

Partisan Top-Two Elections

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9 July 2017

In Oregon, after a quarter century of advocacy for “free” elections, we’ve reached a “dead-end”.

In Oregon, over the last 25 years, tremendous progress has been made toward the goal of free elections. In 1992, Independent voters weren’t even recognized as a legitimate political group - they are now. As the ranks of Independent voters grew, the need for election reform became obvious - you can’t disenfranchise 1/3 of all registered voters. In response, partisans waged a fierce propaganda campaign designed to convince voters that simply opening the closed partisan primaries to Independent voters was enough. The campaign ultimately failed, but it took two decades to run out of steam. An “Open” closed partisan primary amounts to nothing more than “implicit” voter registration. (By requesting a major party ballot, a voter may join a major party temporarily - without changing their registration.)

It now appears that a Top-Two election system is inevitable for Oregon. There is no longer any discussion of opening the closed primaries, no-one attempts to defend state funded partisan primaries as fair or constitutionally valid, and increasing voter frustration with both major parties is un-abated. Still, it’s painfully obvious that the Top-Two election reform movement has stalled completely. Oregon voters have emphatically rejected not one, but two, Nonpartisan Top-Two initiatives in recent years.

If you’re a mouse trying to navigate a maze and you reach a “dead-end”, backtracking and moving laterally is necessary - continuing to push forward is futile. This is probably a good analogy for election reform in Oregon. To that end, this paper attempts to review where we want to go, where we’ve been, where we are, and how we can temporarily move laterally (or backward) to ultimately progress forward and succeed.

What is a "Free" election?

The goal of election reform is "free" elections - but what exactly does that mean? Over the years, the propaganda war in Oregon has slowly converged on this one question. Nationwide, it's becoming obvious that activists everywhere need to adopt a single definition of this word - if we want to help each other.

A "free" election guarantees that all voters and candidates have an unfettered and equal opportunity to participate.

It's not enough to guarantee free elections to voters only. Candidates must also have an equal opportunity to participate. In the former Soviet Union, elections were conducted on a regular basis, but only communist candidates could run for office. That's not a free election system - that's a sham.

An “unfettered” opportunity to participate means artificial barriers may not be used to dissuade voting or candidacy. For example, an election scheme that denies Independent voters and candidates the opportunity to participate in a state financed primary stage is not a free election.

A Nonpartisan Top-Two election is a "Free" election.

In a "Nonpartisan" Top-Two election system, all voters and candidates participate equally in the primary - regardless of party affiliation or non-affiliation, and only the top two candidates advance to the general election. All voters participate equally in the general election, and the candidate with the most votes is elected. A Nonpartisan Top-Two election is a free election - so why do we still conduct partisan elections nearly everywhere except Washington State and California? In Oregon, partisan primaries still exist because voters have rejected Nonpartisan Top-Two initiatives twice in recent years - by huge margins. This occurred even though polls consistently show Oregon voters support "free" elections - by large margins.

Measure 65 (2008) Changes General Election Nomination Processes for Major/Minor Party, Independent Candidates for Most Partisan Offices

Yes 553,640

No 1,070,580 (Source: 2016 Oregon Blue Book)

Measure 90 (2014) Changes general election nomination processes: provides for single primary election ballot listing candidates; top two advance

Yes 459,629

No 987,050 (Source: 2016 Oregon Blue Book)

If an initiative fails to pass by a 2:1 margin, something about the initiative is very, very wrong. Simply placing the initiative back on the ballot with a different sponsor and marketing campaign won't change anything. Either a massive number of Oregon voters lie to pollsters on a regular basis - or - opponents of election reform uncovered one more fatal flaws in the initiative during the first campaign. Most voters in Oregon are indeed truthful - they really do support free elections. Nonpartisan Top-Two elections must be fatally flawed.

"Fairness" is just as important as "Freeness"

The Nonpartisan Top-Two primary has been nicknamed a "Jungle" primary and this clearly resonates with many Oregon voters. In an "open" election, two or more candidates with similar views will typically "split" a single block of voter support. Thus, a candidate may fail to advance from the primary to the general election or, may fail to win the general election, simply because there is a similar candidate on the ballot. This is a very real concern for the major parties because both Republicans and Democrats typically field more than one candidate per office. (There were 13 Republicans on the ballot in the 2016 Florida Presidential Preference Primary.)

A "fair" election guarantees:

a.) the top candidates advance from the primary to the general election and;

b.) the top candidate is elected to the office.

A Nonpartisan Top-Two Election is a free election - but it's not a fair election. Voters in Oregon have reasonably concluded that fair elections are just as important - if not more important than - free elections. At a minimum, any proposed new election system cannot inherently disadvantage the top candidates – Republicans and Democrats. There are ways to mitigate the "vote splitting" problem such as "Ranked Choice" and "Approval" ballots, but vote splitting is not the real "Achilles Heel" of Nonpartisan Top-Two election systems.

Oregon voters will not support abolishing the Bipartisan System.

In the large urban areas of Oregon, the number of registered Democrats far outweigh the number of registered Republicans. At the same time, Republicans hold a decided edge in all the rural areas. Consequently, in most electoral districts, two candidates from the same major party will likely advance to the general election if the primary election is nonpartisan. Not surprisingly, major party voters “hate” the idea of nonpartisan elections. Under the existing Bipartisan Primary system, each major party is guaranteed a spot on the general election ballot - even if their candidate has no chance of winning.

What is surprising - is that many Independent voters also “hate” the idea of choosing between two candidates from the same party in the general election. Many voters in Oregon believe the purpose of the primary is to select the best “candidates” to represent the liberal and conservative approaches to governance. The purpose of the General election is then, to provide voters a vigorous debate between the two sides, and a reasonable opportunity to choose between the disparate approaches. It does not matter who represents the two sides of the debate (Republican, Democrat, Third Party or Independent), only that both viewpoints are represented.

Many voters in Oregon register as “Independent” simply because they choose not participate in the initial candidate selection process. Individual candidates don’t really matter – only the ratio of Liberals to Conservatives in our state and federal governments. These Independent voters are not partisans, nonetheless, they will not accept any new election system that does not provide them with an obvious choice between a liberal and a conservative on the General election ballot - even if they strongly support free elections. This is the fatal flaw in Nonpartisan Top-Two Elections. Most voters do support free elections and election reform but - will not support abolishing the Bipartisan system.

Partisan Top-Two Elections = Closed Bipartisan Primaries + Nonpartisan Top-Two

A Partisan Top-Two election is a cross between existing Closed Bipartisan elections and a Nonpartisan Top-Two system. The idea is to “modify” rather than “abolish” the existing closed partisan primaries in such a way that Independent and third party voters are allowed full participation in all stages of the election - without abolishing the Bipartisan system or creating a system unfair to major political parties and their candidates. A solution of this form should be much more palatable to major party and Independent voters alike. Arguably, without the support of moderate major party voters and all Independent voters - election reform in Oregon will fail.

Shown at the top of the next page are mock ballots for the 2016 presidential primary in Oregon. These are representations of the actual ballots received by Oregon voters in May of 2016. By law, Oregon still conducts Closed Partisan primaries and, as shown, there were three different ballots used – a Republican ballot showing only the Republican Candidates, a Democratic ballot showing only the Democratic candidates and a Nonpartisan ballot, sent to all Third-party and Independent voters - which showed no candidates at all. In Oregon, Independent and Third-Party candidates are legally barred from participating in the primary. (Note: Oregon had 3 major parties in 2016 but the third major party had no presidential candidate.)

Shown below the existing Closed Partisan ballots are mock ballots for the same 2016 presidential primary – if it had been conducted as a Partisan Top-Two. As before, there are still three different ballots – Republican, Democratic and Nonpartisan. However, unlike existing ballots – the name of every candidate appears on every ballot. (Including Third Party and Independent) All candidates and voters are guaranteed the opportunity to participate fully in the primary stage of the election.

Democratic Ballot	
(Vote for One)	
Hillary Clinton	<input type="checkbox"/>
Bernie Sanders	<input type="checkbox"/>
Write-In	<input type="checkbox"/>

Nonpartisan Ballot	
(Vote for One)	
	<input type="checkbox"/>

Republican Ballot	
(Vote for One)	
Ted Cruz	<input type="checkbox"/>
John R Kasich	<input type="checkbox"/>
Donald J Trump	<input type="checkbox"/>
Write-In	<input type="checkbox"/>

Democratic Ballot	
(Vote for One)	
Hillary Clinton (D)	<input type="checkbox"/>
Bernie Sanders (D)	<input type="checkbox"/>
Ted Cruz (R)	<input type="checkbox"/>
John R Kasich (R)	<input type="checkbox"/>
Gary Johnson (L)	<input type="checkbox"/>
Jill Stein (PG)	<input type="checkbox"/>
Donald J Trump (R)	<input type="checkbox"/>
Write-In	<input type="checkbox"/>

Nonpartisan Ballot	
(Vote for One)	
Gary Johnson (L)	<input type="checkbox"/>
Jill Stein (PG)	<input type="checkbox"/>
Hillary Clinton (D)	<input type="checkbox"/>
Ted Cruz (R)	<input type="checkbox"/>
John R Kasich (R)	<input type="checkbox"/>
Bernie Sanders (D)	<input type="checkbox"/>
Donald J Trump (R)	<input type="checkbox"/>
Write-In	<input type="checkbox"/>

Republican Ballot	
(Vote for One)	
Ted Cruz (R)	<input type="checkbox"/>
John R Kasich (R)	<input type="checkbox"/>
Donald J Trump (R)	<input type="checkbox"/>
Hillary Clinton (D)	<input type="checkbox"/>
Gary Johnson (L)	<input type="checkbox"/>
Bernie Sanders (D)	<input type="checkbox"/>
Jill Stein (PG)	<input type="checkbox"/>
Write-In	<input type="checkbox"/>

A two-stage vote tally insures Republicans and Democrats are not artificially disadvantaged.

Note that in 2016, there were 3 Republicans, but only 2 Democrats running for president in Oregon. If the ballots shown above were tallied directly, both Democratic candidates could conceivably advance to the general election. Not because they were the top two, but simply because the progressive vote was split between only 3 candidates (Clinton, Sanders, Stein) while the conservative vote was split 4 ways (Cruz, Kasich, Trump, Johnson). The situation is far worse when an incumbent runs unopposed on a major party ballot.

To avoid the inevitable vote split for major party candidates, the vote tally in a Partisan Top-Two primary is conducted in two stages. The major party ballots are tallied first, with the top major party candidate from each ballot winning all his/her party votes (winner-take-all). In effect, by registering as a member of a major party and requesting a major party ballot, a voter explicitly agrees to support the top major party candidate of his/her party in the final primary vote tally.

Note that the major party ballots have the names of the associated major party candidates grouped together at the top with the names of other candidates listed separately below. Each major party voter can “opt-out” of a major party primary, on a race by race basis, by simply voting for a non-party candidate from the lower half of the ballot. There are no artificial barriers that would prohibit any voter from voting for any candidate.

The results of the partisan tallies are then added to the remaining ballots. Note that if a major party voter opts-out of a particular race by voting for a non-party candidate, that vote is not counted in the partisan tally, but is nonetheless included in the final tally with other nonpartisan votes. This is a free election. Each voter may cast a single vote, and that one vote counts the same as any other vote in determining the top two candidates.

Legal issues: Is a Partisan Top Two election constitutionally valid – Free vs. Fair.

The Oregon constitution explicitly mandates “free” elections

"Article II, Section 1. Elections free. All elections shall be free and equal.—"

The Oregon Supreme Court has interpreted the word “equal” but has chosen to ignore the word “free”:

"In Ladd v. Holmes, 40 Or 167, 66 P 714 (1901), this court interpreted the word "equal" in Article II, section 1, from the perspective of voters. An equal election was held to be an election in which "[e]very elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege." Id., 40 Or at 178." LPO v. Roberts, 305 Or 238 (1988)

This interpretation is, of course, grossly inadequate. Saddam Hussein was elected president of Iraq with nearly 100% of the vote in an election conducted just weeks before the start of the Iraq war with the United States. Arguably, the vote of every elector counted equally in the outcome of the election, and under the current interpretation of Article II, Section 1, Oregon courts would have ruled this election constitutionally valid. Nonetheless, this was not a “free” election. No other candidates were allowed run against Saddam and voting against Saddam was likely punishable by death.

A significant reinterpretation of the Oregon Constitution needs to take place at some point in the future to establish the meaning of the word “free”. Nonetheless, this reinterpretation - whatever it turns out to be, will not include a mandate for “fair” elections. Neither the Oregon or U.S. Constitutions mandate fair elections. As a practical matter, they can't. It's possible to conduct “free and equal” elections, and it is reasonable and necessary that our constitutions mandate that we do so. However, it may never be possible to guarantee that the candidate with the most support will always win. How do we determine who has the most support? The answer is never absolute. It always depends on who else is running.

In theory, there's only one way to guarantee the top candidate wins every election. An election is conducted to determine the least popular candidate. This candidate is then eliminated. Another election is then held to determine the next least popular candidate. This candidate is then eliminated. And so on..., until only one candidate remains. This process is outrageously expensive and time consuming. It just isn't possible.

Both the Oregon and U.S. Supreme courts have declared that the state legislatures may use their power to regulate elections in any way they see fit – provided, the state has a “compelling interest”. It may not be possible to guarantee “fair” elections in an absolute sense. Nonetheless, the courts will always support election schemes that attempt to promote elections that are as fair as possible. The two-stage vote tally in a Partisan Top Two election is designed specifically to insure major party candidates are not artificially disadvantaged. This is constitutionally valid because the state has a compelling interest to mitigate the vote-splitting problem and insure that the primary is fair to major party candidates. At the same time, the “free and equal” constitutional provision is not violated. All candidates and voters participate equally in the primary and no candidates or voter is artificially disadvantaged by the two-stage vote tally.

Finally, in contrast to a Closed Bipartisan primary, a Partisan Top-Two election does not violate the right to “Freedom of Association” mandated by the U.S. Constitution. Unlike Oregon's existing election scheme, there is no penalty for not joining a political party. The name of every candidate appears on every ballot and each voter may cast a single vote regardless of party affiliation or non-affiliation.

Conclusion: Perpetuating Closed Partisan primaries provides a path forward to free elections.

Over the last two decades, tremendous progress has been made in the effort to reform Oregon elections and guarantee every voter and candidate an equal opportunity to participate. Nonetheless, election reform in Oregon has stalled completely. This is due almost entirely to the insistence of reform advocates that the current Closed Bipartisan primary system be abandoned entirely and replaced with a Nonpartisan Top-Two primary. Oregon voters have rejected the Nonpartisan Top-Two primary twice in recent years by huge margins. It now appears that Oregon voters may never support a nonpartisan primary election - it has at least two fatal flaws:

1. A Nonpartisan primary immediately puts Democrats and Republicans at an extreme disadvantage simply because the major political parties typically field more than one candidate per office. These candidates will necessarily “split” a single block of voter support and thus fail to advance to the general election.
2. A strong majority of Oregon voters expect and demand that both the Liberal and Conservative political viewpoints be represented by candidates in the general election (Big vs. Small government). Most voters don’t care who represents these viewpoints (Major Party, Minor Party or Independent) - but both viewpoints must be represented. Unfortunately, a nonpartisan primary all but guarantees that this will not be the case in most electoral districts. Voters will not support abolishing the “Bipartisan” system.

A Partisan Top-Two primary does not abolish the existing Closed Bipartisan primary. Instead, a Nonpartisan Top-Two election is incorporated into the existing Closed Bipartisan primary using a two-stage vote tally. This new hybrid election is arguably “free”. At the same time, it is much more “fair” than the existing Closed Bipartisan primary:

1. All voters and candidates participate equally in the primary. (Major/Minor Party and Independent)
2. This is a “free” election. The name of every candidate appears on every ballot and there are no artificial barriers that would dissuade any voter from voting for any candidate.
3. This is a “fair” election. A two-stage vote tally insures that major party candidates are not disadvantaged simply because Democrats and Republicans typically field more than one candidate per office.
4. This election insures that both the liberal and conservative political viewpoints are represented in the general election for a robust debate. By design, two candidates from the same political party cannot advance to the general election.
5. This election insures a “fair” overall election process by eliminating vote splitting in the general election. Only two candidates will advance to the general election – one conservative and one liberal. A minor party candidate cannot inadvertently sabotage a major party candidate with a similar political viewpoint (George Bush and Ross Perot 1992, Al Gore and Ralph Nader 2000, Hillary Clinton and Bev Stein 2016).

**A "free" election guarantees that all voters and candidates have:
an unfettered and equal opportunity to participate at all stages of an election.**

**A "fair" election guarantees:
a.) the top candidates advance from the primary to the general election and;
b.) the top candidate is elected to the office.**