Voice for Democracy

Newsletter of **Californians for Electoral Reform** February 2015

California Court of Appeals Upholds Top-Two in a Deeply Flawed Decision

by Richard Winger

On January 29, the California Court of Appeals ruled in *Rubin v Bowen* [which challenged the Top-Two primary system] that keeping minor party candidates off the November ballot is a "slight burden" and that this is true as a matter of law, so the plaintiffs are not entitled to a trial to dispute this finding. On February 12 a request for rehearing was filed, but the Court has not agreed to rehear the case. If the Court takes no action by February 27, the petition for rehearing is deemed denied.

The opinion describes the individual plaintiffs as "party members and candidates" but doesn't say that they are also voters, and it does not discuss the rights of voters. The U.S. Constitution gives more rights to voters than to candidates. In November 2010 – the last time California voters could vote for minor party candidates for statewide office in the general election – 5,952,466 voters voted for minor party candidates:

In November 2014, the number of votes cast for minor party candidates for statewide office in California was ***zero***, because the current election system does not permit voters to vote for anyone who didn't place first or second in the June primary. California was the only state in November 2014 in which voters were not able to vote for anyone but Democrats and Republicans for all the statewide offices.

Paradoxically, between October 2010 and October 2014 registration in California minor parties increased by 17.34%. The percentage of voters registered in parties other than Democratic or Republican is 5.29%, whereas four years earlier it was 4.65%. The registration data suggests that if Californians had been permitted to vote for minor party candidates in November 2014, the vote totals would have been higher than in 2010.

Decision is Based on Errors

The decision is based on three points, all of which are faulty because the Court made errors in support of each of its points.

U.S. Supreme Court Has Not Decided the Issue

The California Appeals Court said the U.S. Supreme Court has already upheld the constitutionality of top- two systems in a 2000 decision by Justice Antonin Scalia, *California Democratic Party v Jones*, 530 US 567. That decision struck down California's blanket primary. Scalia said the state would be free to "resort to a *nonpartisan* blanket primary." However, it is obvious that what he imagined was a system with no party labels on the ballot.

This is clear because in 2008, when the U.S. Supreme Court ruled in *Washington State Grange v Washington State Republican Party*, 552 US 442, that Washington state's top-two system doesn't violate freedom of association on its face, Scalia dissented and said having a party label on the ballot next to the name of a candidate not favored by that particular party violates that party's freedom of association.

Another indication that the U.S. Supreme Court has not already decided the issue is that the 2008 Washington decision says in footnote 11 that the Court was not deciding whether top-two violates voting rights. The California Court of Appeals decision does not mention footnote 11.

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Top-Two (cont.)

November is not a "Runoff" Because Federal Law Forbids It

The State Appeals Court believed that California's June primary is the "election" and November is just a "runoff." The very first sentence of the decision says, "Three small political parties and several party members and candidates sought to invalidate California's electoral system for statewide and legislative offices, contending the system, which consists of an open nonpartisan election followed by a runoff between the top-two candidates, deprives them of equal protection and associational and voting rights."

Page 16 of the decision says, "A hypothetical illustrates the point. Plaintiffs' constitutional objection would appear to be mooted if California simply eliminated the general election and awarded elective office to the winner of the primary election." Page 14 says, "Both elections [meaning the June primary and the November election] are 'general elections.'"

The Court obviously did not know that federal law, since 1872, makes this hypothetical idea illegal, as applied to congressional elections. In 1997 the U.S. Supreme Court unanimously invalidated Louisiana's election law, which provided for a congressional election in September and a run-off in November if no one got 50% in September. Foster v Love, 522 US 67. The decision says states must hold congressional elections in all districts in November, and if the state wants a runoff, it must be afterwards. The only states with general election runoffs are Louisiana and Georgia.

Independents Could Vote in Primaries Before Top-Two

Whole paragraphs of the decision are dependent on the judges' erroneous belief that independent voters were excluded from voting in major party congressional and state office primaries before the top-two system went into effect.

The decision says that the top-two system is justified, if only because it makes it possible for independent voters to vote in congressional and partisan state office. The court didn't know that independent voters were permitted to vote in all Republican, Democratic, and American Independent primaries between 2001 and 2010.

The Court also says, "the primary purpose of the top-two system is to permit independent voters to participate in the process of narrowing candidates for the general election." Therefore, the most essential part of the decision, the state interest in the top-two system, is based on a misunderstanding. The decision says, "So long as the primary system served to select party nominees, the state was precluded by the Supreme Court's decision in *Jones* from granting independent voters the right to participate." This sentence is mistaken.

The U.S. Supreme Court *Jones* decision is based on the principle that parties have a right to exclude members of other parties from voting in their primaries. There is no reported decision that says parties have a constitutional right to exclude independent voters from their primaries.

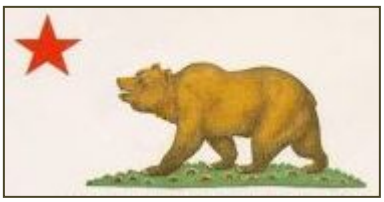
Neither the Republican nor Democratic parties have ever filed a lawsuit to prevent independent voters from voting in primaries. Major parties have filed lawsuits to close their primaries, but these cases were all based on a party's objection to letting members of *other parties* into their primaries. The evidence in these cases all concerns members of other parties, not independents. Even at that, only one of the lawsuits has won so far.

At least five states require parties to let independent voters vote in primaries, and none of these laws has been challenged by either major party. In the majority of states, independent voters can vote in either major party primary for Congress and partisan state office.

What a Trial Would Show, if a Trial were Permitted

The Appeals Court said top-two is not discriminatory. But the U. S. Supreme Court has said that whether a system is discriminatory depends on evidence, and that "sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike" (*Jenness v Fortson*). A trial would show that most voters don't look at independent or minor party candidates until the primary is over. Minor par- ties and independent candidates don't win partisan elections very often, but when they do, they usually get little attention until the primary is over. §

Richard Winger is a CfER Board member and publisher of Ballot Access News (www.ballot-access.org). This article is reprinted by permission with edits from the March 1, 2015 issue of Ballot Access News.



Analysis of Turnout

The Institute of Governmental Studies at UC Berkeley held a conference on Jan. 30-31 titled, "California Votes: A Postmortem on the 2014 Election" (https://igs.berkeley.edu/events/california-votes-2014). Included amid all the information were two interesting analyses of voter turnout. Here is a brief summary of those findings.

Mark DiCamillo, Director, The Field Poll

- Overall turnout (of eligible adults) was lower in CA than in the U.S.: US Turnout: 35.9% CA turnout: 30.9%
- Contrary to national trends, Democrats swept all seven of California's statewide partisan elections, similar to the 2010 elections, and have won all 14 of the statewide partisan races over the past four years.
- Despite low turnout, CA Democrats outnumbered Republicans at the polls; not true nationally. CA independents were much more likely to have supported Democrats than independents nationally. CA white non-Hispanics were less likely than U.S. whites to have supported Republican candidates.

Paul Mitchell, Vice President, Political Data Inc.

The trend of older, white voters is continuing to be the largest voting bloc. High and low turnout elections (i.e. presidential and non-presidential) generally follow the same patterns. However, 2014, with its record low turnout, showed an even greater drop-off of younger voters:

Primary Election

- 2002, 2006, 2010 turnout – 50% of turnout was age 62 (3-election average) or higher
- 2014 – 50% of turnout was age 68 or higher

General Election

- 2002, 2006, 2010 turnout – 50% of turnout was age 40 (3-election average) or higher
- 2014 – 50% of turnout was age 55 or higher

Overall, independent and ethnic voting groups consistently have lower turnout than registration, while whites and major party registrants have higher turnout than registration. §

Congratulations

Congratulations to CfER member Chris Jerdonek for being unanimously elected President of the San Francisco Elections Commission by his fellow commissioners.

Still in his first year of his first five-year term on the commission, Chris has taken a thoughtful, collaborative, and active role on the commission in making improvements to San Francisco elections, including of course, improving support for ranked choice voting.

President's Letter

There are two things that I want to discuss this issue: the obituaries on page 4, and pending legislation. But first I want to apologize for the lateness of the newsletter. On the other hand, its delay enables me to discuss pending legislation.

The obituaries are a new feature for us, and one I hope we don't have to do too often. Irving Krauss, in addition to being Wilma Rule's husband, was very active with the Alpine County Democratic Party and the California Democratic Party, and I would see him at CDP meetings. He graduated from UC Berkeley with a degree in sociology in 1950, and became a professor at Northern Illinois University, De Kalb. He wrote The Insiders' Journey: Pursuing the American Dream, about his career and his life with Wilma. After Wilma died and we created the Wilma Rule Memorial Award in her memory, I would send him yearly updates as to who had won the award. He was very appreciative of that.

Steve Sosnick was a member of our Board for the 2013-2014 term. Prior to that, he was very active in the November 2006 Measure L campaign in Davis. That was an advisory vote to indicate whether Davis should switch to Choice Voting (a fully proportional system) to elect its City Council. It passed 55% to 45%. Since Davis is a general law city, they would have had to become a charter city to implement it (at least that was the thought at the time). A charter was drafted and placed on the ballot in November 2008. However, instead of a narrow charter that just changed the electoral system to Choice Voting, a charter that gave broad powers to the City Council was placed on the ballot, and it lost, 46% to 54%. I don't know

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President's Letter (cont.)

what role Steve played in drafting that charter, but he, like the rest of us, was disappointed in its loss.

I didn't know Eugene Eidenberg, but after reading his obituary, I wish I had. I would have sought his counsel as to how to grow CfER and best accomplish our goals. If there are others of you out there with experience similar to Eugene Eidenberg's, please contact me. I could use your help.

And now for pending legislation. At our Board meeting March 7th, we decided to take a position of "Oppose unless amended" on AB 278 by Assemblymember Roger Hernández (D-AD48). This bill would require all cities with a population of 100,000 or more to use district elections, meaning that Santa Clarita, a city in Los Angeles County with a population of 176,320, would not be able to implement cumulative voting as agreed to in their settlement of Soliz et al. v. Santa Clarita, a lawsuit brought under the California Voting Rights Act. We will be communicating our opposition to him, and ask that he amend it so as to allow large cities to use proportional and semi-proportional systems.

AD48 includes the entirety of the cities of Baldwin Park, Glendora, Covina, Azusa, Duarte, Irwindale, and Bradbury, and portions of West Covina, El Monte, Monrovia, and Industry. If you live in Assemblymember Hernández's district, please let him know that you want him to amend AB 278 to allow large cities to use proportional and semi-proportional systems so settlements such as Santa Clarita's can take effect.§

– Steve Chessin, President

Obituaries

Friends and members of CfER send us notices of the passing of people who have been associated with us in various ways over the years. Here is a listing of three such people.

Our condolences go out to the family, friends and colleagues of the deceased, and to the electoral reform community that has lost some friends.

Eugene Eidenberg, December 3, 2013.

Eugene (Gene) held distinguished careers in academia, politics and business. He died of disease at age 74. Gene is survived by his wife, Anna Chavez; brother, David Eidenberg; and daughters, Danielle Eidenberg-Noppe and Elizabeth Cazenave; and their extended families.

Gene earned a B.A. in Political Science from University of Wisconsin and a Ph.D. in Political Science from Northwestern University. He taught political science at the University of Minnesota, then went into university administration. In 1977, Gene joined President Jimmy Carter's administration where he served in Cabinet and White House Staff positions. In the 1980's, Gene held executive positions in the high tech industry. Gene was also a staunch advocate of civil rights and self-determination through democratic voting. He served many years on the board and as treasurer of the National Democratic Institute for International Affairs. He participated in election observations and civil rights and democracy education programs around the world.

Stephen Sosnick, August 17, 2014

Stephen (Steve) H. Sosnick, Professor Emeritus of Agricultural Economics at UC Davis, died of disease at age 84. Steve is survived by his wife of 63 years, Galya "Gale" Sosnick; daughters Beryl and Elika; sons Randall and Tobin; and five grandchildren.

Steve earned an undergraduate degree and a Ph.D. in economics from UC Berkeley. He taught at Princeton, then took a position as an economics professor in the Department of Agricultural at UC Davis where he remained for 34 years. It's reported that he rode a bicycle to work every day.

Steve studied such issues as commodity auctions, agricultural cooperatives and the marketing of dairy products and fruit. In his later years, after retiring from full-time employment, Steve engaged in community activities including electoral reform, humanitarian causes, and founding a local chapter of the ACLU. Steve also served on the Board of CfER and advocated for proportional representation voting systems.

Irving Krauss, January 6, 2015

Irving was the husband of the late Wilma Rule. Wilma was an early supporter of CfER, which honored her contributions by naming after her the annual award given to a person or organization who exemplifies promotion of proportional representation voting systems, the "Wilma Rule Award." §

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About CfER . . .

Californians for Electoral Reform (CfER) is a statewide citizens' group promoting election reforms that ensure that our government fairly represents the voters. We are a nonpartisan, nonprofit organization with members from across the political spectrum. Since our founding in May of 1993, our numbers have grown from about two dozen to hundreds of members participating in local chapters across California.

OUR ELECTORAL SYSTEM IS IMPORTANT

The method by which we vote has dramatic consequences, and nearly one third of the state's electorate consistently goes without a representative that speaks for them in Sacramento. The choice of electoral system can determine whether there will be "spoilers" or vote-splitting effects, majority sweeps of representation on city councils, or pervasive negative campaigning. The choice of electoral system determines whether minority perspectives or racial and ethnic minority groups receive fair representation or get shut out of the process entirely.

CfER IS THE LEADING ADVOCACY GROUP FOR THESE REFORMS IN CALIFORNIA

CfER works for legislation that would allow cities and counties to adopt voting methods that allow people to rank their preferences when they vote. CfER also works with activists in its local chapters to enact fair election methods in cities and counties across the state.

For more information visit www.cfer.org/aboutus

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