

THE CONSTITUTION AND CONDORCET: DEMOCRACY PROTECTION THROUGH ELECTORAL REFORM

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ABSTRACT

The Madisonian premises of the Constitution need modernization. This modernization, ironically, requires drawing upon the insights of Madison's fellow Enlightenment Era political theorist, Marquis de Condorcet. A Condorcet-based electoral system would enable the election of the candidate who is most preferred by a majority of voters, while simultaneously reducing the risk of electing authoritarian candidates who are preferred by only a minority of voters and, if given the opportunity to take power, would work to subvert the democratic choice of voters in future elections.

Not all Condorcet-based electoral systems are equally vulnerable to strategic manipulation. Given the possibility that authoritarian candidates would seek victory through an organized campaign of strategic voting, while pro-democracy candidates and voters would endeavor to defeat these authoritarian candidates by sincerely voting their preference to protect democracy, it should be recognized that some Condorcet-based electoral systems are more capable than others of foiling this kind of anti-democratic strategic voting and thereby allowing the sincere pro-democracy preferences to prevail. While the topic of "asymmetrical strategic voting" (where some candidates and voters vote strategically, while others vote sincerely) requires more development, the analysis here provides a foundation and framework for further investigation of this topic, especially in the context of how best to safeguard Madisonian republicanism from present and future threats.

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I. INTRODUCTION

The Constitution’s two fundamental goals are, as James Madison articulated them in *The Federalist Papers*, first, the promotion of government in the general public interest (rather than to the advantage of any partial private purpose), and second, the prevention of tyranny at the hands of a despotic regime that has usurped power to pursue its authoritarian oppression.¹ The Madisonian means that the Constitution employs to attain these two goals is its institutional architecture of separated powers and federated government, so that the coercive authority of government is dispersed and quests for control can be checked and balanced by competing quests.² In Madison’s most memorable phrasing of this principle, “Ambition must be made to counteract ambition.”³

Madison’s theory of the Constitution, at least at the time of its adoption, however, gave relatively little consideration to the design of the electoral system by which officials of the new federal government would be

1. See e.g., THE FEDERALIST NOS. 10, 51 (James Madison). For background, see DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 126–61 (Univ. Chi. 1984). See generally GEORGE W. CAREY, THE FEDERALIST: DESIGN FOR A CONSTITUTIONAL REPUBLIC (Univ. Ill. 1989).

2. THE FEDERALIST NO. 51 (James Madison).

3. *Id.*

chosen.⁴ In the original Constitution of 1787, only members of the federal House of Representatives were to be directly elected by citizens, and states were empowered to determine both who was entitled to vote in these elections and how the vote would be conducted (although Congress could override the states on the how, but not the who).⁵ The 1787 Constitution provided that senators in the new Congress would be chosen by state legislatures, and it was not until ratification of the Seventeenth Amendment that citizens were entitled to vote directly for senators.⁶ The President is elected by a body of specially appointed electors that has come to be called “the electoral college,” and the Constitution does not even guarantee that citizens choose the electors.⁷ Instead, the Constitution authorizes state legislatures to determine the “manner” of appointing each state’s electors, and initially some state legislatures kept for themselves the power to pick electors.⁸ With so little electoral role for citizens secured in the Constitution, it is no wonder that Madison did not bother to develop a detailed account of how elections should be conducted in a “republican form of government,” which the Constitution aims to achieve.

Over two centuries later, Madison’s project needs refurbishing. Its goals remain sound, but its methods require revision.⁹ Not only has it become commonplace to observe that the Madisonian system of separated powers has produced too much checking and balancing, rendering a dysfunctional federal government utterly incapable of acting in the public interest,¹⁰ it is also abundantly evident that much more attention needs to be given to the methods by which officeholders are elected. Now that citizens directly elect both senators and representatives in Congress and all states use a popular vote to appoint their presidential electors, the particular procedures by which these elections are conducted are the main determinant of what kind of government wields power under the Constitution. Even something as

4. Alexander Hamilton, sharing the pen name of Publius with Madison, wrote the most about the methods of electing government officials. *See* THE FEDERALIST NOS. 59, 68 (Alexander Hamilton).

5. U.S. CONST. art. I, §§ 2, 4.

6. *See* U.S. CONST. amend. XVII.

7. U.S. CONST. art. II, § 1.

8. *See* ROBERT WILLIAM BENNET, TAMING THE ELECTORAL COLLEGE 41–45 (Stanford Univ. Press 2006).

9. James A. Beckman, *A Constitutional Anachronism: Why the Electoral College Should be Abolished or Its Operation Re-Configured*, 52 CUMB. L. REV. 163, 163–68 (2022).

10. *See* Yasmin Dawood, *Democratic Dysfunction and Constitutional Design*, 94 B.U. L. REV. 913, 922 (2014).

basic as whether a candidate must win a majority rather than merely a plurality of votes in order to prevail in an election can have a huge consequence on the quality of representation that the election provides—and thus on the extent to which the Constitution succeeds or fails in pursuing its twin objectives of avoiding tyranny and advancing the public good.¹¹

The task of retooling Madison's project for this and future centuries can benefit considerably by consulting the electoral science developed by Madison's transatlantic contemporary, Marquis de Condorcet.¹² Like Madison, Condorcet was a creature of the Enlightenment.¹³ Both believed that human reason could be harnessed for the improvement of politics through the cultivation of political science.¹⁴ Both were political philosophers in the sense that they thought deeply and systematically about the nature of government and the fundamental principles that should guide it.¹⁵ But both were also practitioners of politics—not just theorists.¹⁶ Like Madison, Condorcet drafted a new constitution for his revolutionary

11. I have written previously on this point. See EDWARD B. FOLEY, *PRESIDENTIAL ELECTIONS AND MAJORITY RULE: THE RISE, DEMISE, AND POTENTIAL RESTORATION OF THE JEFFERSONIAN ELECTORAL COLLEGE* 6–8, 110–118 (Oxford Univ. Press 2020); Edward B. Foley, *Requiring Majority Winners for Congressional Elections: Harnessing Federalism to Causal Extremism*, 26 LEWIS & CLARK L. REV. 365, 366–67 (2022) [hereinafter *Requiring Majority Winners*].

12. The literature on Condorcet is vast, although not as voluminous (at least in English) as on Madison. See DAVID WILLIAMS, *CONDORCET AND MODERNITY* 206–12 (Cambridge Univ. Press 2004); IAIN MCLEAN & FIONA HEWITT, *CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY* 3–82 (Edward Elgar Publ'g 1994) [hereinafter *CONDORCET FOUNDATIONS*]; see generally STEVEN LUKES & NADIA URBINATI, *CONDORCET: POLITICAL WRITINGS* (Cambridge Univ. Press 2012).

13. Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445, 445 (1992).

14. An insightful discussion of the relationship between Madison and Condorcet is found in Iain McLean, *Before and After Publius: The Sources and Importance of Madison's Political Thought*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT 14, 14–40 (Samuel Kernell ed., Stanford Univ. Press 2003), which builds upon McLean's earlier exploration of the topic in McLean & Urken, *supra* note 13, at 445–55. See also Iain McLean, *The Eighteenth Century Revolution in Social Science and the Dawn of Political Science in America*, 5 EUROPEAN POL. SCI. 112, 119–21 (2006).

15. Randall Strahan, *Personal Motives, Constitutional Forms, and the Public Good: Madison on Political Leadership*, in JAMES MADISON: THE THEORY AND PRACTICE OF REPUBLICAN GOVERNMENT, *supra* note 14, at 63, 63–72; *CONDORCET FOUNDATIONS*, *supra* note 12, at 32–49.

16. *CONDORCET FOUNDATIONS*, *supra* note 12, at 5–31.

republic in France.¹⁷ Unlike Madison, however, Condorcet saw his constitution rejected.¹⁸ In fact, the French Revolution that Condorcet helped instigate turned on him, and he died during the Reign of Terror.¹⁹

Still, Condorcet's work is very much worthy of attention for anyone wishing to revitalize Madisonian constitutionalism for current conditions. Condorcet's constitution was much more democratic than Madison's, giving more power directly to the people through the exercise of the franchise, and thus is arguably more relevant to any effort to design a democratic republic that provides for popular sovereignty and seeks collective self-government on behalf of the commonwealth.²⁰ Even more worthy of consideration today are Condorcet's writings on the mathematics of electoral choice. Although others before him had considered the mathematical challenge of selecting a winner among multiple alternatives, Condorcet's analysis of the topic essentially launched an entire new field of social choice, which continues to develop new insights to this day.²¹

Condorcet's primary contribution was to articulate the idea of what is now known as a "Condorcet winner"—the one option among several that is preferred by a majority of individuals when that option is compared one at a time to each of the other options.²² The options could be items on a legislative agenda or candidates in election; the same mathematical principles apply to all exercises of social choice.²³ The normative premise behind the idea of a Condorcet winner is that no other option can claim to be more preferred by the group as a whole, treating each individual in the group as equals in exercising the collective decision.²⁴ When compared to any other option, the Condorcet winner is preferred by more of these equal

17. *Id.* at 228–34.

18. *Id.* at 27–31.

19. *Id.*

20. Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to the Law of Other States Symposium: Global Influence on U.S. Jurisprudence*, 59 *STAN. L. REV.* 1281, 1292–97 (2007).

21. In the thirteenth century, Ramon Lull anticipated much of Condorcet's thinking four hundred years later. But Lull's work was lost until rediscovery recently. See GEORGE G. SZPIRO, *NUMBERS RULE: THE VEXING MATHEMATICS OF DEMOCRACY, FROM PLATO TO THE PRESENT* 33 (Princeton Univ. Press 2010).

22. *Id.* at 83.

23. *Id.* at 77.

24. *Id.* at 83.

participants, and thus the Condorcet winner has the strongest claim of being the group's collective choice.²⁵

Not every election has a Condorcet winner, however, a proposition that Condorcet himself understood.²⁶ Instead, even when all individuals rationally rank the available options in order of preference, the mathematics of social choice are such that there may be no definitive ranking among the options for the group as a whole.²⁷ Instead, a "Condorcet cycle" can occur, meaning that the group can prefer A over B, and B over C, and C over A—much like the game of rock, paper, scissors.²⁸

Ever since Condorcet explained this cyclical possibility, his followers have developed different ways to settle an election when there is no Condorcet winner because this kind of cycle occurs.²⁹ One simple and normatively attractive way is to employ an electoral method proposed by Condorcet's fellow French theorist, Jean-Charles de Borda.³⁰ Called the "Borda count," the easiest way to calculate it is to add all of the votes each candidate receives in all of the one-on-one comparisons used to look for a Condorcet winner.³¹ In other words, in an election between A, B, and C, A's Borda count is the number of voters who preferred A to B plus the number of voters who preferred A to C; B's Borda count is the number of voters who preferred B to A plus the number of voters who preferred B to C; and C's Borda count is the number of voters who preferred C to A plus the number of voters who preferred C to B.³²

In the absence of an outright Condorcet winner, the candidate with the highest Borda count arguably has the strongest claim for being elected, given the equality of all voters.³³ The Borda winner is the candidate most preferred by the largest number of voters, when each candidate is considered cumulatively against each of the other competitors.³⁴ In the 1950s, the Scottish economist Duncan Black advanced the argument that the best

25. *Id.*

26. *Id.*

27. *Id.*

28. H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231, 1233–34 (1988).

29. *See* CONDORCET FOUNDATIONS, *supra* note 12, at 44.

30. SZPIRO, *supra* note 21, at 60–68.

31. *Id.* at 63–68.

32. *Id.*

33. CONDORCET FOUNDATIONS, *supra* note 12, at 111–13.

34. *Id.*

electoral system overall would elect the Condorcet winner, when one exists, and otherwise elect the Borda winner.³⁵ More recently, the American economist Eric Maskin, working with other colleagues (including Amartya Sen), has explored the mathematical properties that make the Condorcet and Borda electoral methods, especially in combination, normatively powerful.³⁶

But the prevailing electoral system in use throughout the United States, often called “first past the post” because it elects the candidate with the most votes regardless of how high or low this plurality may be, does not aim to elect either the Condorcet or the Borda winner.³⁷ Even efforts at electoral reform in the United States, like the current push for “instant runoff voting,” in which ranked-choice ballots are used to emulate a sequential runoff system without a need to hold another round of voting, are not designed to elect Condorcet or Borda winners.³⁸ The reason often given is that while Condorcet and Borda electoral methods may be attractive in principle, they are vulnerable to strategic manipulation by insincere voters, who cast their ballots in ways that diverge from their true preference.³⁹ Even Borda himself recognized that his system was intended for honest—not dishonest—participants.⁴⁰

But the current threat to democracy posed by authoritarian populism requires a rethinking of this conventional wisdom. A system designed to elect Condorcet winners will prevent putting authoritarian populists in power, as long as these authoritarians have not become so popular among the electorate as a whole that they, rather than other alternatives, are the

35. DUNCAN BLACK & R.A. NEWING, *THE THEORY OF COMMITTEES AND ELECTIONS AND COMMITTEE DECISIONS WITH COMPLEMENTARY VALUATION* at xvi, xxiv (Iain McLean, Alistair McMillan & Burt L. Monroe eds., Kluwer Acad. Publishers rev. 2d ed. 1998).

36. See, e.g., Partha Dasgupta & Eric Maskin, *Elections and Strategic Voting: Condorcet and Borda* 22–27 (Jan. 2020) (unpublished slides), https://scholar.harvard.edu/files/maskin/files/elections_and_strategic_voting_condorcet_and_borda_dasgupta_maskin_01.2020_manuscript.pdf; see also ERIC MASKIN & AMARTYA SEN, *THE ARROW IMPOSSIBILITY THEOREM* 101–24 (Columbia Univ. Press 2014); AMARTYA SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 52–66 (Harvard Univ. Press expanded ed. 2017).

37. GERRY MACKIE, *DEMOCRACY DEFENDED* 5–8 (Cambridge Univ. Press 2003).

38. MASKIN & SEN, *supra* note 36, at 67–68.

39. Dennis C. Mueller, *Public Choice: Early Contributions*, in 1 *OXFORD HANDBOOK OF PUBLIC CHOICE* 42, 43–44 (Roger D. Congleton et al. eds., Oxford Univ. Press 2019).

40. *Id.* at 44.

Condorcet winners.⁴¹ And the issue of strategic voting is different when democracy itself is threatened by one of the candidates in an election: the imperative of defeating that candidate can cause voters to cast their ballots sincerely with that imperative foremost in mind, and doing so significantly limits the degree to which a Condorcet-based electoral system is vulnerable to strategic manipulation.⁴²

Therefore, with the preservation of democracy itself at stake, it is worth pursuing whether incorporating Condorcetian insights into Madisonian constitutionalism can help to improve the performance of republican government on its two basic objectives of avoiding despotism and, instead, achieving self-government that serves the common good.

II. WHAT ELECTORAL SYSTEM BEST PROTECTS DEMOCRACY?

Let us stipulate, for this discussion, that the present threat to democracy in the United States is from the right, not the left.⁴³ Whatever one may think of the policies advocated by progressive Democrats, they are not endeavoring to undo democracy itself.⁴⁴ On the other hand, populist Republicans following in the footsteps of former President Donald Trump pose the danger of dismantling democracy if they manage to take control of government.⁴⁵ Not only did they attempt to negate President Joe Biden's authentic electoral victory in 2020—through the systematic perpetration of the “Big Lie” that the election was stolen from Trump and the ensuing effort to repudiate the result of the election on January 6, 2021—but they have

41. *See id.* (“[Condorcet’s] theorem’s . . . assumptions take on extreme importance when it is used to defend democratic government.”).

42. James Green-Armytage, *Four Condorcet-Hare Hybrid Methods for Single-Winner Elections*, VOTING MATTERS, OCT. 2011, at 5–8.

43. *See* THOMAS E. MANN & NORMAN J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM at XII–XIV (Basic Books 2012) (“[T]he Republican Party [] has become an insurgent outlier—ideologically extreme; contemptuous of the inherited social and economic policy regime; scornful of compromise; unpersuaded by conventional understanding of facts, evidence, and science; and dismissive of the legitimacy of its political opposition.”).

44. *Id.*; Peter Wehner, *The GOP Is a Grave Threat to American Democracy*, ATLANTIC (Apr. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/04/gop-grave-threat-american-democracy/618693/> [<https://perma.cc/9CUZ-KYGL>].

45. Michelle Nichols, *Election Denier on Ballot Aim to Run U.S. Presidential Vote in 2024*, REUTERS (Nov. 8, 2022, 4:22 AM), <https://www.reuters.com/world/us/election-deniers-ballot-aim-run-us-presidential-vote-2024-2022-11-08/> [<https://perma.cc/B3CG-NV9N>].

been openly campaigning for office on the platform of using their power in office to assure that the results of future elections are declared in their favor.⁴⁶

If a majority of voters truly wanted these populists to hold office, it would be impossible in a genuine democracy to prevent them from winning elections. The hope, then, would necessarily be that these populists would not manage to prevent free and fair elections from occurring again in the future, and the voters, having decided to support different candidates, voted these populists out of office in elections whose results they were forced to accept. Perhaps, as an element of Madisonian checks and balances, the courts could be counted upon to insist that these populists relinquish power when the valid votes showed that they had lost.⁴⁷ But, it obviously would be precarious to have an anti-democracy party come to office through democratic elections because of the risk that once that anti-democracy party gained control, those democratic elections would be the last. (Given Madisonian federalism and the separation of powers, it is easier to envision the subversion of democracy for a single election, as if solely because of partisanship, Congress refuses to accept the results of a presidential election and instead awards the presidency to the candidate that the voters did not elect, rather than to imagine the end of democracy in the United States indefinitely. Still, if the presidency along with both houses of Congress came under the control of an authoritarian faction, it is not inconceivable that this faction could work changes in the nation's electoral procedures that would enable it to maintain power against the will of the voters through multiple elections.)

46. See Ed Kilgore, *Trump-Backed Secretaries of State Could Flip the 2024 Election*, N.Y. MAG.: INTELLIGENCER (Feb. 17, 2022), <https://nymag.com/intelligencer/2022/02/trump-backed-secretaries-of-state-could-flip-2024-election.html> [<https://perma.cc/FV4U-BPMT>]; Isaac Arnsdorf et al., *Heeding Steve Bannon's Call, Election Deniers Organize to Seize Control of the GOP—and Reshape America's Elections*, PROPUBLICA (Sept. 2, 2021, 5:00 AM), <https://www.propublica.org/article/heeding-steve-bannons-call-election-deniers-organize-to-seize-control-of-the-gop-and-reshape-americas-elections> [<https://perma.cc/2H8T-CQ2K>].

47. See *Fact Check: Courts have Dismissed Multiple Lawsuits of Alleged Electoral Fraud Presented by Trump Campaign*, REUTERS (Feb. 15, 2021, 9:41 AM), <https://www.reuters.com/article/uk-factcheck-courts-election/fact-check-courts-have-dismissed-multiple-lawsuits-of-alleged-electoral-fraud-presented-by-trump-campaign-idUSKBN2AF1G1> [<https://perma.cc/3W5C-64YA>].

For now, however, the populist movement in the United States, while ascendant, has not reached majority status.⁴⁸ It may have become the dominant faction within the Republican Party, both nationally and in most, if not all states.⁴⁹ It may even have attained the level of 51 percent or more in some gerrymandered congressional districts.⁵⁰ But where Republicans are the majority party, in most of these places the fraction of Republicans who are anti-democracy populists is still not large enough to make them more than 50 percent of the whole electorate.⁵¹

The challenge for democracy then, is to prevent this sub-50 percent contingent of populists from winning elections despite being a minority.⁵² Eliminating gerrymandering would be a huge step in the right direction.⁵³ It is certainly easier for anti-democratic populists to win seats when some of the legislative districts in a state are skewed to overrepresent their share of the statewide electorate in those districts.⁵⁴ A 40 percent faction statewide

48. Donald Trump, the current leader of the populist faction in the United States, did not win a majority of the popular vote nationwide in either 2016 or 2020. EDWARD B. FOLEY, PRESIDENTIAL ELECTIONS AND MAJORITY RULE 111–12 (2020). His electoral college victory in 2016 was based on plurality—not majority—wins in enough states, and it is quite conceivable that he would not have won the electoral college if states had required majority—rather than plurality—victories through the use of runoffs or Instant Runoff Voting. *Id.* Trump also never reached majority approval in public opinion surveys throughout his presidency. *Requiring Majority Winners*, *supra* note 11, at 375.

49. See *The Republican Coalition*, PEW RSCH. CTR. (Nov. 9, 2021), <http://www.pewresearch.org/politics/2021/11/09/the-republican-coalition> [<https://perma.cc/K4UU-ZQZU>].

50. See Chris Walker, *Experts Say GOP House Takeover Would've Been Impossible Without Gerrymandering*, TRUTHOUT (Nov. 9, 2022), <https://truthout.org/articles/experts-say-gop-house-takeover-wouldve-been-impossible-without-gerrymandering/> [<https://perma.cc/GZ2D-QJQH>].

51. *The Republican Coalition*, *supra* note 49 (stating that 23 percent of Republican voters identify as populist right).

52. Samuel S.H. Wang et al., *A Systems Framework for Remediating Dysfunction in US Democracy*, PNAS, Dec. 6, 2021, at 1, 5 (“Democracy often fails to meet its ideals, and these failures may be made worse by electoral institutions. Unwanted outcomes include . . . the ability of a faction of voters to gain power at the expense of the majority.”).

53. See Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 565–66 (2018) (describing the consequences in Hungary when gerrymandering was allowed to run rampant).

54. See *id.* at 567. Viktor Orbán, the quintessential contemporary authoritarian populist, consolidated his anti-democratic hold on power through the use of gerrymandering. *Id.*

easily can have majority status in specific districts through the manipulation of the legislative map.⁵⁵

But it is not enough to end gerrymandering to protect democracy from populism. U.S. Senate seats, along with other statewide elections (like those for governor or secretary of state), are not gerrymandered.⁵⁶ But, they are still susceptible to the possibility that a populist faction, with only 40 percent support in the state or even less, could win office despite not being a majority of the statewide electorate.⁵⁷ Under the conventional electoral system that exists throughout the United States, populist candidates can first win Republican primaries (because populists are a majority in these Republican primaries even though they are not the majority of the whole electorate), and then win the general election because enough Republican voters who would have preferred a non-populist candidate will reluctantly vote for a populist over a Democrat in November.⁵⁸

The question, then, is whether it is possible to design a democratic electoral system that prevents a populist candidate, who is most preferred by only 40 percent of voters or even fewer, from winning in November—especially when the rest of the electorate, more than a majority, would prefer that this anti-democratic populist not prevail. The answer to this question is yes: invoking principles derived from Condorcet, it is possible to design a democracy-protecting electoral system that defeats the anti-democratic populist who is not the most preferred candidate of a majority of the whole electorate.⁵⁹

In fact, there is more than one such system, as there are multiple means of electing a Condorcet winner when one exists.⁶⁰ But alternative Condorcet-compliant procedures differ in their other attributes, including their potential relative vulnerability to strategic manipulation, and thus, there may be sound reasons to prefer some Condorcet-compliant electoral systems

55. *See id.* at 566–68.

56. *Id.* at 566 (“Yes, the United States engages in gerrymandering, but it does so for national elections in fifty different states processes . . .”).

57. *See Requiring Majority Winners, supra* note 11, at 368–72.

58. *See id.* at 370.

59. *See* Edward B. Foley, *Tournament Elections with Round-Robin Primaries: A Sports Analogy for Electoral Reform*, 2021 WIS. L. REV. 1187, 1196–1200 (2021) [hereinafter *Tournament Elections*].

60. Green-Armytage, *supra* note 42, at 1.

over others given the goal of making constitutional democracy more resilient to the risk of backsliding into authoritarianism.⁶¹

III. ALASKA'S NEW "TOP FOUR" SYSTEM

Let us start by considering a reform already adopted in one state: Alaska's Top Four system, which uses a nonpartisan primary in which the four candidates with the most votes advance to a general election that employs Ranked Choice Voting (RCV) to identify the winner.⁶² The particular version of RCV is Instant Runoff Voting (IRV), also known in political science as the "Hare method," after its nineteenth century British inventor, Thomas Hare.⁶³ Instant Runoff Voting works, as its name implies, by eliminating the candidate with the fewest first-choice votes, redistributing the ballots that ranked that candidate first to whichever other candidate is ranked next on the ballot, and repeating this procedure until one candidate has a majority of votes.⁶⁴

Alaska's Top Four system has the potential for combatting anti-democracy populism much better than the conventional electoral system.⁶⁵ I have made this point elsewhere,⁶⁶ as has NYU Professor Rick Pildes.⁶⁷ It is easy to illustrate this point using Alaska's 2022 U.S. Senate election as an example. A Trump-endorsed populist endeavored to defeat Lisa Murkowski, the incumbent Republican, in revenge for Murkowski's opposition to Trump's assault upon democracy (including her vote to convict Trump in his impeachment for inciting the January 6th insurrection).⁶⁸ Had Alaska continued to use the conventional electoral system, the Trump-

61. Richard F. Potthoff, *Simple Manipulation-Resistant Voting Systems Designed to Elect Condorcet Candidates and Suitable for Large-Scale Public Elections*, 40 SOC. CHOICE & WELFARE 101, 120 (2013).

62. Jack Santucci, *Variants of Ranked-Choice Voting from a Strategic Perspective*, 9 POL. & GOV'T 344, 346 (2021).

63. *Id.*; SZPIRO, *supra* note 21, at 203.

64. Santucci, *supra* note 62, at 344.

65. Edward B. Foley, *Can Alaska Save Democracy?*, WASH. POST (Feb. 10, 2022, 8:00 AM), <https://www.washingtonpost.com/opinions/2022/02/10/alaska-ranked-choice-voting-senate-murkowski/>.

66. *Id.*

67. Richard H. Pildes, *More Places Should Do What Alaska Did to Its Elections*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/opinion/alaska-elections-ranked-choice.html>.

68. James Arkin, *Trump Endorses Murkowski Challenger*, POLITICO (June 18, 2021, 2:45 PM), <https://www.politico.com/news/2021/06/18/trump-murkowski-alaska-senate-495187> [<https://perma.cc/V5FE-48YF>].

endorsed populist might have been able to defeat Murkowski in the Republican primary and then win a plurality of votes in the general election even if Murkowski attempted another write-in campaign as she successfully did in 2010.⁶⁹ Whereas Murkowski then was able to accomplish the unusual feat of obtaining a winning plurality of votes as a write-in candidate,⁷⁰ one may assume that she could not have duplicated this accomplishment. Then, the Trump-endorsed populist would win the Senate seat with a plurality—and this plurality win would prevail even if Murkowski would win a majority of votes in a two-person runoff. Alaska’s new system changes all this. By functioning as an instant runoff, Alaska’s use of RCV in the general election enables Murkowski to pick up ballots by being the second (or, in some instances, even third) choice of voters whose preferred candidates were less popular than Murkowski and thus eliminated in the runoff procedure.⁷¹

Accordingly, where an anti-democratic populist is preferred by a plurality but not a majority of the electorate, Alaska’s system enables a majority-preferred candidate—like Murkowski in the 2022 midterms—to demonstrate that majority support by accumulating ballots as less-preferred candidates are eliminated in the instant runoff process.⁷² Liz Cheney, likewise, might have had a better chance of winning reelection if she could have run in an Alaska-style nonpartisan primary, rather than competing against a Trump-endorsed opponent in the Republican primary. Even in an instant runoff system, Cheney might not have been able to overcome the support for the Trump-endorsed candidate in Wyoming. But Cheney had no

69. *Id.*; see also Natalie Allison, *Trump’s Senate Picks Stumble Out of the Gate*, POLITICO, <https://www.politico.com/news/2021/11/28/donald-trump-senate-picks-stumble-523407> [https://perma.cc/97U5-JX37] (Nov. 28, 2021, 8:43 AM) (showing a back and forth race in which Murkowski started in third place behind Trump-endorsed Kelly Tshibaka and surged back in the fall of 2021); Yereth Rosen, *Senator Lisa Murkowski Wins Alaska Write-in Campaign*, REUTERS (Nov. 17, 2010, 6:52 PM), <https://www.reuters.com/article/us-usa-elections-murkowski/senator-lisa-murkowski-wins-alaska-write-in-campaign-idUSTRE6AG51C20101118> [https://perma.cc/FU5A-VK9S] (noting Murkowski was the first Senator to win a write-in campaign in over 50 years, despite the difficult spelling of her last name).

70. Rosen, *supra* note 69.

71. Murkowski vindicated the theory of the system by prevailing in the 2022 election. Jeremy Hsieh & Liz Ruskin, *Murkowski Wins Alaska’s U.S. Senate Race*, ALASKA PUB. MEDIA (Nov. 23, 2022), <https://alaskapublic.org/2022/11/23/murkowski-wins-alaskas-u-s-senate-race/> [https://perma.cc/93CU-Q5QE].

72. See, e.g., David Siders, *Why Sarah Palin’s Loss Is a Warning for the GOP*, POLITICO (Sept. 2, 2022, 10:10 AM), <https://www.politico.com/news/2022/09/02/sarah-palin-loss-gop-alaska-00054633> [https://perma.cc/H4CJ-KSP8] (describing how Sarah Palin, a candidate who would win by a plurality, lost in the instant run off vote).

opportunity to test this proposition as Wyoming continues to employ a plurality-winner general election,⁷³ and Cheney was overwhelmingly defeated in the GOP primary that preceded it. Accordingly, while not perfect, the Alaska system works better to protect democracy itself from an anti-democratic populist who has support from a plurality of the electorate but who is not the choice of a majority.

IV. INSTANT RUNOFF VOTING AND ITS POTENTIAL FAILURE TO ELECT A CONDORCET WINNER

Alaska's new system, as much of an improvement as it is, cannot always protect against the election of an anti-democratic populist who is not the candidate the majority of voters most would prefer. To understand this crucial point, it is worth considering a specific example. Suppose use of Alaska's new system causes these four finalists to appear on the November general-election: a populist Republican, a traditionally conservative Republican, a moderately liberal Democrat, and a further-left progressive Democrat. For sake of convenience, we can label these four candidates: Populist, Conservative, Liberal, and Progressive.

Now, let us suppose that our hypothetical example involves the use of Alaska's system in a closely divided "purple" state, so that these are the ranked-choice ballots that voters cast in November:

% of voters	First-Choice	Second-Choice	Third-Choice	Last-Choice
30	Populist	Conservative	Liberal	Progressive
21	Conservative	Populist	Liberal	Progressive
24	Liberal	Progressive	Conservative	Populist
25	Progressive	Liberal	Conservative	Populist

Note that these preferences assume that voters are loyal to party, above all, regardless of their preference for a more or less centrist candidate of their party. Thus, those who prefer Conservative the most rank Populist second, as the other Republican candidate, rather than crossing party lines to support Liberal over Conservative. And vice versa: those who support Liberal the most rank Progressive second instead of Conservative. Still, these ballots reflect an electorate sharply fragmented among four political

73. WYO. STAT. ANN. § 22-2-117(a) (2023).

camps, reflecting Rick Pildes's warning that this kind of political fragmentation is the dangerous hallmark of our times.⁷⁴

If Alaska's use of Instant Runoff Voting is applied to these ballots to identify the election's winner, then the anti-democratic Populist prevails. Conservative is eliminated first, having the fewest first-choice votes. The 21 percent of ballots that ranked Conservative first are redistributed to Populist, making Populist the winner without need of any further rounds of the IRV procedure since Populist achieved a majority of 51 percent with this initial redistribution.

But Populist is not the most majority-preferred candidate in this election. Based on these ballots, if the election were solely between Populist and Conservative, Conservative would win 70–30. This is because all voters except those who rank Populist first prefer Conservative to Populist. To be sure, most of these voters like Liberal and Progressive even more than Conservative. Still, these voters like Conservative more than Populist, as do those voters who like Conservative most of all.

Conservative, in fact, would beat each of these other candidates one-on-one. As we have seen, Conservative beats Populist 70–30. Based on these same ballots, Conservative would also beat Liberal 51–49 one-on-one, as well as beat Progressive by the same 51–49 margin. Winning all of these one-on-one comparisons with every other candidate makes Conservative the Condorcet winner in this election.

Instant Runoff Voting, however, does not always elect the Condorcet winner,⁷⁵ as our hypothetical set of ballots shows. Moreover, when IRV elects an anti-democratic Populist instead of the Condorcet winner—as it does in this case—IRV doubly disservices the cause of democracy. First, it fails to find the candidate most consistent with the basic majoritarian premises of democracy (the candidate preferred by the majority when compared to each of the others).⁷⁶ Second, and most fundamentally, IRV elects a candidate who, in addition to being disfavored by a majority, is predisposed to dismantle democracy itself once installed into office.⁷⁷ If one values the preservation of democracy, one cannot help but be troubled by this result.

74. Richard Pildes, *Democracies in the Age of Fragmentation*, 110 CALIF. L. REV. 2051 (2022).

75. See Green-Armytage, *supra* note 42, at 1.

76. See *Requiring Majority Winners*, *supra* note 11, at 388.

77. See *id.* at 375–76.

V. ROUND-ROBIN VOTING

An alternative to Instant Runoff Voting that also uses ranked-choice ballots, but which guarantees the election of a Condorcet winner whenever one exists, is Round-Robin Voting.⁷⁸ Almost identical to Duncan Black's combination of Condorcet and Borda's electoral methods,⁷⁹ Round-Robin Voting takes its name from the fact that it emulates a round-robin sports competition in which each competitor faces off against every other competitor.⁸⁰ Given the kind of ranked-choice ballots used in Alaska's Top Four system, it is possible to construct a round-robin competition among the four finalists on the November ballot. The round-robin winner is the candidate who defeats the most opponents when compared one-on-one against each candidate. If the round-robin winner is undefeated in all these one-on-one comparisons, defeating each other candidate in this series of head-to-head competitions, then the round-robin winner is, by definition, also a Condorcet winner (the difference between Black's proposal and Round-Robin Voting is that Black would revert to a Borda count if there is no undefeated round-robin winner, whereas Round-Robin Voting would elect a clear round-robin winner even if not undefeated).⁸¹

Because not every election has a Condorcet winner, and because the round-robin analysis of ranked-choice ballots can cause more than one candidate to be tied with the most one-on-one victories, there needs to be a tiebreaker to determine the round-robin winner.⁸² Similar to a round-robin sports competition, a round-robin election can use the total number of votes cast for and against each candidate in all of the one-on-one competitions as the tiebreaker that best measures each candidate's relative strength against the rest of the candidates combined.⁸³ In soccer, for example, total goals for and against a team in all of the round-robin matches can break a tie between

78. See *Tournament Elections*, *supra* note 59, at 1188.

79. BLACK & NEWING, *supra* note 35, at 81.

80. *Tournament Elections*, *supra* note 59, at 1188, 1200 n.39.

81. Technically, Round-Robin Voting is a combination of the so-called "Copeland method" (which elects the candidate with the most head-to-head victories) and the backup Borda count, whereas Black's system is a combination of pure Condorcet and Borda. See Donald G. Saari & Vincent R. Merlin, *The Copeland Method*, 8 *ECON. THEORY* 51, 51–54 (1996). For a discussion of the Copeland method in relationship to Condorcet, Borda, and other alternatives, see MACKIE, *supra* note 37, at 50–51.

82. *Tournament Elections*, *supra* note 59, at 1195.

83. *Id.* at 1188–91.

two teams with the same number of round-robin victories.⁸⁴ In an election involving ranked-choice ballots, total votes for and against each candidate based on all of the one-on-one comparisons is functionally equivalent to the candidate's Borda score.⁸⁵ Round-Robin Voting thus elects the candidate with the highest Borda score when there is no Condorcet winner and no single candidate has the largest number of one-on-one victories.

Applied to the same set of hypothetical ballots as considered above, Round-Robin Voting would elect Conservative as the winner. In this respect, Round-Robin Voting is superior to Instant Runoff Voting in protecting democracy from an anti-democratic Populist candidate who is disfavored, compared to at least one candidate (Conservative), by a majority of voters. It would be possible to substitute Round-Robin Voting in place of Instant Runoff Voting in Alaska's Top Four system while keeping the rest of the system the same: a nonpartisan primary that sends four finalists to the November election, with voters casting ranked-choice ballots to identify their preferences among the four finalists. The only difference would be the use of Round-Robin Voting, rather than Instant Runoff Voting, to determine the winning candidate given all the preferences on all the ballots. Because Round-Robin Voting elects the majority-preferred candidate—and especially because Round-Robin Voting, unlike Instant Runoff Voting, does not elect a majority-disfavored populist candidate who is committed to undermining democracy upon attaining office—anyone considering the possible adoption of Alaska's Top Four system in other states should also consider the possibility of substituting Round-Robin Voting in place of Instant Runoff Voting as a better method of calculating the winner from the ranked-choice ballots in this kind of Top Four system.

84. See Arvi Pakaslahti, *The Use of Head-to-Head Records for Breaking Ties in Round-Robin Soccer Contests*, 46 J. PHIL. SPORT 355, 355–56 (2019) (detailing the variety of tiebreakers used in elite soccer tournaments including overall goal differential and total goals scored).

85. See SZPIRO, *supra* note 21, at 60–68. To be precise, a true Borda score for each candidate would calculate only votes in favor of the candidate across all round-robin matches and not include all votes cast against the candidate in all these matches. But because votes for and against a candidate sum to 100 percent, calculating a candidate's average vote share in all the one-on-one matches is the same as calculating the candidate's average margin-of-victory in all these round-robin matches. In this respect, elections are different than soccer, because the number of goals for and against a team in any given round-robin soccer match need not sum to the same total number of goals.

VI. BOTTOM-TWO RUNOFF

There exists an electoral system that combines features of both Instant Runoff Voting and Round-Robin Voting and that, at least in theory, potentially offers the benefits of both. Named “Bottom-Two Runoff” and abbreviated BTR (which can sound like “better”),⁸⁶ this hybrid system operates as a sequential elimination of candidates one at a time, similar to the way that IRV does.⁸⁷ But BTR incorporates one-on-one comparison of candidates, two at a time, similar to Round-Robin Voting, and thus will always elect a Condorcet winner when one exists among the candidates.⁸⁸

BTR works this way: it identifies the two candidates with the fewest first-place votes and eliminates whichever of these two candidates is ranked lower on more ballots overall.⁸⁹ After this candidate is eliminated, the same process is repeated until there is a single winner.⁹⁰

Applied to the same set of hypothetical ballots set forth above, BTR elects Conservative as the winner, just as Round-Robin Voting does. We can verify this by examining the operation of its procedure: Conservative and Liberal are the two candidates with the fewest first-choice votes; Conservative is ranked above Liberal on 51 percent of all ballots, with Liberal ranked above Conservative on the remaining 49 percent, and thus Liberal is eliminated. The ballots that ranked Liberal first are redistributed to Progressive, who is ranked second, and so Progressive now is top ranked on 49 percent of ballots. In the second round of this process, Conservative and Populist are the two candidates with the fewest top-ranked votes, and Conservative is ranked higher than Populist on 70 percent of all ballots, with Populist ranked higher than Conservative only on 30 percent. Thus, Populist

86. Warren D. Smith, Comparative Survey of Multiwinner Election Methods 7 (June 18, 2006) (unpublished manuscript), <https://rangevoting.org/WarrenSmithPages/homepage/multisurv.pdf> [<https://perma.cc/F5DJ-V25A>].

87. Warren D. Smith, Descriptions of Single-Winner Voting Systems 17–18 (July 12, 2006) [hereinafter Descriptions of Single-Winner Voting Systems] (unpublished manuscript), <http://www.9mail.de/m-schulze/votedesc.pdf> [<https://perma.cc/4RAA-7YJ2>].

88. There are various different ways, besides BTR, to combine Condorcet and Instant Runoff Voting into a single overall electoral system. See Green-Armytage, *supra* note 42, at 1–2.

89. *Id.*

90. *Id.*; see The Ohio State University Moritz College of Law, *The Problem with Plurality-Winner Elections: And Can Requiring Majority Winners Help Save Democracy?*, YOUTUBE, at 15:05 (Nov. 23, 2021) [hereinafter *The Problem with Plurality-Winner Elections*], <https://www.youtube.com/watch?v=uE1y7qsQpAc> [<https://perma.cc/J7PG-4F54>].

is now eliminated, and the ballots that ranked Populist first are now redistributed to Conservative, who is ranked second on these ballots. This redistribution now gives Conservative 51 percent to Progressive's 49 percent, and so Conservative wins the BTR election.

For anyone attracted to Instant Runoff Voting, but who likes the idea of electing a Condorcet winner as the candidate who by definition is most preferred by a majority of voters, BTR has obvious appeal. Moreover, in the specific context of these hypothetical ballots, where the anti-democratic Populist wins the election if IRV is used, despite Conservative being the Condorcet Winner, BTR seems to be the obviously superior electoral system. Not only does it elect the candidate who most accords with the will of the majority, it also does not cause the election of the Populist who is committed to dismantling democracy once in office. BTR achieves this democracy-safeguarding, indeed democracy-maximizing, result while employing the more straightforward procedure of a sequential-elimination system, rather than requiring the added complexities of the nonsequential round robin process.⁹¹

What, then, is not to like about BTR?

VII. STRATEGIC VOTING

In evaluating the relative merits of alternative electoral systems, it is necessary to consider the possibility that voters will not vote their sincere preferences but instead will vote strategically.⁹² In the theoretical literature, it has long been understood that any voting system that guarantees the election of a Condorcet winner, by comparing one-on-one all the candidates, is vulnerable to strategic manipulation that defeats the candidate who would be the Condorcet winner if all voters cast their ballots sincerely.⁹³ This point

91. *The Problem with Plurality-Winner Elections*, *supra* note 90, at 7:17–17:34.

92. See John H. Aldrich et al., *Strategic Voting and Political Institutions*, in *THE MANY FACES OF STRATEGIC VOTING* 1, 1–6 (Laura B. Stephenson, John H. Aldrich & Andre Blais eds., Univ. Mich. Press 2018); GARY W. COX, *MAKING VOTES COUNT: STRATEGIC COORDINATION IN THE WORLD'S ELECTORAL SYSTEMS* 35–48 (1997); RASHEF MEIR, *STRATEGIC VOTING* 1–4 (Ronald J. Brachman & Peter Stone eds., Springer 2022).

93. See, e.g., Potthoff, *supra* note 61, at 107–08; Mark Allen Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 *J. ECON. THEORY* 187, 188 (1975) (“[E]very strategy-proof voting procedure is dictatorial.”); Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 *ECONOMETRICA* 587, 591 (1973) (“All non-trivial voting schemes are manipulable . . .”).

is especially easy to see if, as is generally assumed (unless the voting rules clearly state otherwise), voters are entitled to list only their first-choice preferences on their ranked-choice ballots, and are thus not obligated to reveal their preferences among remaining candidates.⁹⁴ In this situation, assuming the sincere preferences of all voters is the same as indicated above—which again would result in Conservative being the Condorcet winner—if all voters only reveal their first-choice preferences and refuse to rank the rest of the candidates, then both Round-Robin Voting and Bottom-Two Runoff (both of which aim to elect the sincere Condorcet winner) collapse into the equivalent of a simple plurality-winner election.⁹⁵

Populist, the plurality winner of all first-choice votes, wins all one-on-one comparisons against every other candidate, if all voters strategically refuse to reveal any additional preferences. Thus, Populist—not Conservative—would be the winner in a Round-Robin Voting election in which this kind of insincere strategic voting was pervasive. Likewise, using the alternative BTR system—with only first-choice preferences revealed on the ballots—in the first round of sequential elimination, Liberal defeats Conservative; then, Progressive defeats Liberal; and finally, Populist defeats Progressive.

This preliminary analysis of strategic voting might suggest that it is not worthwhile to adopt any electoral system designed to guarantee the election of a sincere Condorcet winner because all such systems are vulnerable to this kind of collapse back into the equivalence of basic plurality voting.⁹⁶ One might argue that the best that can be achieved, as a practical matter, is Instant Runoff Voting—since it is not vulnerable to the same sort of strategic manipulation.⁹⁷ Unlike with any system that uses one-on-one comparisons to identify a winner (even in part, like BTR), in an IRV election, a voter's decision to reveal a lower-ranked preference can never reduce the chance of winning for that voter's higher-ranked preference. Consequently, when IRV

94. *Representative Government: Instant Runoff Voting (IRV) or Ranked Choice Voting (RCV)*, LEAGUE WOMEN VOTERS OKLA. (Nov. 2019), <https://my.lwv.org/oklahoma/position/representative-government-instant-runoff-voting-irv-or-ranked-choice-voting-rcv> [https://perma.cc/482Y-XWFZ] (“IRV offers voters the option of ‘ranking’ the candidates[] but does not require it.”).

95. *See IRV Degrades to Plurality*, CTR. FOR ELECTION SCI., <https://electionscience.org/library/irv-degrades-to-plurality/> [https://perma.cc/ZK9N-2HCL] (last visited Mar. 31, 2022) (demonstrating the degradational impact of first-choice-only ballots on a real election in Burlington, Vermont).

96. *See id.*

97. *See* Potthoff, *supra* note 61, at 113–16 (comparing IRV with other voting methods).

is used, there is no strategic incentive for voters to withhold their complete sincere preferences.⁹⁸

The analysis of strategic voting, however, needs to go further. Specifically, when there is a serious risk that using IRV will elect an anti-democratic authoritarian candidate who would not be the Condorcet winner if voters cast their ballots sincerely, the goal of preserving democracy from the threat of authoritarianism requires consideration of whether all voters will act strategically in the same way and, if not, whether different electoral systems that seek to elect a sincere Condorcet winner might be more or less vulnerable to strategic voting in significantly varying degrees. Using the same hypothetical example to illustrate this point, Populist wins the election if either simple plurality voting or Instant Runoff Voting is used, whereas Conservative would be the sincere Condorcet winner. But, given the threat to democracy itself if an openly anti-democratic Populist is elected, is it necessarily the case that strategic voting would also cause Populist's election in a system designed to elect the sincere Condorcet winner?

VIII. ASYMMETRICAL STRATEGIC VOTING

It is possible that there might be a significant divide among different groups of voters on whether to vote their ranked-choice ballots sincerely or strategically.⁹⁹ We can characterize this situation as one of asymmetrical strategic voting. It is a possibility to consider especially in the context of contemporary politics, already marked by what has been described as asymmetrical polarization and asymmetrical constitutional hardball.¹⁰⁰ Specifically, we can hypothesize the possibility that voters who most prefer an anti-democratic authoritarian Populist might engage in strategic voting in

98. See James Green-Armytage, *Strategic Voting and Nomination*, 42 SOC. CHOICE & WELFARE 111, 125–30 [hereinafter *Strategic Voting and Nomination*] (referring to IRV as the Hare method).

99. See *id.* at 5–7 ([S]trategic voting means providing a ranking of the candidates that differs from one's true preference ordering . . . it means departing from one's sincere cardinal ratings of the candidates.”).

100. Thomas Mann and Norm Ornstein most notably highlighted the asymmetry of recent partisan polarization. See MANN & ORNSTEIN, *supra* note 43, at 51–58 (expanded edition 2016); see THOMAS MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH* 211–26 (Oxford Univ. Press 2008); see also Jacob S. Hacker & Paul Pierson, *Confronting Asymmetric Polarization*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 59, 59–61 (Nathaniel Persily ed., Cambridge Univ. Press 2015); Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 919 (2018) (predicting that “[w]hile Democrats may well become more aggressive practitioners of constitutional hardball, they will not keep pace with Republicans . . .”).

an effort to get their most-preferred candidate to prevail, while other voters—especially those who strongly oppose this Populist candidate precisely because of their fear for the fate of democracy if that candidate prevails—might choose to cast their ranked-choice ballots sincerely. An analysis of this asymmetrical strategy voting shows, at least in theory, that even within the family of electoral systems that are designed to elect a sincere Condorcet winner, distinct variations within this family differ in their capacity to defend against the strategic voting on behalf of the anti-democratic authoritarian candidate.¹⁰¹

To begin our examination of this point, let us assume that BTR is the electoral system in use for an election involving the same four hypothetical candidates, and that the ranked-choice ballots—if voters cast them sincerely—would be the ones we have already considered:

% of voters	First-Choice	Second-Choice	Third-Choice	Last-Choice
30	Populist	Conservative	Liberal	Progressive
21	Conservative	Populist	Liberal	Progressive
24	Liberal	Progressive	Conservative	Populist
25	Progressive	Liberal	Conservative	Populist

But now let us suppose that the Populist candidate urges the voters who prefer the Populist the most to engage in what is known as a “burying” strategy: to insincerely rank Conservative last on their ballots, rather than sincerely ranking Conservative second.¹⁰² It would be rational for Populist to employ this strategy in an effort to win the election, in order to prevent the election of Conservative as the Condorcet winner, which is what would occur if all voters, including Populist’s supporters, cast their ballots sincerely. Indeed, it is easy to imagine a Populist candidate exhorting his supporters to bury Conservative. It would be similar to Donald Trump, as part of his endorsement of David Perdue in Georgia’s 2022 gubernatorial election, calling incumbent Brian Kemp a Republican in Name Only (RINO), whose reelection would be worse than if the Democratic candidate, Stacey Abrams, won.¹⁰³

101. See sources cited *supra* note 93.

102. See *Strategic Voting and Nomination*, *supra* note 98, at 116–18.

103. Cheryl Teh, *Trump Has Endorsed David Perdue for Georgia Governor, Calling Brian Kemp a ‘RINO’ and ‘Very Weak’*, BUS. INSIDER (Dec. 6, 2021, 8:39 PM), <https://www.businessinsider.com/trump-endorse-david-perdue-georgia-gov-brian-kemp-rino-2021-12> [https://perma.cc/FE9F-7F93].

In our hypothetical example, however, let us assume that all Democratic voters, who prefer either Liberal or Progressive first and the other Democratic candidate second, rank all the candidates on their ballots sincerely and do not engage in any insincere strategic voting. We can imagine a strong motivation for these Democratic voters to be fully sincere in this way: they greatly fear and adamantly oppose the potential election of Populist as an anti-democratic authoritarian. As much as they favor their own most-preferred candidate, their highest priority in this election is to defeat Populist. Therefore, they will make sure to rank Populist last. They clearly prefer Conservative, as a Republican who is not anti-democratic, to Populist, and they clearly prefer both Democrats to Conservative. There is no reason for them not to rank the two Democrats according to their own sincere preferences, and thus all of these Democrats will fully rank the four candidates in the order of their sincere preferences.

For the purposes of our analysis, we can also assume the same of the voters who prefer Conservative the most. Although Populist is urging supporters to bury Conservative, there is no reason for Conservative to retaliate in kind. On the contrary, we can imagine Conservative trying to appeal to as many Republican (right-of-center) voters as possible by claiming to be the more authentic Republican choice, and Republican voters should be most loyal to their party by ranking Conservative first and Populist second. This appeal would be similar to those current Republican candidates who attempt to portray themselves as the true follower of Trump and his policies, even as Trump endorses the candidate's opponent and condemns the candidate as a RINO.¹⁰⁴ For those voters who prefer Conservative the most, we may assume that they sincerely cast their ballots as loyal Republicans in the way Conservative encourages them to do, and they further complete their ballots sincerely by ranking Liberal as the less objectionable Democrat above Progressive.

104. See, e.g., Emma Hurt, *Brian Kemp Says He's "Never Said a Bad Word" About Trump*, AXIOS (Jan. 6, 2022), <https://www.axios.com/brian-kemp-never-said-bad-word-about-trump-74ef0c57-27c1-4041-986b-dae53a6cec51.html> [https://perma.cc/D9SL-E932]; Dan Balz, *George P. Bush Charts a Trumpian Path as He Tries to Extend the Family Dynasty in Texas*, WASH. POST (Feb. 27, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/02/27/george-p-bush-charts-trumpian-path-he-tries-extend-family-dynasty-texas/> [https://perma.cc/4J2X-4KQP] (noting that, despite his opponent receiving Trump's endorsement, Texas attorney general candidate George P. Bush still promises to "finish the Trump Wall").

Given the above, three of the four sets of ballots in our hypothetical example remain sincere. Only the ballots that rank Populist first change to reflect the Populist's burying strategy.¹⁰⁵ For sake of simplicity, we are assuming that all of these voters follow Populist's burying instructions. Accordingly, given this asymmetrical strategic voting, these are now the ballots that the voters cast in this election:

% of voters	First-Choice	Second-Choice	Third-Choice	Last-Choice
30	Populist	Liberal	Progressive	<i>Conservative</i>
21	Conservative	Populist	Liberal	Progressive
24	Liberal	Progressive	Conservative	Populist
25	Progressive	Liberal	Conservative	Populist

If (as we are currently assuming) BTR is the electoral system applied to these ballots, then Populist—not Conservative—wins the election. Conservative and Liberal are the two candidates with the fewest first-choice votes, and thus BTR compares these two candidates one-on-one; Liberal wins this one-on-one 79–21, and thus Conservative is eliminated. The ballots that ranked Conservative first are redistributed to Populist, who now has 51 percent of all ballots and thus wins the BTR election.

In this way, Populist's burying strategy is successful. By using this strategy, Populist is able to defeat Conservative, who would have been the Condorcet winner had all voters ranked their preferences sincerely. Even more significantly from the perspective of the objective to protect democracy from an authoritarian candidate who is not the most preferred by a majority of voters, the effort of all Democratic voters to defeat the authoritarian Populist by sincerely ranking this anti-democratic candidate last on their ballots fails. They are unable to prevent the Populist's election by voting sincerely. With the use of the BTR system, the anti-democratic Populist's campaign of strategic voting triumphs over the coalition of voters who endeavor to preserve democracy by, despite differing in their first-choice votes, uniting in sincerely ranking the authoritarian candidate last. Given the goal of sustaining democracy itself, this outcome—inconsistent with the true preferences of the majority and, furthermore, resulting in the election of an authoritarian hostile to democracy—is not good.¹⁰⁶

105. See *Strategic Voting and Nomination*, *supra* note 98, at 116.

106. If the Populist strategy is to engage “bullet voting” rather than burying—so that the voters whose first choice is Populist do not rank any other candidate—but all other

IX. RAMP-RCV: “RISK-AVOIDING MAJORITY PREFERENCE” RANKED-CHOICE VOTING

There is an alternative to Bottom Two Runoff that is operationally similar but consequentially different in its capacity to confound the kind of asymmetrical burying strategy that BTR cannot protect itself against. While BTR starts by comparing the two candidates with the fewest first-place votes and eliminates whichever of these two is lower-ranked on all the ballots in the election, repeating this same elimination process sequentially until there is a winner,¹⁰⁷ this alternative starts by comparing the two candidates with the most last-place votes and then, like BTR, eliminates whichever of these two is lower-ranked on all the ballots in the election and repeats this elimination process sequentially until there is a single winner. This modest modification in the procedure for identifying which two candidates are least preferred, as the basis for eliminating candidates one at a time, has a big effect on asymmetrical strategic voting. If this alternative system is in place, voters whose highest electoral priority is to defeat a candidate they perceive as a grave threat are able to make this sincere preference prevail, despite the strategic voting on behalf of the candidate they view to be so dangerous. Whereas (as we have seen), if BTR is the electoral system in use, this sincere electoral preference succumbs to the successful asymmetrical strategic voting.¹⁰⁸ Given this capacity to protect against outcomes that voters perceive as especially pernicious, we can call this alternative system the “Risk-Avoiding Majority Preference” version of Ranked-Choice Voting, or RAMP-RCV.¹⁰⁹

To see how RAMP-RCV differs from BTR, let’s consider again the same set of ballots in the four-candidate hypothetical election. As we have seen, if only the voters who rank Populist first vote strategically (in an effort

voters cast sincere ballots that fully rank all their true preferences, so that it is another situation of asymmetrical strategy voting, the outcome under BTR will be the same: the Populist’s strategic voting will be successful in electing the Populist the winner. *See infra* Appendix; *see also* *Bullet Voting*, CTR. FOR ELECTION SCI., <https://electionscience.org/library/bullet-voting/> [<https://perma.cc/2K3H-YSLG>].

107. Descriptions of Single-Winner Voting Systems, *supra* note 87.

108. *Id.*

109. Those familiar with the literature on alternative electoral systems will recognize that RAMP-RCV is a hybrid between Condorcet voting and a kind of inverse version of Instant Runoff Voting known as the Coombs method. In this respect, RAMP-RCV can be seen as a Coombs-Condorcet hybrid much in the same way as BTR is a Hare-Condorcet hybrid. For a discussion of the Coombs method itself, *see* Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (a.k.a, the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUD. 641, 642–47 (2004).

to bury Conservative), and all other voters cast their ballots sincerely, then these are the ballots:

% of voters	First-Choice	Second-Choice	Third-Choice	Last-Choice
30	Populist	Liberal	Progressive	<i>Conservative</i>
21	Conservative	Populist	Liberal	Progressive
24	Liberal	Progressive	Conservative	Populist
25	Progressive	Liberal	Conservative	Populist

If RAMP-RCV rather than BTR is the electoral system in place and thus applied to these ballots, then Liberal—and not Populist—wins the election. First, RAMP-RCV identifies Populist and Conservative as the two candidates with the most last-place votes. Then, comparing these two candidates one-on-one, RAMP-RCV eliminates Populist as lower-ranked on more ballots overall than Conservative (70–30). Next, of the remaining candidates, RAMP-RCV identifies Conservative and Progressive as the two with the most last-place votes and, comparing these two, eliminates Conservative as the lower-ranked overall (79–21). Finally, with only Progressive and Liberal left, comparing these two shows Progressive ranked lower on more ballots (75–25), and thus Liberal wins the election.

This result—different from BTR’s treatment of identical ballots where Populist wins—is noteworthy in two fundamental respects. First, the outcome defeats the Populist’s effort to prevail through the use of the insincere burying strategy, whereas if BTR is used to identify the winner from these same ballots, the Populist’s insincere burying strategy is successful. Thus, at least in this context of asymmetrical strategic voting, BTR rewards insincere manipulation of the process,¹¹⁰ whereas RAMP-RCV rewards sincerity on the part of the voters who cast their ballots in accordance with their sincere priority of the need to defeat Populist because of the perceived danger if that candidate wins. Second, and even more significant, by rewarding sincerity in this way (and foiling insincerity), RAMP-RCV serves to protect democracy itself from the election of an anti-democratic Populist, who would not have been the winner if all voters including Populist’s supporters had cast their ballots sincerely. By contrast, in letting Populist’s asymmetrical strategic voting be successful, BTR does not protect democracy from the election of an anti-democratic authoritarian

110. *Id.* at 651–52.

who would not be the Condorcet winner if all voters were sincere.¹¹¹ In this respect, RAMP-RCV works better than BTR to safeguard democracy from the election of an authoritarian candidate who is not genuinely the most preferred by a majority of voters.

Moreover, if all voters cast their ballots ranking candidates in accordance with their full sincere preferences, then RAMP-RCV would elect Conservative as the sincere Condorcet winner, just as BTR would. It is in the context of asymmetrical voting that RAMP-RCV and BTR diverge, with RAMP-RCV producing the more democracy-protecting result. We can verify the convergence of the two systems when all voters are sincere by applying RAMP-RCV to the original (sincere) set of ballots in this hypothetical election:

% of voters	First-Choice	Second-Choice	Third-Choice	Last-Choice
30	Populist	Conservative	Liberal	Progressive
21	Conservative	Populist	Liberal	Progressive
24	Liberal	Progressive	Conservative	Populist
25	Progressive	Liberal	Conservative	Populist

With these ballots, RAMP-RCV identifies Progressive and Populist as the two candidates with the most last-place votes and, comparing them one-on-one, eliminates Progressive (51–49). Then, of the remaining candidates, Liberal and Populist have the most last-place votes and, of these two, Liberal is eliminated (51–49). With only Populist and Conservative remaining, Populist loses to Conservative (70–30), and thus Conservative—the sincere Condorcet winner—is elected.

There is one more point along these lines to note. Not only is RAMP-RCV successful in foiling Populist’s burying strategy, but if Populist pursues this strategy, RAMP-RCV also produces a result—Liberal’s election—that is inferior according to the sincere preferences of Populist’s voters, who genuinely favor Conservative above Liberal. Therefore, if the election is conducted using RAMP-RCV, and Populist’s voters act rationally according to their own electoral objectives, they may be induced to vote sincerely rather than strategically, in which case the sincere Condorcet winner will prevail. In this way, RAMP-RCV is better positioned than BTR to cause a candidate’s campaign to abandon an attempt to pursue a burying strategy,

111. See *The Problem with Plurality-Winner Elections*, *supra* note 90.

and thus to achieve a result that accords with what a majority of voters truly most prefer.¹¹²

X. IMPLICATIONS OF COMPARING RAMP-RCV AND BTR?

So far, we have considered only how RAMP-RCV and BTR diverge in their treatment of one hypothetical set of ballots in which asymmetrical strategic voting occurs. A thorough comparison of the two alternatives would need to analyze a far wider range of potential situations. In this regard, it is worth noting that the same divergence that occurs in this initial example also occurs in others. For example, even if the relative strength of support between the two Republican factions shifts considerably toward the Populist and away from the Conservative, the same divergence of results between RAMP-RCV and BTR occurs in the context of an asymmetrical burying strategy undertaken by Populist. Likewise, if the overall composition of the electorate shifts dramatically from being 51–49 to 65–35, Republican–Democrat, the same divergence occurs.¹¹³ Still, more analysis is necessary before it is possible to reach a conclusive comparison of these two related, but significantly different, electoral systems.

Moreover, it is important to understand that RAMP-RCV is not superior to Round-Robin Voting in handling the situation of asymmetrical strategic voting, at least according to the preliminary analysis undertaken here. If Round-Robin Voting (as described above) applies to the same set of asymmetrically insincere ballots that we have been considering—where Conservative is ranked last rather than second on those ballots that rank Populist first, but all other ballots remain sincere—then Liberal is the winner, just as if RAMP-RCV is applied to these ballots. Round-Robin Voting identifies Liberal as the winner from these ballots, not by using the kind of sequential elimination process that RAMP-RCV (like BTR) employs, but instead calculating the overall preferences for and against each candidate from all of the one-on-one comparisons (or, functionally

112. If (as in footnote 106) the Populist's strategy is bullet voting rather than burying, then under RAMP-RCV, Conservative will win. *See infra* Appendix. Therefore, if RAMP-RCV is the electoral system, bullet voting is no more successful than burying as a strategy to elect Populist rather than the sincere Condorcet winner, Conservative. Because the asymmetrical use of strategic bullet voting would successfully cause the election of Populist rather than Conservative if BTR is the electoral system, in this situation of asymmetrical bullet voting—as in the situation of asymmetrical burying—RAMP-RCV performs better at foiling the Populist effort to manipulate the outcome insincerely than BTR.

113. *See infra* Appendix for the demonstration of these two variations.

equivalent, each candidate's "Borda scores") because no candidate wins all of the one-on-one comparisons (in other words, there is no Condorcet winner, given the insincerity of the burying strategy) and no single candidate wins more one-on-one comparisons (who would be the "Copeland winner").¹¹⁴

Thus, from the perspective of protecting democracy from the threat of an anti-democratic authoritarian candidate, including from asymmetrical strategy voting that this candidate might employ, there is no reason to prefer RAMP-RCV to Round-Robin Voting. Rather, it is only if Round-Robin Voting is disfavored as an electoral system because of its nonsequential nature (or some other reason relating to its round-robin quality), then it becomes worth considering RAMP-RCV. In particular, if anyone is inclined to consider BTR as better than basic IRV because BTR is designed to guarantee the election of a Condorcet winner—and especially if anyone hopes that BTR is better suited than IRV to protect democracy from the election of an authoritarian who would not be the Condorcet winner if voters cast their ballots sincerely—then one ought to carefully evaluate the tradeoffs between RAMP-RCV and BTR.

There might be features of BTR that make it, in some respects, more attractive than RAMP-RCV. For example, BTR is less different from basic IRV than RAMP-RCV, and thus BTR will seem less new to those already familiar with the mechanics of IRV.¹¹⁵ Also, there may be reasons to believe that when the propensity to engage in strategic voting is symmetrical (not asymmetrical) across all candidates and ideological beliefs, then BTR would be more likely to induce sincere voting than RAMP-RCV. But given the analysis undertaken here, BTR is more vulnerable to asymmetrical strategy voting than RAMP-RCV.¹¹⁶ Moreover, specifically, BTR is unable to protect democracy from the strategic manipulation of an authoritarian candidate who other voters perceive as a grave danger—and who would not win absent

114. See Saari & Merlin, *supra* note 81; see also MACKIE, *supra* note 37, at 50–51.

115. See *Requiring Majority Winners*, *supra* note 11, at 397 n.99.

116. See James Green-Armytage, T. Nicolaus Tideman & Rafael Cosman, *Statistical Evaluation of Voting Rules*, 46 SOC. CHOICE & WELFARE 200, 200–02 (2016) (comparing the vulnerability to strategic voting, under certain conditions, of two hybrid electoral procedures—Condorcet-Hare and Condorcet-Coombs—that, depending on specific mathematical rules, parallel the comparison of BTR and RAMP-RCV; this study, although important, does not directly address the analysis, insofar as it did not consider the specific possibility of asymmetrical strategic voting, and because it also involved three-candidate rather than four-candidate elections).

this strategic manipulation.¹¹⁷ RAMP-RCV, however, is able to thwart this kind of anti-democratic strategic manipulation in situations where BTR cannot. Therefore, anyone who is looking for a sequential-elimination electoral system, similar to IRV, but which can better protect democracy from the risk of authoritarianism that does not reflect the genuine preferences of a majority of voters, should seriously consider RAMP-RCV as an alternative to BTR or basic IRV. One might return to Round-Robin Voting as ultimately optimal, all things considered. But if one is confining the consideration of alternative electoral systems to those that operate as a sequential-elimination procedure, and one has the protection of democracy from anti-democratic manipulation of the process as a priority, then one should not ignore the potential benefits of RAMP-RCV relative to BTR and IRV.

XI. CONCLUSION

More work needs to be done to evaluate alternative electoral systems for their potential to protect democracy from the risk of authoritarian candidates, whom the majority of voters do not prefer above all other alternatives, and thus who would not be the sincere Condorcet winner in an election that, comparing each pair of candidates, guaranteed victory to the candidate who prevailed in all these one-on-one comparisons. Computer simulations, in particular, offer the promise of testing alternative electoral systems in a wide range of circumstances.¹¹⁸ It may turn out that one electoral system is best suited to most situations that are most likely to occur, even though it is not well-suited to some situations that are less probable.¹¹⁹ Conversely, it may turn out that some situations, although not especially likely, are so dangerous that it is essential to guard against their occurrence despite their low likelihood.¹²⁰ In some respects, the core concept of

117. *Id.* at 209–10.

118. Scholars have employed computer simulations of varying power, complexity, and sophistication for a range of studies on elections and election systems for more than 50 years. *See, e.g.*, David Klahr, *A Computer Simulation of the Paradox of Voting*, 60 AM. POL. SCI. REV. 384, 387–88 (1966) (detailing possible absence of Condorcet winners in simple three candidate elections); Florenz Plassmann & T. Nicolaus Tideman, *How Frequently Do Different Voting Rules Encounter Voting Paradoxes in Three-Candidate Elections*, 42 SOC. CHOICE & WELFARE 31, 40–42 (2014) (comparing 14 voting systems for incidence of ties and paradoxes using computer simulations); *see also* MACKIE, *supra* note 37, at 258–80, 310–77 (reviewing and de-bunking results of various computer simulations).

119. *See* Plassmann & Tideman, *supra* note 118, at 31–34.

120. *See id.*

Madisonian republicanism is to create institutional arrangements designed to prevent tyranny even at the cost of making democracy less directly responsive to changing public opinion.¹²¹

But the Madisonian republic is currently struggling to function at all.¹²² In order to preserve the Madisonian objective of structuring a constitutional democracy so that it is able to serve the public interest while avoiding the risk that the government becomes overtaken by autocracy, it is necessary to develop new methods to serve the same longstanding Madisonian objectives. An essential element of this neo-Madisonian project is to identify new electoral procedures that make victorious the candidate who is most preferred by a majority of voters and, simultaneously, is unlikely, once in office, to subvert the electoral system itself. In endeavoring to identify the electoral procedures that best serve this neo-Madisonian goal, as part of any further inquiry, including computer simulations, it is worth considering the possibility of asymmetrical strategy voting.¹²³ It is also worth considering the differences among various electoral systems, all of which aim to elect a sincere Condorcet winner, in their relative capacity to withstand this kind of asymmetrical insincerity in casting ranked-choice ballots.¹²⁴

Indeed, the effort to protect Madison's republic from the kind of despotic usurpation that Madison feared ultimately may depend, at least in part, on identifying correctly which Condorcet-based electoral system, or set of electoral systems, performs best when this consideration is factored into the analysis.

121. See EPSTEIN, *supra* note 1, at 133–35.

122. See Dawood, *supra* note 10, at 914–22; MANN & ORNSTEIN, *supra* note 43, at 81–103.

123. See *Strategic Voting and Nomination*, *supra* note 98, at 115–17; Potthoff, *supra* note 61, at 105–08.

124. Potthoff, *supra* note 61, at 101–03.

APPENDIX

The same divergence between BTR and RAMP-RCV holds when, in a 51R–49D state, the balance between Populists and Conservatives among the Republicans is tilted much more favorably towards the Populists. For example, we can hypothesize the sincere ballots:

45: Populist>Conservative>Liberal>Progressive

6: Conservative>Populist>Liberal>Progressive

24: Liberal>Progressive>Conservative>Populist

25: Progressive>Liberal>Conservative>Populist

Then, we can assume the same kind of asymmetrical strategy voting on the part of the Populists:

45: Populist>Liberal>Progressive>Conservative

6: Conservative>Populist>Liberal>Progressive

24: Liberal>Progressive>Conservative>Populist

25: Progressive>Liberal>Conservative>Populist

Given these asymmetrically insincere ballots, Populist again would win the BTR election while Liberal would win the RAMP-RCV election:

BTR: Liberal beats Conservative; Liberal beats Progressive; Populist beats Liberal

RAMP: Conservative beats Populist; Progressive beats Conservative; Liberal beats Progressive

We also see the same results if the overall balance of the electorate between Republicans and Democrats is shifted to 65R–35D. In this red state scenario, we can hypothesize these sincere ballots:

40: Populist>Conservative>Liberal>Progressive

25: Conservative>Populist>Liberal>Progressive

15: Liberal>Progressive>Conservative>Populist

20: Progressive>Liberal>Conservative>Populist

Given the same type of asymmetrical strategic voting, these would be the ballots:

40: Populist>Liberal>Progressive>Conservative

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25: Conservative>Populist>Liberal>Progressive

15: Liberal>Progressive>Conservative>Populist

20: Progressive>Liberal>Conservative>Populist

With these ballots, once again BTR produces Populist as the winner, while RAMP-RCV produces Liberal as the winner:

BTR: Liberal beats Progressive (Liberal now has 35); Liberal beats Conservative (Populist now has 65); Populist beats Liberal

RAMP: Conservative beats Populist (Liberal now has 55); Progressive beats Conservative; Liberal beats Conservative

If, as a variation on the main hypothetical, Populist voters engage in bullet voting rather than burying, then both BTR and RAMP-RCV would treat the three unranked candidates as equally inferior to Populist on those voters' ballots, and thus these would be the ballots overall:

30: Populist>Conservative=Liberal=Progressive

21: Conservative>Populist>Liberal>Progressive

24: Liberal>Progressive>Conservative>Populist

25: Progressive>Liberal>Conservative>Populist

Given these ballots, Populist would win the BTR election: first, Liberal beats Conservative; then, Liberal beats Progressive; finally, Populist beats Liberal. By contrast, under RAMP-RCV, Conservative wins: first, Populist beats Progressive; then, Populist beats Liberal; finally Conservative beats Populist (for purposes of the RAMP-RCV calculation, it is necessary to treat each of the three unranked candidates as the last-choice candidate on one-third of these ballots).