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Combatting Extremism

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COMBATTING EXTREMISM

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Few of us are happy with the state of American democracy. Our political institutions appear dysfunctional and our political culture more generally has become increasingly toxic and tribalistic.

In Gallup's most recent poll, only 15% of people approved of the job Congress is doing.[1] For perspective, you don't have to go far back to some lost "golden age" to find significantly more positive views of Congress. As recently as twenty years ago, from the mid-1990s to the mid-2000s, Congress' approval rating was three times higher, typically in the 40–50% range.[2] Good reasons for this dissatisfaction exist. Congress has become increasingly frozen, unable to effectively address the major issues of the day that citizens care most urgently about.

A variety of metrics help demonstrate this fact. The congressional session that will conclude in January 2025 is on pace to be the least productive Congress since at least the Great

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1. *Congress and the Public*, GALLUP HIST. TRENDS, https://news.gallup.com/poll/1600/congress-public.aspx [https://perma.cc/G6EC-VL85].

2. *Id.* (charting the public's approval rating of Congress from 1974 to 2024); *see also Satisfaction with the United States*, GALLUP HIST. TRENDS, https://news.gallup.com/poll/1669/general-mood-country.aspx [https://perma.cc/4W2U-E4YY].

Depression.[3] In 2023, Congress enacted fewer laws than in any other single year.[4] To be sure, the 117th Congress (2021–2023) had a burst of productivity, enacting a number of major bills.[5] But those two years were unusual. In general, the number of enacted laws has fallen: in the 1970s, Congress enacted around 800 laws in every two-year term; today, that number is 300–350.[6] But the measure I find most revealing is one that looks at the extent to which Congress manages to legislate on the issues citizens care most intensely about.

That measure has dropped significantly over time. During the 1970s, Congress enacted legislation on 60–70% of those major issues.[7] Today, Congress manages to legislate on only about 30% of them. Even during the burst of productivity from

3. Gurjit Kaur & Patrick Jarenwattananon, *118th Congress to be the Most Unproductive in Decades*, NPR (Dec. 21, 2023, 5:18 PM), https://www.npr.org/2023/12/21/1221040449/118th-congress-to-be-the-most-unproductive-in-decades [https://perma.cc/3Y8Q-NGMJ].

4. Sarah Binder, *Why Congress's 2023 Was So Dismal*, GOOD AUTH. (Dec. 26, 2023), https://goodauthority.org/news/congress-2023-dismal/ [https://perma.cc/4J4Y-427R].

5. Some laws are much more important than others, which means the sheer number of laws passed does not necessarily provide an accurate picture of congressional productivity. Additionally, Congress at times now bundles more substantive issues into a single bill. David Mayhew's seminal study of Congress, *Divided We Govern*, created a method for identifying "important congressional enactments." In his initial study, which covered 1946–1990, he found that each Congress enacted just under ten such laws. DAVID R. MAYHEW, DIVIDED WE GOVERN 49 (1st ed. 1991). When his second edition extended the study to 2002, he found that each Congress from 1991–2002 had enacted an average of eleven such laws. DAVID R. MAYHEW, DIVIDED WE GOVERN 208–13 (2d ed. 2005). Then, from 2003–2022, each Congress enacted twelve such laws. If one accepts Mayhew's methodology, Congress has not become less effective at enacting "important" laws. Yet other major political scientists conclude that more polarized Congresses are less productive and that Congress has grown more polarized in recent decades. NOLAN MCCARTY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW 140 (2019). Other social scientists find that since 2010 Congress has passed fewer amounts of substantive legislation per session than since at least 1990. *See* Drew DeSilver, *Nothing Lame About This Lame Duck: 116th Congress had Busiest Post-Election Session in Recent History*, PEW RSCH. CTR. (Jan. 21, 2021), https://www.pewresearch.org/short-reads/2021/01/21/nothing-lame-about-this-lame-duck-116th-congress-had-busiest-post-election-session-in-recent-history/ [https://perma.cc/2G2X-M7A3].

6. *Statistics and Historical Comparison*, GOVTRACK, https://www.govtrack.us/congress/bills/statistics [https://perma.cc/C669-TK6G].

7. Sarah Binder (@bindersab), X (Dec. 29, 2022, 9:57 AM), https://x.com/bindersab/status/1608477394658070530?s=20&t=TNghCCnYKMmr0LxMA4ExjQ [https://perma.cc/6YU7-QXZD]; *see also* Sarah Binder, *Goodbye to the 117th Congress, Bookended by Remarkable Events*, WASH. POST (Dec. 29, 2022, 7:00 AM), https://www.washingtonpost.com/politics/2022/12/29/congress-year-review [https://perma.cc/2GFC-LCPW].

2021–2023, that percentage was only 40%. The political process has become less capable of addressing current major issues.

But here's something of a silver lining: members of Congress dislike the institution as much as most Americans do. Those with reputations as institutionalists, who are interested in trying to govern, have been retiring. Some wanted out so badly that they made their retirement effective almost immediately, rather than serving out their term to January 2025.

The political parties are more polarized than they have been in more than 100 years. At the same time, they are deeply divided internally as well, especially on the Republican side—which makes governing all the more difficult.

One retiring Republican congressman said: "People feel no loyalty to this institution" (that is, the House).[8] Others say: "Right now, Washington, D.C., is broken; it is hard to get anything done."[9] The rise of cable television and social media—and the fundraising they can unleash—has led some members of Congress to care less about governing and more about gaining attention, often through provoking outrage and staking out extreme positions.[10] You don't have to take my word for that; again, members of Congress say so directly. Republican Senator Thom Tillis of North Carolina, for example, recently said that "attention-grabbing has 'become part of a business model for people here.' . . . 'They're doing it for the purposes of exposure and money' . . . . 'If there is a long-term goal in mind, boy, I'd like them to reveal it at some point.'"[11] For a certain number of members, Congress has become performance art, rather than a vehicle for governing.

Yet, empirical studies suggest that the mass public is not as ideologically polarized on policy issues as are members of

8. Billy House & Erik Wasson, *Republican Divisions Threaten Scalise's Ascent to House Speaker*, BLOOMBERG POLITICS (Oct. 12, 2023, 9:43 AM), https://www.bloomberg.com/news/articles/2023-10-12/steve-scalise-s-ascent-to-house-speaker-threatened-by-republican-divisions [https://perma.cc/HPK5-JLGA] (including a statement from Representative Mike Gallagher from Wisconsin).

9. Savannah Kuchar, *'Washington, D.C. is Broken': Why Dozens of Lawmakers Say They're Leaving Congress*, USA TODAY (Dec. 5, 2023, 7:00 PM), http://www.usatoday.com/story/news/politics/2023/12/05/republican-democratic-lawmakers-leaving-congress-2024/71814547007/ [http://perma.cc/DPD4-AF66].

10. Richard H. Pildes, *Small-Donor-Based Campaign-Finance Reform and Political Polarization*, 129 YALE L.J. F. 149, 158 (2019).

11. Bryan Metzger, *Republicans Are Desperate for Attention — and It's Decimating Their Ability to Govern*, BUS. INSIDER, https://www.businessinsider.com/mike-johnson-speaker-fight-gaetz-mace-republicans-2023-10 [https://perma.cc/TR8Q-DQGM].

Congress or partisan activists, though this issue continues to be debated.[12] To be sure, voters have sorted themselves into the political parties in ways that are more ideologically consistent than in the past. But several empirical studies conclude that a majority of Americans who are not political activists still share many policy beliefs, including on issues such as gun rights, immigration, abortion, or how to teach American history.[13] As one major recent synthesis concludes, "The emerging consensus is that most voters have been and remain overwhelmingly moderate in their policy positions."[14]

These studies show, however, that most partisans incorrectly *believe* that the policy preferences of the other side are more extreme than they are in fact.[15] Progressive activists and extreme conservatives have the largest perception gaps about what the other side actually believes.[16]

Even if less stark disagreement on policy exists among citizens than many believe, American political culture has grown more troubling in recent years. A striking development

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12. *See, e.g.*, Austin C. Kozlowski & James P. Murphy, *Issue Alignment and Partisanship in the American Public: Revisiting the 'Partisans without Constraint' Thesis*, 94 SOC. SCI. RSCH., Feb. 2021, at 1, 2 (suggesting that the American public has become increasingly ideological).

13. *See, e.g.*, MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 23–24 (2017) (showing data that typical Americans have not polarized ideologically); *see also* ANDREW B. HALL, WHO WANTS TO RUN? HOW THE DEVALUING OF POLITICAL OFFICE DRIVES POLARIZATION 25 (2019) (concluding that moderate candidates tend not to run, given the cost-benefit assessment of doing so); Anthony Fowler et al., *Moderates*, 117 AM. POL. SCI. REV. 643, 659 (2022) ("Our findings contribute to a growing literature suggesting that to the extent that elected officials are polarized, it is likely not attributable to mass voting behavior."); Barum Park, *How Are We Apart? Continuity and Change in the Structure of Ideological Disagreement in the American Public, 1980–2012*, 96 SOC. FORCES 1757, 1771 (2018) (showing data that, when polarization is measured in terms of bimodality, most citizens hold moderate issue preferences); Seth J. Hill & Chris Tausanovitch, *A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization*, 77 J. POL. 1058, 1073 (2015) (concluding that the public has not polarized in its policy views from 1956 to 2012).

14. *See* Michael J. Barber & Nolan McCarty, *Causes and Consequences of Polarization, in* SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 15, 24 (Nathaniel Persily ed., 2015).

15. *See* Samantha L. Moore-Berg et al., *Exaggerated Meta-Perceptions Predict Intergroup Hostility Between American Political Partisans*, 117 PROC. NAT'L ACAD. SCIS. 14864, 14871 (Morris P. Fiorina ed., 2020).

16. *See* Rachel Kleinfeld, *Polarization, Democracy, and Political Violence in the United States: What the Research Says*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 5, 2023), https://carnegieendowment.org/research/2023/09/polarization-democracy-and-political-violence-in-the-united-states-what-the-research-says?lang=en [https://perma.cc/NQ67-R4DD].

is the rise of what political scientists call "affective polarization," or what I call here "emotional polarization."[17]

We now see in polling data intense hostility toward members of the opposite party; they have come to be regarded by many as enemies instead of mere political opponents. Indeed, much of actual voting behavior in recent years reflects more hostility toward and hatred of the other party than positive feelings toward one's own party and candidates.

Surveys show emotional polarization is similar across Democrats and Republicans.[18] This emotional polarization makes it more likely that people will tolerate antidemocratic behavior from "their" political figures in order to prevent the other side from gaining power.[19] This is part of what has turned politics existential: the belief that if the other side wins, the country will never be the same.

My claim in this Essay is that part of the reason for these developments is that our current election structures make it too easy for extreme or factional candidates to win office *even when they lack the support of electoral majorities.*[20] Additionally, our current system also creates incentives for candidates and those in government to be more responsive to the ideological wings of the parties, rather than to citizens more generally.

I want to help shift the focus of election law from rules about voting policy and doctrinal concerns such as the *Anderson-Burdick* test[21] to a focus on how the way we structure the democratic process affects the kind of government and governance we get. Ultimately, the purpose of rules and policies about the political process is to empower a government that is not only legitimate but also effective at responding to the interests and concerns of citizens.

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17. *See* Steven W. Webster & Alan I. Abramowitz, *The Ideological Foundations of Affective Polarization in the U.S. Electorate*, 45 AM. POL. RSCH. 621, 623 (2017).

18. *Id.*

19. *See* Eelco Harteveld et al., The (Alleged) Consequences of Affective Polarization: A Survey Experiment in Nine Democracies 9–10 (Sept. 30, 2022) (unpublished manuscript), https://doi.org/10.31219/osf.io/64uwd [https://perma.cc/L4KY-24P7]; *see also* Eli J. Finkel et al., *Political Sectarianism in America*, 370 SCI. 533, 535 (2020).

20. The terms *normative extremism* and *empirical extremism* are taken from the work of Professor Cynthia Miller-Idriss, who also identifies *behavioral extremism*, which denotes uncivil and confrontational modes of behavior. *See generally* CYNTHIA MILLER-IDRISS, HATE IN THE HOMELAND (2022) (analyzing how physical and virtual spaces cultivate extremism).

21. *See* Burdick v. Takushi, 504 U.S. 428 (1992); Anderson v. Celebrezze, 460 U.S. 789 (1983) (explaining the test).

Much of my academic work focuses on the institutional design of democratic institutions and democratic processes. This Essay discusses five institutional-design reforms that would combat extremism by making our democracy more responsive to the preferences of true electoral majorities. My focus is reasonably realistic reforms, in part because some of them have already been adopted in some states. So, I do not discuss turning the United States into a parliamentary system, adopting proportional representation for the House, or changing the Senate or the Electoral College.[22] I also offer a bit of comparative perspective on how other major democracies handle the institutional-design issues I discuss.

At a minimum, I hope to help you see how the democratic politics we get is in part a function of how we structure the institutional framework within which political competition and elections take place.

I. PRIMARY ELECTIONS

The first and, in my view, most important reform is to change the form of the primary elections we use to winnow down candidates for the general election. Put more dramatically, I believe we should consider eliminating the traditional party primary.

At the outset, it is worth noting that most democracies do not use primary elections *at all* to choose their parties' nominees for legislative offices. Instead, the political party itself chooses its candidates, often through processes that the national or local party's leadership controls.

In the United States, primary elections to choose candidates came about as part of the early twentieth-century progressive-era reforms. They were viewed as a way to avoid the perceived corruption of party-political machines that chose nominees. Reformers believed primary elections would also compel citizens to learn more about candidates and become more engaged.[23]

But we have to be careful about romanticizing democracy.[24] Despite these high-minded beliefs of reformers, today's voters

22. For my critique of current proposals to create proportional representation for the U.S. House, see generally Richard H. Pildes, *Skepticism About Proportional Representation for Congress,* 2024 U. ILL. L. REV. 1529.

23. *See* ROBERT BOATRIGHT, REFORM AND RETRENCHMENT: A CENTURY OF EFFORTS TO FIX PRIMARY ELECTIONS 63–66 (2024).

24. *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 824 (2014).

are not champing at the bit to engage in primary elections. Turnout in primaries is notoriously low; less than 15% of eligible voters turned out in the 2014 midterm primaries, and turnout in the last decade rarely surpassed 20%, with a high of 22% in 2022.[25] Moreover, studies show that primary voters are highly unrepresentative of general election voters.[26]

The traditional party primary, controlled by this small, unrepresentative electorate, has become a significant source that fuels the rise and success of more ideologically extreme candidates. There is some empirical dispute about whether primary electorates are dominated by the ideological wings of the parties, but most importantly, politicians perceive that to be the case.

Primary elections have several effects that drive our politics toward the extremes. For example, in a recent book entitled *Rejecting Compromise: Legislators' Fear of Primary Voters*, a group of social scientists interviewed dozens of members of Congress and state legislatures.[27] They found that "[l]egislators *believe* that primary voters are much more likely to punish them for compromising than general election voters or donors."[28] To avoid being "primaried"—a new verb that reflects this dynamic—legislators become less willing to compromise. For example, according to then–Speaker of the House John Boehner, a major bipartisan immigration reform package in 2013, which had passed the Senate with 68 votes, died in the House immediately after the House Majority Leader at the time, Republican Eric Cantor, was defeated from the right in a

25. *See* JOSHUA FERRER & MICHAEL THORNING, 2022 PRIMARY TURNOUT: TRENDS AND LESSONS FOR BOOSTING PARTICIPATION 7 (Mar. 2023), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2023/03/Primary-Turnout-Report_R03.pdf [https://perma.cc/WKM5-9W97].

26. *See* TASK FORCE REPORT ON INSTITUTIONAL REFORMS TO COMBAT EXTREMISM, PRIMARY ELECTIONS (forthcoming 2025); *see also* Andrew B. Hall & Daniel M. Thompson, *Who Punishes Extremist Nominees? Candidate Ideology and Turning Out the Base in US Elections*, 112 AM. POL. SCI. REV. 509, 522–23 (2018) (finding that extremist nominees do poorly in general elections because they skew turnout in the general election away from their own party). *But see* John Sides et al., *On the Representativeness of Primary Electorates*, 50 BRIT. J. POL. SCI. 677, 679 (2018) (finding that primary voters are not demographically distinct or ideologically extreme compared to those who voted in the general election).

27. SARAH E. ANDERSON ET AL., REJECTING COMPROMISE: LEGISLATORS' FEAR OF PRIMARY VOTERS 63 (2020).

28. *Id.* at 79.

primary by a candidate who accused Cantor of being too soft on immigration.[29] We still await major immigration legislation.

Additionally, incumbents preemptively move to more extreme positions to preempt the risk of being challenged, whatever the statistics show about the actual likelihood of a challenge. The traditional party primary can also eliminate candidates who would actually be the preference of a majority in the general election. These candidates cannot get through the party primary. The very qualities that give them broad electoral appeal in a general election are often anathema to a party's primary voters. Studies also show that moderates choose not to run in the first place when they perceive primary electorates to be too extreme for them to survive the primary.[30]

In light of all this, my first proposal is for states to replace the traditional party primary with what is known as the top-four or top-five primary—sometimes called a "unified primary." In these systems, all candidates run in a single primary. Candidates can identify themselves on the ballot in partisan or nonpartisan terms. The top four or five vote-getters in the primary then go on to the general election, in which instant-runoff voting (IRV)—or ranked-choice voting, as it is sometimes called—is used to determine the winner.

The idea behind this reform is that any candidate with broad appeal to the general electorate will have enough support in this single, unified primary to make it through to the general election (in a top-four primary, anyone with at least 25% of the vote would make it). This avoids the premature elimination of candidates who would have majority support in the general electorate.

Then, with instant-runoff voting in the subsequent general election, voters rank in order as many of these four candidates as they wish to rank (I discuss IRV more in a moment). With IRV, a candidate must win a majority of votes to be elected.[31] Thus, among the top four candidates who make it to the general election, the one with the broadest appeal will win. A candidate

29. *See* Michelle Cottle, *Joe Manchin Has Some Unsolicited Advice for Kamala Harris and the Democrats*, N.Y. TIMES (Aug. 18, 2024), https://www.nytimes.com/2024/08/18/opinion/joe-manchin-kamala-harris.html?smid=nytcore-ios-share&referringSource=articleShare&sgrp=c-cb [https://perma.cc/VTF4-NMRM].

30. *See* Danielle M. Thomsen, *Ideological Moderates Won't Run: How Party Fit Matters for Partisan Polarization in Congress*, 76 J. POL. 786, 786 (2014).

31. This means the candidate must win a majority of votes in the final round of tabulation. If some voters do not rank all four candidates, the total number of votes tabulated in the final round can be fewer than the total number of votes cast for first-choice candidates.

cannot be elected simply by winning a plurality of the votes. This further eliminates the possibility that more factional candidates, who can only attract a plurality of voters' support, can win elections.

We have experience with this system. In 2020, voters in Alaska adopted it through a ballot measure that first went into effect for the 2022 elections.[32] Thus far, the evidence indicates that this new primary structure is working very much as intended. In the most high-profile race since the system went into effect, incumbent Senator Lisa Murkowski was reelected.[33] Senator Murkowski has broad support in Alaska, but she likely would not have survived the closed party primary system Alaska used prior to the reform. She was one of the two figures, along with Representative Liz Cheney, whose defeat former-President Donald Trump sought most aggressively.[34]

The Trump-supported Senate candidate would likely have defeated Murkowski in a traditional Republican primary. But under the new system, Murkowski came in first in the primary, making her one of four candidates to go on to the general election.[35] Because she had broad appeal to independents, some Democrats, and Republicans, she won under the IRV rules used for the general election.

The same thing happened in Alaska's state legislative races. Candidates who would have been eliminated in traditional party primaries were elected under this new system. These candidates made it to the general election, as one of the top four candidates, and then won because a majority of the general election voters preferred them. Studies of Alaska's legislative process in the aftermath of its political reform found that the process became less contentious and divisive than it had been, with some of the successful candidates playing critical roles in forging compromises on matters such as the state budget.[36]

Voters in Alaska had not changed. But changing the structure of primary elections rewarded the less ideologically

32. *See* Benjamin Reilly et al., *Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"?*, 15 CAL. J. POL. & POL'Y, 2023, at 1, 9.

33. *See id.*

34. *See* Jonathan Allen & Henry J. Gomez, *Rep. Lix Cheney Loses Her Primary in Wyoming to Trump-Backed Challenger*, NBC NEWS (Aug. 16, 2022), https://www.nbcnews.com/politics/2022-election/rep-liz-cheney-loses-primary-wyoming-trump-backed-challenger-rcna43379 [https://perma.cc/2NU7-244P].

35. *See Senate: Alaska Primary Results*, CNN, https://www.cnn.com/election/2022/results/alaska/primaries/senate [https://perma.cc/W9RA-XVYP].

36. *See* Reilly et al., *supra* note 32, at 1, 14.

extreme candidates that a majority of the general electorate preferred. More effective government resulted.[37]

The unified primary is on the ballot this fall in several states. In 2022, voters in Nevada opted to adopt the top-five version of this system, but state law requires voters to approve the measure a second time this fall before it becomes law.[38] Voters in Arizona, Colorado, Idaho, Montana, and South Dakota will vote on whether to adopt various versions of a unified primary. At the same time, voters in Alaska will be asked whether they want to retain or repeal their top-four primary system.[39]

That these reforms came through states that have direct democracy options, in which voters can legislate such changes, is not surprising. Historically, many political reforms to the election process have begun in states with direct democracy. Self-interested legislators are not inclined to change the rules under which they were elected.

II. VOTING RULES

The second reform I suggest is a change to the voting rules we generally use. I alluded to this change already, in mentioning the role that IRV plays in the top-four primary structure. But I want to say more about that here because, even if states do not change to top-four primaries, we should still consider using IRV for single-member offices such as Senator, Governor, Attorney General, and others. IRV is also

37. Ryan Williamson, *Evaluating the Effects of the Top-Four System in Alaska*, RSTREET 5, https://www.rstreet.org/research/evaluating-the-effects-of-the-top-four-system-in-alaska/ [https://perma.cc/46FC-QJKF].

38. Don Clyde, *Nevada Voters Back Big Changes to Their Election Systems*, NPR (Nov. 13, 2022, 10:04 PM), https://www.npr.org/2022/11/13/1136342255/nevada-election-open-primary-ranked-choice-voting [https://perma.cc/5FCM-GGFE]. The voters rejected the measure. April Corbin Girnus, *Nevada Votesr Reject Open Primaries, Ranked Choice Voting System*, NEVADA CURRENT (Nov. 5, 2024), https://nevadacurrent.com/2024/11/05/nevada-voters-reject-open-primaries-ranked-choice/ [https://perma.cc/XG9C-87WD].

39. Voters in Alaska voted to retain the top-four primary. Eric Stone, *The Recount is Over. Alaska Will Keep Ranked Choice Voting*, ALASKA PUB. MEDIA (Dec. 9, 2024), https://alaskapublic.org/2024/12/09/the-recount-is-over-alaska-will-keep-ranked-choice-voting/ [https://perma.cc/G2F7-ZQ9H]. But in all the other states, the measure failed. *See, e.g., Idaho Proposition 1, Top-Four Ranked-Choice Voting Initiative (2024)*, BALLOTPEDIA, https://ballotpedia.org/Idaho_Proposition_1,_Top-Four_Ranked-Choice_Voting_Initiative_(2024) [https://perma.cc/AE28-JG8C]; Emma Bradford, *Proposition Round-Up: The Results of the 2024 Arizona General Election Ballot Measures*, STATE PRESS (Nov. 13, 2024, 8:26 PM), https://www.statepress.com/article/2024/11/props-roundup-results [https://perma.cc/Y3TC-8AUZ].

particularly appealing for primary elections for those states that maintain the traditional party primary structure.

IRV is another means of precluding factional candidates—rather than those supported by an electoral majority—from winning office. Traditional runoff elections aim to achieve a similar result. In traditional runoffs, if no candidate wins a majority, there is a second round in which the top two candidates compete head-to-head. This ensures that the winner has majority support in this final round of the election process.

After World War II, a majority of the countries that directly elect a president shifted to this type of two-round election system precisely to ensure winning candidates were supported by a majority of the electorate.[40] These countries worried that extremists could get elected too easily if a mere plurality of votes was enough to be elected. Indeed, about 30% of the time in these countries that use runoff elections, the losing candidate in the first round prevails in the final round. Put another way, about 30% of the time, runoffs have prevented more factional candidates from being elected.

In the United States, a few states use runoff general elections.[41] But most states do not.[42] And in open-seat primaries, about 36% of primaries are won with only a plurality of the vote.[43] This makes it too easy for factional candidates to become a party's nominee and then, possibly, be elected.

But runoff elections in the United States tend to have lower turnout than general elections. In fact, this past April, Alabama had runoff elections for a new congressional district in which turnout in the runoff was half that of the initial primary vote.[44]

This is where IRV enters the picture. It is designed to achieve the same purposes as two-stage runoff elections. Its

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40. Ben Reilly & Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies*, *in* INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR, 420, 439 (Paul C. Stern & Daniel Druckman eds., 2000).

41. *Runoff Elections*, BALLOTPEDIA, https://ballotpedia.org/Runoff_election [https://perma.cc/HC4Z-BSYK].

42. *See id.*

43. TASK FORCE REPORT ON INSTITUTIONAL REFORM TO COMBAT POLITICAL EXTREMISM, REPORT OF THE SUB-GROUP ON PROPORTIONAL REPRESENTATION 15 (forthcoming 2025).

44. Victor Hagan, *Voter Turnout Doubles in Redrawn District - Runoff for AL-02 Congressional Seat to Be Held Today*, MONTGOMERY ADVERTISER (Apr. 16, 2024), https://infoweb.newsbank.com/apps/news/document-view?p=AWNB&t=&sort=YMD_date%3AD&fld-base-0=alltext&maxresults=20&val-base-0=Voter%20turnout%20doubles%20in%20Alabama%27s%20redrawn%20congressional&pedirect=true&docref=news/1987932AE24F0CF0 [https://perma.cc/9E96-R74G].

justification is much the same: to reward candidates who have the broadest electoral appeal, rather than more factional candidates. IRV essentially constitutes a multi-round election on a single ballot. A voter ranks candidates in order of preference and when poorly performing candidates are eliminated, the voter's vote on that ballot is transferred to the voter's second-ranked preference. This process continues until one candidate receives a majority of the votes. The system thus folds multiple rounds of voting into a single day and a single ballot.

IRV has been gaining wider acceptance in the United States in recent years. It has been adopted in red, blue, and purple states. Maine and Alaska use it for statewide elections, as well as federal ones, and forty-seven cities now use it, including cities in Utah, Minnesota, and California.[45] In 2019, New York City's voters adopted an amendment to the city charter to use IRV in primary elections for the city council and executive offices, including mayor.[46] Because the Democratic primary often determines the race for mayor of New York City, this was a significant development. A growing number of smaller American cities have also adopted IRV over the past decade. A ballot measure referred by the state legislature in Oregon for voter approval in the fall of 2024 would implement IRV in all state primary and general elections for executive offices at the state and federal levels, as well as for the U.S. House and Senate.[47] Southern states use IRV for military and overseas voters.

The Virginia Republican Party used it to nominate its most recent candidate for governor because it believed choosing a

45. *Ranked Choice Voting Information*, FAIRVOTE, https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used [https://perma.cc/SX3H-AYHW]. In Maine, IRV is used in state elections only for primaries because the Maine Supreme Judicial Court concluded that IRV conflicts with state constitutional provisions. I have argued that the Maine decision is wrong, and, more recently, the Alaska Supreme Court rejected the Maine decision in interpreting a similar constitutional provision. *See* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. Rev. 1773, 1776–77 (2021).

46. Eric Durkin, *Ranked-Choice Voting Adopted in New York City, Along with Other Ballot Measures*, POLITICO (Nov. 5, 2019, 10:04 PM), https://www.politico.com/states/new-york/city-hall/story/2019/11/05/ranked-choice-voting-adopted-in-new-york-city-along-with-other-ballot-measures-1226390 [https://perma.cc/2WVD-GWU5].

47. *Oregon Measure 117, Ranked-Choice Voting for Federal and State Elections Measure (2024)*, BALLOTPEDIA, https://ballotpedia.org/Oregon_Measure_117,_Ranked-Choice_Voting_for_Federal_and_State_Elections_Measure_(2024) [https://perma.cc/JN7J-ARBU]. The ballot measure was defeated. *See id.*

candidate with the widest appeal in the Republican Party would give the party the most electable candidate for the general election. This is one reason IRV should be particularly appealing in primaries. It enables parties to nominate candidates with the broadest support in the party, who are also the candidates likely to have the best chance of winning the general election.

In Virginia, IRV worked exactly this way. Using IRV, the Virginia GOP chose Glenn Youngkin as its nominee over a more extreme candidate, and Youngkin was then elected Governor. After Republicans saw how IRV worked when nominating its gubernatorial candidate, Republican party committees chose to use IRV for their primaries in elections in three of Virginia's congressional districts.

There are several different *forms* of IRV, however, as Professor Ned Foley has analyzed in detail.[48] There is an ongoing academic debate about which particular form of IRV best achieves the range of objectives behind its appeal.[49] As more jurisdictions consider adopting IRV, this debate over the best form will continue.

Surveys show that IRV has been popular in the places it has been used. I should note, though, that five Republican-controlled states have recently banned IRV for all elections,

48. *See, e.g.*, Edward B. Foley, *Total Vote Runoff: A Majority-Maximizing Form of Ranked Choice Voting*, 21 U.N.H. L. REV. 323, 343 (2023) (discussing the "Total Vote Runoff" variation, which uses the same rank choice voting ballots as a regular instant runoff). Foley advocates for Condorcet-compliant forms of IRV, which ensure that the Condorcet winner, if there is one, will be elected. *See generally* Edward B. Foley, *Maximum Convergence Voting: Madisonian Constitutional Theory and Electoral Design*, 76 FLA. L. REV. 1751 (2024). The Condorcet winner is the candidate who would defeat every other candidate in a series of pairwise comparisons. It is possible that there is no such candidate, in which case Foley advocates for default mechanisms that reward the closest analogue to a Condorcet winner. Foley argues that the version of IRV currently in use is defective because it does not ensure that the Condorcet winner will in fact be selected. For example, in a polarized electorate with a Left, Centrist, and Right candidate running, the Centrist might get only 20% of first-choice votes, while the Left and Right would each get 40%. In the version of IRV currently used, the Centrist would be eliminated and the winner would be determined by the second-choice votes of the Centrist supporters. But the Centrist candidate might defeat the Left candidate head-to-head and the Right candidate head-to-head. Thus, the Centrist would be the Condorcet winner. Foley advocates for forms of IRV that will ensure such a winner is in fact elected. But out of the 600 or so IRV elections so far in the United States, a Condorcet winner has failed to get elected only twice.

49. For a contrasting argument to Foley's, which defends the currently used form of IRV against Foley's critiques, see G. Michael Parsons & Rachel Hutchinson, The False Promise of Condorcet (Aug. 2024) (unpublished manuscript).

including Florida; the Republican Party in Alaska is also leading an effort to qualify a ballot measure to enable voters to repeal the state's top-four primary.[50] I'm unsure why IRV has become more of a partisan issue in recent years, except perhaps that a Democrat benefitted from the system in a couple of the initial congressional races that used it. For those who believe in local government, it's also unclear why a state has an interest in what voting rule its local governments use.

But there is no inherent reason IRV would favor one party or the other. Indeed, the Republican Party has recently lost high-profile national races, such as for Senate, because the traditional party primary selected factional candidates who turned out to be too extreme or idiosyncratic to win their general elections. Some of those nominees won their primaries with only a plurality of the vote. For a party that wants to maximize its electoral prospects, using IRV in primary elections should make it more likely that the party will select candidates most likely to win competitive general elections.

III. THE DESIGN OF ELECTION DISTRICTS

The third area of reform I suggest is a different perspective on the way we design election districts.

Over the last decade, reform efforts concerning redistricting have overwhelmingly focused either on combatting partisan gerrymandering or on Voting Rights Act issues, which some of the articles in this Issue address. I have been part of those efforts both in my academic and litigation work. I represented before the Supreme Court minority voters challenging racial gerrymandering,[51] and I was part of the legal team representing Common Cause in the *Common Cause v. Rucho* case,[52] in which the Court ruled against us and held that federal courts cannot address partisan gerrymandering.

Ending partisan gerrymandering is an important goal. But it should not be the *exclusive* focus of redistricting reform. We should not let that concern eclipse the importance of also creating competitive districts. In recent years, however, the number of competitive districts for Congress has plummeted.

50. As noted above, this effort to repeal Alaska's top-four primary with IRV failed.

51. Ala. Legis. Black Caucus v. Alabama, 575 U.S. 254, 257 (2015).

52. 588 U.S. 684 (2019).

From the early 1970s to the early 1990s, around 35% of congressional districts were competitive.[53] But for the coming elections this fall, only about 10% of districts are projected to be competitive;[54] millions of dollars will be poured into this small percentage of races. Constructing competitive election districts, where possible, is another aspect of institutional design that can help reduce polarization and extremism. Competitive districts are typically defined as those in which the winning candidate is projected to receive 55% of the vote or less. The dynamics and incentives for candidates running in competitive districts are dramatically different from those that candidates face in safe districts. In safe seats, incumbents' main threat is being "primaried," which I discussed above.

But in competitive seats, candidates know they have to compete to win in the general electorate. They know they must win over enough voters in the center, who might swing to either party, while also holding on to their base. Moving too far toward the wings of their party risks losing the centrist voters needed to win. These dynamics not only weaken the power of each party's wings, they also create incentives for more centrist candidates to run in the first place.

Competitive districts also make legislators more responsive to changes in voter preferences. If public opinion on important policies shifts by five points, legislators in competitive seats will need to respond to that change. Conversely, in a safe seat, an incumbent can lose five points of support without their seat being threatened.

For all these reasons, incumbents dislike competitive districts. In one redistricting case, an expert testified that incumbents do not want to be 99.9% safe. They want to be 99.9999% safe. That's why you will sometimes see what we call sweetheart or bipartisan gerrymanders, in which the two parties agree to craft seats that are safe for incumbents of both parties.

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53. Alan I. Abramowitz, *Redistricting and Competition in Congressional Elections*, CTR. FOR POL. SABATO'S CRYSTAL BALL (Feb. 24, 2022), https://centerforpolitics.org/crystalball/redistricting-and-competition-in-congressional-elections/ [https://perma.cc/2MRE-EEPF]; *see also* David Wasserman, *Introducing the 2021 Cook Political Report Partisan Voter Index*, COOK POL. REP. (Apr. 15, 2021), https://www.cookpolitical.com/cook-pvi/introducing-2021-cook-political-report-partisan-voter-index [https://perma.cc/659V-KSEB].

54. *2024 CPR House Race Ratings*, THE COOK POL. REP. (Aug. 16, 2024), https://www.cookpolitical.com/ratings/house-race-ratings [https://perma.cc/AQ2F-KLUF].

Limiting partisan gerrymandering is important, but a map can produce fair partisan outcomes with every seat completely safe for one party or the other. In safe seats, the major threat moderate incumbents face is from the ideological wings of their party.

Primary voters in safe-seat districts also have less incentive to compromise and back moderate candidates because the party's candidate will win the general election regardless of that candidate's place on the party's ideological spectrum. In turn, moderates are less likely to run in the first place, because they know they cannot survive the primary electorate.

The dramatic decline in the number of competitive districts contributes to a Congress more polarized than citizens themselves.[55] To be sure, it's not possible to make all districts competitive, given the way voters have come to be sorted geographically, with Democrats in many states concentrated in the major metropolitan areas.

But here is an example of what is possible. In my state of New York, the Democrats, after 2020, crafted a partisan map in which only three of 26 districts were competitive. The New York courts invalidated that map as an unconstitutional gerrymander under the state constitution.[56] When the court appointed a Special Master to re-draw the districts, we ended up with eight competitive districts—nearly three times as many.[57] If even 20% of congressional districts were competitive, the dynamics on Capitol Hill would undoubtedly change.

Some recent creative work in political science demonstrates the different incentives House members face in competitive seats compared to safe ones. Donors from outside a member's district are more polarized than donors from within the member's district. It turns out that on major legislation, members in competitive districts vote in a way that reflects the preferences of their constituents. But in safe seats, representatives vote in a way that reflects the preferences of their more highly-polarized national donor class.

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55. CONTROVERSIES IN VOTING BEHAVIOR (Richard G. Niemi, Herbert F. Weisberg, & David Kimball eds., 5th ed. 2011).

56. *See, e.g.*, Harkenrider v. Hochul, 197 N.E.3d 437 (N.Y. 2022) (holding that the congressional map unilaterally redrawn by the controlling party in the state legislature violated a constitutional prohibition against partisan gerrymandering).

57. Rachel Holiday Smith, *Special Master Carves Up New York's Congressional and State Senate Seats with New Maps*, THE CITY (May 16, 2022, 6:34 PM), https://www.thecity.nyc/2022/05/16/special-master-new-york-city-redistricting-maps/ [https://perma.cc/RQ6H-A4AJ].

In other words, in safe seats, members can defect more from their constituents' preferences and embrace the more ideologically extreme positions of their national donors. This is unsurprising: if you win a safe seat with seventy percent of the vote, you have a lot of slack available to satisfy your national donors with positions your constituents don't support; your seat is safe even if your victory margin winds up dropping next time by several points. But if your district is competitive, you cannot afford to stray much from the preferences of your constituents.

A former Chair of the Republican Congressional Campaign committee—whose role is to maximize Republican election prospects in the House—recently illustrated how election incentives have changed in a comment that brings together several of my points. He noted that twenty years ago, "We ran our caucus to basically support members in swing districts. That's how we got power."[58] In other words, the party had strong incentives to support candidates who had to be responsive to voter preferences in competitive districts.

He went on to say: "Today, they run the caucus now to protect members from R+30 districts [districts where the most recent Republican presidential candidate won by more than 30 points] to protect [the members] in primaries."[59] In other words, given the way districts are designed, the incentive for the party is to take positions extreme enough that members in safe seats will not be primaried by more extreme candidates.

In sum, we have substantial evidence, from both social scientists and members of Congress themselves, that members from safe seats tend to be more ideologically extreme than those elected from competitive districts.

How do we push the system to create more competitive districts? First, when courts must take on the task of remedial re-districting, such as occurred in New York, they should be encouraged to consider the value of competitive districts. Second, provisions creating independent redistricting commissions—which voters in more states have enacted in recent years—should encourage or mandate the creation of competitive districts as a priority, along with partisan fairness and other important values. Third, even in some states that have left redistricting in the hands of state legislatures, voters

58. Paul Kane, *McCarthy Thought He Could Harness Forces of Disruption. Instead They Devoured Him*, WASH. POST (Oct. 5, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/10/05/mccarthy-trump-speaker-removed-tea-party/. [https://perma.cc/QM4R-TRS7].

59. *Id.*

have adopted constitutional provisions that ban partisan gerrymandering.[60] They should similarly add provisions to state constitutions that emphasize competitive districts as well.

IV. CAMPAIGN FINANCE

There is a fourth area in which our current system empowers the extremes: the way we finance elections. When we talk about campaign finance, particularly in law schools, the focus is almost always on one of two issues.

The first is political equality: the concern that those with more resources are able to exercise disproportionate or "unequal influence" over elections. This is the issue *Buckley v. Valeo*[61] held to be an unconstitutional basis for regulating election funding.[62]

The second concern is the risk of political corruption: that politicians are essentially "bought" by large donors or those who spend significantly on their behalf (though *Buckley* also held that only the contribution side of this dynamic could be regulated).[63]

I want to offer a different perspective on how the way we finance our elections shapes our democracy.[64] An important fact not recognized widely enough is that individual donors are much more ideologically extreme than Americans as a whole.

In fact, this is one of the most robust social science findings in the empirical campaign finance literature.[65] There are "extremely large differences" in ideology between donors and even non-donor partisans of the same party.[66] These differences vary across issues. Republican donors, for example, are much more conservative on economic issues than other Republicans; on issues such as tax rates on millionaires, spending on the

60. Hansi Lo Wang, *Is Drawing a Voting Map That Helps a Political Party Illegal? Only in Some States*, NPR (May 17, 2023, 5:00 AM), https://www.npr.org/2023/05/17/1173469584/partisan-gerrymandering-explainer-north-carolina [https://perma.cc/A7VZ-F43Z].

61. 424 U.S. 1 (1976).

62. *Id.* at 54.

63. *Id.* at 29.

64. For a fuller elaboration of the points in this section, see generally Richard H. Pildes, *Campaign Finance and Political Polarization*, *in* MONEY, POLITICS AND THE FIRST AMENDMENT: FIFTY YEARS OF SUPREME COURT DECISIONS ON CAMPAIGN FINANCE REFORMS (Geof Stone and Lee Bollinger eds., forthcoming 2025).

65. *See generally* Richard H. Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 344 (2020).

66. David Broockman & Neil Malhotra, *What Do Partisan Donors Want?*, 84 PUB. OP. Q. 104, 105 (2020).

poor, provision of health insurance, and enacting programs to support those with lower incomes, Republican donors are consistently more conservative than Republican voters. However, on social issues, Republican donors and non-donors are more closely aligned. On the Democratic side, donors are substantially more liberal on social issues, such as capital punishment and abortion, than other Democrats, while their views on economic issues are more similar. Both Republican and Democratic donors are more internationalist or "globalist" than the parties' other supporters. Thus, donors push Republicans further to the right on economic issues and Democrats further to the left on social issues than the parties' other supporters prefer. Perhaps as a result, both representatives and Senators take positions more extreme than those of their constituents and even than their partisan supporters.[67] In fact, donors are also more ideologically extreme than similarly affluent non-donors; in other words, donors are wealthier than non-donors, but their different policy preferences are not merely a reflection of their greater resources.[68]

Moreover, the rise of small donors through internet-based funding over the last five to ten years has not changed this fact. Indeed, it has made it worse. The rise of small donors has enabled more people to contribute to their preferred candidates. This might have enhanced political equality to an extent, but the rise of small donors has done nothing to mitigate the way our system of campaign financing fuels the ideological extremes.

To the contrary, small donors are at least as ideologically extreme as large donors. Moreover, in my own work I have shown that the candidates and members of Congress who are the *most* dependent on small donors tend to be at the ideological poles of both parties.[69] Those who are most dependent on small donors include, for example, Representatives Alexandria

67. *See* Joseph Bafumi & Michael C. Heron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519, 536 (2010) ("Insofar as members of Congress are also extreme, we suggest that a contributing factor for this may be the relative extremism of donating voters."); Joshua D. Clinton, *Representation in Congress: Constituents and Roll Calls in the 106th House*, 68 J. POL. 397, 407 (2006) (explaining that policies passed in the House tend to be more extreme than the standard of the mean voter).

68. Michael J. Barber et al., Donors and Dollars: Comparing the Policy Views of Donors and the Affluent 7 (July 2024) (unpublished manuscript), https://huber.research.yale.edu/materials/114_paper.pdf [https://perma.cc/B4R7-5H26).

69. Pildes, *supra* note 10, at 157.

Ocasio-Cortez (AOC) and Ilhan Omar on the Democratic side and Representatives Jim Jordan and Florida's own Matt Gaetz on the Republican side.

Recall there was a time of great optimism that the internet would improve democracy by making information more widely available before we learned that outrage and extremism drive attention on the major social media platforms. The same dynamic applies to internet-based small donor funding.

Small donations, much more than large ones, are also triggered in response to politically viral moments. The culture of outrage that generates attention on social media provides the same dynamic that turns on the spigot of small donations. For example, when Congress stripped Representative Marjorie Taylor Greene of her committee assignments in response to her purported antisemitic comments and encouragement of violence, she immediately raised $3 million from small donors, with an average contribution of $38.[70] Much of the extreme positions and tactics you see from politicians are designed precisely to raise money from small donors.

On top of this, in recent decades individual contributions and spending have become a much larger share of the money on which campaigns rely. And a higher percentage of individual contributions now come from outside a member's district or even her state. From 2012 to 2022, the average percentage of in-district money for House candidates fell from 37% to 26%.[71] In 2020, for example, more than 99% of the contributions to AOC came from outside her district, as did 92% of the contributions to Matt Gaetz.[72] This is partly due to the nationalization of elections. This is yet another reason why money fuels the extremes: individual contributions from outside a district or state are all the more ideologically motivated, given the lack of motivation to care about district-specific concerns. Thus, our system of privately financed

70. Gregory Svirnovskly, *Marjorie Taylor Greene's Incredible Fundraising Haul Reveals What the GOP is Really About*, Vox (Apr. 7, 2021, 4:40 PM), https://www.vox.com/22372051/marjorie-taylor-greene-campaign-donations-republican-primary-midterms https://perma.cc/ATA2-HP2L].

71. *See* Sarah Bryner, *The Nationalization of Political Contributions and the Rising Role of Out-of-State Donations*, OPEN SECRETS (June 1, 2023), https://www.opensecrets.org/news/reports/out-of-state-donations [https://perma.cc/LPG4-9LR6]. The percentages are similar for incumbents, challengers, and open-seat candidates.

72. *In-District vs. Out-of-District*, OPEN SECRETS, https://www.opensecrets.org/elections-overview/in-district-vs-out-of-district?cycle=2020&display=M [https://perma.cc/BM44-XTFR].

elections helps drive extremism. And this dynamic has become even worse with the rise of small donors.

For comparative perspective again, most major democracies do not fund campaigns through private donations. Instead, they provide public financing to the political parties, which then choose on which races and candidates to spend that money.

If we want to mitigate the polarization and extremism in our politics, then the way we structure campaign finance is another important point of leverage. But that depends on the shape that the reform takes. I believe the proposed direction of reform that is currently favored by many of the major political reform groups is, in fact, the wrong path to take.

Many of these groups favor a national small-donor matching program. In such a program, the government would match every dollar of an up to $200 donation with $6 of public funds, (up to a certain total amount of public financing). A $200 donation would thus become a $1,400 one.

Many reform groups support a small-donor matching system because it would appear to enhance political equality and participation by subsidizing the contributions of small donors. The comprehensive voting-rights reform bill that passed the Democratic House in 2019, entitled the For the People Act, included this proposal.[73] For congressional races, it would have provided individual candidates $6 of public funds for every $1 received in private donations for contributions under $200.[74]

But once we recognize that individual donors in general, including small donors, reflect the ideological wings of the parties, why would we want to base public funding on the preferences of individual donors? Any system of that sort will further fuel the polarization and extremism in our politics. Given the challenges that American democracy currently faces, we should be hesitant about even well-intentioned reforms that would have the consequence of throwing more fuel on the fires of polarization that already rage so hotly.

I have suggested that, if Congress were to enact a small-donor matching program, it should at least limit the match to in-district contributions for House members.[75] That would diminish some of the most polarizing aspects of individual donations, though in-district donors would still be more polarized than the overall electorate. One major political-reform organization, which previously supported a national

73. Pildes, *supra* note 10, at 150.
74. *Id.*
75. *See id.* at 163.

small-donor matching program, now agrees that such matches should be limited to in-district contributions, for the reasons I've described.[76]

A different path to take would be to avoid building public financing around the preferences of individual donors altogether. This is the more traditional form of public financing, which about fourteen states currently use in some form.[77] In these systems, candidates must first raise a small threshold amount from a small number of donors; virtually all credible candidates are able to do so. They then become eligible for grants of public funds. Because these funds come from the general treasury, they are ideologically neutral, unlike public funding that would be based on the preferences of individual donors. In accepting these funds, candidates typically agree not to raise additional money outside of the public financing system, though that is not a necessary feature of such programs.

Public discussions of money in politics rarely focus on the fact that individual donors are more ideologically extreme than citizens in general. But if you view polarization and extremism as some of the biggest threats to American democracy, as I do, it is important to recognize the way our privately financed system of elections contributes to those threats.

Congress, of course, is not going to enact traditional public financing for national elections anytime soon. American public opinion on this issue is in some tension with itself. Public opinion surveys have consistently shown for years that 70–80% of Americans support limits on election spending.[78] Yet at the

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76. Michael Waldman, *Small Donors to Campaigns Are Not the Problem*, BRENNAN CTR. FOR JUST. (MAY 8, 2024), https://www.brennancenter.org/our-work/analysis-opinion/small-donors-campaigns-are-not-problem [https://perma.cc/W9VR-B28T]. The Brennan Center notes that an in-district limitation will "steer[] more candidates to fundraise among their own constituents rather than rely on a more polarized donor base." Ian Vandewalker, *Do Small Donors Cause Political Dysfunction?*, BRENNAN CTR. FOR JUST. (May 8, 2024), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.brennancenter.org/media/12874/download&ved=2ahUKEwjtu5yL86KIAxU1M9AFHXrRKJgQFnoECBIQAQ&usg=AOvVaw0jMDdvtBciNeOvfBVJco0s [https://perma.cc/9QNB-VTQV]. Moreover, it recognizes that "[t]he sort of inflammatory fundraising strategies that critics tend to worry the most about depend on having a nationwide donor base." *Id.*

77. *See generally* Richard Briffault, *A Better Financing System? The Death and Possible Rebirth of the Presidential Nomination Public Financing Program*, *in* THE BEST CANDIDATE 235, 255–58 (Eugene D. Mazo & Michael R. Dimino eds., 2020).

78. Bradley Jones, *Most Americans Want to Limit Campaign Spending, Say Big Donors Have Greater Political Influence*, PEW RSCH. CTR. (May 8, 2018),

same time, a significant percentage simultaneously reject publicly financing our elections, which critics disparage as "welfare for politicians."[79]

Nonetheless, well-designed systems of public financing would reduce the weight of individual donors and therefore could help mitigate polarization and extremism. They might also reduce the endless flood of emails and texts you get from campaigns asking for money. Any movement toward public financing will have to continue at the state level. If those reforms come to be seen as successful, they might eventually create demand for their adoption at the national level.

V. THE PRESIDENTIAL NOMINATIONS PROCESS

The fifth and final institutional-design issue involves one of the most radical changes we have made to our democratic processes in the past fifty years. Reform on this front would be the most difficult of all, but I want at least to make you aware of how dramatic this change was and how it has affected American democracy.

The change to which I'm referring is the creation in the 1970s of the modern system of nominating the major parties' candidates for President. This was when we shifted to the now-familiar selection process in which voters in primary elections (and a few caucuses) effectively choose the parties' nominees.

For 170 years before the shift to a voter-dominated system of nomination, elected party figures from the national, state, and local levels played the dominant role in choosing the parties' nominees.[80] These elected figures performed a type of "peer review," in which the judgments of those experienced in government at the national, state, and local levels—mediated by leading party figures—played a major role in vetting and selecting the nominees. There were some primary elections, which allowed candidates to demonstrate their electoral appeal,

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https://www.pewresearch.org/short-reads/2018/05/08/most-americans-want-to-limit-campaign-spending-say-big-donors-have-greater-political-influence/ [https://perma.cc/3VGH-JGSV].

79. *See* Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 152 U. PA. L. REV. 73, 113 (2004).

80. Richard H. Pildes, *Two Myths about the Unruly American Primary System*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/05/25/two-myths-about-the-unruly-american-primary-system/ [https://perma.cc/37TX-MTG5].

but primary elections alone were never enough to determine the parties' nominees.[81]

When we shifted to our current system of primary elections in the 1970s, two renowned political scientists with expertise in the nominations process issued the following warning: eliminating any role for elected party figures in the process "might also lead to the appearance of extremist candidates and demagogues who, unrestrained by allegiance to any permanent party organization, would have little to lose by stirring up mass hatreds or making absurd promises."[82]

I leave you to make your own judgments about the extent to which this concern has been borne out. At a minimum, there is seemingly less reward for prior significant experience in the national government than in the long era in which elected party figures, through the conventions, played the dominant role in choosing nominees.[83]

The question I want to raise is whether we went too far in taking away any formal role at all for elected party figures in helping to choose the parties' nominees. Would we be better off building back in at least *some role* for the elected party figures from throughout the country in choosing the parties' nominees? For comparative perspective, once again, most other established democracies continue to give elected party figures at least a filtering or mediating role in selecting their party's standard bearers.

For example, in the United Kingdom, Conservative Party members in Parliament first vote to select two candidates as potential party leaders.[84] Those two candidates, who must also be sitting members of Parliament, are then submitted to party members, who make the final selection.[85] In Australia, the peer review model is even stronger; for the more conservative Liberal Party, it is only the party's members in parliament who choose the party leader; for the Labor Party, members in

81. For a fuller exploration of the issues in this Section, see Stephen Gardbaum & Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 N.Y.U. L. REV. 647, 661 (2018).

82. NELSON W. POLSBY, AARON WILDAVSKY & DAVID A. HOPKINS, PRESIDENTIAL ELECTIONS: STRATEGIES AND STRUCTURES OF AMERICAN POLITICS 235 (12th ed. 2008).

83. Since the post-1968 reforms to the nominations process, only one Senator who had not also been Vice President has been elected to the presidency. That was Barack Obama, who served only three years in the Senate. Before 1968, many senators had been nominated and elected President.

84. NEIL JOHNSON, HOUSE OF COMMONS LIBR., LEADERSHIP ELECTIONS: CONSERVATIVE PARTY 4–5 (2024).

85. *Id.*

parliament get 50% of the vote and party members get the other 50%.[86] Additionally, in most of these systems, the party membership is much smaller than in the United States; here, being a "member" of a party merely requires checking a box on your voter registration form, whereas in many other democracies, it requires a more substantial commitment, such as paying annual party dues. In the United Kingdom, for example, the Labor Party has around 432,000 members, while the Conservatives have around 172,000—even though both parties receive millions of votes in elections.[87] Thus, even when "party members" play a role in the nominations process, such as at the final stage of the process, the process bears little resemblance to the plebiscitary process we now use in which millions of primary voters choose the nominees.

In my view, building back in some role for elected party figures is a means to reduce the risk that more extremist candidates will win the nomination of one of the major parties. In the convention system, when party figures played a major role in selecting nominees, the nominee had to be able to broker a range of interests within a party to get nominated, which made extremist nominees less likely. In light of the powers of the American President, it is particularly important to reduce the risk that more extremist figures can capture a party's nomination and with it, potentially, the White House.

Yet, building such a role back into our political culture is no doubt difficult given that voters now take for granted their power to choose the nominees. However, one way of doing so would *not* change the role voters have come to play through the primary elections. Thus, it would not require a dramatic change to the current process of primary elections.

This proposal would change the way delegates are allocated in response to the primary vote in the various states. These changes would make the number of convention delegates a candidate receives more proportionate to the actual vote in a state's primary.

Right now, convention delegates are not awarded on a strictly proportional basis in either party. On the Republican side, primaries generally become winner-take-all affairs after an early stage in the primary cycle. A candidate who wins only a plurality of the state's vote captures all that state's convention

86. Cathy Madden, PARLIAMENT OF AUSTL. LIBR., DEP'T OF PARLIAMENTARY SERVS., PARTY LEADERSHIP CHANGES AND CHALLENGES: A QUICK GUIDE 3, 5 (2022).

87. MATTHEW BURTON & RICHARD TUNNICLIFFE, HOUSE OF COMMONS LIBR., MEMBERSHIP OF POLITICAL PARTIES IN GREAT BRITAIN 4 (2022).

delegates, a reflection of the winner's bonus that follows from winner-take-all rules. This also mirrors the way nearly all states allocate presidential electors in the general election, which is part of the party's justification for its approach. Under winner-take-all rules, factional candidates can more easily succeed.

On the Democratic side, delegates are allocated more proportionately. But candidates who receive less than 15% of the vote receive no delegates at all. Those delegates are awarded instead to the more dominant candidates. Thus, this allocation rule also gives bonus delegates to the candidates who receive more than 15% of the vote.

Awarding delegates in both parties in a completely proportionate way would increase the possibility of a brokered convention. If no candidate received a majority of the delegates before the convention, the convention would then be brokered; the convention would then have to decide how to choose among the various candidates.

Awarding delegates in a more directly proportionate way would eliminate giving extra bumps up to the winning or dominant candidates. It would avoid factional candidates being able to capture all of a state's delegates through winner-take-all allocation rules. In contested primary years, these changes would make it less likely that a candidate would enter the convention having already won a majority of the delegates. That would mean that the convention delegates would play the decisive role in choosing the nominee.

No power would be taken away from voters. Indeed, the system would reflect their votes more accurately. But the votes in primary elections would be somewhat less likely to determine the outcome definitively, particularly when multiple serious candidates compete.

For these changes to make sense, the process of selecting convention delegates would also have to change. Currently, the conventions do not matter; delegates serve mainly in a ceremonial role merely to reflect formally the popular vote in the state. But if the possibility of brokered conventions returns, delegates would have to be prominent enough party figures—such as governors—to have the legitimacy and support to play a critical mediating role in choosing a nominee in the midst of a contested process that had not yielded a clear winner. In the event no candidate came to the convention with a majority of delegates, party leaders would broker interests within the party in an effort to find a widely acceptable nominee. In doing so,

these party leaders would likely value candidates who appealed to a range of interests or factions within the party.

These changes would not be a foolproof mechanism for preventing ideologically extreme candidates from capturing a party's nomination. If primary voters overwhelmingly preferred such a candidate, he or she would still become the party's nominee. But at a minimum, these changes would make it less likely a factional candidate could automatically capture the nomination. And when conventions were contested, the candidate who emerged would also likely reflect a range of interests within the party, rather than just one faction of the party.

Other potential ways exist to build back in more of a voice for elected party figures from around the country.[88] The most direct would be to increase the role in the conventions of what are called "superdelegates." In the Democratic Party, these superdelegates constitute about sixteen percent of the convention.[89] Unpledged to any candidate in advance of the convention, they include current Democrats in the House, Senate, White House, and Governors' Offices, the members of the Democratic National Committee, state Democratic Party chairs, and others. The Democratic Party created these superdelegates in 1984, after the party concluded that the voter-dominated primary process had saddled the party with weak candidates. They were included precisely to bring back in some element of peer review in the nominations process.[90] But after the 2016 election, party rules were changed to permit these superdelegates to vote only if a convention goes to a second ballot.[91] The Republican Party technically also has

88. For more suggestions of how to implement more peer review within the modern nominations process, see Elaine C. Kamarck, *Returning Peer Review to the American Presidential Nomination Process*, 93 N.Y.U. L. REV. 709, 724–27 (2018).

89. KEVIN J. COLEMAN, CONG. RSCH. SERV., THE PRESIDENTIAL NOMINATING PROCESS AND THE NATIONAL PARTY CONVENTIONS, 2016: FAQS 14 (2015).

90. For an account of the battle for superdelegates between the Obama and Clinton campaigns in the 2008 nominations cycle, see JEFF BERMAN, THE MAGIC NUMBER: INSIDE OBAMA'S CHASE FOR THE PRESIDENTIAL NOMINATION 102–09, 219–25 (2012).

91. After I gave this lecture, Democratic Party superdelegates in effect chose the party's nominee for 2024. President Joe Biden had won a majority of convention delegates through the primaries, but, before the convention met, leading party figures persuaded him to withdraw his candidacy. Party leaders then quickly coalesced, before the convention, around Vice President Kamala Harris as the alternative nominee.

superdelegates, but they are currently required to vote for the candidate who won their state's primary.

Both parties could make superdelegates a significant percentage of the convention delegates. They could be free to vote, starting on the first ballot, for the candidate they believed best—and would be expected to do so. Primary elections would still play a role, though perhaps the number of primaries would be reduced to make it less likely a candidate would win a majority of delegates before the convention.

Of course, giving any formal power to elected party figures would run directly against the political culture that has developed since the 1970s, in which voters now feel entitled to have their votes determine the outcome. That makes this reform—and perhaps any reform that would give elected party figures from throughout the country more of a formal role—unlikely at the moment.

But I want to encourage you to recognize, at least, that the way we currently choose nominees is not the "natural" or the only "democratic" way to do so. We all have a tendency to take for granted what has become familiar. I want to disrupt that view a bit by asking you to think about whether our process for nominating presidential candidates would be better off by restoring at least *some* direct role for elected party figures from throughout the country, who are likely to know potential candidates best, in choosing the nominees. That would reduce the risk, in my view, of more extremist figures capturing the nomination and with it, potentially, the presidency.

If some of my proposed changes to the way we structure our elections seem too dramatic or unrealistic, let me return to where I began. American democracy is facing a crisis.

Congress is dysfunctional and increasingly unable to deliver on the important issues citizens care about most. And when democratic governments appear incapable of delivering effective policies on major issues, that failure can lead to the kind of anger, distrust, and dissatisfaction with government we currently see.[92] Even worse, that failure can fuel desires for a strongman or woman figure who promises to cut through this dysfunction and do what democratic governments seem unable to accomplish.[93]

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92. *See generally* Richard H. Pildes, *Political Fragmentation in the Democracies of the West*, 37 BYU J. PUB. L. 209 (2023).

93. Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEG. F. 185, 186–87.

Additionally, we all recognize that American political culture more broadly has become tribalistic, with people not just disagreeing with each other but viewing the other side as a hostile enemy.

We can cross our fingers and hope that we will manage somehow to muddle through and eventually come out the other side of the dark circumstances that have characterized our politics for some time now. Or we can look seriously at whether there are aspects of our current institutional framework within which democratic politics takes place that contribute to these threats, and, if so, we can consider changing those arrangements.

As I have emphasized, my view is that aspects of our current election process make the success of more ideologically extreme candidates too easy, even when a majority of the general electorate would prefer a less extreme figure. Additionally, aspects of our system give legislators strong incentives to respond to the ideological extremes, even when those extremes do not represent the preferences of political majorities.

Congress has become more dysfunctional partly because ideologically extreme representatives make effective governance extremely difficult. They can make even a single political party dysfunctional. Ideologically extreme members of Congress also make political compromise and negotiation much harder, while, in our system of bicameralism and separation of powers, compromise is often necessary for the political system to address major issues.

Moreover, when ideologically extreme figures hold public office, they influence and shape the larger political culture. People take significant cues from the stances and behaviors of candidates and officeholders, particularly high-profile ones.[94]

94. For a recent summary of studies demonstrating this fact, see Thomas B. Edsall, *Two Opposing Developments That Changed American Politics*, N.Y. TIMES (Aug. 7, 2024), https://www.nytimes.com/2024/08/07/opinion/trump-harris-black-lives-matter.html [https://perma.cc/W3TW-6WFL]. As another recent synthesis of these studies concludes, "Politicians and political incentives are probably playing a larger role in driving affective polarization than structural issues such as inequality or geographic sorting." *See* RACHEL KLEINFELD, CARNEGIE ENDOWMENT FOR INT'L PEACE, POLARIZATION, DEMOCRACY, AND POLITICAL VIOLENCE IN THE UNITED STATES: WHAT THE RESEARCH SAYS 44 (2023). Comparative work also demonstrates this dynamic. Countries such as Hungary, Brazil, and Poland, for example, had not been previously polarized but became so under the campaigns and governments of populist leaders who pursued strategies of mobilizing affective polarization. *See* TASK FORCE ON INSTITUTIONAL REFORMS TO COMBAT EXTREMISM, REPORT OF THE SUB-GROUP

Ideologically extreme public figures thus play a significant role in creating and catalyzing the emotional polarization that makes our larger political culture so divisive. With fewer political figures who practice a friends-versus-enemies style of politics, our political culture would become less tribalistic.

To be clear, institutional-design reforms should not be seen as a silver bullet that would magically transform our political culture entirely. Large sociological, historical, and cultural factors are also at work in generating the polarization of our era.[95] And if the majority of general election voters actually want to elect ideologically extreme candidates, then we will, of course, have ideological extremists in office. But the five changes suggested here—to the way we structure primary elections, to the voting rules we use, to the way we design election districts, to the way we finance our elections, and to the way we nominate candidates for the presidency—can contribute to reducing the power of ideological extremism. These changes can matter at the margins, and those margins can matter for the kind of democratic politics and governance we get.

If you share my deep concerns about the state of American democracy and our political culture more generally, I hope you will consider these reform ideas.

ON PROPORTIONAL REPRESENTATION 38–39 (forthcoming 2025) (on file with author); *see also* Matt Yglesias, *Polarization is a Choice*, SLOW BORING (Sept. 12, 2023), https://www.slowboring.com/p/polarization-is-a-choice [https://perma.cc/4SEY-TCEX] ("And one choice people make that is leading to polarized outcomes is precisely the tendency to underplay the role of contingency and agency in political outcomes. If you're convinced that deep underlying forces of polarization will assert themselves no matter what you do, you will make polarizing choices.").

95. *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. LAW REV. 273, 274, 276, 287, 290 (2011).