Maximum Convergence Voting: Madisonian Consitutional Theory and Electoral System Design

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INTRODUCTION

The Madisonian political philosophy upon which the U.S. Constitution rests did not supply the nation with a well-developed theory of electoral procedures. Instead, Madisonian philosophy concentrated on the separation of powers and other elements of constitutional architecture, including federalism, in order to prevent factions from subverting the common good. Subsequent history has demonstrated that Madisonian constitutional architecture, while necessary, is not sufficient for democratic government to operate in the interest of the people as a whole, rather than on behalf of a faction and its own interests. Instead, it is necessary to supplement Madisonian constitutional architecture with a well-designed electoral system that accords with Madisonian values.

Maximum Convergence Voting, a method of electing a single winner when there are more than two candidates, is the method that most accords with Madisonian principles underlying the Constitution. Derived from the work of the Marquis de Condorcet (a French contemporary of Madison and the Constitution's other Framers), Maximum Convergence Voting is the method that most avoids the election of a factional candidate and instead elects the candidate who achieves the greatest common ground among all the voters in the electorate. This Article describes how Maximum Convergence Voting operates, how it can take several different forms—including a Top-Three electoral system, which is a variation of California's existing Top-Two system (and Alaska's existing Top-Four system)—and how it can be used for presidential elections.

I. THE CONSTITUTION'S FAILURE TO PROVIDE AN ADEQUATE ELECTORAL SYSTEM

The Framers of the federal Constitution did not devote much attention to the details of electoral procedures. They left these details mostly to state legislatures. For elections to the new House of Representatives, they permitted Congress to, by statute, override the procedural choices that state legislatures made.[1] The Framers left Senate elections entirely to state legislatures, indeed not even permitting a popular vote for

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1. *See* U.S. CONST. art. I, § 4.

Senate seats (a decision superseded by the Seventeenth Amendment).[2]

The Electoral College system that the Framers created for presidential elections is of course more complicated: each state legislature was given the authority to choose the manner of appointing its state's electors, which could be by either a popular vote or the state legislature itself (or some other means).[3] The Framers specified that each elector would cast two votes for candidates from different states; the candidate receiving the most votes, provided it was a majority of all electors, would become the president, while the runner-up would become the vice president.[4] This system of two votes from each elector almost immediately proved to be a disaster in the election of 1800, when then–Vice President Thomas Jefferson and his running-mate, Aaron Burr, received the same number of votes from a majority of electors.[5] This tie almost precipitated the nation's first civil war, but the Federalist party, which controlled Congress at the time, relented on letting Jefferson become president and Burr vice-president (as the electors had intended) after Alexander Hamilton convinced his Federalist colleagues that Burr would be an even worse president than Jefferson.[6]

The Founding Generation fixed this particular Electoral College flaw through the Twelfth Amendment, ratified in time for President Jefferson's reelection in 1804, requiring that

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2. *See* RICHARD L. HASEN, A REAL RIGHT TO VOTE: HOW A CONSTITUTIONAL AMENDMENT CAN SAFEGUARD AMERICAN DEMOCRACY 29 (2024); Edward B. Foley, *The Constitution and Condorcet: Democracy Protection Through Electoral Reform*, 70 DRAKE L. REV. 543, 545 (2023).

3. U.S. CONST. art. II, § 1, cl. 2. For my and others' previous analysis of the Electoral College system, see generally EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE (2020); ALEXANDER KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE? (2020).

4. *See* U.S. CONST. art. II, § 1, cl. 3.

5. JOHN FERLING, ADAMS V. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 174 (2004).

6. *Id.* at 180–81; *see also* DAVEED DIGGS ET AL., *Election of 1800*, at 03:05, *on* HAMILTON: AN AMERICAN MUSICAL (Atl. Recording Corp. 2015) (highlighting Hamilton's reasons for believing that Jefferson would be a better president than Burr). The literature on the 1800 election is deservedly voluminous. For a useful introduction to its significance to the history and development of the Electoral College system, see generally CAROLYN DUPONT, DISTORTING DEMOCRACY: THE FORGOTTEN HISTORY OF THE ELECTORAL COLLEGE—AND WHY IT MATTERS TODAY (2024).

electors cast separate votes for president and vice-president.[7] But the Twelfth Amendment still left state legislatures with the choice of the method for appointing their state's electors. In doing so, the Founders of the Republic made their second major mistake: having initially failed to anticipate the rise of two-party competition between the Federalists and the Jeffersonians, they now failed to anticipate the possibility of third-party or independent candidates. The method that state legislatures settled into using for appointing electors—"winner-take-all" victories for whichever presidential candidate won the most popular votes in each state, even if most (a *plurality*) was not more than half (a *majority*)—proved incapable of handling competition among more than two candidates. This second oversight has proved hugely consequential in several presidential elections, most spectacularly in 1844,[8] 1912,[9] 2000,[10] and 2016.[11]

In 1844, James Polk beat Henry Clay only because a third-party abolitionist candidate siphoned off enough votes in New York, because abolitionist voters did not consider Clay anti-slavery enough.[12] Afterwards, President Polk, who was aggressively pro-slavery (unlike Clay), took the nation to war against Mexico to conquer new territory that could become additional slave states.[13] President Polk's "Manifest Destiny" conquests destabilized the Missouri Compromise, propelling the Republic down the road to the South's secession.[14] Abraham Lincoln, who campaigned for Clay in 1844, understood the terrible tragedy of anti-slavery voters failing to consolidate their support for Clay in order to defeat Polk.[15]

In 1912, the Republican party fractured between supporters of incumbent-President William Taft, who was running for reelection, and former-President Theodore Roosevelt, who wanted his old job back and who viewed President Taft as insufficiently progressive.[16] This fracture enabled then-Governor Woodrow Wilson, the Democratic candidate, to win

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7. U.S. CONST. amend. XII.

8. *See* FOLEY, *supra* note 3, at 72.

9. *See id.* at 90–91.

10. *See id.* at 106.

11. *See id.* at 111–12.

12. *Id.* at 70–71.

13. *See id.* at 75.

14. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 689–90 (2007).

15. *See* FOLEY, *supra* note 3, at 71.

16. *Id.* at 90–91.

the Electoral College with barely more than forty percent of the popular vote.[17] President Wilson's victory certainly caused the federal government to remain more pro-segregation than it otherwise would have been under either of the two Republicans, because at the time the Republican party was somewhat better on the issues of racial equality and civil rights than the avowedly white supremacist Democrats, including President Wilson.[18] Perhaps even more significant, President Wilson's decisions regarding World War I arguably precipitated the rise of Adolf Hitler and Nazism; according to some historians, had former-President Roosevelt (the more nationally popular of the two Republicans, who probably would have beaten President Wilson in a runoff if there had been one) won the election, his foreign policy pragmatism likely would have handled World War I much better than President Wilson's naïve and misguided idealism, thereby perhaps preventing the ensuing Holocaust.[19]

In 2000, as many readers may remember, the presidential election was plagued with multiple problems. One problem was the fact that Vice President Al Gore almost certainly would have beaten then-Governor George Bush if they had been the only two candidates on the ballot.[20] But there was not, and Ralph Nader's 97,488 votes in the pivotal state of Florida dwarfed President Bush's 537-vote margin of victory in the state.[21] In addition to domestic policy differences, some say that if Gore, rather than President Bush, had been elected president, he would not have expanded the war against al Qaeda to encompass the improvident invasion of Iraq.[22]

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17. *Election of 1912*, THE AM. PRESIDENCY PROJECT, https://www.presidency. ucsb.edu/statistics/elections/1912 [https://perma.cc/8MWU-WAZA].

18. *See* DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 730 (2013).

19. Jeff Nilsson, *Teddy Roosevelt and World War I: An Alternative History*, SATURDAY EVENING POST (Apr. 17, 2014), https://www.saturdayeveningpost.com/ 2014/04/roosevelt-1912/ [https://perma.cc/N995-URJ9]; *see* GOODWIN, *supra* note 18, at 744. For a recent reassessment of Wilson, arguing that the pendulum has swung too far in an anti-Wilson direction, see David Frum, *Uncancel Woodrow Wilson*, ATLANTIC (Mar. 2024), https://www.theatlantic.com/magazine/archive/2024/ 03/woodrow-wilson-racism-civil-rights/677174/ [https://perma.cc/63NA-BDXZ].

20. FOLEY, *supra* note 3, at 105–06. For a discussion of the 2000 election, see generally EDWARD B. FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2d ed. 2024).

21. FOLEY, *supra* note 3, at 5.

22. *See, e.g.*, Gail Collins, *Count Those Votes! Again!*, N.Y. TIMES (Dec. 1, 2016), https://www.nytimes.com/2016/12/01/opinion/count-those-votes-again.html [https://

And in 2016, would Donald Trump have won if Jill Stein (and Gary Johnson) had not been on the ballot in Michigan, Pennsylvania, and Wisconsin? Many think not;[23] if they are correct, then surely the electoral system's inability to determine the will of the majority when votes are split among more than two candidates changed the course of American history. Although the populist sentiments that fueled President Trump's 2016 candidacy would have outlasted his defeat had he lost that year, there's no doubt his presidency altered American political culture. He made acceptable, at least among a large cohort of the electorate, the expression of sentiments that were off-limits previously.[24]

The same flaw that afflicts presidential elections affects congressional and other elections as well. The problem is that a candidate can win the election with less than a majority of the votes as long as that candidate has the largest plurality.[25] This plurality-winner feature of the electoral system, combined with the use of partisan primaries—another element of the system unforeseen by the Founders[26]—deprives voters in the general election of the opportunity to vote for the candidate whom a majority would prefer to win, instead forcing them to choose

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perma.cc/G6X5-FJSQ]. *But see* Frank P. Harvey, *President Al Gore and the 2003 Iraq War: A Counterfactual Test of Conventional "W"isdom*, 45 CAN. J. POL. SCI. 1, 28 (2012) (discussing that Gore may have expanded the war if elected due to demands from the international community).

23. *See, e.g.*, Eli Watkins, *How Gary Johnson and Jill Stein Helped Elect Donald Trump*, CNN (Nov. 25, 2016), https://www.cnn.com/2016/11/10/politics/gary-johnson-jill-stein-spoiler/index.html [https://perma.cc/7P8C-Y5GU]; Steve Benen, *Third-Party Voters Played a Key Role in Election Results*, MSNBC (Nov. 9, 2016), https://www.msnbc.com/rachel-maddow-show/third-party-voters-played-key-role-election-results-msna923951 [https://perma.cc/DA3H-N7U2]; Steven Shepard, *The Electoral College is the Big Factor in a Third-Party Nightmare for Democrats*, POLITICO (July 15, 2023), https://www.politico.com/news/2023/07/15/electoral-college-third-party-democrats-00106472 [https://perma.cc/76PD-DYC2].

24. *See, e.g.*, ADAM SEWER, THE CRUELTY IS THE POINT: THE PAST, PRESENT, AND FUTURE OF TRUMP'S AMERICA 3 (2021); *cf.* Matthew C. MacWilliams, *Trump Is an Authoritarian. So Are Millions of Americans*, POLITICO (Sept. 23, 2020), https://www.politico.com/news/magazine/2020/09/23/trump-america-authoritarian ism-420681 [https://perma.cc/S39H-HSW9] (discussing the undertones of authoritarianism in former-President Trump's public expressions).

25. *See* Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Combat Extremism*, 26 LEWIS & CLARK L. REV. 365, 366–67 (2022).

26. RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 1, 52–54 (1969); *see also* THE FEDERALIST NO. 9 (Alexander Hamilton), NO. 10 (James Madison) (discussing the negative effect of faction formation on democracy).

from the limited options presented by the electoral system.[27] Candidates who lose their party's primary are not even on the ballot in the general election. Even if they were able to run in the general election as a third-party or independent candidate, the plurality-winner rule would cause them to split the vote in three (or more) ways—just as Roosevelt running against Taft and Wilson did after he lost his party's nomination to Taft.

The consequence of this flawed system under current conditions of partisan polarization has led to a Congress that is much more populated by extremists aligned with President Trump and his Make America Great Again (MAGA) movement than the voters who elect these members of Congress would actually prefer.[28] In so-called "red" (Republican-leaning) states and districts, when general-election voters are faced with a choice between a Democrat and a MAGA candidate who won the Republican primary, the voters routinely choose the MAGA candidate over the Democrat. In "blue" (Democrat-leaning) states and districts, Democrats can beat MAGA candidates in the general election; in red states and districts, it is a different story. Yet, even while casting a ballot for a MAGA candidate over a Democrat in November, these general-election voters would have preferred by an even wider margin to elect a non-MAGA Republican who lost the GOP primary.[29]

Ohio's 2022 U.S. Senate election is an example. MAGA candidate, and future Vice President, J.D. Vance beat Representative Tim Ryan, the Democrat.[30] But Senator Rob Portman, the non-MAGA outgoing Republican, would have beaten Ryan by a much wider margin; however, Senator Portman did not have the stomach for a MAGA-dominated

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27. Edward B. Foley, *How Our System of Primary Elections Could Destroy Democracy*, WASH. POST (May 19, 2022), https://www.washingtonpost.com/opinions/2022/05/19/primary-elections-majority-vote/ [https://perma.cc/NL5V-25DJ].

28. David Montgomery, *How to Save America from Extremism by Changing the Way We Vote*, WASH. POST (Oct. 31, 2022), https://www.washingtonpost.com/magazine/2022/10/31/ranked-choice-voting-multi-member-house-districts/ [https://perma.cc/35SV-57XR].

29. For an excellent theoretical explanation of how the system of partisan primaries and plurality-winner general elections produces this result, see Nate Atkinson & Scott C. Ganz, *Robust Electoral Competition: Rethinking Electoral Systems to Encourage Representative Outcomes*, 84 MD. L. REV. 102 (2024).

30. *See* Haley BeMiller, *How J.D. Vance Won an Ohio U.S. Senate Race That Captured National Attention*, CINCINNATI ENQUIRER (Nov. 9, 2022), https://www.cincinnati.com/story/news/politics/elections/2022/11/09/ohio-senate-jd-vance-defeats-tim-ryan-takeaways/69589892007/ [https://perma.cc/64GE-7UFS].

primary and might not have been able to win without currying Trump's favor as Senator Vance did.[31]

In the House, Arizona's second congressional district illustrates the same phenomenon. A Trump-endorsed MAGA candidate, Eli Crane, beat a non-Trump-endorsed state representative, Walter Blackman, in the Republican primary[32] and then went on to defeat the Democrat in the general election.[33] Although the non-Trump-endorsed Republican would likely have won by even more (and, based on past performance in the Arizona legislature, would have been a constructive institutionalist in Congress[34]), MAGA candidate Crane was the one who went to Washington, where he became part of the group of extremists, led by Representative Matt Gaetz, that toppled Representative Kevin McCarthy's speakership.[35] Indeed, "MAGA Mike" Johnson became McCarthy's successor as Speaker of the House only because the

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31. *See id.* ("'I'm a Republican; I'm not a J.D. Vance Republican,' said Mark Durket of Sycamore Twp. 'I did vote for him because I didn't want to see two Democrats for Senate in Ohio. . . . So that was important to me, even though I didn't like the candidate.'").

32. Taylor Seely, *Trump-Backed Candidates Sweep in Arizona Primary, Showing Former President's Sway Among Republicans*, ARIZ. REPUBLIC (Aug. 2, 2022), https://www.azcentral.com/story/news/politics/elections/2022/08/02/arizonans-head-polls-vote-high-profile-primary-races/10203279002/ [https://perma.cc/M3G4-5NFH].

33. Shondin Silversmith, *Eli Crane Defeats Tom O'Halleran, Flipping a Seat to Republican Control*, AZMIRROR (Nov. 11, 2022, 3:30 PM), https://azmirror.com/briefs/eli-crane-defeats-tom-ohalleran-flipping-a-seat-to-republican-control/ [https://perma.cc/C87Z-25FY]; *Arizona's 2nd Congressional District Election, 2022*, BALLOTPEDIA, https://ballotpedia.org/Arizona%27s_2nd_Congressional_District_election,_2022 [https://perma.cc/95XU-JYLE].

34. *See, e.g.*, Jon Hecht, *Representative-Elect Blackman Seeks Accountability at Legislature*, JOURNAL AZ (Nov. 20, 2018), https://journalaz.com/2018/11/20/representative-elect-blackman-seeks-accountability-at-legislature/ [https://perma.cc/JP3U-QMPX] (discussing Blackman's focus on "small-bore local issues that affect people more" instead of large national, presidential issues). *But see* Adam Waltz, *Seven Arizonan Republican Legislators Face Calls to Ban Them From the House and Senate*, ABC AZ. (Jan. 7, 2021, 8:23 PM), https://www.abc15.com/news/state/seven-arizonan-republican-legislators-face-calls-to-ban-them-from-the-house-and-senate [https://perma.cc/M3LT-W2RL] (reporting on a call to ban Blackman from the House due to his support for the "Stop The Steal" movement, which "claims that President Donald Trump won Arizona and the nation in the November 3[, 2020,] election").

35. Renee Romo & Alexandria Cullen, *Biggs, Crane Join Democrats in Historic Vote to Oust McCarthy as Speaker*, CRONKITE NEWS (Oct. 3, 2023), https://cronkitenews.azpbs.org/2023/10/03/biggs-crane-join-democrats-in-historic-vote-to-oust-mccarthy-as-speaker/ [https://perma.cc/6QLK-746B].

MAGA wing of the party has become so dominant.[36] But the dominance of the MAGA wing is not because American voters prefer MAGA to non-MAGA Republicans; instead, it is due to the structure of the electoral system that gives general-election voters a choice between only MAGA candidates and Democrats.

Moreover, this same structure is what set the stage for the horrendous January 6 attack on the Capitol. The members of Congress who perpetrated the plan to nullify President Joe Biden's 2020 victory in the joint session of Congress on January 6, 2021, owed their offices to the system that favored them over more moderate Republicans, despite the fact that a majority of all their constituents—and not just their primary voters— would have preferred more moderate alternatives. As Josep Colomer has shown, Republicans in Congress who won their seats in an electoral system different from the standard one of partisan primaries followed by a plurality-winner general election were much less likely to object to President Biden's victory on January 6, 2021, than Republicans who won their seats in the standard system.[37] If the United States ends up losing its democracy completely because of a MAGA takeover, it won't be because that's what a majority of Americans want. Rather, it will be because of a flawed electoral system that did not enable voters to choose what they truly most preferred.

II. CRAFTING AN ELECTORAL SYSTEM CONSONANT WITH THE CONSTITUTION

Assuming that American democracy survives, there will be an opportunity to repair this flawed system. The fact that the Framers of the Constitution were largely inattentive to issues of electoral system design means that Americans today can choose what kind of electoral system, consistent with the Constitution's basic framework, would best carry forward the Republic's project of collective self-government.[38] To be sure, Americans could theoretically scrap the Constitution altogether and start entirely anew—perhaps even eliminating the presidency as too dangerous an institution given the

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36. Zachary Basu, *MAGA Movement Gets Its Speaker*, AXIOS (Oct. 25, 2023), https://www.axios.com/2023/10/25/mike-johnson-speaker-house-republicans-trump [https://perma.cc/QQ73-3YLF].

37. JOSEP M. COLOMER, CONSTITUTIONAL POLARIZATION A CRITICAL REVIEW OF THE U.S. POLITICAL SYSTEM 120 (2024).

38. *See* MICHAEL BENNET, THE LAND OF FLICKERING LIGHTS: RESTORING AMERICA IN AN AGE OF BROKEN POLITICS 23–24 (2019).

technological advances in warfare and telecommunications.[39] A constitutional convention tasked with drafting a whole new constitution for the country might prefer a purely parliamentary system, possibly even a legislature elected on the basis of proportional representation, as found in many European nations.[40]

But the inquiry undertaken here takes the Constitution as fixed. Even if constitutional amendments are not impossible, they certainly are exceedingly difficult, and it is unrealistic to expect that in the foreseeable future there will be enough support to achieve amendments eliminating the Electoral College or radically changing the basic structure of the Senate, in which the Constitution insists that each state must have an equal vote.[41] And while the Constitution does not completely rule out proportional representation (PR) for the House of Representatives, it makes the kinds of PR systems that exist in Europe unworkable here. Because the Constitution guarantees each state at least one seat regardless of population,[42] the smallest states with only one seat cannot be elected on the basis of proportional representation—just as a state's U.S. Senator cannot be elected proportionally.

Even constrained by the Constitution in this way, there is much freedom to choose among alternative electoral systems. Broadly speaking, this choice could be undertaken in two different ways. The first way would be purely philosophical: we would think rigorously about the idea of democracy and

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39. For critiques of the recently accelerating expansion of presidential power, see William G. Howell & Terry M. Moe, *The Strongman Presidency and the Two Logics of Presidential Power*, 53 PRESIDENTIAL STUD. Q. 145, 164 (2023). *See generally* BOB BAUER & JACK GOLDSMITH, AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY (2020) (arguing for reform, not elimination, of the presidency to constrain its excessive powers and abuses); Peter M. Shane, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009) (discussing the recent era of "aggressive presidentialism" and its potential consequences).

40. *See, e.g.*, Ari Shapiro, *Would The U.S. Be Better Off With A Parliament?*, NPR (Oct. 12, 2013), https://www.npr.org/sections/itsallpolitics/2013/10/12/2322702 89/would-the-u-s-be-better-off-with-a-parliament [https://perma.cc/P4ES-5TQ2].

41. In their latest book, TYRANNY OF THE MINORITY: WHY AMERICAN DEMOCRACY REACHED THE BREAKING POINT (2023), Professors Steven Levitsky and Daniel Ziblatt argue in favor of these two constitutional reforms while recognizing their extreme difficulty. For an optimistic case that such constitutional reform might be more achievable than commonly thought, see Larry Schwartztol & Justin Florence, *Amending the Constitution Is Impossible Until Suddenly It's Not*, ATLANTIC (Jan. 11, 2024), https://www.theatlantic.com/politics/archive/2024/01/we-need-talk-about-amending-constitution/677065/ [https://perma.cc/WU7J-68FC].

42. *See* U.S. CONST. art. I, § 2.

determine what we think is the best procedure for implementing fundamental democratic values;[43] we would then endeavor to fit this philosophically best method within the Constitution's frame as much as possible. But this purely philosophical method wouldn't be an attempt to implement the Constitution's own values or those of its authors. Instead, we would be infusing *our* values into the box that the authors built for us.

The second approach would attempt to design and implement an electoral system most reflective of, and consonant with, the values and principles underlying the Constitution itself. Although the Constitution does not spell out a specific electoral system, what electoral system would it spell out if it did? Or, to put the same point somewhat differently, what electoral system would be most harmonious with the kind of government that the Constitution and its Framers envisioned?[44]

Although these two approaches are conceptually distinct, as a practical matter, they are largely congruent. The Constitution

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43. For an impressive exercise of this nature, see generally EERIK LAGERSPETZ, SOCIAL CHOICE AND DEMOCRATIC VALUES (2016) (discussing the theory of social choice and its links to political theory and philosophy).

44. There is an argument that our current constitution is not the original Constitution ratified in 1789 but instead a new constitution—or constitutional regime—created by the adoption of the Fourteenth Amendment coerced upon the South by military occupation during Reconstruction. *See* NOAH FELDMAN, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA 312 (2021); ERIC FONER, SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION 90–91 (2019). Professor Kermit Roosevelt III makes this argument most forcefully, drawing upon Professor Bruce Ackerman's previous work in this view*, in Reconstruction as Revolution: The Fourteenth Amendment and the Destruction of Founding America*, 25 U. PA. J. CONST. L. 1073 (2023) and KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY 95, 179 (2022); for an additional overview of the argument, see Kermit Roosevelt III, *A Tale of Two Americas*, 25 U. PA. J. CONST. L. 939 (2023) and 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 115 (1998). While I agree with these authors that it is imperative to recognize the way the Constitution was radically transformed during Reconstruction, including by the coercive way the Fourteenth Amendment was ratified, I think the narrative of discontinuity that these authors depict is too strong. As Ackerman himself recognized in his more complicated theory of the relationship between the original Constitution and the current one, the original one is still operative in significant respects even if much modified. Moreover, and much more important for purposes of electoral system design, the major transformations wrought by Reconstruction did not significantly alter the basic Madisonian theory concerning how to structure republican government to serve the public interest. Consequently, if we want to design and implement an electoral system most harmonious with the Constitution as we have it today, we still need to tailor that electoral system to Madisonian theory and principles.

was a product of the Enlightenment.[45] As such, it was based on the fundamental premise that the exercise of human reason—in other words, philosophical inquiry as informed by empirical evidence—could improve the science of politics, providing greater understanding of what rules, institutions, and procedures would produce a better government on behalf of the citizenry.[46] As the Declaration of Independence famously puts it, the Founders believed—in accordance with "the Laws of Nature and of Nature's God" and "self-evident" truths—that "to secure" the "unalienable Rights" to "life, liberty, and pursuit of happiness" (among others),

> Governments are instituted among Men, deriving their just powers from the consent of the governed,— That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[47]

The Constitution itself was an exercise of this most basic right "to alter or abolish" the existing "Form of Government" because, as a matter of legal authority, its content and ratification amounted to a complete break from the Articles of Confederation and their amendment procedures.[48] Indeed, the Constitution's preamble announces its intent "to form a more

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45. JAMES T. KLOPPENBERG, TOWARDS DEMOCRACY: THE STRUGGLE FOR SELF-RULE IN EUROPEAN AND AMERICAN THOUGHT 2 (2016); JAMES MCGREGOR BURNS, FIRE AND LIGHT: HOW THE ENLIGHTENMENT TRANSFORMED OUR WORLD 117–18 (2013); ROBERT A. FERGUSON, THE AMERICAN ENLIGHTENMENT 1750-1820, at 90 (1997); RALPH KETCHUM, FRAMED FOR POSTERITY: THE ENDURING PHILOSOPHY OF THE CONSTITUTION 6 (Wilson Carey McWilliams & Lance Banning eds., 1993); *cf.* Harold J. Berman, *The Impact of the Enlightenment on American Constitutional Law*, 4 YALE J. L. & HUMS. 311, 329 (1992) (stating that the Constitution was a product of various (sometimes conflicting) belief systems).

46. *See* RITCHIE ROBERTSON, THE ENLIGHTENMENT: THE PURSUIT OF HAPPINESS, 1680-1790, at 21–31 (2021) (describing how individual Enlighteners advocated for the use of empirical reason); JONATHAN I. ISRAEL, DEMOCRATIC ENLIGHTENMENT: PHILOSOPHY, REVOLUTION, AND HUMAN RIGHTS 1750-1790, at 19–20 (2011); Iain McClean, *Before and After Publius: The Sources and Influence of Madison's Political Thought*, *in* JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 16–19 (Kernell ed., 2003).

47. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

48. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 412–13 (2016); ACKERMAN, *supra* note 44, at 9.

perfect Union" because experience and reason had demonstrated the necessity for change.[49]

Thus, if further experience and the development of political science demonstrates the necessity for additional changes, the Framers of the Constitution would not have opposed them. On the contrary, the Framers firmly believed in the possibility of human progress, including with respect to the operation of a republican form of government endeavoring to "promote the general Welfare" and "secure the blessings of Liberty" to "We the People" and "our Posterity."[50] They knew themselves to be the beneficiaries of such progress over the previous century, made manifest through the wisdom of Locke, Montesquieu, and others.[51] They anticipated that future generations would benefit from continued progress and more accumulated wisdom.[52] Therefore, if contemporary philosophy and political science point the way to better electoral procedures to secure "the consent of the governed" and improve government in service of "the general Welfare," then the Framers of the

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49. U.S. CONT. pmbl. In the preface to his edition of *The Federalist Papers*, which endeavored to persuade the public to support ratification of the newly drafted Constitution, Professor J. R. Pole writes:

> A good case can be made for claiming *The Federalist* as the culminating political classic of the Enlightenment. It remains in many ways a serene example of Enlightenment ideals. In the first place, it is a secular statement, which never appeals to religious faith or claims to base its reasoning on religious principles. . . . It is a product of the Enlightenment also in its conviction in the power of reason.

J. R. Pole, *Introduction* to ALEXANDER HAMILTON ET AL., THE FEDERALIST xx (J. R. Pole ed., Hackett Publishing Co., 2005).

50. *See* U.S. CONST. pmbl.

51. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 7–8 (1969); *see also* Jack N. Rakove, *Ticklish Experiments: The Paradox of American Constitutionalism*, in AMERICA AND ENLIGHTENMENT CONSTITUTIONALISM 217, 219 (Gary L. McDowell & Jonathan O'Neill eds., 2006) ("In its revolutionary origins, American constitutionalism displayed a remarkable confidence in the capacity of human reason to create new institutions of government organized on republican principles.").

52. *See* Rakove, *supra* note 51. DENNIS CARL RASMUSSEN, FEARS OF A SETTING SUN: THE DISILLUSIONMENT OF AMERICA'S FOUNDERS (2021), is not to the contrary insofar as, despite losing some of their revolutionary fervor as the early Republic developed, *see id.* at 3, they continued to believe that reason and evidence would be the best means for avoiding backsliding and ongoing advancement, see *id.* at 224; *see also* DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 50 (1989) (discussing Madison's concerns that passion would outweigh reason and the need to safeguard against this).

Constitution would have wanted us to take advantage of this advancement in philosophical and scientific inquiry.[53]

Moreover, the Founders themselves evolved in their own thinking as a result of new experiences once the Constitution was put into effect. Madison, in particular, changed his views in light of experience. While he had hoped that the Constitution would constrain the formation of permanently oppositional political parties, by 1792 he had come to believe in the necessity of forming and belonging to a "republican" political party in opposition to the "federalist"—or what he would describe as the "monarchical"—political party of Alexander Hamilton and then–Vice President John Adams.[54] Decades later, after his own presidency, Madison explained in letters to colleagues that he had come to believe more firmly than before in the necessity of majority rule as the most important feature of republican government.[55]

The connection between philosophical reasoning and the Constitution's animating values is more than just the most abstract injunction that each generation take advantage of the newest thinking. Rather, the Constitution's Framers had a specific conception of the difficulty of reconciling the preferences of majority and minority factions within the body politic, and they wanted to design a system that would best protect the interests of the minority while at the same time permitting the considered judgment of the majority to prevail.[56] Protecting minority rights while enabling majority rule remains a challenge for any democracy.[57] Yet advancements in

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53. In particular, Thomas Jefferson believed that there should be a new constitution every two decades to take advantage of new ideas. *See* Letter from Thomas Jefferson to William Smith (Nov. 13, 1787) (on file with the Library of Congress), https://www.loc.gov/exhibits/jefferson/105.html [https://perma.cc/RXB2-8FNH].

54. *See* Douglas W. Jaenicke, *Madison v. Madison: The Party Essays v. The Federalist Papers*, *in* JAMES MADISON (Terence Ball ed., 2008).

55. Robert A. Dahl, *James Madison: Republican or Democrat?*, 3 PERSPS. ON POL. 439, 443–44 (2005).

56. *See* THE FEDERALIST NO. 10 (James Madison); DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 86 (2008); *see also* Greg Weiner, *James Madison and the Legitimacy of Majority Factions*, 2 AM. POL. THOUGHT, 198, 199 (2013) (discussing Madison's conception of majority rule).

57. *See* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL 87 (1982); Jonathan Riley, *American Democracy and Majority Rule*, 32 NOMOS: AM. SOC'Y FOR POL. & LEGAL PHIL. 267, 268 (1990) (outlining the complex majoritarian and antimajoritarian framework of American democracy); JEREMY WALDRON, LAW AND DISAGREEMENT 299 (1999); *see also* Stephen Macedo, *Against*

the understanding of electoral procedures since the time of the Republic's founding make it possible to adopt a voting system that maximizes the degree to which the preferences of the minority are reflected in the outcome, even as the will of a majority prevails.

First, it is important to recognize that the role of majority rule under the Constitution is confined by the architectural features of federalism and separation of powers. The will of the nation cannot prevail over those matters that are constitutionally reserved for each of the states under the Tenth Amendment,[58] and, within those domains, the states themselves are entitled to choose their own constitutional arrangements within the full breadth of "republican" forms of government.[59] Similarly, the Senate is irrevocably structured according to the principle of equal representation for each state, regardless of population,[60] and thus often will act contrary to the will of the national majority as a whole—although, of course, each Senate election can, and should, be conducted to achieve the will of the majority in the particular state. Likewise, as I discuss at length in *Presidential Elections and Majority Rule*,[61] the Electoral College, as structured by the Twelfth Amendment, is designed to achieve a compound federalism-based form of majority rule, rather than reflect the will of a simple nationwide majority: as the authors of the Twelfth Amendment intended, to win the presidency would require a majority (not merely a plurality) of electoral votes, and this Electoral College majority would be formed from winning the support of the majority within each state that contributed to this Electoral College victory.[62] These structural features of the Constitution would prevent a national majority

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Majoritarianism: Democratic Values and Institutional Design, 90 B. U. L. REV. 1029, 1032 (2010) ("[Majority rule] lacks legitimacy if majorities oppress minorities and flaunt their rights.").

58. New York v. United States, 505 U.S. 144, 157 (1992); Printz v. United States, 521 U.S. 898, 919–20 (1997); Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 471 (2018).

59. U.S. CONST. art. IV, § 4.

60. U.S. CONST. art. I, § 3, cl. 1. This is the one provision of the Constitution (apart from the no-longer-operative Slave Trade Clause) that cannot be amended, known as an "entrenched clause," even by the ordinarily difficult amendment procedures. It instead requires the consent of each state. *See* U.S. CONST. art. V.

61. *See generally* FOLEY, *supra* note 3.

62. *Id.* at 44–45.

from trampling upon the interests of states with their own majorities at odds with its preferences.[63]

Second, the Bill of Rights and similar provisions elsewhere in the Constitution would further limit the power of majorities, either nationally or in a state. The judicial enforcement of these constitutional rights, even against elected legislatures, including Congress, would come to mean, as the Supreme Court itself famously phrased it, that these "fundamental rights may not be submitted to vote; they depend on the outcome of no elections" because their "very purpose . . . was to withdraw certain subjects from the vicissitudes of political controversy . . . to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[64] To be sure, we understand that the composition of the Court itself—and thus its interpretation of these constitutional provisions—may be affected by changing public opinion and which political party wins presidential and Senate elections.[65] Even so, the basic principle remains true: if Congress or a state legislature enacts a law that reflects the will of a majority in the nation or that state, but that law contravenes a constitutional right as interpreted by the Supreme Court (for example, "the right to bear arms" protected by the Second Amendment), then the will of the majority must yield to the Court-enforced constitutional right.[66]

All these constitutional constraints on the operation of majority rule do not mean that the Constitution leaves no room for the will of a majority to prevail. On the contrary, as just indicated above, after the Seventeenth Amendment, elections for Senators can and should be conducted so that the preference of each state electorate's majority prevails.[67] Likewise, the popular vote that each state holds to appoint the state's presidential electors can and should be conducted so that the

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63. *Cf.* Judith A. Best, *Presidential Selection: Complex Problems and Simple Solutions*, 119 POL. SCI. Q. 39, 39 (2004) (describing how the Electoral College was designed to tame majority rule by seeking "majority rule with minority consent").

64. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

65. *See* Matthew E.K. Hall, *The Semiconstrained Court: Public Opinion, the Separation of Powers, and the U.S. Supreme Court's Fear of Nonimplementation*, 58 AM. J. POL. SCI. 352, 363–64 (2014).

66. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 70–71 (2022) (holding that despite a state's popular support for specific gun-control laws, the fundamental right to own a firearm superseded attempted state regulation).

67. U.S. CONST. amend. XVII (moving the selection of senators away from state legislatures and providing for the direct election of senators by the people of each state).

will of the majority in that state's electorate prevails. Similarly, elections for each state's seats in the House of Representatives can and should be structured to be consistent with the preferences of the majority of voters in the state. Indeed, the Framers of the Constitution specifically intended that a state's delegation in the House of Representatives be elected in a way that reflects the collective preferences of the state's electorate.[68] More broadly, the Framers had an expectation that whenever it was constitutionally appropriate to put a matter to a vote of a constituency, the outcome of the election should conform to the choice made by a majority of eligible voters in that election.[69]

Even if the Framers didn't have this expectation, the progress in understanding the mathematics of electoral

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68. *See* Robert J. Dinkin, Voting in Revolutionary America: A Study of Elections in the Original Thirteen States, 1776-1789 at 93 (1982).

69. Weiner, *supra* note 56 (discussing that Madison contemplated "majorities operating within institutional frameworks designed to encourage their reasonableness"). As Pennsylvania's constitution of 1776 explicitly put it, the reason to conduct elections was to "make the voice of a majority of people the law of the land." Dinkin, *supra* note 68.

In colonial America, there was considerable confusion about the difference between majority and plurality winners. Several colonies required majority winners, while others permitted plurality winners. Moreover, even in those colonies requiring majority winners, often the administration of elections failed to follow the rule and devolved to permitting plurality winners instead. Where the distinction was understood, additional rounds of balloting were sometimes necessitated to reach a majority. *See* Peverill Squire, The Rise of the Representative: Lawmakers and Constituents in Colonial America 100–01 (2017); Anthony J. Gaughan, *Voting in Colonial and Revolutionary America*, *in* Oxford Handbook of Am. Election L. (2024). At least one contemporaneous commentator observed that in Massachusetts the distinction between a majority and plurality was understood and enforced "because where there are more than two candidates, a person may have [a plurality], though not a majority of the voters." William Douglass, 1 A Summary, Historical and Political, of the First Planting, Progressive Improvements, and Present State of the British Settlements in North America 491 (1755).

This confusion between plurality and majority continued during the period of constitution formation in the states after the Declaration of Independence in 1776 and before the adoption of the new federal Constitution. *See* Dinkin, *supra* note 68, at 105 ("As in the provincial period, the proportion of votes necessary for a candidate to be elected—plurality or majority—was not always well defined in the statutes."). In New England, however, it was clear that a majority was required; several gubernatorial elections there during this period needed to be decided by a runoff procedure in the state's legislature because no candidate received a majority of votes from citizens at the polls. *Id.* ("This happened once in Massachusetts, three times in New Hampshire, and five times in Connecticut during the 1780s."). There was a similar need for run-off voting, by citizens in this case, in some initial New England congressional elections. *Id.* ("It took three ballottings in New Hampshire and three to five in some districts of Massachusetts before every race was decided.").

procedures, beginning in the Enlightenment and continuing today, has led to a recognition that any election in which the preferences of voters is to be treated equally requires that the winning candidate be the one preferred by a majority of voters.[70] Around the same time that the Framers were writing the Constitution and *The Federalist Papers* in defense of it (drawing upon their understanding of Montesquieu and other Enlightenment thinkers), the Enlightenment in France was continuing to develop new insights into the nature of republican electoral procedures. In particular, the Marquis de Condorcet wrote a series of essays showing that whenever there are three or more candidates in an election, determining which candidate a majority of voters prefers requires comparing each candidate to each other candidate, two at a time.[71] If, in this series of pairwise comparisons, there is one candidate whom a majority of voters prefers over each other alternative, then this one candidate should win the election. Scholars who study alternative electoral methods call this kind of candidate a *Condorcet Winner* in recognition of Condorcet's analysis of why this kind of candidate should win a multi-candidate election.[72] We can also use the term *Convergence Voting* to define any electoral method that always elects a Condorcet Winner (whenever there is one) because, as with a Venn diagram, different majorities of voters may converge on a single Condorcet Winner as a result of all the pairwise comparisons.[73]

Condorcet recognized, however, that the preferences of voters among three or more candidates in some elections might be such that there is no single candidate whom a majority of

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70. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 141 (1989).

71. *See* SAUL STAHL & PAUL E. JOHNSON, UNDERSTANDING MODERN MATHEMATICS 93 (2007). *See generally* MARQUIS DE CONDORCET, *Essai Sur L'application de L'analyse à la Probabilité des Décisions Rendues à la Pluralité des Voix* (1785) (discussing the applications of probability theory to decision-making processes).

72. *See* Jack Murtagh, *Could Math Design the Perfect Electoral System?*, SCI. AM. (Nov. 2, 2023), https://www.scientificamerican.com/article/see-how-math-could-design-the-perfect-electoral-system/ [https://perma.cc/9S4C-VBZU].

73. To take a simple example of how Convergence Voting works in this way, suppose there are three candidates: Blue, Purple, and Red. Assume that 40% of voters like Blue best and Purple second-best, another 40% of voters like Red best and Purple second-best, and the remaining 20% of voters like Purple best and split down the middle between Blue and Red for whom they like second-best. Convergence Voting will elect Purple because Blue and Purple voters form a majority to prefer Purple over Red, while Red and Purple voters form a (second) majority to prefer Purple over Blue. Thus, these two different majorities converge upon Purple as the single majority-preferred candidate over each alternative.

voters prefer to each other candidate.[74] In this case, Condorcet suggested that the winner of the election should be the candidate who comes closest to being a Condorcet Winner,—in other words, the candidate whose largest one-on-one defeat against another candidate is the smallest margin of defeat suffered by any of the candidates.[75] For the sake of clarity, we may call this specific electoral method *Maximum Convergence Voting* because, like any Convergence Voting method, it will elect the single candidate who is majority-preferred against all opponents, when there is one (again, a Condorcet Winner).[76]

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74. *See* Bernard Grofman, *The Theory of Committees and Elections: The Legacy of Duncan Black*, *in* TOWARDS A SCIENCE OF POLITICS: ESSAYS IN HONOR OF DUNCAN BLACK 11, 13–14 (Gordon Tullock ed., 1981); DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 46 (1958).

75. *See* Nicolaus Tideman, *How Should Votes Be Cast and Counted?*, *in* 2 OXFORD HANDBOOK OF PUBLIC CHOICE 17 (Roger Congleton et al. eds., 2019) (discussing that this method, which is called "Minimax" in the technical literature, "was first described by Duncan Black . . . in his effort to discern what voting rule Condorcet had in mind").

76. Maximum Convergence Voting, as defined here, is known in the scholarly literature on electoral theory by the unfortunately confusing term "Minimax"; in my own previous work, I have suggested "Maximum *Consensus* Voting" as a potentially suitable name for this electoral method. *See* Edward B. Foley, *Decreasing the Political Polarization of the American Public*, ABA TASK FORCE FOR AM. DEMOCRACY (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy//resources/decreasing-political-polarization-american-public/ [https://perma.cc/G5HU-XKR2]. Upon further reflection, I believe "Maximum *Convergence* Voting" is a better term. The main reason is that "Maximum Convergence Voting" signals that it is a species within the larger class of Convergence Voting methods, all of which will elect a candidate who is a Condorcet Winner. One might consider calling this larger class of Condorcet-compliant electoral methods (in other words, those that will always elect a Condorcet Winner when one exists) "*Consensus* Voting" rather than "Convergence Voting," but I believe that "Consensus Voting" is a somewhat misleading term for the property of Condorcet-compliance (always electing an existing Condorcet Winner), whereas "Convergence Voting" is an accurate term for this property. The word "consensus" entails a "general agreement" according to its dictionary definition and, thus, suggests, if not complete unanimity, a degree of agreement that is "wide" and much larger than a bare majority. *Consensus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/consensus [https://perma.cc/YCY9-DHYC]. But the existence of a Condorcet Winner entails only that one candidate is preferred by at least a bare majority when compared one-on-one against each other candidate. Therefore, it is possible to elect a Condorcet Winner for whom there is no "general" or "wide" agreement, or consensus, within the electorate that this candidate should win. But it is necessarily true that a majority of voters *converge* upon a Condorcet Winner when there is a different majority of voters who prefer the Condorcet Winner to each alternative candidate. Thus "Convergence Voting" is an appropriately descriptive name for the class of Condorcet-compliant electoral methods.

And when there is not a Condorcet Winner, Maximum Convergence Voting will elect the candidate whom the largest minority of voters support, thus achieving the whole electorate's greatest degree of convergence upon a single choice.[77]

The Framers of the Constitution, including Madison, were only dimly aware of Condorcet's work on election procedures, some of which was not even written until after the Constitution was drafted and ratified.[78] As they gathered at the constitutional convention in Philadelphia during the summer of 1787, they certainly did not fully understand and appreciate the significance of Condorcet's work to their own constitutional project.[79] If they had, they surely would have wanted to incorporate his insights into their constitutional design.

Given their great concern for how to protect the interests of minorities within a republican system of majority rule, the Framers would have especially appreciated that Maximum Convergence Voting maximizes the extent to which the preferences of minorities are honored while simultaneously letting the preferences of a majority prevail. This is true because Maximum Convergence Voting elects the candidate for whom a minority casts the most votes (and thus does least poorly) in the situation where this candidate loses by the largest margin against one of the opponents (and thus causes this

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"Maximum *Consensus* Voting" would be an acceptable name for what the technical literature calls Minimax, because Minimax always elects the candidate for whom there is the greatest degree of agreement, or consensus, among voters within the electorate—even if that greatest degree is not especially wide. But if "Convergence Voting," rather than "Consensus Voting," should be the name for the category of Condorcet-compliant methods, then "Maximum Convergence Voting" would be a more informative and less confusing name for the Minimax method. Moreover, "maximum convergence" is a fully accurate description of how Minimax operates because it finds the candidate for whom there is the greatest extent of convergence among voters within the electorate and who, thus, comes closest to being a Condorcet Winner when there isn't one.

77. Because Maximum Convergence Voting elects the candidate whose largest defeat is by the narrowest of margins, compared to each opponent's largest defeat, this electoral method necessarily elects a Condorcet Winner (when there is one), who suffers no defeat in any of the one-on-one matchups against each other candidate.

78. *See* Iain McClean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445, 455 (1992). *But see* Norman Schofield, *The Intellectual Contribution of Condorcet to the Founding of the US Republic 1785–1800*, 25 SOC. CHOICE & WELFARE 303, 316 (2005) (suggesting that the United States's polity "reflects . . . aspects of Condorcet's ideas").

79. *See* Arnold B. Urken, *The Condorcet-Jefferson Connection and the Origins of Social Choice Theory*, 72 PUB. CHOICE 213, 231 (1991).

minority of voters its worst defeat).[80] In other words, Maximum Convergence Voting always chooses the candidate with the *least worst* outcome in the candidate's head-to-head matchups against the other candidates. Consequently, if we wish today to use the electoral method that is most consonant with the philosophical principles underlying the Constitution, we should use Maximum Convergence Voting (or at least some closely related version of Convergence Voting that also aims to elect the candidate who is the best approximation of a Condorcet Winner when there isn't one).[81]

By maximizing the preferences of minorities insofar as can be achieved consistently with majority rule, Maximum Convergence Voting has the additional virtue of electing the candidate reflecting the greatest possible degree of consensus (or common ground) among voters. The winner, in other words, is the candidate for whom the fewest number of voters are against the outcome. This feature of maximizing social consensus is an attribute that the Framers of the Constitution,

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80. For example, if one candidate's largest margin of defeat is 60-40, while another candidate's largest margin of defeat is 55-45, the latter candidate's largest margin of defeat is smaller. Electing the candidate whose largest margin of defeat is the smallest of all the candidates is the same as choosing the candidate with the most minority support—in other words, whose largest loss comes closest to being a majority win.

81. The mathematics of electoral theory for situations in which there is no Condorcet Winner can get quite complicated. Other specified electoral methods besides Maximum Convergence Voting, based on their specific mathematical properties, can stake a claim for being able to find the candidate closest to a Condorcet Winner when there isn't one. For example, C. L. Dodgson (who wrote *Alice's Adventures in Wonderland* using the name Lewis Carroll) proposed a method that would elect the candidate for whom the minimum change in the electorate's collective preferences would produce a Condorcet Winner. *See generally* CHARLES L. DODGSON, THE PRINCIPLES OF PARLIAMENTARY REPRESENTATION (1884). But when there are more than a few candidates, this "Dodgson method" can become computationally very challenging, even for modern computers. *See* Michael Fellows et al., *Determining the Winner of a Dodgson Election is Hard*, *in* IARCS INT'L CONF. ON FOUNDS. OF SOFTWARE TECH. & THEORETICAL COMPUT. SCI. 459, 460 (Kamal Lodaya & Meena Mahajan eds., 2010). Maximum Convergence Voting is the simplest and most straightforward way to identify the candidate who has a powerful claim to being closest to a Condorcet Winner because Maximum Convergence Voting elects the candidate for whom the fewest voters would need to switch their first-choice preference to a different candidate for that other candidate to become a Condorcet Winner. *See infra* Part III. As we discuss subsequently, choosing an electoral system that is easy enough for voters to understand, and for the government's election officials to administer, is an essential attribute to the feasibility of an electoral system's adoption.

including Madison, would have valued in an electoral system.[82] They believed that government should act in the general or common interest of the public as a whole.[83] An electoral system that came as close as possible to finding shared agreement among voters on the choice to be made would have been seen by the Framers as the electoral system most suited to implementing the Constitution's aims.

This consensus-maximizing method is also supported by contemporary political theory. As John Rawls has persuasively explained, parties in an "original position" to make a fair social contract, behind a "veil of ignorance" that did not permit them to know the identities of the persons for whom they were making this social contract, would need to hedge their bets so that the bargain struck did not end up being too bad for them once the "veil of ignorance" was lifted.[84] Rawls used the term "strains of commitment" to describe the necessity of this risk-averse strategy regarding the content of the social contract: the bargain could not be one that a person could not be expected to

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82. *See* JAY COST, JAMES MADISON: AMERICA'S FIRST POLITICIAN 5 (2021) [hereinafter COST, JAMES MADISON] ("Factions would check one another, and eventually the only way past such a stalemate would be to meet in the middle. In this process of finding common ground, something approaching justice and the public interest might be achieved, without the need for a king or a class of nobility."); *see also* Jay Cost, *The Conservative Case for the Constitution, Part III: How the Constitution Promotes Consensus*, AM. ENTER. INST. at 1 (2021).

83. COST, JAMES MADISON, *supra* note 82, at 93 ("Republican politics, practiced on a large enough scale, could secure itself. If he was right, it followed that national majorities had to be invested with sweeping powers to govern on behalf of the public interest.").

84. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 15–16 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]. The most common understanding of the veil of ignorance, as Rawls first described it in A THEORY OF JUSTICE, is that the parties in the original position are making the social contract for *themselves* although they do not know *their own* identities. *See* JOHN RAWLS, A THEORY OF JUSTICE 136–41 (1971). This conception of the original position has been criticized as excessively artificial because it is difficult for individuals to imagine themselves without any identity whatsoever. Consequently, a superior conception of the original position—one reflecting the refinement of Rawls's views contained in JUSTICE AS FAIRNESS: A RESTATEMENT, is that the parties in the original position know their own identities but that they have a fiduciary obligation to make the best social contract for another person whose identity they do not know. Whichever conception of the Rawlsian veil of ignorance one prefers, Maximum Convergence Voting is the electoral method most consistent with the social contract that would be agreed upon in the Rawlsian original position.

honor as fair.[85] Although Rawls himself did not specify any particular electoral procedure as incorporated within the social contract agreed upon in the original position, the consensus-maximizing electoral method is certainly harmonious with Rawlsian principles. No electoral method imposes less burdensome "strains of commitment": the voting procedure that minimizes the number of voters who end up on the losing side of the election is the fairest outcome possible among equal citizens when unanimity is unattainable. The losing side in this election knows that it could not have done any better. Given the disagreement that needed to be put to a vote, some citizens inevitably needed to end up disappointed by the outcome. The consensus-maximizing method derived from Condorcet's work, Maximum Convergence Voting, is the method that yields the fewest disappointed citizens. Thus, a social contract incorporating this method for any matters that need to be put to a vote among citizens should be accepted as a fair social contract worthy of respect and obedience by all citizens.

There remains the practical task of devising a specific form of this consensus-maximizing method that election officials and voters can readily understand and implement. The Condorcet method becomes mathematically more difficult as the number of candidates increases. With three candidates, there are only three pairwise comparisons: A v. B, A v. C, B v. C. But with four candidates, there are six: A v. B, A v. C, A v. D, B v. C, B v. D, C v. D. With five candidates, there are ten: A v. B, A v. C, A v. D, A v. E, B v. C, B v. D, B v. E, C v. D, C v. E, D v. E. And so on. Even with the benefits of modern computing, which were unavailable to Condorcet, it is necessary to limit the number of candidates in order to make an election using any form of Convergence Voting manageable for both the voters, who must cast their ballots, and the election administrators who must operate the computers that tally the results and make the results available to the public in a format that is easily comprehensible.

The use of ranked-choice ballots can facilitate this process. If each voter ranks the candidates in order of preference, a computer can take those rankings and calculate all the pairwise comparisons between each pair of candidates. For each pair, it is simply a matter of identifying which candidate is ranked

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85. RAWLS, JUSTICE AS FAIRNESS, *supra* note 84, at 103; *see also* JEREMY WALDRON, *John Rawls and the Social Minimum*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 250, 260–61 (1993) (critiquing the idea of strains of commitment on the basis of human psychology).

above the other on each ballot and then adding up the total number of ballots on which a candidate is ranked above the opponent.

But the use of ranked-choice ballots adds some difficulties. Most significantly, different winners can be identified from the same ranked-choice ballots depending on which tabulation procedure is used. In fact, the procedure commonly associated with ranked-choice voting in the United States today is *not* any form of Convergence Voting, including the consensus-maximizing one. Instead, ranked-choice voting in the United States uses a very different tabulation method, which can best be described as *Lowest Plurality Runoff* because it eliminates the candidate with the lowest plurality of first-choice votes across all the ballots and then redistributes those ballots that ranked that eliminated candidate first to whichever candidate each one ranked second.[86] This Lowest Plurality Runoff tabulation method repeats its elimination-and-redistribution procedure until a candidate has accumulated a majority of the ballots.[87]

Because the same set of ranked-choice ballots can produce different winners depending on which tabulation method is used,[88] voters may be anxious about the use of ranked-choice voting in general. Or they may prefer not to use ranked-choice ballots for other reasons, including their relative complexity compared to more familiar forms of voting. It is possible to conduct an election using Maximum Convergence Voting without ranked-choice ballots, but, as a practical matter, doing so is feasible for only three candidates. This version of Maximum Convergence Voting would simply ask voters to declare their preferences directly for each of the three pairwise comparisons: A v. B, A v. C, and B v. C.[89]

Thus, there are essentially three different ways that elections could employ Maximum Convergence Voting. First, as already indicated, elections could use ranked-choice ballots and identify the winner with the consensus-maximizing tabulation method. Second, elections could use ranked-choice ballots but recognizing the difference in winners between alternative

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86. Atkinson & Ganz, *supra* note 29, at 130.

87. *Id.*

88. *Id.* at 130, 138–39.

89. Edward B. Foley & Eric S. Maskin, *How to Depolarize American Politics*, PROJECT SYNDICATE (Feb. 8, 2024), https://www.project-syndicate.org/commentary/top-three-election-system-solves-polarization-and-democratic-disillusionment-by-edward-b-foley-and-eric-s-maskin-2024-02 [https://perma.cc/EA4G-V462].

tabulation methods, conduct a kind of runoff election between two different methods. Third, elections could conduct direct pairwise comparisons without ranked-choice ballots, but with only three candidates.

We shall now consider the pros and cons of each of these three different possibilities.

III. A TOP-FOUR GENERAL ELECTION WITH CONSENSUS-MAXIMIZING RANKED-CHOICE VOTING

The easiest way to illustrate how the consensus-maximizing form of ranked-choice voting would work in the context of a general election is to show it as a variation of Alaska's Top-Four system with ranked-choice voting.[90] Alaska's electoral system is a two-stage process.[91] The first stage is a nonpartisan primary in which all candidates from all parties, as well as independents, compete against each other.[92] Voters cast a simple ballot in which they identify one candidate whom they wish to advance to the second stage.[93] The top four candidates, who receive the most of these single-preference votes, are the ones to advance.[94] In the second stage, voters cast a ranked-choice ballot that permits them to list the order in which they prefer the top four candidates.[95] Alaska then uses the Lowest

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90. *See* Benjamin Reilly et al., *Alaska's New Electoral System: Countering Polarization or "Crooked as Hell"?*. 15 CAL. J. POL. & POL'Y i, at i–1 (2023). In November 2024, Alaska's voters rejected (by an extremely narrow margin of 743 votes) an effort to repeal its Top Four system, which went into effect in 2022. 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].

91. Reilly et al., *supra* note 90, at i.

92. *Id.* Professor Danielle Allen has suggested that "all-comers preliminary election" would be a better term than "nonpartisan primary" for this first stage of the electoral process. Danielle Allen, *Our Democracy is Menaced by Two Dragons. Here's How to Slay Them*, WASH. POST (July 20, 2023), https://www.washingtonpost.com/opinions/2023/07/20/gerrymandering-electoral-college-solution-democracy/ [https://perma.cc/ZDT2-JY2J]. Previously, I have used the term "All Qualified Candidates Primary" (AQCP). *See generally* Edward B. Foley, *Nomination and Election of Statewide Candidates*, 2024 U. ILL. L. REV. 1607 (2024). Whatever term is used, it is important to understand that a candidate's party affiliation can be included on the ballot along with the candidate's name. And if a state wishes, it could permit parties that had endorsed or nominated a particular candidate before this first round to include the fact of this endorsement or nomination on the ballot for this preliminary election.

93. Reilly et al., *supra* note 90.

94. *Id.*

95. *Id.*

Plurality Runoff method to tabulate the winner from these ranked-choice ballots.[96]

Now, imagine the same system as Alaska's except that it uses Maximum Convergence Voting as its tabulation method to identify the winner from the ranked-choice ballots in the second stage of the process. The best way to demonstrate this method, and to contrast it with Lowest Plurality Runoff, is to use an example derived from the two latest U.S. Senate campaigns in Ohio. In 2022, the top four candidates in the primaries (based on votes from both major party primaries) were three Republicans and one Democrat.[97] Two of the three Republicans were from the party's new MAGA wing, vying for former-President Trump's endorsement, with one getting it and the other not.[98] The third Republican was from the party's traditional GOP wing, distancing himself from former-President Trump and the MAGA movement.[99] In 2024, the exact same types of candidates received the top four spots in the primaries for Ohio's other U.S. Senate seat: two MAGA Republicans (only one endorsed by former-President Trump), one non-MAGA traditional GOP Republican (in fact, the same candidate as in 2022, Matt Dolan), and one Democrat.[100]

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96. *Id.*

97. *Ohio U.S. Senate Primary Election Results*, N.Y. TIMES (June 3, 2024), https://www.nytimes.com/interactive/2022/05/03/us/elections/results-ohio-us-senate .html [https://perma.cc/R9QZ-HMRA].

98. These were Senator J.D. Vance and Josh Mandel. *See* Ben Jacobs, *J.D. Vance on His MAGA Conversion: Trump's Man in Ohio Once Called Him "America's Hitler," but There's an Explanation.*, N.Y. MAG.: INTELLIGENCER (July 15, 2024), https://nymag.com/intelligencer/2022/04/j-d-vance-explains-his-conversion-to-trump -and-maga.html [https://perma.cc/UQ5T-DEJX]; Jennifer Medina & Lisa Lerer, *How Josh Mandel, Son of Suburban Ohio, Became a Right-Wing Warrior*, N.Y. TIMES (Feb. 15, 2022), https://www.nytimes.com/2022/02/15/us/josh-mandel-ohio-trump.html [https://perma.cc/CV9D-4WV3]. Senator Vance secured former-President Trump's endorsement. Jill Colvin & Julie Carr Smith, *Trump Backs GOP's JD Vance in US Senate Primary in Ohio*, ASSOC. PRESS (Apr. 15, 2022), https://apnews.com/ article/2022-midterm-elections-steve-bannon-josh-mandel-congress-ohio-06e64ac7b a0f8d84b608fb82f4e632eb [https://perma.cc/QT45-VU8K].

99. This was Matt Dolan. Liz Skalka, *A Non-MAGA Republican's Late Surge in Ohio is Scrambling a Key Senate Primary*, HUFFPOST (Mar. 16, 2024), https://www.huffpost.com/entry/ohio-senate-primary-matt-dolan-bernie-moreno-don ald-trump_n_65f373e8e4b0b4d0b898d8f7 [https://perma.cc/L62M-WMSM].

100. Julie Carr Smith, *Trump Favorites Morena and Merrin Win GOP Primaries to Face 2 Vulnerable Ohio Democrats This Fall*, ASSOC. PRESS (Mar. 20, 2024), https://apnews.com/article/election-2024-senate-ohio-moreno-larose-dolan-cffe7722 ac68e79deebae8353dd2fb18 [https://perma.cc/HC3K-KNY4]. The Trump-endorsed candidate is Bernie Moreno. *Id.* Frank LaRose was the other MAGA candidate,

Based on the similarities of these two races, we can create a stylized example of how Alaska's system would apply in Ohio. Let's suppose that after a nonpartisan primary of the type Alaska uses, these are the top four candidates who advance to the general election:

MAGA1 (Trump-endorsed)
MAGA2 (not Trump-endorsed)
GOP (the non-MAGA traditional Republican)
DEM (the sole Democrat among the top four)

Now, let's assume that these are the ranked-choice ballots cast by the voters in the general election:

% of ballots	1st choice	2nd choice	3rd choice	4th choice
35	MAGA1	MAGA2	GOP	DEM
7	MAGA2	MAGA1	GOP	DEM
10	GOP	MAGA2	MAGA1	DEM
8	GOP	DEM	MAGA2	MAGA1
40	DEM	GOP	MAGA2	MAGA1

With these ballots, MAGA1—the candidate endorsed by Trump—wins the election if, as in Alaska, Lowest Plurality Runoff is the tabulation method. First, MAGA2, with the fewest number of first-choice votes, is eliminated, and the ballots that rank MAGA2 first are redistributed to the candidate ranked second on those ballots, MAGA1. As a result, MAGA1 now has 42% of the ballots. At this point, GOP, with only 18% of the ballots, is the next candidate eliminated. These ballots are redistributed to either MAGA1 or DEM, depending on which one each ballot has ranked second. As a result of this redistribution, MAGA1 ends up with 52% of the ballots and, thus, wins the election ahead of DEM's 48%.

By contrast, the consensus-maximizing tabulation method (Maximum Convergence Voting) looks for the largest margin of defeat suffered by any candidate in the head-to-head comparisons of each pair of candidates.[101] To do this, one constructs a matrix of all the pairwise comparisons based on the ranked-choice ballots:

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having transformed himself into a Trump sycophant in his failed attempt to get former-President Trump's endorsement. *Id.* Incumbent Senator Sherrod Brown was the Democrat. *Id.*

101. *See supra* note 76 and accompanying text.

For/Against (+/-)	MAGA1	MAGA2	GOP	DEM
MAGA1		35-65= **-30**	42-58= **-16**	52-48= 4
MAGA2	65-35= 30		42-58= **-16**	52-48= 4
GOP	58-42= 16	58-42= 16		60-40= 20
DEM	48-52= **-4**	48-52= **-4**	40-60= **-20**	

From this matrix, one can see that GOP does not suffer any head-to-head defeat against another opponent and thus is a Condorcet Winner. Accordingly, by definition, GOP's largest margin of defeat—the pairwise comparison in which GOP does the worst—is the smallest of any candidate: zero. Put differently, GOP's worst performance is the 16-point margin of victory against each of the MAGA candidates; this is the strongest of each candidate's worst performance.

Maximum Convergence Voting thus produces a different winner from the same ranked-choice ballots than Lowest Plurality Runoff. Maximum Convergence Voting's winner, GOP, is the candidate who achieves the greatest degree of common ground among all voters. In other words, GOP is the candidate who puts the smallest share of the electorate on the losing side of the outcome.

Here's the clearest way to understand this crucial point: when GOP wins, 42% of voters have chosen a different candidate. By contrast, if MAGA1 were elected, 65% of voters would have agreed that there was a better candidate in the race: MAGA2. But if MAGA2 had won, 58% would have preferred someone else: GOP. Likewise, if DEM had won, 60% of voters would have preferred a different winner: also GOP. These numbers show that GOP is the candidate who unquestionably achieves the most consensus possible among the four alternatives. This electoral method, in other words, produces the least dissatisfied electorate.

By contrast, the tabulation method that Alaska uses—Lowest Plurality Runoff—elects the most polarizing candidate among the four alternatives: MAGA1, the candidate who produces the largest percentage of voters who think that someone else should have won. Between these two tabulation methods, it should be obvious which is more consistent with the philosophy underlying the Constitution. MAGA1 is the most factional candidate, so the Framers would not have wanted an

electoral method to make this candidate the winner.[102] By contrast, GOP is the least factional candidate and, thus, would have been the candidate that the Founder's philosophy considered most deserving of victory.

Maximum Convergence Voting always elects the least factional candidate. A Condorcet Winner, like GOP, is necessarily the least factional candidate in the election (because a majority prefers the Condorcet Winner to each opponent). But even when there is no Condorcet Winner, Maximum Convergence Voting still elects the least factional candidate by identifying the one whose victory causes the fewest voters to be on the losing side. Thus, given the goal embodied in the Constitution of avoiding the empowerment of factions at the expense of the overall common good,[103] Maximum Convergence Voting is the electoral method most consonant with the Constitution's philosophy of government.

As attractive as Maximum Convergence Voting is for its property of always electing the least polarizing candidate, it theoretically can lead to some anomalous results when there are four or more candidates. In particular, given a set of ranked-choice ballots, the candidate who wins if Maximum Convergence Voting is the tabulation method can sometimes be the candidate who loses each pairwise comparison with every other candidate and, thus, is a *Condorcet Loser*.[104] It seems intuitively odd to elect a candidate if a majority of voters prefers each other candidate in the race to that one.

Here's an example of ranked-choice ballots involving four candidates where the Maximum Convergence Voting winner is a Condorcet Loser:

% of ballots	1st choice	2nd choice	3rd choice	4th choice
12	DEM	PROG	MAGA	GOP
11	DEM	PROG	GOP	MAGA
33	PROG	MAGA	DEM	GOP
11	MAGA	GOP	DEM	PROG
11	GOP	DEM	PROG	MAGA
22	GOP	MAGA	DEM	PROG

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102. *See* THE FEDERALIST NO. 10 (James Madison).

103. *See supra* Part II.

104. *See* Richard B. Darlington, *The Case for Minimax-TD*, 34 CONST. POL. ECON. 410, 415 (2023).

One difference between this example and the previous one is that here there is no second MAGA candidate, but instead a Progressive one, PROG, in the mold of Senator Bernie Sanders. Also, unlike the electorate in the previous example, this one leans more heavily to the left.

To calculate which candidate is the Maximum Convergence Voting winner based on these ballots, the first step (as before) is to conduct the matrix of pairwise comparisons:

For/against (+/-)	DEM	PROG	MAGA	GOP
DEM		67-33= 34	34-66= **-32**	56-44= 12
PROG	33-67= **-34**		67-33= 34	56-44= 12
MAGA	66-34= 32	33-67= **-34**		56-44= 12
GOP	44-56= **-12**	44-56= **-12**	44-56= **-12**	

From this matrix, we see that GOP's worst defeat is the smallest of any candidate: GOP loses to each other candidate by a 12-point margin, 56-44; whereas PROG and MAGA suffer defeats of a 34-point margin, 67-33; and DEM suffers a defeat with a 32-point margin, 66-34. Another way to express these numbers is to say that GOP is the candidate whose largest defeat comes closest to reaching 50% of the electorate: GOP reaches 44% in each pairwise comparison, whereas PROG and MAGA reach only 33% in their worst pairwise performances, and DEM reaches only 34%. The fewest voters are disappointed by the outcome if GOP wins, so GOP is the Maximum Convergence Voting winner.

Still, there is something jarring with this result insofar as GOP does not prevail in any of the three head-to-head comparisons. GOP is a Condorcet Loser because a majority of voters would prefer every other candidate to win instead of GOP. No matter how attractive Maximum Convergence Voting might be as a way to avoid factional winners and counteract polarization, it is impossible to say that Maximum Convergence Voting is consistent with the fundamental principle of majority rule in democratic elections insofar as it lets a Condorcet Loser prevail.

One way to avoid this unsettling and anomalous result is to use Maximum Convergence Voting in the first stage of a two-stage electoral procedure, rather than in the second, and to that option we turn momentarily. Professor Wes Holliday has helpfully proposed another way of avoiding this anomaly that works in the context of a four-candidate race, such as the one

that we are now considering, although it would require a somewhat different solution to avoid the problem in an election with five or more candidates.[105] Holliday's proposal for a four-candidate race is to elect the Condorcet Winner when there is one and, when there is not, elect, of the candidates who suffer a single head-to-head defeat (mathematically there will be either two or three of them), the candidate whose margin of defeat is the narrowest.[106] This proposal avoids electing a Condorcet Loser because the candidates who suffer a single head-to-head defeat will have two head-to-head victories. In essence, this proposal applies the Maximum Convergence Voting method but limits its application to only those candidates who tie for first place in terms of their number of head-to-head victories (by each of these tied candidates having a single head-to-head defeat).

In the example we have been considering, Holliday's proposal would elect DEM. Of the three candidates who all have a single head-to-head defeat—DEM, MAGA, and PROG—DEM's single defeat has the smallest margin: 32 points, compared to 34 points for each of the others. Is DEM the candidate most deserving to win the election based on all the preferences expressed on the ballots cast? One can argue that, in a sense, DEM has a claim to being the candidate closest to that of a Condorcet Winner in an election without one. Having suffered a single head-to-head defeat, DEM would need only one more head-to-head victory to be a Condorcet Winner. While that is also true of MAGA and PROG, the other two candidates who suffer only a single head-to-head defeat, DEM's defeat is the one closest to being a victory, so DEM can claim to be closest to a Condorcet Winner.

But in another sense, GOP, despite being a Condorcet Loser, is still the candidate closest to being a Condorcet Winner. It would take only seven voters switching their preferences to make GOP the Condorcet Winner. (If seven of the voters who cast ballots in the first row listed above switched to cast ballots in the penultimate row, that would suffice for GOP to become the Condorcet Winner.[107]) And from this perspective, GOP is

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105. Wesley H. Holliday, A Simple Condorcet Voting Method for Final Four Elections 1–2 (unpublished manuscript) (July 7, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4758509 [https://perma.cc/82P8-P5NR].

106. *Id.* at 2.

107. One can confirm this point by entering the ballots into Professor Rob LeGrand's voting calculator: 5: DEM>PROG>MAGA>GOP; 11: DEM>PROG>GOP

still the candidate who, if elected, leaves the fewest voters disappointed by the outcome. Thus, an argument could be made that a Madisonian protection of the interests of minorities, in an effort to elect the least factional candidate who has the broadest degree of support among the entire electorate, would choose GOP over DEM despite GOP not having any head-to-head victories.

Given the possibility of arguing this point both ways, perhaps it is best not to settle the choice definitively in the final round of the election but instead put it again to the voters themselves which of these two candidates they would prefer to elect. Thus, it is the possibility of using the Maximum Convergence Voting method in the first rather than second round of a two-round system that we should now consider.

IV. A TOP-TWO NONPARTISAN PRIMARY WITH MAXIMUM CONVERGENCE VOTING

California uses the same kind of nonpartisan primary that Alaska does, where all candidates regardless of their partisan affiliation (including independents) compete against each other.[108] Whereas Alaska uses this type of primary to identify four candidates for the general election, in which ranked-choice ballots are employed to elect the single winner, California uses this type of primary to identify only two candidates to advance to the general election, where a simple ballot is used to decide which of the two is the winner.[109] It is possible, however, to reverse Alaska's order of the two stages in which ranked-choice ballots are used as part of the overall electoral system. In other words, it is possible to employ ranked-choice ballots in a California-style, nonpartisan primary to identify the top two candidates to advance to the general election, where a simple ballot is used to pick between these two finalists. This system would be like California, with only two candidates on the ballot in November. But unlike California, the use of ranked-choice

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>MAGA; 33: PROG>MAGA>DEM>GOP; 11: MAGA>GOP>DEM>PROG; 18: GOP>DEM>PROG>MAGA; and 22: GOP>MAGA>DEM>PROG. Rob LeGrand, *Ranked-Ballot Voting Calculator*, https://www.cs.angelo.edu/~rlegrand/rbvote/calc.html [https://perma.cc/AKX5-6E9V].

108.   *See* MICHAEL ALVAREZ & ANDREW SINCLAIR, NONPARTISAN PRIMARY ELECTION REFORM: MITIGATING MISCHIEF 34–37 (2015); RICHARD BARTON, UNITE AM. INST., CALIFORNIA'S TOP-TWO PRIMARY: THE EFFECT OF ELECTORAL POLITICS AND GOVERNANCE 5 (June 2023), https://docsend.com/view/hnmec525w7bzy48p [https://perma.cc/GFX9-XS84].

109.   CAL. CONST. art. II, § 5.

ballots in the preliminary round of voting would provide more information about voter preferences and, thus, potentially make a difference as to which two candidates are on the November ballot.

If states adopt this idea (and thus use ranked-choice ballots in a California-style top-two primary), Maximum Convergence Voting can be the tabulation method to identify the top two candidates. In this case, the electoral procedure would calculate the worst margin of defeat for each candidate and determine which two candidates have the narrowest of these worst-defeat margins. For the first example above, based on Ohio's two Senate elections, these two candidates would be GOP (who suffers no defeats and, therefore, necessarily has the narrowest worst defeat margin: zero) and MAGA2 (whose worst defeat margin is 16 points, 58-42, better than DEM's worst defeat margin of 20 points, 60-40, and MAGA1's worst defeat margin of 30, 65-35). In this way, using Maximum Convergence Voting procedure in the primary would identify the two least polarizing candidates to advance to the general election, where the electorate could decide which of those two it prefers.

For the second example above, involving a more left-leaning electorate, the top two candidates based on the Maximum Convergence Voting tabulation method would be GOP and DEM. As we saw above, GOP suffers a 12-point margin of defeat in the pairwise comparisons against each of the other candidates. That 12-point margin is the narrowest of any candidate's worst margin of defeat. DEM is the candidate whose worst defeat has the next narrowest margin: 32 points. The worst margin of defeat for both MAGA and PROG is wider: 34 points.

Thus, if Maximum Convergence Voting were the method used to determine which two candidates advance from the nonpartisan primary to the general election, GOP and DEM—the two least polarizing candidates, given the overall set of preferences expressed by the voters in the primary—would advance in this instance, and the voters would be able to make their final head-to-head choice between the two of them. Using Maximum Convergence Voting in the primary instead of the general election avoids the anomaly of a Condorcet Loser winning the election. Here, in the general election between GOP and DEM, if a majority of voters continues to prefer DEM to GOP (as is true in the primary), then DEM, and not GOP, will win the election. Maximum Convergence Voting in the primary assures that one of the two least polarizing candidates

will win while at the same time making sure that the election's winner is a candidate preferred by a majority of voters.

This approach, in effect, is a way to incorporate Holliday's proposal. One of the two candidates to advance to the final round can always be the top candidate as determined by his method.[110] The other finalist can be whichever other candidate is best according to the Maximum Convergence Voting method, even if a Condorcet Loser. In this situation, the head-to-head final round will be between two candidates who have plausible claims of being the closest to a Condorcet Winner. The majority of voters can then settle which of these two should be elected into office.

The two examples we have discussed involve four candidates. This is because, as stated at the outset, these examples are based on Alaska's Top-Four system, which has four candidates in the general election. But if we decide to use ranked-choice ballots in the primary rather than the general election (and further decide to use Maximum Convergence Voting as the tabulation method), can we assume that there will be only four candidates in the primary?

No, but this is not a problem. Ranked-choice voting methods, including Maximum Convergence Voting, can handle more than four candidates. Nevada, for example, contemplated (but rejected) the adoption of ranked-choice voting for a general election involving five candidates.[111]

The key point here is that it is feasible to conduct a nonpartisan primary with ranked-choice ballots where the number of candidates on the ballot is flexible and at the same time manageable for both voters and administrators. The number of signatures required for candidates to collect in order to qualify for the nonpartisan primary ballot can be set at a level that will assure a reasonable number of qualifying

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110. *See* Holliday, *supra* note 105, at 2.

111. Jeremy Gelman et al., The Consequences of a Top-5/RCV System in Nevada: Advantaging Moderates but Sidelining Third Parties? 5 (unpublished manuscript) (Apr. 27, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4808131 [https://perma.cc/EP62-ZQ6F]; Tabitha Mueller & Eric Neugeboren, *After Restructuring, Are Nevada Ranked-Choice Ballot Measure Backers Ready for 2024?*, NEV. INDEP. (May 7, 2024), https://thenevadaindependent.com/article/after-restruct uring-is-nevada-ranked-choice-ballot-measure-ready-for-election [https://perma.cc/ 25F4-ZDRC]; April Corbin Girnus, *Nevada Voters Reject Open Primaries, Ranked Choice Voting System*, NEV. CURRENT (Nov. 5, 2024), https://nevadacurrent.com/2024/ 11/05/nevada-voters-reject-open-primaries-ranked-choice/ [https://perma.cc/27M7-A747].

candidates, say between four and seven.[112] Moreover, signature-gathering can be modernized to permit candidates to collect signatures online,[113] thereby facilitating the process of meeting the threshold level wherever it is set—a level that can be adjusted as necessary in light of experience and expectations.

Further, there is not necessarily a reason to be concerned that turnout for the nonpartisan primary will be too low, with most voters, as a practical matter, choosing only between the top two finalists in the general election. France, for example, conducts a two-round electoral system for which turnout in the first round is high relative to turnout in the second round (and significantly higher than congressional primaries in nonpresidential years).[114] The reason is that France holds the first round very shortly before the second round and on the same date throughout the country.[115] If states conducted nonpartisan primaries for congressional elections just a few weeks before the November general election and on the same date throughout the United States—in September, for example—turnout could be expected to be much higher than traditional American primaries, which are often months before the November general election and on different dates in different states; these primaries likely would be much closer to turnout levels for general elections in congressional midterm races.

The above analysis demonstrates the practical feasibility of using Maximum Convergence Voting as the method for identifying the top two finalists in a nonpartisan primary with ranked-choice ballots. Indeed, one can argue that this electoral system is the one that corresponds most closely to the values

112. *See* Foley, *supra* note 92.

113. *See* Tom Scanlon, *Candidates Push for Ballot Signatures*, SCOTTSDALE PROGRESS (Apr. 9, 2024), https://www.scottsdale.org/city_news/candidates-push-for-ballot-signatures/article_31d90304-e86f-11ee-879e-0b8e593c66ff.html [https://perma.cc/7HCF-NYP8].

114. *Share of Registered Voters Who Voted in Legislative Elections in France from 1958 to 2024, by Round*, STATISTA (Aug. 6, 2024), https://www.statista.com/statistics/1088941/voter-turnout-legislative-elections-france/ [https://perma.cc/2QGT-MSLA]; *see also* Joshua Ferrer & Michael Thorning, *2022 Primary Turnout: Trends and Lessons for Boosting Participation*, BIPARTISAN POL'Y CTR at 9, 28–32 (Mar. 2023), https://bipartisanpolicy.org/report/2022-primary-turnout/ [https://perma.cc/J5JC-3VQ9].

115. Theo Bourgery-Gonse, *France's Mysterious Two-Round Voting System Explained*, EURACTIV (June 30, 2024), https://www.euractiv.com/section/elections/news/frances-mysterious-two-round-voting-system-explained/ [https://perma.cc/N46F-NYFW].

that animate the Constitution. It finds the two least factional candidates from a field of qualifying contenders, and then lets the majority of voters decide which of these two least factional candidates is preferable. Moreover, no matter how many candidates are on the primary ballot, it is guaranteed that one of the two finalists will not be a Condorcet Loser. By definition, only one candidate can be a Condorcet Loser because only one candidate can lose head-to-head against every other candidate. (Because every other candidate has at least one head-to-head victory against the Condorcet Loser, none of these other candidates can lose every head-to-head match.) Thus, using the method of Maximum Convergence Voting in a California-style primary would be a sensible way to implement concern for the protection of minorities within the context of a majority-winner electoral system in accordance with the political philosophy of *The Federalist Papers*.[116]

Using Maximum Convergence Voting in the nonpartisan primary, rather than in the general election, also opens up the pragmatic possibility of a compromise with advocates of the Lowest Plurality Runoff method of tabulating ranked-choice ballots.[117] While Maximum Convergence Voting can claim to be the tabulation method most consonant with the Constitution for the reasons stated above, Lowest Plurality Runoff has its passionate defenders who likely would resist adopting Maximum Convergence Voting instead of their preferred method.[118] Lowest Plurality Runoff reflects a philosophy of democracy different from Maximum Convergence Voting. Lowest Plurality Runoff can be understood as seeking to identify the most popular candidate (when the field is cleared of less popular candidates) even if the most popular one is a polarizing figure whom many voters abhor. By contrast, Maximum Convergence Voting seeks to identify the least disfavored candidate and, thus, the one capable of securing the widest degree of support among voters.

Given these contrasting philosophies of democracy, it is possible to use ranked-choice ballots in a Top-Two nonpartisan primary to permit the strongest candidate according to each of

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116. *See supra* Part II.

117. Ross Hyman et al., A Majority Rule Philosophy for Instant Runoff Voting 1 (Aug. 2023) (unpublished manuscript), https://www.researchgate.net/publication/37 3163600_ [https://perma.cc/CAJ4-VZVE].

118. *See* Greg Dennis, *How is RCV Better Than Approval, Score or Condorcet Voting Methods?*, FAIRVOTE (Oct. 23, 2018), https://fairvote.org/how_is_rcv_better_t han_approval_score_or_condorcet_voting_methods/ [https://perma.cc/2JGC-RUPP].

these philosophies to advance to the general election. In other words, among the candidates on the primary ballot, whichever one would win based on the Lowest Plurality Runoff method secures one of the two spots on the general election ballot. Likewise, whichever candidate would win based on the Maximum Convergence Voting method secures the other spot on the general election ballot. Then the general election voters can decide which of the two they most prefer.[119] (This approach also avoids the election of a Condorcet Loser because the Lowest Plurality Runoff method will never elect a Condorcet Loser.)

Surely, even the most passionate advocates of the Lowest Plurality Runoff method for tabulating ranked-choice ballots could not object to this compromise. After all, the strongest candidate in the field according to the Lowest Plurality Runoff method will win the election if, after further campaigning and debate, a majority of general election voters prefer this candidate over whomever Maximum Convergence Voting identifies as the strongest candidate. But, conversely, if the candidate whom Maximum Convergence Voting identifies as the strongest is preferred by a majority of voters over whomever Lowest Plurality Runoff picks as its winner, then Maximum Convergence Voting's strongest candidate is the one to deserve to win the election, and any objection that advocates of Lowest Plurality Runoff would have to that outcome would be inconsistent with the basic democratic principle that the preference of the majority should prevail.

If this pragmatic compromise between these two different methods of tabulating ranked-choice ballots can make it more likely that Maximum Convergence Voting is incorporated into the electoral system, it would be worth pursuing. But, unfortunately, at the moment, there is misguided opposition to any version of ranked-choice voting.[120] Thus, it is important to

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119. If the winners of both the Lowest Plurality Runoff and Maximum Convergence Voting methods are the same candidate, the second finalist in the Top-Two system would be the runner-up according to both of these methods; if the two methods produce two different runners-up, then whichever of the two is preferred by more voters based on the ranked-choice ballots would be the second general election finalist.

120. *See, e.g.*, Wesley Muller, *Conservatives Rally Against Ranked Choice Voting in Louisiana*, LA. ILLUMINATOR (Mar. 14, 2024), https://lailluminator.com/2024/03/1 4/conservatives-rally-against-ranked-choice-voting-in-louisiana/ [https://perma.cc/ PR2T-VN7L]; Ralph Chapoco, *Why Did Alabama Ban Ranked Choice Voting?*, ALA. REFLECTOR (May 16, 2024), https://alabamareflector.com/2024/05/16/why-did-alab ama-ban-ranked-choice-voting/ [https://perma.cc/2QX6-5NUK]; Ray Marcano,

pursue the possibility of implementing Maximum Convergence Voting without the use of ranked-choice ballots.

V. A Top-Three General Election After a Simple Nonpartisan Primary

As indicated earlier, there is a way to conduct an election according to the Maximum Convergence Voting method without using ranked-choice ballots as long as the election is limited to three candidates. The way to do this is to have voters directly express their preferences between each pair of the three candidates: A v. B, A v. C, and B v. C. If one of the three candidates prevails over each of the other two in their pairwise comparisons, that candidate—who, by definition, is a Condorcet Winner—wins the election.

In the unlikely event that there is no Condorcet Winner and instead each candidate prevails in only one pairwise comparison against each other opponent, then there needs to be a method to break this three-way tie among the candidates. The Maximum Convergence Voting method easily can serve this purpose because, in the context of a three-candidate election, Maximum Convergence Voting is extremely simple to understand: it elects the candidate whose single head-to-head defeat is the closest to being a victory—in other words, the candidate who has the narrowest defeat margin. In addition to being entirely straightforward and readily comprehensible by all voters, this way to break a three-way tie is the one most consistent with the principles underlying the Constitution for the reasons we have examined earlier.[121]

The 2024 U.S. Senate election in Arizona is a useful illustration of this direct Top-Three electoral system. The incumbent Senator Kyrsten Sinema, who used to be a Democrat but who is now an independent, abandoned her campaign to seek reelection because she knew she could not win under the

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MARCANO: Ranked-Choice Voting Offers Clear Advantages – and Faces Stiff Opposition, Dayton Daily News (June 30, 2024), https://www.daytondailynews.com/ideas-voices/marcano-ranked-choice-voting-offers-clear-advantages-and-faces-stiff-opposition/ZN5ONFF4V5D2LG3ZLIAHRR2U3E/ [https://perma.cc/XP7F-YPZ9]. The November 2024 defeat of reform proposals in multiple states confirms the public's current hostility to ranked choice voting. Russell Berman, *Why Voters Rejected Election Reform*, The Atlantic (Dec. 8, 2024), https://www.theatlantic.com/politics/archive/2024/12/election-reform-ranked-choice-partisan-primaries/680912/ [https://perma.cc/BWC5-TR6Y].

121. *See supra* Part II, at 19–21.

existing electoral system.[122] Unable to win the Democratic party's primary because she had become too centrist for Arizona's Democratic voters, she realized that she also had no path to victory as an independent in a plurality-winner general election; she would come in third behind the two major-party nominees: Representative Reuben Gallego, a progressive Democrat, and Kari Lake, the former broadcaster turned election denialist mega-MAGA Trump lieutenant.[123]

But if Arizona used the Top-Three system for this Senate race, Senator Sinema could run as an independent and would be one of the three candidates on the November general election ballot, along with Gallego and Lake. (There is no doubt that Senator Sinema, as an independent, would finish third behind Gallego and Lake in a nonpartisan primary of the type California uses in its Top-Two system and Alaska uses for its Top-Four general election.) In the Top-Three general election, voters would receive a ballot asking them to express their preference between each pair of these three candidates: Senator Sinema versus Gallego, Senator Sinema versus Lake, and Gallego versus Lake. It is highly likely that Senator Sinema, a centrist candidate positioned in between the other two, would win the election based on this method. Neither Gallego's nor Lake's core supporters (meaning the voters who like that candidate more than both opponents) are large enough groups to be a majority of the whole electorate and, therefore, would be unable to beat Senator Sinema head-to-head.

Instead, Senator Sinema would win more voters than her opponent in each of her head-to-head matchups on the Top-Three ballot. Against Gallego, Senator Sinema would receive the votes of those who like her best plus the Republican-leaning voters who prefer Lake to Gallego. Against Lake, Senator Sinema would again receive the votes of those who like her best plus, this time, the Democratic-leaning voters who prefer Gallego to Lake. These two head-to-head victories would make Senator Sinema the Condorcet Winner and, deserving to win this three-way race as the least factional and most consensus-

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122. Alexander Marquez et al., *Independent Sen. Krysten Sinema Will Not Run for Re-Election in Arizona*, NBC NEWS (Mar. 5, 2024), https://www.nbcnews.com/politics/congress/independent-sen-kyrsten-sinema-will-not-run-re-election-arizona-rcna124499 [https://perma.cc/UA88-ZZPT].

123. *See id.*; Geoffrey Skelley, *How Sinema's Retirement Changes the Arizona Senate Race*, ABC NEWS (Mar. 11, 2024), https://abcnews.go.com/538/sinemas-retirement-arizona-senate-race/story?id=107936427 [https://perma.cc/RD2R-ZBRP].

achieving candidate, the winner according to the Maximum Convergence Voting electoral method.

We can consider also what would happen in the unlikely event that there were a three-way tie among the candidates in their direct pairwise comparisons in this Top-Three general election. Suppose, for example, Senator Sinema beats Gallego, 55% to 45%; Lake beats Senator Sinema, 51% to 49%; and Gallego beats Lake, 53% to 47%. In this situation, each candidate has one head-to-head defeat (and also one head-to-head victory). Of these three, Senator Sinema's single head-to-head defeat has the narrowest margin: her 2-point loss to Lake is smaller than Lake's 6-point loss to Gallego and Gallego's 10-point loss to Senator Sinema. Based on these numbers, Senator Sinema is the best candidate according to the Maximum Convergence Voting method. Because her loss is the narrowest, she is the least polarizing candidate. Of the three, each of whom has the support of a majority of voters (against one opponent, but not the other), Senator Sinema is the one with the broadest range of support within the electorate. Thus, she is the candidate who should win according to the values underlying the Constitution, and she is the one who would be declared the winner if Maximum Convergence Voting were the operative procedure for this election.

In the context of a three-candidate race, Maximum Convergence Voting never suffers from the anomaly that a Condorcet Loser wins the election. With three candidates, there are only two mathematical possibilities: either there is a Condorcet Winner, who prevails in both head-to-head comparisons against each other opponent, or, instead, there is a three-way tie among the candidates, with each prevailing in one head-to-head comparison but not in the other. When there is a Condorcet Winner, Maximum Convergence Voting elects that candidate because, by definition, the Condorcet Winner's margin of defeat—zero—is the smallest. (And, obviously, when Maximum Convergence Voting elects the Condorcet Winner, it does not elect the candidate who is the Condorcet Loser in that same race.) When there is the three-way tie of one head-to-head victory and one head-to-head defeat, Maximum Convergence Voting (as we have seen) elects the candidate whose single defeat has the narrowest margin—and that candidate, with a single victory, cannot be a Condorcet Loser, which is defined as having no head-to-head victories.

Moreover, Maximum Convergence Voting has the essential virtue of extreme simplicity in the context of this Top-Three

election. Voters can easily understand a ballot that allows them to vote for their direct head-to-head preferences between each pair of candidates. Because there are only three pairwise comparisons when there are only three candidates, a voter's task of casting a Top-Three ballot is easily manageable and not burdensome. Voters surely can understand the idea that the candidate who defeats both opponents in each of their head-to-head matchups is, and deserves to be, the winner of this Top-Three election. Voters can also understand and appreciate the simplicity of using Maximum Convergence Voting as the tiebreaker in the event of a three-way tie: it is straightforward to discern which of the three candidates has the narrowest margin of defeat in the context of a three-way, one–win–to–one–loss tie.

Crucially, because each candidate has only a single defeat in this situation, Maximum Convergence Voting does not require comprehending the more complicated concept of *least worst* defeat, which this method requires when there are more than three candidates and multiple candidates have more than one defeat.[124] If candidates have two or more head-to-head defeats, Maximum Convergence Voting requires, first, identifying the largest margin of defeat for each candidate and, second, identifying which of these largest defeat margins is the smallest. This calculation is mathematically precise and easily made by a modern computer but can be rather confusing for an ordinary voter to grasp (at least initially). But when each candidate has only a single defeat, which must be true when there are only three candidates and no Condorcet Winner, then Maximum Convergence Voting requires the much simpler task of identifying the candidate whose single defeat has the smallest margin. Understanding this straightforward tiebreaker method does not demand too much of voters; if adoption of this method is accompanied by an explanation of why it is the method that most accords with the values of the Constitution and its underlying Madisonian philosophy, voters will appreciate its use as part of the Top-Three system.

Moreover, the simplicity of the Top-Three system makes it especially easy to follow the election returns as they are reported on Election Night. When the Top-Three procedure of voting the three head-to-head matchups is directly on the ballot, there are no complicated elimination-and-redistribution computations, as with Lowest Plurality Runoff (or other

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124. *See supra* Part II.

ranked-choice voting methods). Instead, on Election Night, news outlets can report the three head-to-head results in running tallies as the votes come in. Voters can watch as the numbers change for each candidate in each of the three head-to-heads and immediately see whether any candidate is ahead in both of their head-to-heads and, if not, which candidate is behind by the least amount. This kind of Top-Three system is the easiest way to administer Maximum Convergence Voting, and it is its most publicly accessible form.

Thus, Maximum Convergence Voting is entirely workable in the context of a three-candidate general election. Of course, there needs to be a procedure to produce three—and only three—candidates for the general election. For that, a slight modification of California's Top-Two nonpartisan primary is suitable. Instead of having the two candidates with the most votes in a simple single-preference ballot advance to the general election, it is easy to have the three candidates with the most votes in this same type of primary advance to the general election.

It would also be possible to have a more complicated nonpartisan primary as the first stage of a Top-Three system. For example, instead of having voters select a single candidate among all those who qualify for the primary ballot (and have the three candidates with the most votes advance to the general election), the nonpartisan primary in the Top-Three system could permit voters to identify both their first and second choices among the candidates on the ballot. The system then could award one point for each first-choice vote a candidate receives and a half point for each second-choice vote. This alternative method for conducting the nonpartisan primary would tend to elevate less factional or polarizing candidates—those with a wider range of support within the electorate—and, thus, would be more consonant with the Madisonian values underlying the Constitution. But given that the goal of the Top-Three system is to employ the Maximum Convergence Voting method in its simplest possible form, it seems more efficacious to combine a direct Top-Three general election with the very basic kind of nonpartisan primary that California (as well as Alaska) employs: each voter votes for just one candidate, and the top three vote-getters compete in the general election in the form of a round-robin competition, where each voter directly expresses a preference between each pair of candidates, and the Maximum Convergence Voting tabulation method determines which candidate wins.

This simplest Top-Three electoral system would be a good way to implement the values underlying the Constitution, even if more complicated systems using Maximum Convergence Voting—like the modified form of a nonpartisan primary described in the previous paragraph or a Top-Four system of the kind proposed by Holliday—might serve Madisonian values even better. There is an inevitable tradeoff between, first, the imperative of sufficient simplicity and, second, optimization of the electoral system's capacity to elect the candidate who best represents the entirety of the electorate in light of its divergent preferences. This simplest Top-Three system, with its most basic California-style nonpartisan primary, is an appropriate balance between these two inevitably conflicting objectives. Indeed, it is a balance that Madison himself, as a pragmatic politician who recognized the necessity of compromise, would applaud if it enables improvement upon the existing electoral system that, with experience, has proven deficient.[125] In this simplest Top-Three system, the nonpartisan primary would identify the three most popular candidates from whatever larger field qualified for the primary ballot. Then, consistent with the Madisonian goal of a government that serves the public interest rather than the interests of a faction, the Maximum Convergence Voting method would elect whichever of the three candidates is the least factional.

Moreover, this Top-Three system would be a way to satisfy the increasing sentiment among American voters for some type of "third-party" alternative to the existing two-party hyperpolarized political competition.[126] In this Top-Three system, a centrist third party could form, and, as long as it is able to advance its nominee as one of the three general election candidates, this centrist third-party nominee would have a good chance of winning the election given the Maximum Convergence Voting method. As we have already seen, Senator

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125. In future work, I will consider additional evidence from Madison's own writing that towards the end of his life, long after his role at the constitutional convention of 1787 in Philadelphia, he understood the representational benefits of a Top-Three system like that proposed here and, moreover, would have embraced the adoption of such a system if he had seen how it could have been implemented practically. *See* Edward B. Foley, *The Real Preference of the Voters: Achieving Neo-Madisonian Electoral Reform*, WISC. L. REV. (forthcoming 2025).

126. *See* 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/HP4C-FRW3] (describing "the highest [percentage of American support for a third major party] since Gallup first asked the question in 2003").

Sinema is the kind of centrist candidate who would reflect the middle of the electorate between Democrats on the left and Republicans on the right and, likewise, would tend to prevail in the direct head-to-head comparisons using the Maximum Convergence Voting method. Other American politicians currently contemplating the formation of a third party—such as Senator Joe Manchin, former-Governor Larry Hogan, Senator Mitt Romney, and former-Representative Liz Cheney—to compete against the MAGA-dominated Republican party and, in their view, the excessively progressive Democratic party would do well to push for adoption of this Top-Three system.[127]

Without it, their goal of forming a competitive third party is quixotic under current conditions of hyperpolarization.[128] In the conventional electoral system, or even in Alaska's system with Lowest Plurality Runoff as its tabulation method for ranked-choice ballots, the nominee of a centrist third party cannot prevail, and the election will come down to a choice between the nominees of the two polarized major parties.[129] But if this Top-Three system were used, then, even in conditions of hyperpolarization, the nominee of the centrist party would tend to pick up support from each side in the head-to-head against the nominee on the other side. When the electorate is highly polarized, a centrist third-party candidate is the one most likely to be able to assemble a coalition of voters with the broadest reach when each candidate must face each other opponent head-to-head.

Under the Constitution, it is straightforward that authority already exists to adopt this Top-Three system. States could

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127. *See* Vaughn Hillyard et al., *Joe Manchin and Jon Huntsman Flirt with Third-Party 2024 Ticket in New Hampshire*, NBC NEWS (July 17, 2023), https://www.nbcnews.com/politics/2024-election/joe-manchin-jon-huntsman-flirt-third-party-2024-ticket-new-hampshire-rcna94377 [https://perma.cc/PSX2-HEER]; Rashad Simmons, *Hogan: Third-Party 2024 Presidential Candidate 'Very Likely'*, THE HILL (Aug. 22, 2023), https://thehill.com/homenews/4164588-hogan-third-party-2024-presidential-candidate-very-likely/ [https://perma.cc/KD5D-E8H3]; Erin Doherty, *Romney's Third-Party Dance with Manchin Spills into View*, AXIOS (Sept. 13, 2023), https://www.axios.com/2023/09/13/mitt-romney-joe-manchin-third-party [https://perma.cc/2QZF-GYYY]; Andrew Howard, *Liz Cheney Says She's Considering a Third-Party Presidential Bid*, POLITICO (Dec. 5, 2023), https://www.politico.com/news/2023/12/05/liz-cheney-2024-third-party-00130100 [https://perma.cc/2EUZ-L4NS].

128. Atkinson & Ganz, *supra* note 29, at 105.

129. For the data showing this, see Nathan Atkinson et al., *Beyond the Spoiler Effect: Can Ranked-Choice Voting Solve the Problem of Political Polarization*, 2024 U. ILL. L. REV. 1655, 1676–77 (2024).

adopt it for elections to state and local offices. States could also adopt it for congressional elections, as could Congress itself.[130] And it would be easy for election officials to implement it without delay or expense. Unlike ranked-choice voting, which requires more sophisticated voting technology and software, this direct Top-Three system is the same as just doing three separate races, each between two candidates. Every state already has the technology and software to implement this system.

But what about the possibility of a Top-Three system for presidential elections, the context in which it is arguably most needed?

VI. A TOP-THREE PRESIDENTIAL ELECTION SYSTEM

The 2024 presidential election, even before its first primary in New Hampshire on January 23, had boiled down to three main contenders: incumbent President Joe Biden, assured of being renominated by his Democratic party; ex-incumbent President Donald Trump, virtually assured of winning his Republican party's nominating contests; and former U.N. Ambassador Nikki Haley, attempting to forge a middle path between the two other main contenders but finding no room for this kind of middle path within the Republican party's Trump-dominated primary process. Given the clarity of her message, as a future-oriented alternative to two elderly politicians hobbled by their past failures,[131] there had been speculation whether she would be willing to run as presidential nominee of the No Labels group,[132] which had been undertaking an effort to get ballot access for a centrist third-party ticket assuming that President Biden and former-President Trump would be the two major-party nominees.[133]

Although Haley ultimately dismissed the No Labels overture, quipping that she was happy with the Republican

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130. U.S. CONST. art. I, § 4.

131. *See* Aaron Pellish & Kylie Atwood, *Haley Goes After Trump and Biden as 'Grumpy Old Men' While Courting Older Voters in South Carolina*, CNN (Feb. 6, 2024), https://www.cnn.com/2024/02/06/politics/nikki-haley-older-voters-south-carol ina/index.html [https://perma.cc/AG5M-6FGU].

132. Julia Manchester, *Haley Faces Growing Third-Party Speculation*, THE HILL (Mar. 4, 2024), https://thehill.com/homenews/campaign/4501906-haley-faces-grow ing-third-party-speculation/ [https://perma.cc/VN9R-4CJT].

133. Katherine Koretski, *No Label Gains 2024 Ballot Access in 12th State*, NBC NEWS (Oct. 24, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/ no-labels-gains-2024-ballot-access-12th-state-rcna121916 [https://perma.cc/7QRZ-XUJX].

label,[134] her candidacy sounded much more like a third-party campaign than a realistic bid to win the thoroughly MAGA-controlled Republican nomination.[135] In the New Hampshire primary, she won most of her votes from independent voters (who are permitted to cast ballots in either party's primary) as well as the relatively few remaining Never Trump Republicans.[136] By contrast, former-President Trump won three-quarters of Republican voters.[137] As many commentators noted afterwards, it is impossible to win a Republican primary without winning among Republican voters—Haley was primarily supported by independents and moderates.[138] Consequently, after being trounced by former-President Trump in her home state of South Carolina on February 25 and then losing all but one of the Super Tuesday primaries on March 5, 2024, Haley abandoned her campaign for the GOP nomination.[139] And yet, even though Haley was better suited to be a centrist No Labels candidate than the Republican nominee, there would have been no path to victory for any No Labels candidate given the two-party structure of the Electoral College

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134. *See* Ali Vitali, *Nikki Haley Knocks Down the Possibility of Third-Party No Labels Bid*, NBC NEWS (Mar. 1, 2024), https://www.nbcnews.com/politics/2024-election/nikki-haley-knocks-down-third-party-no-labels-bid-rcna141345 [https://perma.cc/LH9S-9C4D].

135. *See* Amy B. Wang, *Haley Calls Jan. 6 a 'Terrible Day' and Sharpens Attack Against Trump's 2020 Claims*, WASH. POST (Jan. 11, 2024), https://www.washingtonpost.com/politics/2024/01/11/nikki-haley-january-6-republican-debate/ [https://perma.cc/S9C5-EXWR].

136. Gary Langer et al., *Haley Captures Independents and College Grads, but Trump Base Holds Fast in NH: Exit Poll*, ABC NEWS (Jan. 23, 2024), https://abcnews.go.com/Politics/new-hampshire-primary-sees-strong-turnout-unaffiliated-voters/story?id=106613187 [https://perma.cc/FE8E-7NBC]; *see also* Sally Goldenberg et al., *Nikki Haley is Consolidating the 'Never Trump' Vote*, POLITICO (Nov. 22, 2023), https://www.politico.com/news/2023/11/22/nikki-haley-never-trump-voters-00128398 [https://perma.cc/W3EF-WDA3] (explaining how Haley drew support from "Trump-skeptical" Republican donors and organizers).

137. Julia Terruso, *Donald Trump Won New Hampshire, but Results Still Signal Potential Problems for General Election*, PHILA. INQUIRER (Jan. 24, 2024), https://www.inquirer.com/politics/donald-trump-joe-biden-new-hampshire-nikki-haley-pennsylvania-takeaways-20240124.html [https://perma.cc/9KAP-GQGZ].

138. *See, e.g.*, Meg Kinnard & Amelia Thomson-Deveaux, *Nikki Haley Can't Win the Republican Primary with 40%. But She Can Expose Some of Trump's Weaknesses*, ASSOC. PRESS (Feb. 29, 2024), https://apnews.com/article/haley-polling-trump-gop-super-tuesday-109ce563f68aa8e1b159d98769e943d8 [https://perma.cc/P6WQ-XL57].

139. Jazmine Ulloa & Jonathan Weisman, *Haley's Failed Campaign Highlights G.O.P. Rifts and Trump's Dominance*, N.Y. TIMES (Mar. 6, 2024), https://www.nytimes.com/2024/03/06/us/politics/nikki-haley-drops-out-trump.html [https://perma.cc/W66A-FVFR].

system. Indeed, No Labels itself surrendered its quest to field a presidential ticket when no one of stature was willing to serve as its presidential candidate.[140]

By contrast, imagine that the Top-Three electoral system had been in place for the 2024 presidential election and Haley had decided to run as the third candidate against both former-President Trump and the Democratic nominee, who was Vice President Kamala Harris after President Biden dropped out of the race. Haley most likely would have beaten both of them—at least based on polls before she left the race.[141] Head-to-head against Vice President Harris, Haley would have had even more support than former-President Trump (because Haley would have had the support of all the Republican and Republican-leaning voters who refused to support Trump because of his many transgressions).[142] Head-to-head against former-President Trump among all voters, and not just Republicans, Haley presumably would have trounced him, because most Democrats would prefer her over him,[143] and she would have added their votes to those of her supporters (independents and remaining Never Trump Republicans). Moreover, given the nonpartisan nature of the preliminary round of the Top-Three system, Haley could have run as a Republican rather than as an independent even though former-President Trump would have secured the Republican Party's nomination at its convention. (In this respect, the preliminary round in a Top-Three presidential election is separate from the party's primaries, and caucuses, which determine the delegates for the party's nominating convention. Haley would have had to secure enough signatures to qualify for the preliminary round, held in September, after the summertime nominating conventions for

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140. Rebecca Davis O'Brien & Reid J. Epstein, *No Labels Abandons Effort to Field a Presidential Candidate*, N.Y. TIMES (Apr. 4, 2024), https://www.nytimes.com/2024/04/04/us/politics/no-labels-election-presidential-candidate.html [https://perma.cc/W6LR-A6VD].

141. *2024 General Election: Haley vs Biden*, REALCLEARPOLLING, https://www.realclearpolling.com/polls/president/general/2024/haley-vs-biden [https://perma.cc/2BTD-M2MP].

142. Christine Zu, *New Wisconsin Poll Shows Trump Tied with Biden, Haley Ahead by 15 Points*, POLITICO (Feb. 7, 2024), https://www.politico.com/news/2024/02/07/haley-biden-trump-wisconsin-poll-00140200 [https://perma.cc/7FJE-HABQ].

143. This is especially true if Harris would have urged her supporters to vote for Haley against Trump for the same reason that she campaigned towards the end of her campaign with never-Trump Liz Cheney: Harris's belief, which she repeatedly emphasized as part of her campaign's closing argument, that the reelection of Trump would be a threat to American democracy.

the two major parties, but Haley's popularity would have made it easy for her to satisfy any reasonable online signature-gathering requirement.)

Thus, using a Top-Three system for presidential elections would give Americans the kind of competitive third-candidate option that they increasingly tell pollsters they want, especially in the 2024 presidential election. A Top-Three system would make it realistic for Senator Manchin, former Governor Hogan, or any other potential centrist candidate to run with the hope of winning and not just being a spoiler. Indeed, if a Top-Three system were in place for the 2024 presidential election, Haley would not necessarily have been the third candidate on the general election ballot. Other would-be centrist candidates, such as Senator Manchin and Hogan, potentially would have competed against Haley in the preliminary round necessary to determine which three candidates were the finalists for the November ballot. One of those competitors would have needed to earn the third spot on the ballot. It could have been Haley—she might be more popular than Senator Manchin or Hogan or whoever else would have tried to run in the centrist lane between the two major party nominees (there is not polling on that)—but it might have been someone else.[144]

The key point, then, is that a Top-Three presidential election would enable a competitive race between a Republican, a Democrat, and a centrist third-party alternative, regardless of the specific individuals occupying these three slots. The Republican or Democrat could win only by appealing directly to the middle of the electorate to take votes away from the centrist candidate. In this way, the Top-Three system would effectively counteract partisan polarization. The centrist would win as long as the Republican and Democrat position themselves closer to the base of their respective, highly polarized parties.

By counteracting polarization in this way, the Top-Three system would help make American democracy healthier. It would also make presidential elections conform more closely to the goals that the Framers of the Constitution had when designing the original Electoral College. The Framers wanted

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144. Whoever would have won this third spot on the November ballot, it certainly would not have been Robert Kennedy, Jr., because credible centrists—such as Haley, Hogan, or Senator Manchin—would have rather coalesced around a single centrist to prevent Kennedy from slipping into the third spot as a result of a split centrist vote. Edward B. Foley, *Kennedy and Condorcet*, COMMON GROUND DEMOCRACY (May 7, 2024), https://edwardbfoley.substack.com/p/kennedy-and-condorcet [https://perma.cc/QU2R-RSK6].

to elect the least factional president possible.[145] They failed in this respect, insofar as they (and the authors of the Twelfth Amendment, adopted to repair the defects of the original Electoral College) created a system permitting the election of a factional president, such as President Trump in 2016, who was supported only by a minority of voters.[146] A Top-Three system based on Maximum Convergence Voting would serve the Founders' objective of avoiding a factional president by electing a third-party candidate if the two major parties become too factional in choosing their presidential nominees.

But how would it be possible to adopt a Top-Three system for presidential elections? Theoretically, a constitutional amendment could do that. But everyone knows how exceedingly difficult it is to amend the Constitution.[147]

Amending the Constitution could be made somewhat easier by proposing not to constitutionalize the Top-Three system specifically but, instead, to constitutionalize Condorcet's general principle of Convergence Voting: whenever there is a candidate whom a majority of voters prefer to each other candidate, this majority-preferred candidate (who, by definition, is a Condorcet Winner) should win the election. This version of the constitutional amendment could give Congress the authority to choose the specific way to implement Convergence Voting, including whether to use ranked-choice ballots and, if so, whether to use them in the primary or general election. Even the choice of whether to employ Maximum Convergence Voting as the specific form of Convergence Voting, rather than another tabulation method that guarantees the election of a Condorcet Winner (when there is one), could be left to Congress. The public campaign to adopt this version of the constitutional amendment would focus on persuading Americans that Condorcet's basic principle of Convergence Voting deserves adoption and that it fits with the Constitution, rather than persuading them that a Top-Three system would be the best way to implement Condorcet's principle for presidential elections. This public campaign, of course, would not need to invoke Condorcet's name or use the technical term "Condorcet Winner" to convey to voters the merits of the Convergence Voting concept.

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145. FOLEY, *supra* note 3, at 15.

146. *See id.* at 171.

147. *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 CALIF. L. REV. 2005, 2020 (2022).

Here's an example of how this kind of constitutional amendment could be drafted:

> Section 1. The president of the United States shall be elected by a nationwide vote in which all adult citizens of the United States are eligible to participate.

> Section 2. The procedures to elect the president shall require that, if the final vote has three or more candidates on the ballot, a candidate whom a majority of voters prefer to each other candidate wins the election.

> Section 3. The vice president of the United States shall be elected in the same vote as the president.

> Section 4. The Congress shall enact legislation to specify the procedures to elect the president and vice president.

This constitutional amendment would be very much worth fighting for, and the basic Convergence Voting principle easily could resonate with most Americans, who already accept the idea that the winning candidate should be one whom a majority of voters prefer. Even so, the practical difficulties of adopting any constitutional amendment are so enormous, one unfortunately cannot be optimistic that this "Convergence Voting for presidential elections" amendment would be adopted anytime soon.

Another way to adopt a Top-Three system for presidential elections, without a constitutional amendment, would be through a variation of the National Popular Vote Interstate Compact (NPVIC).[148] The key idea underlying NPVIC is that states can pool their electoral votes.[149] If states that collectively have a majority of electoral votes—at least 270—agree to cast their electoral votes for the same candidate, that candidate necessarily will win the presidential election (given that the Twelfth Amendment awards the presidency to whomever receives a majority of electoral votes).[150]

NPVIC pools the electoral votes of the states willing to join it in order to elect whichever candidate receives a plurality of

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148. *See* David Sharp, *Maine Joins Compact to Elect the President by Popular Vote but It Won't Come into Play This November*, ASSOC. PRESS (Apr. 15, 2024, 5:59 PM), https://apnews.com/article/maine-national-popular-vote-compact-2a345dc04d7e3937c4857577523a3a11 [https://perma.cc/8E8X-64NJ].

149. *Id.*

150. U.S. CONST. amend. XII.

the national popular vote. Right now, states with 209 electoral votes have joined NPVIC, so it is 61 electoral votes short of the number necessary for it to take effect.[151] Thus far, "blue" states have been receptive to NPVIC, whereas "red" and even "purple" states have not.[152] Presumably, this is because twice since 2000 Democrats have won a plurality of the national popular vote and still lost a majority of the electoral votes under the existing state-by-state, winner-take-all system.[153] In any event, even though advocates for NPVIC have been endeavoring to reach the magic number of 270, their effort seems to have stalled.[154]

A similar pooling principle can be used on behalf of the Top-Three system. In other words, if states with collectively at least 270 electoral votes adopted the Top-Three system for presidential elections, they could ensure that the winner of the Top-Three vote using the Maximum Convergence Voting method would become president. (The states in the pool would need to specify among themselves which specific form of Convergence Voting to use to tabulate their collective votes. Although the states could choose a different form of Convergence Voting besides Maximum Convergence Voting, if they want to choose the form most consistent with the Constitution and its Madisonian values, they should choose Maximum Convergence Voting.) In this situation, the pooling principle would need to extend only to those states that joined the pool. Whereas NPVIC calculates its winner based on the plurality of all votes nationwide—including states that do not join NPVIC—an agreement among states to elect the winner of the Top-Three system using the Maximum Convergence Voting method would need to limit its scope to ballots cast in the states participating in the agreement. This is because states outside the agreement, if they continued to use their existing electoral method, would not provide their voters with ballots that would enable them to express their set of pairwise preferences among the three candidates, which is necessary for their votes to be

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151. *Id.*

152. *Status of National Popular Vote Bill in Each State*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/state-status [https://perma.cc/YT64-F94G]; *see also* Jason Willick, *This Blue-State Election Compact Could Create a Constitutional Crisis*, WASH. POST (June 11, 2023, 6:30 AM), https://www.washingtonpost.com/opinions/2023/06/11/democratic-electoral-alliance-potential-constitutional-crisis/?outputType=amp [https://perma.cc/XW2J-F3EF] (discussing Minnesota's national popular vote bill and the implications of a popular-vote system).

153. FOLEY, *supra* note 3, at 106, 110–11.

154. *See id.* at 142–43.

included within the calculation of the winner according to the Maximum Convergence Voting method. By contrast, all states joining the agreement would use ballots permitting their voters to make all the necessary pairwise comparisons: (again) A v. B, A v. C, and B v. C. Thus, the winner of the election could be determined by applying the Maximum Convergence Voting method to all the pooled ballots from all the states in the agreement. Because those states would have at least 270 electoral votes, the winner based on applying Maximum Convergence Voting to the pooled ballots from those states necessarily would become president regardless of the votes in the states that did not join the agreement. Moreover, because being outside the pool would prevent a state from influencing the Electoral College outcome, there would be an inexorable incentive for all states to join the pool once it reached the critical threshold of 270 electoral votes and went into effect.

How likely is the adoption of a Top-Three system for presidential elections by means of this pooling principle? Candidly, not high—especially given the inability of NPVIC to reach 270 electoral votes despite over two decades of effort. Still, the evident need and desire for an electoral system that accommodates more centrist, third-party candidates might increase the public's receptivity for this proposal. The public would need to be educated on how the Top-Three system works, why it elects the candidate with the broadest range of support among voters, and how it could be adopted through the pooling principle. If the public education were successful, the proposal's prospects might be better than NPVIC's because the partisan implications of a Top-Three system are not so one-sided. While NPVIC clearly advantages Democrats to the detriment of Republicans, the Top-Three system would benefit both Democrats and traditional Republicans fearful of former-President Trump and his MAGA movement. It would be necessary for Democrats and traditional Republicans to join together in embracing the Top-Three system, but if they did, their coalition would be large enough in states with 270 electoral votes collectively that there would be some chance of success.

If a Top-Three system were adopted for presidential elections in this way, how would it work in relation to the existing system of partisan primaries leading to the nominating conventions for the two major parties in the summer of each presidential election year? There would need to be an additional round of voting in between these conventions and the November

general election. This additional round of voting would include the two major-party nominees, as well as the nominees of any third parties and independent candidates who qualify for the ballot. This additional round of voting, in other words, would be equivalent to the nonpartisan primary in a Top-Three system applicable to a single state's elections. This additional round of voting would winnow the field of candidates from all of those qualifying for this ballot to the three finalists, who face off against each other in the November general election, where voters would express their three sets of head-to-head comparisons among these three candidates.

One might argue that voters are already burdened enough without having to cast an additional ballot in an extra round of voting. In that case, parties could abandon their partisan primaries and simply make their nominations in their summertime conventions by permitting the assembled delegates to choose whichever candidate these delegates collectively think is best. This nomination method is the way parties did it before the advent of partisan primaries.[155] In any event, states could leave that choice to the parties themselves. States would hold their two rounds of voting: first, the preliminary round with all qualifying candidates, presumably in September, and second, the Top-Three general election in November limited to the three candidates who advance from the preliminary round. If, given this Top-Three system, parties still want to hold primary elections before their nominating conventions, that would be each party's own decision. The two rounds of voting necessary for the Top-Three system would occur regardless of the decision each party makes.

This Top-Three system for presidential elections would be far better than the existing Electoral College process. In 2024, the current Electoral College procedures forced Americans to make a binary choice between two candidates, after knocking out a preferred third candidate before all the voters have had a chance to express their preferences. And even if this third candidate were on the ballot in November along with the other two, the existing Electoral College system would only produce

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155. Elaine Kamarck, *Are Convention Delegates Bound to Their Presidential Candidate?*, BROOKINGS (July 11, 2024), https://www.brookings.edu/articles/are-convention-delegates-bound-to-their-presidential-candidate/ [https://perma.cc/V84H-PKR7]; *see* Richard H. Pildes & Frances Lee, *Presidential Nominations*, *in* Larry Diamond, Edward B. Foley, & Richard H. Pildes (eds.), ELECTORAL REFORM IN THE UNITED STATES: PROPOSALS TO COMBAT POLARIZATION AND EXTREMISM (forthcoming 2025).

a fractured outcome that—given polarization—would be a victory for one of the two polarized major parties rather than providing a way for the electorate to express a consensus preference for the third candidate.

Thus, moving to this Top-Three system for presidential elections would enable Americans to elect the president they actually most prefer when compared to their two other options. It also would make presidential elections conform to the vision of a common-ground presidency that the Framers of the Constitution wanted but failed to achieve. Although they were the intellectual heirs of the Enlightenment, the Framers did not incorporate into the Constitution insights from Condorcet's work—the latest Enlightenment thinking on elections—which was occurring across the Atlantic at essentially the same time as the Framers' own work. But today we can incorporate Condorcet's thinking, as well as subsequent refinements of his electoral philosophy, into the constitutional framework the Framers bequeathed to us. If we do so, we will be carrying forward the Constitution's project guided by advancements in understanding through the exercise of human reason in the way that the Framers themselves would want us to do.

CONCLUSION

If we were writing on a completely clean slate and deciding what electoral system to adopt for our nation, we might or might not choose a version of Maximum Convergence Voting. There are arguments based purely on political philosophy for adopting this method of tabulating an electorate's set of preferences when more than two candidates are competing for a single office. The political philosophy of John Rawls, in particular, with its emphasis on protecting the interests of those least fortunate in society, would support the use of Maximum Convergence Voting whenever a matter must be put to a vote among citizens with equal voting rights. Because Maximum Convergence Voting is the tabulation most protective of those citizens on the losing side of the vote, consistent with the basic democratic principle that the majority must prevail when unanimity does not exist, Rawlsian philosophy would view Maximum Convergence Voting as an especially fair way to implement majority rule in a democracy. Moreover, because Maximum Convergence Voting is a modern refinement of the Marquis de Condorcet's Enlightenment-era political philosophy, there are multiple philosophical pathways

for reaching the conclusion that Maximum Convergence Voting is the best electoral method to adopt.

Americans, however, need not rely on pure political philosophy alone to reach this conclusion. Instead, they can rest their case on the congeniality of Maximum Convergence Voting to the Constitution and its animating values. The Constitution was founded upon the Madisonian premise that government should operate for the common good rather than on behalf of any factional interest within the polity. While the Constitution aims to avoid factional control of the government through its separation of powers (including its basic division of legislative authority between Congress and the states), the Constitution recognizes that in a republic the choice of the people's representatives must be made by the people themselves.[156] Because Maximum Convergence Voting is the electoral method that most avoids the election of a factional candidate, and instead elects the candidate most capable of achieving the greatest common ground among all the voters in the electorate, Maximum Convergence Voting is the electoral method most harmonious with the Constitution and its underlying principles.[157] Thus, as long as the Constitution exists, there is a compelling case that Maximum Convergence Voting is the electoral method that should be used when a single winner is to be chosen among several candidates. While others may wish to appeal to pure political philosophy, it suffices to appeal to the Constitution's own political philosophy as grounds for embracing Maximum Convergence Voting for American elections.

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156. That is why the Constitution specifies that the House of Representatives, as the people's chamber within the federal legislature—the Senate was originally designed to represent the states as units rather than their citizens as individuals—must be elected by "the people" of each state. U.S. CONST. art. I, § 2.

157. *See supra* Part II.