printed on paper of a different texture from the paper to be used for the official ballot.

(c) One sample ballot ~~of the party to which the voter belongs, as evidenced by his or her registration,~~ shall be mailed to each voter entitled to vote at the primary not more than 40 nor less than 10 days before the election. ~~A nonpartisan sample ballot shall be so mailed to each voter who is not registered as intending to affiliate with any of the parties participating in the primary election.~~

13301. (a) At the time the county elections official prepares sample ballots for each political party at the presidential primary, he or she shall also prepare a list of candidates for delegates for each political party. The names of the candidates for delegates of any political party shall be arranged upon the list of candidates for delegates of that party in parallel columns under their preference for President. The order of groups on the list shall be alphabetically according to the names of the persons they prefer appear upon the ballot. Each column shall be headed in boldface 10-point, gothic type as follows: "The following delegates are pledged to _____ ." (The blank being filled in with the name of that candidate for presidential nominee for whom the members of the group have expressed a preference.) The names of the candidates for delegates shall be printed in eight-point, roman capital type.

(b) Copies of the list of candidates for delegates of each party shall be submitted by the county elections official to the chairman of the county central committee of that party,

and the county elections official shall post a copy of each list in a conspicuous place in his or her office.

SEC. 10. Section 13302 of the Elections Code is amended to read:

13302. The county elections official shall forthwith submit the sample *official primary* ballot ~~of each political party~~ to the chairperson of the county central committee of ~~that~~ *each political* party, and shall mail a copy to each candidate for whom nomination papers have been filed in his or her office or whose name has been certified to him or her by the Secretary of State, to the post office address as given in the nomination paper or certification. The county elections official shall post a copy of ~~each~~ *the* sample ballot in a conspicuous place in his or her office.

SEC. 11. (a) No provision of this act may be changed except by a vote of the people.

(b) The Legislature shall amend or delete other provisions of law not encompassed by this act which conflict with the provisions herein in order to bring them into conformity with this act.

SEC. 12. If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Appendix E. Glossary

Primary Systems

Blanket Primary. Allows all registered voters, regardless of party affiliation, to vote for any candidate for each office. Ballots list each candidate, regardless of party affiliation, on the same ballot. The voter may “jump,” or vote for candidates from different parties, within the ballot. The voter may not vote for more than one candidate for each office. All candidates are listed by office and not in any party order.

Closed Primary. Restricts voters to vote only in the primary of the party with whom they are affiliated. Unaffiliated voters are not allowed to vote in primary elections of any party.

Modified Closed Primary. Allows each party to choose to allow or disallow non-affiliated voters to vote in that party’s primary election. Voters must request a party specific ballot at the poll or when requesting an absentee ballot.

Modified Open Primary. Allows all registered voters to vote, regardless of party affiliation. The voter must ask for the party specific ballot at the poll or when requesting an absentee ballot. Voters are allowed to vote only on the ballot of one party.

Nonpartisan Primary. Allows voters to choose one candidate from a group of candidates that appear on the ballot without party affiliation. A set number of candidates, as prescribed by the state constitution, receiving the greatest number of votes advance as candidates in the general election. Candidates become eligible for the ballot through either party selection or the collection of a certain number of signatures. Candidates may campaign under party affiliations if state law permits. This method of primary selection is not applicable to Presidential primaries.

Open Primary. Allows all registered voters to vote, regardless of party affiliation, for only candidates of the party of the voters’ choice. All candidates are listed by party affiliation and office and are on the same ballot. Voters are not allowed to cross party lines when voting.

Decline to State. Voters who choose not to affiliate with a party at time of registration. These voters “decline to state” a party affiliation in states in offering the opportunity to choose party affiliation. In California, these decline to state or “DTS” voters may not vote for partisan offices in primary elections.

Lawmaking Processes

Constitutional Initiative. Permits alteration to the Constitution of the State of California proposed by citizens. In order to qualify a constitutional initiative for the ballot, the signatures of registered California voters equaling 8 percent of the most recent gubernatorial vote is required. The support of a simple majority of voters is necessary to enact an initiative.

Executive Order. Legally binding orders given by the governor, acting as the head of the executive branch of the State of California to state administrative agencies. Governors generally use executive orders to direct state agencies and officials in their execution of laws or policies established by the California Legislature. Executive orders do not require Legislative approval, but have the same legal weight as laws passed by the Legislature. An executive order cannot alter the California Constitution.

Legislative Constitutional Amendment. Permits alteration to the Constitution of the State of California proposed by the legislature. In order to reach the ballot, a two-thirds vote of each house of the California Legislature is required. The support of a simple majority of voters is necessary to enact a legislative constitutional amendment (LCA).

Proposition. Includes ballot measures allowing voters to vote on statutes, amendments to the state constitution, or general obligation bonds. There are five types of propositions. This article refers to two types of propositions specifically aimed at altering the state constitution: legislative constitutional amendments and constitutional initiatives.