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## THE NOMINATION AND ELECTION OF STATEWIDE CANDIDATES

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*The standard system of statewide elections for governor and U.S. senator, among other offices, deserves a thorough overhaul. The collection of signatures by candidates to qualify for the ballot, currently confined to antiquated pen-and-paper technology, can be modernized and put online so that it can function as a kind of “approval voting” system that yields a reasonable number of candidates (five, for example) for a primary election ballot. Likewise, online party conventions can enable parties to endorse candidates before the primary occurs and to have their endorsed nominees qualify for the government’s “All Qualified Candidates Primary” ballot. Moreover, innovative forms of Ranked Choice Voting—like “Optimal Tournament Voting”—can be used to identify the two candidates on the primary ballot most suitable to advance to the general election, with suitability for this purpose determined by which candidates are most representative of the whole electorate.*

*Alternatively, even without ranked-choice ballots, the mathematical principles and procedures of Optimal Tournament Voting can be used to create a “top three” general election, in which voters directly express their preferences between each pair of the three candidates who advance to the general election—from an All Qualified Candidates Primary in which voters select the single candidate they most prefer, and the three candidates with the most votes in the primary qualify for the general election ballot. Moreover, whether the general election has two or three finalists on the ballot, “fusion voting” can be employed in the general election to permit parties whose nominees are not one of the finalists to renominate whichever finalist they prefer. States should experiment with these innovative alternatives and other variations along the same lines so that elections for statewide offices, like governor or U.S. senator, will produce winners who are the candidates most preferred by a majority of the electorate’s voters.*

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## I. INTRODUCTION

The theory and practice of democracy are challenged by the task of selecting a single choice from multiple options. When there are only two alternatives, the basic tenets of democracy settle quickly upon the principle of majority rule: whichever of the two alternatives is preferred by a majority must prevail. Whether this principle of majority rule is derived with mathematical rigor, as in May’s Theorem, or instead follows philosophically from the idea that all adult citizens in a democracy must have equal voting rights, it is readily apparent that to let the minority prevail over the majority is to make those in the minority count for more than those in the majority.<sup>1</sup>

To be sure, a constitution may cordon off certain fundamental rights, so they are not trammled upon by majority rule.<sup>2</sup> But with respect to those matters that are put to a vote of the citizenry, like whether to elect candidate A or B, the candidate whom more than half the voters prefer must prevail over the candidate whom fewer than half favor. Even when the margin between the two candidates is as narrow as can be, with one receiving just one more vote than the other, victory must go to the slightly larger share. Otherwise, the votes of the smaller

1. See CHARLES BEITZ, *POLITICAL EQUALITY* 58–67 (1989); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 138–44 (1989).

2. See STEVEN LEVITSKY & DANIEL ZIBLATT, *TYRANNY OF THE MINORITY* 145–46 (2023); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 321 (2014).

number carry greater weight than the votes of the marginally more numerous group, thereby violating the essential precept of voter equality.<sup>3</sup>

But when there are three or more options for voters to choose from, determining the will of the majority can become problematic. No single option may be the preference of a majority. For example, 40% may prefer A, 35% may prefer B, and 25% may prefer C.

What is worse, no single option may be preferred by a majority even when separately compared one-on-one against each other option. Whenever an election does have a single candidate that a majority of voters prefer when compared one-on-one against each of the others, a strong argument rooted in basic democracy theory exists that this candidate ought to win the election. This kind of majority-preferred candidate is known in the field of social choice as a “Condorcet winner,” named after the eighteenth-century French thinker who focused on the concept, the Marquis de Condorcet.<sup>4</sup> But, alas, it is possible that an election has no candidate who satisfies the condition of being a Condorcet winner, as Condorcet himself well understood.<sup>5</sup>

For example, suppose using ranked-choice ballots, we know that these are the preferences of voters among all three options:

TABLE 1

% of voters	first choice	second choice	third choice
40	A	B	C
35	B	C	A
25	C	A	B

3. Cf. MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE 161–62 (2014) (discussing debate on supermajority voting requirements for constitutional rules).

4. See Edward B. Foley, *The Constitution and Condorcet: Democracy Protection Through Electoral Reform*, 70 DRAKE L. REV. 543, 547 (2023), and works cited therein on Condorcet. This article is not the place to defend the proposition that a Condorcet winner, when one exists, should hold the office in question as a result of the election. There are those who argue that a weak Condorcet winner, one whom few voters support enthusiastically but whom many are willing to accept as a compromise backup, is not well-suited to holding office—and that the electorate would be served by awarding the office to an alternative candidate. See, e.g., *Why the Condorcet Criterion Is Less Important than It Seems*, FAIRVOTE (Aug. 10, 2010), <https://fairvote.org/why-the-condorcet-criterion-is-less-important-than-it-seems/> [https://perma.cc/N25K-44UA]. This debate will be taken up in a separate piece of the overall project of which this article will form a part.

5. There is an important empirical issue of how frequent—or infrequent—is this theoretical possibility of no Condorcet winner. See, e.g., NICLAS BOEHMER & NATHAN SCHAAR, COLLECTING, CLASSIFYING, ANALYZING, AND USING REAL-WORLD ELECTIONS 21 (Jan. 9, 2023) (finding that 86% of elections have a Condorcet winner). For purposes of this Article, the key point is that the government needs to adopt some electoral system that will yield a definitive winner, and therefore it is not enough for the electoral system to declare that a candidate who is a Condorcet winner mathematically is entitled by law to be declared the official winner of the election. Instead, it is necessary for the government to adopt a complete electoral system that will award the office to a candidate when no Condorcet winner exists (even assuming that the law will award the electoral victory to an existing Condorcet winner). The alternative options analyzed in this article aim at assessing what may be the optimal way to handle this contingency.

If we compare A and B one-on-one, we see that a majority of voters (65%) prefer A to B. If we compare B to C one-on-one, an even larger majority (75%) prefer B to C. But when we compare C to A, we now have a majority, albeit narrower (60%), preferring C to A.

Each option, in other words, is preferred by a different majority of voters. B's majority may be the largest, but it is still true that more voters prefer A to B. Therefore, maybe A should win the election. Yet more voters prefer C to A, and so maybe C should win. But, again, more voters prefer B to C, and we see that we are stuck in an endless cycle rather like the game of Rock, Paper, Scissors.

There is no obvious way to break this cycle. We could award the election to the candidate who is most often preferred by voters, when compared to each of the other opponents. Here, this candidate is B, who is preferred over C by 75% and preferred over A by 35%. This metric, which best captures the average preference of all voters with respect to all candidates (since the largest total preference, divided by the number of voters, is the largest average preference), is known in the literature of electoral science as a candidate's "Borda score"—named after the eighteenth-century French theorist who proposed it, Jean-Charles de Borda, who was Condorcet's contemporary and intellectual rival.<sup>6</sup>

But it can be difficult to see why B should prevail over A. Especially if C is knocked out of contention, and the election comes down to a choice between A and B, then 65% of voters prefer A to B, and it seems that A rather than B should win. Moreover, there is good reason to knock C out of contention as the weakest candidate. Not only does C have the fewest first-choice votes, but C is the least preferred candidate overall—the one with the lowest Borda score. Only 60% prefer C to A, and only 25% prefer C to B. Thus, maybe the majority-preference cycle should be broken by knocking out C (even though a majority prefers C to A) and letting A prevail over B by a majority vote.<sup>7</sup>

With respect to elections for seats in a legislative chamber (other than the U.S. Senate, as will be discussed in what follows), it would be possible to sidestep this problem of potential cycling of electoral majorities through a system of proportional representation. In our example, if A, B, and C are political parties rather than individual candidates, the electoral system could award 40% of the legislative seats to Party A, 35% of seats to Party B, and 25% of seats to Party C. To be sure, the legislative chamber itself would need to operate by majority rule, and there would be the risk that votes in the legislative chamber would be subject to the same sort of majority cycling. But parliamentary procedure can handle the cycling of legislative majorities by rules that determine the order in which proposals to alter the status quo are considered.<sup>8</sup>

Some might argue that the purest form of representative democracy is a single legislative chamber elected by proportional representation, in which case

6. See, e.g., H. PEYTON YOUNG, *EQUITY IN THEORY AND PRACTICE* 37 (1994) (defining the Borda score).

7. See *infra* Section IV.B.

8. See Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1002 (1989). Elections for the chair of a legislative chamber, like Speaker of the House, need their own rules for handling the risk of majority cycling.

the problem of majority cycles can be confined to its parliamentary context.<sup>9</sup> But whether or not that argument deserves to be persuasive, it is not how representative democracy is practiced in the United States among many other places.<sup>10</sup> The governor of each state in the United States is a separately elected office, and this statewide election for a single officeholder cannot be subject to proportional representation.<sup>11</sup> The same point is true of other offices elected statewide, including for each state's two U.S. Senators.<sup>12</sup>

Thus, the potentiality of majority cycling cannot be avoided for gubernatorial and other statewide elections. The question then becomes how best to deal with this. And to answer this question, it is worth thinking about the totality of the electoral process, including the nomination of candidates entitled to be on the ballot, as well as the specific procedures that elect the single statewide officeholder from those candidates who do qualify to be on the ballot.

There are also other issues besides the risk of majority cycling to consider in the overall design of the electoral system, as will become apparent throughout the discussion that follows. One of these, for example, is the potential problem of strategic voting—in other words, the deliberate distortion of a voter's true preferences in order to produce results different from what the system is designed to achieve.<sup>13</sup> Thus, even in the case where there would be a sincere Condorcet winner that would avoid the problem of majority cycling, a voting procedure that aims to elect this sincere Condorcet winner into office may produce in practice the opposite result because of its susceptibility to strategic manipulation by candidates (and their supporters) seeking to defeat this sincere Condorcet winner.<sup>14</sup>

An electoral procedure also might be too complicated for ordinary voters to comprehend—a serious problem in a system of collective self-government by all adult citizens. Or tabulation of ballots might be too time-consuming or cumbersome for election officials to handle efficiently and reliably from one election to the next—another important practical concern to consider. Moreover, asking voters to provide input at too many stages of an overall electoral process (for example, not just a primary and general election but also separate runoffs for either or both) may be an unrealistic expectation when voters lead busy lives with lots of demands on their time besides the obligation to indicate their electoral preferences over and over again. This last point relates to the potential problem of too many candidates wishing to run for the elective office at stake. How many

9. See *id.* at 979.

10. See Levmore, *supra* note 8, at 972 n.4.

11. Jack Santucci, Matthew Shugart & Michael S. Latner, *Sources of Change: Toward a Different Kind of Party Government—Proportional Representation for Federal Elections*, PROTECT DEMOCRACY (Oct. 16, 2023), <https://protectdemocracy.org/work/toward-a-different-kind-of-party-government/> [<https://perma.cc/A95L-PSNA>]; *Electoral System*, BALLOTPEDIA, [https://ballotpedia.org/Electoral\\_system](https://ballotpedia.org/Electoral_system) (last visited Apr. 20, 2024) [<https://perma.cc/DR5N-PTFV>].

12. Presidential elections are different, given the Electoral College system; each state's presidential electors could be elected proportionally. See *Electoral System*, *supra* note 11.

13. Levmore, *supra* note 8, at 988–89.

14. See François Durand, *Coalitional Manipulation of Voting Rules: Simulations on Empirical Data*, 34 CONST. POL. ECON. 390, 390 (2023).

candidates should be eligible to vie for the voter's expression of support, and how often should voters be asked to winnow the field of candidates to some smaller number before a single winner is declared victorious?

With these general issues in mind, it is time to dive into details.

## II. A TWO-CANDIDATE-ONLY NOVEMBER GENERAL ELECTION?

Should the totality of the electoral process be structured so that it ends with a final "general election"—held in November by tradition—that has only two candidates on the ballot for the specific statewide office at stake (governor or U.S. Senator, for instance)? The idealized conception of a two-party electoral system is intended to operate this way. Each of the two parties nominates its own most preferred candidate from among its internal contenders, and then these two nominees face off against each other in the November general election.<sup>15</sup>

This two-party electoral system, by confining the November choice to just two options, solves the cycling problem. At least, it does with respect to the November general election. The question of what method the parties use to select their nominees potentially raises the risk of cycling majorities among their own internal contenders for each party's nomination. Moreover, the winner of this two-candidate-only November general election is mathematically guaranteed to receive a majority. Theoretically, there could be an exact tie, but that's extraordinarily unlikely in a statewide election involving many thousands, and sometimes even millions, of votes for each candidate. Absent a tie, the one candidate who has more votes than the other necessarily will have a majority, over 50%, of the votes cast in this specific election.

The fundamental normative premise of this idealized two-party system is that it is appropriate to limit the November general election to just two candidates in this way. If some third candidate would like to be in contention, with a spot on the ballot along with the nominees of the two parties, the response from defenders of the two-party system is: "Sorry, but you should have secured one of the two parties' nominations; if you can't win either party's nomination, then you don't deserve a spot on the November general election ballot."

In this system, the two parties are supposed to be gatekeepers to the November general election ballot. One of their essential roles is to serve this gatekeeping function.<sup>16</sup> The two parties, in other words, are supposed to organize electoral competition so that it falls inside either of two large political tents, one left-of-center and the other right-of-center.<sup>17</sup> The result, in theory, is the

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15. See generally RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* (1969); JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM I* (1973); ALAN WARE, *THE DYNAMICS OF TWO PARTY POLITICS 6* (2009); William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 *AM. POL. SCI. REV.* 753, 756 (1982).

16. See JOHN ALDRICH, *WHY PARTIES?* 57 (2011). The Supreme Court has interpreted the Constitution to permit the final round of an electoral system to be confined to just two candidates, as long as the penultimate round is open to more than two candidates. See *Storer v. Brown*, 415 U.S. 724, 728 (1982); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 447–48 (2008).

17. See *Storer*, 415 U.S. at 728.

November general election comes down to a choice between the strongest left-of-center candidate and the strongest right-of-center candidate, and a majority of voters get to decide which of the two sides of the political divide gets to control the office at stake for the next term, until it is time to hold a new election for the same office.<sup>18</sup>

The problem is that this idealized conception of two-party electoral competition is not performing in practice as expected. Currently, each party uses a primary election to nominate its candidate for the general election, and these partisan primary elections are widely perceived as producing unrepresentative and inadequate options for the general-election voters.<sup>19</sup> A common complaint is that these partisan primaries skew each party's nominee towards the more extreme ends of the political spectrum.<sup>20</sup> Contenders for the party's nomination must cater to the "base" of the party's supporters within the electorate, according to this argument.<sup>21</sup> The "base" arguably tends to be more divergent from the middle of the electorate than what the average voter, perhaps even the average member of each party, prefers.<sup>22</sup> Even if the two partisan primaries exactly match each half of the overall electorate, if the winner of each partisan primary corresponds to the median voter in each primary, then the two primary winners will diverge significantly from the median of the overall electorate. Moreover, under conditions of increasing polarization, the further away the median voter of each primary is from the median voter of the overall electorate; in turn, the further away from the general election's median voter are the winners of the two primaries.<sup>23</sup>

As a result of this skewing effect of partisan primaries in a two-party system, voters in the November general election are given two choices, neither of which corresponds very well to what the majority of voters—or the November election's median voter in particular—wants. In the 2022 midterms, this skewing was especially pronounced on the Republican, and thus right-of-center, side.<sup>24</sup> In primary after primary, Republicans nominated a more extreme candidate, catering to the party's base.<sup>25</sup> Then, in the general election, that more extreme candidate lost, being too distant from the state's median voter, although in many instances the median voter would have preferred a more moderate Republican over

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18. *See id.*

19. *The Primary Problem*, UNITE AM., <https://primaryproblem.uniteamerica.org> (last visited Apr. 20, 2024) [<https://perma.cc/W5D6-PMNF>].

20. *Id.*

21. *See* Joseph Bafumi & Michael C. Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 530 (2010).

22. *Id.* at 519.

23. Nathan Atkinson, Edward B. Foley & Scott Ganz, *Beyond the Spoiler Effect: Can Ranked-Choice Voting Solve the Problem of Political Polarization*, 2024 U. ILL. L. REV. (forthcoming 2024).

24. Colby Itkowitz, "Mainstream and Not Extreme": Far-Right Candidates, Views Rejected in Key Battlegrounds, WASH. POST (Nov. 14, 2022, 10:35 PM), <https://www.washingtonpost.com/politics/2022/11/14/republicans-far-right-midterms/> [<https://perma.cc/EAR6-WBJ6>].

25. *Id.*

the Democrat who was elected.<sup>26</sup> But the median voter could not elect the more moderate Republican, instead of the Democrat, because the more moderate Republican was defeated in the partisan primary. New Hampshire's 2022 U.S. Senate election is a particularly illustrative example.<sup>27</sup> Also, even when the more extreme Republican nominee did manage to win the general election, the median November voter would have preferred a more moderate Republican who was defeated in the primary. Ohio's 2022 U.S. Senate election exemplifies this.<sup>28</sup>

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26. Jonathan Weisman & Katie Glueck, *Extreme Candidates and Positions Came Back to Bite in Midterms*, N.Y. TIMES (Nov. 14, 2022), <https://www.nytimes.com/2022/11/14/us/politics/gop-far-right-election-voters.html> [<https://perma.cc/J78D-F588>].

27. In New Hampshire's 2022 U.S. Senate election, a far-right election denier, Don Bolduc, narrowly won the Republican primary against a traditionally institutionalist Republican, Chuck Morse, who was president of the state senate. Henry J. Gomez, *Don Bolduc Wins New Hampshire's GOP Senate Primary*, NBC NEWS PROJECTS, NBC NEWS (Sept. 13, 2022, 3:30 AM), <https://www.nbcnews.com/politics/2022-election/new-hampshires-senate-primary-offers-one-last-gop-slugfest-rcna47273> [<https://perma.cc/VMX9-34QF>]. In the general election, Bolduc lost to the Democrat, incumbent Senator Maggie Hassan. Dustin Jones, *Democrat Maggie Hassan Keeps Senate Seat in New Hampshire, Beating GOP's Don Bolduc*, NPR (Nov. 8, 2022, 11:42 PM), <https://www.npr.org/2022/11/08/1131261458/hassan-bolduc-nh-senate-results> [<https://perma.cc/6K87-39AX>]. But there is good reason to believe that if Morse rather than Bolduc had been the GOP nominee, the Republican would have won the seat. The reason is that in the same election the state's Republican governor, Chris Sununu, a moderate who endorsed Morse in the primary and ridiculed Bolduc for his extremism, beat the Democrat 57%-42%, whereas Hassan beat Bolduc only 54%-44%. *New Hampshire Governor Election Results*, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-new-hampshire-governor.html> [<https://perma.cc/7SNK-GJE7>]. These numbers show a large group of Sununu-Hassan ticket-splitters (about 14%). Even if less than half of these ticket-splitters would have voted for Morse instead of Hassan if they had been given that option instead of Bolduc, then Morse rather than Hassan would have won. See Aaron Blake, *The Worst Candidates of the 2022 Election*, WASH. POST (Nov. 30, 2022, 1:42 PM), <https://www.washingtonpost.com/politics/2022/11/30/worst-candidates-2022-election/> [<https://perma.cc/89UV-P67G>].

28. Trump-endorsed election denier J.D. Vance beat Tim Ryan, the Democrat, in the general election by 6 points: 53-47. Ximena Bustillo, *Trump-Backed J.D. Vance Wins Senate Seat in Ohio Over Democrat Tim Ryan*, NPR (Nov. 8, 2022, 11:23 PM), <https://www.npr.org/2022/11/08/1131246060/ohio-senate-tim-ryan-vance-results> [<https://perma.cc/L97J-XDXY>]. But other statewide Republican candidates who were not nearly as extreme as Vance, like Ohio's governor Mike DeWine, won their races by about 20 points or more. See *id.* (reporting results for Attorney General, Auditor, and Secretary of State in addition to Governor). In the Republican primary, Matt Dolan distanced himself from Trump and ran against Vance as much less extreme. Ally Mutnick, *Cleveland Browns Owners Take Sides in Senate GOP Primary*, POLITICO (Aug. 23, 2023, 2:02 PM), <https://www.politico.com/news/2023/08/23/cleveland-browns-ohio-gop-senate-primary-00112452> [[perma.cc/G3VJ-4ZV2](https://perma.cc/G3VJ-4ZV2)]. There is little doubt that Dolan would have beaten Ryan by a margin much larger than Vance's, closer to the other statewide races on the ballot that year. Moreover, as between Dolan and Vance, there is no doubt whatsoever that Ohio's median voter would have preferred Dolan: all of Ryan's supporters would have favored the less extreme Dolan over Vance, along with the significant portion of GOP voters who also would have preferred the less extreme Republican.

The same point can be made about North Carolina's 2022 U.S. Senate election. Another Trump-endorsed election denier, Ted Budd, won narrowly. *North Carolina U.S. Senate Election Results*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-north-carolina-us-senate.html> [<https://perma.cc/JD66-VS8Z>]. But Budd's opponent in the Republican primary, former governor Pat McCrory who was much more moderate than Budd and thus lost the Trump-dominated primary, would have beaten the Democrat in the general election by a greater margin. Undoubtedly, too, North Carolina's Democrats—who were almost able to elect their own candidate—would have preferred McCrory to Budd, and so McCrory not Budd would have been more representative of the state's median voter.

U.S. House of Representatives elections also suffer from the same effect. A clear example from 2022 is Arizona's second congressional district. There, another Trump-endorsed election denier candidate, Eli Crane, won the primary against a more traditionally institutionalist, Walter Blackman, who accepted the validity of President Biden's 2020 victory. *Arizona Second Congressional District Primary Election Results*, N.Y. TIMES



The same situation can happen in reverse. Democrats in their party's primary can nominate a candidate too extreme for the general election's median voter, causing the Republican nominee to win in November, even though the majority of November voters would have preferred to elect a more moderate Democrat instead of the Republican nominee. In this case, the primary process on the left-of-center side of the spectrum prevents the majority in November from electing its most preferred candidate. Wisconsin's 2022 U.S. Senate election arguably was a version of this.<sup>29</sup>

This effect of partisan primaries, pulling each party's nominees away from the center and towards the opposite poles of the political spectrum, has led to calls for reforming the procedures by which primary elections are conducted.<sup>30</sup> In particular, there have been calls for reforms that would make sure that candidates must win a majority of votes within a party's primary in order to win the party's nomination.<sup>31</sup> Because primaries often have several candidates (and not just two)—especially in elections when no incumbent is running for reelection—when the rule is that a candidate needs to receive only more votes than any other candidate in the primary to win the nomination, it is easy for a candidate to become the party's nominee with as few as 30% of the votes, and sometimes even fewer.<sup>32</sup> Because it is possible that this winning plurality of votes comes from the most extreme faction within the party, a plurality-winner rule for a primary election can exacerbate the primary's polarizing effect. Consequently, the hope of reformers is that requiring candidates to win a majority, rather just a plurality, of votes within a primary in order to secure the party's nominations can counteract at least some of a primary election's polarizing tendencies.

But reforming the procedures for conducting partisan primaries may not be the panacea that some have expected.<sup>33</sup> Even if partisan primaries produce nominees that perfectly correspond to the preferences of each primary's median

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(Aug. 10, 2022, 10:10 PM), <https://www.nytimes.com/interactive/2022/08/02/us/elections/results-arizona-us-house-district-2.html> [<https://perma.cc/6W3J-NPQ6>]. Crane went on to win the general election in a Republican district that would not elect a Democrat. See Bustillo, *supra*. But the general election voters in that district would have preferred to elect the more moderate Blackman as their representative to Congress, rather than the much more extreme Crane.

29. Mandela Barnes, a progressive, won the Democratic primary and then lost the general election to Wisconsin's extreme Republican senator, Ron Johnson. Taurean Small, *Expert Breaks Down Johnson's Win Over Barnes in Wisconsin*, SPECTRUM NEWS NY1 (Nov. 10, 2022, 5:12 PM), <https://ny1.com/nyc/all-boroughs/politics/2022/11/10/senator-johnson-s-campaign-came-out-on-top--but-why-> [<https://perma.cc/5bkx-95cc>]. But that same year, the state's moderate Democratic governor, Tony Evers, won reelection. Molly Beck, Katelyn Ferral & Madeline Heim, *Wisconsin Gov. Defeats to Win Second Term in 2022 Midterm Election*, MILWAUKEE J. SENTINEL (Nov. 9, 2022, 12:23 AM), <https://www.jsonline.com/story/news/politics/elections/2022/11/09/tony-evers-defeats-tim-michels-in-2022-wisconsin-governor-election/69597058007/> [<https://perma.cc/XW4G-CR6U>]. Had the state's Democrats nominated a moderate in the mold of Evers, rather than a progressive like Barnes, they would have had a better chance of defeating the extremist Johnson.

30. See Edward B. Foley, *How Our System of Primary Elections Could Destroy Democracy*, WASH. POST (May 19, 2022, 4:25 PM), <https://www.washingtonpost.com/opinions/2022/05/19/primary-elections-majority-vote/> [<https://perma.cc/6VJV-CBAC>].

31. *Id.*

32. *Id.*

33. See ROBERT G. BOATRIGHT, REFORM AND RETRENCHMENT (forthcoming 2024).

voter, in a two-party system the two nominees may diverge quite sharply from the preferences of the general election's median voter.<sup>34</sup> The majority of Republicans really may want a much more right-leaning candidate, while the majority of Democrats really may want a candidate who leans much more to the left. In many states, such as Arizona, there will be a large group of voters who consider themselves independents, rather than either Republicans or Democrats, and will be dissatisfied with the two nominees that the Republicans and Democrats genuinely want.<sup>35</sup> A two-party system that limits the general election to just the two party's nominees cannot redress this dissatisfaction among independents by perfecting the procedures for the two parties' primaries. Indeed, it is the very limitation of the general election to only two candidates who perfectly reflect what adherents of the two parties want that is precisely what causes these independent voters to be dissatisfied.<sup>36</sup>

It would be possible to address this dissatisfaction of independents while still having the general election boil down to a dichotomous choice between only two candidates through the use of a contingent runoff procedure like the kind most prominently on display recently in Georgia's 2020 and 2022 U.S. Senate elections.<sup>37</sup> Under a contingent runoff procedure, if no candidate receives a majority of votes in the regular November general election, then the two candidates with the most votes move on to a subsequent runoff election between just the two of them.<sup>38</sup> This type of runoff procedure would allow an independent candidate appealing to independent voters to qualify for the November general election.

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34. See Foley, *supra* note 30.

35. Renee Romo, *Independents, with a Lowercase i, Are Now Arizona's Biggest Voter Group*, CRONKITE NEWS (Aug. 31, 2023), <https://cronkitenews.azpbs.org/2023/08/31/independents-with-a-lowercase-i-are-now-arizona-biggest-voter-group/> [<https://perma.cc/N3R4-PXCN>]. Arizona's 2024 U.S. Senate election clearly illustrates the problem. The Democrats, wanting a more progressive nominee, made it clear that incumbent Kirsten Sinema would lose her (former) party's primary forced Sinema to become an independent. Ed Kilgore, *Kari Lake vs. Kyrsten Sinema Is Already 2024's Wildest Senate Race*, INTELLIGENCER (Sept. 28, 2023), <https://nymag.com/intelligencer/2023/09/lake-sinema-2024-senate-race.html> [<https://perma.cc/AE7B-UB43>]. The MAGA-dominated Republican primary will nominate one of their own far-right candidates. Sinema may attempt to represent the middle by running to retain her seat as an independent. But given the degree of partisan polarization, even if there are many Arizona voters in the middle, there may not be enough for Sinema to win a conventional three-way race between her Democratic and Republican opponents. Early polling suggests that she would come in third behind the other two, although she still would win a significant percentage of the electorate, perhaps even more than a quarter. *Id.*; Jeremy Duda, *Swing Voters Largely Back Sinema for Senate, but Support Gallego Over Lake*, AXIOS (Nov. 13, 2023), <https://www.axios.com/local/phoenix/2023/11/13/kyrsten-sinema-election-polls-arizona> [<https://perma.cc/Z7GX-5YTG>].

36. Joe Manchin's decision not to seek reelection to his Senate seat, and instead explore the possibility of creating a third-party movement for the middle of the electorate, is further indication that the polarization of the two major parties has left a widening gap in the center, with its voters wishing to be represented by someone other than a candidate of the left or the right. Manchin's announcements follow earlier recent efforts in this same vein, including Andrew Yang's creation of a centrist Forward party and the No Labels group's effort to achieve ballot access for a centrist presidential ticket. Andrew Desiderio & John Bresnahan, *The Erosion of the Senate's Dealmaking Middle*, PUNCHBOWL NEWS (Nov. 10, 2023), <https://punchbowl.news/article/joe-manchin-forgoes-reelection-senate-middle-erodes/> [<https://perma.cc/6J5V-2LQ9>].

37. Joseph Ax, *Georgia's Top Election Official Calls for End to Runoffs in the State*, REUTERS (Dec. 14, 2022), <https://www.reuters.com/world/us/georgias-top-election-official-calls-end-runoffs-state-2022-12-14/> [<https://perma.cc/L3M7-VX2R>].

38. See *id.*

Competing in this November election against the nominees of the two parties, the independent candidate would at least have a shot at receiving more votes than at least one of these party nominees and thus make it to the runoff.<sup>39</sup> Once in the runoff, the independent would then have a chance to beat the other candidate one-on-one. For example, if Arizona had this type of runoff procedure, incumbent Senator Krysten Sinema—now an independent, rather than a Democrat—with enough support among the state’s independent voters conceivably could dislodge either the Democratic or Republican nominee and then win the runoff against the other opponent.<sup>40</sup>

The drawbacks of this kind of runoff, however, are well known. They are expensive and time-consuming, requiring the government to administer a whole new round of voting.<sup>41</sup> Turnout tends to be much lower, as the obligation to cast another ballot is burdensome on voters who have multiple other demands on their time.<sup>42</sup> Accordingly, while a runoff has the advantage of making the election end with a vote guaranteed to produce a majority for the winning candidate (because the runoff has only two candidates on the ballot), its disadvantages are widely perceived as too great to justify its use.<sup>43</sup> Georgia, for example, is currently considering eliminating runoffs after their recent experiences with them.<sup>44</sup>

It is possible also to make the November general election function like a runoff. This is what California does with its nonpartisan “top two” primary, which sends two—and only two candidates—onto the November general election ballot.<sup>45</sup> This system allows an independent candidate to compete along with Democrats and Republicans in the nonpartisan primary and thus enables the independent to earn one of the two spots in the November general election if the independent is one of the two candidates with the most votes in the primary.<sup>46</sup> California’s system also avoids the extra expenses and time-consuming burdens of a separate runoff after the November general election, and consequently

39. See Duda, *supra* note 35.

40. Based on current polling, she is unlikely to be successful in this respect. But there is some evidence—and speculation—that Sinema, by moving to the center-right, might be able to pull ahead of a far-right candidate. Duda, *supra* note 35; Kilgore, *supra* note 35. If so, the Sinema would be able to force a runoff if Arizona used the kind of electoral system that Georgia does; and if Sinema did make it to a one-on-one runoff against the Democratic nominee, there is a good chance that the Republican voters who supported Lake would vote for Sinema in the runoff as being less objectionable than the Democrat, in which case Sinema would be able to win the election as the candidate most aligned with Arizona’s median voter.

41. *Runoff Election: An Explainer*, ROCK THE VOTE (Dec. 2, 2022), <https://rockthevote.org/explainers/runoff-elections-an-explainer/> [https://perma.cc/T6LQ-XEJS].

42. Stephen G. Wright, *Voter Turnout in Runoff Elections*, 51 J. POL. 385, 386 (1989). In Georgia’s 2022 U.S. Senate election, which was a particularly competitive and important race, turnout in the regular general election was 56.9%, whereas turnout for the runoff was 50.5%, according to the Georgia Secretary of State’s Data Hub. *Compare Data Hub—November 8, 2022 General Election*, GA. SEC’Y OF STATE, <https://sos.ga.gov/data-hub-november-8-2022-general-election> (last visited Apr. 21, 2024) [https://perma.cc/HX3X-PDTW], *with Data Hub—December 6, 2022 Runoff*, GA. SEC’Y OF STATE, <https://sos.ga.gov/data-hub-december-6-2022-runoff> (last visited Apr. 21, 2024) [https://perma.cc/RHM4-6JBJ].

43. See Ax, *supra* note 37.

44. *Id.*

45. Washington State uses the same system, and its use survived a facial challenge in the U.S. Supreme Court. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 444 (2008).

46. See *id.*

California's system does not tend to suffer the same significantly reduced turnout problem generally associated with runoffs.<sup>47</sup> Thus, as between these two alternatives, the California system is a much better way to have an election end with just two candidates while still operating a process that gives independents a chance to compete against Democrats and Republicans.

But the California system is far from ideal. For one thing, as practiced in California itself, it can cause far too many candidates to appear on the nonpartisan primary ballot. In 2016, for example, there were 34 candidates on the ballot in California's nonpartisan primary for U.S. Senator.<sup>48</sup> In 2018, there were twenty-seven candidates for governor on the state's nonpartisan ballot.<sup>49</sup> These numbers are much too high to provide meaningful choices for voters. Ballot clutter can cause significant voter confusion and thus distort the democratic decision that voters make.<sup>50</sup>

Beyond the sheer confusion that ballot clutter can cause, California's use of a simple plurality to identify the two finalists who advance to the general election can have its own distorting effects. Suppose there are four Democrats who are serious contenders in the nonpartisan primary, but only two Republicans. Suppose the Democrats split 60% of all the votes in the primary, while the two Republicans split 40%. This 60%–40% ratio in favor of Democrats is hardly unreasonable in California, given its reputation as a “blue” state: Democratic governor Gavin Newsom won reelection against his Republican challenger by essentially this margin, 59.2%–40.8%.<sup>51</sup> But in this hypothetical example, if the four Democrats split their 60% share evenly, and the two Republicans do the same with their 40% share, then each Democrat will get 15% of the votes, and each Republican will get 20%. The result under California's “top two” system is that the two Republican candidates will advance to the November general election, and none of the Democrats will. That result, quite obviously, does not make any sense.

There ought to be a better procedure that winnows the field of primary contenders in a rational way so that the final choice between just two alternatives is a more meaningful contest that will yield a result reasonably in accord with what the state's median voter wants. A final choice between two Republican alternatives is obviously not consonant with the preferences of California's median voter. One main rationale for the two-party system is that each party's primary is supposed to conduct this rational winnowing process: the Democratic primary

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47. RICHARD BARTON, UNITE AM. INST., CALIFORNIA'S TOP TWO PRIMARY: THE EFFECTS ON ELECTORAL POLITICS & GOVERNANCE 19 (2023).

48. *United States Senate Election in California, 2016*, BALLOTPEdia, [https://ballotpedia.org/United\\_States\\_Senate\\_election\\_in\\_California\\_2016](https://ballotpedia.org/United_States_Senate_election_in_California_2016) (last visited Apr. 21, 2024) [<https://perma.cc/QR39-8BXG>].

49. *California Gubernatorial Election*, BALLOTPEdia, [https://ballotpedia.org/California\\_gubernatorial\\_election\\_2018](https://ballotpedia.org/California_gubernatorial_election_2018) (last visited Apr. 21, 2024) [<https://perma.cc/8KQM-FE9V>].

50. Spenser Mestel, *How Bad Ballot Design Can Sway the Result of an Election*, GUARDIAN (Nov. 19, 2019), <https://www.theguardian.com/us-news/2019/nov/19/bad-ballot-design-2020-democracy-america> [<https://perma.cc/6U8U-TKLN>].

51. *California Governor Election Results*, N.Y. TIMES (Dec. 20, 2020), <https://www.nytimes.com/interactive/2022/11/08/us/elections/results-california-governor.html> [<https://perma.cc/EK9N-PFGW>].

will pick the best Democrat among the four contenders, while the Republican primary will pick the better of the two GOP candidates. In November, then, all the state’s voters—including the median voter—will face a rational choice between a single Democrat and a single Republican.

Rational, yes, but now we are back with the system of the supposedly ideal version of two-party primaries picking the best Democrat and the best Republican, and only those two candidates on the November general election ballot, with no room for an independent (or the nominee of some third party).

Is there not some way to revise the California system so that it still ends with just two candidates on the November general election ballot, yet with a much better primary election that permits more options beyond just Democrats and Republicans and also does not yield the kind of ballot clutter or irrationality that bedevils California’s current system? Alternatively, should we dispense with the idea of ending the electoral process in November with a choice between only two alternatives, and instead open up the November general election to more than two candidates while recognizing that there will be no post-November runoff and thus the inevitable risk of fragmented or cyclical majorities in November?

### III. DESIGNING AN “ALL QUALIFIED CANDIDATES PRIMARY”<sup>52</sup>

There is no reason why an across-the-board primary election, involving candidates from more than two parties as well as independent candidates, must have twenty or more names running for the same office on the ballot. Instead, the primary reasonably may be limited to a handful of names, roughly five or so, giving voters a range of choices while keeping the choice manageable—and thus meaningful. What matters is the rules that determine which handful of candidates qualify for this across-the-board primary ballot. These rules must give all candidates seeking to run for the office a fair opportunity to become one of the candidates who qualify for a spot on the primary ballot.

The simplest version of a fair qualification process would be to require all candidates to satisfy the same minimum signature-gathering requirement. But signature-gathering need not be conducted with antiquated pen-and-paper technology. Instead, it would be possible to modernize signature-gathering by creating an online system of electronic signature-gathering.<sup>53</sup>

52. Danielle Allen has proposed something similar, calling it instead an “all comers preliminary” election. See Danielle Allen, *Our Democracy Is Menaced by Two Dragons. Here’s How to Slay Them.*, WASH. POST (July 20, 2023, 5:40 AM), <https://www.washingtonpost.com/opinions/2023/07/20/gerrymandering-electoral-college-solution-democracy/> [https://perma.cc/3ZLM-SNQ2].

53. Arizona is the one state, in addition to the District of Columbia, that has modernized signature-gathering through an online system in which registered voters can electronically sign a candidate’s petition to qualify for the ballot. *Welcome to E-Qual*, ARIZ. SEC’Y OF STATE, <https://apps.azsos.gov/equal/> (last visited Apr. 21, 2024) [https://perma.cc/G5QP-ULDN]; see also *Methods for Signing Candidate Nominating Petitions*, BALLOTPEDIA, [https://ballotpedia.org/Methods\\_for\\_signing\\_candidate\\_nominating\\_petitions](https://ballotpedia.org/Methods_for_signing_candidate_nominating_petitions) (last visited Apr. 21, 2024) [https://perma.cc/W3ZE-T9JK]. The effectiveness of Arizona’s innovative system, however, is limited by the fact that candidates wishing to appear on the ballot as the nominee of a new political party must first have their new party qualify for being recognized and the party’s qualification process requires old-fashioned pen-

No aspect of the overall electoral system is more mired in outdated technology than the signature-gathering process. In most places, candidates still must engage in the laborious (and thus potentially expensive) process of going door-to-door to have voters sign a paper version of a petition to become qualified to appear on the ballot.<sup>54</sup> These paper-based signatures must then be verified in another laborious process.<sup>55</sup>

Instead, the government could set up a website where all would-be candidates can file their petitions of candidacy and all registered voters can electronically sign any petition they wish. The issue of internet security is far different with respect to this kind of online electronic signature system than it would be for online voting. Because voting involves a secret ballot, the internet security concerns insurmountably preclude the possibility of online voting for the foreseeable future.<sup>56</sup> But signature-gathering, by definition, does not involve a secret ballot. Who signed which petitions is a matter of public record.<sup>57</sup> Thus, it is possible to assure the integrity of the signature-gathering process, to verify both that (a) the petition's signers are registered voters entitled to sign, and (b) the government's count of how many valid signatures a petition receives is an accurate count.<sup>58</sup>

In this way, the signature-gathering process can be made a lot less burdensome for candidates. While the government could still keep open the alternative of using paper-based signature-gathering to supplement the new online process, the expectation is that candidates (and voters) would move quickly to the online system to take advantage of its convenience. Candidates, for example, could use social media to send messages encouraging recipients of the message to click a link to sign their petition, and, if necessary, register to vote in order to be eligible to sign the petition. Campaign staff also could go door-to-door with smartphones or tablets to collect electronic signatures on the spot—the contemporary equivalent to old-fashioned neighborhood canvassing, thus making it unnecessary for those signing a candidate's petition to have their own personal internet access. The timeframe for gathering these electronic signatures could be generous, so that candidates have ample opportunity to spread their messages encouraging supporters to sign.

Given the convenience of this electronic signature-gathering system, it would not be inappropriate for the government to require a large number of signatures as the threshold to qualify for the primary ballot. If the aim would be for about five candidates to qualify, the threshold could be set, at least initially, at

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and-paper signature gathering. *Creating a Political Party*, ARIZ. SEC'Y OF STATE, <https://azsos.gov/elections/candidates/running-office/creating-political-party> (last visited Apr. 21, 2024) [<https://perma.cc/TC9K-RCDW>].

54. *See Internet or Online Voting Remains Insecure*, AM. ASS'N FOR THE ADVANCEMENT OF SCI., <https://www.aaas.org/epi-center/internet-online-voting> (last visited Apr. 21, 2024) [<https://perma.cc/3429-HAS4>].

55. *Id.*

56. *Id.*

57. *See id.*

58. *See id.* By contrast, online banking does not involve the same insurmountable security problem precisely because the bank's customers can retain their own records to verify what the bank reports as the contents of their accounts.

5% of registered voters. Although one might think that a 5% threshold might cause too many candidates to qualify, this is unlikely. In any event, if it turned out that more candidates qualified to be desirable, the threshold could be adjusted upward.

It would be a mistake to think that a high percentage to qualify for the primary ballot would be an inappropriate burden to impose on candidates. In a sense, this initial signature-gathering process to qualify for the ballot is the first stage of a multi-stage electoral process by which candidates must demonstrate adequate support to advance to the next stage. As long as any candidate can file a petition for candidacy and thus enter the system, where voters can find their name and petition on the government's website, there is no barrier to entry whatsoever. The only "burden" imposed is the obligation to secure enough support from voters to advance to the next stage of the process.<sup>59</sup>

In this respect, electronic signature-gathering is the functional equivalent of so-called "approval voting"—where voters can approve of as many candidates as they wish, rather than being limited to cast a single vote for just one candidate.<sup>60</sup> In a signature-gathering system, voters can sign the petitions of candidacy of as many candidates as they wish.<sup>61</sup> Thus, securing the support of just 5%, or even 10% if necessary, of voters is not too much to ask in order to earn a spot on the primary ballot, which should be limited to the serious contenders who reasonably have a chance of becoming one of the "top two" finalists on the November general election ballot. In other words, any candidate can enter the system simply by filing the petition of candidacy. But only the handful of candidates capable of generating serious support through the signature-gathering, or "approval voting," process deserve a spot on the next-stage "primary" ballot.

#### A. *A Role for Political Parties to Qualify Nominees for the Primary Ballot*

Although the immediately aforementioned system of how candidates qualify themselves for the primary ballot through electronic signature-gathering would be the simplest, it might not be the most sensible. As described above, there is no formal role for political parties in the process.<sup>62</sup> Rather, it is the candidates who earn their own spots on the ballot. To be sure, political parties could endorse their most preferred candidate, both before and after the ballot-qualification stage of the process. This kind of endorsement would signal a party's

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59. In *Jenness v. Fortson*, the Supreme Court upheld a Georgia law requiring the collection of signatures from 5% of the eligible voters in order to qualify for the ballot in a gubernatorial (or other) general election. 403 U.S. 431, 437 (1971). In its opinion, the Court concluded its opinion by emphasizing that "Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes [and] has insulated not a single potential voter from the appeal of new political voices within its borders." *Id.* at 442. That opinion, written over a half-century ago before the technology of the internet was even envisioned, obviously applies with even more force to a system on online electronic signature-gathering that has no barriers of entry whatsoever for any candidates or any voters—and similarly permits any voter to sign as many candidate petitions as the voter wishes.

60. STEVEN J. BRAMS & PETER C. FISHBURN, *APPROVAL VOTING* 5 (2d ed. 2007).

61. See *Methods for Signing Candidate Nominating Petitions*, *supra* note 53.

62. See *supra* Part II.

desire to have one particular candidate prevail in the primary election to become one of the two candidates who advance to the November general election.

The party could make this endorsement during the signature-gathering process, before the endorsed candidate officially qualifies for the ballot. Or the party could wait until after a candidate has qualified for the primary ballot and then make the endorsement that the party wants this candidate to advance to the general election. Either way, the party's endorsement would occur outside the government's electoral process itself. The endorsement would not be a prerequisite either for being on the primary ballot or for prevailing in the primary election. The endorsement instead would be just collateral information that a voter might choose to consider as part of the voter's own evaluation of the candidate, much as a voter might (or might not) choose to weigh the endorsement of non-party interest groups, like environmental organizations or pro-life or pro-choice advocacy groups on the issue of abortion.

There are reasons, however, to give political parties a more formal role in the process of qualifying candidates for the primary ballot. Political parties organize political deliberation, whether inside an elected legislature as members decide what legislation to adopt or during the electoral process to determine who should get to hold office to represent the voters in government. Enabling voters to associate candidates with parties helps voters decide which candidates to support.<sup>63</sup>

Thus, in addition to letting candidates themselves qualify for the primary ballot by meeting the signature-gathering threshold requirement, it would be possible to let political parties qualify their endorsed nominees for the ballot by means of the same signature-gathering threshold requirement. In other words, either the candidate or the party could collect the required number of electronic signatures, which we are presuming for the sake of consideration would be 5% of registered voters. The only difference is that if a party met this requirement on behalf of its nominee, then what would appear on the ballot is the name of both party and the candidate. By contrast, if a candidate qualifies for the ballot independently from any party, then only the name of this independent candidate would appear on the ballot.

But this difference is significant. Including the party's name on the ballot next to the name of its endorsed nominee gives the voter, on the ballot itself, additional information about the candidate that is unavailable with respect to an endorsement from any other kind of group. For example, we can imagine the "All Qualified Candidates Primary" ballot looking something like this if four party nominees and one independent candidate qualified:

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63. See generally Aldrich, *supra* note 16; FRANCES MCCALL ROSENBLUTH & IAN SHAPIRO, RESPONSIBLE PARTIES (2018).



**Mary Jones**

*Party: Democrat*

**Fred Chang**

*Party: Republican*

**Sarah Applewood**

*Party: Moderate*

**Victor Nunez**

*Party: Patriot*

**Chris Peterson**

*Party: [none]*

A ballot with these party labels is more informative for voters, and as long as independent candidates have an equal opportunity to secure a spot on the ballot as party nominees—each facing the same hurdle of having to meet the same signature-gathering threshold—there is no good reason not to permit parties to qualify candidates for the ballot as the nominees of these parties. Voters would appreciate having this information directly on the ballot itself.<sup>64</sup>

Note that in this All Qualified Candidates Primary (“AQCP”), a party’s nomination of a candidate would occur *before* the primary and *not* as a result of it. In this respect, the AQCP is a nonpartisan primary, much like California’s: it does not exist to determine a party’s nominee.<sup>65</sup> But it differs from California’s version of nonpartisan primaries insofar as it does not permit candidates to select whatever party labels they wish, regardless of the party’s position regarding the candidates. In the AQCP, only a party’s endorsed nominee can carry the party’s label on the primary ballot.<sup>66</sup> If a party wishes to have a candidate appear on the primary ballot associated with the party’s own name, the party will need to make this nomination in advance and qualify the candidate for the ballot as the party’s nominee.<sup>67</sup>

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64. It has been suggested that a party might wish to qualify more than one endorsed nominee for this primary ballot. But a party should not get to dictate the content of the government’s ballot, and it would be reasonable for the government to restrict each party to a single nominee. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353 (1997) (upholding the reasonableness and constitutionality of the inverse limitation—restricting each candidate to a single party’s nomination). Given that this primary ballot serves a key winnowing function in between, first, signature-gathering and, finally, the November election, the government has a strong justification for contending that each party should settle on its own preferred candidate for this single office, so that the voters can choose from among a handful of a candidates who are representative of the different policy alternatives presented by contending political parties.

65. *See infra* Section III.C.

66. *See infra* Part IV.

67. If it helps, one can think of the AQCP as the first or preliminary round of a two-round general election, of the kind that France uses for its presidential and legislative elections, where political parties nominate their candidates before the preliminary round of this two-round system. From this perspective, the abbreviation AQCP

B. *An Online Party Convention to Nominate a Primary Candidate*

How would political parties choose their nominee in advance of the primary, since for the last century the primary has served that role? The answer is: by whatever means the party chooses. As an association of individuals protected by the First Amendment, the party can determine whatever internal operating procedure it wishes, as long as it is consistent with whatever laws exist for the governance of non-profit groups.<sup>68</sup>

There is no need for the government to run the mechanism by which the party makes its own nominations. Indeed, it is curious why the government, at the taxpayer's expense, pays for this non-governmental association's internal deliberative procedures. This is especially true when voter turnout in party primaries is so low.<sup>69</sup> But even apart from this point, the party's determination of whom it wants to nominate is the party's own concern, and not the concern of the government itself.

Still, if the government wishes to aid parties in their choice of nominees, the government can do so using new technology to update the traditional method of making nominations before the advent of partisan primaries: nominating conventions. Employing the same basic technology that enables online signature-gathering, the government could enable parties to conduct an online convention among all registered voters wishing to participate.<sup>70</sup> All the candidates seeking to secure a party's nomination as part of appearing on the primary ballot could place their names before the party's participating voters in the online convention,

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could stand for All Qualified Candidates Preliminary, to invoke Danielle Allen's terminology. See Abel Mestre, *French Legislative Elections: Sharp Decline in Voter Turnout Highlights a Worrying Trend*, LE MONDE (June 19, 2022), [https://www.lemonde.fr/en/politics/article/2022/06/19/french-legislative-elections-sharp-decline-in-voter-turnout-highlights-a-worrying-trend\\_5987291\\_5.html](https://www.lemonde.fr/en/politics/article/2022/06/19/french-legislative-elections-sharp-decline-in-voter-turnout-highlights-a-worrying-trend_5987291_5.html) [<https://perma.cc/X4LG-MTSW>]. But most Americans use the term "primary election" to refer to the first of two rounds of voting in an electoral system, and they do so even when—as in California's "top 2" system, as well as Alaska's newer "top 4" variation on the same two-round structure—the first round does not select a party's nominee but instead is the state's procedure for winnowing the field of all qualified candidates regardless of party down to a smaller number for the final round of voting. Given this point, there is no constitutional distinction between limiting party labels on the first round of this two-round system to party nominees and limiting party labels to party nominees on a general election ballot, like Georgia's, that is potentially followed by a runoff. As we have seen, California's system is mathematically and structurally the same as Georgia's, except that in California the runoff occurs on the same date as first round in Georgia and the California runoff is mandatory and not contingent on whether any candidate achieves a majority in the first round. Barton, *supra* note 47, at 31–32.

68. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 586 (2000).

69. See Allen, *supra* note 52.

70. If the party wanted to strictly limit attendance at the online convention to only those voters who had established a commitment to the party in advance, the government could set up a procedure to screen registered voters so that only those who satisfied the party's membership criteria were entitled to participate. Under Supreme Court doctrine, a state can limit a partisan primary to party members but only if the party itself wants that limitation. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). The reason is that the First Amendment gives the party, rather than the state, the right to determine who participates in the selection of the party's nominee, as the Court confirmed in *California Democratic Party v. Jones*, 530 U.S. at 586.

and the party's voters could then choose which of these candidates they wished to be the party's nominee.<sup>71</sup>

This procedure would be a convention, not an election, insofar as it would not involve a secret ballot. But because no secret ballot would be involved, there would be no insurmountable internet security issues, as with electronic signature-gathering for reasons already stated.<sup>72</sup> The procedure could be convenient for participants, as the convention could be held open for an ample period of time. There would be none of the burdens associated with attending an in-person convention. But if a political party did not wish to use this optional procedure made available by the government, the party could choose its nominee in whatever alternative procedure it preferred—and which it wished to undertake at its own expense.

There would be the question of exactly what voting method would be used to make the nomination at one of these government-facilitated online party conventions. Given the likelihood of multiple candidates seeking the party's nomination, there would be the same basic collective choice conundrum of how to determine which candidate a majority of participants prefer. In keeping with the principle that the party should be entitled to govern itself as far as feasible, one possibility is to have the government-facilitated process use online ranked-choice ballots, while permitting the party itself to decide in advance the particular method of identifying the winning candidate—the one receiving the party's nomination—from all the preferences of participants indicated on the online ballots. The party, in other words, would be free to choose for itself whether to use the conventional “Lowest Plurality Runoff” method of identifying the winning candidate, which eliminates candidates sequentially based on fewest first-place preferences on the ranked-choice ballots, or the alternative “Total Vote Runoff” method, which eliminates candidates sequentially based on all the preferences on the ranked-choice ballots.<sup>73</sup> The party also could choose one of the myriad of other methods for computing results from ranked-choice ballots.<sup>74</sup>

The secret ballot needs to remain secure for the all-voters public elections that the government itself operates, including the All Qualifying Candidates Primary. But there does not need to be a secret ballot for the internal deliberative

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71. Having the government handle the administration of the online nominating convention might increase the likelihood of avoiding the kind of technical snafus the Iowa Democratic Party had in operating an online caucus in 2020. See Kate Fazzini, *Iowa Caucus Debacle Is One of the Most Stunning Tech Failures Ever*, CNBC (Feb. 4, 2020, 5:03 PM), <https://www.cnbc.com/2020/02/04/iowa-caucus-app-debacle-is-one-of-the-most-stunning-it-failures-ever.html> [<https://perma.cc/LD9H-PSDG>]. In any event, the fact that human error can cause technology to malfunction is not reason, by itself, to reject use of the particular technology. Only if this technology is especially prone to mishandling relative to the benefits it provides would there be reason to avoid its use. Without evidence to the contrary, one would expect that an online nominating convention could be administered with the same degree of success as online voter registration.

72. See *supra* notes 56–58 and accompanying text.

73. See discussion *infra* Sections IV.A–B.

74. This article explores several of these alternative methods subsequently. For an introduction to different ways to tabulate the winner of an election from ranked-choice ballots. See generally ANDREW REEVE & ALAN WARE, *ELECTORAL SYSTEMS: A COMPARATIVE AND THEORETICAL INTRODUCTION* (1992); GEORGE G. SZPIRO, *NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT* (2010).

procedures of the private association that is the political party. Or at least the government does not need to conduct a full secret-ballot election for the benefit of the party's internal deliberations at the government's expense.

An online convention would be more convenient to voters wishing to participate in a political party's internal deliberations on which candidate to nominate for the All Qualifying Candidates Primary. Voters would not need to make a trip to the polls or struggle with the procedures for receiving and mailing a paper absentee ballot, as in a regular government-run election. Instead, voters could declare their preferences for the party's nomination from the comfort of their homes, using their laptops, tablets, or smartphones. They would need to undertake the more burdensome procedures of a secret-ballot election only with respect to the All Qualifying Candidates Primary itself as well as the ensuing "top two" November general election.

C. *Another Way for Parties to Qualify a Nominee on the AQCP Ballot*

For reasons previously stated, it is valuable to have parity in the way both party nominees and independent candidates qualify for the primary ballot.<sup>75</sup> Still, it is possible to consider one exception to this parity—for the nominees of previously successful parties. Without entrenching a two-party duopoly, which it is essential to avoid, the system could let a party whose nominee was one of the two candidates to advance to the November general election in the previous election for the same office bypass the electronic signature-gathering requirement and automatically qualify its nominee for this election's primary.

One could argue that all parties, even previously successful ones, should be required to satisfy the same electronic signature-gathering requirement in each election. On this view, if a major political party—like the Democrats or Republicans currently—cannot muster signatures from 5% of registered voters for its nominee, then it is no more entitled to a spot on the primary ballot than any other political party that fails to gather the required number of signatures. The argument has added force when the process of gathering electronic signatures online is as convenient and costless as can be.

But the opposite argument is also powerful. If a party has proven itself in the previous election for the same office, by having its candidate reach the final round as one of the top two contenders, then it is pointless to have the party prove itself again in the very next election. It deserves a spot on the primary ballot in this election as well, without having to go through the trouble of gathering signatures in the way that a party or independent candidate that previously has not proven itself should need to do. In this next election, the party's nominee still has to win enough votes in the primary to advance again to the general election. Based on past performance, the party cannot secure one of the two final spots in the November general election. (For sake of comparison, one could design an electoral system in which all other candidates have to compete for the single spot

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75. See *supra* Section III.A.

available for challenging an incumbent who seeks reelection; but that amount of advantage stemming from the result of the last election is more than is warranted.). Giving a spot in the primary to a party that has established itself as worthy of being in contention among multiple other contenders is not an undue structural advantage.

This one-time “bye” from the obligation to collect electronic signatures does not give the party any kind of entrenched status. Its candidate may not be one of the two finalists in the November general election this time. If that is the case, then this party must go back to collecting the required number of signatures in the next electoral cycle in order to qualify its nominee for the primary ballot again. It has no ongoing security of a spot on the primary ballot. Rather, it must prove itself as having one of the top two finalists in order to repeat its avoidance of needing to gather signatures.

So-called “minor” parties and independent candidates may still feel that they are disadvantaged if the same two “major” parties repeatedly send their nominees on to the November general election. But if that happens, it is because of the votes that the nominees of these two “major” parties receive in the primaries. Which candidates have a realistic chance of being one of the top two finalists in the All Qualifying Candidates Primary depends on the rules used to aggregate the preferences of the primary’s voters and to determine, based on those preferences, which are the two candidates most favored by the voters and thus most deserving to advance to the November general election.<sup>76</sup> Therefore, it is to those rules that we should now turn.

#### IV. THE METHOD OF SELECTING THE PRIMARY’S “TOP TWO” FINALISTS FOR THE GENERAL ELECTION

The most important feature of any “top two” electoral system, which puts two and only two candidates in the November general election as a result of its primary, is the method for determining *which two* of the candidates are entitled to advance to the general election.<sup>77</sup> As we have already discussed, California uses the simplest method: because the state uses a traditional unranked ballot, voters are able only to cast a first-choice preference for whichever single candidate on the ballot they most prefer, and the two candidates who receive the highest number of these first-choice preferences are the two that move on to November.<sup>78</sup> But as we also have already seen, this method—despite its simplicity—is fundamentally flawed: it can cause irrational splits among candidates competing in the same ideological “lane” so to speak, with the result that two right-of-center candidates are the two November finalists, while the state’s median voter would prefer to elect one of the left-of-center candidates.<sup>79</sup>

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76. See *infra* Part IV.

77. See discussion *supra* Part II.

78. See *supra* notes 45–47 and accompanying text.

79. See *supra* notes 48–51 and accompanying text.

Other types of anomalies can occur. Imagine this three-way split in a state using California's method: 34% of the primary voters most prefer the left-of-center candidate on the ballot, although they would be very happy with the moderate centrist running as an independent on the ballot, but they despise the right-of-center candidate on the other side of the ideological spectrum. Another 34% of the primary voters most prefer the right-of-center candidate on the ballot, although they too would be quite satisfied with the independent moderate centrist, while they also despise the left-of-center candidate on the opposite side of the ideological spectrum. Meanwhile, 32% of the primary voters most prefer the independent moderate in the middle, while they equally dislike the two polarizing candidates on the left and the right. California's overly simplistic "top two" system will put the two polarizing candidates on the November ballot because each of their 34% share of first-choice preferences was slightly better than the 32% share received by the moderate centrist, and California's electoral method is too crude to factor in the fact that voters on the left and the right view the moderate centrist very favorably as an entirely suitable runner-up to their most preferred choice.<sup>80</sup>

Nor can California's method take account of the fact that voters on the left and the right have strong antipathy towards the candidate on the opposite side ideologically from them, and that the 32% of voters in the middle also dislike both of the ideologically one-sided candidates. By excluding the moderate centrist, who is barely behind in first-choice preferences and widely admired by all voters across the entire ideological spectrum, from one of the two spots on the November ballot—and giving those two spots to divisive candidates with barely more first-place preferences, and each of whom is strongly opposed by voters on the other side of the ideological divide—California's system has failed to identify which two candidates are the ones most deserving to make it to the final round of the electoral process.<sup>81</sup> Given the totality of the preferences among all the state's voters with respect to all three of these candidates, the moderate centrist should be one of the two finalists, competing against whichever of the two more ideologically polarizing candidate is slightly more favored overall in the electorate than the other. Excluding the centrist from the final round disserves the electorate overall, given the goal of constructing an electoral process that will produce a winner most representative of the electorate's preferences as a whole.

While it is easy to condemn California's crude system in this way, it is more difficult to specify exactly what should replace it. For the same reason that it can be a challenge to identify the majority of the electorate's preference among three or more candidates, as we observed at the very outset, it can also be challenging to identify which two among multiple candidates most deserve to occupy the two final spots, from which the majority of voters can make their decisive selection. There are a number of alternative methods better than California's overly

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80. See *supra* notes 45–51 and accompanying text.

81. Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*, 2021 WIS. L. REV. 1187, 1189 (2021).

simplistic system.<sup>82</sup> It is worth analyzing several of them, as part of evaluating which ones states should seriously consider if they wish to reform their electoral process to make it as democratically representative as practicable.

#### A. *Lowest Plurality Runoff*

The use of a ranked-choice ballot for the All Qualifying Candidates Primary would open up a range of alternative electoral methods for identifying the “top two” candidates deserving to be the finalists on the November election ballot. Alaska uses a ranked-choice ballot at the general-election stage in its “top four” variation on the California’s “top two” system, while (like California) retaining a simple first-choice ballot in its nonpartisan primary in order to determine the candidates who advance to the general election.<sup>83</sup> But any state could reverse this order and use the ranked-choice ballot for the primary instead, leaving the simple ballot to select the majority’s preference among only two finalists.<sup>84</sup> As between these two alternatives, there are reasons to believe that it is preferable to use the ranked-choice ballot first in the primary and then a simple ballot in the general election to choose among two finalists, rather than the reverse order as Alaska does. But it is better to defer this comparison between Alaska’s system and the use of a ranked-choice ballot in an All Qualifying Candidates Primary until after surveying some of the various ways in which ranked-choice ballots can be used to identify the top two finalists deserving to compete head-to-head for support of a majority of voters in the November general election.

The most common electoral method that uses ranked-choice ballots is Lowest Plurality Runoff.<sup>85</sup> Indeed, it so far predominates in current usage that it is often called “Ranked Choice Voting” as if it were the only method that employs ranked-choice ballots, which it most definitely is not.<sup>86</sup> It is also often called “Instant Runoff Voting” insofar as it attempts to emulate a traditional runoff election in a single round of balloting by use of its specific mathematical method for identifying the election’s winner from the ranked-choice ballots.<sup>87</sup> But other mathematical methods for identifying the election’s winner from the same ranked-choice ballots could be equally well described as an “instant runoff” procedure, and thus it’s more descriptive to label this particular method in terms of its unique way of selecting the winner from the rankings on all the ballots.<sup>88</sup>

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82. See, e.g., *id.* at 1189–90.

83. I have discussed Alaska’s system in previous work. See, e.g., *id.* at 1226.

84. Edward B. Foley, *Total Vote Runoff: A Majority-Maximizing Form of Ranked Choice Voting*, 21 U.N.H. L. REV. 323, 364 (2023).

85. *Id.* at 323.

86. See *id.*

87. *Id.*

88. In the field of electoral theory, Lowest Plurality Runoff is often called the “Hare method” after the British political theorist who proposed it (although his initial proposition was for use in multimember legislative bodies in the form now known as the Single Transferable Vote). See W.D. WALLIS, *THE MATHEMATICS OF ELECTIONS AND VOTING* 7 (2014).

The key feature of Lowest Plurality Runoff is that it eliminates candidates one-by-one based on which candidate has the fewest first-place votes in each elimination round.<sup>89</sup> “Plurality” is the term used to identify the number of voters for whom a candidate is their first choice. Thus, the candidate with the highest plurality is the first choice of more voters than any other candidate, and traditional elections without ranked ballots or runoffs are plurality-winner elections because the candidate with more votes, which only reflect first-choice preferences, wins.<sup>90</sup>

Although Lowest Plurality Runoff is usually used to identify a single winner of an election, as in Alaska, its sequential elimination procedure can be used to produce two finalists from a larger number of candidates.<sup>91</sup> Thus, it would be possible to use Lowest Plurality Runoff in the All Qualifying Candidates Primary to pick the “top two” to advance to the November general election.

The main problem with Lowest Plurality Runoff, however, is that it replicates some of the same basic polarizing features of California’s overly simplistic “top two” system.<sup>92</sup> With respect to the earlier example of the 34%–34%–32% split among three candidates in first-choice preferences, Lowest Plurality Runoff will eliminate the candidate who comes up just short with 32%, even though that candidate is the well-liked runner-up among all the voters on the left and right who slightly preferred a more left-leaning or right-leaning candidate. Lowest Plurality Runoff also ignores the fact that voters on the left and right may strongly dislike the right-leaning and left-leaning candidates and would much prefer to elect the moderate centrist if they cannot prevail in their slight preference for the candidate who is closest to their own left-leaning or right-leaning views.<sup>93</sup> Lowest Plurality Runoff thus replicates the California’s system of leaving the electorate as a whole with the choice of only the two more ideologically polarizing candidates, rather than giving the electorate the choice between the generally well-liked moderate centrist and whichever of the two more ideological candidate is more favored than the other.<sup>94</sup>

In this respect, Lowest Plurality Runoff does not serve well the preferences of the electorate as a whole, just as California’s simplistic system does not.<sup>95</sup> If the goal of the All Qualifying Candidates Primary is to identify the two contenders most deserving to be finalists in the process of electing a winner who is most representative of the electorate as a whole, Lowest Plurality Runoff fails in that

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89. *Id.*

90. *Id.* at 10.

91. *Id.* at 9.

92. A systematic study of the potentially polarizing effect of Lowest Plurality Runoff is contained in a separate article in this same symposium. See Atkinson, Foley & Ganz, *supra* note 23. That Article uses the more common term Instant Runoff Voting to refer to the same electoral method. *Id.* This article uses the more specific term, Lowest Plurality Runoff, in order to distinguish it more clearly from other “instant runoff” methods that employ ranked-choice ballots.

93. *Id.*

94. *Id.*

95. *Id.* In Nick Stephanopoulos’s important terminology and framework, Lowest Plurality Runoff leads to significant “misalignment” in the context of highly polarized electorates. See Stephanopoulos, *supra* note 2, at 286.



objective by having the final choice be between two polarizing candidates rather than making one of the two final alternatives the candidate who, based on all the preferences identified on the totality of the electorate's ranked-choice ballots, is the candidate who does best overall in mirroring the electorate's aggregate preferences. In this example, this most representative candidate is the one with slightly fewer first-choice preferences, at 32% compared to 34% for each of the other candidates, but who also is the well-liked runner-up of the rest of the voters. Compared to the two other candidates, who barely do better in first-choice preferences, and who are widely and deeply disliked by voters on the opposite side of the spectrum, it is clear that that the moderate centrist should be one of the two finalists and not excluded from the final round. Yet that is precisely what Lowest Plurality Runoff, like California's system, does.

Nor is this single example unique in this respect. Rather, it is the very structure of Lowest Plurality Runoff's method of eliminating candidates one-by-one that it will tend to favor two more polarizing candidates to the exclusion of a consensus-building centrist. By focusing on the fewest first-place preferences as its basis for eliminating candidates, rather than the overall preferences on the ranked-choice ballots, Lowest Plurality Runoff produces this polarizing effect.<sup>96</sup> This effect is more pronounced if the electorate itself is more ideologically polarized, with relatively fewer voters in the middle. This point can be demonstrated by conducting a series of computer-simulated elections. When thousands of elections occur using Lowest Plurality Runoff, the clear pattern that emerges is that this electoral method elevates candidates who ideologically correspond to the first-choice preferences of a polarized electorate.<sup>97</sup>

#### B. *Total Vote Runoff*

A small change to the Lowest Plurality Runoff procedure can make a big difference. Instead of eliminating the candidate with the fewest first-place preferences, the "instant runoff" process can eliminate the candidate who is least preferred overall, measured by all the ranked-choice preferences on all the ballots in the All Qualified Candidates Primary.<sup>98</sup> Called Total Vote Runoff to distinguish it from Lowest Plurality Runoff, this method calculates a candidate's overall level of preference within the electorate according to this formula: if  $n$  is the number of candidates on the AQCP ballot, then a candidate who is ranked first on a voter's ballot receives  $n-1$  votes, a candidate who is ranked second receives  $n-2$  votes, and so forth, with the candidate ranked last receiving  $n-n$  (that is, zero) votes.<sup>99</sup> The idea behind this formula is that a voter prefers a first-ranked candidate to every other candidate on the ballot, and thus, this first-ranked candidate receives one vote from this voter insofar as the ranked-choice ballot structures a

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96. See Atkinson, Foley & Ganz, *supra* note 23.

97. *Id.*

98. Foley, *supra* note 84, at 344.

99. *Id.* at 347-48.

competition between this candidate and each other candidate on the ballot.<sup>100</sup> Candidate A gets a vote from this voter, in other words, against Candidate B, and against Candidate C, and Candidate D, and so forth.<sup>101</sup>

Similarly, a candidate ranked second on a voter's ballot gets a vote from this voter against all other candidates on the ballot except for the first-ranked candidate. That is why a second-ranked candidate receives  $n-2$  votes from the ranked-choice ballot if there are  $n$ -number of candidates on the ballot. The same principle applies all the way down the rankings on the voter's ballot. The candidate ranked last on a ballot receives no votes against any other candidate, and thus earns 0 votes from this ballot in the Total Vote Runoff calculation. Calculating a candidate's "Total Votes" from each ballot by this formula is mathematically equivalent to the candidate's "Borda score," as described at the outset.<sup>102</sup>

The Total Vote Runoff ("TVR") procedure sums a candidate's total votes from all the ranked-choice ballots cast.<sup>103</sup> It then eliminates the candidate with the fewest overall total votes.<sup>104</sup> After eliminating the lowest-scoring candidate in this way, TVR repositions the remaining candidates on each ballot in the same way that Lowest Plurality Runoff ("LPR") does: whichever candidate was ranked immediately below the eliminated candidate moves to occupy the position vacated by the eliminated candidate.<sup>105</sup> Thus, a candidate ranked second on a voter's ballot moves to occupy the first-choice position if the eliminated candidate was the one ranked first on that voter's ballot. Through this repositioning process, candidates can move from third-place to second-place, or fourth-place to third-place, and so forth, depending on which ranking the eliminated candidate occupied. Once this repositioning occurs, the TVR procedure repeats the elimination process by, first, recalculating each candidate's new Total Votes score based on each candidate's newly determined position on each voter's ballot and, then, by again eliminating the candidate with the lowest Total Votes score.

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100. *Id.* at 347.

101. For a more elaborate discussion of Total Vote Runoff, see *id.* at 343. The Total Vote Runoff procedure was originally proposed in a co-authored column with Eric Maskin. See Edward B. Foley & Eric S. Maskin, *Alaska's Ranked-Choice Voting Is Flawed. But There's an Easy Fix.*, WASH. POST (Nov. 1, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/11/01/alaska-final-four-primary-begich-palin-peltola/> [https://perma.cc/HBX4-2U5G]. The Total Vote Runoff method is also mathematically equivalent to, but operationally different, from what voting theory literature calls the Baldwin method, after the Australian scholar who proposed it. See Hannu Nurmi, *Building Bridges over the Great Divide*, in *ADVANCES IN COLLECTIVE DECISION MAKING: INTERDISCIPLINARY PERSPECTIVES FOR THE 21ST CENTURY* 9, 16 (Sascha Kurz, Nicola Maaser & Alexander Mayer eds., 2023); CHARLES E. PHELPS & GURUPRASAD MADHAVAN, *MAKING BETTER CHOICES: DESIGN, DECISIONS, AND DEMOCRACY* 50 (2021). The operational difference between Total Vote Runoff and Baldwin's method is that (when used to elect a single winner) Total Vote Runoff, like Lowest Plurality Runoff, always checks to see if any candidate has a majority of first-choice vote before proceeding to eliminate any candidate—because whenever a candidate crosses the majority threshold, they immediately win the election. When used to pick the top two candidates in an All Qualified Candidates Primary to advance to the general election, Total Vote Runoff and Baldwin's method would be operationally identical. Even in this context, it makes more sense to use the term Total Vote Runoff, rather than Baldwin, in public discourse about the nature of the method, so that citizens have some notion from its name about its nature.

102. See *supra* notes 6–7 and accompanying text.

103. Foley, *supra* note 84, at 343.

104. *Id.*

105. *Id.* at 343–44.

Like LPR, TVR can be used to elect a single winner from a ballot with multiple candidates.<sup>106</sup> Also like LPR, TVR can be used to determine the two candidates who deserve to be the “top two” finalists that advance to the November general election.<sup>107</sup> Unlike LPR, the TVR sequential elimination procedure will not tend to elevate polarizing candidates.<sup>108</sup> Instead, the mathematical details of the TVR calculation will tend to elevate the two least polarizing candidates.<sup>109</sup> Indeed, the TVR formula will always elevate a candidate who is a Condorcet winner, if one exists. In other words, as described at the outset, a Condorcet winner is a candidate whom a majority of voters prefer when compared one-on-one to each other candidate on the ballot; if TVR is the electoral method applied to the All Qualified Candidates Primary ballot, this majority-preferred Condorcet winner will always be one of the “top two” finalists to advance to the November general election.<sup>110</sup> Thus, unlike LPR, the TVR procedure maximizes the chances that the November election’s eventual winner will be the candidate who is most representative of the electorate’s preferences overall, as determined by the majority’s choice between two candidates, both of whom emerged from the primary as the two strongest candidates by eliminating sequentially the other candidates based on which one was least preferred by the electorate overall.<sup>111</sup>

In the case of the 34%–34%–32% example we have considered previously, TVR would treat it very differently than LPR. Assume these are the ranked-choice ballots:

TABLE 2

%	1 <sup>st</sup> choice	2 <sup>nd</sup> choice	3 <sup>rd</sup> choice
34	Left	Center	Right
34	Right	Center	Left
18	Center	Left	Right
14	Center	Right	Left

With these ballots, here are each candidate’s Total Votes:

TABLE 3

Candidate	1 <sup>st</sup> Place		2 <sup>nd</sup> Place		Total Votes
	Ballots (P1)	Votes (2*P1)	Ballots (P2)	Votes (1*P2)	(2*P1) + (1*P2)
Left	34	<b>68</b>	18	<b>18</b>	<b>86</b>
Right	34	<b>68</b>	14	<b>14</b>	<b>82</b>
Center	32	<b>64</b>	68	<b>68</b>	<b>132</b>

106. *Id.* at 363.

107. *See id.* at 343.

108. *See id.* at 323.

109. *See id.* at 346–50.

110. *See id.* at 343.

111. A Condorcet-consistent electoral method, like TVR, will tend to elect significantly fewer polarizing candidates than LPR, as demonstrated by the computer simulations described in Atkinson, Foley & Ganz, *supra* note 23.

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TVR would eliminate the right-of-center candidate, having the fewest total votes, slightly lower than the left-of-center candidate, and both much lower than the centrist's total votes. Thus, if TVR were used in an All Qualifying Candidates Primary, and these were the three candidates on the primary ballot, then TVR would send the left-of-center and centrist candidates as the two finalists for the general election. The general election would thus test whether the electorate overall really would prefer the moderate centrist compared to the candidate offering a left-of-center policy position.

Given the goal of eventually electing the candidate whose views are closest to the November electorate's median voter, which is the goal that follows from the principle that the majority of voters in November should decide the election's outcome, a strong argument can be made that TVR would be the best electoral method for determining the top two candidates from the All Qualifying Candidates Primary who deserve to advance to the general election.<sup>112</sup> The mathematical properties of the TVR calculation certainly serve this goal. But there are countervailing considerations as well.

TVR, while not inherently too complicated for the average voter to understand, is not the most straightforward system to explain. The sequential elimination process of LPR is itself something that requires a bit of pondering when first encountered by an ordinary citizen. Necessarily, then, the extra step of calculating a candidate's total votes is an added layer of complexity upon a system that already is complicated enough. The extra complexity is arguably worth it, given the mathematical benefits of the TVR method. But the extra complexity is unavoidably a negative factor when doing a cost-benefit analysis on whether to adopt TVR instead of LPR.

Moreover, the mathematical calculations necessary to complete the TVR process are even more complicated with respect to voted ballots that do not provide ranked-choice preferences for all the candidates on the ballot. To make the mathematical properties of the TVR method work, all unranked candidates on a ballot must share the points allocated to the unranked positions on the ballot.<sup>113</sup> Thus, if there are four candidates on the ballot, and a voter only ranks one of them as a first-choice preference, but leaves all three other candidates unranked, then these three other candidates must equally share the two votes awarded to a second-choice candidate and the one vote awarded to a third-choice candidate.<sup>114</sup> Thus, each of the three unranked candidates earns one vote from this TVR ballot.

The rationale for this treatment of unranked candidates can be explained to voters. Unranked candidates are essentially tied for each unranked position. The first-choice candidate on this ballot deserves all three votes because the voter clearly preferred this candidate to all three who were unranked. But as between these three other candidates, the voter expressed no preference. Thus, all three equally tied for second place, and all three equally tied for third place as well. As

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112. Foley, *supra* note 84, at 343.

113. *See id.* at 350–51 for further details on this point.

114. *See id.*

a result, all three equally deserve to split the votes awarded for being in second and third place.

While this explanation is possible, it is not the easiest information to convey. Thus, explaining how and why TVR works in practice is inevitably something of a challenge. This challenge, while not insurmountable, is a factor to consider when deciding whether to adopt this electoral method for a jurisdiction.

There is also the possibility that TVR will induce strategic voting in situations that LPR would not. Strategic voting is the practice of casting a ballot in a way that differs from the voter's sincere preferences regarding the candidates.<sup>115</sup> Strategic voting, if successful, can cause election results to diverge from the outcomes that would occur if voters had cast their ballots sincerely.<sup>116</sup> While the mathematical properties of TVR are such that its vulnerability to strategic voting should not be overstated, a point pursued in previous work on TVR,<sup>117</sup> it is a risk that cannot be discounted entirely—at least not based on currently available research and analysis.

If vulnerability to strategic voting were the main concern about the possible adoption of TVR instead of LPR, this concern could be addressed by a hybrid procedure that picks as the “top 2” finalists the winners based on both the TVR and LPR methods if they are different candidates. If, instead, the winners of these two different methods are the same individual candidate, the second “top 2” finalist in this hybrid would be the runner-up of these two methods if, again, that runner-up is a single candidate. If each of the two different methods has a different runner-up, while having the same winner, then the second “top 2” finalist would be whichever of these two runners-up is preferred by more voters than the other one based on all their relative rankings on the ranked-choice ballots. In this scenario, the first “top 2” finalist would be the single winner based on both methods. This TVR-LPR hybrid should be no more vulnerable to strategic voting as LPR itself, given computer simulations showing that this kind of hybrid—where LPR is paired with a procedure that protects a Condorcet winner from defeat—is equally resistant to strategic manipulation as LPR itself.<sup>118</sup>

### C. *Most Preferred Runoff*

There is a tabulation method for ranked-choice ballots closely related to TVR but much simpler both to explain and to operate. Like TVR, this method calculates the “total votes” or “preference points” that each candidate receives for being ranked higher than another candidate on a ballot—the candidate's Borda score, in other words.<sup>119</sup> This method also resembles TVR in using this

115. *See id.* at 355–63.

116. *See id.*

117. *Id.* Computer simulations also show that the Baldwin method, which is mathematically equivalent to TRV, performs relatively well in resisting strategic manipulation. *See Durand, supra* note 14, at 403 figs. 9 & 10; James Green-Armytage, *A Dodgson-Hare Synthesis*, 34 CONST. POL. ECON. 458, 468 tbl. 1 (2023).

118. *See Durand, supra* note 14, at 404; Green-Armytage, *supra* note 117, at 463.

119. *See Foley, supra* note 84, at 323.

calculation as part of a sequential elimination process, in which candidates are eliminated one at a time.<sup>120</sup>

Unlike TVR, however, this method does not recalculate a candidate's total votes—or preference points, to employ that term for the same calculation in this context—after each candidate is eliminated. Instead, each candidate's preference points are used to determine the sequence by which each pair of candidates competes head-to-head, with the candidate preferred by fewer voters being the one eliminated.<sup>121</sup> The two candidates with the fewest preference points are the first pair. After one of these two is eliminated, based on being the one preferred by fewer voters head-to-head, the same sequential process continues until only one candidate is left: of the remaining candidates, the two with the fewest preference points based on the calculation at the outset is the next pair of candidates to compete head-to-head. Depending on which of the two in the first pair was eliminated, the second pair may be a match between the candidate with the lowest Borda score and the candidate with the third lowest Borda score, or it may be between the candidates with the second and third lowest Borda scores.

This process of sequential head-to-head competitions guarantees that a Condorcet winner will prevail no matter whether this candidate's Borda score was the highest, second highest, or even lower among all the candidates on the ballot.<sup>122</sup> Whether the Condorcet winner must survive several elimination rounds to win the last elimination round, or instead just competes in the last elimination round and wins that single head-to-head match, the Condorcet winner by definition will not be defeated in any of these head-to-head faceoffs.<sup>123</sup> The candidate with the highest Borda score, whether or not that candidate is a Condorcet winner, necessarily will only compete in the final head-to-head match. Thus, this method guarantees that the candidate with the highest Borda score will win unless that candidate is bested by a different candidate who, although having a lower Borda score, is nonetheless preferred by more voters than the candidate with the highest Borda score—as a Condorcet winner can be.

In other words, this method assures that the candidate with the strongest claim to being the one most preferred by the voters will come out on top.<sup>124</sup> Ordinarily, whoever has the highest Borda score can claim to be the most preferred candidate. After all, this is the candidate with the most preference points, the most straightforward way of measuring which candidate is most preferred overall. But if the candidate with the highest Borda score is not a Condorcet winner and another candidate beats the Borda winner in the final elimination round, because this other candidate is preferred by more voters than even the Borda

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120. *See id.* at 345.

121. *See id.* at 343–44 (describing how TVR recalculates a candidate's total votes after candidates are eliminated).

122. Mathematically, a Condorcet winner's Borda score cannot be below the average Borda score of all candidates, as the Australian scholar E.J. Nanson first demonstrated. *See* Nurmi, *supra* note 101, at 10.

123. *See infra* Tables 4–5.

124. *See infra* Tables 4–5.

winner, then this other candidate earns the title of being the most preferred candidate. For this reason, we can call this method *Most Preferred Runoff*.<sup>125</sup>

We can illustrate the Most Preferred Runoff (MPR) procedure using the same set of ballots that we used to illustrate TVR:

TABLE 4

%	1 <sup>st</sup> choice	2 <sup>nd</sup> choice	3 <sup>rd</sup> choice
34	Left	Center	Right
34	Right	Center	Left
18	Center	Left	Right
14	Center	Right	Left

With these ballots, here again is each candidate’s Borda score (Total Votes or “preference points”):

TABLE 5

Candidate	1 <sup>st</sup> Place		2 <sup>nd</sup> Place		Borda Score
	Ballots (P1)	Votes (2*P1)	Ballots (P2)	Votes (1*P2)	(2*P1) + (1*P2)
Left	34	<b>68</b>	18	<b>18</b>	<b>86</b>
Right	34	<b>68</b>	14	<b>14</b>	<b>82</b>
Center	32	<b>64</b>	68	<b>68</b>	<b>132</b>

The candidates with the two lowest Borda scores are Left and Right. Thus, they compete in the first head-to-head match. Left beats Right 52-48, thus eliminating Right. In the second and final head-to-head match, Center beats Left 66-34. In this case, Center is both the Borda and Condorcet winner.

Like TVR, MPR can be used either to pick a single winner or instead to identify the “top two” candidates in a California-style All Qualified Candidates Primary.<sup>126</sup> When used in this latter way, the MPR procedure stops after the penultimate elimination round, having identified two candidates for the final round and, rather than conducting this final round instantaneously, permits these two finalists to face off subsequently after more campaigning and letting voters reconsider their preferences between these two candidates. In the example we have been considering, MPR—like TVR—would identify Center and Left as the two finalists most worthy of facing off against each other in another round of balloting when these two are the only candidates remaining for the voters to focus their attention on.

While TVR and MPR seem especially similar in the case of a three-candidate example like this one, MPR’s advantage of being considerably simpler becomes more apparent as the number of candidates increases. Not only is it unnecessary to calculate Borda scores more than once (for each elimination round)

125. I am unaware of where the specific procedure described here as Most Preferred Runoff has been described previously in the literature on alternative ranked-choice methods. I extend my apologies to whoever may have described the procedure previously.

126. See *supra* Tables 4–5; Foley, *supra* note 84, at 343.

using MPR, it is also unnecessary to calculate fractional Borda scores for unranked candidates. Unlike with TVR, a Condorcet winner is guaranteed to prevail using MPR whether or not unranked candidates receive fractional Borda scores. The reason is that MPR uses Borda scores only to “seed” the sequence of elimination rounds.<sup>127</sup> Borda scores do not directly determine which candidate is eliminated in the MPR procedure—only which candidate is preferred by more voters in each head-to-head comparison does—whereas Borda scores directly determine which candidate is eliminated in each round of the TVR procedure.<sup>128</sup> Condorcet winners will win however many head-to-head matches they encounter in an MPR procedure, and this is true whether or not fractional preference points have been included in the calculation of the Condorcet winner’s Borda score for the purpose of seeding the sequence of elimination rounds.

MPR, moreover, should not be materially more vulnerable to strategic voting than TVR given their mathematical similarities.<sup>129</sup> But if the risk of strategic voting is a concern, it would be possible to use an MPR-LPR hybrid just as we saw that it is possible to use a TVR-LPR hybrid. The structure of the MPR-LPR hybrid would be essentially the same: the winner of each method would be the “top 2” finalists if they are different candidates; if they are the same single candidate, then the other “top 2” finalist would be the runner-up of the two methods if, again, this runner-up is a single individual and, if not, then whichever of the two runner-ups beats the other head-to-head.

This MPR-LPR hybrid, like MPR alone but unlike LPR alone, would guarantee that a Condorcet winner is one of the “top 2” finalists. Moreover, in an All Qualified Candidates Primary lacking a Condorcet winner, this MPR-LPR hybrid—again like MPR alone but unlike LPR alone—would at least enable the Borda winner to be one of the “top 2” finalists. In this way, both MPR and the MPR-LPR hybrid make sure that at least one of the two finalists in the November general election is a nonpolarizing candidate aligned with the preferences of the entire electorate, whereas LPR by itself is unable to provide this crucial assurance.<sup>130</sup>

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127. *See supra* Table 5.

128. *See* Foley, *supra* note 84, at 343–44.

129. There is a simpler sequential elimination procedure, called Bottom Two Runoff, that seeds the sequencing of elimination rounds based on first-place votes rather than Borda scores. *See* Foley, *supra* note 4, at 560. Because elimination is based on the same series of head-to-head comparisons, a Condorcet winner will prevail in the Bottom Two Runoff procedure just as in the Most Preferred Runoff procedure. But Bottom Two Runoff is significantly more vulnerable to strategic voting than Total Vote Runoff or Most Preferred Runoff. *See id.* at 561–63 (discussing the additional vulnerability of Bottom Two Runoff to strategic voting than other Condorcet-compliant methods). Thus, Bottom Two Runoff would be recommended instead of Most Preferred Runoff only if its additional simplicity were deemed necessary for the public to comprehend and accept any Condorcet-compliant procedure.

130. A somewhat simpler Condorcet-LPR hybrid would make the “top 2” finalists the Condorcet winner and the LPR winner unless they are the same candidate, in which case the “top 2” finalist would be the LPR winner and LPR runner-up. The disadvantage of this particular hybrid, however, is that in the absence of a Condorcet winner in the All Qualified Candidates Primary, there is no assurance that the candidate with the highest Borda score will be one of the two finalists—in contrast to the MPR-LPR hybrid, which would achieve this and thus provide significantly greater protection against misalignment under conditions of high polarization. (Nick Stephanopoulos, as part of his alignment theory, defines alignment in two different ways: outcomes in alignment



D. *Optimal Tournament Voting*

There is another Condorcet-compliant version of ranked-choice voting that is worth considering. Known as *Minimax*, it calculates each candidate's biggest head-to-head margin of defeat: the difference between (1) the number of voters favoring this candidate's opponent over this candidate and (2) the number of voters favoring this candidate over the opponent.<sup>131</sup> If used to elect a single winner, it elects the candidate whose biggest head-to-head margin of defeat is the smallest.<sup>132</sup> A Condorcet winner by definition is the only candidate with no head-to-head defeats, and thus a Condorcet winner necessarily will prevail using the Minimax method.<sup>133</sup>

The same Minimax method could also be used to determine the "top 2" finalists in the All Qualified Candidates Primary.<sup>134</sup> If so, the procedure would be straightforward: simply identify the two candidates whose biggest head-to-head margins of defeat are the smallest. A Condorcet winner necessarily would be one of these two finalists. There would be no need for a sequential elimination process to protect a Condorcet winner from potentially being excluded from the top 2 finalists.

While the relative simplicity of the Minimax method makes it an attractive option, one can argue that it would be worth combining this method with Borda scoring to form a Borda-Minimax hybrid as the best way to identify the top 2 finalists. As we have seen, the candidate with the highest Borda score can be understood as the *most preferred* candidate, because that candidate is preferred more often in head-to-head comparison to each other candidate than any other candidate—in other words, has the most preference points, or total votes, from all of these head-to-head comparisons. By contrast, the candidate with the best (in other words, lowest) Minimax score can be understood as the *least disfavored* candidate. This candidate, whom we can call the Minimax winner, is also the candidate closest to being a Condorcet winner (if there isn't one) insofar as it would take the fewest votes to convert this candidate's largest head-to-head loss into a victory.<sup>135</sup> In another sense, we can consider the Minimax winner—being the least disfavored and closest to majority-preferred compared to each other candidate—to be the most consensus-achieving candidate. Accordingly, a better name for Minimax might be *Maximum Consensus Voting*.

If the most preferred (Borda) and least disfavored (Minimax) candidates are different, then arguably the election should be decided by a direct head-to-

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with the electorate's median voter, and outcomes in alignment with the entire electorate, presumably measured by the average—or mean—voter). Just as a Condorcet winner is the candidate closest to an electorate's median voter, a Borda winner is the candidate closest to the electorate's mean voter. See Stephanopoulos, *supra* note 2, at 287.

131. Richard B. Darlington, *Minimax Is the Best Electoral System After All*, CORNELL UNIV. 2 (Sept. 21, 2016), <https://arxiv.org/pdf/1606.04371.pdf> [<https://perma.cc/RG6G-V7L2>].

132. *Id.*

133. *See id.*

134. *See supra* notes 77–78 and accompanying text; Darlington, *supra* note 131, at 2.

135. *See supra* notes 134–35 and accompanying text. I am grateful to Wes Holliday for this point.

head contest between these two candidates to determine which a majority of voters prefer more. Identifying the most preferred option is obviously one normatively attractive way to achieve the best outcome for the democracy, treating all voters as equal. It's the method that focuses on the positive attribute of maximizing the collective set of preferences across all voters. By contrast, identifying the least disfavored option is another attractive way to produce the best result for a democracy, considering everyone's preferences as equal. It's the method aimed at avoiding undesirable outcomes, minimizing the degree of dissatisfaction in the result, and thus achieving the maximum degree of agreement.<sup>136</sup> Obviously, it would be most desirable if achieving the most preferred and least disfavored outcome would be identical, but unfortunately that cannot always be the case.

Based on this reasoning, the method for identifying the top 2 candidates in the All Qualified Candidates Primary who should advance to the November general election are the Borda and Minimax winners if they are two different candidates. If both the Borda and Minimax methods identify the same candidate as the best, then according to the formula for previously discussed hybrids, the second November finalist should be the runner-up of these two methods if that runner-up is also a single candidate and, if not, then whichever of the two runner-ups wins the direct head-to-head between the two of them.<sup>137</sup> Because this Borda-Minimax hybrid guarantees that the two best candidates will be the two finalists for the November general election, including the most preferred and least disfavored candidates whether they are the same or different individuals—and also

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136. See Darlington, *supra* note 131, at 2.

137. Another way to choose the second November finalist when the Borda and Minimax winners are the same candidate is to give this second spot on the November ballot to whichever single candidate is the runner-up to this combined Borda-Minimax winner. Defined this way, the Borda-Minimax runner-up is the candidate whose head-to-head defeat against the Borda-Minimax winner has the smallest margin. This alternative definition for the Borda-Minimax runner-up is arguably simpler and also has the attribute of making the runner-up candidate less likely to prevail in the November general election unless preferences or turnout changes after the All Qualified Candidates Primary. When the Borda-Minimax runner-up is defined in the way specified in the text, there is the mathematical possibility that this runner-up would beat the Borda-Minimax winner head-to-head based on the preferences in the All Qualified Candidates Primary (when the Borda-Minimax winner is not a Condorcet winner). In other words, despite having both the best Borda and Minimax scores, a candidate theoretically could lose head-to-head to another candidate who is inferior to this single candidate who is both most preferred and least disfavored. It is understandable why one might not want to give the second November spot to this inferior candidate who, if preferences and turnout do not change, would beat the Borda-Minimax winner head-to-head.

On the other hand, the concept and structure of the All Qualified Candidates Primary and its relationship to the "top two" November election is that the AQCP should choose whichever two candidates are the best measured according to the relevant criteria and then let the electorate take a second look at these two candidates, after they have competed more in some additional campaigning, including the possibility of one or more additional head-to-head debates between the two. Thus, it is to be expected that preferences will shift somewhat as the voters learn more about these two finalists in light of the additional competition and the opportunity for reflection and deliberation it affords. Consequently, if there is another candidate who is the runner-up defined in terms of having both the second-best Borda and Minimax scores, then this candidate arguably deserves the second November slot—and, more important, the voters arguably deserve to take a second look at this candidate in comparison to the Borda-Minimax winner.

In any event, for the purposes of this article, there need not be a definitive resolution of which definition of the Borda-Minimax runner-up is superior. Indeed, different states should be free to choose whichever definition they prefer. Experience through experimentation with both alternatives might illuminate this decision in the long run.

guarantees that a Condorcet winner, if there is one, will be one of these two finalists—this Borda-Minimax hybrid may appropriately be called *Optimal Tournament Voting*.<sup>138</sup>

A five-candidate example can usefully illustrate how this *Optimal Tournament Voting* procedure would work. Suppose the five candidates that qualify for the All Qualified Candidates Primary are the nominees of five new parties that form to compete in this electoral system. From left to right on the conventional ideological spectrum, these new parties are Progressive, Liberal, Moderate, Conservative, and Revivalist. (The Revivalist party can be understood as another term for the “Make American Great Again” or MAGA wing of the current Republican party.).

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138. There are at least two other possible hybrids with Minimax that could be considered alternative forms of an Optimal Tournament Voting procedure. One would be an LPR-Minimax hybrid, which would select the LPR and Minimax winners as the top two finalists. See *infra* note 140. The LPR-Minimax runner-up, like the Borda-Minimax runner-up could be defined in either of the two ways discussed *supra* note 137. There are several properties of this LPR-Minimax hybrid that are attractive. First, it might be simpler and more straightforward to voters and election officials than the Borda-Minimax hybrid insofar as voters and election officials may already be familiar with the LPR form of ranked-choice voting—and insofar as LPR is easier to explain than the “preference points” that form a Borda score. Second, given that LPR is much less vulnerable to strategic voting than Borda, the LPR-Minimax hybrid is also likely to be less vulnerable to strategic voting than the Borda-Minimax hybrid. Third, while a Borda score measures the total (or average) preference that the electorate has for each candidate and is normatively attractive for this reason, LPR arguably can be understood as identifying the candidate closest to the most dominant (“modal”) preference of the electorate, with the most dominant preference being determined not merely by the simple plurality of first-choice votes but instead by the LPR procedure, which eliminates “the spoiler effect” of candidates splitting the most dominant preference. On the problem of the “spoiler effect,” see Atkinson, Foley & Ganz, *supra* note 23. Understood this way, the LPR-Minimax hybrid could be viewed as providing to the electorate as the “top two” candidates: (i) the most popular candidate, with popularity understood as the modal candidate as identified by the LPR procedure; and (ii) the most consensual candidate, with consensus understood as narrowest range of disagreement as measured by Minimax. An All Qualified Candidates Primary that delivered these two candidates to the November general election for voters to choose between could also be considered as providing the voters with the two strongest alternatives from which to make a final head-to-head decision. For sake of definitional clarity, we might call this particular hybrid *Optimal Ranked Runoff*.

The other possible hybrid would be Plurality-Minimax, which would select as the top two candidate: (i) the candidate with the highest plurality of first-choice votes, and (ii) the candidate with the best (lowest) Minimax score. See Darlington, *supra* note 131, at 2. The only reason to adopt this hybrid, rather than the LPR-Minimax one, would be political pragmatism: if public understanding of Plurality-Minimax was easier to achieve, and/or if the public would be more likely to accept an All Qualified Candidates Primary that guarantees that the candidate with the most first-choice votes earns a spot on the November ballot.

Suppose also that in a particular election these are the ranked-choice ballots cast in the All Qualified Candidates Primary:

TABLE 6

%	1 <sup>st</sup> choice	2 <sup>nd</sup> choice	3 <sup>rd</sup> choice	4 <sup>th</sup> choice	5 <sup>th</sup> choice
25	Progressive	Liberal	Moderate	Conservative	Revivalist
10	Liberal	Progressive	Moderate	Conservative	Revivalist
5	Moderate	Liberal	Conservative	Progressive	Revivalist
14	Moderate	Conservative	Liberal	Revivalist	Progressive
16	Conservative	Revivalist	Moderate	Liberal	Progressive
30	Revivalist	Conservative	Moderate	Liberal	Progressive

These ballots indicate a highly polarized electorate, with more voters on the right side of the political spectrum than the left. The Moderate party has the first-choice support of only 19%, or roughly one-fifth, of the electorate, with 35% to the left and 46% to the right. But the center-left (Liberal) and the center-right (Conservative) parties, because of the hyperpolarization, have less first-choice support than the further-left (Progressive) and the further-right (Revivalist). Still, the Moderate party's nominee is the Condorcet winner based on these ballots, because both the left and the right—which neither command a majority of the electorate on their own—prefer the Moderate candidate to either candidate on the opposite side of the ideological spectrum. Thus, the Moderate candidate wins all the head-to-head comparisons based on these ranked-choice ballots.

The Optimal Tournament Voting procedure would operate by determining which candidate is most preferred based on having the highest Borda score (most preference points) and which candidate is least disfavored based on having the best Minimax score (the candidate whose biggest margin of defeat is the smallest). Given these ballots, the Conservative party's nominee has the highest Borda score:

$$(16 \times 4) + (44 \times 3) + (5 \times 2) + (35 \times 1) = 241$$

The Moderate party's nominee has no defeats and thus the best Minimax score. Optimal Tournament Voting therefore would identify the Conservative and Moderate candidates as the two finalists for the November general election, where presumably Moderate would defeat Conservative unless the preferences of voters changed as a result of further campaigning. But whichever of these two candidates ultimately wins the November general election, they have the strongest claim of being the two candidates most deserving to advance as the final one-on-one contenders in November. At the time of the primary, they are the two candidates who most closely reflect the overall preferences of the entire electorate, understood either as being most preferred or least disfavored.<sup>139</sup> By contrast, given these same ballots, Lowest Plurality Runoff would make the

139. In this example, the Borda and Minimax winners are the Minimax and Borda runners-up, a nice confirmation that Optimal Tournament Voting is identifying the top 2 candidates worthy to be the general election finalists.

Progressive and Revivalist nominees the two finalists—the most polarizing possible outcome, out-of-sync with the totality of the whole electorate’s preferences.<sup>140</sup>

Strategic voting should not be an undue concern for Optimal Tournament Voting given the relative resistibility of Minimax to strategic manipulation.<sup>141</sup> But if one wanted to secure the extra immunity provided by Lowest Plurality Runoff, one could create a hybrid between both it and Optimal Tournament Voting. But that hybrid would be extra complicated, given that Optimal Tournament Voting is itself already a hybrid between Borda and Minimax. It would be much more straightforward to create a hybrid between LPR and Minimax, which would be analogous to the Borda-Minimax hybrid. Doing so would preserve the advantages of Minimax, including its guarantee of giving a Condorcet winner the best Minimax score. The only sacrifice would be the substitution of LPR instead of Borda.<sup>142</sup> Whether that substitution would be worth making depends on an assessment of the tradeoff between protecting the electoral system from the risk of strategic voting and endeavoring to include as one of the top two finalists in the general election the candidate with the strongest claim of being most preferred by all the voters overall.<sup>143</sup>

140. In contrast to *Optimal Tournament Voting*, the LPR-Minimax hybrid labeled Optimal Ranked Runoff in *infra* note 141 would make Revivalist and Moderate the two finalists in the November general election. The argument that this pair would be a better final round for the whole electorate than the Conservative and Moderate pair would be based on Revivalist having almost twice as many first-choice votes as Conservative despite Conservative’s much larger number of preference points (Borda score). As we saw, Conservative’s Borda score is 241, whereas Revivalist’s is  $(30 \times 4) + (16 \times 3) + (0 \times 2) + (14 \times 1) = 182$ . Either way, Moderate as the Condorcet winner in the primary is likely to prevail in the general election unless the electorate’s preferences shift significantly. Even so, a general election campaign between Conservative and Moderate, rather than Revivalist and Moderate, is more likely to be more robust and competitive—and to give November voters a more genuine head-to-head comparison between two candidates with plausible claims of being most representative of the entire electorate. A general election involving Revivalist and Moderate will be a much more factional—and polarizing—campaign that arguably disserves the voters as a whole. True, Revivalist received more first-choice votes in the primary than Moderate, but it was only 30% of the whole electorate, and being a far-right candidate was clearly opposed by a much larger segment of the electorate than Conservative. For these reasons, Conservative versus Moderate is a better match for November voters than Revivalist versus Moderate, and providing the best possible one-on-one match for the November general election is the purpose of the All Qualified Candidates Primary. Still, if a state wished to adopt the LPR-Minimax hybrid of Optimal Ranked Runoff rather than the Borda-Minimax hybrid of *Optimal Tournament Voting*, that would not be an unreasonable decision for a state to make (by means of legislation or a ballot initiative) for the reasons stated in *supra* note 138.

141. Green-Armytage, *supra* note 117, at 468 tbl. 1.

142. See *supra* note 138 and accompanying text.

143. For anyone wishing to verify or explore the analysis of this example under various alternative ranked-choice voting methods using Rob LeGrand’s invaluable online calculator, available at <https://www.cs.angelo.edu/~rlegrand/rbvote/calc.html> [<https://perma.cc/2465-TJYB>], these are the ballots in the appropriate format:

25: P>L>M>C>R  
 10: L>P>M>C>R  
 5: M>L>C>P>R  
 14: M>C>L>R>P  
 16: C>R>M>L>P  
 30: R>C>M>L>P

### E. *Plus-Minus Voting*

If any form of ranked-choice voting is deemed too complicated for use in any particular state, there is an alternative system that does not use ranked-choice ballots but can emulate to a considerable extent the capacity of Condorcet-compliant electoral methods to identify the candidates most preferred by the electorate’s median voter. In this alternative system, each voter can cast one positive vote for whichever candidate on the ballot the voter likes best. In this respect, the system is the same as what California uses for its “top two” primary.<sup>144</sup> But this alternative system has the added feature that each voter also can cast one negative vote for whichever other candidate on the ballot the voter likes least—or, put differently, dislikes most.<sup>145</sup>

In this Plus-Minus Voting system, all the candidate’s positive votes and negative votes are summed, with each positive vote counting +1 and each negative vote counting -1.<sup>146</sup> If Plus-Minus Voting were used to elect a single winner, then the candidate with the highest net total of positive and negative votes would win the election.<sup>147</sup> If Plus-Minus Voting were used to identify the “top two” candidates on the All Qualifying Candidates Primary who deserve to advance to the November general election, then the two candidates with the highest net totals of positive and negative votes would be the two finalists.

Plus-Minus Voting, while not as robust in identifying the two candidates most preferred by the electorate’s median voter as any Condorcet-compliant method, like Optimal Tournament Voting, would be a vast improvement on the overly simplistic system used in California’s “top two” primary. For example, in the case of the electorate split 34%-34%-32%, as previously described, if each voter cast a positive vote for their most preferred candidate and a negative vote for their least preferred, then these would be the votes that correspond to the preferences expressed by the same voters on ranked-choice ballots:

TABLE 7

	Left	Center	Right
Plus Votes	34	32	34
Minus Votes	-48	0	-52
Net Votes	-14	32	-18

Using Plus-Minus Voting, the centrist would easily advance to the November general election as one of the “top two” finalists, along with the left-of-center candidate who narrowly edged out the right-of-center candidate for the second spot. This result of the All Qualifying Candidate Primary is the same using Plus-

144. *Primary Elections in California*, CAL. SEC’Y OF STATE, <https://www.sos.ca.gov/elections/primary-elections-california> (last visited Apr. 21, 2024) [<https://perma.cc/PVQ3-KP4A>].

145. REFORM ELECTIONS NOW: BREAKING THE PARTISAN GRIDLOCK 10 (2023), <https://reformelections.now.org/wp-content/uploads/2023/04/REN-Election-Reform-Movements-in-States-AZ-PA-CT-VA-3.23.2023-FINAL.pdf> [<https://perma.cc/8PVE-TG7J>].

146. *See id.*

147. *See id.*

Minus Voting as it would be using any of the Condorcet-compliant methods we have considered: Total Vote Runoff, Most Preferred Runoff, or Optimal Tournament Voting.<sup>148</sup> Thus, Plus-Minus Voting is a way to replicate much of the benefits of a Condorcet-compliant method without the added complexities of any ranked-choice voting systems. Even if Most Preferred Voting is the simplest Condorcet-compliant form of ranked-choice voting, it has more steps to explain to voters and more intricate computations for election officials to perform—and verify—than Plus-Minus Voting.<sup>149</sup>

For the same reason, Plus-Minus Voting endeavors to achieve the same anti-polarization objectives that underlie Condorcet-compliant methods, while simultaneously avoiding the extra complexities of ranked-choice voting. To be sure, Plus-Minus Voting likely is even more susceptible to strategic manipulation than any Condorcet-compliant method.<sup>150</sup> It is possible that supporters of a left-leaning or right-leaning candidate would cast their single negative vote against a centrist candidate who is their sincere second-choice, rather than casting this single negative vote against the candidate on the opposite side of the ideological spectrum, whom they dislike the most. They would vote insincerely in this way in the hope that harming their second-choice candidate would help their first-choice candidate to win.

But how often would this kind of strategic use of a voter's single negative vote really occur in practice? After all, by casting their negative vote strategically in this way, voters risk electing the candidate they dislike the most, rather than electing their second-choice preference. That's obviously dangerous, especially when they would be quite happy if their second-choice preference wins and extremely unhappy if their most-disliked candidate does. In any event, if there are more than three candidates who qualify for the All Qualified Candidates Primary, then giving each voter a single negative vote reduces its utility as a mechanism of strategic voting.<sup>151</sup> A voter could disfavor only one candidate strategically,

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148. Here are these ballots in the format for entry into the online calculator, *supra* note 143 and accompanying text:

34: L>C>R  
 34: R>C>L  
 18: C>L>R  
 14: C>R>L

149. Minimax (or Maximum Consensus Voting), without the inclusion of Borda scoring in the form of *Optimal Tournament Voting*, is arguably even simpler for election administrators to compute and verify than Most Preferred Voting—but it also arguably more difficult to explain and justify to voters as the best way to determine which two candidates are most deserving to be the finalists in a top-2 system. While achieving the maximum consensus possible is obviously desirable, it involves avoiding negativity rather than just seeking positivity. Citizens may wish to adopt a voting system that enables them to maximize the positive rather than just minimize the negative.

150. Plus-Minus Voting, like Approval Voting, is a cardinal electoral method, not an ordinal electoral method, insofar as voters directly award candidates numerical values, rather than rank candidates. Cardinal electoral methods tend to be more vulnerable to strategic manipulation than ordinal electoral methods. See James Green-Armytage, T. Nicolaus Tideman & Rafael Cosman, *Statistical Evaluation of Voting Rules*, 46 SOC. CHOICE & WELFARE 183, 201 (2015) (analyzing the relative resistibility to strategic voting of cardinal as well as ordinary electoral methods).

151. See *id.* at 201–03.

leaving the possibility that another candidate generally liked by most voters even if not their top choice would emerge as worthy of being one of the two November finalists.

Plus-Minus Voting, moreover, presumably would appeal to many voters in an era of exacerbated polarization. Many voters nowadays cast their ballots with the greater priority being able to defeat a candidate they intensely dislike rather than to elect the candidate they most prefer.<sup>152</sup> Consider, in this regard, the animosity of anti-Trump voters towards Trump, or even the voters in 2016 who voted against Hillary Clinton more than they voted for Trump. Having a negative vote as well as a positive vote would enable voters to express this kind of negative preference as well as their traditional positive choice. The effect of summing both positive and negative votes would tend to avoid the election of the most polarizing candidates on the ballot and, instead, elevate candidates closer to the preferences of the electorate's median voter.<sup>153</sup>

#### V. A "TOP THREE" ALTERNATIVE—AND THE NEED FOR EXPERIMENTATION

The foregoing analysis reveals there is no open-and-shut obvious choice of which electoral method to adopt for the All Qualifying Candidates Primary. Based solely on each system's mathematical attributes, Optimal Tournament Voting might have a compelling claim for being the best—or perhaps even the hybrid of Lowest Plurality Voting and Minimax, if minimizing the risk of strategic manipulation is an overriding concern.<sup>154</sup> Most Preferred Runoff, however, is a simpler Condorcet-compliant system that will also redress the problem of polarization by identifying the two candidates most preferred by the electorate's median voter—and thus a majority of all the electorate's voters—even if those two candidates have fewer first-choice support than other more polarizing candidates who are less representative of the whole electorate. Yet Plus-Minus Voting is even more straightforward than Most Preferred Runoff.<sup>155</sup> Plus-Minus Voting, compared to any form of ranked-choice voting, is more readily comprehensible to all voters upon hearing its elements for the first time.<sup>156</sup> This fact puts Plus-Minus Voting in a formidable position of being the most practical way to achieve the goal of electing the candidate most favored by the median voter, assuming that it is not unduly vulnerable to strategic manipulation.

The fact that the choice of which electoral method to use is debatable is a strong reason to have this choice applicable to the primary rather than the general election. As we have seen, a Condorcet-compliant form of ranked-choice voting, like Most Preferred Runoff or Optimal Tournament Voting, could be used

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152. See, e.g., Thomas B. Edsall, *What Motivates Voters More Than Loyalty? Loathing*, N.Y. TIMES (Mar. 1, 2018), <https://www.nytimes.com/2018/03/01/opinion/negative-partisanship-democrats-republicans.html> [<https://perma.cc/2KXX-M23K>] (describing social science research on this point); see also Michael S. Kang, *Voting as Veto*, 108 MICH. L. REV. 1221, 1223 (2010).

153. See *supra* Table 7.

154. See *supra* note 140 and accompanying text.

155. See *supra* Section IV.E.

156. See *supra* Section IV.E.



instead of Lowest Plurality Runoff in Alaska’s “top 4” general election.<sup>157</sup> So used, the Condorcet-compliant method would identify the single winner among the four candidates on the November ballot—rather than being used to identify the “top 2” candidates in the primary who advance to the general election.<sup>158</sup> But when it is not incontrovertible which specific electoral method is the one to employ, then it is better to have the electoral method select two candidates to face off against each other in a final round of competition, rather than to have the electoral method decisively identify the single winning candidate. Simply put, the stakes are half as high when electoral competition leaves two candidates still in contention. The voters themselves will be able to make the final choice based on a simple majority vote between the two contenders.

It is often objected that a “top 2” system, like California’s, is problematic because of lower turnout in the primary, where the field of candidates is winnowed so drastically to only two finalists.<sup>159</sup> Voters need to have more than two options when turnout is much higher in the November general election, according to this argument.<sup>160</sup> It follows, this argument continues, that a form of ranked-choice voting is necessary in the general election to handle the decision among four or five or perhaps even more finalists.<sup>161</sup>

This turnout argument needs to be taken seriously. But ultimately it need not be decisive. France uses a California-style “top 2” system for legislative as well as presidential elections, and it is able to achieve high levels of turnout—much higher than in the United States—for its first round of its legislative races that is equivalent to the nonpartisan primary in California’s system.<sup>162</sup> One important reason for France’s much higher first-round turnout is that it holds the two rounds much closer together (and on a Sunday rather than a Tuesday), whereas in the United States—including California—primaries are often many months before the general election.<sup>163</sup> If all primaries for congressional seats,

157. See *supra* Sections IV.C–D.

158. *Id.*

159. See, e.g., *Top-Two Primary Engages Independents—Despite Low Turnout Overall*, PUB. POL’Y INST. OF CAL. (Apr. 30, 2014), <https://www.ppic.org/press-release/top-two-primary-engages-independents-despite-low-turnout-overall/> [<https://perma.cc/Y4QK-VZG9>].

160. *Id.*

161. See *id.*

162. In 2022, France had its lowest turnout for the first round of its legislative elections: 47.5%. See Mestre, *supra* note 67. By contrast, in California’s 2022 “top 2” primary, turnout of registered voters was only 33.2%. See CAL. SEC’Y OF STATE, HISTORICAL VOTER REGISTRATION AND PARTICIPATION IN STATEWIDE PRIMARY ELECTIONS 1914-2022, <https://elections.cdn.sos.ca.gov/sov/2022-primary/sov/05-historical-voter-reg-primary.pdf> (last visited Apr. 21, 2024) [<https://perma.cc/SK6B-ZE2U>].

163. In 2022, the first round of France’s legislative elections was on Sunday, June 12. The second round was just one week later—Sunday, June 19, where turnout was actually slightly lower than in the first round: 46.23%. Mariama Darame & Patrick Roger, *French Legislative Elections: Abstention Remains the Largest ‘Party’ in France*, LE MONDE (June 21, 2022, 4:19 PM), [https://www.lemonde.fr/en/politics/article/2022/06/21/french-legislative-elections-abstention-remains-the-first-party-in-france\\_5987501\\_5.html](https://www.lemonde.fr/en/politics/article/2022/06/21/french-legislative-elections-abstention-remains-the-first-party-in-france_5987501_5.html) [<https://perma.cc/7G6S-ZPCF>]. California’s “top 2” primary in 2022 was Tuesday, June 7. See CAL. SEC’Y OF STATE, *supra* note 162. The general election was five months later on Tuesday, November 8. *Prior Statewide Elections*, CAL. SEC’Y STATE, <https://www.sos.ca.gov/elections/prior-elections/prior-statewide-elections> (last visited Apr. 21, 2024) [<https://perma.cc/6XD9-KH5E>].

including U.S. Senate seats, along with other major statewide offices like governor, were held on a single Sunday in September or October, it is most probable that turnout for these primaries would be much higher than it currently is in the United States.<sup>164</sup>

In any event, experimenting with different ways to conduct “top 2” nonpartisan primaries, like California’s, should be part of the electoral experimentation that states should be encouraged to pursue. Even if some states might prefer a “top 4” or “top 5” general election, like Alaska’s and Nevada’s (if the adoption of “top 5” is confirmed in Nevada),<sup>165</sup> other states might favor the decisiveness of a “top 2” general election. These states, therefore, should be incentivized to move beyond California’s unduly simplistic way of picking its two finalists and instead try alternative methods like Most Preferred Runoff or Optimal Tournament Voting. The goal is for states to strive for a sensible balance of avoiding complexity, strategic voting, and outcomes unrepresentative of the electorate because of how polarization affects the system’s tabulation of preferences.

If a state does wish to have more than two candidates on the general election ballot, another option to seriously consider would be a “top 3” system that does not include ranked-choice voting, but instead has voters directly express their preferences between each pair of the three candidates on the November ballot: A v B, B v C, C v A. The winner of the election would be whichever candidate is preferred by more voters against each opponent—in other words, the Condorcet winner. If in any election there is no Condorcet winner, but instead a three-way tie in which each candidate is preferred against one opponent but disfavored compared to the other, then this tie could be resolved by electing the candidate whose single margin of defeat is the smallest—i.e., the Minimax winner.<sup>166</sup>

Moreover, using Minimax to break this three-way tie is consistent with conducting a “top 3” election in accordance with the Optimal Tournament Voting method.<sup>167</sup> The reason is that mathematically in elections with only three candidates the Minimax winner will always be the same as the Optimal Tournament Voting winner. In other words, in a three-candidate election, if there is no Condorcet winner, then *either* the Minimax winner will have the highest Borda score (and thus be the Optimal Tournament Voting winner for *this* reason) *or* the Minimax winner will be preferred head-to-head by more voters than the Borda winner (and thus be the Optimal Tournament Voting winner for *that* reason).<sup>168</sup> Unlike when there are more than three candidates, there is no possibility that the Borda winner beats the Minimax winner head-to-head.<sup>169</sup> Accordingly, in what we can call an *Optimal Top-Three Tournament* election officials can simply

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164. See *supra* notes 162–63 and accompanying text.

165. *Nevada Question 3, Top-Five Ranked Choice Voting Initiative (2024)*, BALLOTPEDIA, [https://ballotpedia.org/Nevada\\_Question\\_3\\_Top-Five\\_Ranked-Choice\\_Voting\\_Initiative\\_\(2024\)](https://ballotpedia.org/Nevada_Question_3_Top-Five_Ranked-Choice_Voting_Initiative_(2024)) (last visited Apr. 21, 2024) [<https://perma.cc/8MQN-EUU6>].

166. *Supra* notes 131–32 and accompanying text.

167. See *id.*

168. See *id.*

169. See *supra* Section IV.D.

perform the Minimax calculation with assurance that the elected candidate will be the optimal winner.<sup>170</sup>

This kind of “top 3” system can be explained and justified to the public on the ground that it will elect whichever of the three candidates is preferred by a majority of voters over each opponent, the Condorcet winner, or, when there is no such candidate and each candidate wins one and loses one of their head-to-heads against their two opponents, then the election’s winner is at least the candidate whose single defeat is by the narrowest margin, the Minimax winner. In this way, the system elects the candidate who is least divisive and thus can be more positively described as the most common-ground candidate—the candidate who comes closest to being a Condorcet winner and who thus achieves the maximum degree of consensus achievable in this election, as described above. Moreover, because the election outcome accords with Optimal Tournament Voting, the public can properly be told that in this three-candidate election there is no other candidate who is more preferred by the electorate overall who beats this most common-ground candidate head-to-head. Therefore, this most common-ground candidate is the best of the three to elect to the single statewide office at stake in this election.<sup>171</sup>

In this “top 3” system, there still would be the question of how the three finalists qualify for the general election ballot. The simplest method would be the kind of All Qualified Candidates Primary, described previously, in which the three candidates receiving the most votes would advance to the general election.<sup>172</sup> Although approval voting could be used in the primary to determine the three general election finalists, there is a danger that the dominant party in the state would run three candidates who would get the three most approval votes, precluding any other finalists.<sup>173</sup> While a form of ranked choice voting could be used to determine the three finalists, if the goal of adopting this “top 3” system is to avoid the use of ranked-choice voting for the sake of making the voting method as easy as possible for voters to understand, then it is easiest just to use conventional plurality voting for the primary: each voter simply selects the single candidate on the primary ballot that voter most prefers, and the three candidates with the most votes in the primary make it onto the general election ballot. There is some risk that a Condorcet winner among the candidates in the primary would fail to be one of the three finalists given the use of simple plurality voting in the primary. But the risk of this is fairly low, and arguably this Condorcet winner would not deserve to be one of the three finalists unless that candidate is at least among the three most popular candidates, as measured by each voter’s first-choice preferences, on the primary ballot. Plus-Minus Voting, as described above, could also be used to identify the top three candidates.

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170. I am very grateful to Wes Holliday for making this mathematical point.

171. Because the Optimal Top Three Tournament does not use ranked-choice ballots, there is no reason to entertain the possibility of the LPR-Minimax hybrid, Optimal Ranked Runoff, in this context.

172. See *supra* Part III.

173. I am grateful to Mike Parsons for this point.

This kind of “top 3” system could be seen as a good way to give voters the kind of third option that they are increasingly clamoring for.<sup>174</sup> A third “Common Sense” or other centrist party could compete for one of the three spots on the November ballot. And if a centrist party’s nominee does secure one of these “top 3” spots, then the Optimal Tournament Voting method of determining the general election winner would give the centrist party’s nominee an excellent chance to prevail against more divisive opponents.

Thus, this kind of “top 3” system would be a strong antidote to polarization without needing to use any form of ranked-choice voting, either in a primary or the general election. In this respect, this kind of “top 3” system might appeal to moderate Republicans, whose party currently professes vehement opposition to ranked-choice voting.<sup>175</sup> While that opposition is misguided, especially with respect to forms of ranked-choice voting that are Condorcet-compliant, the kind of Optimal Top-Three Tournament just described is a way to achieve a Condorcet-compliant election while simultaneously deflecting the entire debate over ranked-choice voting. Moreover, moderate Republicans should find the Optimal Tournament Voting method attractive for reasons of self-interest as well as good government: otherwise, given increasing polarization, their faction of the GOP is likely to suffer extinction as the MAGA movement cements its dominance.<sup>176</sup>

Still, as attractive as this kind of “top 3” system might be in some states, experimenting with alternative electoral methods, including different forms of ranked-choice voting, will be necessary in other states. Some may resist the idea of voting three times to pick one winner for a single office, as an Optimal Top-Three Tournament without ranked-choice ballots would require. Others may simply prefer the idea of a general election ending up as a straightforward one-on-one choice between the two strongest opponents. If so, then it is especially important to experiment with different methods to employ in the All Qualified Candidates Primary, along the lines described above, for determining the two strongest opponents.

## VI. ADDING FUSION TO THE GENERAL ELECTION BALLOT

There is another advantage to structuring the election as a two-stage process where the first stage is the All Qualifying Candidates Primary followed by a “top two” general election where at least one of the two finalists has been determined by an election method that is mathematically aimed to identify the candidate

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174. Support for the proposition that “a third major party is needed” is “the highest since Gallup first asked the question in 2003.” Jeffrey M. Jones, *Support for Third U.S. Political Party Up to 63%*, GALLUP (Oct. 4, 2023), <https://news.gallup.com/poll/512135/support-third-political-party.aspx> [https://perma.cc/R5JZ-P8EQ].

175. REPUBLICAN NATIONAL COMMITTEE, RESOLUTION TO OFFICIALLY OPPOSE RANKED CHOICE VOTING ACROSS THE COUNTRY 1, <https://prod-static.gop.com/media/2-RESOLUTION-TO-OFFICIALLY-OPPOSE-RANKED-CHOICE-VOTING-ACROSS-THE-COUNTRY.pdf> (last visited Apr. 21, 2023) [https://perma.cc/F9XW-7FZV].

176. Andrew Desiderio & John Bresnahan, *The Erosion of the Senate’s Dealmaking Middle*, PUNCHBOWL NEWS (Nov. 10, 2023), <https://punchbowl.news/article/joe-manchin-forgoes-reelection-senate-middle-erodes/> [https://perma.cc/P5R6-CUT9].

closest to the electorate's median voter. This additional advantage is the ability to introduce what is known as "fusion voting" as an element of the general election ballot.<sup>177</sup>

"Fusion voting" is the possibility that a candidate can appear on a ballot as the endorsed nominee of more than one political party.<sup>178</sup> Fusion voting thus enables one candidate to represent a coalition of parties, thereby widening the candidate's appeal.<sup>179</sup> Fusion voting makes it more likely that one candidate will be able to build a coalition wide enough to encompass the electorate's median voter and, having done so, win the election supported by a majority of voters.<sup>180</sup>

The way fusion voting could work in a system with an All Qualifying Candidates Primary is that any party whose nominee qualified for the primary ballot but did not advance to the general election could, after the primary, decide to make a secondary fusion nomination for one of the two finalists on the general election ballot. This finalist candidate could then appear on the ballot both as primary nominee of one party and the secondary nominee of another party. In theory, fusion voting could also be incorporated into the kind of "top 3" system described in the previous section, but it would make little sense to add fusion voting to Alaska's "top 4" system with ranked-choice voting or a "top 5" variation on the Alaska model. The value of two or more parties fusing together to endorse the same candidate considerably diminishes when there are four, five, or more candidates on the general election ballot; in this situation, a party of any significant strength within the electorate would want to get its own nominee onto the general election ballot, rather than co-nominating another party's nominee.

Using the example discussed earlier, suppose these are the candidates appearing on the All Qualified Candidates Primary ballot:

**Mary Jones**

*Party: Democrat*

**Fred Chang**

*Party: Republican*

**Sarah Applewood**

*Party: Moderate*

**Victor Nunez**

*Party: Patriot*

**Chris Peterson**

*Party: [none]*

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177. See Cyrena Kokolis, Chris Parr & Beau Tremiere, *Fusion Voting, Explained*, PROTECT DEMOCRACY (Dec. 19, 2023), <https://protectdemocracy.org/work/fusion-voting-explained/> [<https://perma.cc/XW8C-4S4J>].

178. There are different types of fusion voting. One type involves the candidate's name appearing twice with each separate party label. The other involves each candidate's name appearing only once but with both party labels next to the candidate's name. This article focuses on the latter version as it is less confusing to voters and more in keeping with overall goals and design of the All Qualified Candidates Primary system.

179. Kokolis et al., *supra* note 177.

180. *See id.*

Suppose further than in this primary election, the two candidates advancing to the general election are Applewood, the Moderate, and Chang, the Republican. If fusion voting were added to the general election ballot, then the Democratic Party (whose candidate did not advance) could issue a fusion nomination to Applewood to signal that the Democrats support her over her Republican opponent in the “top two” general election. If the Democrats decide to co-nominate Applewood, then her appearance on the general election ballot would reflect this fusion nomination:

**Sarah Applewood**

*Primary Party: Moderate*

*Secondary Party: Democrat*

A fusion voting nomination of this type could help general election voters determine which of the two finalists is closest to their own views.

## VII. CONCLUSION

Regrettably, there is no perfect electoral system that all states indisputably should employ for the nomination and election of their statewide officeholders. But reasonable choices can be made to improve upon existing procedures. First, electronic signature-gathering can be employed to create an appropriately twenty-first-century form of determining which candidates deserve to qualify to be on the ballot in the primary election.<sup>181</sup> Second, and similarly, current technology can be used to enable political parties to hold online conventions in which voters can conveniently participate to decide which candidate should receive the party’s nomination *before*, and not as a result of, the primary election.<sup>182</sup> This innovation of online nominating conventions can enable the government’s primary election to become a contest among the nominees of all qualifying parties, as well as qualifying independent candidates, to decide which two candidates among these qualifiers deserve to go head-to-head against each other in the November general election.

Third, a suitable selection can be made among alternative electoral methods designed to identify which candidates are most aligned with the preferences of the electorate’s median voter. Most Preferred Runoff is one such electoral method (in sharp contrast to Lowest Plurality Runoff, which can lead to significant misalignment with the median voter’s preferences), and so too is Optimal Tournament Voting—and even, to a lesser degree, Plus-Minus Voting.<sup>183</sup> One of these electorate methods, or another variation with the same objective of advancing at least one non-polarizing candidate, would be an appropriate way for a state to structure an All Qualified Candidates Primary that sends the “top two” finalists

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181. *See supra* Part III.

182. *See supra* Section III.B.

183. *See supra* Sections IV.C–E.

to the November general election. That way voters in November could validate whether the non-polarizing candidate is truly the preference of the majority. Alternatively, Optimal Tournament Voting could be used in a “top 3” general election, the three candidates for which would be determined by a preliminary round of voting that permitted voters to identify which candidate they viewed as meriting to be one of the three November finalists.<sup>184</sup>

Lastly, a mechanism of “fusion voting”—which allows political parties whose nominees in the primary do not become one of the finalists in the general election to make a secondary nomination in favor of one of these finalists—would help build cross-party coalitions that facilitate the ability of candidates to earn support from a majority of voters.<sup>185</sup> All of these reforms would help make elections better identify the candidate whom a majority of a state’s voters would prefer to elect to the statewide office at stake.

Consequently, all these measures should be pursued vigorously as part of an overall effort to resuscitate the capacity for collective self-government in the United States.

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184. *See supra* Section IV.D.

185. *See supra* Part VI.

