

Fordham Law Voting Rights and Democracy Forum

Volume 1 | Issue 3

May 2023

Third Parties and the Electoral College: How Ranked Choice Voting Can Stop the Third-Party Disruptor Effect

Hillary Bendert

Fordham University School of Law

Jacqueline Hayes

Fordham University School of Law

Kevin Ruane

Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/vrdf>



Part of the [Civil Rights and Discrimination Commons](#), [Election Law Commons](#), [President/Executive Department Commons](#), [Rule of Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Hillary Bendert, Jacqueline Hayes & Kevin Ruane, *Third Parties and the Electoral College: How Ranked Choice Voting Can Stop the Third-Party Disruptor Effect*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 332 (2023).

Available at: <https://ir.lawnet.fordham.edu/vrdf/vol1/iss3/6>

This Report is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Voting Rights and Democracy Forum by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

REPORT

THIRD PARTIES AND THE ELECTORAL COLLEGE: HOW RANKED CHOICE VOTING CAN STOP THE THIRD-PARTY DISRUPTOR EFFECT

*Fordham University School of Law
Rule of Law Clinic**

*Hillary Bendert,** Jacqueline Hayes*** & Kevin Ruane*****

EXECUTIVE SUMMARY OF RECOMMENDATIONS

The Rule of Law Clinic recommends the following reforms to prevent third-party candidates from having a disruptor effect in presidential elections, in particular, by changing electoral outcomes through siphoning votes from major party candidates:

1. Eliminating the “Winner-Take-All” system for allocating electoral votes in the states:
 - The Winner-Take-All system is used in forty-eight states and the District of Columbia. Under this system, states assign all their electoral votes to the plurality vote winner in their states.
 - This system, however, holds inherent risks that third-party candidates could have a disrupting effect on the outcome of an election. As a result of these risks, voters may be discouraged from voting for third-party candidates and third-party candidates may decline to run. These impacts are undemocratic.

* This Report was researched and written by students in Fordham University School of Law’s Rule of Law Clinic under the supervision of Dean Emeritus John D. Feerick and Professor John G. Rogan during the Fall 2022 semester. The Clinic gratefully acknowledges the following individuals for sharing their knowledge and expertise during this Report’s development: Robert Bauer, Nicole A. Gordon, David Hopkins, the Honorable Marcy L. Kahn, Jesse Wegman, and Richard Winger.

** J.D. Candidate, 2023, Fordham University School of Law; B.S., 2019, Vanderbilt University.

*** J.D. Candidate, 2023, Fordham University School of Law; B.A., 2018, Emory University.

**** J.D. Candidate, 2023, Fordham University School of Law; B.A., 2020, Boston College.

2. Implementing Ranked Choice Voting in the states:
 - Ranked Choice Voting eliminates disruptor effects by allowing voters who wish to vote for a third-party candidate to do so, while also ranking other candidates in case their most-preferred candidate does not receive enough votes to win.
 - Ranked Choice Voting makes it significantly more likely that the candidate preferred by the most voters would win a presidential election.
 - States have the constitutional authority to implement Ranked Choice Voting and they can implement it without affecting their relative clout in the Electoral College because they would still assign all of their electoral votes to a single candidate.
 - Ranked Choice Voting can lead to more civil campaigning and help fight against hyperpartisan politics.

3. Supporting measures implementing Ranked Choice Voting:
 - States should not require voters to rank each candidate on the ballot due to potential consternation and the non-mandatory nature of voting in the United States.
 - States should aim to announce election results as soon as feasibly possible, instead of announcing the results of each round of tabulations over the course of days or weeks.
 - States should take advantage of current federal election grants to implement Ranked Choice Voting.
 - The federal government should pass legislation that would create grants for states that choose to implement Ranked Choice Voting.

EXECUTIVE SUMMARY OF RECOMMENDATIONS332

INTRODUCTION334

I. THIRD-PARTY CANDIDATES IN PAST ELECTIONS HIGHLIGHT THE DISRUPTOR EFFECT.....336

II. STATE-LEVEL AUTHORITY AND THE RISKS ASSOCIATED WITH WINNER-TAKE-ALL SYSTEMS340

III. ALTERNATIVES TO RANKED CHOICE VOTING HAVE SIGNIFICANT DRAWBACKS.....341

A. *Alternative 1: Traditional Proportional Allocation*.....342

1. Mathematical Issues 342

2. Collective Action Problem 343

3. Contingent Elections Are More Likely 344

4. Conditional Winner-Take-All 344

<i>B. Alternative 2: The District System</i>	345
<i>C. Alternative 3: Approval Voting</i>	347
<i>D. Alternative 4: Runoffs</i>	347
<i>E. Alternative 5: National Popular Vote</i>	348
IV. RANKED CHOICE VOTING IS THE BEST METHOD TO PREVENT ELECTION DISRUPTIONS AND ELIMINATE THE “COSTS” OF VOTING FOR THIRD PARTIES	349
<i>A. How Ranked Choice Voting Works</i>	349
<i>B. Ranked Choice Voting Eliminates the Disruptor Effect</i>	350
<i>C. Ranked Choice Voting Works Well Within the “Winner-Take- All” System</i>	351
<i>D. Ranked Choice Voting Can Lead to More Civil Campaigning</i>	351
<i>E. Education Can Increase Public Understanding of Ranked Choice Voting</i>	352
<i>F. Vote Splitting with Three or More Popular Candidates Occurs in Similar Ways to “Winner-Take-All” Systems</i>	353
<i>G. Ranked Choice Voting Does Not Violate the One-Person, One-Vote Principle</i>	355
V. IMPLEMENTING RANKED CHOICE VOTING	356
CONCLUSION.....	358

INTRODUCTION

Although third-party presidential candidates have never come close to winning an election, they have affected history. The 1912 and 2000 presidential elections provide notable examples of this impact. Without Ralph Nader’s third-party candidacy in 2000, the Iraq War arguably may not have occurred.¹ Most of the 97,421 votes Nader captured in the pivotal state of Florida would have gone to Democratic candidate Al Gore—more than enough to close the 537-vote deficit that cost Gore the presidency.² A century earlier, Theodore Roosevelt’s Progressive Party candidacy may have given

¹ While no one can be completely sure, of course, “that Gore would not have taken the United States into war in Iraq . . . there are reasons to believe that he would not have done so.” Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Election Mechanism*, 85 *FORDHAM L. REV.* 993, 1007 (2016).

² See *id.* at 1006 (“If only Al Gore and George W. Bush had been on the ballot, then Gore would have won Florida and, with it, an Electoral College majority.”).

Woodrow Wilson the presidency,³ and in effect, delayed the American entry into World War I by several years.⁴

Current dissatisfaction with politics and the two major parties will probably inspire more third-party candidacies.⁵ Nearly half of Americans identify as independent, rather than Republican or Democratic.⁶ While third-party candidates give voters different options, many voters might be reluctant to support them.⁷ As history demonstrates, casting a vote for a third-party candidate may, at best, result in a wasted vote, and, at worst, prevent the most popular candidate from winning.⁸ This “disruptor” effect stems from third-party candidates garnering a fraction of the vote that would otherwise go to major-party candidates. The Electoral College system is vulnerable to the third-party disruptor effect because every state—except for Maine and Nebraska—allocates their electoral votes to the candidate who wins a plurality of the statewide vote.⁹ Consequently, in states where the margins between candidates are close, relatively few votes for a third-party candidate might change the winner.¹⁰

It is difficult to assess whether third parties are viable solutions to voter dissatisfaction with the two major parties. But the current system is not particularly fair to third-party candidates and voters interested in supporting them.¹¹ Candidates should be able to

³ See *id.* at 1003 (describing Roosevelt’s candidacy as “[u]nquestionably, the most consequential third-party candidacy in the history of presidential elections.”).

⁴ Had the “election been confined to Roosevelt and Wilson,” for example, Roosevelt would have likely “secured an Electoral College majority.” *Id.* But in “sharp contrast” to Wilson’s “idealist” foreign policy agenda, Roosevelt was “advocating for entry into the war as early as 1914, whereas Wilson delayed entry into the war until 1917.” *Id.* at 1004.

⁵ See, e.g., Michael Scherer, *No Labels Group Raises Alarms with Third-Party Presidential Preparations*, WASH. POST (Apr. 2, 2023, 4:51 PM), <https://www.washingtonpost.com/politics/2023/04/02/no-labels-third-party-election/> [<https://perma.cc/R6VK-SCHV>].

⁶ See Rachel Kleinfeld et al., *Renewing U.S. Political Representation: Lessons from Europe and U.S. History*, CARNEGIE ENDOWMENT FOR INT’L PEACE 4 (2018), https://carnegieendowment.org/files/CP_326_Kleinfeld_Political_Parties_Interior_FINAL.pdf [<https://perma.cc/2JDM-TFEA>].

⁷ See Hanna Trudo & Amie Parnes, *Americans Are Unhappy with Politics. But a Third Party Faces An Uphill Battle*, THE HILL (Aug. 4, 2022, 5:15 AM), <https://thehill.com/homenews/campaign/3586996-americans-are-unhappy-with-politics-but-a-third-party-faces-an-uphill-battle> [<https://perma.cc/WV55-ZMP5>].

⁸ See Aliza Astrow, *The Dangerous Illusion of a Presidential Third Party in 2024*, THIRD WAY (Dec. 8, 2022), <https://www.thirdway.org/report/the-dangerous-illusion-of-a-presidential-third-party-in-2024> [<https://perma.cc/J3PV-AYDD>].

⁹ See *infra* notes 50–54 and accompanying text.

¹⁰ See Foley, *supra* note 1, at 993–96.

¹¹ See DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 663 (7th ed. 2022) (noting that our Nation’s election laws and overall electoral system “makes it very difficult for third party candidates to win

run, and citizens should be able to vote without worrying that they will swing the election to their least preferred candidate. To uphold democratic principles, the candidate preferred by the most voters should win.

This Report recommends that states implement Ranked Choice Voting (“RCV”) in presidential elections to stop the third-party disruptor effect. Under the RCV system, voters rank their preferences and the system identifies the candidate preferred by the most voters—sometimes after multiple tabulations.¹² RCV is a tried-and-true balloting method that encourages voter turnout and may even promote civility in campaigns.¹³ Indeed, RCV allows voters to safely support their third-party choice while ranking another candidate second, avoiding the possibility that a third-party candidate will siphon votes away from a major party candidate.

Part I provides a brief history of third parties in the United States and the presidential elections they have impacted. Next, Part II discusses the relevant constitutional and legal framework that states must work within to implement RCV. Part III then highlights several alternatives to RCV for preventing the third-party disruptor effect. This part also provides an in-depth analysis of these alternatives’ downsides—explaining why these are less viable options for reform.

Part IV provides background on how RCV works, and utilizes illustrative examples. Part IV then argues that RCV is the best mechanism for preventing the disruptor effect. Finally, acknowledging that each state has unique needs that may require tailored solutions, Part V provides broad recommendations for states to implement RCV in presidential elections.

I. THIRD-PARTY CANDIDATES IN PAST ELECTIONS HIGHLIGHT THE DISRUPTOR EFFECT

No third-party candidate has won a presidential election since the two-party system emerged after the Whig Party’s demise in the 1850s.¹⁴ In fact, only four third-party candidates have

legislative seats . . . [and that] the Electoral College works to the same effect” in presidential elections).

¹² See *id.* at 700 (“Under this system, voters rank the candidates in their order of preference. Each ballot’s top choice is then counted. If no candidate has a majority, the last-place candidate is removed and the top remaining choice on the ballots counted, with the process continuing until one of the candidates has a majority of votes.”).

¹³ RCV has “been adopted in at least 50 jurisdictions across the United States, including for statewide and federal elections in Maine and Alaska.” JIMMY BALSER, CONG. RSCH. SERV., LSB10837, RANKED-CHOICE VOTING: LEGAL CHALLENGES AND CONSIDERATIONS FOR CONGRESS 1 (2022).

¹⁴ See Julia Foodman, *A History of Third Party and Independent Presidential Candidates*, FAIRVOTE (July 16, 2019), https://fairvote.org/a_history_of_

received electoral votes since 1920.¹⁵ Despite their lack of success in presidential elections, third parties continue to run and receive support from voters. Still, there are several elections in recent and distant history where third parties have potentially changed the electoral outcome—and, in turn, the Nation’s trajectory.¹⁶

For example, in the 1844 election, two abolitionists, Henry Clay and James Birney, each with differing philosophies for ending slavery, split votes in the critical state of New York, allowing James K. Polk to win the presidency.¹⁷ If one of the abolitionists had won, slavery might have ended without the Civil War.¹⁸ Moreover, in 1860, the third-party candidate, Abraham Lincoln, won on the minority Republican ticket on an anti-slavery platform.¹⁹

In 1912, Teddy Roosevelt, a former Republican, challenged the incumbent Republican President William Howard Taft.²⁰ Roosevelt created the Progressive Party, but the Republican vote was still split, and Democratic nominee Woodrow Wilson won easily.²¹ If Roosevelt had won,²² he likely would have brought the United States into World War I much sooner than Wilson.²³ Additionally, Roosevelt’s views on foreign policy could have resulted in less harsh repercussions for Germany after World War I, potentially altering the course of the twentieth century.²⁴

The 1968 election featured one of the most successful third-party presidential candidacies in modern times. Alabama Governor

independent_presidential_candidates [https://perma.cc/S2YX-PLFE]; Phillip A. Wallach, *Prospects for Partisan Realignment: Lessons from the Demise of the Whigs*, BROOKINGS INST. (Mar. 6, 2017), https://www.brookings.edu/research/prospects-for-partisan-realignment-lessons-from-the-demise-of-the-whigs [https://perma.cc/PV9U-E7P9].

¹⁵ See Christopher Klein, *Here’s How Third-Party Candidates Have Changed Elections*, HIST. (Nov. 11, 2019), https://www.history.com/news/third-party-candidates-election-influence-facts [https://perma.cc/AC5H-93MR] (“Since 1920 . . . only four third-party candidates—Robert La Follette in 1924, Strom Thurmond in 1948, George Wallace in 1968 and John Hospers in 1972—have been able to win even a single electoral vote.”).

¹⁶ See, e.g., *supra* text accompanying notes 1–4.

¹⁷ See Lawrence Lessig, *What Is Rank Choice Voting? How Maine’s Voting System Can Lead the Way to a Stronger U.S. Democracy*, INT’L BUS. TIMES (June 16, 2019, 11:08 AM), https://www.ibtimes.com/what-rank-choice-voting-how-maines-voting-system-can-lead-way-stronger-us-democracy-2801019 [https://perma.cc/S78Q-794F].

¹⁸ See *id.*

¹⁹ See Kristina Nwazota, *Third Parties in the U.S. Political Process*, PBS (Sept. 20, 2021, 1:55 PM), https://www.pbs.org/newshour/politics/politics-july-dec04-third_parties [https://perma.cc/33MH-JPAL].

²⁰ See Foley, *supra* note 1, at 1003.

²¹ See *id.*

²² Notably, Roosevelt and Wilson were the two most popular candidates in the election of 1912. See *id.*

²³ See *id.* at 1004.

²⁴ See *id.*

George Wallace ran on a segregationist platform as a member of American Independent Party.²⁵ He won ten million popular votes and five Southern states.²⁶ But he fell short of his goal of preventing either of the two major party candidates—Republican Richard Nixon and Democrat Hubert Humphrey—from winning a majority of the electoral votes.²⁷ And the race’s outcome probably would have been the same without him. Still, Wallace illustrated third-party candidates’ disruptive potential—and provoked a major congressional effort to abolish the Electoral College.²⁸

In 1992, Texas billionaire Ross Perot garnered 18.9 percent of the national popular vote, prompting speculation that his candidacy may have caused incumbent George H.W. Bush’s loss to Bill Clinton.²⁹ Yet Perot could have pulled away just as many votes from Clinton as he did from Bush.³⁰ Another possibility is that many third-party voters may have abstained from voting had their preferred candidate not been running.³¹

The 2000 presidential election is widely regarded as one of the most contentious in American history, culminating in a Supreme Court decision.³² Green Party candidate Ralph Nader might have won critical votes in Florida, which otherwise would have gone to Democratic candidate Al Gore.³³ Those votes might have cost Gore the state of Florida and, with it, the presidency.³⁴ George W. Bush won the key state by fewer than 600 votes.³⁵ This razor-thin margin of victory has led many to speculate that third-party voters may have

²⁵ JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 149 (2020).

²⁶ *Id.*

²⁷ See John D. Feerick, *It’s Time to Rethink the Electoral College*, AM. MAG. (May 8, 2020), <https://www.americamagazine.org/politics-society/2020/05/08/its-time-rethink-electoral-college> [https://perma.cc/82N4-BNDG].

²⁸ See *id.*

²⁹ See Foley, *supra* note 1, at 1005 (“Many people believe that Ross Perot was responsible for George H.W. Bush losing his bid for reelection in 1992.”) (citing J. DAVID GILLESPIE, CHALLENGES TO DUOPOLY: WHY THIRD PARTIES MATTER IN AMERICAN TWO-PARTY POLITICS 8 (2012) (“Many Republicans blamed Perot for spoiling Bush’s 1992 reelection bid by siphoning away millions of votes.”)).

³⁰ See *id.* at 1006.

³¹ See generally Dean Lacy & Barry C. Burden, *The Vote Stealing and Turnout Effects of Ross Perot in the 1992 U.S. Presidential Election*, 43 AM. J. POL. SCI. 233 (1999).

³² See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

³³ See Foley, *supra* note 1, at 1006 (noting that Nader won 97,488 votes in Florida).

³⁴ One detailed analysis of Nader’s effect on the result in Florida concluded that he spoiled Gore’s victory because the 2000 presidential race in Florida was “so incredibly tight.” Michael C. Herron & Jeffrey B. Lewis, *Did Ralph Nader Spoil Al Gore’s Presidential Bid: A Ballot-Level Study of Green and Reform Party Voters in the 2000 Presidential Election*, 2 Q.J. POL. SCI. 205, 222 (2007).

³⁵ See Foley, *supra* note 1, at 1006.

played a decisive role in tipping the scales against Gore, effectively spoiling the election for him.³⁶

Voters have sometimes chosen a third-party candidate as an expression of their dissatisfaction with the major parties. In the 2016 election, for example, Libertarian Gary Johnson and Green Party candidate Jill Stein received significant support in key swing states. This support was, of course, aided by the fact that the two-major party candidates, Republican Donald Trump and Democrat Hillary Clinton, were possibly the two least favorably viewed presidential candidates in history.³⁷ This dissatisfaction led millions of Americans to register a “protest” vote by voting Johnson or Stein.³⁸ Ultimately, Trump won the Electoral College and the presidency, though Clinton won the national popular vote.³⁹ Stein and Johnson’s impact on the outcome is uncertain, but the totality of votes each received in the critical states of Pennsylvania, Michigan, and Wisconsin were larger than the margins between Clinton and Trump.⁴⁰

Prominent third-party candidates in recent elections have rejected claims that they played a “spoiler” role. For example, Stein attributes these allegations to the “politics of fear,” or the notion that “you have to vote against what you’re afraid of rather than for what you truly believe.”⁴¹ Similarly, Nader argues that “spoiler” is a “politically bigoted word . . . reserved for treating third-party candidates like second-class citizens.”⁴² To improve perceptions of

³⁶ See Herron & Lewis, *supra* note 34, at 222.

³⁷ See Lydia Saad, *Trump and Clinton Finish with Historically Poor Images*, GALLUP (Nov. 8, 2016), <https://news.gallup.com/poll/197231/trump-clinton-finish-historically-poor-images.aspx> [<https://perma.cc/TQK7-SMTX>] (“Trump’s 61% unfavorable score is worst in presidential polling history [and] Clinton’s 52% unfavorable score is second-worst”).

³⁸ Tina Nguyen, *Gary Johnson and Jill Stein Handed the Presidency to Donald Trump*, VANITY FAIR (Nov. 10, 2016), <https://www.vanityfair.com/news/2016/11/gary-johnson-jill-stein-election-2016> [<https://perma.cc/PV5N-B76B>].

³⁹ See *id.*

⁴⁰ In Pennsylvania, for example, Trump received 44,292 more votes than Clinton, while Johnson received 146,715 votes and Stein garnered 49,941 votes. In Michigan, Trump received 10,704 more votes than Clinton, while Johnson received 172,136 votes and Stein received 51,462. And in Wisconsin, Trump received 22,748 more votes than Clinton, with Johnson receiving 106,674 votes and Stein garnering 31,072 votes. See *2016 Presidential Election Results*, N.Y. TIMES (Aug. 9, 2017, 9:00 AM), <https://www.nytimes.com/elections/2016/results/president> [<https://perma.cc/UUG8-CNY6>].

⁴¹ Dana Milbank, *From Jill Stein, Disturbing Echoes of Ralph Nader*, WASH. POST (Aug. 23, 2016), https://www.washingtonpost.com/opinions/from-jill-stein-disturbing-echoes-of-ralph-nader/2016/08/23/513bc40a-696c-11e6-ba32-5a4bf5aad4fa_story.html [<https://perma.cc/NY4W-35ZR>].

⁴² Ralph Nader, *I Was Not a ‘Spoiler’ in 2000. Jill Stein Doesn’t Deserve That Insulting Label, Either*, WASH. POST (Sept. 2, 2016), <https://www.washingtonpost.com/opinions/ralph-nader-i-was-not-a-spoiler-in->

third-party candidates, states can enact reforms to prevent this disruptor effect.

II. STATE-LEVEL AUTHORITY AND THE RISKS ASSOCIATED WITH WINNER-TAKE-ALL SYSTEMS

The most prominent features of the United States' electoral system are state-run.⁴³ The United States Constitution recognizes the primary role that states maintain in administering federal elections.⁴⁴ Moreover, federal law provide states with a significant role in choosing electors.⁴⁵ Accordingly, states have the legal authority to implement voting reforms to prevent third-party candidates from having a disruptor effect on presidential elections.

The president and vice president are chosen by electors from each state, commonly known as the Electoral College.⁴⁶ Under the Constitution, each state has the power to appoint electors "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."⁴⁷ In addition, the District of Columbia is allocated three electors.⁴⁸ Thus, out of the total 538 electoral votes, a presidential candidate must win at least 270 to become president.⁴⁹

The Constitution allows state legislatures to determine how electors are appointed.⁵⁰ The method of appointment has many constitutionally acceptable variations.⁵¹ All states award their

2000-jill-stein-doesnt-deserve-that-insulting-label-either/2016/09/02/02df0e74-6fa3-11e6-993f-73c693a89820_story.html [https://perma.cc/PA2R-MENZ].

⁴³ See Jerry H. Goldfeder, *Excessive Judicialization, Extralegal Interventions, and Violent Insurrection: A Snapshot of our 59th Presidential Election*, 90 FORDHAM L. REV. 335, 338–43 (2021).

⁴⁴ See U.S. CONST. art. I, §§ 2, 4; *id.* art. II, § 1; *id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). See also Jerry H. Goldfeder, *Election Law and the Presidency*, 85 FORDHAM L. REV. 965, 967 (2016) ("[T]he Electoral College plan was envisioned to permit states to play the central role in choosing the nation's chief executive.").

⁴⁵ See, e.g., 3 U.S.C. § 2, amended by H.R. 2617, Consolidated Appropriations Act of 2023, Pub. L. No. 117-328, 136 Stat. 4459, Division P (to be codified at 3 U.S.C.).

⁴⁶ See U.S. CONST. art. II, §§ 1–3; *id.* amend. XII; *id.* amend. XXIII.

⁴⁷ *Id.* art. II, § 1, cl. 2.

⁴⁸ See *id.* amend. XXIII.

⁴⁹ Tim Lau, *The Electoral College, Explained*, BRENNAN CTR. FOR JUST. (Feb. 13, 2023), <https://www.brennancenter.org/our-work/research-reports/electoral-college-explained> [https://perma.cc/Y54G-5A59].

⁵⁰ U.S. CONST. art. II, § 1, cl. 2 ("Each State . . . in such Manner as the Legislature thereof may direct" electors).

⁵¹ See James W. Ceaser & Jamie Raskin, *Article II, Section I, Clauses 2 and 3*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-ii/clauses/350> [https://perma.cc/625L-6ZXE] (last visited Apr. 20, 2023).

electoral votes to candidates chosen by their state’s voters.⁵² Forty-eight states and the District of Columbia use a “Winner-Take-All” system, where the winner of the popular vote receives all of the electoral votes.⁵³ Maine and Nebraska allocate their votes using the District System: one elector is chosen for each of the states’ congressional districts and two electors are chosen based on the statewide popular vote.⁵⁴ Because state legislatures have control over how their electors are chosen and how electors’ votes are allocated, reforms for addressing third-parties’ impact on the Electoral College should be made at the state-level.

The current balloting system in most states is a “Winner-Take-All” single-choice voting system.⁵⁵ But this system retains an inherent risk: in a race with two major party candidates and one third-party candidate, the third-party candidate could have a disrupting effect.⁵⁶ This occurs when the third party candidate siphons off votes from an ideologically similar major party, resulting in the other major party candidate’s victory.⁵⁷ This disruptor effect can negatively impact both major party and third-party candidates. For example, voters wishing to vote for a third-party candidate may feel discouraged to do so for fear of wasting their vote.⁵⁸ Consequently, this phenomenon can make it challenging for third parties to gain support and legitimacy in the eyes of voters.⁵⁹

III. ALTERNATIVES TO RANKED CHOICE VOTING HAVE SIGNIFICANT DRAWBACKS

Before offering why RCV is the best policy to stop third-party disruptors in the Electoral College system, Part III analyzes alternative systems that might prevent the third-party disruptor effect. While Part IV ultimately recommends implementing RCV, some systems that proportionally allocate state electors have merit. Thus, Part III.A examines the Traditional Proportional Allocation and Conditional Proportional Allocation alternatives. Additionally,

⁵² See Lau, *supra* note 49.

⁵³ See *id.*

⁵⁴ See EDWARD FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE 131–32 (2020).

⁵⁵ See STEVEN KULL ET AL., AMERICANS ON RANKED CHOICE VOTING IN FEDERAL ELECTIONS: A NATIONAL SURVEY OF REGISTERED VOTERS, PROGRAM FOR PUBLIC CONSULTATION 2 (2022), https://publicconsultation.org/wp-content/uploads/2022/04/RCV_Report_0422.pdf [<https://perma.cc/RG2V-MYMH>].

⁵⁶ See *supra* text accompanying notes 5–9.

⁵⁷ See *id.*

⁵⁸ See Nwazota, *supra* note 19 (“Voters often worry that a vote for a third-party candidate is ‘wasted’ since he or she is unlikely to win.”); KULL ET AL., *supra* note 55, at 4.

⁵⁹ See KULL ET AL., *supra* note 55, at 4.

Part III analyzes other possibilities, including the District System, Approval Voting, and Runoffs. Lastly, Part III briefly analyzes eliminating the Electoral College in favor of a national popular vote.

A. Alternative 1: Traditional Proportional Allocation

Under the Traditional Proportional Allocation system, a state's Electoral College votes would reflect individual candidates' proportional shares of the popular vote.⁶⁰ For example, in a given state, if 45 percent of the popular vote went to Candidate A, approximately 45 percent of the state's Electoral College votes would go to Candidate A. If Candidate B received 50 percent of the popular vote, 50 percent of the state's Electoral College votes would go to Candidate B—and so forth.⁶¹

Nonetheless, the Traditional Proportional Allocation System comes with several challenges, each of which is discussed in turn.

1. Mathematical Issues

A Traditional Proportional Allocation system “would require some kind of rounding formula to handle the situation in which a candidate's share of the popular vote did not divide evenly into the state's number of electoral votes.”⁶² Whole numbers are, of course, required because it would be impossible for an elector to be a fraction. Thus, it is highly unlikely that states would have an easily divisible number of electoral votes proportional to the number of popular votes that each candidate receives.

Accordingly, other variations on proportional allocation—such as the Whole Number Proportional Method,⁶³ the Fractional

⁶⁰ See FOLEY, *supra* note 54, at 131–32.

⁶¹ See *id.*

⁶² See *id.*

⁶³ The Whole Number Proportional Method is likely the most straightforward solution to solve mathematical challenges under the Traditional Proportional Allocation system. Under this system, states would “enact laws dividing their electoral votes, in whole-number increments, based on each candidate's share of the state's popular vote.” *The Whole-Number Proportional Method of Awarding Electoral Votes*, NAT'L POPULAR VOTE 1 (2021), <https://www.nationalpopularvote.com/sites/default/files/memo-whole-number-proportional-v7-2021-5-1.pdf> [<https://perma.cc/39Z9-DJCC>] (last visited Apr. 20, 2023).

Proportional Method,⁶⁴ the Largest Remainder Method,⁶⁵ and a Combination with Ranked Choice Voting⁶⁶—are possible responses to these mathematical challenges.

2. Collective Action Problem

Even if the mathematical issues are solved, collective action problems stymie widespread adoption of Traditional Proportional Allocation because election systems must be changed at the state level.⁶⁷ Any state that chooses to use Traditional Proportional Allocation will have to “abandon” the Winner-Take-All single-choice voting system whereby all of a state’s Electoral College votes go to a single candidate.⁶⁸ By abandoning the Winner-Take-All system, states would diminish their “relative clout among other states” that continue to use the Winner-Take-All system.⁶⁹ State

⁶⁴ Under the Fractional Proportional Method, instead of simply rounding to the nearest whole number, “a state’s electoral votes would be divided proportionally according to the percentage of popular votes received in the state by each presidential candidate—with the *fractional calculation carried out to three decimal places*. . . . [But] [b]ecause the fractional proportional method would involve fractional elector votes, a federal constitutional amendment would be required.” *The Fractional Proportional (Lodge-Gossett) Method of Awarding Electoral Votes*, NAT’L POPULAR VOTE 1 (2021), <https://www.nationalpopularvote.com/sites/default/files/memo-fractional-proportional-lodge-gossett-v4-2021-5-1.pdf> [https://perma.cc/FZS5-WLEW] (last visited Apr. 20, 2023).

⁶⁵ To allocate proportional electoral votes using the Largest Remainder Method, the number of votes for each party must be divided by a “quota” which represents the number of votes required for a seat. Considered “[o]ne of the simplest seat allocation formulas,” the first step is to calculate a quota, determined by taking the *total number of votes* in a district and dividing this number by the *number of seats*. For example, if 100,000 votes were cast and ten seats are to be filled, the quota is 10,000: 100,000 divided by ten. Then, the quota is divided into the vote that each party receives, and the party wins one seat for each whole number produced: for example, the Republican party received 38,000 votes, which is divided by the quota (10,000) to produce three seats, the remainder is 8,000. After the first allocation of seats, the remainder numbers for each party (here, 8,000 for the Republican party) “are compared and the parties with the largest remainders are allocated the remaining seats.” *How Proportional Representation Elections Work*, FAIRVOTE, <https://fairvote.org/archives/how-proportional-representation-elections-work> [https://perma.cc/H4UN-CQWQ] (last visited Apr. 20, 2023).

⁶⁶ Under the RCV system, it is possible to use “ballots for the purposes of allocating a state’s electoral votes proportionally between the top two finalists based on the ballot rankings (rather than conducting the last round of the instant runoff process in order to produce a single winner in the state, who receives all of the state’s electoral votes).” FOLEY, *supra* note 54, at 131–32. Instead of an instant runoff between the top two candidates, this system would allocate the top two candidates’ votes proportionally. *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.* at 132.

⁶⁹ *See id.*

lawmakers may hesitate to lose this clout for several reasons. For one, state lawmakers may fear the consequences of depriving their party's candidate of all their state's electoral votes. In the long term, they may also worry about their state receiving less attention from presidential candidates during campaigning.

3. Contingent Elections Are More Likely

Further, the Traditional Proportional Allocation system may prevent any candidate from receiving the 270 Electoral College votes required to win the presidency. This is perhaps the largest concern in terms of the democratic process. If no candidate receives a majority of electoral votes, the Twelfth Amendment requires the House of Representatives to elect the president and the Senate to elect the vice president.⁷⁰ In contingent elections, "the House would choose among the *three* candidates who received the most electoral votes. Each state, regardless of population, [then] casts a single vote for President."⁷¹ A contingent election could exacerbate the flaws in the Electoral College system. The influence of small states, for example, would become even more disproportionate.⁷²

The risk that no candidate will win an Electoral College majority is greater if a third party receives a significant proportion of the electoral votes and thus siphons votes away from other candidates.⁷³ For this Report's purposes, this risk undermines the intended goal of preventing the effect of third-party disruptors.

4. Conditional Winner-Take-All

A conditional system where a state employs Traditional Proportional Allocation only if a candidate receives less than a

⁷⁰ U.S. CONST. amend. XII. See generally THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS (2020).

⁷¹ NEALE, *supra* note 70, at Summary.

⁷² There have only been two contingent elections in United States history: the first, in 1800, was dysfunctional and took thirty-six rounds of balloting to resolve; the second, in 1824, was marred by suspicions of corruption. See Joanne B. Freeman, *The Presidential Election of 1800: A Story of Crisis, Controversy, and Change*, GILDER LEHRMAN INST. AM. HIST., <https://ap.gilderlehrman.org/essay/presidential-election-1800-story-crisis-controversy-and-change> [https://perma.cc/EDY7-VF4V] (last visited Apr. 20, 2023) ("The presidential election of 1800 was an angry, dirty, crisis-ridden contest that seemed to threaten the nation's very survival."); *The House of Representatives Elected John Quincy Adams as President*, HIST., ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1800-1850/The-House-of-Representatives-elected-John-Quincy-Adams-as-President> [https://perma.cc/GR3H-4AYS] (last visited Apr. 20, 2023).

⁷³ See NEALE, *supra* note 70, at 16.

majority of votes is a more modest approach to Traditional Proportional Allocation.⁷⁴ Conditional Winner-Take-All is a rather simple concept for states that employ the Winner-Take-All single-choice voting system: the ballot remains the same and a voter chooses one candidate. If a candidate receives a majority of the vote on the conventional ballot, then they win all of the state's Electoral College votes. But if a candidate does not win a majority, "the contingent proportionality formula kicks in, dividing the state's electoral vote between the plurality winner and any other candidate who qualifies for a share of the state's electoral votes according to the proportionality formula."⁷⁵

However, the Conditional Winner-Take-All system is successful in preventing a third-party disruptor in very narrow circumstances. In the 2000 presidential election, for instance, this system would have prevented Nader from becoming a disruptor in Florida, where neither Bush nor Gore had a majority of the vote.⁷⁶ Because both candidates were below the 50 percent threshold, Florida's electoral votes would, instead, have been divided proportionally among Bush, Gore, and Nader.⁷⁷

At any rate, this system would not reliably stop disruptors. If either Bush or Gore had won just a sliver more of Florida's popular vote, they would have taken all of the state's electoral votes under this system. In the event that Bush or Gore had received more votes, Nader would still be a third-party disruptor.

B. Alternative 2: The District System

Under the modern District System used in Maine and Nebraska, "one electoral vote is awarded to the presidential candidate who receives the most popular votes in each of a state's congressional districts. . . [with] [t]he state's remaining two votes" awarded to the statewide winner.⁷⁸ Delaware and Virginia were the first states to use the District System, employing it in the first presidential election in 1789.⁷⁹ Before the 1800 election, Federalist

⁷⁴ See FOLEY, *supra* note 54, at 131–32.

⁷⁵ *Id.*

⁷⁶ See *Statistics: 2000 Election*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/elections/2000> [<https://perma.cc/9NG6-FDJW>] (last visited Apr. 20, 2023). Because neither Bush nor Gore had the majority of the vote, applying the Conditional Winner-Take-All system would have changed the outcome.

⁷⁷ See *id.*

⁷⁸ *Analysis of the Congressional District Method of Awarding Electoral Votes*, NAT'L POPULAR VOTE, <https://www.nationalpopularvote.com/analysis-congressional-district-method-awarding-electoral-votes> [<https://perma.cc/X8PE-YQGS>] (last visited Apr. 20, 2023).

⁷⁹ ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* 32 (2020).

Alexander Hamilton advocated for a district system in New York to stop the Democratic-Republicans from getting all of the state's votes.⁸⁰ And proposals for constitutional amendments requiring states to use the District System gained significant traction in the early-1800s.⁸¹

By splitting “the state’s electoral college votes among the candidates depending on which particular district each candidate won,” the system makes it less likely for a third-party candidate to act as a disruptor.⁸² Unlike the Winner-Take-All system, third-party candidates cannot affect the outcome of all of a state’s electoral votes by siphoning off just 1 percent or less of the popular vote.

The drawbacks of the District System, however, are the same as the Traditional Proportional Allocation and Conditional Proportional Allocation systems.⁸³ Of particular concern, the District System could diminish a state’s relative clout because a presidential candidate will not receive all of the electoral votes in a given state.⁸⁴ Moreover, the same collective action problem and risk of contingent elections exist under this system.⁸⁵ Further, the system magnifies the effects of gerrymandering congressional districts, and would increase the incentive for states to gerrymander.⁸⁶ Ultimately, the District Method does not provide an adequate solution to the third-party disruptor effect.

⁸⁰ *Id.* at 34.

⁸¹ *Id.* at 42–45, 61–62.

⁸² FOLEY, *supra* note 54, at 131–32.

⁸³ *See supra* Part III.A.

⁸⁴ *See* Claire Daviss, *Fuzzy Math: Wrong Way Reforms for Allocating Electoral Votes*, NAT’L POPULAR VOTE, <https://fairvote.org/report/fuzzy-math> [<https://perma.cc/HK56-QJBR>] (last visited Apr. 20, 2023) (noting that the “district system would make the presidential election less meaningfully competitive. Recent elections demonstrate that a smaller percentage of the population lives in current swing congressional districts than in current swing states.”). *See also* *Analysis of the Congressional District Method of Awarding Electoral Votes*, *supra* note 78 (“Presidential campaigns would not be attracted to a state by the congressional-district method, but, instead, only to the relatively few closely divided districts, if any, in a given state. For example, recent presidential campaigns paid attention to Nebraska’s closely divided 2nd congressional district (the Omaha area), while totally ignoring the politically non-competitive rural 1st and 3rd districts.”).

⁸⁵ *See supra* Parts III.A.2, III.A.3.

⁸⁶ *See The Congressional-District Method of Awarding Electoral Votes*, NAT’L POPULAR VOTE 2 (2021), <https://www.nationalpopularvote.com/sites/default/files/memo-congressional-district-method-v15-2021-5-18.pdf> [<https://perma.cc/H68C-PF8E>].

C. Alternative 3: Approval Voting

Approval Voting is a single-winner voting system that allows voters to choose any number of candidates.⁸⁷ The ballots look the same as regular single-choice ballots, but voters may select multiple candidates.⁸⁸ The candidate chosen the most wins the election.⁸⁹ Proponents contend that this system is simpler and more democratic than plurality voting or RCV.⁹⁰ While Approval Voting is an intriguing alternative to RCV and the current Winner-Take-All system, the idea is too novel to be practical.

Though studies have been conducted on Approval Voting in Germany and France, the system has not been deeply explored, especially in the United States.⁹¹ Only two United States jurisdictions—Fargo, North Dakota, and St. Louis, Missouri—have implemented the system, and they have only done so recently.⁹² The importance of presidential elections requires a tried-and-true method of voting.

D. Alternative 4: Runoffs

Runoffs, also known as the “Two-Round System,” are used in ten states for primary elections and in Georgia and Louisiana for general elections.⁹³ If, in the first round of an election, no candidate receives 50 percent or more of the votes, a second round between the top two candidates is held on a later date.⁹⁴ Runoff elections allow voters to change their minds on candidates and provide more time for debate and consideration.⁹⁵

While traditional runoffs offer some of the same benefits that RCV does, they carry additional disadvantages. Namely, traditional runoff elections often see reduced voter turnout in the second

⁸⁷ See *Approval Voting*, CTR. FOR ELECTION SCI., <https://electionscience.org/library/approval-voting> [<https://perma.cc/Q7NM-T9X8>] (last visited Apr. 20, 2023).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See *id.*; Jazmine Smith et al., *The Case Against Approval Voting—and for Real Democracy Reform in Seattle*, URBANIST (Mar. 15, 2022), <https://www.theurbanist.org/2022/03/15/the-case-against-approval-voting> [<https://perma.cc/GD4U-BR9X>].

⁹³ See *Runoff Election*, BALLOTPEdia, https://ballotpedia.org/Runoff_election [<https://perma.cc/5H2S-VHVR>] (last visited Apr. 20, 2023).

⁹⁴ See *id.*

⁹⁵ See generally Declan Alvidrez et al., *Primary Runoff Elections and Decline in Voter Turnout*, FAIRVOTE (2020), <https://fairvote.app.box.com/s/lib8blpxmffiskcchq815dmmdyqzai6p> [<https://perma.cc/XV7Q-7YRP>].

round.⁹⁶ Between 1994 and 2020, for example, 240 of the 248 primary election runoffs (or 97 percent) saw reduced turnout in the second round.⁹⁷ Runoffs are also expensive to administer, even without considering additional campaign spending. In Louisiana, for example, the costs of second-round runoffs were found to be as expensive as the first round, meaning that traditional runoffs were twice as expensive as the single-choice system.⁹⁸ Furthermore, Georgia’s runoff method was implemented in the 1960s by a segregationist state legislator in response to the U.S. Supreme Court striking down the “so-called ‘white-only primary’” elections.⁹⁹ Accordingly, these considerations make RCV a superior system to traditional runoffs.

E. Alternative 5: National Popular Vote

Abolishing the Electoral College and electing a president based on a national popular vote would address some of the concerns raised by third parties. First, the winner-take-all approach in the states would be eliminated. Second, the number of votes cast would make it unlikely that a third party could be a disruptor. But proponents of the Electoral College, who view it as an important protection of federalism, would probably object to abolishing the system.¹⁰⁰

Regardless, abolishing the Electoral College would likely require a constitutional amendment.¹⁰¹ Amending the Constitution, of course, is “no small feat,” but in public polling, abolishing the Electoral College through a constitutional amendment maintains “overwhelming public support.”¹⁰² Nonetheless, constitutional amendments “have proved particularly hard to pass with respect to

⁹⁶ See *id.* at 4–7.

⁹⁷ *Id.* at 4.

⁹⁸ See Gabriella Lewis, *New Study Reveals Runoffs Are Consistently Expensive, Uncompetitive, and Yield Low Turnout*, FAIRVOTE (July 22, 2021), https://fairvote.org/new_study_reveals_runoffs_are_consistently_expensive_uncompetitive_and_yield_low_turnout [https://perma.cc/R97N-L9JT].

⁹⁹ Nicole Ellis, *Georgia Runoff Elections Have Segregationist Roots*, PBS (Dec. 3, 2022, 9:40 AM), <https://www.pbs.org/newshour/politics/the-racist-history-behind-georgias-runoff-elections> [https://perma.cc/6TQX-T2SM].

¹⁰⁰ See, e.g., Ceaser & Raskin, *supra* note 51.

¹⁰¹ See Adam Drake, *Increasing Voter Investment in American Democracy: Proposals for Reform*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 18, 28–30 (2022).

¹⁰² *Id.* at 30 (citing Rebecca Salzer & Jocelyn Kiley, *Majority of Americans Continue to Favor Moving Away from Electoral College*, PEW RSCH. CTR. (Aug. 5, 2022), <https://www.pewresearch.org/fact-tank/2022/08/05/majority-of-americans-continue-to-favor-moving-away-from-electoral-college> [https://perma.cc/M832-T3Z4]. See generally ABA COMM’N ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT (1967).

the existing Electoral College system.”¹⁰³ For that reason, RCV offers the most viable solution.

IV. RANKED CHOICE VOTING IS THE BEST METHOD TO PREVENT ELECTION DISRUPTIONS AND ELIMINATE THE “COSTS” OF VOTING FOR THIRD PARTIES

RCV is the best way to stop the third-party disruptor effect within the Electoral College system. While there are drawbacks to RCV, these pale in comparison to the clear improvements that RCV promises. Indeed, as election law scholar Edward Foley contends, “[t]here is no perfect voting system . . . [b]ut this truth also does not negate the fact that some voting systems are better . . . especially in the context of a particular nation at a particular point in its history.”¹⁰⁴ The current Electoral College system is “especially deficient.”¹⁰⁵ Thus, Part IV recommends that states implement RCV in presidential elections to stop the third-party disruptor effect.

First, Part IV.A explains what RCV is and why it is presently the best system for addressing the negative effects of third parties. Sections B, C, and D then establishes some of the most consequential benefits of RCV. Finally, Sections E, F, and G address some of the criticisms of RCV and how state and local governments can overcome them.

A. *How Ranked Choice Voting Works*

RCV is a ballot system where the voter ranks some or all candidates in order of preference. Votes are then tabulated by round. In the first round, all voters’ first preferences are counted. If, when all first-preference votes are counted, one candidate has received a majority of votes (over 50 percent), the election is over, and that candidate wins. If no candidate receives a majority of first-preference votes, then the election goes to an instant runoff. In the first round of the instant runoff, the candidate with the least first-preference votes is eliminated. All voters who listed the eliminated candidate as their first preference will then have their second-preference choice counted and added to the vote totals of the remaining candidates. If, after this round of counting, one candidate’s vote total reaches a majority, the election is over, and that candidate wins. If there is still no majority winner, then the next candidate with the lowest vote total is eliminated. Those who listed this candidate as their first preference will have their second-preference votes counted. There are also those who listed this

¹⁰³ Foley, *supra* note 1, at 1012.

¹⁰⁴ *Id.* at 1020.

¹⁰⁵ *Id.*

candidate as their second choice who need to be accounted for in this round. Because they had listed this candidate as their second preference, they will have their third preferences counted and allocated to the corresponding candidates. This process continues until one candidate receives a majority.¹⁰⁶

To illustrate, assume there are four candidates in a race for president: A, B, C, and D. In a RCV state, voters go to the polls and rank the candidates based on whom they prefer. After the first preferences are tallied, A and B each receive 45 percent of the vote, C receives 6 percent, and D receives 4 percent. Since no candidate received a majority of votes, the instant runoff is triggered. Since D received the least number of first-preference votes, D is eliminated. The voters for D then have their second preferences counted. Here, D voters split down the middle between A and C for their second preference. Now, the count is at 47 percent for A, 45 percent for B, and 8 percent for C. Still, there is no majority, so the runoff continues.

Candidate C is the next to be eliminated, since they have the least number of combined first-and-second-preference votes. First, the votes of those who listed C as their first preference will be counted by looking at the candidate that they listed as a second preference. Two-thirds of those who listed C as their first preference ranked A as their second preference, and the other third ranked B as their second preference. Then, those who listed C as their second preference will have their votes counted by looking at their third preferences. Assume all of them ranked A as their third choice. Therefore, the count would be at 53 percent for A, and 47 percent for B. Candidate A now has a majority, and wins the election.

B. Ranked Choice Voting Eliminates the Disruptor Effect

RCV presents a solution to the third-party disruptor effect, as it allows voters to rank all candidates in order of preference. This enables voters to vote for their preferred third-party candidate without fearing that their vote would be wasted. This eliminates the need for voters to forgo voting for their preferred candidate in favor of the most viable candidate, or picking between the *lesser of two evils*. In other words, the “costs” of voting for a third-party candidate are eliminated.¹⁰⁷

Therefore, RCV provides a two-fold benefit. First, the disruptor effect is eliminated if most voters decide to rank more than one candidate on their ballot. Second, third parties might have an

¹⁰⁶ For a separate overview of how RCV works, see BALSER, *supra* note 13.

¹⁰⁷ See Alan J. Simmons et al., *Ranked-Choice Voting and the Potential for Improved Electoral Performance of Third-Party Candidates in America*, 50 AM. POL. RES. 366, 370 (2022).

easier time gaining traction in elections because those who wish to support them can do so without fear of *wasting* their votes.

C. Ranked Choice Voting Works Well Within the “Winner-Take-All” System

RCV can be implemented at the state level without affecting a state’s relative clout in the Electoral College system. This is because a state will still allocate all of its Electoral College votes to the single winner of an RCV election. Thus, a state will continue to have the same Electoral College impact as under the current system. The continued use of the Winner-Take-All system would also mean that the increased risk of contingent elections that comes with the Traditional Proportional Allocation system would not accompany use of RCV.

D. Ranked Choice Voting Can Lead to More Civil Campaigning

Further, RCV can shift the tone of campaigns from negative attacks on candidates to more positive campaigning.¹⁰⁸ A single-choice voting system can incentivize candidates to run negative campaigns that focus on attacking opponents rather than promoting policy ideas.¹⁰⁹ In a single-choice voting system, candidates might only seek to appeal to a small base of strong supporters to increase their turnout, which leads candidates to attack their opponents.¹¹⁰ Attacking the opponent is not necessarily intended to persuade voters to choose the attacker, but rather to decrease enthusiasm for the opponent and cause lower turnout generally.¹¹¹

Negative campaigning has been linked to the public’s growing disapproval of Congress and lower satisfaction with the candidates they have to choose from.¹¹² The prominence of negative campaigning has also led to decreased public trust in government and institutions.¹¹³ A system that incentivizes negative campaigning creates a toxic, highly partisan, and polarizing environment.

Because a candidate in a ranked-choice election will not necessarily win an election in the first round, they need to appeal to a wider range of voters beyond their core base.¹¹⁴ Indeed, candidates

¹⁰⁸ See Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, 106 NAT’L CIVIC REV. 25, 26 (2017).

¹⁰⁹ See Angela Sbrano, *How Should Alaskans Choose?: The Debate Over Ranked Choice Voting*, 37 ALASKA L. REV. 295, 303 (2020).

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See Todd Donovan et al., *Campaign Civility Under Preferential and Plurality Voting*, 42 ELECTORAL STUD. 157, 157–58 (2016).

¹¹³ See *id.* at 158.

¹¹⁴ See John & Douglas, *supra* note 108, at 25.

will seek to receive second or third place rankings from supporters of the other candidates. This will typically cause a candidate to employ less negative campaigning.¹¹⁵ These are not mere predictions: studies have shown that RCV systems notably reduce political negativity.¹¹⁶ RCV can therefore provide greater public debate on policy and ideas.

E. Education Can Increase Public Understanding of Ranked Choice Voting

RCV has been criticized for being too complex. Some critics contend that the ranking process, structure of the ballot, and array of choices are too difficult for some voters to understand.¹¹⁷ One problem that could result from RCV's complexity is overvoting, which can occur in two scenarios. The first is when a voter selects more than one candidate for one of their preferences.¹¹⁸ The second occurs when a voter selects the same candidate more than once.¹¹⁹ These errors can prevent the counting of a voter's ballot.¹²⁰

Overvoting has occurred several times in RCV elections in the United States. For example, in one statewide election in Maine, 533 ballots were invalidated because of overvoting.¹²¹ And in a citywide election in San Francisco, 820 ballots were found to be invalid because of overvoting.¹²² A study of San Francisco's transition from a two-election runoff system to RCV unearthed concerning results. Specifically, the study found that overvoting, and consequently invalid ballots, were more common in predominantly Latinx and Black precincts.¹²³ The study also found increases in overvoting in elderly and low-income communities.¹²⁴

These concerns were echoed by New York City Mayor Eric Adams when he was a candidate in the 2021 mayoral primary.¹²⁵

¹¹⁵ See Donovan et al., *supra* note 112, at 158.

¹¹⁶ See generally John & Douglas, *supra* note 108. See also Donovan et al., *supra* note 112, at 162.

¹¹⁷ See Erin Carman & Vanessa Glushevski, *Ranked Choice Voting: A Shift Toward a Better Democracy*, 3 WILLAMETTE SOC. JUST. & EQUITY J. 36, 56 (2020).

¹¹⁸ See Brandon Bryer, *One Vote, Two Votes, Three Votes, Four: How Ranked Choice Burdens Voting Rights and More*, 90 U. CIN. L. REV. 711, 726 (2021).

¹¹⁹ See *id.* at 726–27.

¹²⁰ See *id.* at 727.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See Samantha Maldonado, *Did Ranked Choice Voting Work in NYC? It Depends on Whom You Ask*, THE CITY (July 19, 2021, 10:07 PM), <https://www.thecity.nyc/2021/7/19/22584637/did-ranked-choice-voting-work-in-nyc-eric-adams> [<https://perma.cc/7EQM-JCNP>].

Specifically, Adams said more educated voters would be “fine,” but that the same would not be true for others, such as the elderly or those for whom English is not a first language.¹²⁶ This, in his opinion, would cause the system to “lose voters.”¹²⁷

Yet Adams did not refer to any data to support his claims. In fact, the data from the New York City primary pointed in the opposite direction. Exit polls found that, of the 1,700 Democratic voters surveyed, 78 percent felt that they understood RCV “extremely or very well.”¹²⁸ Additionally, 95 percent of voters surveyed said that they found the ballots simple to complete.¹²⁹ This held true across ethnic groups.¹³⁰

Even if the data from New York City is promising, RCV is at least more complicated than single-choice voting. This makes it more likely to confuse some voters. Some voting experts and political observers believe that large public education campaigns can significantly reduce any voter confusion gaps that may exist in the short term after a state implements RCV.¹³¹ While such campaigns would certainly impose short-term costs, they would be key to any successful implementation of RCV.¹³²

F. Vote Splitting with Three or More Popular Candidates Occurs in Similar Ways to “Winner-Take-All” Systems

RCV works well when third-party candidates have considerably smaller support than the two major-party candidates.¹³³ And RCV works especially well if the third-party candidate is not a “centrist” candidate, but rather somewhere closer to the major parties along the ideological spectrum.¹³⁴

For example, assume in one election using RCV that Candidate A, a right-wing major party candidate, receives 45 percent of the vote. Candidate B, a left-wing major party candidate,

¹²⁶ *See id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See* Carman & Glushevski, *supra* note 117, at 56–57.

¹³³ *See id.*

¹³⁴ *See id.*; Lee Drutman & Maresa Strano, *What We Know About Ranked-Choice Voting, Candidates and Campaigns, Claim 6: RCV Changes Who Runs*, NEW AM. (Nov. 10, 2021), <https://www.newamerica.org/political-reform/reports/what-we-know-about-ranked-choice-voting/candidates-and-campaigns> [<https://perma.cc/8YD6-8K7V>] (“In practice, a pragmatic centrist candidate is unlikely to be the first choice of many voters, simply because the share of voters with genuinely centrist political opinions is very limited. In a single-winner RCV election, the best a pragmatic centrist can hope for generally is for her transfer votes to matter.”).

receives 40 percent of the vote. Finally, Candidate C, a far-left third-party candidate receives 15 percent of the vote. Candidate C is eliminated in the first round. Presumably, many voters who ranked C as their first choice would rank B as their second, given the ideological similarities between B and C. Assume for the sake of simplicity that all who ranked C as their first preference ranked B as their second preference. Therefore, in the runoff between A and B, B would win with 55 percent of the vote. This prevents C from disrupting the election and A, the less preferred candidate, from winning.

This example shows how well RCV works when the third-party candidate is not a strong contender to win. Indeed, RCV prevents the third party from creating a situation where a less popular candidate wins. At the same time, RCV allows voters to support the third party without worrying that doing so could lead to their least preferred candidate winning. Critics of RCV contend that the system fails when there are more than two very popular candidates.¹³⁵ In such a case, it is possible that the most widely preferred candidate could lose.¹³⁶

Assume that there are three candidates, each with significant followings. The conservative Republican, R, is polling at 35 percent. The liberal Democrat, D, is polling at 35 percent. Finally, a candidate from the new moderate “Centrist” party, C, is polling at 30 percent. Polling has revealed that in head-to-head matchups, C beats both R and D. The election occurs, and Candidate A receives 35 percent of the vote, D receives 35 percent, and C receives 30 percent. Candidate C is eliminated, even though C would have beaten either R and D in a head-to-head matchup and was likely the widely preferred candidate, even if not the most preferred candidate.

This scenario is called the “center squeeze effect.”¹³⁷ In a competitive election between three candidates where one candidate falls “in the middle,” that candidate tends to get “squeezed” out of the election even if they are the most widely preferred in head-to-head matchups.¹³⁸ RCV seemingly does not address this problem—but this does not mean that RCV should not be used. RCV does not handle the problem any worse than a single-choice voting system.¹³⁹

Alternatively, it is hard to predict whether voters may have changed votes for a more “viable” candidate. In such a competitive election, it is not clear that any candidate is more viable than another

¹³⁵ See, e.g., Aaron Hamlin, *The Limits of Ranked Choice Voting*, CTR. FOR ELECTION SCI. (Feb. 7, 2019), <https://electionscience.org/voting-methods/runoff-election-the-limits-of-ranked-choice-voting> [<https://perma.cc/5K9U-N5B6>].

¹³⁶ See *id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ In a single-choice voting system, using the example above, Candidate C would have still lost if the results held true.

because all three had wide support. Further, as of this writing, there is no third party that appears likely to present a significant near-term challenge to the two-party system.¹⁴⁰ It is also unclear that if such a party rose that it would be in the “center.”¹⁴¹ Given these significant uncertainties, RCV remains a strong policy choice despite its challenges in addressing the center squeeze effect.

G. Ranked Choice Voting Does Not Violate the One-Person, One-Vote Principle

Opponents of RCV contend that the system’s attempt to eliminate “wasted” votes violates the one-person, one-vote doctrine.¹⁴² This doctrine is a “central tenant of liberal democracy”¹⁴³ and originates from a series of legislative districting cases before the U.S. Supreme Court.¹⁴⁴ These decisions prevented states from drawing districts that provided some voters with more electoral power than others.¹⁴⁵

RCV opponents argue that the system allows some voters but not others to have multiple votes.¹⁴⁶ For example, under this interpretation, those who choose not to cast second or third choice votes for candidates moving to the final tabulation rounds are denied additional votes.¹⁴⁷ But this is a misconception.¹⁴⁸ Because only a voter’s ranked preference in the final round of tabulation counts toward the election outcome, voters are not actually voting for more

¹⁴⁰ See William A. Galston, *Are Americans Finally Ready for a Third Party?*, BROOKINGS INST. (Aug. 12, 2022), <https://www.brookings.edu/blog/fixgov/2022/08/12/are-americans-finally-ready-for-a-third-party> [<https://perma.cc/V6T7-2QA8>] (discussing the recent creation of the “Forward Party,” founded by Andrew Yang, a 2020 Democratic presidential candidate, and Christine Todd Whitman, a former Republican governor of New Jersey).

¹⁴¹ See generally Phillip Bump, *The Problem for Third Parties? America Is Not a Political Free Market*, WASH. POST (July 28, 2022, 5:50 PM), <https://www.washingtonpost.com/politics/2022/07/28/problem-third-parties-america-is-not-political-free-market> [<https://perma.cc/V6TM-PDT4>].

¹⁴² Carman & Glushevski, *supra* note 117, at 58.

¹⁴³ Ian Bollag-Miller, *One Person, How Many Votes? Measuring Prison Malapportionment*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 94, 97 (2022).

¹⁴⁴ See, e.g., *Baker v. Carr*, 364 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Westberry v. Sanders*, 379 U.S. 1 (1964).

¹⁴⁵ See *Evenwel v. Abbott*, 578 U.S. 54, 59–60 (2016).

¹⁴⁶ See, e.g., *Ranked Choice Voting: A Disaster in Disguise*, FOUND. GOV’T ACCOUNTABILITY (Aug. 25, 2022), <https://thefga.org/research/ranked-choice-voting-a-disaster-in-disguise> [<https://perma.cc/23MP-J2NT>].

¹⁴⁷ See Shawn Griffiths, *How Ranked Choice Voting Survives The “One Person, One Vote” Challenge*, FAIRVOTE (Dec. 5, 2018), https://fairvote.org/how_ranked_choice_voting_survives_the_one_person_one_vote_challenge [<https://perma.cc/CPF4-FPKP>].

¹⁴⁸ See *id.*

than one candidate.¹⁴⁹ This concept is known as the “single transferrable vote.”¹⁵⁰ Moreover, the system aims to show how voters would have voted in consecutive runoff elections needed to produce a winner with majority support, but without spending the money and risking the lower turnout of a separate runoff election.¹⁵¹

In 2018, Maine’s RCV law was challenged in federal district court.¹⁵² In *Baber v. Dunlap*, the challengers alleged that the RCV law was unconstitutional and disenfranchised some voters.¹⁵³ The court, however, rejected all of the challenger’s constitutional claims, stating that RCV “encourages First Amendment expression” by allowing voters to support third parties without worrying about any disruptive effect.¹⁵⁴ The court explained that ranked choice balloting does not violate the one-person, one-vote principle because all candidates are treated equally on the ballot.¹⁵⁵ Further, the court also held that majority rights had been advanced without any burden on minority rights, and therefore did not create an equal protection violation.¹⁵⁶

V. IMPLEMENTING RANKED CHOICE VOTING

While every state has unique needs and limitations that may require tailored solutions, Part V provides broad recommendations for implementation.

First, states must determine whether to require that a voter rank each candidate presented on the ballot. Under non-RCV systems, voters can leave sections of their ballot blank if they choose.¹⁵⁷ But under RCV, the purpose of mandating a rank for each candidate is to prevent “ballot exhaustion,” where a voter’s ballot is not countable because their listed choices are no longer in the contest.¹⁵⁸ Nonetheless, requiring a voter to rank each candidate on a ballot would likely cause unnecessary consternation and seems to run counter to the non-mandatory nature of voting in the United States.¹⁵⁹ Accordingly, states should not require voters to rank each candidate on the ballot.

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² 376 F. Supp. 3d 125 (D. Me. 2018).

¹⁵³ *See id.* at 129.

¹⁵⁴ *Id.* at 145.

¹⁵⁵ *Id.* at 140.

¹⁵⁶ *See id.* at 142.

¹⁵⁷ *See Do You Have to Vote for Everything on Your Ballot?*, BALLOTPEDIA, [https://ballotpedia.org/Do_you_have_to_vote_for_everything_on_your_ballot%3F_\(2022\)](https://ballotpedia.org/Do_you_have_to_vote_for_everything_on_your_ballot%3F_(2022)) [<https://perma.cc/QE7Z-H9NA>] (last visited Apr. 20, 2023).

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.,* Andy Craig, *Mandatory Voting is a Bad and Unconstitutional Idea*, CATO INST. (June 17, 2022), <https://www.cato.org/commentary/mandatory->

Next, states must choose how they will count the votes and announce the results of an election winner. The first consideration is whether a technology exists that would allow polling places to input ballots into a machine that automatically counts votes and tabulates the results for any potential runoff rounds, identifying a winner without delay. For example, in New York City's 2021 mayoral primary, it took several weeks to announce a winner.¹⁶⁰ Software is likely to help stop human errors in counting and can also combat questions of illegitimacy due to delays in announcing results. In light of current rhetoric around delays in election results,¹⁶¹ states should strive to declare a winner as soon as practicable.¹⁶²

Further, states will have to spend additional funds on new systems. In addition to potentially purchasing new RCV software,¹⁶³ states will have to fund public education campaign to ensure that RCV does not lead to lower voter turnout and that voters fully understand how to use it.¹⁶⁴ New York City, for example, spent \$15 million on a media campaign, language access and accessibility resources, and direct outreach.¹⁶⁵ Following those efforts, "New Yorkers showed up in force, with the highest turnout in 32 years."¹⁶⁶

voting-bad-unconstitutional-idea [<https://perma.cc/L93P-M464>] ("The First Amendment protects not only freedom of speech but also freedom from compelled speech. And even if a coerced voter shows up and casts a spoiled ballot, participating in an election is a speech act. It implies affirmation of the legitimacy and desirability of the electoral system and our current constitutional order.").

¹⁶⁰ See David Weigel & Jada Yuan, *New Yorkers Vote in Primaries for Mayor After a Race Dominated by Crime and Coronavirus Recovery*, WASH. POST (June 22, 2021, 11:33 PM), https://www.washingtonpost.com/politics/nyc-mayoral-election/2021/06/22/84b423c6-d2ae-11eb-ae54-515e2f63d37d_story.html [<https://perma.cc/KQ4B-BPF9>].

¹⁶¹ See, e.g., Maya King & Zach Montellaro, *New York's 'Head Swirling' Mistake Puts Harsh Spotlight on Ranked-Choice Voting*, POLITICO (July 6, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/06/new-york-ranked-choice-voting-498221> [<https://perma.cc/8UEB-VKM9>].

¹⁶² In implementing new election software that may rely on online databases, states will need to mitigate potential security concerns. See Eric Geller, *Some States Have Embraced Online Voting. It's a Huge Risk.*, POLITICO, (June 9, 2020, 4:16 PM), <https://www.politico.com/news/2020/06/08/online-voting-304013> [<https://perma.cc/L74M-582S>].

¹⁶³ See Rachel Orey et al., *The Path of Federal Election Funding*, BIPARTISAN POL'Y CTR. (June 16, 2022), <https://bipartisanpolicy.org/explainer/federal-election-funding-path> [<https://perma.cc/4WRR-AZL2>].

¹⁶⁴ See *supra* Part IV.E.

¹⁶⁵ See *New York City to Launch \$15 Million Ranked Choice Voting Education Campaign*, NYC.GOV (Apr. 28, 2021), <https://www1.nyc.gov/office-of-the-mayor/news/315-21/new-york-city-launch-15-million-ranked-choice-voting-education-campaign> [<https://perma.cc/63D4-K8KN>].

¹⁶⁶ *New York City's Ranked Choice Voting Rollout: Better Elections Yield Better Results*, FAIRVOTE (July 10, 2021), https://fairvote.org/new_york_city_s_ranked_choice_voting_rollout_better_elections_yield_better_results [<https://perma.cc/DJ3W-VWDT>].

Additionally, exit polling showed that 95 percent of voters thought that RCV was simple to use.¹⁶⁷ Given the demonstrated effectiveness of these results, states should mirror New York City's investments in these efforts.

Moreover, the federal government should consider passing legislation to provide funding to states seeking to implement RCV. In 2003, for example, Congress “authorized and funded a voting system replacement reimbursement grant program in the Consolidated Appropriations Resolution . . . [which included] [g]rants capped at \$4,000 per precinct and \$15 million for the program as a whole.¹⁶⁸ Specifically, the grants “were designed to reimburse . . . states for costs they incurred in obtaining certain types of voting equipment prior to the November 2000 general election.”¹⁶⁹ Congress can similarly pass legislation “to support state and local efforts to implement RCV” to help with implementation costs.¹⁷⁰

CONCLUSION

The 2000 presidential election highlighted the potential costs associated with voting for a third-party presidential candidate. The potential impact of votes for third-party candidates might lead many voters to support one of the two major-party candidates out of fear that their least favored candidate will win. This fear, however, is anti-democratic. Voters should be able to vote for the candidate who best represents their interests without concern of disrupting the election. RCV thus offers a solution that fits well within the Electoral College system. By implementing RCV, the United States can foster greater participation and representation in the democratic process while preserving democratic values.

¹⁶⁷ *See id.*

¹⁶⁸ KAREN L. SHANTON, CONG. RSCH. SERV., R46636, ELECTION ADMINISTRATION: FEDERAL GRANT FUNDING FOR STATES AND LOCALITIES 7 (2022).

¹⁶⁹ *Id.*

¹⁷⁰ *See* BALSER, *supra* note 13, at 4. In the 117th Congress, for example, several pieces of legislation were introduced to “award grants to state and local governments” transitioning to RCV. *Id.*