

REQUIRING MAJORITY WINNERS FOR CONGRESSIONAL  
ELECTIONS:  
HARNESSING FEDERALISM TO COMBAT EXTREMISM

by  
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*Congress should enact a law requiring a candidate for a seat in Congress to receive a majority of votes in order to win the election. Congress should let states determine what particular procedure to use to determine whether a candidate wins a majority, as there are significantly different methods of identifying a majority winner. While this simple piece of legislation might seem inconsequential—many Americans assume, erroneously, that elections already require majority winners—it in fact would cause states to undertake a form of experimentation in the details of electoral system design that would have the effect of counteracting the threat that anti-democracy extremism currently poses in America.*

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## INTRODUCTION

One of the oldest and most basic features of federalism is its capacity to facilitate experimentation with different methods of implementing self-government. Each sovereign state within the federal union can function, in Justice Louis Brandeis’s famous words, as a “laboratory” of democracy, testing different ways of pursuing the public interest so that all states get the benefit of lessons learned.<sup>1</sup> On no issue is the need for this kind of experimentation more urgent right now than the procedures democratic elections use to ascertain the collective preference of the electorate.

It is the ability of an election to identify what the voters collectively want that entitles the elected officeholders to claim the fundamental democratic status of deriving their “just powers from the consent of the governed.”<sup>2</sup> But, as much as the government in the United States of America wishes to claim this fundamental democratic status for itself, there is elementary confusion about what attributes of an election would entitle it to make this claim. It is commonly said that what makes an election democratic is that it captures the will of the majority, and thus is a form of majority rule, and yet most states do not require candidates to win a majority of votes to be elected.<sup>3</sup> They only need to win a plurality, or more than any other

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<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>2</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>3</sup> For an important new book on the historical development of majority rule, see WILLIAM J. BULMAN, *THE RISE OF MAJORITY RULE IN EARLY MODERN BRITAIN AND ITS EMPIRE* (2021). In 1834, late in his life, James Madison—the founder most associated with the political philosophy animating America’s government—described in a lengthy letter his commitment to the principle of majority rule. Recognizing that the choice inevitably was “between a republican Govern. in which the majority rule the minority, and a Govt. in which a lesser number or the least number rule the majority,” Madison made clear his emphatic preference for the former over the latter:

The result of the whole is, that we must refer to the monitory reflection that no government of human device and human administration can be perfect; that that which is the least imperfect is therefore the best government; that the abuses of all other governments have led to the preference of republican government as the best of all governments, because the least imperfect; that the vital principle of republican government is the *lex majoris partis*, the will of the majority . . . .

James Madison, Letter on Majority Government (1834), <https://www.loc.gov/resource/mjm>.

candidate, which in a race involving three or more candidates, might cause the candidate with the most votes to have less than 50%.<sup>4</sup>

This misunderstanding over the difference between majority and plurality wins, and the confusion over how best to conduct an electoral process in which there are more than two candidates—as there almost always will be, unless and until the field gets winnowed to two finalists—is especially problematic at this moment in American history. The deep cleavage that has emerged between the Trumpian and traditional wings of the Republican Party is creating an acute challenge for the capacity of existing electoral procedures to accurately ascertain the majority preference of all the state’s voters given choices that include not just one Republican candidate and one Democrat—but instead extend to sharply different types of Republicans. This problem would be worrisome enough if it meant only that elections were mistakenly producing winners that did not accord with what the majority of voters wanted. But it is even more alarming when the winners that the majority does not want are extremists who lack a commitment to democracy itself.<sup>5</sup> Yet this alarming situation is exactly where America finds itself today in the aftermath of the January 6 insurrection at the Capitol and, even more disturbingly, in the denialism about what happened that day and why, which has since gained traction on the right.<sup>6</sup>

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24\_0683\_0687/?st=gallery. The great political theorist Robert Dahl quoted and discussed this passage to make the point that Madison was much more enamored of majority rule at the end of his life than at the time he wrote the *Federalist Papers* in support of the newly drafted Constitution. ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 36–37 (2d ed. 2003). One can also note that while constitutional provisions may appropriately constrain the operation of majority rule, either through their structural system of checks and balances or a judicially enforceable bill of rights, the offices of government elected by the people under the Constitution should be elected in accordance with the principle of majority rule and thus by a majority of voters.

<sup>4</sup> On the history of majority and plurality voting, see EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE (2020); see also Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773 (2021).

<sup>5</sup> Of all the presidential candidates on the ballot in November 2016, Trump likely was the “Condorcet loser,” meaning that he would have lost a two-person race against every other candidate on the ballot. See FOLEY, *supra* note 4, at 130; Richard F. Pothoff & Michael C. Munger, *Condorcet Loser in 2016: Apparently Trump; Condorcet Winner: Not Clinton?*, 49 AM. POL. RSCH. 618, 619 (2021).

<sup>6</sup> See David Brooks, Opinion, *The G.O.P. Is Getting Even Worse*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/04/22/opinion/trump-gop.html>. For the Trumpian base, “the Jan. 6 insurrection was not a shocking descent into lawlessness but practice for the war ahead.” *Id.* Liz Cheney, since her ouster from GOP leadership in the House, has been especially vocal about the ongoing threat that Trump and his “Big Lie” presents. On this, see especially David Axelrod’s interview with Liz Cheney. David Axelrod, *The Axe Files: Ep. 447 – Rep. Liz Cheney*, CNN AUDIO (June 7, 2021), <https://www.cnn.com/audio/podcasts/axe-files?episodeguid=86782b30-e750-470e-8781-ad3f01771e12>; see also Catie Edmondson, *Cheney Embraces Her Downfall, Warning G.O.P. of Trump in a Fiery Speech*, N.Y. TIMES (Oct. 21, 2021),

The best way to counteract this predicament is to reform election procedures so that an election's results accurately represent the preferences of a majority of voters. But, because it remains unclear exactly what election procedures would most optimally achieve this democratic objective, experimentation among the states as laboratories of democracy is essential. As shall become clear in Part II below, there are multiple methods of producing majority winners, all of which are far preferable to permitting plurality winners, but none is so obviously the single correct choice for all states that it alone should be the nationally uniform method.

This need for experimentation among the states does not mean that there is no role for Congress to play. On the contrary, Congress can—and should—jumpstart this experimentation among different methods of producing majority winners by requiring all states to eliminate plurality-winner elections for congressional seats. Congress, in other words, should require candidates for the Senate and the House of Representatives to receive a majority of votes in order to win a Senate or House election. This simple law, which Congress undoubtedly has the constitutional authority to enact, would do more than anything else—especially in the short run—to reduce the risks that anti-democratic extremists gain power without actually being the candidates preferred by a majority of voters.<sup>7</sup>

Given the stakes, enacting this simple congressional statute should be the nation's highest and most immediate election reform priority. Below are the additional details to bolster this basic point.

## I. THE ACUTE AND IMMEDIATE PROBLEM IN AMERICAN DEMOCRACY

Roy Blunt. Richard Burr. Rob Portman. Richard Shelby. Pat Toomey.

These are the five traditionally conservative Republican U.S. Senators who have decided not to run for reelection in 2022.<sup>8</sup> While each undoubtedly had his own personal reasons as part of the decision to call it quits, the obvious common feature is that all five are not associated with the populist Trumpian wing of the Republican Party. Each faced the threat of a Trump-recruited candidate in the Republican primary election.<sup>9</sup> While each might have survived that Trumpian primary

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<https://www.nytimes.com/2021/05/11/us/politics/liz-cheney.html>.

<sup>7</sup> An earlier opinion column sketched the basics of this statutory proposal. Edward B. Foley, Opinion, *Why Congress Should Require Its Members to Be Elected by a Majority of Votes*, WASH. POST (Mar. 5, 2021, 8:00 AM), <https://www.washingtonpost.com/opinions/2021/03/05/why-congress-should-require-its-members-be-elected-by-majority-votes/>.

<sup>8</sup> Andrew Desiderio, *Sen. Roy Blunt Won't Run for Reelection in Latest Blow to GOP*, POLITICO, <https://www.politico.com/news/2021/03/08/gop-sen-roy-blunt-will-not-run-for-reelection-474342> (Mar. 8, 2021, 1:52 P.M.).

<sup>9</sup> Jack Brewster, *'They Will Get Primaried': Trump, His Allies, Threaten Republicans Who Won't Object to Electoral College*, FORBES (Jan. 6, 2021, 12:53 PM), <https://www.forbes.com/sites/>

challenge, it would have required shifting one's own campaign positions further to the right, and the cost of currying favor with the newly Trumpian base of the GOP was ultimately not worth it for these incumbents.<sup>10</sup>

To be clear, this threat of a primary challenge did not mean that the incumbent had lost popularity overall in his state. Rob Portman, for example, remained a broadly popular and respected incumbent in Ohio, well-suited to the right-of-center (but not too far-right) position of the state's median voter in a general election.<sup>11</sup> Roy Blunt, likewise, still retained considerable appeal with the general election voters of Missouri, another right-of-center "red" state, but not as deeply red as some others (like Mississippi).<sup>12</sup> But popularity with a state's general election voters does not guarantee popularity with a party's primary voters, and that is the problem.

The structure of the electoral system that predominates in the United States—a partisan primary followed by a "first past the post" general election, which permits a plurality winner even without a majority—deprives the state's voters of the candidate they most prefer.<sup>13</sup> Using Rob Portman again as an example, in the November general election he would easily beat any Democratic opponent. The general election voters as a whole also would clearly prefer him to any Trumpian challenger to his right; this point is easy to see once one realizes that most Democrats in the general election would prefer Portman to a more extreme Republican, and he would also have the support of those remaining traditional conservatives who see him as their candidate.<sup>14</sup>

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jackbrewster/2021/01/06/they-will-get-primaried-trump-allies-threaten-republicans-who-wont-object-to-electoral-college/.

<sup>10</sup> A recent demonstration of Trump's strength in Republican primaries came in a special election for Ohio's fifteenth congressional district, which previously had been represented by GOP moderate, Steve Stivers. The Trump-endorsed candidate, Mike Carey, finished 20 points ahead of anyone else, including a candidate backed by Steve Stivers (and another endorsed by Senator Rand Paul). See Marissa Martinez, *Trump-Backed Carey Wins GOP Nod in Ohio Special Election*, POLITICO (Aug. 3, 2021, 9:08 PM), <https://www.politico.com/news/2021/08/03/trump-backed-carey-wins-gop-nod-in-ohio-special-election-502351>.

<sup>11</sup> See Carl Hulse & Jonathan Martin, *Portman to Retire in Ohio, Expanding 2022 Battle for Senate*, N.Y. TIMES, <https://www.nytimes.com/2021/01/25/us/politics/rob-portman-ohio-senate-republicans.html> (Mar. 6, 2021).

<sup>12</sup> Bryan Lowry & Jonathan Shorman, *Roy Blunt Won't Run for Reelection in 2022, Likely Setting Up Crowded GOP Primary*, KAN. CITY STAR, <https://www.kansascity.com/news/politics-government/article249775748.html> (Mar. 8, 2021, 6:40 PM).

<sup>13</sup> See UNITE AM. INST., THE PRIMARY PROBLEM (2021), <https://www.uniteamerica.org/reports/the-primary-problem>; see also Nick Troiano, *Party Primaries Must Go*, ATLANTIC (Mar. 30, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/party-primaries-must-go/618428/>. See generally ANDREW REYNOLDS, BEN REILLY & ANDREW ELLIS, ELECTORAL SYSTEM DESIGN: THE NEW INTERNATIONAL IDEA HANDBOOK 35–37 (2005).

<sup>14</sup> The Election Law at Ohio State program held a webinar to address this point, using Portman as an example to illustrate the more general problem. Ohio State Univ. Moritz Coll. L.,

We can illustrate this point with some numbers. Suppose that in an election between Portman and a Democrat, 60% of the state’s general-election voters would prefer Portman to 40% for the Democrat. (In 2016, Portman beat Ted Strickland, the state’s Democratic ex-governor, 58%–37%.<sup>15</sup>) But Portman cannot make it to the general election ballot if he is blocked by a defeat within the Republican primary. Let’s assume that in a GOP primary, two-thirds of the Republican primary voters would prefer a Trumpian challenger to Portman, while only one-third would prefer Portman to the Trumpian challenger. Yet, if Ohio’s general election voters had been given the same choice between Portman and his Trumpian challenger, Portman easily would have won: his one-third of 60% of Republican voters equals 20% of the overall vote, plus he would have secured most if not all of the 40% who wanted the Democrat but would take Portman over the Trumpian challenger if that were the choice.<sup>16</sup>

But the consequence of the party primary as a hurdle to clear, in order to reach the general election, is to cause the wrong candidate to prevail in November. “Wrong” in this sense is defined solely by the November electorate’s overall preferences. We have just seen that, if given the choice between Portman and the Trumpian challenger, Ohioans in November would choose Portman. And if given the choice between Portman and the Democrat, Portman would easily win. Yet the Republican primary sends the Trumpian challenger, not Portman, to the November election. Moreover, we can assume that the Trumpian challenger would prevail in the November election against a Democrat as long as more than half of Portman’s primary voters stay loyal to the GOP nominee, rather than defecting to the Democrat.

We can formalize this illustration by constructing a matrix of the November electorate’s ranked preferences among the three candidates:

**Table 1: Hypothetical ranked preferences of Ohio general election voters**

% of voters	1st choice	2nd choice	3rd choice
40	Democrat	Portman	Trumpian
40	Trumpian	Portman	Democrat
15	Portman	Trumpian	Democrat
5	Portman	Democrat	Trumpian

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*The Problem with Plurality-Winner Elections: And Can Requiring Majority Winners Help Save Democracy?*, YOUTUBE (Nov. 23, 2021), <https://www.youtube.com/watch?v=uE1y7qsQpAc>.

<sup>15</sup> *2016 Official Election Results*, OHIO SEC. OF STATE (2016), <https://www.sos.state.oh.us/elections/election-results-and-data/2016-official-elections-results/> (select “Results by County (XLSX)” under “General Election: November 8, 2016” and “Court of Appeals”).

<sup>16</sup> For purposes of this simple illustration, we are holding turnout constant; the fact that primary turnout is lower than the general election, and skewed towards the poles of the political spectrum, only exacerbates the problem.

For purposes of this example, we simplistically assume that all Democrats would prefer Portman to the Trumpian challenger, and all supporters of the Trumpian challenger would prefer Portman to the Democrat. (In the real world, it would be messier, but the basic point would hold.) Likewise, let's assume that three-quarters of those who pick Portman as their first choice would vote for the Trumpian challenger in the November election, while one-quarter would defect to the Democrat. With these numbers, the Trumpian challenger will win the general election 55%–45% against the Democrat, given the current system of the party primary being a prerequisite to the November election, even though Portman would have beaten the Democrat 60%–40%, and Portman also would have beaten the *Trumpian challenger* by the same 60%–40% margin if those had been the two November candidates.

One might argue that this consequence is not so bad, an inevitable byproduct of having a two-party system. It is the role of each party in the system to put forward the best representation of itself as a party, and then let the general-election voters decide which of the two parties they wish to prevail. On this view, the party primaries might not pick the most centrist available candidates from their ranks. As a result, a more moderate or consensus choice, like Portman, might fall through the cracks.<sup>17</sup>

But that fact alone does not mean the system is not working. If one of the two parties veers too far to the extreme, the other party can discipline that extremism by offering a more palatable alternative to the general-election voters. This happened when the Tea Party took Republicans too far to the right in GOP primaries. The Democrats were able to win November elections that they otherwise would have lost just because Republicans nominated candidates like Richard Mourdock, who primaried against respected Senator Richard Lugar and then lost to Joe Donnelly.<sup>18</sup>

Similarly, in a state like Pennsylvania, Republicans need to be careful about replacing Senator Pat Toomey with a nominee who is too Trumpian. Pennsylvania

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<sup>17</sup> For the now-canonical defense of political parties in America's democracy, see JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995).

<sup>18</sup> Gregory J. Krieg, *Defiant Mourdock Loses Indiana Senate Race*, ABC NEWS (Nov. 6, 2012), <https://abcnews.go.com/Politics/OTUS/mourdock-falls-short-indiana-senate-race/story?id=17652019>. Other examples include Todd Akin in Missouri, who lost to Claire McCaskill in the general election, and Christine O'Donnell in Delaware, who defeated respected former Governor Mike Castle in the primary only to lose in the general election to Chris Coons. Diana Reese, *Claire McCaskill Legitimately Shuts Down Todd Akin in Missouri Senate Race*, WASH. POST (Nov. 7, 2012), <https://www.washingtonpost.com/blogs/she-the-people/wp/2012/11/07/claire-mccaskill-legitimately-shuts-down-todd-akin-in-missouri-senate-race/>; RACHEL M. BLUM, *HOW THE TEA PARTY CAPTURED THE GOP: INSURGENT FACTIONS IN AMERICAN POLITICS* 7–8, 78 (2020). See generally ROBERT G. BOATRIGHT, *GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES* (2013).

leans blue, as is evident by President Biden's win there. Thus, the Democrats could pick up that Senate seat if Republicans nominate a candidate ill-suited to the state's November voters.<sup>19</sup>

If the same cannot be said of redder states, like Ohio and Missouri, then that is the consequence of the state's political complexion, not an inherent fault of the two-party system, or so this argument would go. In other words, suppose (again) that Ohio Republicans nominate a Trumpian candidate to replace Portman, rather than someone in Portman's own mold.<sup>20</sup> If the Democrats could not beat the Trumpian in Ohio as easily as they could in Pennsylvania, then that circumstance would simply be a reflection of Ohio being a redder state than Pennsylvania. Each state would be getting the representation it prefers within the context of the two-party system, and there would be no grounds for complaint if more moderate candidates like Portman himself—or anyone else trying to run in his "lane"—could not succeed within the dynamics of two-party competition. Even if the general election voters would be attracted to a moderate alternative, this argument would maintain, they would need to make a choice between the Republican and Democrat options that the two parties' primary elections deliver to the November ballot.

This argument ordinarily might be compelling. It presents, however, a serious problem at this moment in American history. Two-party electoral competition only works if both parties are committed to accepting the results of what the voters decide.<sup>21</sup> But when one of the two parties, or a dominant faction within one of the two parties, refuses to abide by electoral verdicts, the system cannot stand.<sup>22</sup>

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<sup>19</sup> CNN lists this Pennsylvania race as the Senate seat most likely to flip from one party to the other in the 2022 election. Simone Pathe, *The 10 Senate Seats Most Likely to Flip in 2022*, CNN (Nov. 12, 2021, 6:05 AM), <https://www.cnn.com/2021/11/12/politics/senate-race-rankings-november>.

<sup>20</sup> The leading contenders for the GOP nomination in Ohio's 2022 U.S. Senate election are trying to outdo each other in expressing their affinity to Trump. See Paul Steinhauer, *GOP Candidates in Ohio Senate Race Compete Over Who Is More Pro-Trump*, FOX NEWS (Feb. 19, 2021), <https://www.foxnews.com/politics/ohio-senate-republicans-trump-support>.

<sup>21</sup> Henry Farrell, *Trump's Refusal to Respect the Vote Shatters 'All the Historically Ingrained Expectations' About American Democracy*, WASH. POST: MONKEY CAGE (Sept. 27, 2020), <https://www.washingtonpost.com/politics/2020/09/27/trump-wont-commit-respecting-vote-no-one-knows-what-will-happen-next-few-months/>; see also Lee Drutman, *Why the Two-Party System Is Effing Up U.S. Democracy*, FIVETHIRTYEIGHT (June 16, 2021), <https://fivethirtyeight.com/features/why-the-two-party-system-is-wrecking-american-democracy/>.

<sup>22</sup> On this most fundamental point, see STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); see also Edward B. Foley, Opinion, *If the Losing Party Won't Accept Defeat, Democracy Is Dead*, WASH. POST (Nov. 19, 2020), <https://www.washingtonpost.com/opinions/2020/11/19/if-losing-party-wont-accept-defeat-democracy-is-dead/>; EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016).



The 2020 election, and especially January 6 and its aftermath, necessarily changed the calculus on this crucial question. If President Trump had accepted defeat, as losing candidates must do for democracy to work, or even if after January 6, the Republican Party repudiated the spurious claim that Trump had won the election, as some leaders like Mitch McConnell urged for a short period thereafter,<sup>23</sup> then the takeaway would have been that, despite its messiness in 2020, the fundamental precepts of the system essentially remained intact. Dangerously, however, that is *not* the lesson to be learned from what transpired in the 2020 election. Especially in the weeks and months after January 6, it has become clear that ex-President Trump has consolidated his power over the GOP base, and Republican politicians wanting to show their loyalty to Trump continue to perpetrate the myth that he was robbed of victory in the miscounting of votes.<sup>24</sup> With the Make America Great Again (“MAGA”) movement inside the GOP still thoroughly beholden to the “Big Lie,” it is regrettably obvious that the Trumpian wing of the GOP—the wing that is ascendant—cannot be trusted to count votes fairly and honestly.<sup>25</sup> If they continue to insist that Trump won in 2020, it means they cannot accept the electorate’s verdict in favor of opposing candidates. That means, in turn, that if they are given the power to count the votes, the grave danger is that they will only count them in a way that causes their own candidates to win.<sup>26</sup>

Consequently, the choice with GOP primaries between MAGA and traditionally conservative candidates has structural implications beyond the ideology of policy that results from the electoral outcome. At stake is the ongoing operation of electoral competition itself. Replacing Portman and Blunt with MAGA-loyal senators, and similar replacements throughout government, is not merely an ideological shift to the right, in other words. It is a question of whether elections will be running

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<sup>23</sup> Siobhan Hughes, *GOP Senate Leader McConnell Rejects Trump’s Fraud Claims*, WALL ST. J. (Jan. 6, 2021, 1:55 PM), <https://www.wsj.com/livecoverage/biden-trump-electoral-college-certification-congress/card/D3m1htBWKtXP10Lv4tuB>.

<sup>24</sup> The MAGA movement’s persistent attack on Liz Cheney, as a consequence of her refusal to accept the “Big Lie,” is one visible element of this post-January 6 development, and it includes a vigorous effort to defeat her bid for reelection in the 2022 Republican primary. See Robert Draper, *Liz Cheney vs. MAGA*, N.Y. TIMES MAG., <https://www.nytimes.com/2021/04/22/magazine/liz-cheney-vs-maga.html> (Oct. 21, 2021). Kevin McCarthy refuses to publicly condemn Republicans who perpetuate the “Big Lie,” despite a face-to-face plea from an injured Capitol police officer that he do so. Luke Broadwater, *Officer Injured in Capitol Riot Asks McCarthy to Disavow Lies About It*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/us/kevin-mccarthy-capitol-riot-officer.html>.

<sup>25</sup> Reid J. Epstein & Lisa Lerer, *Rejecting Biden’s Win, Rising Republicans Attack Legitimacy of Elections*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/us/politics/republican-election-fraud-claims.html>.

<sup>26</sup> For a succinct and cogent summary of this threat, see Richard L. Hasen, *Republicans Aren’t Done Messing with Elections*, N.Y. TIMES (Apr. 23, 2021), <https://www.nytimes.com/2021/04/23/opinion/republicans-voting-us-elections.html>.

fairly in the future, allowing ballots to be counted as cast.<sup>27</sup>

The acuteness of this threat is seen clearly in Trump's recruitment of a primary challenger for Georgia's Secretary of State Brad Raffensperger, who like Rob Portman, is a traditionally conservative Republican.<sup>28</sup> Raffensperger insisted on counting votes honestly in the 2020 election, despite Trump's persistent efforts to subvert the counting process—including the phone call in which Trump asked Raffensperger to “find” just enough votes for Trump to win the state.<sup>29</sup> Because of Raffensperger's integrity, which Trump views as disloyalty to him, Trump recruited Representative Jody Hice to run against Raffensperger in the GOP primary.<sup>30</sup> Hice is one of the leading proponents of the “Big Lie” that the election was stolen from Trump. (Hice was one of the House members most vocal of this baseless view.<sup>31</sup>) Thus, the effort to replace Raffensperger with Hice for the Office of Secretary of State is a Trumpian attempt to replace honest vote-counting with vote-counting that looks to “find” enough votes for MAGA-supported candidates to win.

Yet Raffensperger might be the candidate that Georgia's general election voters most prefer—similar to Portman in Ohio. According to polls, Raffensperger is popular among Democrats because of his integrity, as well as among those Republicans who still stand for counting votes honestly. But he is unlikely to make it out of the MAGA-controlled Republican primary.<sup>32</sup> Thus, as with Portman, in this case the

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<sup>27</sup> *The Atlantic* sounded the alarm with its January/February 2022 issue. See the cover story by Barton Gellman, as well as pieces by George Packer and Jeffrey Goldberg. See Barton Gellman, *January 6 Was Practice*, ATLANTIC, Jan.–Feb. 2022, at 24; George Packer, *Imagine the Worst: How to Head Off the Next Insurrection*, ATLANTIC, Jan.–Feb. 2022, at 17; Jeffrey Goldberg, Editor's Note, *A Party, and Nation, in Crisis*, ATLANTIC Jan.–Feb. 2022, at 10. Robert Kagan sounded a similar theme in his Washington Post essay. Robert Kagan, Opinion, *Our Constitutional Crisis Is Already Here*, WASH. POST (Sept. 23, 2021, 3:32 PM), <https://www.washingtonpost.com/opinions/2021/09/23/robert-kagan-constitutional-crisis/>.

<sup>28</sup> Maggie Haberman, *Trump Endorses a Loyalist, Jody Hice, for Georgia Secretary of State*, N.Y. TIMES (Mar. 22, 2021), <https://www.nytimes.com/2021/03/22/us/politics/jody-hice-raffensperger-trump-georgia.html>.

<sup>29</sup> Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021), [https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555\\_story.html](https://www.washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html).

<sup>30</sup> Henry J. Gomez, *Trump Has Georgia Revenge on His Mind as He Returns to Campaign-Style Rallies*, NBC NEWS (June 27, 2021, 1:30 AM), <https://www.nbcnews.com/politics/donald-trump/trump-has-georgia-revenge-his-mind-he-returns-campaign-style-n1272408>; Haberman, *supra* note 28.

<sup>31</sup> Daniel Dale, *Fact Check: Trump-Backed Candidate for Georgia Elections Chief Begins Campaign with False Claims About 2020 Election*, CNN (Mar. 29, 2021, 11:09 PM), <https://www.cnn.com/2021/03/29/politics/fact-check-hice-2020-election-claims-secretary-of-state-newsmax/index.html>.

<sup>32</sup> David Siders & Zach Montellaro, *'He's Toast': GOP Leaves Raffensperger Twisting in the Wind*, POLITICO (Mar. 28, 2021, 7:00 AM), <https://www.politico.com/news/2021/03/28/>

existing electoral system prevents the state's general-election voters from choosing the candidate they would most prefer. Moreover, the consequence is to deny voters their preferred choice of a candidate pledged to honest elections, and potentially replace the candidate—as a result of the party primary—with a candidate committed to the “Big Lie” electoral dishonesty.<sup>33</sup>

Other nations around the world have lost their democracies as a result of authoritarian movements using existing electoral procedures to gain power and then subvert the electoral system from within.<sup>34</sup> The United States of America now faces this type of danger more acutely than ever in its own history.<sup>35</sup> The existing procedures enable “Big Lie” Trumpian candidates to gain power, even though they are not the candidates the general-election voters would most prefer.

Trump himself gained power without winning a majority of votes in 2016.<sup>36</sup> Remarkably, he never was above 50% in public opinion polls during his entire four-year term.<sup>37</sup> Trump now hopes to amplify his MAGA movement by primarying GOP incumbents disloyal to him.<sup>38</sup> If successful, he can use the structural deficiency of the existing system to put into office candidates who are not the ones the voters would most want to elect. If enough gain power through this non-majoritarian way,

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georgia-secretary-of-state-gop-478251.

<sup>33</sup> Trump has also recruited David Perdue to primary incumbent Georgia Governor Brian Kemp because Kemp, like Raffensperger, refused to subvert Biden's victory in Georgia as Trump demanded. Perdue has made it a focal point of his campaign against Kemp that he would not have certified Biden's victory. Emma Hurt, *Trump-Backed Perdue Says He Wouldn't Have Certified Georgia 2020 Results*, AXIOS (Dec. 8, 2021), <https://www.axios.com/david-perdue-georgia-2020-election-certification-56e54cd2-c0c1-41e8-a44e-f582335243da.html>. Perdue may knock Kemp out the race, just as Hice may knock out Raffensperger, even though Kemp, like Raffensperger, might be the candidate most preferred by a majority of the state's general election votes. I explore this point at greater length on the Election Law Blog. See Ned Foley, *David Perdue and Round-Robin Voting*, ELECTION L. BLOG (Dec. 9, 2021, 6:27 AM), <https://electionlawblog.org/?p=126211>.

<sup>34</sup> LEVITSKY & ZIBLATT, *supra* note 22.

<sup>35</sup> *Statement of Concern: The Threats to American Democracy and the Need for National Voting and Election Administration Standards*, NEW AM. (June 1, 2021), <https://www.newamerica.org/political-reform/statements/statement-of-concern/>.

<sup>36</sup> FOLEY, *supra* note 4, at 140.

<sup>37</sup> Alexandra Hutzler, *Donald Trump Is First President in Modern History to Never Reach 50% Approval in Gallup Poll*, NEWSWEEK (Jan. 19, 2021, 11:52 AM), <https://www.newsweek.com/donald-trump-first-president-modern-history-never-reach-50-approval-gallup-poll-1562653>. Trump also never reached 50% in FiveThirtyEight's aggregation of polls. *How Unpopular Is Donald Trump?*, FIVETHIRTYEIGHT (Jan. 20, 2021, 11:57 AM), <https://projects.fivethirtyeight.com/trump-approval-ratings/>.

<sup>38</sup> Alex Isenstadt, *Republicans Who Impeached Trump Are Already on the Chopping Block*, POLITICO (Jan. 21, 2021, 7:55 PM), <https://www.politico.com/news/2021/01/21/trump-revenge-gop-impeachment-backers-461189>.

they can then dismantle or cripple electoral competition, as other authoritarian movements have.

While it is important not to overstate this danger, it also cannot be ignored, and present circumstances mandate inquiry into what electoral reform best addresses the threat.<sup>39</sup> Although the existing system of partisan primaries followed by a first-past-the-post general election might suffice in ordinary times given the nation's historical commitment to two-party electoral competition, when the very premises of that commitment are threatened, it becomes imperative to consider how to assure that elections are held so as to identify and implement the will of the electorate.

Simply put, when November voters would prefer to elect a Portman or a Raffensperger, but are unable to do so because of how partisan primaries control access to the November ballot, and when depriving November voters of the chance to choose their most preferred candidate may result in the election of officeholders who do not believe in free and fair elections and who are willing to repudiate them, then it is time to consider what revisions to the electoral system could enable voters to elect the candidates whom they actually most want and, at the same time, elect candidates who are willing to preserve the ongoing operation of a competitive electoral system.

## II. SOME POSSIBLE REMEDIES—BUT WHICH MIGHT NOT BE STRONG ENOUGH MEDICINE

### A. *Eliminating “Sore Loser” Laws and Bans on Write-In Candidates?*

If the diagnosis of the disease is that the primary election is blocking general-election voters from choosing their most preferred candidate, why not stop the primary election from being this kind of obstacle? There is no inherent reason why a candidate defeated in a party primary cannot run in the general election. Obviously, the defeated primary candidate cannot run in the general election as *that party's chosen nominee*, but the defeated candidate still could run in the general election as an independent or even as the nominee of some other (presumably minor) political party.

Nobody illustrates this point better than Senator Lisa Murkowski of Alaska. In her 2010 run for reelection, she was primaried from the right by a Tea Party insurgent, Joe Miller. She lost that primary election to Miller, who, as a result, became

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<sup>39</sup> The first draft of this Article was written in advance of the AALS symposium held in early May 2021. Since then, this danger (already apparent to those who follow election law closely) has only intensified and become more widely recognized. Unfortunately, it has not become equally well-understood that the majority-winner proposal advocated in this Article would be a powerful countermeasure.

the Republican Party's nominee in the November general election.<sup>40</sup> But Murkowski did not give up, and she waged a write-in campaign as an independent candidate. Part of her message was that voters needed to spell Murkowski with an "i" not a "y" at the end.<sup>41</sup>

She won the general election, with 39% of the vote. Miller came in second, with 35%. The Democrat, Scott McAdams, finished third, with only 23%.<sup>42</sup>

In this way, Murkowski proved that it is possible to be the most popular candidate in the general election even after losing a major-party primary to a more polarizing challenger who appeals to the more extreme elements within the party's base voters, but who is more unpalatable to the state's electorate as a whole. After she won this write-in campaign, the Republican Party in the Senate accepted her back into its caucus. Though Murkowski says she remains a Republican, in 2022 she will again be primaried from the right, this time by a Trumpian loyalist.<sup>43</sup> (More on Murkowski and Alaska's 2022 election later.)

Murkowski is not the only incumbent Senator to have won reelection in November after having been outflanked in one's own party primary. Joe Lieberman of Connecticut sought another Senate term in 2006.<sup>44</sup> (In 2000, he had won reelection to the Senate even as he also was Al Gore's running mate.<sup>45</sup>) Ned Lamont, however, did not consider Lieberman liberal enough, and so he primaried Lieberman from the left.<sup>46</sup>

<sup>40</sup> Frank James, *Alaska's Joe Miller May Be Lisa Murkowski's Secret Weapon*, NPR (Oct. 19, 2010, 10:50 AM), <https://www.npr.org/sections/itsallpolitics/2010/10/19/130669723/alaska-s-joe-miller-admits-to-ethics-violations>.

<sup>41</sup> See Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I?: Part I: The Question of Assistance to the Voter*, 28 ALASKA L. REV. 1 (2011).

<sup>42</sup> William Yardley, *Murkowski Wins Alaska Senate Race*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/politics/18alaska.html>; *State of Alaska 2010 General Election November 2, 2010 Official Results*, ALASKA DIV. OF ELECTIONS, <https://web.archive.org/web/20140820201516/http://www.elections.alaska.gov/results/10GENR/data/results.htm>.

<sup>43</sup> Alex Isenstadt, *Trump Alums Sign Up with New Murkowski Opponent*, POLITICO, <https://www.politico.com/news/2021/03/29/tshibaka-murkowski-alaska-2022-election-478388> (Mar. 29, 2021, 7:59 PM); see also Manu Raju & Alex Rogers, *Trump's Fight with Murkowski Roils GOP with New Alaska Senate Challenger Emerging*, CNN, <https://www.cnn.com/2021/04/19/politics/alaska-senate-race-2022-lisa-murkowski-donald-trump/index.html> (Apr. 19, 2021, 7:01 AM) ("[Murkowski's challenger] aligned herself with the former President on perhaps his top issue. 'We don't know the outcome of the 2020 election,' [Kelly] Tshibaka responded when asked whether she agreed with Trump that he won the 2020 election.").

<sup>44</sup> Patrick Healy, *Lamont Defeats Lieberman in Primary*, N.Y. TIMES (Aug. 8, 2006), <https://www.nytimes.com/2006/08/08/nyregion/08cnd-campaign.html>.

<sup>45</sup> *Lieberman Wins Senate Race*, CNN (Nov. 8, 2000, 8:57 AM), <https://www.cnn.com/2000/ALLPOLITICS/stories/11/07/senate.connecticut/>.

<sup>46</sup> Healy, *supra* note 44.

Lamont won the primary, but Lieberman got on the general-election ballot. Although running essentially as an independent, he formally had the ballot designation as the candidate of the “Connecticut for Lieberman” Party. In any event, he won the general election with just shy of 50% of the vote (49.7%). Lamont got almost 40% (39.7%). The Republican, Alan Schlesinger, received less than 10% (9.6%).<sup>47</sup>

Once back in the Senate, Lieberman remained officially an independent—keeping some formal distance with his former party, in contrast to Murkowski—although he still caucused with the Democrats.<sup>48</sup> He did not run again in 2012.<sup>49</sup> Still, like Murkowski, he showed it possible to win a general election as an independent after being primaried by one’s own party.

But the law often does not permit the kind of win that Lieberman and Murkowski achieved. Many states have “sore loser” laws, which specifically prohibit a candidate who loses a partisan primary from appearing on the general-election ballot as an independent or nominee of another party.<sup>50</sup> Some states also explicitly prohibit the kind of write-in campaign that Murkowski mounted.<sup>51</sup> The combination of both prohibitions would effectively prevent the kind of general-election candidacy—and victory—that Lieberman and Murkowski were able to accomplish.

The U.S. Supreme Court, moreover, has upheld the constitutionality of both types of prohibitions. In *Storer v. Brown*,<sup>52</sup> the Court rejected a constitutional challenge to California’s version of a “sore loser” law, which was so strict as to bar a candidate from being on the general-election ballot as an independent if that candidate had even voted in a party’s primary or had been registered with that party during the previous year. The Court reasoned that the strictness of the law was consistent with the state’s goal of limiting the general election to only those candidates who survived the primary as the first round of a two-round process. “The general

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<sup>47</sup> Mark Pazniokas, *Lieberman Defeats Lamont*, HARTFORD COURANT (Nov. 8, 2006), <https://www.courant.com/news/connecticut/hc-xpm-2006-11-08-0611080155-story.html>; *Vote for United States Senator Summarized by Congressional District, November 7, 2006*, CONN. SEC’Y OF THE STATE (Nov. 2006), <https://portal.ct.gov/SOTS/Register-Manual/Section-VIII/Vote-for-United-States-Senator-2006>.

<sup>48</sup> Joseph Lieberman, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Joseph-Lieberman> (Feb. 20, 2022).

<sup>49</sup> Molly Ball & David Catanese, *Lieberman Bows Out, Won’t Run in 2012*, POLITICO, <https://www.politico.com/story/2011/01/lieberman-bows-out-wont-run-in-2012-047823> (Jan. 20, 2011, 11:52 AM).

<sup>50</sup> Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013 (2011).

<sup>51</sup> “Nine states—Arkansas, Hawaii, Louisiana, Mississippi, Nevada, New Mexico, Oklahoma, South Carolina and South Dakota—won’t accept any write-ins at all.” Zachary Roth, *What Are State Write-In Rules for Candidates?*, NBC NEWS (Oct. 11, 2016, 12:04 PM), <https://www.nbcnews.com/politics/elections/what-are-state-write-rules-candidates-n664536>.

<sup>52</sup> 415 U.S. 724 (1974).

election ballot is reserved for major struggles,” Justice White wrote for the Court; “it is not a forum for continuing intraparty feuds.”<sup>53</sup>

In *Burdick v. Takushi*,<sup>54</sup> the Court upheld Hawaii’s prohibition against write-in votes. Again, the Court justified the prohibition as part of the state’s effort to limit the general election to only those candidates who survived the primary. Indeed, the Court explicitly declared: “The prohibition on write-in voting is a legitimate means of averting divisive sore-loser candidacies.”<sup>55</sup>

Whatever one thinks of the Court’s constitutional analysis in these two cases, the policy justifications for prohibiting votes for a candidate like Lieberman or Murkowski are questionable. In each of their elections, these two candidates were the ones most preferred by the voters of the state, although they had lost their respective party’s primary. Preventing general-election voters from choosing them, rather than their opponents, would not have served the cause of democracy or yielded an electoral process better suited to identifying the preferences of the voters.

Still, one can understand why a state might adopt these laws. Winning a general election with less than 40% of the vote, as Murkowski did in 2010, is hardly ideal. While she would have won a majority in a two-way race against either of her major-party opponents that year, in other elections there is no guarantee that a sub-40% plurality winner would prevail head-to-head against each of the other candidates in the race. For example, assume that Murkowski and Miller switched their percentages in 2010, so that Miller got 39% while Murkowski got 35%. Then, Miller would have been declared the plurality winner. But Murkowski still would have beaten him in a two-way race, as she would have picked up most if not all of the 23% that the Democrat received—she being much more moderate, and thus attractive to the Democrat’s voters than the more extreme Tea Party candidate, Miller. (And Murkowski still would have beaten the Democrat head-to-head, picking up enough support from the more conservative Miller voters.) Thus, the plurality-winner rule would have favored Miller in that counterfactual situation, but it would have caused the candidate less-preferred by a majority to win.

Accordingly, the policy solution to the problem of polarizing primary elections is not simply to eliminate sore loser laws, as well as prohibitions on write-in candidates, in order to let general-election voters choose a defeated primary candidate. Opening up the general election to all candidates, while retaining the rule that the plurality winner is elected, still enables the will of the majority to be defeated. Florida’s 2010 U.S. Senate race can serve to illustrate this point. In that election, incumbent Republican Governor Charlie Crist dropped out of his party’s primary in order to run in the general election as an independent. Marco Rubio won the Republican

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<sup>53</sup> *Id.* at 735.

<sup>54</sup> 504 U.S. 428 (1992).

<sup>55</sup> *Id.* at 439.

primary as a Tea Party candidate.<sup>56</sup> In the general election, Rubio was the plurality winner with 48.9%. Crist came in second with 29.7%. The Democrat, Kendrick Meek, ran third, with 20.2%.<sup>57</sup> While we cannot be sure that Crist would have received all of the Democrat's votes if it had been a two-way race between him and Rubio, it's conceivable since Crist was the moderate and thus preferable to Democrats compared to Rubio running to Crist's right. If Crist would have beaten Rubio in a two-person race, then we can say that the plurality-winner rule served to deprive Florida's voters of their actual majority-preferred choice.

Ultimately, the only way to guarantee that the will of a majority of voters prevails in an election is to have the law require that a candidate receive a majority of votes to win. There are different ways to implement a majority-vote requirement. But requiring a majority of votes to win, by definition, rules out permitting a candidate to win with a plurality that falls short of a majority.

### B. California's "Top Two" Nonpartisan Primary

In 2010, California's voters adopted Proposition 14, which put in place a new nonpartisan primary for the 2012 election, in which the two candidates who receive the most votes move on to the November general election.<sup>58</sup> All candidates for the same office run against each other in the primary, regardless of party affiliation. Consequently, this system is sometimes called a "jungle" primary.<sup>59</sup>

The first state to adopt this specific electoral method was Washington, in 2004. The U.S. Supreme Court upheld the constitutionality of Washington's procedure in 2008, when it was first employed.<sup>60</sup> California's subsequent adoption of the same system eclipsed Washington's in significance given California's status as the nation's most populous state.

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<sup>56</sup> Damien Cave, *Rubio Continues Quick Rise in G.O.P. with Win in Florida Senate Race*, N.Y. TIMES (Nov. 2, 2010), <https://www.nytimes.com/2010/11/03/us/politics/03florida.html>.

<sup>57</sup> *November 2, 2021 General Election*, FLA. DEP'T OF STATE (Nov. 2010), <https://results.elections.myflorida.com/?ElectionDate=11%2F2%2F2010> (choose "U.S. Senator" from "Select Office" drop down menu).

<sup>58</sup> Jesse McKinley, *Calif. Voting Change Could Signal Big Political Shift*, N.Y. TIMES (June 9, 2010), <https://www.nytimes.com/2010/06/10/us/politics/10prop.html>.

<sup>59</sup> A "blanket" primary, in which voters can switch back and forth between different parties in the same election to choose the nominee of different parties depending on the specific election on the ballot, is a distinctly separate kind of electoral system and was invalidated in *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

<sup>60</sup> *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008). Louisiana had a somewhat different version of a two-round system, with a runoff after the November election, if no candidate wins a majority in November. See LA. SEC'Y OF STATE, 2022 ELECTIONS (Dec. 12, 2021), <https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2022.pdf>.



The system is simple. Each voter in the primary can cast a single vote for whichever candidate the voter most prefers. The two highest vote totals, also regardless of party affiliation, determine which two candidates face off against each other, head-to-head, in the November general election. Given the nonpartisan structure of the primary, it is possible for two candidates from the same party to be the dueling finalists on the November ballot.

This is what happened in 2018 when incumbent Senator Diane Feinstein won reelection. She got the most votes in the primary, 44.2%. Runner-up was another Democrat, Kevin de Leon (who was president pro tempore of the state senate); he got 12.1%.<sup>61</sup> The two faced each other in November, when Feinstein received 54.2% to de Leon's 45.8%.<sup>62</sup>

It also happened in 2016. That year Kamala Harris, then the state's Attorney General, finished first in the primary, with 39.9%. Lorretta Sanchez, a Democratic member of the U.S. House of Representatives, received 18.9%.<sup>63</sup> In November, Harris won with 61.6%, compared to 38.4% for Sanchez.<sup>64</sup>

If Florida had this system in place for its 2010 U.S. Senate election, incumbent Republican Governor Charlie Crist might have won the Senate seat. He surely would have been one of the two candidates with the most votes in the hypothetical nonpartisan primary, along with Marco Rubio. Whether he or Rubio would have won the November general election, with only the two of them on the ballot, is a closer question. The nature of the fall campaign would have been different, without a Democratic nominee being the third candidate in the race. It might have been that Democrats would have refused to show up in November to vote for a Republican, even to defeat a Tea Party candidate to Crist's right. Or it might have been that Crist could have tailored a message to appeal to wider range of moderate Republicans and Democrats, enough to defeat Rubio. In any event, if used by Florida in 2010, California's top-two system would have at least given Crist a chance, which he did not have under the existing system with its plurality-winner general election following a typical partisan primary.

Thus, California's top-two system is a definite improvement over the existing plurality-winner system due to its ability to produce a winner who is the preferred

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<sup>61</sup> Cal. Sec'y of State, *Supplement to Statement of Vote, Statewide Summary by County for United States Senator*, in STATEMENT OF VOTE: STATEWIDE DIRECT PRIMARY ELECTION 251, 253 (June 5, 2018), <https://elections.cdn.sos.ca.gov/sov/2018-primary/ssov/uss-summary.pdf>.

<sup>62</sup> Cal. Sec'y of State, *United States Senator*, in STATEMENT OF VOTE: GENERAL ELECTION 45, 47 (Nov. 6, 2018), <https://elections.cdn.sos.ca.gov/sov/2018-general/sov/45-us-senator.pdf>.

<sup>63</sup> Cal. Sec'y of State, *United States Senator*, in STATEMENT OF VOTE: PRESIDENTIAL PRIMARY ELECTION 75, 77 (June 7, 2016), <https://elections.cdn.sos.ca.gov/sov/2016-primary/75-us-senate-formatted.pdf>.

<sup>64</sup> Cal. Sec'y of State, *United States Senator*, in STATEMENT OF VOTE: GENERAL ELECTION 23, 25 (Nov. 8, 2016), <https://elections.cdn.sos.ca.gov/sov/2016-general/sov/23-us-senate-formatted.pdf>.

choice of a majority of voters.<sup>65</sup> Mathematically, the winner of the November election in the top-two system must receive a majority of the November votes. When only two candidates are in the race, the one with more votes must have over 50%.

Even so, California's top-two system is no panacea. Although it guarantees a majority winner in the simple sense just explained, it does not guarantee that the ultimate winner in November is the candidate, of all those competing in the nonpartisan primary, who would be most preferred by a majority of voters when compared to each other candidate in the field. This is because the two candidates with the most votes in the primary may have intense but not wide support, and a third candidate in the race—who is not the first choice of most voters—may be broadly preferred by a strong majority when considered one-on-one against each other competitor in the race.

The examples involving Rob Portman and Brad Raffensperger, discussed in Part I, illustrate this truth. Given the hypothetical preferences of voters enumerated in Table 1 (above), Portman would finish third in a nonpartisan “top two” primary like California's. This is because only 20% of voters would cast their simple “pick-one” ballots for him as their first choice, whereas 40% of voters would choose the Trumpian, and another 40% the Democrat. Thus, the Trumpian and the Democrat would face off against each other in November, with Portman left behind.

Yet, as we saw in Part I, given these same hypothetical preferences, if the two candidates in November were Portman and the Trumpian, Portman would receive the majority of votes. And if it were Portman versus the Democrat in November, Portman would also win that two-candidate matchup. In this way, a California-style top-two system fails to identify the candidate who is actually the strongest in the field; it causes the defeat of a candidate who would beat either of the two candidates whom this system declares to be the finalists for the November ballot. A majority of voters prefer Portman to either of the two candidates whom this “top two” system selects for the general election. Insofar as it is the job of the electoral system to yield a winner that the electorate most prefers among all competitors, the California system does not always perform its job.<sup>66</sup>

The same point applies to Raffensperger. If Georgia were to use California's “top two” nonpartisan primary for its 2022 Secretary of State election, we could

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<sup>65</sup> See Christian R. Grose, *Reducing Legislative Polarization: Top-Two and Open Primaries Are Associated with More Moderate Legislators*, 1 J. POL. INSTS. & POL. ECON. 267 (2020).

<sup>66</sup> In the technical terminology of electoral system design, Portman, in this example, would be the “Condorcet winner” because he beats all other competitors one-on-one. The term is named for the Marquis de Condorcet, the eighteenth-century French philosopher who focused on this kind of especially majoritarian candidate. For a useful and accessible introduction to Condorcet, as well as the historical development of electoral system design in which Condorcet plays a major role, see GEORGE G. SZPIRO, *NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT* 66–78 (2010).

assume that Hice and a Democrat would come in first and second, thereby advancing to the general election and leaving Raffensperger off the November ballot. Yet Raffensperger would win a majority of votes against either of those other candidates, one-on-one. The California system would again fail to put the strongest candidate in the field on the November ballot, as in the Portman example.

The problem is a general one, integral to the basic structure of California's system. Myriad other examples, besides Portman and Raffensperger, could be used. Roy Blunt in Missouri is in the same posture as Portman in Ohio. Indeed, the Trumpian wing of the Republican Party has become strong enough that the Trumpian candidate might easily finish among the top two candidates in a California-style nonpartisan primary, with a Democrat securing the second of those top two spots. Yet it still would be true in many states—not just Ohio and Missouri, but also Florida, Indiana, Iowa, and North Carolina, among others—that a non-Trumpian traditional Republican would beat either the Trumpian or the Democrat head-to-head. Although the Trumpian wing has eclipsed traditional Republicans in intensity of enthusiasm on the right, it nonetheless remains true that traditional Republicans retain a breadth of appeal in moderately red states (like the ones just mentioned), so that a majority of the state's voters would prefer a traditionally Republican candidate to either a Trumpian or Democrat alternative.

Consequently, use of the California system would cause the Trumpian to win the general election, but the general-election voters would have preferred the non-Trumpian traditional Republican. The California system is thus not the antidote to what currently ails American democracy. It neither assures winners that the voters most want, nor protects the ongoing operation of democratic elections from the risk of MAGA-motivated authoritarianism.

Although better than the plurality-winner system that most states use, the California system is not good enough. It is necessary to continue searching for a solution.

### C. *Instant Runoff Voting*

Another type of electoral system is attracting a lot of attention and is increasingly being adopted in various states and localities. Most commonly called “Ranked Choice Voting,” it is also known as “Instant Runoff Voting” because its calculation of a winner from multiple candidates on the same ballot emulates a second-stage runoff election without actually holding the separate runoff.<sup>67</sup> This latter term is more precise because, as we shall see later, there is a different kind of calculation that can be performed using the same ranked-choice ballots.

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<sup>67</sup> New York City became the largest jurisdiction in the United States to use instant runoff voting, for its June primary in its 2021 mayoral election. David Leonhardt, *A Guide to Ranked-Choice Voting*, N.Y. TIMES, <https://www.nytimes.com/2021/06/16/briefing/a-guide-to-ranked-choice-voting.html> (Oct. 11, 2021).

A ranked-choice ballot enables a voter to rank candidates in order of preference: first, second, third, and so forth, up to however many candidates are on the ballot for the same office.<sup>68</sup> Although it is possible to require voters to rank all the candidates from top to bottom in order to have any of their preferences count, it is also possible simply to permit voters to rank as many candidates as they wish while leaving the remainder unranked. Instant Runoff Voting then uses a procedure to eliminate candidates one at a time, until a single candidate has a majority of votes.<sup>69</sup>

The first candidate to be eliminated is the one with the fewest first-choice votes. The ballots that ranked this eliminated candidate first are then redistributed to the candidate who is ranked second on those ballots. To use the simple hypothetical example in Table 1, Portman is the candidate who would be eliminated first. Only 20% of voters ranked him first, compared to 40% for both the Trumpian and the Democrat. With Portman thus eliminated, three-quarters of the ballots that ranked him first—or 15% of all ballots—would be redistributed to the Trumpian, while one-quarter of the ballots ranking him first—5% overall—would be redistributed to the Democrat. With the ballots redistributed in this way, the Trumpian would have 55% of all ballots, whereas the Democrat would have only 45%. Thus, the Trumpian wins the Instant Runoff election based on this set of voter preferences on these ballots.

There are different ways to use Instant Runoff Voting in a general election, depending upon what type of primary election a state adopts and how the primary interacts with the November ranked-choice ballot. Maine uses partisan primaries to identify candidates for the Instant Runoff Voting general election.<sup>70</sup> By contrast, Alaska has adopted a nonpartisan “top four” primary, which selects four finalists regardless of party to compete in the November general election, with Instant Runoff Voting used to identify the single winner among these four finalists.<sup>71</sup>

As a result of recent reforms adopted in Maine, each political party holds its own primary election using ranked-choice ballots, with Instant Runoff Voting to determine the winner if no candidate has a majority of first-choice votes. The winners of these partisan primaries move on to the November general election ballot, joined by any additional qualifying independent candidates. With ranked-choice

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<sup>68</sup> New York City limited voters to a maximum of five ranked candidates, although there were 13 candidates on the ballot. Leonhardt, *supra* note 67.

<sup>69</sup> See Pildes & Parsons, *supra* note 4, at 1784.

<sup>70</sup> *Primary Elections in Maine*, BALLOTPEDIA, [https://ballotpedia.org/Primary\\_elections\\_in\\_Maine](https://ballotpedia.org/Primary_elections_in_Maine) (last visited July 11, 2022); see also Kevin Miller, *Democratic Battle to Take on Collins Heads to Primary Vote Tuesday*, PORTLAND PRESS HERALD (July 12, 2020), <https://pressherald.com/2020/07/12/democratic-battle-to-take-on-collins-heads-to-primary-vote-tuesday/>.

<sup>71</sup> James Brooks, *Alaska Becomes Second State to Approve Ranked-Choice Voting as Ballot Measure 2 Passes by 1%*, ANCHORAGE DAILY NEWS (Nov. 17, 2020), <https://www.adn.com/politics/2020/11/17/alaska-becomes-second-state-to-approve-ranked-choice-voting-as-ballot-measure-2-passes-by-1/>.

ballots, the November voters indicate their preferences among all the candidates, with Instant Runoff Voting again determining the winner if no candidate has a majority of first-choice preferences.

For the two U.S. Senate elections held in Maine under this new system, it has not been necessary to invoke the Instant Runoff method of calculating a winner. In 2018, Angus King, the independent who caucuses with the Democrats in the Senate, was running for reelection as an independent.<sup>72</sup> Only one Republican was on the ballot in the primary: Ed Brakey, a state senator.<sup>73</sup> In the Democratic primary there was also only one candidate on the ballot: a self-proclaimed Democratic Socialist, Zak Ringelstein, who clearly was positioning himself to Senator King's left.<sup>74</sup> In the general election, King received 54% of first-choice votes, winning outright with that majority. Brakey, the Republican, got 35% of first-place votes, and Ringelstein, the official Democratic nominee, only 10%.<sup>75</sup>

In 2020, Susan Collins, the moderate Republican, ran for reelection. She had no opponent on the ballot in the GOP primary. (There was a write-in candidate, Amy Colter, who received roughly 1% of the primary's votes, with Collins receiving all the rest.<sup>76</sup>) There were three candidates on the ballot in the Democratic primary, but Sara Gideon received 70.2% of first-choice votes, avoiding any need for an Instant Runoff with the other two candidates.<sup>77</sup>

In the general election, Collins won 50.4% of first-choice votes, also avoiding an Instant Runoff.<sup>78</sup> Gideon received only 41.9%. Lisa Savage, an independent candidate running to Gideon's left, affiliated with the Green Party but not designated as such on the ballot, was the first choice on only 4.9% of ballots.<sup>79</sup> Before ballots

<sup>72</sup> Kevin Miller, *Citing Unfinished Work, Angus King Launches Re-Election Bid for U.S. Senate*, PORTLAND PRESS HERALD, <https://www.pressherald.com/2018/05/31/citing-unfinished-work-king-launches-reelection-bid-for-u-s-senate/> (Oct. 9, 2018).

<sup>73</sup> *Id.*

<sup>74</sup> See Maxwell Hauptman, *Senate Candidate Zak Ringelstein Proffers a Progressive Punch*, ELLSWORTH AM. (Aug. 23, 2018), <https://www.ellsworthamerican.com/maine-news/political-news/senate-candidate-zak-ringelstein-proffers-a-progressive-punch/>.

<sup>75</sup> *Maine Senate Election Results 2018*, POLITICO, <https://www.politico.com/election-results/2018/maine/senate/> (Apr. 3, 2022, 3:21 PM).

<sup>76</sup> See *Tabulations for Elections Held in 2020*, ME. DEP'T OF THE SEC'Y OF STATE, <https://www.maine.gov/sos/cec/elec/results/results20.html> (Nov. 2020) (select "U.S. Senate - Republican" under heading "July 14, 2020 - Primary Election - Non-Ranked Choice Offices"); Kendra Caruso, *Write-in Candidate Challenges Collins for Republican Nomination*, REPUBLICAN J. (June 23, 2020), <https://waldo.villagesoup.com/2020/06/23/write-in-candidate-challenges-collins-for-republican-nomination-1862503/>.

<sup>77</sup> *Maine U.S. Senate Primary Election Results*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/07/14/us/elections/results-maine-senate-primary-election.html> (July 21, 2020).

<sup>78</sup> See *Tabulations for Elections Held in 2020*, *supra* note 76 (select "United States Senator" under heading "November 3, 2020 General Election").

<sup>79</sup> *Id.*; Jennifer Mitchell, *Green Party Presidential Candidate Comes to Maine in Support of*

were cast, there had been some expectation among pundits that Gideon and Savage together might win enough first-choice votes to keep Collins under 50%, thereby triggering the Instant Runoff procedure, with the possibility that Gideon might pull ahead of Collins after a redistribution of the ballots ranking Gideon first.<sup>80</sup> But it was not to be. Collins was able to obtain a majority against both of these opponents—as well as one other independent on the general election candidate, who received only 1.63% of ballots.

Although the Maine system has not yet caused a more traditional Republican senator to survive a serious primary challenge from the right, one can easily imagine how it might do so. Invoking again the example of Florida's 2010 Senate race, Charlie Crist's independent candidacy might have prevailed if the Maine system had been in place. Altogether, there were ten candidates in the November general election, although seven of them collectively received only 1.3% of the total votes.<sup>81</sup> The Instant Runoff process would have eliminated these candidates, redistributing this small percentage of ballots to the three remaining candidates. At that point in the process, Meek, the Democrat, would have been the next eliminated; Meek received only 20.2% of the vote, compared to Crist's 29.7%.<sup>82</sup> If the redistribution of Meek's ballots would have given Crist a majority (because Meek's voters presumably preferred Crist to Rubio, running to the right of Crist), then Crist would have won the election as a result of the Instant Runoff procedure.

In this respect, Maine's Instant Runoff Voting system functions similarly to California's top-two system. It permits a more moderate candidate, like Crist, to run as an independent against a more conservative Republican, like Rubio, and as long as this more moderate candidate can come in second place among first-choice preferences, this more moderate candidate can pull ahead in the final round by gaining the support of more liberal voters whose first-choice candidate has been eliminated and who would prefer a more moderate candidate rather than a conservative. The final round of the Instant Runoff process, in other words, is essentially the mathematical equivalent of California's elimination of all other competitors except the two top finalists.

Alaska's new version of Instant Runoff Voting has not yet been put into effect, but in theory it should be even more conducive to independent centrist candidates than Maine's version. Because four candidates reach the general election ballot by

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*Lisa Savage*, ME PUB. (Oct. 21, 2020, 11:53 AM), <https://www.mainepublic.org/politics/2020-10-21/green-party-presidential-candidate-comes-to-maine-in-support-of-lisa-savage>.

<sup>80</sup> See, e.g., Emily Cochrane, *Voting System in Maine Threatens Collins in Final Days of Close Senate Race*, N.Y. TIMES, <https://www.nytimes.com/2020/11/01/us/politics/susan-collins-sara-gideon-maine.html> (Nov. 3, 2020).

<sup>81</sup> *Election 2010: Florida*, N.Y. TIMES (2010), <https://www.nytimes.com/elections/2010/results/florida.html>.

<sup>82</sup> *Id.*

competing against each other in a nonpartisan primary, a centrist candidate need only finish among the top four in the primary. (As in California's nonpartisan primary, each voter chooses only one candidate to advance to the general election.) Once on the general election ballot, the centrist candidate need only avoid being one of the first two candidates eliminated in the Instant Runoff procedure and, by being preferred over a more extreme candidate by a majority of voters, can end up winning.

Pundits already have observed how Alaska's new system can help Lisa Murkowski fend off a Trumpian challenge on her right when she runs for reelection in 2022.<sup>83</sup> Murkowski is likely to easily place among the top four in the nonpartisan primary. Then, even if she has fewer first-choice votes than her Trumpian challenger, she can win the Instant Runoff process if voters who rank the other finalists first prefer her to the Trumpian. She would pick up those ballots as result of the Instant Runoff redistributions, and end up with a majority of ballots, outpacing the Trumpian.<sup>84</sup>

But, to be clear, Instant Runoff Voting does not always cause a centrist candidate, like Murkowski, to prevail.<sup>85</sup> Neither Maine's version nor Alaska's guarantee that a more moderate candidate, even if preferred by a majority of voters when compared to each other candidate in the election, will win. We have already seen this point illustrated with the hypothetical example involving Portman. The Trumpian won with the Instant Runoff Procedure because Portman was eliminated first, having received only 20% of first-choice votes; after redistribution of the Portman-first ballots, the Trumpian beat the Democrat, 55%–45%.

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<sup>83</sup> Lee Drutman, *There's a Reason Why Lisa Murkowski Can Threaten to Leave the Republicans*, WASH. POST (Jan. 9, 2021), <https://www.washingtonpost.com/politics/2021/01/09/theres-reason-why-lisa-murkowski-can-threaten-leave-republicans/>.

<sup>84</sup> One survey of Alaska's voters shows how this would happen. In the survey, Murkowski is the first choice of 36%, and the Trump-endorsed candidate Kelly Tshibaka the first choice of 27%. When the Instant Runoff process is emulated in the survey, Tshibaka pulls slightly ahead of Murkowski 40%–39% after one candidate (Joe Miller, Murkowski's Tea Party opponent in 2020) is eliminated; but then, when the Democrat is eliminated in the second (and final) round of the Instant Runoff process, Murkowski ends up back on top with 55% to Tshibaka's 45%. See Matt Buxton, *Poll: Murkowski Would Win Hypothetical Four-Way Race Under Ranked Voting*, MIDNIGHT SUN (Aug. 2, 2021), <https://midnightsunak.com/2021/08/02/poll-murkowski-would-win-hypothetical-four-way-race-under-ranked-voting/>.

<sup>85</sup> Indeed, some recent public opinion polls suggest that Murkowski herself might struggle to prevail in 2022 even with instant runoff voting. She is polling behind both her Trumpian challenger and a potential Democratic candidate, putting her in a position comparable to Raffensperger. See Henry Olsen, Opinion, *How Democrats Could Win Alaska's Senate Seat Thanks to Ranked-Choice Voting*, WASH. POST (June 16, 2021, 2:28 PM), <https://www.washingtonpost.com/opinions/2021/06/16/how-democrats-could-win-alaskas-senate-seat-thanks-ranked-choice-voting/> (noting that it is still most likely that the Trumpian candidate will win, if Murkowski ends up in third place among first-choice votes).

This outcome occurs using the Instant Runoff procedure, even though Portman still would have beat the Trumpian one-on-one among Ohio general election voters. As we have previously seen using the rankings in Table 1, without the Democrat in the race, Portman would get 60% of votes: the 20% who rank him first, plus the 40% who rank the Democrat first but who also prefer Portman to the Trumpian. Likewise, Portman would beat the Democrat 60%–40% in a head-to-head matchup. Thus, the Instant Runoff Voting procedure—like California’s top-two system—fails to identify the candidate who beats all others head-to-head and who thus is the candidate most preferred by a majority of the electorate.

Even when there are four candidates competing in the Instant Runoff procedure, as with Alaska’s system, the same problem can arise. Consider a state that leans red, but not too far. A traditionally conservative Republican would tend to beat a typical Democrat one-on-one and definitely would trounce a farther-left Democrat from the progressive wing of the party (the “AOC” wing). In this red-leaning state, if forced to choose between a Trumpian and a progressive Democrat, the November voters would pick the Trumpian. But given the choice between the Trumpian and a more moderate (conventionally liberal) Democrat, like Joe Biden, the state’s voters would choose the Democrat. Still, the state’s November voters would prefer the more moderate (traditionally conservative) Republican, who would beat all the others in one-on-one matchups.

Given this political complexion of the state’s electorate, use of Alaska’s top-four nonpartisan primary likely would yield a general election ballot with these four choices: a Trumpian, a traditional conservative, a center-left liberal, and a farther-left progressive. While a top-four primary avoids “base” voters sending only the Trumpian and the progressive to the November general election, the polarization that is occurring among voters themselves is likely to cause the Trumpian and the progressive candidates to receive more first-choice votes using ranked-choice ballots than either the traditional conservative or the moderate liberal candidates. In this case, the use of the Instant Runoff Voting procedure to select the winner from the ranked-choice ballots can cause the Trumpian to prevail, even though the voters would have preferred the traditional conservative.

We can show this more clearly with the rankings listed in Table 2.

**Table 2: Hypothetical ranked preferences of all voters in a “leans red” state**

% of voters	1st choice	2nd choice	3rd choice	4th choice
31	Trumpian	Conservative	Liberal	Progressive
14	Conservative	Trumpian	Liberal	Progressive
10	Conservative	Liberal	Trumpian	Progressive
5	Liberal	Conservative	Progressive	Trumpian
15	Liberal	Progressive	Conservative	Trumpian
25	Progressive	Liberal	Conservative	Trumpian



With these preferences, Instant Runoff Voting first eliminates the Liberal candidate, who has the fewest first-choice votes, 20%. The ballots listing Liberal first are redistributed, three-quarters of them (15% of the total) going to the Progressive candidate and one-quarter of them (5% of the total) going to the Conservative candidate. As a result of this redistribution, Progressive now has 40% and Conservative now has 29%, with Trumpian still at 31%.

At this point in the Instant Runoff procedure, the Conservative is eliminated with the lowest number of votes, and the Conservative's ballots are redistributed according to the remaining rankings on those ballots. Only those ballots that ranked Liberal first, but Conservative above Progressive, which amounted to just 5% of all ballots, now get redistributed to Progressive instead of Trumpian. The rest of the ballots that had ranked Conservative above either Trumpian or Progressive, which amounted to 29% of the total ballots, prefer Trumpian to Progressive and thus get redistributed to Trumpian. This round of redistribution leaves Trumpian with 55% to 45% for Progressive. Thus, Trumpian wins the Instant Runoff election.

Instant Runoff Voting produces this victory for the Trumpian even though the traditional Conservative candidate would have beaten the Trumpian head-to-head. From the rankings in Table 2, only 31% of voters—those that rank Trumpian first—prefer Trumpian to Conservative. All the other voters, 69%, prefer Conservative to Trumpian. In this way, Instant Runoff Voting causes the Trumpian candidate to defeat a more moderate Conservative, who is preferred by a majority of voters when compared to each of the other candidates including the Trumpian. (Based on the rankings in Table 2, the Conservative would defeat the Liberal 55%–45% and the Progressive 60%–40%.)

Although an improvement over the existing plurality-winner system, Instant Runoff Voting—even in its Alaska version with a nonpartisan primary leading to four finalists—comes up short. It is not the method that necessarily makes the winner the candidate most preferred by a majority of voters. Even more crucially, it can defeat the preference of a majority by awarding victory to a Trumpian candidate who would be rejected by a majority of voters in favor of a traditional conservative, and by giving victory to the Trumpian rather than the traditional conservative jeopardize the ongoing operation of democracy itself.

Given this attribute of Instant Runoff Voting, it is necessary to keep searching for alternative electoral methods.

#### *D. Approval Voting*

St. Louis, Missouri, for its mayoral elections, has recently adopted another type of electoral system.<sup>86</sup> Called “approval voting,” it permits voters to choose more than

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<sup>86</sup> Rachel Lippmann, *St. Louis Gears Up for First Election Using Approval Voting*, ST. LOUIS PUB. RADIO (Mar. 1, 2021, 6:41 AM), <https://news.stlpublicradio.org/government-politics->

one candidate at the same time. In contrast to ranked-choice ballots, approval voting does not require—or enable—voters to rank candidates in order of preference. Instead, approval voting simply allows voters to declare each candidate as acceptable or unacceptable, in a kind of pass-fail system, with each candidate approved by a voter receiving one equally weighted vote in that candidate's favor. Approval voting then straightforwardly adds up all the votes each candidate receives.<sup>87</sup>

St. Louis uses approval voting for its nonpartisan primary. The two candidates with the most votes in the primary, based on this procedure, then move to the general election. St. Louis thus has an electoral system similar to California's top two system, except that St. Louis substitutes approval voting for California's conventional single-vote procedure in the nonpartisan primary.

The one and only mayoral election that St. Louis held using this new system seems to have been a procedural success,<sup>88</sup> but it is too early to tell how well this system would work in statewide elections. One can imagine this system giving more moderate candidates, who appeal to a broad cross-section of voters, the opportunity to be one of the top two vote-getters in the primary. Democrats in Georgia, for example, might cast "approval" votes for Brad Raffensperger even as they also vote for the Democrat. Similarly, had approval voting been the system for Florida's 2010 U.S. Senate race, perhaps a large number of both Republicans and Democrats would have cast approval votes for Charlie Crist even as they also cast votes for either Rubio, the Republican nominee, or Meek, the Democrat. If approval voting worked this way, it would enable a moderate consensus-building candidate to move onto the general election, where that candidate would have a good chance of winning a majority of votes against whichever other opponent was also on the November ballot.

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issues/2021-03-01/st-louis-gears-up-for-first-election-using-approval-voting; Nathaniel Rakich, *In St. Louis, Voters Will Get to Vote for as Many Candidates as They Want*, FIVETHIRTYEIGHT (Mar. 1, 2021, 6:00 AM), <https://fivethirtyeight.com/features/in-st-louis-voters-will-get-to-vote-for-as-many-candidates-as-they-want/>.

<sup>87</sup> See STEVEN J. BRAMS & PETER C. FISHBURN, *APPROVAL VOTING* 3 (Springer Science+Business Media 2d ed. 2007) (1983).

<sup>88</sup> Mark Schlinkmann, *Jones Showed Broad Support in St. Louis Mayoral Primary, While Spencer Was Lifted by High Turnout Wards*, ST. LOUIS POST-DISPATCH (Mar. 4, 2021), [https://www.stltoday.com/news/local/govt-and-politics/jones-showed-broad-support-in-st-louis-mayoral-primarywhile-spencer-was-lifted-by-high/article\\_8d82a3ab-3f8f-5d77-bfd4-45795ad4af0b.html](https://www.stltoday.com/news/local/govt-and-politics/jones-showed-broad-support-in-st-louis-mayoral-primarywhile-spencer-was-lifted-by-high/article_8d82a3ab-3f8f-5d77-bfd4-45795ad4af0b.html). ("It functioned just as it was supposed to – candidates with truly broad approval move from the primary to the general election," said Kathleen Farrell, a League of Women Voters official who took part in the effort.") In a survey after the primary, 60% said that they cast approval votes for more than one candidate. See Mark Schlinkmann, *Poll Shows Jones, Spencer Running Close in Mayoral Race*, ST. LOUIS POST-DISPATCH (Mar. 8, 2021), [https://www.stltoday.com/news/local/govt-and-politics/poll-shows-jones-spencer-running-close-in-mayoral-race/article\\_1d6b4b59-447c-5b02-868d-0686f385fcb4.html](https://www.stltoday.com/news/local/govt-and-politics/poll-shows-jones-spencer-running-close-in-mayoral-race/article_1d6b4b59-447c-5b02-868d-0686f385fcb4.html) [hereinafter Schlinkmann, *Poll*].

But as promising as approval voting might seem, it has potential pitfalls. It is obviously susceptible to strategic manipulation. If voters want to make sure that their most-preferred candidate will prevail, they will withhold a second “approval” vote from a consensus candidate they might admire.<sup>89</sup> Thus, even if in Ohio many Republicans and Democrats approve of Senator Portman’s performance in office, Republicans wanting to replace Portman with a Trumpian might refrain from casting a second approval vote for Portman. Likewise, Democrats wanting to replace Portman with one of their own might also deny Portman a second approval vote. In this case, approval voting would fail to elect Portman as the winner even though a majority of Ohioans would prefer him to either the Trumpian or the Democrat.

While approval voting is worth considering, it remains prudent to keep looking for other possible options as well.

### III. ROUND-ROBIN VOTING: AN ALTERNATIVE TO TRY

Theoretically, in a multicandidate election, sometimes—even often<sup>90</sup>—there is a candidate who is preferred by a majority of voters when compared one-on-one to every other candidate in the field. In this respect, this singularly majority-preferred candidate beats all others in head-to-head competition. Portman is that candidate in Table 1, and similarly, the traditionally conservative Republican is that candidate in Table 2.

Yet, as we have seen, existing electoral systems—including both versions of Instant Runoff Voting adopted in Maine and Alaska—can fail to elect this singularly majority-preferred candidate. These systems can elect a Trumpian even when a majority of voters would prefer a traditionally conservative Republican, like Portman. This frustration of the majority’s preference would be bad enough in a democracy, given the goal of serving the will of the electorate. But it is especially problematic when the Trumpian wing of the Republican Party, unlike its traditionally conservative wing, is not sufficiently committed to the enterprise of democracy itself to guarantee its sustained existence if Trumpians are able to gain power despite being opposed by a majority.

Given this problem, and especially its urgency, why not design an electoral system that directly identifies—and thus elects—the candidate who prevails in a series of one-on-one matchups against all the other competitors?<sup>91</sup> We are familiar

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<sup>89</sup> In a survey of voters participating in the St. Louis election, of the 38% who cast only one “approval” vote despite the opportunity to cast more, 24% of these voters said they confined their choice to a single candidate because “voting for more than one would hurt the chances of their favorite.” Schlinkmann, *Poll, supra* note 88.

<sup>90</sup> THOMAS SCHWARTZ, *CYCLES AND SOCIAL CHOICE: THE TRUE AND UNABRIDGED STORY OF A MOST PROTEAN PARADOX* 34–37 (2018) (cycling less frequent than theory might suggest); see also GERRY MACKIE, *DEMOCRACY DEFENDED* (2003).

<sup>91</sup> For an earlier inquiry along these lines, see Eric Maskin & Amartya Sen, *Opinion, How*

with that kind of competition from sports. It is a round-robin tournament, in which each entrant (team or individual, depending on the sport) competes against each other entrant, with the scores of these head-to-head matches tallied to determine standings among the competitors. World Cup Soccer, for example, uses an initial round-robin tournament to determine which teams will advance to the final elimination-round of the competition.<sup>92</sup> Other examples abound, including the initial “pool” stage of fencing tournaments and various Olympic sports.<sup>93</sup>

In an election, it would be possible to replicate the round-robin format precisely by asking voters to pick the winner of each head-to-head matchup between two of the candidates. For example, a voter’s ballot could pose the head-to-head matchup between Conservative and Liberal, and then ask the voter which of these two candidates does the voter prefer. The ballot could do the same for each of the head-to-head matchups among all the candidates in the competition: Conservative versus Progressive, Progressive versus Trumpian, Trumpian versus Liberal, and so forth. If there are four candidates in the round-robin competition—Trumpian, Conservative, Liberal, and Progressive—there is a total of six head-to-head matchups.

While a ballot constructed in this way would have the advantage of focusing each voter on the round-robin nature of the competition (comparing each pair of candidates head-to-head), the process would take more space on the ballot—and time to complete it—than is typical in an election. In effect, there would be six races for a voter to vote on, not just one. And if the number of candidates increases from four to five, then the number of head-to-head matchups in the round-robin tournament jumps from six to ten.<sup>94</sup>

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*Majority Rule Might Have Stopped Donald Trump*, N.Y. TIMES (Apr. 28, 2016), <https://www.nytimes.com/2016/05/01/opinion/sunday/how-majority-rule-might-have-stopped-donald-trump.html>; see also Eric Maskin & Amartya Sen, *The Rules of the Game: A New Electoral System*, N.Y. REV. BOOKS (Jan. 19, 2017), <https://www.nybooks.com/articles/2017/01/19/rules-of-the-game-new-electoral-system/>; Eric Maskin & Amartya Sen, *A Better Electoral System in Maine*, N.Y. TIMES (June 10, 2018), <https://www.nytimes.com/2018/06/10/opinion/electoral-system-maine.html> (comparing Instant Runoff Voting with a version of ranked-choice voting aimed at identifying the Condorcet winner in an election if and when one exists). In addition to these articles aimed at a general audience, one can explore the more theoretical work of Maskin and Sen on the design of electoral systems. See, e.g., ERIC MASKIN & AMARTYA SEN, *THE ARROW IMPOSSIBILITY THEOREM* (2014). For a useful background on the history of this field, see GEORGE G. SZPIRO, *NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT* (2010).

<sup>92</sup> *Round Robin Tournaments*, MATCH PLAY HANDBOOK, <https://matchplay.events/handbook/round-robin> (last visited July 11, 2022).

<sup>93</sup> E.g., Kathryn Atwood, *Your First Tournament – Part Two: Pools*, SOCAL DIV. OF USA FENCING (Apr. 6, 2018), <http://www.socaldivision.org/your-first-tournament-part-two-pools/>.

<sup>94</sup> The general formula for determining the number of matches in a round-robin tournament for any given “n” number of competitors is  $n(n-1)/2$ . ROBERT J. BARCELONA, MARY SARA WELLS

But it is also possible to construct the round-robin competition from the same type of ranked-choice ballots used for Instant Runoff Voting. We saw this when we compared candidates head-to-head using the rankings listed in Tables 1 and 2. Given each voter’s rankings among all candidates, one can tabulate all the head-to-head matchups between each pair of candidates by examining which of these two candidates was preferred over the other on each voter’s ballot.

For example, using the rankings in Table 2, we can construct this six-match round-robin tournament among the four candidates:

**Table 2a: Head-to-head outcomes using hypothetical ranked preferences of all voters in a “leans red” state**

Matchup	Winner	W %	Loser	L %	W Margin
Trumpian v. Conservative	Conservative	69	Trumpian	31	38
Trumpian v. Liberal	Liberal	55	Trumpian	45	10
Trumpian v. Progressive	Trumpian	55	Progressive	45	10
Conservative v. Liberal	Conservative	55	Liberal	45	10
Conservative v. Progressive	Conservative	60	Progressive	40	20
Liberal v. Progressive	Liberal	75	Progressive	25	50

From these round-robin results, we can compute these standings for the four candidates:

**Table 2b: Standings from head-to-head matchups using hypothetical ranked preferences of all voters in a “leans red” state**

Candidate	Wins	Losses	Total Votes For	Total Votes Against	Vote Diff.	Total Win/Loss Margin
Conservative	3	0	184	116	68	38+10+20=68
Liberal	2	1	175	125	50	10-10+50=50
Trumpian	1	2	131	169	-38	-38-10+10=-38
Progressive	0	3	110	190	-80	-10-20-50=-80

Based on these standings, Conservative obviously is the strongest candidate in this round-robin competition. Not only does Conservative win all three head-to-head matchups against the other candidates, but Conservative’s total “vote differential”—the total percentages in favor of Conservative in these three matchups minus the total percentages in favor of Conservative’s opponents—is higher than any other candidate. (A candidate’s total “vote differential” is also the sum of the candidate’s margin of victory, or margin of defeat expressed in negative numbers, from all of the matchups.)

But it will not always be the case that a candidate wins all the head-to-head matchups in the round-robin competition. Just as in a soccer, fencing, or other sports tournaments, every competitor may have some number of defeats as well as victories. It is even possible that no single competitor has a better win–loss record than all opponents in the round-robin matchups. In that case, it is possible to break ties in the standings by turning to each candidate’s net total score. Something like this occurs in soccer tournaments, where goals for and against are used to break ties when teams are tied based on teams’ win–loss records.<sup>95</sup> The same is true for the round-robin portion of fencing tournaments, when points for and against are used when bouts won and lost are tied.<sup>96</sup>

To illustrate how this would work in an election, consider this more complicated set of ranked-choice ballots in a competition among the same four candidates:

**Table 3: New hypothetical ranked preferences of all voters in a “leans red” state**

# of voters	1st choice	2nd choice	3rd choice	4th choice
20	Trumpian	Conservative	Liberal	Progressive
11	Trumpian	Progressive	Conservative	Liberal
14	Conservative	Trumpian	Liberal	Progressive
10	Conservative	Liberal	Trumpian	Progressive
5	Liberal	Conservative	Progressive	Trumpian
15	Liberal	Progressive	Conservative	Trumpian
10	Progressive	Liberal	Conservative	Trumpian
11	Progressive	Liberal	Trumpian	Conservative
4	Progressive	Trumpian	Liberal	Conservative

The main difference between these rankings and those in Table 2 is that the two ends of the political spectrum here bend towards each other in the sense that a portion of voters who rank Trumpian first now rank Progressive second, and vice versa. Think, in other words, about how Bernie Sanders and Trump were somewhat popular with each other’s voters. Although from opposite ends of the political spectrum, they shared populist traits that to some extent differentiated them from either moderate conservatives or liberals more towards the center.<sup>97</sup>

<sup>95</sup> INT’L FOOTBALL ASS’N BD., *LAWS OF THE GAME 2021/22*, at 87, 168 (2021), <https://downloads.theifab.com/downloads/laws-of-the-game-2021-22?l=en>.

<sup>96</sup> Atwood, *supra* note 93.

<sup>97</sup> See Danielle Kurtzleben, *Here’s How Many Bernie Sanders Supporters Ultimately Voted for Trump*, NPR (Aug. 24, 2017, 2:53 PM), <https://www.npr.org/2017/08/24/545812242/1-in-10-sanders-primary-voters-ended-up-supporting-trump-survey-finds>.

With these new rankings in Table 3, we can compute these round-robin results:

**Table 3a: Head-to-head outcomes using new hypothetical ranked preferences of all voters in a “leans red” state**

Matchup	Winner	W%	Loser	L%	W Margin
Trumpian v. Conservative	Conservative	54	Trumpian	46	8
Trumpian v. Liberal	Liberal	51	Trumpian	49	2
Trumpian v. Progressive	Trumpian	55	Progressive	45	10
Conservative v. Liberal	Conservative	55	Liberal	45	10
Conservative v. Progressive	Progressive	51	Conservative	49	2
Liberal v. Progressive	Liberal	64	Progressive	36	28

These round-robin results, in turn, yield these standings among the four candidates:

**Table 3b: Standings from head-to-head matchups using new hypothetical ranked preferences of all voters in a “leans red” state**

Candidate	Wins	Losses	Total Votes For	Total Votes Against	Vote Diff.	Total Win/Loss Margin
Liberal	2	1	160	140	20	2-10+28=20
Conservative	2	1	158	142	16	8+10-2=16
Trumpian	1	2	150	150	0	-8-2+10=0
Progressive	1	2	132	168	-36	-10+2-28=-36

Liberal and Conservative are tied in terms of their win–loss record, with two wins and one loss apiece. But Liberal has a higher total “vote differential” than Conservative, 20 compared to 16. What this means, in terms of the preference of voters, is that Liberal’s majorities were larger on average than Conservative’s.

One could declare Liberal the winner of the election based on this tiebreaking higher net score. But it would be better to make this round-robin competition the primary phase of the election, with a final face-off between the top two candidates as determined by the round-robin standings, in this case Liberal and Conservative. Indeed, if the preferences of voters remain the same from the primary to the general election (and assuming turnout also remains the same), then Conservative would beat Liberal in their November matchup, 55–45. In any event, as with the use of round-robins for the first stage of a sports tournament, to be followed by a second

stage of direct competition between finalists determined from the round-robin competition, it makes sense to have a second round of direct competition in the November general election between the two strongest contenders in the round-robin matchups.

In this respect, the use of the round-robin competition would be a variation on California's top-two nonpartisan primary system. Instead of the simple primary that California currently conducts, in which each voter chooses only one candidate among all the contenders on the ballot, this nonpartisan round-robin primary would have voters rank their preferences among candidates as the basis for constructing the round-robin of head-to-head matchups. (Alternatively, the primary ballot could actually ask voters to complete all of these round-robin matchups themselves, despite the extra space and time this would take.) The two candidates moving on to the November general election ballot would be the top two candidates as determined by the round-robin standings, rather than the two candidates with the most first-choice votes, which is the case according to the current California system.<sup>98</sup>

Use of this kind of round-robin competition for the nonpartisan primary, rather than California's current method, makes a big difference. Given the rankings in Table 3, employing California's current system would send Trumpian and Progressive on to the November general election ballot, as they are the two candidates with the highest number of first-choice votes: 31% for Trumpian and 25% for Progressive (compared to 24% for Conservative and 20% for Liberal). By contrast, the round-robin competition among the four candidates identifies the other two, Liberal and Conservative, as the two strongest. These two have the broadest support, winning majorities of votes more often in head-to-head matchups than either Trumpian or Progressive. Liberal and Conservative each have 2–1 win–loss records, whereas Trumpian and Progressive both have 1–2 win–loss records, indicating that these latter two were rejected by majority of voters more often than Liberal or Conservative. Likewise, the higher total vote differentials in the round-robin for Liberal and Conservative, compared to Trumpian and Progressive, indicate how much larger their majority support among voters.

The existing California system thus identifies the two candidates with the most enthusiasm as a result of an increasingly polarized electorate. The Trumpian and Progressive generate greater intensity of support and thus the higher number of first-choice preferences among voters, which is what the California nonpartisan primary captures. But the round-robin primary, while including those first-choice preferences as part of its calculation, also captures what all the voters think about all the candidates when compared against each other. More robust in this way, it is a better

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<sup>98</sup> How candidates qualify for the ballot in a round-robin primary is addressed in a separate paper focusing specifically on the details of implementing this innovative method of election. See Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*, 2021 WIS. L. REV. 1187.



reflection of what a majority of voters want—and thus less susceptible to the artificially distorting effect of increased polarization.

Round-robin competition also reflects the will of the majority better than Instant Runoff Voting. Given the preferences of voters in Table 3, Trumpian again would win using Instant Runoff calculations. As with Table 2, the Instant Runoff procedure would first eliminate Liberal, who has the smallest number of first-choice votes. After redistribution, Conservative again would be eliminated next, and the final round of the Instant Runoff math would show Trumpian prevailing over Progressive, 55–45. But as we have already seen, both Liberal and Conservative beat Trumpian head-to-head, given the preferences in Table 3. A majority of voters, in other words, would prefer either Liberal or Conservative over Trumpian, and yet Instant Runoff Voting declares Trumpian the winner. The round-robin competition, based on the same voter preferences, produces a result more consonant with majority rule, by identifying both Liberal and Conservative as stronger candidates, measured either by win–loss record or total vote differentials.<sup>99</sup>

Although actual operation would be the proof, round-robin voting is more likely to work better than approval voting in identifying the majority preferences of voters. As we have seen, approval voting is subject to a significant risk of strategic manipulation. While round-robin voting might also be subject to this risk to some extent, it is likely to be less insofar as voters are willing to provide their genuine rank-order preferences among candidates, rather than indicating simple up-or-down approval or disapproval of them. In any event, round-robin voting, like approval voting, needs to be tested in practice in order to make a definitive assessment on this point.<sup>100</sup>

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<sup>99</sup> It is also possible to construct a hybrid electoral system that combines attributes of Instant Runoff Voting and Round-Robin (or Condorcet) Voting. Known as “Bottom-Two Runoff” or BTR Voting, this hybrid would identify the two candidates with the fewest first-place votes and, between these two, eliminate the one who loses their head-to-head (round-robin) matchup. This system would then redistribute the ballots that ranked this eliminated candidate first to whichever candidate is ranked next. The system would continue this process until one candidate reached a majority. For an illustration of BTR Voting, see Ohio State Univ. Moritz Coll. L., *supra* note 14. A potential advantage of BTR Voting is that, for those jurisdictions considering Instant Runoff Voting in light of the move by Maine and Alaska to that system, BTR would be a small change in the “instant runoff” procedure, and yet this small change would yield the significant benefit of always causing a Condorcet winner (defined as the candidate who wins all round-robin matches based on ranked-choice ballots) to prevail in the election.

<sup>100</sup> The so-called “Coombs method” would be yet another way to achieve majority winners that states could consider. The Coombs method is similar to Instant Runoff Voting except instead of eliminating candidates who are ranked first by the fewest number of voters, the Coombs method eliminates candidates who are ranked last by the largest number of votes. In this way, the Coombs method knocks out candidates whom a majority of voters strongly oppose being elected. See Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (a.k.a. the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUDS. 641 (2004).

#### IV. CONGRESS SHOULD REQUIRE EXPERIMENTATION OF MAJORITY-WINNER SYSTEMS

Given all of the above, there is a clear and urgent problem with no indisputably single best solution. The danger of Trumpian extremism is not dissipating after January 6 but instead growing ever more apparent, and the risk of Trumpian candidates winning elections even when they are not the preferred choice of a majority of voters is very real and dangerous for democracy. Not only would these Trumpian winners hold office—and wield power—despite not being candidates the electorate most wanted to win, but the Trumpian hostility to free and fair elections itself, especially the unwillingness to count ballots as cast, makes Trumpian officeholders wielding power in opposition to the will of a majority an especially grave threat to the future of American democracy.<sup>101</sup>

Despite this danger being readily apparent, no single solution is so obviously the correct remedy that it should be adopted everywhere to the exclusion of all other options. California's top-two system and either version of Instant Runoff Voting, Maine's or Alaska's, are clearly preferable to the existing system of partisan primaries followed by plurality-winner general elections. But, as we have seen, California's system as well as both versions of Instant Runoff Voting are all vulnerable to the same flaw of letting a candidate prevail even when a majority of voters would prefer, even strongly prefer, another candidate running in the same election. St. Louis-style approval voting and the innovative proposal of round-robin voting, as described above, both have the potential of overcoming this vulnerability, but neither has been tested to know for sure.

In this context, the best interim solution is experimentation. Let states be the laboratories of democracy, as Justice Brandeis famously said. If some states were to adopt the proposed round-robin system, while other states were to try approval voting for a statewide rather than a citywide election, the experience of these states could be measured against other states using California's version of a top-two system—because both the round-robin system as proposed and St. Louis-style approval voting are more sophisticated variations of California's basic approach: having a nonpartisan primary send the two strongest candidates to battle each other in the November general election. At the same time as some states experiment with these different varieties of a nonpartisan primary leading to a top-two general election, other states can continue to experiment with different versions of Instant Runoff Voting, like Maine's and Alaska's. A decade or two of robust experimentation with all these different alternatives to the currently prevailing, but distinctly inferior, system of partisan primaries followed by a plurality-winner general election will yield

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<sup>101</sup> On the urgent need to combat the current threat of Trumpian extremism, see Richard H. Pildes, *How to Keep Extremists Out of Power*, N.Y. TIMES (Feb. 25, 2021), <https://www.nytimes.com/2021/02/25/opinion/elections-politics-extremists.html>.

evidence on which particular system, or systems, is most conducive for the continuing capacity of American democracy to reflect the will of the voters.

Congress can easily facilitate this experiment, simply by requiring states to elect members of Congress by majority, rather than plurality, winners. Congress undoubtedly has the power to adopt this requirement, pursuant to Article I, Section 4 of the Constitution, which entitles Congress to prescribe the procedures for congressional elections.<sup>102</sup> If Congress did adopt this requirement, states currently using plurality-winner general elections—which is most of them—would need to make the switch to some form of majority-winner system. But as long as Congress required only that the winner in November receive a majority of votes, states would remain free to choose the particular form of majority-winner system they preferred. This freedom would enable states collectively to conduct a natural experiment among the various acceptable alternatives, including California’s top-two system, various permutations of Instant Runoff Voting, St. Louis-style approval voting, round-robin voting, and perhaps others as well. All of these different systems produce a majority winner in November, which is why all of them are preferable to the plurality-winner system, and why all of them would pass muster under this proposed congressional legislation. The experiment would then determine which of these various majority-winner systems might prove most successful and durable, or whether perhaps a variety of different majority-winner systems ought to remain long-term, as their different features may suit different states in a federalist system.

The statute that Congress would need to draft in order to adopt this requirement could be extraordinarily short and straightforward. Its provisions need not be hardly more elaborate than this:

Section 1: For any election to a seat in Congress, the winning candidate shall receive a majority of votes in the November election.

Section 2: To implement the requirement set forth in section 1, states may choose either (a) to use conventional single-preference ballots, on which voters mark only a choice for their most preferred candidate, and to hold the election in more than one stage, in order that the final stage is confined to two candidates from whatever larger set of candidates appeared on the ballot at any earlier stage; or (b) to hold an election, of however many stages the state chooses, using ballots that permit voters to rank their preferences among candidates, from which a final result may be calculated mathematically that yields a single winning candidate preferred by a majority of voters.

The first section establishes the basic rule. By requiring a majority of votes specifically in the November election itself, it rules out the use of a subsequent runoff to

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<sup>102</sup> Article I, Section 4 of the Constitution explicitly provides: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .”

guarantee that the eventual winner reaches a majority of votes. The reason for Congress to preclude post-November runoffs is that turnout drops off precipitously, whereas the November general election—being the main event—secures the highest possible turnout.<sup>103</sup> The will of the electorate's majority should be determined when the largest portion of eligible voters are participating.

The second section of this draft statute then clarifies that the majority of votes, sufficient to win the congressional election, can be identified either by conventional ballots—on which the voters makes a single choice among two alternatives—or ranked-choice ballots, with a mathematical formula (either Instant Runoff Voting, round-robin voting, or some other) used to ascertain a candidate preferred by a majority of votes to whichever other candidate is the runner-up using the particular mathematical formula. A state that chooses to employ conventional ballots in November to select a winner between two candidates will obviously need to have some preliminary stage of the process to narrow the field to these two finalists. This preliminary stage, as we have seen, could be California's simple nonpartisan primary, or it could be a St. Louis-style approval voting primary, or it could be an innovative round-robin voting primary. Similarly, a state that uses ranked-choice ballots for its November election would have options in how to construct the primary election that determine which candidates are on the November ranked-choice ballot. It could be a partisan primary, as in Maine, or a nonpartisan primary, as in Alaska; the state could choose to use ranked-choice ballots for the primary, as Maine does, or conventional ballots for the primary, like Alaska.<sup>104</sup>

Congress should consider it a high priority to pass this straightforward statute. It should not be especially controversial. In fact, Congress passed a version of it once before, in 1866.<sup>105</sup> That version, however, applied only to Senate and not House elections, and it governed when U.S. Senators were elected, not by a popular vote of citizens, but by state legislatures. There had been a problem of some state legislatures letting plurality winners prevail in U.S. Senate elections, when the legislatures were split among three or more candidates, with none having a majority. Congress,

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<sup>103</sup> See generally Stephen G. Wright, *Voter Turnout in Runoff Elections*, 51 J. POL. 385 (1989).

<sup>104</sup> It should be clear from the language of the proposed statute that "a majority of voters" who prefer the winning candidate over the runner-up in Instant Runoff Voting may be fewer than the majority of voters who cast ballots in the election, because some voters may decline to rank as many candidates as on the ballot. In a separate paper, I explain why a majority of votes, whenever two candidates are compared head-to-head based on ranked ballots, qualifies as a form of majority rule, equivalent to a majority vote in a legislature despite a number of abstentions that make the majority vote less than a majority of all members. See Foley, *supra* note 98, at 1209. Here, it suffices to say that if additional clarity is needed on this point, extra language can be added to the statute to remove any possible ambiguity.

<sup>105</sup> Act of July 25, 1866, ch. 245, 14 Stat. 243; WENDY J. SCHILLER & CHARLES STEWART III, *ELECTING THE SENATE: INDIRECT DEMOCRACY BEFORE THE SEVENTEENTH AMENDMENT* 7–8 (2015).

therefore, required state legislatures to adopt a procedure to assure that Senate candidates reach a majority, and not just a plurality, of votes in order to be elected. This version of a congressionally mandated majority-vote requirement, however, became obsolete when Seventeenth Amendment to the U.S. Constitution transferred the authority to elect U.S. Senators from state legislatures to a state's citizens.

Congress now should resuscitate the majority-winner requirement, making it applicable to popular-vote elections. It could confine the requirement again to Senate elections. The reason to limit the rule in this way would be to leave open the possibility that Congress might adopt some form of proportional representation system, like the Fair Representation Act, for House elections, in which case a majority-winner rule would be inapposite.<sup>106</sup> But the better course would be to make the majority-winner requirement applicable to House as well as Senate election for as long as House districts are subject to the single-member rule. If and when the House ever moves to multimember districts with some form of proportional representation, at that point Congress could limit the majority-winner requirement just to Senate elections. It could do so with the most minor of changes in the proposed draft language, replacing "Congress" with "the Senate" in section 1.

## CONCLUSION

There is a small change that Congress could make to the procedures for congressional elections that would have a major positive effect. Rarely is there an opportunity to produce so much benefit with so little effort. Indeed, because most Americans already believe congressional elections are governed by the rule that the modest change would put in place, this reform imposes no burden of disrupting the public's expectations about how elections ought to work.

The change would be to require a candidate to receive a majority of votes in the November general election to win a seat in Congress. That's all. The change would conform to expectations that democratic elections embody the principle of majority rule. Yet because in most states a majority of votes is not required, but merely a plurality, this simple rule change would induce states to determine for themselves what particular version of a majority-winner system they wish to adopt. That state-by-state process, in turn, would catalyze a natural experiment among 50 laboratories of democracy as to which versions of majority-winner systems are most effective in translating voter preferences into government policies. This natural experiment would be intrinsically valuable for American democracy, given its current shortcomings in its capacity to serve the collective will of the citizenry. Moreover, a congressional requirement of majority winners would be especially salutary at this

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<sup>106</sup> See Lee Drutman, *The Case for Proportional Voting*, NAT'L AFFS., Winter 2018, at 50.

moment in combatting the anti-democracy extremism that has overtaken the Republican Party and thus threatens the ongoing health of electoral competition in America.

Traditionally conservative Republicans, like Rob Portman of Ohio or Roy Blunt of Missouri, are a dying breed, soon to be replaced by Trumpian enthusiasts. But it does not need to be this way. In fact, it should not be this way—if the majority of voters in the relevant states were able to have their preferences prevail.

The existing electoral system, however, does not let the true preferences of the majority prevail. Instead, it distorts those preferences, resulting in victory for Trumpian candidates when the majority would have wanted the traditionally conservative GOP candidate to win. This distortion, moreover, is not inevitable. Congress has the power to enact a simple majority-winner requirement that would cause states to change their electoral rules in ways that would reduce the risk of this type of distortion. Traditionally conservative Republicans in Congress, like Portman and Blunt themselves, should see it in the interest of their wing of the GOP to adopt this simple change.

Democrats in Congress, moreover, should see it in their own party's interest—as well as in the public interest generally—to adopt this simple majority-winner rule in order to maximize the chances that the responsible wing of the Republican Party wards off the challenge from the insurgent Trumpian wing. If the Trumpian wing were just the Tea Party 2.0, the calculus for Democrats might be different. Let the GOP veer too far to the right in its own primaries, Democrats might think in a self-serving way, because that would make it easier to defeat extreme candidates in a general election.

If only ideology were at stake, that might be a rational calculus. But the existence of democracy itself is at risk—because the Trumpian wing of the GOP is not merely the Tea Party 2.0. Instead, a defining attribute of being Trumpian, which at its core requires loyalty to Trump himself, requires embracing the anti-democratic and authoritarian premise that votes must be counted to produce the result Trump desires, not what the ballots themselves show or what the voters want.

Democrats, if they care about their country as they profess to do, must want to save democracy first and win elections for their own party's candidates second. They must want to strengthen the traditional wing of the Republican Party for two reasons. First, because the traditional wing of the Republican Party—as represented by Liz Cheney—actually believes in counting ballots as cast and holding elections in order to determine the will of the voters. Second, because the traditional wing of the Republican Party, rather than the Trumpian wing, would prevail in many elections if the system were designed to determine the actual preference of the majority of voters, rather than letting the distorting effect of partisan primaries and plurality-winner general elections produce a winner different from what the majority of voters actually want.

American democracy cannot survive without healthy two-party competition in which both major parties embrace the basic premise that the result of elections should reflect what the majority of voters actually want. Right now, this kind of two-party competition is threatened as much as it has ever been in the nation's history, at least since the Civil War and its aftermath in the nineteenth century. Congress needs to meet the challenge of this moment by passing a simple majority-winner requirement that will significantly reduce the risk that elections can be won by a faction within a party hostile to the very idea that the will of the majority should prevail.