Analysis of HB3166 The Open Primary Act

Submitted by Dr. Robert Close (rclose@alloregonvotes.org)

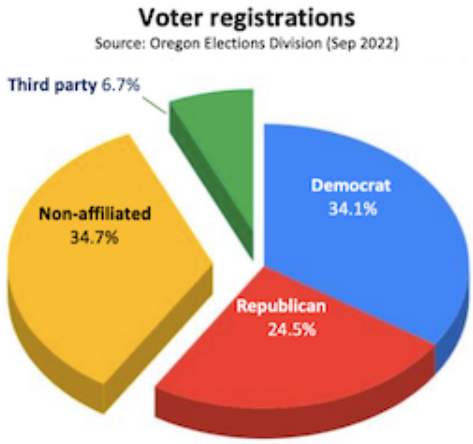
Introduction

HB3166, The Open Primary Act, is a positive step toward making Oregon's elections "free and equal" as promised in the state constitution. It would enfranchise more than one-third of the population in the primary elections than are often more competitive than subsequent general elections. However, the original bill and proposed amendments each contain elements that have been soundly rejected by voters. Ranked-choice voting (Measure 117) was rejected by voters in the Fall 2024 election, and ballot initiatives proposing Top-2 primaries were voted down in 2008 and 2014. A better alternative to these options is described below.

Background

Article II, Section 2 of the Constitution of Oregon requires that: *"Every citizen of the United States is entitled to vote in all elections not otherwise provided for by this Constitution"*, subject only to age, residency, and voter registration requirements.

Oregon's primary elections have been violating this constitutional principle of equal treatment for over a century. As with other forms of segregation, it is not possible to have "separate but equal" treatment of voters segregated by political party affiliation. Currently the state of Oregon and its two major political parties deny more than a million citizens the right to vote in taxpayer-funded primary elections, punishing these voters for declining to affiliate with a party and thereby violating their right to freedom of association. Victims of this discrimination include clergy, judges, journalists, and veterans whose professional ethic requires nonpartisanship.

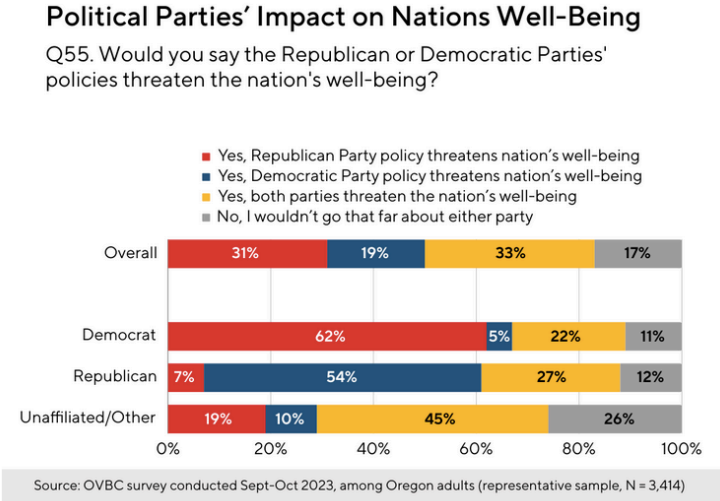


In his farewell address, George Washington warned of the dangers of political party polarization:

"The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries, which result, gradually incline the minds of men to seek security and repose in the absolute power of an individual; and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty."

Washington's prophetic warning has now been fulfilled on the national level with the election of a president who scorns democratic elections, condones violence as a means to retain power, and has publicly demanded *"the termination of all rules, regulations, and articles, even those found in the Constitution."* But instead of building a coalition to strengthen democracy, Oregon politicians continue to exercise extreme partisanship, thereby degrading state and country. Oregon's closed primary system discriminates against non-affiliated voters, suppresses independent-minded candidates with cross-party appeal, and restricts general election voters to a choice of candidates who have been vetted only by a small minority of citizens.

The result has been political dysfunction and voter dissatisfaction. The weaker party has repeatedly staged walkouts to deny a quorum in the state legislature, and 13 counties have voted to secede from the state. A 2023 survey by the Oregon Values and Beliefs Center (OVBC) found that 83% of Oregonians believe that one or both major political party's policies "threaten the nation's well-being". Sizeable minorities, 27% of Democrats and 34% of Republicans, reported that their own party's policies threaten the nation's well-being.



HB 3166: Introduced Version (Top-5 Primary)

As introduced, HB3166 would enfranchise over a million non-affiliated voters in primary elections for state government offices, allowing all voters to participate on an equal basis regardless of political affiliation. This would give general election voters a choice between the five most viable candidates rather than between candidates nominated by small partisan minorities. Voters would rank (or score) these candidates, but the 2024 voter rejection of ranked-choice voting proposed in Measure 117 makes this feature of the bill politically unappealing.

HB 3166: Proposed Amendments (Top-2 Primary)

Proposed amendments (readable version here) would change the inclusive primary elections to a Top-2 format as proposed in ballot initiatives that were twice rejected by Oregon voters. Minor parties need not participate in the primary election, so they would be guaranteed to have candidates on the general election ballot, but major parties would not. This reverse discrimination is untenable. Only two candidates on a general election ballot would have been vetted by a large fraction of voters. By maintaining plurality voting (vote for one) in general elections, candidates would still often be elected without majority support.

An Alternative Proposal (Top-3 Primary)

Top-2 open primaries and ranked-choice voting have both been rejected in the past by Oregon voters. A Top-3 primary would give general election voters a broader choice of viable candidates than Top-2, and there is a simple way to elect the optimal candidate without requiring ranking (or scoring). If three nominees are advanced from the primary election, then the general election could be a simple round-robin contest as shown below:

Sample Ballot for 3-way Instant Round Robin

The winning candidate is the one who has, or comes closest to having, majority support over each opponent. One candidate will almost always win the election by having majority support over the other two. Otherwise, the winner is the candidate who would need the fewest additional votes to win both of their pairwise runoffs. This choice minimizes the number of voters who prefer one of the losing candidates, which should be the goal of any election.

By combining Top-3 inclusive primaries with instant round robins in the general election, all Oregonians would enjoy equal primary voting rights, candidates from any party or no party would receive equal treatment by the state, the general election would feature only viable candidates vetted by all eligible voters, ballots would have the familiar “vote for one” format for each pairwise matchup, and the winning candidate would always be the one most preferred by voters. Oregon’s elections would truly be “free and equal” as promised in the state constitution.