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Upending Minority Rule: The Case for Ranked-Choice Voting in West Virginia

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UPENDING MINORITY RULE: THE CASE FOR RANKED-CHOICE VOTING IN WEST VIRGINIA

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I. INTRODUCTION

“As Maine goes, so goes the nation.” Such was the nineteenth-century truism that referenced Maine’s status as a presidential bellwether, a title the state earned first by electing a Whig governor before the election of William Henry Harrison—the first Whig president—in 1840,¹ and later by having accurately “predicted” the results of 18 of 26 presidential contests² through the outcomes of its September gubernatorial elections from 1832 to 1932.³ While Maine’s

¹ ‘As Maine Goes...’ *Coined in 1840 Race*, N.Y. TIMES (Sept. 7, 1958), <https://timesmachine.nytimes.com/timesmachine/1958/09/07/91405659.pdf>.

² See *Historical Election Results: Electoral College Box Scores 1789–1996*, NAT’L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/federal-register/electoral-college/scores.html> (last visited Oct. 17, 2019). The victorious parties in the presidential elections of 1832, 1836, 1840, 1844, 1860, 1864, 1868, 1872, 1876, 1888, 1896, 1900, 1904, 1908, 1920, 1924, 1928, and 1932 also won the Maine gubernatorial elections held in those same years. See *infra* note 3.

³ See *Former Maine Governors*, NAT’L GOVERNORS ASS’N, <https://www.nga.org/former-governors/maine/> (last visited Oct. 3, 2019). Note that Maine elected its governors to one-year

predictive reputation may have fallen by the wayside,⁴ its innovations in election law might win it the attention—and, as this Note will argue, the imitation—of other states.⁵

In November 2016, voters in Maine approved Question 5, a referendum establishing a system of ranked-choice voting (“RCV”) for congressional, gubernatorial, and legislative elections.⁶ RCV is a system for conducting elections that ensures that the winning candidate will receive a majority of support from the electorate, disallowing the possibility of a plurality victor.⁷ It works by asking voters to rank the candidates on the ballot according to their preference instead of asking voters to choose only one candidate among many. The votes are tallied, and if one candidate wins a majority—50% plus one—of first-preference votes, that candidate wins the election. If nobody has a majority, all of the first-preference votes for the least popular candidate are redistributed to those voters’ second-preference selections. If one candidate then has a majority, that candidate wins; if not, the process repeats itself until a winner is determined.⁸

The election and re-election of Paul LePage, a Republican politician regarded as being both significantly more conservative than the median Maine voter and a lightning rod for gaffe-related controversy,⁹ precipitated the campaign to alter the way Maine voted.¹⁰ LePage was elected governor in 2010 in a contest between four candidates, including two independents. LePage won just 38% of the vote, but it was enough to win an election in which the

terms in the relevant period until switching to two-year terms in the 1880 election, with the victors taking office the following January.

⁴ See Edward R. Tufte & Richard A. Sun, *Are There Bellwether Electoral Districts?*, 39 PUB. OPINION Q. 1, 1 (1975).

⁵ See generally L. Sandy Maisel, *Ranked Choice Voting: “As Maine Goes. . .”*, AM. INT. (Aug. 7, 2018), <https://www.the-american-interest.com/2018/08/07/ranked-choice-voting-as-maine-goes/>.

⁶ *Maine Question 5—Allow Ranked-Choice Voting—Results: Approved*, N.Y. TIMES (Aug. 1, 2017, 11:25 AM), <https://www.nytimes.com/elections/2016/results/maine-ballot-measure-5-allow-ranked-choice-voting> [hereinafter *Question 5 Results*].

⁷ See Katharine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/us/maine-ranked-choice-voting.html>.

⁸ Andrew Spencer et al., *Escaping the Thicket: The Ranked Choice Voting Solution to America’s Districting Crisis*, 46 CUMB. L. REV. 377, 393 (2016).

⁹ See, e.g., Jess Bidgood, *How Controversial Is Gov. Paul LePage of Maine? Here’s a Partial List*, N.Y. TIMES (Aug. 29, 2016), <https://www.nytimes.com/2016/08/30/us/controversial-gov-paul-lepage-maine-list.html>.

¹⁰ Nik DeCosta-Klipa, *How Paul LePage Got Elected, and How Mainers Think They Can Fix a Broken Voting System*, BOSTON GLOBE (Sept. 1, 2016), <https://www.boston.com/news/politics/2016/09/01/how-paul-lepage-got-elected-and-how-mainers-think-they-can-fix-a-broken-voting-system>.

Democratic nominee and a left-leaning independent split the vote among Maine’s left-leaning majority. Four years later, LePage was re-elected—again with a plurality—after a new Democratic nominee and the same left-leaning independent again split the vote.

Although independent candidates have had significantly less of an impact on West Virginia politics than in Maine, West Virginia’s first-past-the-post (“FPTP”) electoral system has delivered weak-plurality election winners on a number of occasions. The state’s newly nonpartisan supreme-court elections, moreover, pose a serious challenge to the representational value of the institutions they populate precisely because of the increased likelihood of a plurality victor. With three contests for the state supreme court scheduled for the 2020 primary election,¹¹ the seriousness of the problem created by plurality-winner voting systems is bound only to grow more glaring.

West Virginians, however, have a choice. West Virginia can follow Maine’s lead and deliver more power to voters in choosing their preferred representatives. The passage and implementation of RCV in Maine should be replicated by West Virginia in order to develop truly democratic representative institutions.

II. BACKGROUND

In order to understand the need for RCV in West Virginia, it must be established why majorities are desirable in elections, why West Virginia is failing to produce election victors with majority backing, and why RCV would provide an adequate remedy for this problem. The following Section provides an adequate foundation for these assertions via a brief survey of historical trends, election results, and state electoral systems. This Section demonstrates that the overall national trend with regard to popular political participation has been toward more democratic and majoritarian institutions. This Section also examines various congressional and judicial elections in West Virginia to show that plurality winners occur commonly in state elections and only promise to proliferate in the future. Lastly, this Section explains the means by which RCV produces majority winners with ease and simplicity.

¹¹ Lacie Pierson, *Loughry’s Resignation Sets Up Races for 3 Supreme Court Seats in 2020*, CHARLESTON GAZETTE-MAIL (Nov. 15, 2018), https://www.wvgazette.com/news/cops_and_courts/loughry-s-resignation-sets-up-races-for-supreme-court-seats/article_87dbeb64-04ed-53cd-bdd1-5ac2910723bc.html.

A. Voting and Majoritarianism

The role of the popular vote in electing political leadership has been a contested matter from the country's beginning.¹² Some figures of the founding generation saw no particular connection between democracy and the practice of conducting elections, and instead understood republicanism and democracy to be oppositional ideas.¹³ To this cohort, democracy entailed the personal administration of government by the collective citizenry of a given community, while a republic invested governing power in a much smaller number of elected individuals.¹⁴ James Madison, writing pseudonymously, argued that the republican form of government's advantage over democracy was that it would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations."¹⁵

Founding-period law, however, significantly circumscribed the pool of electors by whom the republican body of citizens was chosen.¹⁶ Because the United States inherited its legal traditions from a British system in which politics was exclusively an affair of the propertied classes, generally only white, male, landholding adults could vote in early American elections.¹⁷ Following the lead of frontier territories, which sought to attract settlers with the promise of laxer requirements for the right to vote, U.S. states gradually began to move toward universal white male suffrage.¹⁸ Voting rights explicitly restricted on the basis of race fell after the Civil War, a reform that resulted from the abolition of slavery following the Civil War and the incorporation of formerly enslaved black men into a society in which universal male suffrage had established itself as the governing standard.¹⁹ Jurisdictions shortly began expanding the franchise beyond men as well, starting in 1870 with the Wyoming Territory—whose legislators desperately wanted to attract female settlers to relieve the territory's

¹² See Shlomo Slonim, *The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President*, 73 J. AM. HIST. 35, 38 (1986).

¹³ THE FEDERALIST NO. 10 (James Madison) ("[D]emocracies have ever been spectacles of turbulence and contention A republic . . . opens a different prospect, and promises the cure for which we are seeking.").

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 895 (2005).

¹⁷ *Id.*

¹⁸ *Id.* at 899.

¹⁹ See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 278–79 (updated ed. 2014).

sex ratio of six men for every woman²⁰—and culminating with the Nineteenth Amendment’s extension of the franchise to all adult women 50 years later.²¹

One consequence of the democratizing trend in the United States was blowback from elements of society threatened by majority rule.²² John C. Calhoun—dubbed the “Marx of the Master Class” by historian Richard Hofstadter for his contributions to political theory on behalf of the slave-owning class²³—was perhaps the most notable opponent of popular democracy in the antebellum period.²⁴ Calhoun theorized a modification of the U.S. constitutional system called “concurrent majority” that would give minority interests (i.e., slaveholders) veto power over decisions made by the majority.²⁵ Being a slaveholder himself, and representing South Carolina—at one point the Union’s wealthiest state and, by percentage, its most enslaved—in the United States Senate, Calhoun sought to restrict to the greatest possible degree the extent to which a numerical majority could exert power over the state.²⁶ Although Calhoun died in 1850, his legacy was later embodied in the government of the Confederate States of America, which honored Calhoun by depicting his image on Confederate currency.²⁷ Unfortunately for that legacy, the Union victory in the Civil War prevented the proponents of minority rule from overcoming the overall trend of expanded enfranchisement.²⁸

Perhaps the most enduring organ of antidemocratic power in American government is the Electoral College.²⁹ The Electoral College originated in the Constitution as a deliberative body comprising electors chosen by state

²⁰ Tom Rea, *Right Choice, Wrong Reasons: Wyoming Women Win the Right to Vote*, WYOHISTORY.ORG (Nov. 8, 2014), <https://www.wyohistory.org/encyclopedia/right-choice-wrong-reasons-wyoming-women-win-right-vote>.

²¹ AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 403 (paperback ed. 2006).

²² See COREY ROBIN, *THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO DONALD TRUMP* 6 (2d ed. 2018).

²³ RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 67–68 (1948).

²⁴ See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 1–2 (2017).

²⁵ See JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* 28, 47–48 (1851).

²⁶ See MACLEAN, *supra* note 24, at 2–3, 5.

²⁷ See *John C. Calhoun*, NAT’L PARK SERV., <https://www.nps.gov/people/john-c-callhoun.htm> (last updated Nov. 11, 2018).

²⁸ See FONER, *supra* note 19.

²⁹ See Jason Brennan, *The Electoral College Is Anti-Democratic—And That’s a Good Thing*, MARKETWATCH (Nov. 8, 2016, 8:39 AM), <https://www.marketwatch.com/story/the-electoral-college-is-anti-democraticand-thats-a-good-thing-2016-09-12>; John Nichols, *The Electoral College Has the Starkly Anti-Democratic Power to Make a Loser a “Winner”*, NATION (Dec. 15, 2016), <https://www.thenation.com/article/the-electoral-college-has-the-starkly-anti-democratic-power-to-make-a-loser-a-winner/>.

legislatures that would elect the President every four years.³⁰ Because the Constitution permits states to select their own method of appointing electors, most states (with the notable exceptions of South Carolina until 1868 and Colorado in 1876) quickly opted to put the selection of electors to popular vote, and over time, the selection looked more-or-less like voting directly for one presidential candidate or another.³¹ In the Progressive Era, reformers brought another institution similarly removed from popular power under democratic control, amending the Constitution to fill U.S. Senate seats by direct election.³² But the Electoral College remained, and in the elections of 1876, 1888, 2000, and 2016, it handed victory to presidential candidates who failed to win the popular vote.³³

The Electoral College, however, represents an exception to the democratizing trend. The expansion of the franchise from its rarefied, property-mediated beginnings in the late eighteenth century to its present-day breadth suggests that a transformation occurred in the way Americans understood the purpose of voting. Although the typical politico in James Madison's generation would have categorically rejected such a thing as American "democracy," succeeding generations of Americans embraced the word and rendered it synonymous with the American project.³⁴ The result of the upheavals of the nineteenth century was that the word "democratic" no longer described a form of government distinct and opposed to a "republican" alternative, but rather the extent to which a republican government is accountable to its electorate and of whom that electorate is composed.

B. Voting in West Virginia and Elsewhere

In West Virginia, as in every other state to some extent, the winner of a given election is the candidate who receives more votes than any other

³⁰ See Slonim, *supra* note 12, at 52.

³¹ See Devin McCarthy, *How the Electoral College Became Winner-Take-All*, FAIRVOTE (Aug. 21, 2012), <https://www.fairvote.org/how-the-electoral-college-became-winner-take-all>.

³² See John J. Dinan, *Progressivism and Federalism*, in KEEPING THE COMPOUND REPUBLIC: ESSAYS ON AMERICAN FEDERALISM 105, 105 (Martha Derthick ed., 2001); see also U.S. CONST. amend. XVII.

³³ Alvin Chang, *Trump Will Be the 4th President to Win the Electoral College After Getting Fewer Votes Than His Opponent*, VOX, <https://www.vox.com/policy-and-politics/2016/11/9/13572112/trump-popular-vote-loss> (last updated Dec. 19, 2016, 1:37 PM).

³⁴ See President Ronald Reagan, Westminister Address (June 8, 1982) ("If the rest of this century is to witness the gradual growth of freedom and democratic ideals, we must take actions to assist the campaign for democracy."); President Woodrow Wilson, Address Delivered at Joint Session of the Two Houses of Congress (Apr. 2, 1917) ("The world must be made safe for democracy.").

candidate.³⁵ This system is called FPTP voting.³⁶ Because this method does not require that a candidate win a majority of the vote, candidates who receive a plurality of the vote frequently win elections despite the majority of participating voters choosing someone else. FPTP is the method by which elections are decided at every level of the West Virginia electoral system, including primary and general elections. Crucially, however, the word “plurality” does not appear in the state constitution, neither in reference to how electoral victors are decided nor in any other context.³⁷

Some other states use electoral systems designed to preclude plurality victors in certain elections. Eleven states provide for a runoff election following a regular election if no candidate receives a majority of the vote.³⁸ In these runoffs, the top two candidates from the regular election compete in a second election held several weeks after the initial election or the state legislature decides the contest. Reducing the field of candidates to two ensures that one candidate will receive a majority. Most of the states that allow for runoffs only use them at the primary stage, but two states—Mississippi and Georgia—conduct a runoff election in the event that no candidate in the general election receives a majority. Louisiana differs from the rest in that it holds its primary election—which includes all candidates regardless of party—at the same time as other states’ general elections in November, providing for a subsequent general election only in the event that no candidate wins a majority.³⁹ While these states, South Dakota excepted,⁴⁰ use runoff elections for all levels of elective office, all states use a simple FPTP system without the possibility of a runoff for allocating electoral votes in presidential elections.⁴¹

³⁵ W. VA. CODE ANN. § 3-5-4(b) (West 2019) (“In primary elections a plurality of the votes cast shall be sufficient for the nomination of candidates for office.”); *id.* § 3-6-11 (“The person having the highest number of votes for any one of such offices shall be declared duly elected thereto . . .”).

³⁶ Charles King, *Electoral Systems*, GEO. U. (2000), http://faculty.georgetown.edu/kingch/Electoral_Systems.htm.

³⁷ See generally W. VA. CONST.

³⁸ *Primary Runoffs*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx> (last visited Oct. 17, 2019).

³⁹ *How Are Statewide and Local Candidates Elected?*, LA. DEP’T ST., <https://www.sos.la.gov/ElectionsAndVoting/GetElectionInformation/HowAreCandidatesElected/Pages/default.aspx> (last visited Oct. 17, 2019).

⁴⁰ *Primary Runoffs*, *supra* note 38.

⁴¹ See Thomas Berry, *A Presidential-Election Runoff Would Be Legal for States to Adopt*, NAT’L REV. (Apr. 14, 2016, 8:00 AM), <https://www.nationalreview.com/2016/04/presidential-election-runoff-states/>.

West Virginia's voting system is unlike most others, however, in that it regularly conducts multiple-winner elections.⁴² The lower house of the state legislature, the 100-member West Virginia House of Delegates, has been divided into 67 districts since the 2012 elections.⁴³ Many districts are single-member, but others are represented by as many as four or five delegates.⁴⁴ In state-house elections in multi-member districts, voters have as many votes as there are seats up for election, meaning that a voter in a four-member district has the opportunity to allocate those votes among as many as four candidates of her choosing. These votes are not stackable, i.e., a voter in this scenario cannot put two of her four votes toward one candidate. Because this system allows for large number of candidates in elections where voters have multiple votes to allocate, winning candidates regularly receive relatively small percentages of the vote.⁴⁵

C. *Plurality Victors in Congressional Elections*

The use of FPTP voting in West Virginia's partisan primary elections has led to a number of notable plurality winners in just the last decade. Unlike general elections, which have significant barriers to entry for someone seeking a place on the ballot without a major party's nomination,⁴⁶ the only actual barrier for a qualified state resident to gain ballot access in the primary is the filing fee.⁴⁷ The result of this is that primary elections in West Virginia routinely produce nominees who failed to secure majorities from their parties' voters, and in high-profile contests that draw large numbers of candidates, the winner's plurality can be extraordinarily small.⁴⁸

The 2014 Republican primary for West Virginia's second congressional district was one such high-profile contest. Shelley Moore Capito had held the seat for 14 years, but in 2014, she declined to run for re-election in order to run

⁴² See Ben Williams, *West Virginia Moves to Single Member Districts*, NAT'L CONF. ST. LEGISLATURES: NCSL BLOG (Apr. 10, 2018), <http://www.ncsl.org/blog/2018/04/10/west-virginia-moves-to-single-member-districts.aspx>.

⁴³ See *id.*

⁴⁴ *Id.*

⁴⁵ See generally *Statewide Results: General Election – November 8, 2016*, W. VA. SECRETARY ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2016&eid=23&county=Statewide> (last visited Oct. 17, 2019) [hereinafter *2016 W. Va. General Election*]. The winning candidates for the five seats representing District 51 in the state house won between 9.48% and 11.84% of the vote. *Id.*

⁴⁶ See W. VA. CODE ANN. § 3-5-23 (West 2019).

⁴⁷ See *id.* § 3-5-7(a).

⁴⁸ See Simone Pathé, *West Virginia House Matchups Set for November*, ROLL CALL (May 8, 2018, 11:12 PM), <https://www.rollcall.com/news/politics/west-virginia-house-matchups-set-november>.

for a seat in the U.S. Senate opened up by the retirement of five-term Senator Jay Rockefeller.⁴⁹ Having been the only Republican-held U.S. House seat in West Virginia from 2001 to 2011, West Virginia's second congressional district was regarded as a relatively safe open seat for Republicans to defend in the 2014 midterm elections. This reputation as a Republican-friendly district drew seven candidates to compete for the Republican nomination in the open district.

The contest for West Virginia's second congressional district was also influenced by the varied geographical profile of the district, which stretches from the Ohio River in the west to the Shenandoah River in the east.⁵⁰ The district is anchored on either end by Charleston—the state capital and principal city in the populous Kanawha Valley—and Martinsburg, the largest city in the state's fast-growing Eastern Panhandle. The decision by Shelley Moore Capito, who resides in Charleston, to decline re-election signaled an opportunity for Eastern Panhandle residents to use the clout gained from the area's late population bloom to send one of their own to Congress instead of settling for a representative from the other side of the state.⁵¹ Hence, the candidates who decided to run for the seat and the subsequent results reflected some geographical tension created by the shape of the district.

The result of the seven-candidate contest was that the winning candidate, former Maryland State Senator Alex Mooney,⁵² won with just over 36% of the vote. The second and third-place finishers, Ken Reed and Charlotte Lane respectively, combined for more than 40% of the vote, and with the fourth-place finisher, Steve Harrison, included, the vote totals of the first three runners-up comprised a majority of votes cast.⁵³ Mooney was particularly controversial at the time because of his apparently limited connections to the state, having first moved to West Virginia a few months prior to the primary election.⁵⁴ Mooney would go on to win the general election by a narrow margin with only a plurality

⁴⁹ Aaron Blake, *Rep. Shelley Moore Capito Will Run for Senate*, WASH. POST (Nov. 25, 2012, 10:56 PM), <https://www.washingtonpost.com/news/the-fix/wp/2012/11/25/rep-shelley-moore-capito-will-run-for-senate>.

⁵⁰ Shauna Johnson, *Alex Mooney Wins GOP Nomination in 2nd District*, W. VA. METRONews (May 13, 2014, 9:46 PM), <http://wvmetronews.com/2014/05/13/alex-mooney-wins-republican-nomination-in-2nd-district/>.

⁵¹ Jonathan Matisse, *Eastern Panhandle Politics Shaping West Virginia*, SAN DIEGO UNION-TRIB. (Aug. 2, 2014, 8:51 AM), <https://www.sandiegouniontribune.com/sdut-eastern-panhandle-politics-shaping-west-virginia-2014aug02-story.html>.

⁵² Theodore Schleifer, *With Eyes on Seats in Maryland and West Virginia, Politicians Cross Borders*, N.Y. TIMES (July 31, 2014), <https://www.nytimes.com/2014/08/01/us/politics/nick-casey-alex-mooney-midterm-elections.html>.

⁵³ See *Statewide Results: Primary Election – May 13, 2014*, W. VA. SECRETARY ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2014&eid=14&county=Statewide> (last visited Oct. 17, 2019).

⁵⁴ Schleifer, *supra* note 52.

of the vote.⁵⁵ Notably, the Republican share of the vote in West Virginia's second congressional district declined by more than 20 percentage points between 2012 and 2014.⁵⁶

Following their 2014 disappointment, Democrats in the second congressional district were enthusiastic to take on the evidently vulnerable Mooney when he ran for re-election in 2016.⁵⁷ Five Democrats filed for the party's nomination in West Virginia's second congressional district and the result was quite similar to what Republicans experienced two years earlier. Mark Hunt, a former state delegate, won the primary with just 29% of the vote,⁵⁸ much of which came from the district's western counties.⁵⁹ The candidate preferred by the Democratic Congressional Campaign Committee ("DCCC"), Cory Simpson, placed second.⁶⁰ In third place came Tom Payne, who dominated the Eastern Panhandle counties as a consequence of being the only candidate from the region in the race despite being relatively unknown.⁶¹ The influence of geography on the outcome of the election was so clear that when asked if he would have done something differently in hindsight to improve his election-night performance, Simpson responded, "Had an Eastern Panhandle address? I don't know."⁶² Mark Hunt, the choice of less than one in three Democratic primary voters in the

⁵⁵ See *Statewide Results: General Election – November 4, 2014*, W. VA. SECRETARY ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2014&eid=21&county=Statewide> (last visited Oct. 17, 2019) [hereinafter *2014 W. Va. General Election*].

⁵⁶ Compare *id.* (showing Republican Alex Mooney winning West Virginia's second congressional district in 2014 with 47.08% of the vote), with *Statewide Results: General Election – November 6, 2012*, W. VA. SECRETARY ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2012&eid=13&county=Statewide> (last visited Oct. 17, 2019) (showing Republican Shelley Moore Capito winning West Virginia's second congressional district in 2012 with 69.77% of the vote).

⁵⁷ See Lauren French, *House Democrats Pick Top Republican Targets*, POLITICO (Feb. 11, 2016, 6:01 AM), <https://www.politico.com/story/2016/02/house-democrats-republican-targets-219118> (listing West Virginia's second congressional district among the first targets of the Democratic Congressional Campaign Committee's Red to Blue program in 2016).

⁵⁸ *Statewide Results: Primary Election – May 10, 2016*, W. VA. SECRETARY ST., <http://services.sos.wv.gov/apps/elections/results/results.aspx?year=2016&eid=22&county=Statewide> (last visited Oct. 17, 2019) [hereinafter *2016 W. Va. Primary Election*].

⁵⁹ See David Gutman, *Subterfuge, Favoritism Charges Emerge After Hunt Wins WV House Race*, CHARLESTON GAZETTE-MAIL (May 11, 2016), https://www.wvgazette.com/news/politics/subterfuge-favoritism-charges-emerge-after-hunt-wins-wv-house-race/article_99a3cb73-38a4-5cf9-962b-cb489042f294.html.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

district, lost easily in the general election as Mooney improved on his 2014 performance by more than ten percentage points.⁶³

Another similar contest came in 2018 in West Virginia's third congressional district. The third district was a longtime Democratic stronghold until Republican-turned-Democrat State Senator Evan Jenkins defeated incumbent Democrat Nick Rahall in 2014.⁶⁴ Jenkins coasted to re-election in 2016⁶⁵ as Donald Trump won the district by nearly 50 points in the presidential election.⁶⁶ Because of the decisive Republican advantage in the district (at least on the federal level), Jenkins's decision to forego re-election to run for U.S. Senate in 2018 caused a rush among both Republicans and Democrats to succeed him.⁶⁷

This race, like the Republican primary in the second congressional district four years earlier, attracted seven Republicans vying for one spot, although one candidate—Philip Payton—ended his campaign prior to the election due to potential liability under the Hatch Act.⁶⁸ The result, however, was even more level across the field than the crowded second-district contest in 2014. The victorious candidate, State Delegate Carol Miller, won the election with just under 24% of the vote, with three other candidates receiving at least 18% of the vote.⁶⁹

In other states, plurality winners such as Carol Miller, Alex Mooney, and Mark Hunt would have had to face the first runner-up in a runoff election a number of weeks after the initial election.⁷⁰ It is unknown what the results would have been in either election, given the nuances and opacity of voters' intentions

⁶³ Compare 2014 W. Va. General Election, *supra* note 55 (showing Republican Alex Mooney winning West Virginia's second congressional district in 2014 with 47.08% of the vote), with 2016 W. Va. General Election, *supra* note 45 (showing Mooney winning re-election in West Virginia's second congressional district with 58.18% of the vote).

⁶⁴ Tarini Parti, *Rahall's 38 Years in House End*, POLITICO (Nov. 4, 2014, 10:19 PM), <https://www.politico.com/story/2014/11/2014-west-virginia-election-results-evan-jenkins-nick-rahall-112527>.

⁶⁵ 2016 W. Va. General Election, *supra* note 45.

⁶⁶ Jeff Jenkins, *Monmouth Poll: Miller, Ojeda Locked in Tight Race*, W. VA. METRONews (Oct. 16, 2018), <http://wvmetronews.com/2018/10/16/monmouth-poll-miller-ojeda-locked-in-tight-race/>.

⁶⁷ John Raby, *Crowded Field Seeks 3rd District House Seat in West Virginia*, SEATTLE TIMES (May 3, 2018, 8:18 AM), <https://www.seattletimes.com/nation-world/crowded-field-seeks-3rd-district-house-seat-in-west-virginia/>.

⁶⁸ Taylor Stuck, *Payton Withdraws from House 3 Race*, HERALD-DISPATCH (Huntington, W. Va.) (Apr. 20, 2018), http://www.herald-dispatch.com/elections/payton-withdraws-from-house-race/article_5d215b2c-ea66-510b-9565-98e7e7ab5c62.html.

⁶⁹ See May 8, 2018, *Primary Election*, W. VA. SECRETARY ST., <http://results.enr.clarityelections.com/WV/74487/Web02-state.195772/#/> (last visited Oct. 17, 2019).

⁷⁰ See *supra* note 38 and accompanying text.

when they select a candidate for which to vote, but the legitimacy of the democratic process is called into question when the system allows a candidate who was not the first choice for three out of four Republican voters proceed to the general election.

D. *Plurality Victors in Judicial Elections*

West Virginia elects its judiciary from top to bottom. Judges on the municipal, magistrate, family, circuit, and state supreme court levels are subject to election by popular vote and all the pressures and influences that follow.⁷¹ Shortly after Republicans took control of the state legislature following the 2014 elections, legislators undertook efforts purportedly to preserve popular control over the judiciary while easing concerns that partisan bias might have infected the facially impartial legal system. On March 25, 2015, Governor Earl Ray Tomblin signed into law H.B. 2010, which provided for nonpartisan elections conducted at the date of the primary election for all state-level judges.⁷²

The first nonpartisan state supreme court election was conducted in 2016, pitting the incumbent Republican Brent Benjamin against one Republican opponent and three Democrats, including a former state supreme court justice and Attorney General Darrell McGraw and former State Senator William Wooton.⁷³ In the nominally nonpartisan race, outside money poured into the state as conservative donors deserted Benjamin and rallied around Beth Walker, a Republican supreme-court candidate who had run for the office before.⁷⁴ The final results of the election reflected the consolidation of traditionally Republican money around Walker's candidacy as she prevailed with less than 40% of the vote while McGraw and Wooton received approximately 23% and 21% respectively.⁷⁵ The incumbent Benjamin placed a distant fourth with just 12% of the vote.⁷⁶ Unlike the plurality-winner House primaries discussed earlier, whose

⁷¹ *Judicial Selection in the States: West Virginia*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/index.cfm?state=WV (last visited Oct. 17, 2019).

⁷² Stephanie Wilmes, *West Virginia Moves to Nonpartisan Judicial Elections in 2016*, WM. & MARY L. SCH.: ST. ELECTIONS (Nov. 2, 2015), <http://electls.blogs.wm.edu/2015/11/02/west-virginia-moves-to-nonpartisan-judicial-elections-in-2016/>.

⁷³ See Shauna Johnson, *On the Campaign Trail: Beth Walker, State Supreme Court Candidate*, W. VA. METRONews (Apr. 11, 2016, 12:05 AM), <http://wvmetronews.com/2016/04/11/on-the-campaign-trail-beth-walker-state-supreme-court-candidate/>.

⁷⁴ David Gutman, *Third-Party Pours into WV Supreme Court Race*, CHARLESTON GAZETTE-MAIL (Apr. 28, 2016), https://www.wvgazette.com/news/cops_and_courts/third-party-money-pours-into-wv-supreme-court-race/article_b2665e9c-475e-58b1-a8b6-2b804d14d883.html.

⁷⁵ See 2016 W. Va. Primary Election, *supra* note 58.

⁷⁶ See *id.*

victors at least have the check of having to face the other party's nominee in the general election, the winner of the state supreme court election would not face a second electoral fight in November because the nonpartisan election system had scheduled the general election for the state supreme court at the same time as the state's primary elections.⁷⁷

In 2018, the limits of nonpartisan judicial elections were foregrounded again in the fallout from the impeachment crisis at the West Virginia Supreme Court of Appeals. In order to avoid a federal indictment, Democratic Justice Menis Ketchum resigned from the court,⁷⁸ and amid the impeachment proceedings against the other four justices, another Democratic justice, Robin Davis, resigned in order to trigger a special election the coming November.⁷⁹ As a result, two nonpartisan special supreme court elections were scheduled to be decided alongside the regular 2018 general election contests. Each of these two special elections featured ten candidates, a situation which was accurately predicted to be a recipe for victorious candidates winning with slim pluralities.⁸⁰

The victorious candidates in West Virginia's special supreme court elections indeed won with small pluralities. Tim Armstead, the former Republican Speaker of the House of Delegates who had been appointed to the supreme court seat vacated by Ketchum,⁸¹ won the opportunity to finish out the two years remaining in the term with just over 26% of the vote.⁸² By comparison, the vote totals of the next four runners-up combined constituted a majority of votes cast in the race.⁸³ And yet, the preferences of this majority, as well as the

⁷⁷ Wilmes, *supra* note 72 (“[T]he new law fixes the date of judicial elections on the day of the primary rather than the general election.”).

⁷⁸ Lori Kersey & Lacie Pierson, *On Eve of Impeachment Meetings, Ketchum Quits WV Supreme Court*, CHARLESTON GAZETTE-MAIL (July 11, 2018), https://www.wvgazette.com/news/politics/on-eve-of-impeachment-meetings-ketchum-quits-wv-supreme-court/article_0bb52c20-b886-53c9-b221-b3f3991554ce.html.

⁷⁹ Lacie Pierson & Jake Zuckerman, *WV Supreme Court Justice Davis Leaves Court; Justices Workman, Walker to Stay*, CHARLESTON GAZETTE-MAIL (Aug. 14, 2018), https://www.wvgazette.com/news/politics/wv-supreme-court-justice-davis-leaves-court-justices-workman-walker/article_91a8f5ae-0030-5c98-b6e2-639827e46929.html.

⁸⁰ Hoppy Kercheval, Editorial, *WV Supreme Court Vacancies Will Be Filled by Small Percentage of Voters*, W. VA. METRONews (Aug. 24, 2018, 12:24 AM), <http://wvmetronews.com/2018/08/24/wv-supreme-court-vacancies-will-be-filled-by-small-percentage-of-voters/>.

⁸¹ Caity Coyne, *Armstead, Jenkins Win Supreme Court Races*, CHARLESTON GAZETTE-MAIL (Nov. 6, 2018), https://www.wvgazette.com/election_2018/armstead-jenkins-win-supreme-court-races/article_f369ac31-b86c-541f-845a-17937a4ae3c6.html.

⁸² See *November 6, 2018, General Election*, W. VA. SECRETARY ST., <https://results.enr.clarityelections.com/WV/92360/Web02-state.221451/#/> (last visited Oct. 17, 2019) [hereinafter *2018 W. Va. General Election*].

⁸³ See *id.*

larger majority of all voters who chose a candidate other than Armstead, are left unreflected in the actual representational makeup of the court.

Evan Jenkins, the appointee to the court's other vacant seat, won with a larger plurality than Armstead, but a mere plurality nonetheless.⁸⁴ Jenkins, who benefited from the name recognition afforded by a 20-year career in the state legislature, four years of service in the U.S. House of Representatives, and a high-profile campaign for the Republican nomination for U.S. Senate just a few months earlier, won just over 36% of the vote.⁸⁵ In a similar outcome to Armstead's victory, the vote totals of the first six runners-up combined for a majority of the vote in Jenkins's election.⁸⁶ The third of the electorate captured by Jenkins was, however, enough to win the former representative the right to serve out the remaining six years of Davis's unfinished 12-year term.⁸⁷

Taken together, recent elections in West Virginia have exposed anti-majoritarian flaws in the FPTP system through the election of various plurality victors in partisan congressional primary contests. The faults in this system are magnified by the recent innovation of nonpartisan supreme court elections, which feature the same FPTP free-for-all as primary elections but with the uneasy weight of finality included. With the post-election resignation of Justice Allen Loughry, the 2020 primary election will feature three supreme court elections on the ballot at once.⁸⁸ The state's first three nonpartisan supreme court elections having produced three plurality winners, there is little reason to expect that the next three will produce anything different.

E. Ranked-Choice Voting

RCV encodes the principle of majoritarianism into the electoral system.⁸⁹ RCV works by asking voters to rank candidates in an election according to their preference. This is in contrast to FPTP, which asks voters to select one candidate out of all those running for a particular office. Instead of making a singular selection as to their favorite candidate, voters' selections in an RCV system are denoted as first-choice, second-choice, etc. If no first-choice candidate receives a majority of the vote, the candidate with the fewest first-choice votes is eliminated and her first-choice votes default to the

⁸⁴ Coyne, *supra* note 81.

⁸⁵ 2018 W. Va. General Election, *supra* note 82.

⁸⁶ *See id.*

⁸⁷ Brad McElhinny, *Evan Jenkins and Tim Armstead Win Supreme Court Seats*, W. VA. METRONews (Nov. 6, 2018, 10:34 PM), <http://wvmetronews.com/2018/11/06/supreme-court-races-election-night-draft/>.

⁸⁸ Pierson, *supra* note 11.

⁸⁹ Rosa O'Hara, Opinion, *How Australia Could Fix U.S. Elections*, WASH. POST (Mar. 22, 2018, 3:18 PM), <https://www.washingtonpost.com/news/worldpost/wp/2018/03/22/ranked-choice-voting/>.

second-choice picks on those ballots, which are redistributed accordingly in an instant runoff. If one candidate receives a majority after this redistribution, that candidate wins. If not, the process repeats with the elimination of the new last-place candidate until a majority is achieved.

Preferential systems share nomenclature and an interest in majoritarianism with runoff systems, but there are important differences. First, the RCV system requires voters to cast just one ballot, while the runoff system asks voters to return to the polls weeks after the initial election.⁹⁰ Another difference is that RCV captures the shades of detail in voter preference more accurately than a regular runoff. In an RCV election, for example, a relatively popular third-place candidate in a five-candidate election has the opportunity to demonstrate his broad appeal by gaining ground from second- or third-choice preference votes, while in a regular runoff election, such a candidate would be shut out completely after the first election.

III. THE RANKED-CHOICE EXPERIMENT IN MAINE

A. *Question 5: The Battle at the Ballot*

The legal wrangling over RCV in Maine began when voters approved the statewide adoption of the voting system in 2016.⁹¹ The ballot initiative posed the following question to voters: “Do you want to allow voters to rank their choices of candidates in elections for U.S. Senate, Congress, Governor, State Senate, and State Representative, and to have ballots counted at the state level in multiple rounds in which last-place candidates are eliminated until a candidate wins by majority?”⁹² Maine, already at odds electorally with the rest of the country as one of only two states to allocate its presidential electoral votes by congressional district and not winner-take-all,⁹³ puzzled over whether to further distinguish its electoral system.

Mainers divided over the proposed overhaul to its voting methods. Proponents of Question 5’s passage argued that the incumbent system of plurality voting discouraged the electorate from evaluating candidates on their merit and instead forced voters to weigh their preference for a candidate against the likelihood that their vote would enable victory for a more viable but

⁹⁰ *Primary Runoffs*, *supra* note 38.

⁹¹ *See Question 5 Results*, *supra* note 6.

⁹² Press Release, Dep’t of the Sec’y of State of Me., Secretary Dunlap Announces Final Wording of Referendum Questions (June 23, 2016), <https://www.maine.gov/sos/news/2016/referendumquestions.html>.

⁹³ Edward D. Murphy, *Trump Takes 1 of Maine’s 4 Electoral Votes, in a First for the State*, PORTLAND PRESS HERALD (Nov. 8, 2016), <https://www.pressherald.com/2016/11/08/mainers-take-matters-into-their-own-hands-after-bitter-presidential-campaign/>.

less-preferred candidate.⁹⁴ Advocates for RCV argued that preferential voting would free Maine voters from this bind and allow them to vote their consciences instead.⁹⁵ Noting that the Republican–Democratic party duopoly that had once had the moderating effect of consolidating public opinion into two electoral options no longer controlled the independent-minded Maine electorate, some supporters of Question 5 praised the potential for RCV to lead to the election of consensus-minded candidates, as candidates would theoretically strive to appeal to the broadest possible coalition of interests in order to obtain both first-round and later-round votes.⁹⁶

Opponents saw less to be enthusiastic about in Question 5. Those opposed to RCV argued that the purported benefits of adopting a preferential voting system were unlikely to materialize.⁹⁷ One opponent argued that the prospect of ballot exhaustion—the phenomenon in which voters “undervote” by ranking only some of the candidates and thus exhaust their ballot when all of their chosen candidates are eliminated—negated the majoritarian arguments in RCV’s favor, citing the rates of ballot exhaustion in municipalities that had already implemented RCV for local elections.⁹⁸ Opponents also cast doubt on the proposition that RCV would result in consensus building. To the contrary, they argued, RCV could have a negligible effect on political polarization as similarly disposed parties on one side of the spectrum would simply coalesce against parties on the other side.⁹⁹

Once ballots were counted, Maine voters made history twice in the 2016 election. First, Maine split its electoral votes between two presidential candidates for the first time since the state adopted a district-based electoral vote allocation system in 1972, delivering Donald Trump one electoral vote from the state’s second congressional district.¹⁰⁰ Second, supporters of Question 5 prevailed with 52% of the vote and Maine became poised to adopt RCV for state-level elections.¹⁰¹ The ensuing legal battle, however, ensured that Maine’s path to implementing preferential voting would be far more complicated than simply following the 2016 up-or-down vote in its favor.

⁹⁴ Editorial, *Our Opinion: Support Question 5 to Bring Back Consensus Politics*, PORTLAND PRESS HERALD (Oct. 16, 2016), <https://www.centralmaine.com/2016/10/16/our-opinion-support-question-5-to-bring-back-consensus-politics/>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Simon Waxman, *Ranked-Choice Voting Is Not the Solution*, DEMOCRACY (Nov. 3, 2016, 3:03 PM), <https://democracyjournal.org/arguments/ranked-choice-voting-is-not-the-solution/>.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Murphy, *supra* note 93.

¹⁰¹ *Question 5 Results*, *supra* note 6.

B. Legislative and Judicial Roadblocks

One of the central arguments advanced by opponents of RCV in Maine was that the system would violate the Maine constitution.¹⁰² State Senator Heather Sirocki, a vocal opponent of preferential voting, cited a letter from the state attorney general that suggested that RCV would face constitutional obstacles if voters were to vote in favor of Question 5.¹⁰³ Then–Attorney General Janet T. Mills highlighted the use of the word “plurality” in the context of declaring victors in elections in more than one clause of the state constitution.¹⁰⁴ Specifically, the state constitution instructs the Governor to examine the municipally tabulated vote totals for elections to the state house of representatives and “issue a summons to such persons as shall appear to have been elected by a plurality of all votes returned.”¹⁰⁵ Provisions governing the election of individuals to the state senate are worded similarly to those controlling elections to the state house, deploying the word “plurality” to describe the requirements for victory.¹⁰⁶ The state constitution further describes the requirement for discerning victorious candidates in gubernatorial elections, instructing that “votes shall be received, sorted, counted and declared and recorded, in the same manner as those for Senators and Representatives”¹⁰⁷ and that a gubernatorial election winner should be declared “in case of a choice by plurality of all the votes returned.”¹⁰⁸

The Maine Senate found these issues troubling enough that it decided to seek an official disposition on the matter. The Senate voted three months after the passage of Question 5 to request that the state supreme court decide on the constitutionality of RCV before its ultimate implementation in 2018, a maneuver

¹⁰² Heather Sirocki, *Ranked Choice Voting: Wrong for Maine & Blatantly Unconstitutional*, ME. WIRE (Mar. 29, 2016), <http://www.themainewire.com/2016/03/ranked-choice-voting-wrong-maine-blatantly-unconstitutional/>.

¹⁰³ *Id.* (citing Letter from Attorney Gen. Janet T. Mills, Me., to President Michael D. Thibodeau, Me. Senate (Mar. 4, 2016), <https://www.maine.gov/ag/about/opinions/AG%20Opinion%20RCV%20March%204%202016.pdf>).

¹⁰⁴ Letter from Attorney Gen. Janet T. Mills, Me., to President Michael D. Thibodeau, Me. Senate (Mar. 4, 2016), <https://www.maine.gov/ag/about/opinions/AG%20Opinion%20RCV%20March%204%202016.pdf>.

¹⁰⁵ ME. CONST. art. IV, pt. 1, § 5.

¹⁰⁶ *Id.* pt. 2, §§ 3–5.

¹⁰⁷ *Id.* art. V, pt. 1, § 3.

¹⁰⁸ *Id.*

constitutionally employed only for “solemn occasions.”¹⁰⁹ While some senators were unclear on the actual solemnity of the occasion, both pro- and anti-Question 5 senators voted in support of the request in order to resolve the matter with some finality.¹¹⁰

The Maine Supreme Judicial Court heard oral arguments on the questions posed by the state senate and issued a unanimous opinion against the constitutionality of RCV on May 23, 2017.¹¹¹ Finding first that it was authorized to answer the Senate’s request for an opinion on RCV given the seriousness of the prospect of electing candidates under an unconstitutional system,¹¹² the court ruled that a preferential voting system, as described by the referendum question, would be unconstitutional because any system in which voting would be conducted in rounds could violate the plurality requirement described in the state constitution.¹¹³ The court reasoned that a scenario in which one candidate receives a plurality of the vote in the first round but loses after second-preference votes are redistributed in the second round would plainly run afoul of the state constitution’s requirement that candidates with a plurality of the vote be declared winners in their respective elections.¹¹⁴

Maine legislators then grappled with the burden of balancing voters’ express support for an RCV system and the evident constitutional hurdles to implementing their wishes. Failing both to repeal the new law and to pass a constitutional amendment, the legislature endorsed in a special session a bill that would postpone the implementation of RCV indefinitely without a voter-approved constitutional amendment before 2021. Those in favor of RCV responded by filing the requisite number of signatures to put forward a “people’s veto,” a process in which the electorate may overturn an act of the legislature by popular referendum, in this case held concurrently with the subsequent primary election on June 12, 2018.

With the delay bill submitted for voters’ approval, the question turned to the method of voting Maine would use in its primary election. The state supreme court held in a narrow ruling that the secretary of state was obligated to follow the law as it stood and ordered the implementation of RCV for the primaries, which were not subject to the court’s prior advisory opinion on the constitutionality of RCV in a state general election. With the use of RCV

¹⁰⁹ Scott Thistle, *Maine Senate Asks for Court Opinion on Ranked-Choice Voting*, PORTLAND PRESS HERALD (Feb. 2, 2017), <https://www.pressherald.com/2017/02/02/senate-debates-whether-to-ask-for-court-opinion-on-ranked-choice-voting/>.

¹¹⁰ *Id.*

¹¹¹ *In re Op. of the Justices of the Supreme Judicial Court Given Under the Provisions of Article VI, Section 3 of the Me. Constitution*, 162 A.3d 188 (Me. 2017).

¹¹² *Id.* at 208.

¹¹³ *Id.* at 211.

¹¹⁴ *Id.*

confirmed, voters would get the opportunity to vote again on RCV not as a theoretical matter, but as the method of voting they actually use.

The results of the people's-veto referendum would suggest that Maine voters liked what they saw on their primary ballots. Supporters of RCV grew their majority to 55% in their victorious campaign to veto the legislature's delay bill. With RCV protected from legislative shenanigans and restricted to constitutionally permissible offices through the general election, the stage was set for RCV's first general-election test.

C. Implementation

The first high-profile election in Maine to be subjected to the rigors of RCV was the 2018 election for the state's second congressional district.¹¹⁵ In this race that captured national attention, the two-term incumbent Republican Bruce Poliquin faced a challenge not only from Democratic state representative Jared Golden, but also from two independent candidates, Will Hoar and Tiffany Bond.¹¹⁶ The expansive, rural blue-state district was notable for splitting Maine's electoral votes in 2016 for the first time ever, giving one of Maine's four electoral votes to Donald Trump.¹¹⁷ Observers noted during the campaign that the new RCV system in use in Maine would be likely to have an effect on the outcome of the election, given the number of candidates and the district's recent support for Democratic congressional representation.¹¹⁸

The initial outcome of the election in the second congressional district was indeed that no candidate received a majority of the vote, triggering an RCV-mediated second round of vote tabulation.¹¹⁹ Poliquin received a plurality with 46.4% of the first-round votes, but the difference between Poliquin's share and Golden's 45.5% share was close enough that the election would be decided by the second-preference votes of the approximately 8% of voters who chose one of the two independent candidates on their first ballot.¹²⁰ With the two

¹¹⁵ Colin Woodard, *Maine's Pioneering Ranked-Choice Election Likely to Catch on Nationally*, PORTLAND PRESS HERALD (Nov. 18, 2018), <https://www.pressherald.com/2018/11/18/maines-pioneering-ranked-choice-election-likely-to-catch-on-nationally/>.

¹¹⁶ Steve Collins, *Nation's Eyes on Maine's 2nd District*, PORTLAND PRESS HERALD (Oct. 7, 2018), <https://www.pressherald.com/2018/10/07/maines-2nd-district-race-among-the-liveliest-in-the-nation/>.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Woodard, *supra* note 115.

¹²⁰ See Michael Shepherd, *Golden Defeats Poliquin in Contested 2nd District Ranked-Choice Count*, BANGOR DAILY NEWS (Nov. 15, 2018, 12:31 PM), <https://bangordailynews.com/2018/11/15/politics/golden-defeats-poliquin-in-contested-2nd-district-ranked-choice-count/>.

independents mathematically eliminated from contention, their second-round votes were redistributed at once, breaking overwhelmingly for Golden.¹²¹ Those votes pushed Golden above the majority threshold, resulting in his victory and the incumbent Poliquin's defeat.¹²²

Poliquin had filed a last-ditch legal challenge to the RCV law prior to the final vote count, but after the second-round votes handed the election to Golden, the incumbent congressman amended his complaint and requested that the court order either that only the first-round votes be counted or that a do-over election be scheduled.¹²³ The U.S. District Court for the District of Maine rejected Poliquin's arguments that RCV was too confusing for voters and that the system disenfranchised voters who declined to rank all the listed candidates, holding that the courts are in no position to second-guess Maine's decisions regarding its voting methods.¹²⁴ Despite assurances from Poliquin's attorney that the ruling would be appealed to the fullest extent,¹²⁵ Poliquin tweeted his concession of the entire matter that Christmas Eve.¹²⁶ Further litigation would not prevent the successful implementation of RCV in its Maine debut.

Maine's second district was as close to an ideal testing ground for RCV as a state could muster. Although the district had a long history of retaining incumbents so long as they opted for re-election,¹²⁷ the district leans only slightly toward Republicans and the 2018 midterm elections were expected to favor Democratic candidates nationwide. Maine is also one of the few states where independent and third-party candidates, including one of the state's U.S. Senators, routinely run competitive and occasionally successful campaigns.¹²⁸ Being a method of conducting elections that protects third-party candidates from the spoiler effect, RCV would be expected to present independent-minded voters with a particularly risk-free opportunity to vote for a candidate from outside the two major parties. Given the marginality of the district, such defections would be more likely (a) to affect the outcome of the election and (b) to be ordinarily subject to greater-than-usual pressure to ignore options outside the two major parties.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Kate Taylor, *Maine Republican Drops Challenge to State's New Vote System, Conceding House Race*, N.Y. TIMES (Dec. 24, 2018), <https://www.nytimes.com/2018/12/24/us/maine-republican-poliquin-concede.html>.

¹²⁴ *Baber v. Dunlap*, 349 F. Supp. 3d 68, 80 (D. Me. 2018).

¹²⁵ *Id.*

¹²⁶ Taylor, *supra* note 123.

¹²⁷ Kate Taylor & Liam Stack, *Maine's Bruce Poliquin, Lone Republican in House From New England, Loses Re-Election*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/politics/poliquin-maine-loses.html>.

¹²⁸ Alex Isenstadt, *A Declaration of Independents in 2010*, POLITICO (Sept. 27, 2009, 7:10 PM), <https://www.politico.com/story/2009/09/a-declaration-of-independents-in-2010-027634>.

If the purpose of RCV is to neutralize the spoiler effect in multi-candidate elections, then the example set by Maine's second district served its purpose perfectly. After the initial round of voting, Republican Poliquin got the most votes but failed to secure a majority. After the elimination of the two independent candidates, their transfer votes pushed the Democrat Golden to a majority. The votes for the independent candidates materially affected the outcome of the race, demonstrating that the spoiler effect created by FPTP distorted the preference of the electorate at-large. The outcome may not have been to Poliquin's advantage, but RCV succeeded on its own terms by correcting for the inability of FPTP to produce a just result when more than two candidates participate.

IV. ANALYSIS: WHY RANKED CHOICE, AND WHY WEST VIRGINIA

A. *Democracy Demands Ranked Choice*

The long-term trend of popular movements and societal adaptation to changing economic conditions has been toward the democratization of American political institutions. The structures instituted by the Constitution were intended to insulate the higher echelons of government from popular opinion so that the republican character of the state could be protected from the threat of democracy, the founding generation's particular *bête noire*. Successive generations repudiated this intention. With the exception of the Jim Crow voter-suppression measures passed at the turn of the century for the purpose of establishing explicitly antidemocratic apartheid states throughout the South, partisan gerrymandering intended to game geography in favor of one party over another, and late measures in statehouses to erect bureaucratic barriers to the exercise of the right to vote, the overwhelming historical trend has pointed toward empowering the widest possible electorate to exert the most power possible in directing government action.¹²⁹

The popular project of the last two centuries has been to force the Constitution—and liberalism in a more general sense—to live up to its promises. The promotion of democratic control over government has been a key component of this effort because the experience of an antimonarchical war for independence, the peopling of the frontier shortly after the war, and the Constitution's own language all point inexorably toward democratic government mediated through republican institutions.

The ordinary people of the United States shared neither the elite education nor the upper-class status of the revolution's political leadership and would thus have understandably considered their war against the British to be a

¹²⁹ See generally TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018).

war against distant, unrepresentative, and unresponsive political institutions that could not reasonably be replaced with a government intentionally insulated from the people. Thus, a tradition of independence and self-government was born, even if it would not be instantiated in the actual structure and operation of the state for generations to come. Popular politics took over quickly enough, however, as Andrew Jackson's "Democracy" overturned the party system that dominated the first decades of the country's history.¹³⁰

The dominance of the frontier in the self-image of Americans was crucial as well in the development of the self-government ethos that informs this democratic tradition. The first states to decline to impose serious restrictions on the franchise for lack of property were the first two new states admitted into the Union: Kentucky and Vermont.¹³¹ What those states shared in common is that they were overwhelming rural, largely unsettled, and existed at the peripheries of the United States where the influence of central government and institutions of higher learning would be felt the least. The fact of these settlers' lives is that they governed themselves without deference to their supposed betters. The democratic easing of access to the franchise was not just a matter of ideology but a matter of practicality as well. These states and later territories needed migrants to come and push the frontier further west, and the ability to vote was attractive to many men without property who would not have been able to vote in the eastern states. The implementation of strategic suffrage would later be repeated in the Wyoming Territory in the passage of women's suffrage for the purpose of attracting female settlers in the overwhelmingly male territory.

Lastly, the Constitution famously opens with the invocation of "We the People."¹³² These words inaugurated a national self-conception for the United States as a country not governed by a royal family or an aristocratic caste but by the people residing within its borders. If the farmers, fur trappers, and enslaved people were not literally in the room where the details of the document were debated and hammered out, the Constitution's drafters appeared by their words to be speaking on their behalf. In the world of the late eighteenth century, it was no small thing to identify the sovereignty of the country in its people rather than a particular bloodline. While it is true that the framers of the Constitution sought to create a government immune to undue popular pressure, the endeavors nonetheless produced a founding document in which those farmers, fur trappers, and enslaved people would see their own reflections. The virus of democracy was encoded into the language of the Constitution and needed only to see the document enacted for its release and dispersal throughout the body politic. The

¹³⁰ See HOFSTADTER, *supra* note 23, at 67.

¹³¹ See Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219, 232 (2013).

¹³² U.S. CONST. pmb.

Constitution offered the people a participatory inch, and the people naturally took a mile.

None of this to suggest that democracy is a favorable form of government simply because it is the one that the United States has inherited after more than two centuries of struggle and progress. These facts of American history serve only to confirm that democracy has and almost certainly will continue to be the way that Americans understand their relationship to government. Democracy's pressure on the governance of the United States comes not out of left field but from below, from the masses of people who comprise the electorate on whose instructions the state purports to act. It is not therefore an imposition of some un-American, alien view of the way government is supposed to function to suggest that elected public officials ought to serve at the permission of the majority.

The key reform embodied in RCV speaks not simply to democracy but to one of its central propositions: majority rule. Of all the modes of decision-making tried and theorized over centuries of human civilization, it would be a difficult task to uncover one that balances the interests of fairness to all people with the necessity of practicality than democracy by majority rule. The arguments for majoritarianism are threefold: (1) that the sovereign on whose behalf state action occurs ought to decide what that state action should be; (2) that the people at-large are the legitimate sovereign of a given jurisdiction, not some smaller privileged class; and (3) that to reject something is as expressive an act as to endorse.

The first argument is virtually a tautological expression of sovereignty; it is as true under an autocratic monarchy as it is in a democratic republic. When the state acts, it acts in the name of someone or of something. And while it may be theoretically true that this would undergird any state expression of democracy, the reality is that the people at-large fit this role more naturally than any individual person or privileged subset of the populace. It satisfies theoretical rigor to say that the sovereignty of France lay in its king and that the actions of the French state were conducted in the name of the king, but France did not die alongside its king. The French people continued speaking the French language, reproducing French culture, and understanding themselves as French persons. In reality, when an action is brought on a country's behalf, it is brought on behalf of a people without whom the country would not be.

The second argument asserts that the sovereignty of a state should capture the widest possible swath of people in the interest of fairness and security. Opponents of this notion might argue that the accidents of birth naturally create a class of people preordained for leadership. They would, however be wrong to make such an argument. The accidents of birth are just that: accidents. Nobody has the opportunity to choose the talents they will receive naturally from birth, and likewise nobody chooses the station, class, race, or sex into which they are born. The aristocrat need understand as easily as he was born into wealth, he could have just as easily been born into slavery. From that

perspective, it is easy to understand that one's station in life is often accepted but rarely obtained by request, and that in order to account for the unfairness in the randomness of birth the nobleman should not be privileged in his speech above the common man. And as for security, the dilution of sovereignty into the masses is a necessary bulwark against a tyrant who would imagine himself the human embodiment of state sovereignty.

Thirdly, with the sovereignty of the people and the fairness of democratic equality established, the democratic superiority of majority rule over plurality rule follows logically. The conduct of democracy occurs in the act of collective decision making, most efficiently through the practice of voting. A vote records the opinion of the electorate on a particular issue, and because the overwhelming size of the United States necessitates that deliberation occur through chosen representatives, the particular issue in question is more often about the selection of decision makers rather than resolving the substantive decision itself. It is at this point that practical complications have frustrated the full expression of democracy, but RCV fairly easily resolves the problem.

In a referendum on a particular question in which the options are binary—yes or no—its acceptance and rejection are encoded automatically into the options. Acceptance of one entails rejection of the other. The matter of representation complicates this because by selecting one candidate out of many, the voter is incapable of expressing their opinions on all the available options. My vote for Candidate A at the expense of Candidate B and Candidate C cannot signal that I actually quite liked Candidate C but hated Candidate B. The voter appears simply to reject all but the selected candidate. A system that fails to express the nuance of opinion in such cases fails to take into account the full legitimacy of rejection as an opinion. In a three-way contest, the victor might fall short of a majority and still win, and without RCV, there is no way to reckon with the fact that a majority of the electorate in such a case did express a judgment on the contest: that the victor was not the majority's first choice. Without reckoning with the semiotic nuance of a non-vote, representative democracy cannot operate according to the will of the majority.

An opponent of the majority-rule principle might argue that majority rule inevitably resolves into tyranny, risking the permanent oppression of the minority by a well-disciplined majority. That person might argue that one need only look to the Jim Crow South to know the terror a majority can enact on a disempowered minority. This objection is not without legitimate concern, but it misapprehends both the political dynamics of the Jim Crow South and the ability of a legitimate democracy to self-immolate in the scenario described.

For one, the Jim Crow state governments of the South represented not the danger of a democracy gone awry but the disaster that grows inevitable when democracy is invalidated by an entrenched ruling class. The Jim Crow governments established apartheid states through campaigns of racist terrorism; accordingly, they represented not majority rule by a monolithic white class but minority rule by a propertied elite committed to the suppression of democratic

power through racist demagoguery. Blacks were prevented from meaningful participation by force, and whites outside the ruling caste were prevented from meaningful participation by elite design: to abolish democracy rather than rely on an impoverished white underclass to sustain some racist imitation thereof.

Further, the exclusion of certain groups from *the people* frustrates democracy's bedrock principle of equality. The partisans for Jacksonian Democracy understood that an egalitarian ethos had something to do with the establishment and survival of a democracy, even if their racist myopia prevented them from seeing the glaring contradiction between egalitarianism and the slave society that thrived in antebellum America. Democracy entails certain concomitant principles that, if violated, would invalidate the democratic legitimacy of the body in question. Accordingly, Americans might have believed that they were establishing and maintaining a democracy over the first century and a half of the country's history, but we know now—and those excluded on account of race, sex, or class knew then—that it was incomplete. The failures are incurable through democracy's rollback. Only deeper democratization and further enfranchisement can fix the deep contradictions in the practice of democracy.

The case for RCV, accordingly, rests on the necessity of majority rule to the functioning of a democratic society. It brings meaning and thrust to an electorate decision to *reject* a particular option by requiring a majority for a candidate to declare victory. To be chosen first by more than any other candidate but to have been rejected by the majority would no longer pass democratic muster. The first-round rejection of a candidate would function as a retrospectively oriented demand that the candidate make herself as appealing as possible to most of the electorate and not hide away in a loud minority electable through a flaw in the system.

RCV's advantage over FPTP is chiefly in the principle it advances, which would align the electoral infrastructure of the United States with the country's historical drive toward more democratic and majoritarian institutions since the nineteenth century. FPTP in combination with the two-party system does tend to produce majoritarian results, but RCV would preserve the majoritarian impulse while allowing for nonpartisan contests and proliferation smaller parties that would otherwise be harmed by the "spoiler effect" promoted by FPTP.

B. Ranked Choice Is Superior to Alternative Reforms

Opponents of RCV might argue that there are other ways to demand a majority of voters approve of a victorious candidate than to ask them to rank them on the ballot. They might point to those states that hold a second election in the event that no candidate wins a majority and invite the top two finishers to participate. While this technically achieves the theoretical demand for an elective

majority, those states that hold later-date runoff elections frustrate majority rule on more practical levels.

For one, runoff elections held at a later date suffer from depressed turnout. Voters unfamiliar with the practice might not know at all that another election would have to occur. Voters might also decide not to participate in the runoff election because their preferred candidate finished outside the top-two. At any rate, runoff elections happen with smaller electorates that are necessarily less representative of the pool of eligible voters, not only absolutely, but even just in comparison with the initial election. If one wants voters to express their full opinions on all the candidates, it is best to have them do so all at once. Because the RCV system asks less from the voter logistically, it could help fight the significant turnout dips experienced in typical runoff elections.¹³³

The second issue with the later-runoff solution is that in a massive multi-candidate election, the practice of selecting the top two could ignore the dominant trends within the electorate. For instance, in California, the top two primary-election vote-getters regardless of party advance to the general election. In a system like that, a district that would primarily vote Democrat could wind up with two Republicans to choose from in the general election. Such an outcome could easily result from a candidate field in which there are two Republicans but maybe four Democrats. If the two Republicans split the conservative minority evenly, their vote totals would outweigh any individual vote total among an evenly split Democratic electorate. Such a system would only perpetuate the bullying and hectoring already endemic to the FPTP system, in which candidates are harassed into nonparticipation out of fear that their candidacy might swing the election in favor of their least-favored candidate.

C. Ranked Choice and West Virginia

RCV would serve West Virginia's electorate beyond its ordinary advantages both by encouraging voters in the geographically diverse state to vote for candidates outside their home region and by permitting nonpartisan judicial elections to be conducted fairly.

As mentioned earlier, West Virginia's elections can often be influenced by voters' intense identification with their home regions. West Virginia's geography varies significantly, from the Metro D.C. farmlands and bedroom communities of the Eastern Panhandle to the rugged southern coalfields. As a result, candidates can feel compelled to pander to the pride of one region over another.

RCV would work to mitigate the effect of regional bias in deciding elections. Under an RCV system, candidates would not just be campaigning for

¹³³ John Marek, Opinion, *Making the Case for Instant Runoff Voting*, MEMPHIS FLYER (Nov. 30, 2017), <https://www.memphisflyer.com/memphis/making-the-case-for-instant-runoff-voting/Content?oid=9865239>.

voters' first-place votes, but their second-place votes as well. For that reason, a candidate for the second congressional district from the Eastern Panhandle would have to find some way to appeal to voters in the Kanawha Valley rather than rely on the regional bias of their local supporters. On the flipside, voters would be pushed to expand their horizons beyond their home regions as well and cast their secondary votes to candidates from other parts of the state. As West Virginia faces the prospect of losing one of its three congressional districts,¹³⁴ its remaining districts will only become more geographically diverse, further heightening the need for RCV.

If West Virginia wants to conduct its highest judicial elections under the reasonable premise of nonpartisanship, it is crucial that RCV be used to facilitate these elections. West Virginia elects justices to its state supreme court for 12-year terms and holds these elections as statewide nonpartisan contests concurrent with its primaries. A nonpartisan election—in which the number of potential candidates is unlimited—put before a primary electorate is a recipe for failing to obtain democratic legitimacy. And thus far this has proven true: no justice elected under the nonpartisan system has won a majority of the vote. With three seats on the court on the primary ballot in 2020, this pattern is almost certain to repeat itself until the system is reformed.

V. CONCLUSION

The central case in favor of introducing RCV into West Virginia's electoral system addresses both a practical need and an undergirding philosophical need: too many of West Virginia's elections are resulting in plurality victors and this phenomenon runs counter to the United States' post-Civil War trend toward a more democratic electoral system. In joining Maine through the adoption of RCV, West Virginia could establish itself as an innovative leader in the latest reform seeking to democratize representative government.

The framers of the Constitution's deep suspicion of popular power meant that the establishment of democracy in America came not at the conclusion of the American War of Independence, but rather gradually through two intervening centuries of struggle and progress. The institution-dissolving violence of the Civil War—called by some historians “the Second American Revolution”—devastated the entrenched ruling class of the South and elevated to positions of civic leadership people who had been enslaved just years earlier. The war instilled new ideas of citizenship in the minds of Americans and inspired a greater sense of ownership over one's government among the common people

¹³⁴ Joselyn King, *Report: Population Decline Could Lead W. Va. to Lose Congressional Seat After 2020*, INTELLIGENCER (Wheeling, W. Va.) (Dec. 28, 2017), <http://www.theintelligencer.net/news/top-headlines/2017/12/report%E2%80%88population-decline-could-lead-w-va-to-lose-congressional-seat-after-2020/>.

of the country. At the beginning of the twentieth century, reformers reignited this spirit of democratic entitlement by extending the franchise to women, instituting primary elections, and amending the Constitution to provide for the direct election of U.S. senators. In the wake of the midcentury Civil Rights Movement, democracy was restored in the Southern states that had operated under apartheid governments ever since Black Americans were terrorized into forced disenfranchisement following the end of Reconstruction. While the Founders' generation might have sought to keep government in the hands of an educated elite, the predominant trend of the years since has been to expand the influence of regular people on the affairs of state. In adopting RCV, West Virginia would continue that trend.

RCV furthers democracy because it privileges majorities over pluralities. The harm associated with plurality victors lies in the inherent unpopularity of the winner: plurality winners have, by definition, been rejected for a different candidate by the majority of voters. In many cases, the two may be the same; there will be no reason to object when a first-round plurality winner becomes a second-round majority winner in an RCV scenario. What makes the difference is that RCV permits voters to express their most unencumbered preference in selecting their representatives, without the latent limitations imposed by the spoiler effect. Elections in which voters are forced to strategize rather than vote their consciences promote gamesmanship over self-government. Dysfunction results from legislatures populated by accidental representatives. In the interest of democracy and toward the goal of electing governments that fully reflect voters' preferences, West Virginia must adopt RCV for its elections.

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