

Dismantling the Political Duopoly

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ABSTRACT

The last U.S. presidential election cycle was marked by a number of unprecedented events, including thirty-four felony charges against one of the two major party candidates, an attempted political assassination targeting that same candidate, and the replacement of the other major party candidate with one who did not run in the primary. These and other developments underscore widespread concerns of American voters over increasing polarization and the lack of meaningful choices where two parties monopolize the system. There is a lively contemporary debate about how well, or poorly, the current political system represents the will of the people, and how it might be improved consistent with constitutional principles. This essay contributes to the existing scholarship by examining the duopolistic two-party system through the lens of free market competition. The politics industry operates on the same set of principles and incentives as any other, and requires open and robust competition to generate products that best serve consumers' needs. The lack of competition in the politics industry deprives voters of meaningful alternatives, and operates primarily to benefit wealthy interests and entrench the two major parties. This has a negative impact on Americans' lives. The essay proposes three potential solutions—ranked choice voting, nonpartisan primaries, and independent redistricting commissions. If implemented, these would help democratize the current duopolistic system, thereby enhancing representative government and restoring public trust.

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There is nothing I dread So much, as a Division of the Republick into two great Parties, each arranged under its Leader, and concerting Measures in opposition to each other. This, in my humble Apprehension is to be dreaded as the greatest political Evil, under our Constitution.

—John Adams¹

I. INTRODUCTION

Political polarization in the United States has worsened substantially in recent years.² The ideological divisions created by this trend have undermined open discourse, compromise, and trust in the political system—elements crucial to a healthy, functional democracy.³ One root cause of these developments is America’s longstanding “textbook duopoly” of the Republican and Democratic parties,⁴ which has, for almost

1. Letter from John Adams to Jonathan Jackson dated 2 October 1780, NAT’L ARCHIVES, FOUNDERS ONLINE, <https://perma.cc/K4CJ-PPNU>.

2. See Lili Levi, *Anti-Antisemitism Now*, 78 U. MIAMI L. REV. 745, 773 (2024); Rebecca E. Zietlow, *Abortion, Citizenship, and the Right to Travel*, 27 EMP. RTS. & EMP. POL’Y J. 335, 358 (2024).

3. See *Crutchfield v. U.S. Army Corps of Engineers*, 192 F. Supp. 2d 444, 456 n.18 (E.D. Va. 2001) (noting it is a “well-settled precept that political discourse and dialogue are vital to a healthy democracy”); see also Andrew Sullivan, *America Wasn’t Built for Humans*, INTELLIGENCER (Sept. 18, 2017), <https://perma.cc/7NM2-JJNW> (asserting political tribalism is “corrupting and even threatening our system of government”).

4. KATHERINE M. GEHL & MICHAEL E. PORTER, *THE POLITICS INDUSTRY: HOW POLITICAL INNOVATION CAN BREAK PARTISAN GRIDLOCK AND SAVE OUR DEMOCRACY* 7 (2020).

the entire lifespan of the country, limited political choices, heightened partisan division, and perverted the incentives of elected leaders.⁵

Ironically, our political system “has become the preeminent barrier to addressing the very problems it exists to solve.”⁶ This has led to what some term a “democratic recession”⁷—a weakening of democratic institutions—caused by the duopolistic political system in combination with other factors, such as partisan primaries, gerrymandering, onerous ballot access rules, and other arbitrary obstacles faced by third party candidates.⁸ These developments run counter to the will of the people, as most voters desire options beyond the Democratic and Republican parties.⁹ Since the 1990s, a sharp rise in dissatisfaction with democracy in the U.S. has marked a “profound shift in America’s view of itself.”¹⁰ Today, more than half are unsatisfied with the state of our democracy.¹¹ Moreover, a majority of Americans “are not satisfied with the two-party system and want a third choice.”¹² A Pew Research survey conducted in July 2024 found that 68% say they are not satisfied with their choices for president, while 87% say the presidential campaign does not make them feel proud of the country.¹³

In short, there is widespread concern over how the political system now represents, or fails to represent, the will of the people. This should be unsurprising when looking at the political system through the lens of free market competition. Given the enormous structural barriers to competition in our political system, resulting in a perpetual two-party duopoly, voters

5. See David Schleicher, “Politics As Markets” Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections, 14 SUP. CT. ECON. REV. 163, 167 (2006) (“economists have developed a long literature analyzing structural market failures that function like the natural duopoly in American political markets”); see also Bret Stephens, *How Capitalism Went Off the Rails*, N.Y. TIMES (June 18, 2024), <https://perma.cc/B9N2-J6QD> (“both major parties are wedded to two versions of the same failing ideas”).

6. GEHL & PORTER, *supra* note 4, at 3.

7. The Honorable M. Margaret McKeown, *The Future of Democracy and the Rule of Law*, 64 VA. J. INT’L L. ONLINE 1, 1 n.1 (2023); Luís Roberto Barroso & Luna van Brussel Barroso, *Democracy, Social Media, and Freedom of Expression: Hate, Lies, and the Search for the Possible Truth*, 24 CHI. J. INT’L L. 51, 53 (2023).

8. See Stephen E. Gottlieb, *Election Reform and Democratic Objectives—Match or Mismatch?*, 9 YALE L. & POL’Y REV. 205, 217–18 (1991).

9. See *Most Americans are dissatisfied with their choices for president*, IPSOS (Jan. 25, 2024), <https://perma.cc/W7RW-C7HF>; Jeffrey M. Jones, *Support for Third U.S. Political Party Up to 63%*, GALLUP (Oct. 4, 2023), <https://perma.cc/FY7P-NSGP>.

10. R.S. FOA, A. KLASSEN, M. SLADE, A. RAND, AND R. COLLINS, *The Global Satisfaction with Democracy Report 2020* CAMBRIDGE, UNITED KINGDOM: CENTRE FOR THE FUTURE OF DEMOCRACY 20 (Jan. 2020), <https://perma.cc/EWP7-V8CV>.

11. See *id.*

12. See IPSOS, *supra* note 9.

13. See *Amid Doubts About Biden’s Mental Sharpness, Trump Leads Presidential Race*, PEW RSCH. CTR. (July 11, 2024), <https://perma.cc/D4PT-6QCA>.

are deprived of meaningful choice in determining who represents them in government.¹⁴ People are aware of this, and they are not happy about it. Nearly 60% of Americans believe the two parties do not adequately represent them.¹⁵ Likewise, 63% of U.S. adults say that the Republican and Democratic parties do “such a poor job” of representing them that a “third major party is *needed*.”¹⁶

This essay contributes to the existing scholarship on how to fix our broken political system by examining the two-party duopoly, and the legal structures underpinning it, through the lens of the politics industry theory pioneered by Katherine M. Gehl and Michael E. Porter. Because the politics industry operates under the same principles as any other industry, the solutions to some of its greatest structural shortcomings involve ways to broaden voters’ choices. The essay presents three proposed solutions that, if implemented, would enhance democratic representation and revitalize American democracy. Part II discusses how viewing the political system through the lens of political industry theory helps explain why the duopoly exists and why it is problematic. Part III explores the ways that allowing the duopoly to remain entrenched harms democracy and foments partisan division. Part IV discusses three possible solutions—ranked choice voting, nonpartisan primaries, and independent redistricting commissions. Part V concludes.

II. THE POLITICS INDUSTRY AND THE REPUBLICAN-DEMOCRAT DUOPOLY

In the leadup to the recent U.S. presidential election, most voters preferred neither of the two major-party candidates.¹⁷ Under a different political system, one might expect the unpopularity of two leading candidates—indeed, the only two viable candidates—to result in the rise of one or more other options. Other political movements with fresh ideas could exploit the public’s disdain for the platforms presented by the two established parties. However, in our own system, no such insurgent third party can be expected to arise; the Republican and Democratic party nominees remained the only two meaningful options to choose from, even though most preferred neither.¹⁸

14. See GEHL & PORTER, *supra* note 4, at 3–7.

15. See Lydia Saad, *Public Interest in Having a Third Major Party Dips to 56%*, GALLUP (Oct. 6, 2022), <https://perma.cc/ALA6-5MCJ>.

16. Jones, *supra* note 9 (emphasis added).

17. See IPSOS, *supra* note 9.

18. See Louis Michael Seidman, *Democracy and Legitimation: A Response to Professor Guinier*, 34 LOY. U. CHI. L.J. 77, 86–87 (2002) (“[I]t is foolish to suppose that this country is on the verge of a fundamental rethinking of our political system. There is not going to be proportional representation. There are not going to be viable third and fourth

This lack of meaningful options for voters might appear, at first, to be a systemic flaw. What is most often assumed, by the public and by courts, is that the American political system is designed to represent the will of the electorate,¹⁹ and therefore impediments to the people expressing their political will run counter to the purpose of the system itself. However, Katherine M. Gehl and Michael E. Porter argue that, on the contrary, “our political system isn’t broken,” but rather “is delivering exactly what it is currently designed to deliver.”²⁰ That is, “our political system is no longer designed to serve the public interest, and has been slowly reconfigured to benefit the private interests of gain-seeking organizations: our major political parties and their industry allies.”²¹ Accordingly, the system is not in need of fixing; it is already “fixed” in favor of its primary beneficiaries.²²

The idea politicians work not for voters but for moneyed interests is not a fringe conspiracy theory; it is well-documented.²³ In a 2014 study, political scientists Martin Gilens of Princeton and Benjamin Page of Northwestern examined data from nearly 2,000 opinion polls and concluded, “economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while average citizens and mass-based interest groups have little or no independent influence.”²⁴ This is something of which the public is well aware. Most people know or strongly suspect politicians are not working on the public’s behalf; indeed, “[m]ore than 80% of Americans believe

parties that drive the Democrats to the left, and if there are, the only result will be to further entrench a conservative, Republican plurality.”)

19. See, e.g., *New York Times Co. v. Sullivan* 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system.”).

20. KATHERINE M. GEHL & MICHAEL E. PORTER, *WHY COMPETITION IN THE POLITICS INDUSTRY IS FAILING AMERICA* 1 (2017), <https://perma.cc/57AL-54DG>.

21. *Id.*

22. See Katherine M. Gehl & Michael E. Porter, *Fixing U.S. Politics*, *HARVARD BUS. REV.* (July–Aug. 2020), <https://perma.cc/QE3U-J9PV>; see also GEHL & PORTER, *supra* note 4, at 3–4 (“In fact, Washington is working *exactly* how it is designed to work and delivering exactly the results it is designed to deliver, because it wasn’t designed to work for us—for the citizens, the voters, the public interest.”).

23. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 564–81 (2014). There are even reported examples of quid pro quo money for influence exchanges. See, e.g., Taylor Giorno, *\$800,000 wire transfer from billionaire donor to US Chamber raises curtain on dark money*, *THE HILL* (June 11, 2024), <https://perma.cc/FEC8-G738>.

24. Gilens & Page, *supra* note 23, at 564. Some subsequent studies, however, have asserted that the Gilens/Page data underlying their study does not hold up. See, e.g., Peter K. Enns, *Relative Policy Support and Coincidental Representation*, 13 *PERSP. ON POL.* 1053, 1053–64 (2015).

elected officials don't care what people like them think.”²⁵ The topic has been well studied, and experts tend to conclude that the rich get what they want most²⁶ or almost all the time.²⁷

Such poor representation is to be expected of a duopolistic political system wherein two parties collude to exclude all competitors.²⁸ Indeed, the American system has, since even before the country was founded, split into two major factions; in the leadup to independence, these were the Federalists and Anti-Federalists.²⁹ Following the founding, this evolved into the Federalists and the Democratic-Republicans, formerly known as the Anti-Federalists,³⁰ lasting until 1828. Following a realignment of the political landscape at that time, the two major parties that emerged were the Democratic Party and the Whig Party.³¹ It was not until the 1850s that the current two-party system came into being.³² Much has been written about the perceived benefits and drawbacks of the duopoly³³; but for better or worse it has existed now for over 150 years.³⁴

This system, which Gehl and Porter call the “politics industry,” can best be understood by applying the principles and incentives applied to any industry. In short, this is because “the politics industry is driven by the same five forces that shape competition in any industry: rivals, buyers, suppliers, the threat of new entrants, and the threat of substitutes.”³⁵ At its core, every industry serves its customers. The American politics industry is no different. The question is—who are the customers it serves? A private industry's customers are those who buy and use its products.³⁶ Thus, while

25. Jenn Hatfield, *More than 80% of Americans believe elected officials don't care what people like them think*, PEW RSCH. CTR. (Apr. 30, 2024), <https://perma.cc/MV7Z-A35Z>.

26. See Enns, *supra* note 24, at 1053–54.

27. See Gilens & Page, *supra* note 23, at 564–81.

28. See Lynn Adelman, *The Misguided Rejection of Fusion Voting by State Legislatures and the Supreme Court*, 56 IDAHO L. REV. 107, 112 (2020) (“As long as we have single member districts and plurality elections, the two-party duopoly will remain.”).

29. David A. Dulio & James A. Thurber, *America's Two-Party System: Friend or Foe?*, 52 ADMIN. L. REV. 769, 769–70 (2000).

30. *Baca v. Colorado Dep't of State*, 935 F.3d 887, 947 (10th Cir. 2019), *rev'd*, 591 U.S. 655 (2020) (discussing these two parties).

31. See William G. Shade, *The Second Party System*, in PAUL KLEPPNER, ET AL., *EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 77–112 (1983).

32. See *id.*; Gary D. Allison, *Protecting Our Nation's Political Duopoly: The Supremes Spoil the Libertarians' Party*, 41 TULSA L. REV. 291, 291 n.2 (2005).

33. A Westlaw search of the term “political duopoly” returned 182 law review and law journal results.

34. See Allison, *supra* note 32, at 291 n.2.

35. GEHL & PORTER, *supra* note 4, at 8.

36. See *Customer*, MERRIAM-WEBSTER DICTIONARY, <https://perma.cc/NB8Q-JWKY> (defining the term as “one that purchases a commodity or service”).

profit is the end motive,³⁷ the pursuit of it requires a business to seek and satisfy customers as the source of its revenue. Turning to the politics industry, an idealist might well imagine that, because it serves the public at large, its customers would be all citizens over which it governs.³⁸ If that were true, its customers would be all members of the public. However, as is true with private industry, the customers the politics industry serves are those on whom it depends for survival. Whereas customers on whom private industry depends are largely those who buy and use its products, “customers in the politics industry can be divided into five major segments based on how they engage with the industry: partisan primary voters, special interests, donors, average voters, and non-voters.”³⁹ Perhaps not surprisingly, the two ruling parties “prioritize the customers that most advance their interests through the two currencies of politics: votes, money, or both.”⁴⁰ The customers who have the greatest influence on decisions made by the politics industry—those for whom the greatest effort is made to appease—are partisan primary voters, special interests, and donors.⁴¹ On the other hand, “[a]verage voters and current non-voters, the majority of citizens, have little or no influence on policy or outcomes.”⁴²

Accordingly, our political system currently offers only two choices, neither of which most people want or prefer. As an industry, our politics is not serving the wants and needs of most Americans, and incumbent politicians have no incentive to improve it.⁴³ If the duopoly benefited the public, then there would be no need to overhaul the system. However, the duopoly works against the public interest, and, according to some, is one of the worst possible democratic systems.⁴⁴

37. Although there is debate on where to draw the line on legal obligations of for-profit companies, *see, e.g.*, David A. Wishnick, *Corporate Purposes in A Free Enterprise System: A Comment on Ebay v. Newmark*, 121 YALE L.J. 2405, 2406–09 (2012), the fact that the company’s existence depends on generating a profit means that profit will almost always be the underlying aim.

38. *See* Gehl & Porter, *supra* note 20, at 3.

39. *Id.*

40. *Id.*

41. *See id.*

42. *Id.*

43. *See* Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U.L. REV. 795, 834 (1989) (“incumbent politicians of either party have no incentive to change the status quo”).

44. *See* Mark Brodin, *How to Overcome Tribalism, the Shouty Minority and Facebook Toxicity*, POLITICO (Nov. 7, 2021), <https://perma.cc/MGW6-X553>.

III. HOW THE DUOPOLY HAMSTRINGS DEMOCRACY AND INCREASES POLARIZATION

The duopolistic system hampers democracy. To begin with, “average voters have only two choices in most general elections,” and as a result, “parties appeal to them on the margin.”⁴⁵ This makes general elections zero-sum contests, with all that entails. In such contests, parties compete not by striving to deliver outcomes for the benefit of voters, but “rather by seeking to be a little less disliked than—or slightly preferred to—the other party.”⁴⁶ Accordingly, “[p]arties don’t need to deliver solutions, but only convince average voters to choose them as the ‘lesser of two evils.’”⁴⁷ Gehl and Porter explain why this is so problematic in the politics industry context: “In a normal industry, ignoring such a large group of customers would make a competitor vulnerable to new competition. But in the politics industry . . . the barriers to entry are very high, and therefore, new competition does not emerge.”⁴⁸

Jonathan Haidt, a social psychologist, aptly stated: “The worst number of political parties to have in a country is one. But the second worst number is two.”⁴⁹ Under the current duopolistic political scheme, parties lack accountability because they do not need to deliver solutions.⁵⁰ Rather, because they need only convince voters they are the lesser evil, it turns focus away from policy and the public’s best interests.⁵¹ A 2016 Pew Research study reported that the main factor in choosing a candidate was a dislike for their opponent.⁵² Even today, a 2024 Reuters poll reported

45. Gehl & Porter, *supra* note 20, at 3.

46. *Id.*

47. *Id.*

48. *Id.*; see also Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589, 1595 (1999) (making the same point).

49. Brolin, *supra* note 44; see also Jonathan Haidt on *Democracy’s Moral Foundations*, DEMOCRACY WORKS PODCAST (Nov. 15, 2021), <https://perma.cc/GTL9-E4QT> (observing that if you simply add a third combatant, hatred of each for the other drastically lowers).

50. See Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 575 (September 2014) (discussing a study where researchers in 2014 examined congressional action on 1,779 policy issues, concluding that “[w]hen the preferences of economic elites and the stands of organized interest groups are controlled for, the preferences of the average American appear to have only a minuscule, near-zero, statistically non-significant impact upon public policy.”).

51. See ARISTOTLE, *THE NICOMACHEAN ETHICS* 273 (Harris Rackham, trans., Harvard Univ. Press 1956) (ca. 335 BCE) (“a lesser evil in comparison with a greater counts as a good, since the lesser of two evils is more desirable than the greater, but what is desirable is good, and the more desirable it is, the greater good it is”).

52. See *In Their Own Words: Why Voters Support – and Have Concerns About – Clinton and Trump*, PEW RSCH. CTR. (Sept. 21, 2016), <https://perma.cc/XDM5-QPC9> (in the 2016 presidential election, 33% of Trump supporters and 32% of Clinton voters

that 67% of Americans in both parties were “tired of seeing the same candidates in the presidential election, and wanted someone new.”⁵³

In other industries, ignoring such a large group of customers would make a competitor vulnerable to new competition.⁵⁴ However, the two parties are insulated by artificially high barriers to entry for new competition,⁵⁵ which explains why no major new party has emerged since the founding of the Republican Party in 1854.⁵⁶ As a result, the parties ignore average voters and focus on delivering results to donors, special interests, and partisan primary voters.⁵⁷ Most Americans agree that campaign contributors have disproportionate influence: 64% say that major donors have “a lot” of influence over how representatives vote on issues, while 14% say that constituents have “a lot” of influence.⁵⁸ This concentration of power in the hands of narrow segments of the electorate distorts political priorities and stifles moderate voices.

Like other industries, the politics industry operates as a contest wherein competitors compete for currency—in the case of the politics industry, these are votes and money.⁵⁹ But unlike other industries, which have antitrust regulations to promote competition and protect against monopolistic tendencies, the politics industry lacks such rules.⁶⁰ Applying antitrust principles to the politics industry (i.e. dismantling the duopoly and allowing third-party candidates to enter the “market”) is essential for safeguarding our democracy and promoting a more equitable representation for all.⁶¹ Furthermore, campaign finance regulations exacerbate disparities among political actors.⁶² While donors can contribute substantial sums to national party committees, independent candidates face restrictive limits on fundraising, which places them at a distinct disadvantage.⁶³ This disparity in funding opportunities reinforces

attributed their choice of candidate to opposition to the other candidate, and many expressed frustration and disgust with the campaign).

53. Jason Lange, *Trump vs. Biden: The rematch many Americans don't want*, REUTERS (Jan. 25, 2024), <https://perma.cc/3HDC-WNM9>.

54. See Cain, *supra* note 48, at 1595.

55. See *id.*

56. See Gehl & Porter, *supra* note 20.

57. See Gehl, *supra* note 11, at 3–4.

58. Conrad Foreman, *Money in Politics: Campaign Finance and Its Influence over the Political Process and Public Policy*, 52 UIC J. MARSHALL L. REV. 185, 187 (2018).

59. See Gehl & Porter, *supra* note 20, at 21.

60. See *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

61. Others have already proposed applying the antitrust framing to the politics industry. See, e.g., Yen-Tu Su, *Retracing Political Antitrust: A Genealogy and Its Lessons*, 27 J.L. & POL. 1, 41 (2011) (discussing political antitrust theories).

62. See Gehl & Porter, *supra* note 20, at 22.

63. See Rebecca Henderson, *The Business Case for Saving Democracy*, HARVARD BUS. REV. (Mar. 10, 2020), <https://perma.cc/KK8Z-QJEX>; *Contribution limits for 2023-*

the entrenched duopoly, resulting in a decline in legislation passed, an extinction of moderates in the Senate and the House, and a regression of bipartisan support for laws enacted.⁶⁴ According to a Pew Research analysis, Democrats and Republicans on average are more divisive ideologically today than at any time in the past 50 years.⁶⁵ Now, there are only about two-dozen moderate Democrats and Republicans left on Capitol Hill, versus more than 160 in 1971–72.⁶⁶

Warnings against such radical polarization can be found in numerous sources that date back to the founding period, including the Federalist and Anti-Federalist papers.⁶⁷ Naturally, concentration of power in the hands of a few, whether those few comprise one political party or two, leads to the suppression of viewpoints at odds with the viewpoints of those in power. This runs afoul of the Framers' intent and ultimately undermines the broader interests of the community at large. As one recent *Atlantic* headline bemoaned, "America is Now the Divided Republic the Framers Feared."⁶⁸ When two—and *only two*—major political parties dominate the political arena, it directly leads to a lack of meaningful alternatives to voters and a narrowing of policy options.⁶⁹ This structure allows—indeed incentivizes—politicians to resort to scorched-earth measures for attaining and maintaining power rather than representing the public.⁷⁰ Ultimately, the ones most adversely affected by this political structure are those who are supposed to be the beneficiaries of it.

There is a growing perception both domestically and internationally that the functioning of democracy in the United States has been inadequate

2024 federal elections, FEDERAL ELECTIONS COMMISSION (last visited Aug. 1, 2024), <https://perma.cc/4K4B-V37Z>; Foreman, *supra* note 58.

64. See Grant J. Tobin & Nathan J. Kelly, *Legislative Productivity of the U.S. Congress, 1789-2004*, 16 POL. ANALYSIS 303, 304–09 (2008), <https://perma.cc/EL7W-K2K7>; Gehl & Porter, *supra* note 20, at 2.

65. See Drew Desilver, *The polarization in today's Congress has roots that go back decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://perma.cc/N8W5-PE3D>. According to one group of data scientists, the partisan divide is larger than at any time since the Civil War. Laura Paisley, *Political polarization at its worst since the Civil War*, USC TODAY (Nov. 8, 2016), <https://perma.cc/VW2P-GJQ9>.

66. See *Id.*

67. See THE FEDERALIST NO. 10 (James Madison) (advocating that no single entity should dominate the political landscape, and warning against the dangers of factionalism); THE ANTI-FEDERALIST PAPERS NO. 1 (Oct. 1787) (expressing a fear that centralization of authority would lead to the emergence of an aristocratic ruling class, which could manifest in the form of a political elite dominated by a small number of parties).

68. See Lee Drutman, *America is Now the Divided Republic the Framers Feared*, THE ATLANTIC (Jan. 2, 2020), <https://perma.cc/EFV9-LTVB>.

69. See Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589, 1595 (1999).

70. See Robert Reich, *Win-At-Any-Cost Politics: Why Republicans Use Scorched Earth Tactics to Entrench Their Power*, MILWAUKEE INDEPENDENT (Jan. 26, 2017), <https://perma.cc/BUR2-U86X>; Gabriel Debendetti, *Democrats launch scorched-earth strategy against Trump*, POLITICO (Apr. 18, 2023), <https://perma.cc/8RLJ-TSNP>.

in addressing significant governance challenges.⁷¹ Consequently, public approval of Congress and trust in the government have reached historically low levels.⁷² The escalating costs of election campaigns, the rising influence of dark money in politics, and low voter turnout rates further underscore the ailing state of democracy.⁷³ The world takes note of all this, causing a global ripple effect.⁷⁴ Many countries look to the United States as a model for democracy, but this could change if we do not enact positive change starting with our current political structure. Fortunately, there are several proposed solutions to this issue, three of which are outlined below.

IV. THREE POTENTIAL SOLUTIONS TO HELP DISMANTLE THE DUOPOLY

Solution 1: Nonpartisan, Open Party Primary Elections

The largest and fastest growing political bloc in the U.S. is independents.⁷⁵ In fact, 50% of the next generation of voters registered as unaffiliated with either party.⁷⁶ As such, an increasing number of voters are unable to vote in primary elections because most states have a version of “closed” primaries—also called “partisan” primaries—to determine candidates for the general election.⁷⁷ In a closed primary, only voters registered with a party can vote.⁷⁸ In Florida, for instance, only registered Democrats can vote in the Democratic primary and only registered Republicans can vote in the Republican primary.⁷⁹ Closed primaries favor “fringe” candidates, and push moderate candidates to take more extreme

71. See Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. OF DEMOCRACY 141, 151-54 (Jan. 2015), <https://perma.cc/39ZK-ZMVK>. The slowed pace of legislation, the dwindling ability of Congress to enact a budget, and the 2013 federal government shutdown are just a few indicators of a political system marked by polarization and gridlock.

72. See *Public Trust in Government: 1985-2023*, PEW RSCH. (Sept. 19, 2023), <https://perma.cc/UL54-8LTN>.

73. See Gehl & Porter, *supra* note 20, at 4.

74. See John Campbell, *Dear America: The Rest of The World is Watching*, COUNCIL ON FOREIGN REL. (Jan. 15, 2021, 11:10 AM), <https://perma.cc/2GRQ-4RKN>.

75. See Mike Allen, *Record number of Americans say they're politically independent*, AXIOS (Apr. 17, 2023), <https://perma.cc/K4GV-72RA>.

76. See Ashley Lopez, *Why some states are turning to nonpartisan primaries*, NPR (heard on All Things Considered) (Sept. 16, 2023), <https://perma.cc/NPF9-89Z9>.

77. Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2236 n.80 (1996); see also *State Election Types*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 06, 2024), <https://perma.cc/H26K-EV43>.

78. See *Open and Closed Primaries*, FAIRVOTE, <https://perma.cc/YR2X-G6ZQ> (Last accessed May 02, 2024).

79. See *Florida's Closed Primary System: What You Need to Know to Vote*, POSITIVELY OSCEOLA (June 13, 2024), <https://perma.cc/965Y-FMX2>.

partisan positions.⁸⁰ Such primaries incentivize politicians to focus on partisan primary voters,⁸¹ thereby ignoring most of the electorate.

By contrast, in “open” (or “nonpartisan”) party primaries, voters of any affiliation may vote in the primary of any party.⁸² A concerted effort to make all states follow an open primary system will be an effective step toward reducing divisiveness and making the political system more representative.⁸³

There are at least five reasons why open primaries would bring much-needed improvement to the political system.⁸⁴ First, nonpartisan primaries encourage more people to vote. In 2022, only about 10% of eligible Americans cast ballots in primary elections deciding the winners in the vast majority (83%) of Congressional seats.⁸⁵ An open primary system would very likely incentivize more voting, particularly by independents. Second, open primaries reduce polarization of ideas and people.⁸⁶ By allowing voters from different parties to participate in the same primary, open primaries cater to more moderate candidates who are less extreme and more willing to compromise.⁸⁷ Third, open primaries increase accountability, not only to their own party but also to voters in general.⁸⁸ Candidates would likely be less prone to cater to interests of extreme factions of their party and more likely to listen to needs and concerns of average voters.⁸⁹ Fourth, nonpartisan primaries can save taxpayers money by consolidating multiple primaries into a single election.⁹⁰ And fifth, open primaries improve representation by reducing the number of districts whereby candidates rarely or never face serious competition for their seat.⁹¹ For example, 80% of congressional districts are considered “safe”

80. See Steven Bradford, *Fair Representation Without the Fair Representation Act: How Modifying 2 U.S.C. § 2c Can Fix Gerrymandering*, 57 WAKE FOREST L. REV. 1031, 1047–48 (2022).

81. See Gehl, *supra* note 20, at 3–4.

82. *Id.*

83. A further step in this direction would be to implement ranked choice voting, discussed in more detail below. See Rachel Hutchinson & Matthew Oberstaedt, *Nonpartisan Primaries are Better with Ranked Choice Voting*, FAIRVOTE (Jul. 24, 2023), <https://perma.cc/V8HP-7GPG>. Note: the only “con” is the “vote splitting dilemma,” which is solved by ranked choice voting (*see infra*, page 19, Solution 2: Ranked Choice Voting).

84. See THE FORWARD PARTY, <https://perma.cc/B5MS-DSFK> (last accessed on May 2, 2024). The Forward Party’s campaign website lists these as the main benefits to shifting to an open primary system.

85. See Nick Troiano, *The Primary Problem*, UNITE AM. INST. (Mar. 2021), <https://perma.cc/Z698-XGNX>.

86. See THE FORWARD PARTY, *supra* note 84.

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

for one party, meaning the outcome is essentially decided in the primary.⁹² An open primary would likely make many such districts less “safe” for incumbents, and therefore more responsive to the electorate.

However, recent experience shows there are major hurdles to implementing open primaries in many states. For instance, in 2020, Florida voters voted on a proposed state constitutional amendment to allow all voters to vote in the primary election, in which all candidates would compete with one another, regardless of party affiliation.⁹³ In the election, Florida voters voted strongly in favor of the amendment, with over 57% of voters voting “Yes” to pass it.⁹⁴ However, because the threshold required to amend the Florida constitution was increased from 50% to 60% in 2006,⁹⁵ the amendment failed.⁹⁶ Indeed, the Florida legislative proposal in 2023 attempted to increase the threshold yet further, to 66.7%.⁹⁷ In Florida, and likely elsewhere, popular support for nonpartisan primary elections does not translate into changes to the primary system because of roadblocks thrown up by state legislatures.

Nevertheless, an encouraging note comes from Alaska, where the state supreme court recently upheld the constitutionality of nonpartisan open primaries⁹⁸ in response to a challenge to a ballot initiative passed in that state by a thin margin.⁹⁹ The ballot initiative passed with 50.55% of the vote.¹⁰⁰ Alaska, unlike Florida, has not increased the threshold for passing such measures above 50%. Thus, while such changes have been held constitutional, they face fierce opposition from state legislatures and other entrenched interests. This makes it difficult, if not virtually impossible, to implement open, nonpartisan primary systems in many states.

92. Hutchinson & Oberstaedt, *supra* note 83.

93. See Advisory Opinion to the Att’y Gen. re All Voters Vote in Primary Elections for State Legislature, Governor, & Cabinet., 291 So. 3d 901 (Fla. 2020).

94. See Florida Amendment 3, Top-Two Open Primaries for State Offices Initiative, BALLOTPEdia (2020), <https://perma.cc/GD3B-6PJK>.

95. See Christopher Berman, *Putting the Sun Back into the Sunshine State: How Florida’s Transition to Solar Power Has Brought the State Out of the Shadows Cast by Big Oil’s Energy-Monopoly*, 7 BARRY U. ENVTL. & EARTH L.J. 161, 187 n.74 (2017).

96. See Florida Amendment 3, *supra* note 94.

97. See Jessica Bulman-Pozen & Miriam Seifter, *The Right to Amend State Constitutions*, 133 YALE L.J. F. 191, 227 n.70 (2023).

98. See *Kohlhaas v. Office of Lieutenant Governor*, Div. of Elections, 518 P.3d 1095 (Alaska 2022).

99. See Alaska Ballot Measure 2, Top-Four Ranked-Choice Voting and Campaign Finance Laws Initiative, BALLOTPEdia (2020), <https://perma.cc/ZQR6-5J6S>.

100. See *id.*

Solution 2: Ranked Choice Voting

In the United States, we primarily use a single choice voting (SCV) system, also known as plurality voting, the simple plurality system, or first-past-the-post.¹⁰¹ Under this system, in most elections, voters can choose only one candidate, and the one with the most votes wins.¹⁰² However, systems like this one arguably “deprive voters of meaningful choices, create increasingly toxic campaign cycles, advance candidates who lack broad support and leave voters feeling like our voices are not heard.”¹⁰³ On the other hand, ranked choice voting (RCV), also known as instant runoff voting, makes elections better in four primary ways: First, it promotes majority support by ensuring that the winning candidate truly has the support of a majority of voters.¹⁰⁴ Second, it reduces strategic voting amongst the electorate by eliminating the “spoiler” effect.¹⁰⁵ Third, it encourages positive campaigning amongst candidates and prevents scorched earth campaigning.¹⁰⁶ Fourth, it saves money for both taxpayers and campaigns alike.¹⁰⁷

Although ranked choice voting may seem “exotic” or foreign, support for such a system can be found in documents authored by the Framers.¹⁰⁸ The mechanics of RCV are straightforward; voters have the option to rank candidates in order of preference (i.e. first, second, third, and so forth).¹⁰⁹ If the voter’s first choice does not have a chance to win,

101. See Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1780–81 (2021); see also Ryan J. Silver, *Fixing United States Elections: Increasing Voter Turnout and Ensuring Representative Democracy*, 10 DREXEL L. REV. 239, 242 (2017) (defining the “first-past-the-post” voting system as “a winner-take-all system in which the candidate who receives at least a plurality of votes wins the election,” and noting some argue “that first-past-the-post voting helps maintain the status quo by sustaining the power of the two main political parties to the detriment of third parties”).

102. See *id.*

103. *Ranked Choice Voting*, FAIRVOTE, <https://perma.cc/FQJ3-CKDK>; see also The Georgia Virtue, *Ranked-choice voting proves to be lightning rod issue in several states*, TGV NEWS (Feb. 26, 2024), <https://perma.cc/QQ78-ZQGB>.

104. See Miles Parks, *Ranked choice is ‘the hot reform’ in democracy. Here’s what you should know about it*, NPR (Dec. 13, 2023), <https://perma.cc/4DVL-TT3Q>.

105. See generally David McCune & Jennifer Wilson, *Ranked-choice voting and the spoiler effect*, 196 PUB. CHOICE 19, 19–50 (2023).

106. See *Ranked Choice Voting*, *supra* note 103.

107. See *id.*

108. Lisa Femia, *The Madisonian Case for Ranked Choice Voting: Federalist No. 10, Preferential Voting, and the American Democratic Tradition*, 23 N.Y.U. J. LEGIS. & PUB. POL’Y 953, 957–58 (2021).

109. See Parks, *supra* note 104. It is worth noting that “[j]urisdictions use two primary methods for counting ranked votes: instant runoff voting (IRV) and single transferrable vote (STV).” See also Femia, *supra* note 108, at 962. “In single winner elections, such as for mayor or governor, election officials typically employ instant runoff voting (IRV).” *Id.* Because most state and federal elections are single winner elections, IRV is what is generally referred to in this essay when discussing RCV. However, “[f]or

the voter's ballot still counts for their next choice.¹¹⁰ For example, in a four-candidate general election, the voter would have the choice to rank candidates in order of preference, from first choice to least choice. If no candidate receives a majority in the first round, the candidate with the fewest first choices will be eliminated. Voters who liked that candidate best would have their ballots instantly counted for their second choice, which is repeated until one candidate reaches a majority and wins.¹¹¹

In elections that are dominated by two major party candidates, RCV gives more voters an impact by allowing third-party or independent voters to rank their backup choices. In fact, RCV causes an average of 17% more votes to directly affect the outcome between candidates who have a chance at winning, amounting to millions more voters casting a meaningful vote.¹¹² Once other candidates are eliminated, voters still have a say in the contest between the two finalists. For example, in 2022, the election for Maine's Second Congressional District involved RCV with incumbent Democrat Jared Golden and the Republican challenger Bruce Poloquin.¹¹³ Together, they earned 93% of the vote, while the independent candidate Tiffany Bond earned 7%.¹¹⁴ The finalists faced off in an "instant runoff," and that 7% of voters got to participate with their ballots counting for their second-choice candidates.¹¹⁵ 78% of Bond voters chose to rank a backup choice, and thus, nearly 17,000 Maine voters had their ballot count toward a finalist because of RCV.¹¹⁶ As stated by Mary Peltola, U.S. Representative of Alaska, "RCV is the way forward—a way of letting us vote for who we want, rather than just voting against who we don't."¹¹⁷ It does this by promoting majority support, reducing strategic voting and spoiler effects, encouraging positive campaigning, and saving money.

multi-winner elections, as in at-large city council or multiseat legislature races, officials count ranked choice votes through a process known as single transferrable vote (STV)." *Id.* at 963. An extended discussion of the distinctions between IRV and STV are beyond the scope of this essay.

110. See Parks, *supra* note 104.

111. See Deb Otis, *With RCV, 17% More Votes Make a Difference*, FAIRVOTE (Mar. 2024), <https://perma.cc/8KNG-WKR8>.

112. See *id.*

113. See *id.*

114. See *id.*

115. *Id.*

116. See *id.*

117. Mary Peltola (@MaryPeltola), X (Nov. 16, 2022, 5:53 PM), <https://perma.cc/68UD-P6PQ>.

A. Ranked choice voting promotes majority support

Through its reallocation mechanism, ranked-choice voting ensures the winning candidate has majority support.¹¹⁸ The candidate who wins must receive more than 50% of the votes,¹¹⁹ which means they must be the preferred candidate—even if not necessarily the first-choice candidate—of a majority of voters. RCV makes more votes count meaningfully because voters have the option to rank backup choices in case their favorite candidate does not make it to the final round.¹²⁰

Moreover, in an SCV system, voters supportive of a third party candidate can be left with the Hobson choice of either voting for the candidate they support, and thus risk the “spoiler” effect, or voting for a candidate they do not prefer based on how they believe others will be voting in the election, thereby maximizing the chance their vote will “count.”¹²¹ In contrast, under the RCV model, voters simply rank the candidates honestly, knowing their vote will count for a finalist if their top choice cannot win. A number of authors have also asserted that the RCV model is likely to lead to more diverse candidates and elected officials.¹²² Moreover, a study of four cities that used RCV in elections found more candidates of color were elected to office with RCV implemented.¹²³ As society’s electorate becomes more diverse, a more diverse elected body arguably lends further support to the theory RCV promotes majority support. As noted by one author, “[i]f we’re electing folks with ranked-choice voting, they’re more accountable to the needs of their voters or else they lose their seats.”¹²⁴

B. Ranked choice voting reduces strategic voting

In a traditional SCV system, voters may feel pressured to vote for the “lesser of two evils” instead of their preferred candidate to avoid wasting or “spoiling” their vote.¹²⁵ Ranked-choice voting eliminates this issue by allowing voters to rank their preferred candidates in order, without

118. See Benjamin Plener Cover, *Two-Party Structural Countermandering*, 107 IOWA L. REV. 63, 112 (2021).

119. See *id.*

120. See *id.*

121. *Id.* at 77–78.

122. See Lee Drutman & Maresa Strano, *What We Know About Ranked-Choice Voting*, NEW AM. (Nov. 10, 2021), <https://perma.cc/3TRP-DWMY>; Barbara Rodriguez, *How ranked-choice voting elevates women and people of color seeking office*, 19TH NEWS (June 17, 2021), <https://perma.cc/J9NK-B59P>.

123. See *Ranked Choice Voting: An Explainer*, ROCK THE VOTE, <https://perma.cc/ZFX8-KLTF> (Last accessed May 02, 2024).

124. Rodriguez, *supra* note 122.

125. Plener Cover, *supra* note 118, at 78.

worrying about spoilers.¹²⁶ Some have argued “that first-past-the-post voting helps maintain the status quo by sustaining the power of the two main political parties to the detriment of third parties,” a result of the spoiler effect.¹²⁷ This often compels voters to engage in strategic voting, where they opt for a “compromise” candidate over their preferred choice.¹²⁸

RCV eliminates this effect by allowing voters to rank candidates in order of preference, thus freeing them from considering these arbitrary strategic constraints. Voters are able to express their preferences without fear of inadvertently aiding a less-preferred candidate or wasting their vote on an unelectable candidate.¹²⁹ This feature ensures that even when a voter’s top preference does not advance to the final round, their subsequent selections will still have a meaningful say in the electoral process.¹³⁰ Consequently, more votes will meaningfully count and fairness of electoral outcomes will be enhanced.¹³¹

The 1992 presidential election serves as a case in point. Nationwide, Bill Clinton won 43% of the popular vote, with George H.W. Bush at 37% of the popular vote, and Ross Perot at 19%, which many attribute to costing Bush the election.¹³² Under the current SCV method, Perot’s voters had no say in the outcome between Clinton and Bush. Under the RCV method, however, they could have. Once Perot became unviable, their vote could have counted towards their next highest choice between Clinton and Bush.

C. Ranked choice voting encourages positive campaigning

In one recent study, Todd Donovan and Caroline Tolbert observed the ways that implementing an RCV system might improve the quality of political discourse and engagement.¹³³ The authors observed increased civility in political campaigns that were conducted under RCV systems.¹³⁴ According to the study, the nature of the RCV ranking system fosters a more positive and issue-focused campaign environment.¹³⁵ It does this by forcing candidates to focus on issues, and by reducing incentives for

126. *See id.*

127. Silver, *supra* note 101, at 242.

128. *Id.*

129. *See id.* at 270.

130. *See id.*

131. *See* Adminnewspack, *Can Ranked Choice Voting Transform Our Democracy?*, BETTER GOV’T ASS’N (May 27, 2021), <https://perma.cc/M94V-7SEY>.

132. *Id.*

133. *See* Todd Donovan & Caroline Tolbert, *Civility in Ranked-Choice Voting Elections: Does Evidence Fit the Normative Narrative?*, 60 J. OF REPRESENTATIVE DEMOCRACY 583 (June 4, 2023), <https://perma.cc/9RA7-3FMN>.

134. *See id.*

135. *See id.*

negative campaigning because candidates must avoid alienating any voters who may rank them somewhere on their list.¹³⁶

Moreover, RCV further encourages positive campaigning by incentivizing candidates to reach out to a broader range of voters, rather than just core supporters.¹³⁷ Elimination of the zero-sum nature of the current SCV system would likely prompt candidates and parties to shift away from scorched-earth campaigns, potentially leading to more positive campaigning and fewer negative attacks.¹³⁸ Of course, electoral politics under any system will likely involve a significant amount of loathsome tactics and rhetoric, which are inherent in human affairs in the pursuit of power,¹³⁹ but studies nevertheless demonstrate RCV results in candidates adopting a more issues-focused campaign strategy that appeals to a larger percentage of the electorate.¹⁴⁰

D. Ranked choice voting saves taxpayers and campaigns money

By eliminating the need for primary elections and runoffs, ranked-choice voting can ultimately save money for both taxpayers and campaigns. By consolidating primary elections and runoff elections into a streamlined process, RCV reduces the financial burdens that come with administering multiple elections.¹⁴¹ One mark of criticism against RCV is the potential for upfront costs to cover necessary items such as voter education programs or voting equipment. However, in 2018, the Fiscal Policy Institute analyzed future savings resulting from RCV implementation and concluded that it more than justifies the short-term costs of updating voting equipment.¹⁴² In fact, the Fiscal Policy Institute concluded there would be a net *savings*—not a cost—in moving to RCV.¹⁴³ Furthermore, in 2019, the New York Independent Budget Office stated that RCV would ultimately save the city up to \$20 million per election cycle.¹⁴⁴ One way RCV might save taxpayer money is it avoids

136. *See id.*; *see also* David O'Brien & Pam Keller, *American Democracy in the 21st Century: A Retrospective*, 56 IDAHO L. REV. 223, 233 (2020) (coming to the same conclusion as Donovan and Tolbert).

137. *See* O'Brien & Keller, *supra* note 136.

138. *See* Donovan & Tolbert, *supra* note 133.

139. *See* THOMAS SOWELL, *DISMANTLING AMERICA* 71 (2010) ("If you took all the deception and fraud out of politics, there might not be a lot left.").

140. *See* Donovan & Tolbert, *supra* note 133.

141. *See* *Ranked Choice Voting*, *supra* note 103. According to FairVote, ranked choice voting saves money for states and local governments by eliminating additional rounds of voting.

142. *See* David Dyssegaard Kallick and Jonas Shaende, *Ranked Choice Voting: Saving Money While Improving Elections*, FISCAL POL'Y INST. (June 28, 2018), <https://perma.cc/8T48-A94U>.

143. *See id.*

144. *See* Bernard O'Brien, *Eliminate the Need for Citywide Run-Off Elections*, NEW YORK CITY INDEP. BUDGET OFF. (Oct. 22, 2019), <https://perma.cc/N8FY-LTJ7>.

the costs inherent in organizing and conducting separate primary elections. Further, campaigns will benefit from lower expenses related to extended campaign periods and a reduction in the need for these negative campaign opponent advertisements. Additionally, reducing the number of times voters need to go to polls may well increase voter turnout.¹⁴⁵

Despite the upsides, implementing RCV is an uphill battle. On April 26, 2022, the Florida governor signed into law an act prohibiting ranked-choice voting: “A ranked choice voting method . . . may not be used in determining the election or nomination of any candidate to any local, state, or federal elective office in this state.”¹⁴⁶ Fortunately, there are concerted efforts being made to ensure all Americans, including moderates, feel represented.¹⁴⁷ For example, the Forward party focuses on running candidates at the state and local level, attempting to build their political party “from the ground up.”¹⁴⁸ Of the more than 500,000 elected offices in this country, 70% of those races go uncontested and over 5% go unfilled.¹⁴⁹ With voting reform, naturally, voter education programs must follow. Under an effective voter education program, they should emphasize how to correctly fill out a ranked ballot and encourage voters to use multiple rankings if they like multiple candidates on any level. In summary, RCV promotes true majority support, reduces strategic voting and spoiler effects, encourages positive campaigning over scorched-earth campaigns, and saves money.

Solution 3: Implementing Independent Redistricting Commissions to Replace Gerrymandering

Gerrymandering is the process of drawing legislative district boundaries that create artificial advantages for the party in control.¹⁵⁰ Despite widespread acknowledgment of its unconstitutionality,¹⁵¹ the U.S. Supreme Court has failed to provide a remedy, citing to a difficulty in

145. See Jones, *supra* note 5.

146. FLA. STAT. ANN. § 101.019 (West 2024).

147. See *About Us*, FAIRVOTE, <https://perma.cc/2XYW-V9K3> (Last accessed May 02, 2024); and Fair Representation Act, H.R. 7740, 118th Cong., 2d Sess. (2024), <https://perma.cc/4VE6-7TBU>.

148. See FORWARD PARTY, *supra* note 84.

149. See Andrew Yang, *America is Hungry for New and Better Political Options*, NEWSWEEK (Jul. 06, 2023), <https://perma.cc/URK4-5UZN>.

150. See *What is Gerrymandering?*, CAMPAIGN LEGAL (Nov. 29, 2021), <https://perma.cc/9VR8-9DEU>.

151. See *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022). In some jurisdictions, gerrymandering can be considered unconstitutional. For example, the New York State Constitution expressly prohibits partisan gerrymandering, stating that districts shall not be drawn to discourage competition or for the purposes of favoring or disfavoring other candidates or political parties.

establishing standards for identifying unlawful gerrymandering.¹⁵² Gerrymandering distorts representation and undermines the principle of fair elections. Gerrymandering further reduces competition by creating “safe seats” for one party, guaranteeing a win in the general election for the party for whom the district was made “safe” for. This is inherently anti-competition and fundamentally against the tenants of this country. Moreover, representatives from gerrymandered districts answer primarily to the primary voters in their own party, reducing the accountability of elected officials to its citizens they are meant to serve. Gerrymandering techniques such as “packing” and “cracking” concentrate opposition voters in a few districts and disperses them across others, resulting in a concentration and dilution of their influence.¹⁵³ These behaviors lead to legislative bodies that do not reflect the political makeup of our electorate.

A partisan gerrymander is a district map that is intentionally designed to enhance the power of one political party at the detriment of the other.¹⁵⁴ America is the only country that allows partisan legislators to draw up maps that we use in most states.¹⁵⁵ Partisan gerrymandering was not even recognized as a cause of action until the 1980’s,¹⁵⁶ and a court has never struck down a district plan on this basis.¹⁵⁷ Gerrymanders cause distortions of public policy which are very difficult to fix because of the court’s refusal to intervene, exemplified by the 2019 Supreme Court Decision in *Rucho v. Common Cause*.¹⁵⁸

A. Partisan gerrymandering

In *Rucho*, the appellees challenged their states’ congressional districting maps as unconstitutional gerrymanders.¹⁵⁹ The Supreme Court ruled that any federal constitutional challenge to a district map that arises out of an alleged partisan gerrymander presents a nonjusticiable “political question.”¹⁶⁰ Unlike challenges to congressional districts based on the “one person, one vote” rule and racial gerrymandering, in which courts do have a role in assessing the constitutionality of congressional districts,¹⁶¹

152. See *Rucho v. Common Cause* *infra* at 20.

153. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN CTR. FOR JUST., <https://perma.cc/SR2N-6WNM> (Last updated June 9, 2023).

154. See Paul M. Smith, *The Supreme Court, Gerrymandering, and the Rule of Law*, AM. BAR ASS’N (Jul. 26, 2023), <https://perma.cc/3ZLZ-KDWE>.

155. See *id.*

156. See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015). <https://perma.cc/HH4F-S4DW>.

157. See *id.*

158. See 588 U.S. 684 (2019).

159. See *id.* at 689–90.

160. *Id.* at 718.

161. *Wesberry v. Sanders*, 376 U.S. 1, 7–9 (1964) (one person one vote); see *Shaw v. Reno*, 509 U.S. 630, 641–42 (1993) (racial gerrymandering).

the Court in *Rucho* deemed political gerrymandering beyond the reach of federal courts.¹⁶² According to Justice Roberts, who authored the majority opinion, “[t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities.”¹⁶³ But while conceding that there could be a case where “political gerrymandering has gone too far,” the majority declines to articulate where the line should be drawn, and, once again, the Court has never once struck down a gerrymandered congressional district on this basis.¹⁶⁴ The *Rucho* decision was a 5-4 decision, and Justice Kagan’s dissent highlights why allowing political parties to draw congressional districts presents serious risks to democratic institutions:

The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.¹⁶⁵

Kagan further took issue with the majority’s claim that any test or standard on such claims is beyond the Court’s reach, noting that “courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims.”¹⁶⁶ As such, even if the majority is correct, that some political gerrymandering must be allowed, the courts could at least articulate a standard making clear where such partisan map-drawing crosses the line and becomes unconstitutional.

However, it is unclear why partisan map-drawing should even be allowed at all. For one thing, “gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense.”¹⁶⁷ Permitting political gerrymandering disrupts the very democratic process

162. See *Rucho*, 588 U.S. at 701, 718. The modern “political question” doctrine originated in *Baker v. Carr*, 369 U.S. 186 (1962). Its purpose is to ensure courts refrain from adjudicating issues better suited for resolution by the political branches.

163. *Rucho*, 588 U.S. at 701.

164. Stephanopoulos & Eric M. McGhee, *supra* note 156.

165. *Rucho*, 588 U.S. at 721–22 (Kagan, J., dissenting).

166. *Id.* at 722.

167. *Id.* at 751.

voting is intended to ensure by flipping the system on its head: political gerrymandering allows leaders to choose their voters rather than voters choosing their leaders. For another, as the majority in *Rucho* acknowledged, some states have approved “ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors.”¹⁶⁸ This is not a new or novel idea; in numerous countries voting districts are drawn by nonpartisan officials.¹⁶⁹ Further, in most of the world’s democracies, there are mechanisms to ensure that the individuals that make up the legislature are proportional to the votes cast by the electorate.¹⁷⁰

Independent redistricting commissions decrease political manipulation of district boundaries, increase fairness, improve representation, and restore public trust. These commissions would also remove the conflict of interest that is inherent in allowing partisan legislators to draw district boundaries and result in further electoral fairness and a restoration of the rule of law. But while these solutions help restore true democratic voting and representation, they are all but impossible in most states because “[f]ewer than half the States offer voters an opportunity to put initiatives to direct vote.”¹⁷¹ Indeed, “even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail.”¹⁷²

B. Independent redistricting commissions benefits

Independent redistricting commissions are beneficial for several reasons. First, independent redistricting commissions can be an effective tool to help reduce gerrymandering.¹⁷³ One of the key advantages of independent redistricting commissions is their ability to prevent the manipulation of district boundaries to benefit a particular political party. Commissions comprised of impartial members are more inclined to draw fair districts that do not unfairly favor any one party, as their decisions are not influenced by partisan interests. In addition, the implementation of independent redistricting commissions promotes fairness.¹⁷⁴ These commissions play a crucial role in ensuring that electoral districts are delineated in a manner that accurately reflects the diverse interests of all constituents in the region. Consequently, this diminishes the impact of

168. *Id.* at 748.

169. *See* Smith, *supra* note 154.

170. *See id.*

171. *Rucho*, 588 U.S. at 748.

172. *Id.* at 791.

173. *See* FORWARD PARTY, *supra* note 84; *see also* Christopher Lamar, *Do Independent Commissions Really Prevent Gerrymandering? Yes, They Do*, CAMPAIGN LEGAL CTR. (Nov. 1, 2021), <https://perma.cc/SYS2-RLAC>.

174. *See id.*

special interest groups and empowers voters to play a more significant role in shaping the electoral landscape. Another way that independent redistricting commissions can create positive impact in our political system is by enhancing representation.¹⁷⁵ These commissions guarantee that marginalized communities are able to participate in the political process and have their voices heard. This is particularly crucial for minority groups who may face marginalization or exclusion from the political arena as a result of gerrymandering or other systemic issues. Finally, independent redistricting commissions can play a significant role in rebuilding public trust.¹⁷⁶ By ensuring that district boundaries are drawn transparently and impartially, these commissions can help enhance confidence in the electoral process. This, in turn, can alleviate worries about electoral fraud and establish a framework for a more legitimate and equitable electoral process.

V. CONCLUSION

People on both sides of the political aisle agree the U.S. political system is not healthy. Whether we choose to label it a “democratic recession,” “democratic decline,”¹⁷⁷ or some other euphemism, our democracy is not serving the public effectively, as shown by the rising political polarization, legislative gridlock, and voter disenfranchisement. This is not how our political system is supposed to work. After all, “[t]he goal of democracy isn’t winning, but rather governing.”¹⁷⁸ Our nation’s leaders have lost sight of this. As a result, our most recent presidential election was a contest between two candidates without the popular support even of members of their own party.¹⁷⁹ This is the result of a system in which a dominant, polarizing duopoly stifles competition, limits choices, and misaligns incentives for elected officials.

In 1787, Benjamin Franklin famously warned that our system of government, if not maintained, might slip away. As the story goes, after emerging from a session where they were drafting the Constitution, Franklin was asked what kind of government the new Constitution would establish and he quipped, “A republic, if you can keep it.”¹⁸⁰ We have kept

175. *See id.*

176. *See id.*

177. Vanessa Williamson, *Understanding democratic decline in the United States*, BROOKINGS (Oct. 17, 2023), <https://perma.cc/8HAM-ZW3W>.

178. Rex Smith, *Scorched-earth politics at peril to democracy*, THE SEATTLE TIMES (Oct. 2, 2018), <https://perma.cc/52AP-8ER9>.

179. *See In Tight Presidential Race, Voters Are Broadly Critical of Both Biden and Trump*, PEW RSCH. CTR. (Apr. 24, 2024), <https://perma.cc/DJ2U-ELAD>.

180. Benjamin Pontz, *Review: Keeping Our Republic*, 2023 HARV. J.L. & PUB. POL’Y PER CURIAM 40, 1 (2023). Other Framers likewise warned against the threat of political divisions, such as John Adams decrying a duopolistic political system. *Supra* note 1.

it now for two and a half centuries, but in an age where a losing candidate can attempt to overturn an election by making false accusations that the election was stolen,¹⁸¹ and when most voters believe the system itself no longer functions,¹⁸² it is evident that we have work to do to ensure our democratic republic endures for future generations.

The current state of our political system, particularly the dominance of two parties in power, appears to threaten the democratic republican system founded two and a half centuries ago. To address this crisis and take steps to revitalize our democracy, urgent action is needed from lawmakers and citizens alike to dismantle the entrenched duopoly and give way to a more diverse political landscape. This can be achieved through measures such as nonpartisan primaries, ranked choice voting, and enacting independent redistricting commissions. It is imperative that we heed the warnings of the Framers and take decisive action to break free of the duopoly's harmful chokehold on our democracy. By embracing these reforms, we can foster a more vibrant democracy, restore public trust in the political process, and uphold the fundamental principles upon which our nation was founded.

Moreover, George Washington famously predicted and warned against many political ills we see today. See GEORGE WASHINGTON, WASHINGTON'S FAREWELL ADDRESS: TO THE PEOPLE OF THE UNITED STATES 13 (1796), <https://perma.cc/54JE-DSF4> (“The alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism.”). See also Drutman, *supra* note 68 (explaining that the political duopoly has caused America to become “that dreaded divided republic” that John Adams had feared, “breaking the system of government the Founders put in place with the Constitution); *Early Presidents on Happiness, Government, and Public Opinion*, NAT. CONST. CTR. (Feb. 24, 2022), <https://perma.cc/BED8-AXHW> (wherein Jeffrey Rosen explains that the general theme of Washington's farewell address is that “unity of government is crucial to the future of the Republic”).

181. See Wes Henricksen & Broderick Betz, *The Stolen Election Lie and the Freedom of Speech*, 127 PENN ST. L. REV. PENN STATIM 111, 112–13 (2023).

182. See *Most Americans are dissatisfied*, *supra* note 9; Jones, *supra* note 9.